THE *RED LION* OF CABLE, AND BEYOND? — *TURNER BROADCASTING* v. *FCC*[†]

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† The Court's opinion following remand, Turner Broadcasting System, Inc. v. FCC, No. 95-992, 1997 WL 141375 (U.S. Mar. 31, 1997), issued while this Article was in press. The majority did not alter its basic approach from the first *Turner Broadcasting* opinion that considered the must-carry rules content-neutral and subject to only intermediate scrutiny. Some of the fundamental problems with that approach discussed in this Article have now been compounded by Justice Breyer's crucial concurring opinion that eschews strict scrutiny while in fact demonstrating why such review was necessary. The critique presented here therefore remains fully applicable.

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"[Y]ou're talking about the future of the First Amendment."**

I. INTRODUCTION

As the computer bit replaces the atom as the scientific icon of the times, the future role of the First Amendment in the world of electronic media is indeed at stake. The digital Information Age has precipitated a free-speech paradigm shift from street corner speaker to television network, and now well beyond into cyberspace.[1] Unfortunately, the Supreme Court's jurisprudence is not keeping pace with this revolution. The Court's failure, this Article suggests, threatens the core First Amendment values of individual autonomy and freedom of choice for both speakers and listeners—the freedom to convey and access ideas and information without state direction or intervention.

In its recent cable opinion, *Turner Broadcasting System, Inc. v. FCC*,[2] the Court split 4-1-4 with five opinions, unable to reach any satisfactory consensus on the constitutional status of cable television and the specific must-carry rules at issue.[3] The major interests—cable programmers and operators, broadcasters, and telephone companies—hoping, as was Congress, for a prompt and definitive ruling, were left in a perplexed and uncertain state. As the Court gave something to each of these interests with one hand, it immediately took something back with the other, forsaking strict scrutiny of infringements on editorial discretion in favor of an intermediate level of review. This unsettling approach is conducive neither to free speech nor productive development of the media.

The Court has now made a bad situation even worse in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[4] by its treatment of "indecency" on certain cable access channels. In a

** Professor Laurence Tribe, arguing before the Supreme Court for the constitutional right of telephone companies to enter the cable television market. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036 (1996), Official U.S. Supreme Court Transcript, 1995 WL 733396, at *42 (Dec. 6, 1995); *see infra* part IIIC.

1 *Compare* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986), *with* Owen M. Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613, 1614-15 (1995).

2 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994), *on remand*, 910 F. Supp. 734 (D.D.C. 1995), *probable jurisdiction noted*, 116 S. Ct. 907 (1996).

3 One commentator describes the fractured and convoluted line-up of Justices and separate opinions as more difficult to follow than the classic Abbott & Costello "Who's On First" routine. Nicholas W. Allard, *Must Carry and the Courts: Bleak House, The Sequel*, 13 CARDOZO ARTS & ENT. L.J. 139, 141 n.7 (1994).

4 116 S. Ct. 2374 (1996) (upholding one and invalidating other provisions of the Cable Television and Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 10(a), 10(b), and 10(c), 106 Stat. 1486 (1992) (codified at 47 U.S.C. §§ 532(h),

case with six contentious opinions, none of which enjoyed a full majority, the plurality assiduously managed not only to avoid defining the First Amendment status of cable within fairly well-established boundaries, but seemed to grope at a new, *ad hoc* constitutional approach somewhere between intermediate and strict scrutiny.[5] The primary public interest in full First Amendment freedom of the press cannot avoid suffering from the Court's emerging and confusing hierarchy of differing constitutional statuses for various segments of the media, precisely as they all—voice, print, video, and data—are converging technologically into one.[6]

This Article focuses on *Turner*. The must-carry rules challenged there, which required cable operators to transmit certain local television broadcast stations, provided the first occasion for the Supreme Court to give full consideration to the status of cable under the First Amendment. Much like the fairness doctrine in broadcasting,[7] the rules bore the heavy burden of serving as a proxy for most regulation of cable, and perhaps for other new technologies as well. But if *Turner* was to be the "*Marbury v. Madison* of the cable industry and all current and future communications technologies,"[8] it may have been better if the Court had not had jurisdiction here either. *Turner* threatens to be the *Red Lion* of cable, badly skewing the next generation of electronic media regulation. With additional issues of the electronic media certain to reach the Supreme Court in the near future, including a new round in *Turner* itself, it becomes even more important to understand the etiology of the first *Turner* opinion, the Court's misstep there, and its ramifications.

The context for this examination of *Turner* is the prolific current debate over just which values and goals enshrined in an eighteenth century First Amendment are most important for a media-

532(j), and note following § 531 (1994)), regarding indecency on commercial, leased access, and public access cable channels).

[5] As Justice Kennedy put it, "The plurality opinion . . . is adrift . . . . [I]t applies no standard, and by this omission loses sight of existing First Amendment doctrine." *Denver Area*, 116 S. Ct. at 2404, 2406-07 (Kennedy, J., concurring in part, dissenting in part).

[6] Under the Court's approach, one commentator counts as many as seven distinct electronic media, each potentially with its own First Amendment standards. *See* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247 (1994).

[7] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

[8] Tony Mauro, *Marbury v. Madison of the Info Highway?*, LEGAL TIMES, Jan. 10, 1994, at 12. For an indication of the importance of the case, see Linda Greenhouse, *In Big Cases, Lots of Briefs and "Friends,"* N.Y. TIMES, Dec. 24, 1993, at A22 (describing the 22 filed briefs signed by 126 lawyers ("a virtual Who's Who of the Supreme Court bar") representing 49 separate entities).

driven twenty-first century. Some argue we need a "New Deal" for speech, one which allows considerable government regulation of the media marketplace, even when content-motivated, to return us to the Madisonian ideals of a deliberative democracy and political equality.[9] This highly instrumentalist vision of the First Amendment is often accompanied by a concern over "Lochnerizing" this Amendment—using the principles of free speech and free press to undermine essentially economic regulation of media industries in much the same way that constitutional principles of liberty and freedom of contract once were used to attack market regulation generally.

The premise of this Article is very different. Government attempts to shape or control the mass media, whether explicitly related to content or not, are presumptively unwise and inappropriate. We should not assume that we can easily or meaningfully distinguish, for First Amendment purposes, inappropriate content regulation of the media from what appears to be largely economic or structural regulation. Even government subsidies, generally the most neutral form of intervention, often have troubling implications.[10] Furthermore, content issues are not easily divorced from their competitive consequences. The gamut of media regulatory issues—mandated access or common-carrier provisions, rate regulation and related matters, licensing and ownership restrictions, universal access and communications subsidies, indecent and violent programming, children's television issues, political programming, and the like—are constitutionally more of one piece than is usually acknowledged.

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[9] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137 (1994); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57; Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65 (1994).

But see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996); Ronald W. Adelman, *The First Amendment and The Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125 (1996); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172 (1987); Robert Post, *Meikeljohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Corn-Revere, *supra* note 6; Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439 (1995).

[10] *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984) (invalidating statutory ban on editorializing by noncommercial broadcasters that accept grants from the Corporation for Public Broadcasting). *See generally* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

Two related conclusions then follow. First, the Court should be very slow to abandon strict scrutiny of any media regulation so that most government intervention should not survive unless manifestly required, and narrowly tailored, to serve a truly compelling state interest that cannot adequately be met by less restrictive means. Secondly, there should be a strong presumption that the newer electronic media are to be treated no differently from the traditional print media. Indeed, in an electronic, digital world the mass media are becoming unified and largely indistinguishable for constitutional purposes. The abundance of sources and variety of content among all media dispel any need for government regulation and confirm that each medium is entitled to the full protection of the First Amendment.

Turner is likely to play a seminal role in this debate over the future of media freedom of expression. Rapid technological advances may create more channels for communication than programming available to fill them, rendering the must-carry provisions themselves of minor importance. But just as *Red Lion* has had enduring significance well beyond the fairness doctrine and that mandate's demise, so too *Turner* may have broad influence over the next generation of media regulation. Under the majority's approach only the most palpably content- or viewpoint-based restrictions will require truly heightened scrutiny. Then, as in *Denver Area,* further infringements on media free speech may be balanced away on an *ad hoc* basis, particularly when some perceived special characteristic of a medium is thought to weigh heavily on one side. The inappropriate "gatekeeper" or "bottleneck" view of the cable operator, for example, as enshrined in *Turner* and adopted by other courts, threatens to be the new "scarcity" rationale. As such, it may inappropriately justify new media regulation the way the now largely discredited notion of spectrum scarcity still sometimes justifies second-class status for broadcasting. Such theories of state intervention tend to reinforce each other and perpetuate a balkanized First Amendment that can only inure to the long-run detriment of free expression.

Turner is the Supreme Court's first substantive word on the constitutional status of new media technologies, but is far from the last.[11] Even the result on further Supreme Court review following

[11] The battle over cyberspace and control of the Internet, for example, has just begun. *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Penn. 1996) (preliminarily enjoining indecency restrictions on Internet communications in the Communications Decency Act of 1996, 47 U.S.C. § 223 *et seq.* (1996)), *probable jurisdiction noted,* 117 S. Ct. 554

remand is uncertain.[12] Indeed, the three-judge panel on remand was split as badly as such a court ever could be.[13] Nonetheless, an understanding of the background to *Turner* and an analysis of the opinions to date provide crucial perspective for the central debate.

In part II, this Article describes the FCC's previous, unsuccessful efforts to promulgate must-carry obligations that could survive judicial review. Part II also documents Congress's attempt at a procedural and substantive end-run around the First Amendment when it codified must-carry. This alone demonstrates the importance of stringent judicial review.

Part III discusses the Supreme Court's default in this regard and the very "mixed bag" from its give and take for broadcasters, cable operators and programmers, telephone companies, and other media. The Telecommunications Act of 1996[14] alters some of the immediate landscape, especially for telephone companies. But a particular concern remains in the *Turner* majority's willingness to overlook the clear content-based nature of government regulation and apply less than strict scrutiny. In addition, the Court's reliance on a diversity interest regarding the media, and its approval of the artificial construct of "gatekeeper" control, both raise a troubling First Amendment specter. Part IV then describes the difficulty the majority's approach engendered even for the remand panel, demonstrating the virtue in the full First Amendment freedom of the press that follows from a unified view of the mass media.

(1996); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *cert. filed*, No. 96-595, 65 U.S.L.W. 3323 (Oct. 15, 1996).

12 As one court stated in trying to predict the current Court's approach to must-carry: "[A]ll that we can say is that four justices are already on record against the 'must-carry' provisions; one is on record in favor of them; three are awaiting new factual findings from the three-judge district court; and one has not yet spoken." A-R Cable Services—Me, Inc. v. FCC, No. 95-134-P-H, 1995 U.S. Dist. LEXIS 6440, at *8, 78 Rad. Reg. 2d (P & F) 1283 (D. Me. May 10, 1995) (denying temporary restraining order against FCC must-carry order).

Future review of must-carry, or similar constitutional issues of new media regulation, will be by a Court on which Justice Breyer, generally somewhat more skeptical of government regulation, has replaced Justice Blackmun, the fifth vote for the majority position in *Turner*. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 286-87 (1982) (indicating that in reviewing regulation of an industry, such as cable, based on its supposed natural monopoly characteristics, one must consider both available substitutes and future technological change that can produce competitive pressures). Yet, Justice Breyer's disappointing plurality opinion in *Denver Area*, "arguably . . . the nadir of the Court's First Amendment jurisprudence," does not bode well. *See* James C. Goodale, *Caught in Breyer's Patch*, N.Y.L.J., July 23, 1996, at 1.

13 *See infra* part IV.

14 Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter 1996 Telecommunications Act].

II. The Third Time's the Charm for Must-Carry

The Court was probably wise to wait for a relatively mature cable industry before undertaking a full study of its constitutional status. The history of judicial review of broadcast regulation demonstrates the difficulties the Court can perpetuate by proceeding in the absence of a firm understanding of the medium in question and the significance of the First Amendment issues at stake.[15] Thus, while the Court early on noted its appreciation of the editorial functions performed by cable programmers and operators, and the necessity for careful First Amendment analysis,[16] it postponed full consideration until Congress forced its hand in the 1992 Cable

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[15] The Court's first truly substantive review of the statutory scheme for regulation of broadcasting established in the Radio Act of 1927, ch. 169, Pub. L. No. 69-632, 44 Stat. 1162 (1927), restated in the 1934 Communications Act, ch. 652, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-610 (1994)), contained only surprisingly inadequate and inappropriate First Amendment analysis. *See* National Broad. Co. v. United States, 319 U.S. 190, 226-27 (1943); Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting*, 46 Md. L. Rev. 212, 220-27 (1987). The first opportunity to rectify this did not occur until 26 years later when the Court upheld two corollaries of the fairness doctrine, and therefore the doctrine itself by implication. *See Red Lion*, 395 U.S. 367. By this time, the system of comprehensive government regulation, based on the amorphous "public interest" standard, probably was too ingrained to be questioned seriously. But see *Radio-Television News Directors Ass'n v. United States*, 400 F.2d 1002, 1019 (7th Cir. 1968), one of two cases reviewed in *Red Lion*, in which the Seventh Circuit termed the concept of broadcast licensees as public trustees "[l]ogically . . . meaningless" and speculated that broadcasting might be entitled to the same level of First Amendment protection as print. The original broadcast regulatory structure thus has persisted for seven decades despite tremendous advances in technology and profound developments in First Amendment jurisprudence.

A few years after *Red Lion*, journalist Fred Friendly reported that, apparently unknown to the Court, the case involved an incident in which the fairness doctrine had been prostituted and used, not to foster diversity of viewpoints as the Court imagined it would be, but as part of a carefully orchestrated campaign to chill politically unpopular expression. *See* Fred Friendly, The Good Guys, The Bad Guys and The First Amendment 35-54 (1975). *But see* Fred Cook, Maverick: Fifty Years of Investigative Reporting 292-311 (1984) (protagonist in *Red Lion* affair disputes Friendly's account). Only more recently has the Court indicated it might rethink its fundamental approach to broadcasting, *see League of Women Voters*, 468 U.S. at 376 n.11. However, this issue was still left open after *Turner*. *See infra* part IIIA.

Lessons from these seminal cases may have cautioned the Court from too precipitous an involvement with cable. In *Denver Area*, however, the plurality elevated caution to virtual paralysis by avoiding fundamental constitutional issues of the electronic media out of fear of deciding them wrongly. *See Denver Area*, 116 S. Ct. at 2403 (Souter, J., concurring) ("[W]e know too little to risk the finality of precision;" so the Court should follow the maxim, "'First, do no harm.'"). As Justice Kennedy responded, in case of doubt the Court should opt in favor of "allowing speech, not suppressing it." *Id.* at 2407 (Kennedy, J., concurring in part, dissenting in part).

[16] *See* FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) ("Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include."); *id.* at 709 n.19 (FCC cable access rules may exceed the agency's statutory authority and also raise "not frivolous" First Amendment problems); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-95 (1986) (holding that through its own original programming, or through exercising editorial discretion in choosing programming of others, activities of a cable operator "seem to implicate First Amendment interests"); Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("[Cable television]

Act.[17]

Moreover, in many ways it is appropriate that the Supreme Court dealt first with the must-carry cable issue, as there was significant prior judicial review of such regulation. Unfortunately, the Court did not pay sufficient attention to this earlier analysis.

A. *Quincy* and *Century*

The concept of cable operators being obligated to carry certain broadcast stations dates from the early 1960s.[18] Such requirements were based on the Federal Communications Commission's ("FCC") concern with the growing effect of cable on local broadcasting. Under a complex formula, the FCC required cable operators to carry all local or significantly viewed broadcast signals regardless of program duplication or the capacity of the cable system. When these rules were invalidated in *Quincy Cable TV, Inc. v. FCC*,[19] the FCC responded with a scaled-down version imposed for an interim five-year period. During this time consumers could become acclimated to receiving both over-the-air broadcast signals and cable signals through the use of an "A/B switch" to alternate between the two sources.[20] Despite the more limited scope of these new rules, the circuit court in *Century Communications Corp. v. FCC*[21] had little difficulty in again striking them down.

The panel in *Quincy* found two polar wings of the D.C. Circuit,

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is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'").

[17] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C) [hereinafter 1992 Cable Act].

In *Preferred Communications*, a challenge to a municipality's denial of a cable television franchise, the Court remanded for a fuller factual development of the disputed issues without which the Court thought it not "desirable to express any more detailed views on the proper resolution of the First Amendment question." 476 U.S. at 495. For the Congressional pressure on the Court to resolve the must-carry issues, see *infra* note 38 and accompanying text.

[18] *See* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963), *aff'g* 32 F.C.C. 459 (1962) (upholding prohibition on microwave import of distant television signals by a cable system based on feared adverse effects on local broadcasters unless local signals also were carried and not duplicated).

[19] 768 F.2d 1434, 1440-43 (D.C. Cir. 1985).

[20] The new rules also tied the number of required must-carry signals to a cable system's channel capacity, set a standard of minimum viewership for a station to qualify for must-carry, limited the number of noncommercial stations that had to be carried, and eliminated duplication of network affiliates. *See* Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Report and Order, 1 F.C.C.R. 864 (1986), *reconsid. denied*, 2 F.C.C.R. 3593 (1987); Century Communications Corp. v. FCC, 835 F.2d 292, 296-97 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir. 1988).

[21] 835 F.2d 292.

Judge J. Skelley Wright,[22] who wrote the opinion, and Judge Robert Bork, joined by centrist Judge Ruth Bader Ginsburg, to produce a unanimous opinion voiding the initial rules as "fundamentally at odds with the First Amendment."[23] Since the Supreme Court had not addressed the constitutional validity of must-carry rules or any analogous regulation of cable television,[24] the court first had to settle on the applicable First Amendment standard of review. Although it had "serious doubts" about the appropriateness of applying merely an interest-balancing formulation rather than more exacting scrutiny,[25] the court applied the *O'Brien*[26] test only because the rules so clearly failed under even that looser approach. Indeed, although the court acknowledged that, "as is invariably the case," the government could frame the interest at stake—the preservation of local broadcasting—in "essentially speech-neutral terms," the must-carry rules "favor[ ] certain classes of speakers over others" and "severely impinge on editorial discretion." Thus they are a "far cry" from the typical, merely incidental burdens on speech.[27] Because the FCC had failed to support its rules with anything beyond mere speculation and intuition, and had proceeded in such an indiscriminating and overinclusive way, the first must-carry rules could not withstand even *O'Brien* scrutiny.

Under pressure from broadcasters and Congress, the FCC soon tried to meet these objections with a more limited, interim version of the rules. This version fared no better before another unanimous panel of the D.C. Circuit. Again the court avoided resolving the "vexing question" of the appropriate level of First Amendment scrutiny since the "unjustified and . . . unduly sweep-

[22] *See, e.g.*, Judge Wright's opinion in *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), holding that broadcast licensees violate the First Amendment by a flat ban on accepting paid, public issue announcements. This opinion then was reversed in *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

[23] *Quincy*, 768 F.2d at 1438.

[24] *Id.* at 1445.

[25] *Id.* at 1448, 1453.

[26] United States v. O'Brien, 391 U.S. 367 (1968). Under the *O'Brien* test, developed in the context of a case involving expression mixed with conduct (burning a draft card to protest the Vietnam War), regulations that impose only "incidental" burdens on speech will be sustained if the government satisfies its burden of showing they further "an important or substantial governmental interest . . . unrelated to the suppression of free expression . . . [and] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. The *O'Brien* test often is referred to as the *O'Brien/Ward* test because it is quite similar to the standard applied to time, place or manner restrictions on speech. *See* Ward v. Rock Against Racism, 491 U.S. 781, 797-99 (1989); *see also* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding city ordinance prohibiting posting of signs on public property).

[27] *Quincy*, 768 F.2d at 1451-53 (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 48 (1977)).

ing" new must-carry regime also clearly failed the less demanding *O'Brien* test.[28] Significantly, in carrying out the *O'Brien* inquiry the court noted that "the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake."[29] Thus, the court's considerable doubts about both the substantiality of the government's asserted interest—the FCC's "speculative fears" about the effect on local broadcast stations—and the lack of narrow tailoring, even in rules that were to last only five years, again were more than enough to invalidate the new rules under *O'Brien.*[30]

B. *The 1992 Cable Act and the Genesis of* Turner

In several respects the must-carry obligations Congress imposed as part of its comprehensive re-regulation of cable in the 1992 Cable Act are even more onerous than those struck down in *Century.*[31] Section 4 of the 1992 Cable Act requires all but minimally-sized systems to use up to one-third of their channels to carry "local commercial television stations" that request carriage.[32] Section 5 imposes similar, additional, carriage requirements for "local noncommercial educational television stations," that is, public broadcast stations.[33] While current industry figures do not ap-

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28 *Century*, 835 F.2d at 297-300.

29 *Id.* at 299.

30 *Id.* at 300.

31 *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues: Notice of Proposed Rule Making, 7 F.C.C.R. 8055 (1992); Report and Order, 8 F.C.C.R. 2965 (1993); Clarification Order, 8 F.C.C.R. 4142 (1993); Order, 8 F.C.C.R. 5083 (1993); Stay Order, 9 F.C.C.R. 2678 (1993); Memorandum Opinion and Order on Reconsideration, 9 F.C.C.R. 6723 (1994). The must-carry rules are codified at 47 C.F.R. § 76 (1996). For a summary of the limited scope of the *Century* rules, see *Century*, 835 F.2d at 296-97.

32 1992 Cable Act, Pub. L. No. 102-385, § 4, 106 Stat. 1460, 1471 (1992) (codified at 47 U.S.C § 534 (1994)). Unlike the previous rules, one or two qualified low power stations may be included to reach the one-third level. But cable operators need not carry more than one affiliate for each of the national broadcast networks, nor any station that "substantially duplicates" the signal of another already carried. Those broadcast stations that are carried must be transmitted on a continuous, uninterrupted basis, at the same channel location as their over-the-air broadcast, and on the "basic service tier" provided to all subscribers. *Id.*

33 *Id.* § 5 (codified at 47 U.S.C. § 535 (1994)). Section 6 of the 1992 Cable Act (codified at 47 U.S.C. § 325 (1994)), the retransmission consent provision, is intimately connected to sections 4 and 5, but played surprisingly little role in the Court's opinion. *See infra* notes 184-86 and accompanying text. Under section 6, local commercial broadcasters have the option of either requesting mandatory, uncompensated carriage under section 4, or negotiating a carriage agreement with the operator. Such an agreement might include monetary or other compensation, such as the broadcaster getting another cable channel to program ("ransom channels") in return for allowing the cable operator to carry its main, popular broadcast signal. Otherwise, section 6 prohibits the operator from carrying the broadcast signal without the station's consent. This differs from the situation prior to the 1992 Cable Act, in which the compulsory license provisions of the copyright law, 17 U.S.C. §§ 111, 119 (1988), allowed cable operators to transmit local broadcast signals without

proach the statutory limit, under the regulations cable systems could have well over thirty percent (not just the twenty-five percent of the *Century* rules) of their available channels occupied by signals they are forced to carry in full. These signals must be carried at a mandated channel location without any need to satisfy a minimum viewership standard to take account of viewer interests and preferences. These are permanent, not interim, requirements. In a "bad case" scenario, a typical cable system with just over forty channels might be forced to carry thirteen local commercial broadcast stations and three public television signals, occupying about forty percent of its capacity. And, these must-carry provisions are in addition to requirements under the 1984 Cable Act for public, educational, and governmental ("PEG") access channels and channels set aside for commercial leased access (up to fifteen percent of large system capacity).[34] The cumulative displacement of the cable operator's editorial control and discretion clearly is substantial.[35]

In implementing this scheme Congress learned well the lessons from *Quincy* and *Century*.[36] In the 1992 Cable Act, Congress

charge and distant, imported signals upon payment of administratively determined royalty fees.

[34] The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-59 (1994)), *as amended by* the 1992 Cable Act [hereinafter the 1984 Cable Act], allows a local franchising authority to require that a cable operator provide "adequate" channel capacity for "public, educational, or governmental use," the so-called "PEG" access requirements. *Id.* § 7(b)(4)(B) (codified at 47 U.S.C. §§ 531, 541). The Act also mandates that a cable operator designate a proportional number of its channels, up to 15% of available channels for large systems, for leased commercial use by unaffiliated persons. *Id.* § 9 (codified at 47 U.S.C. § 532). In some limited situations a cable operator may be able to place a must-carry station on an unused PEG channel. *Id.* § 4(c)(2) (low power station) and § 5(d) (noncommercial educational stations).

The D.C. Circuit recently affirmed the constitutionality of these provisions. *See* Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (per curiam) *rehear. en banc denied*, 1997 U.S. App. LEXIS 2016 (Feb. 7, 1997). Just after this decision the Mayor of New York City nicely illustrated one sort of danger such access provisions create when he tried to use one of the City's public access channels to force Time Warner's cable system to carry Rupert Murdoch's Fox News Channel. *See* Elizabeth Jensen & Eben Shapiro, *Who Picks What a City Sees? Stay Tuned*, WALL ST. J., Oct. 14, 1996, at B1; Clifford J. Levy, *A Phone Call to Giuliani Initiated New York City's Cable Clash*, N.Y. TIMES, Nov. 4, 1996, at B12. A federal district court promptly rebuked the Mayor for an unwarranted exercise of political power intended "to reward a friend and to further a particular viewpoint" that violated Time Warner's First Amendment rights. *See* Time Warner Cable v. New York, 943 F. Supp. 1357, 1400 (S.D.N.Y. 1996), *appeal docketed sub nom.* Time Warner Cable v. Bloomberg, L.P., No. 96-9515(L) (2d Cir. argued Feb. 19, 1997).

[35] *See* Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 5-7 (D.D.C. 1993), *aff'd in part, rev'd in part sub nom. Time Warner*, 93 F.3d 957 (sustaining the facial constitutionality of the PEG and leased access provisions of the 1984 and 1992 Cable Acts, but ignoring their cumulative effect with the must-carry provisions even though the *Turner* must-carry challenge was before the same district court judge in a special, three-judge district court panel); *see infra* note 46.

[36] The legislative history of the 1992 Cable Act contains elaborate attempts to justify must-carry and support its constitutionality. *See* S. REP. NO. 92, at 38-46, 53-62 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135-36; H.R. REP. NO. 628, at 47-74 (1992).

responded to public complaints about poor cable service at high rates with comprehensive re-regulation of the industry "wired" in an attempt to preclude unfavorable judicial review as much as possible. First, Congress avoided the D.C. Circuit, where two separate panels unanimously had invalidated less onerous must-carry rules without invoking strict scrutiny. Section 23 of the 1992 Cable Act provides that a civil action challenging the constitutionality of any part of sections 4 or 5 of the Act must be heard by a three-judge district court.[37] Further, Congress forced the Supreme Court's hand by providing a direct appeal to that Court as a matter of right from any decision of the three-judge district court holding any provision of section 4 or 5 unconstitutional.[38]

This strategy worked. Within hours of Congress passing the Act over President Bush's veto,[39] cable operators and programmers began filing five (eventually consolidated) challenges against virtually the entire substance of the legislation, including most prominently the must-carry provisions. The three-judge district court declined to consider the broadside attack on the whole Act.[40] Instead, the court severed all claims other than those challenging the constitutionality of the sections 4 and 5 must-carry provisions. This unfortunate artificial bifurcation fostered by Congress precluded any court from properly considering the Congressional scheme for regulation of the cable industry as Congress designed it, namely as an integrated whole with cumulative effects.[41]

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[37] 1992 Cable Act § 23 (codified at 47 U.S.C. § 555(c)).

[38] *Id.*

[39] 138 CONG. REC. S16,676 (daily ed. Oct. 5, 1992). This was the only Bush veto overridden.

[40] *See* Turner Broad. Sys., Inc. v. FCC, 810 F. Supp. 1308 (D.D.C. 1992). The other matters proceeded before a single-judge district court. *See* Time Warner Entertainment Co. v. FCC, 810 F. Supp. 1302 (D.C.C. 1992) (denying applications for preliminary relief), *reviewed sub nom.* Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993) (upholding most of the 1992 Cable Act while finding a few requirements unconstitutional), *aff'd in part, rev'd in part sub nom.* Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (per curiam). Judge Jackson both presided over *Daniels Cablevision* and wrote the majority opinion in *Turner.*

[41] In *Alliance for Community Media v. FCC,* 56 F.3d 105 (D.C. Cir. 1995) (en banc), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996), the court of appeals used a similar divide and conquer strategy to uphold section 10 of the 1992 Cable Act controlling indecency on certain cable access channels. By reading subsections of this provision separately, and ignoring their interaction, the majority managed to find that a federal statute commanding cable operators to either ban, or segregate and block, certain indecent cable speech does not constitute state action. The majority therefore was able to avoid a crucial portion of the First Amendment attack on the statute. *See Alliance,* 56 F.3d at 123. The Supreme Court at least corrected this gaffe. *See Denver Area,* 116 S. Ct. at 2382, at 2404-05 (Kennedy, Ginsburg, JJ., concurring in part, dissenting in part).

1. The Three-Judge District Court

Although the government had not requested it, the three-judge panel, in a split decision, granted summary judgment upholding the must-carry statutes against a facial First Amendment challenge. The court did so by viewing the 1992 Cable Act, and specifically the must-carry provisions, as "simply industry-specific antitrust and fair trade practice regulatory legislation . . . essentially economic regulation."[42] Congress simply was using its commerce regulatory powers to "impose order upon a market in dysfunction . . . a market in a commercial commodity."[43] What is this commodity? It is "the means of delivery of video signals to individual receivers." And it was of "no particular significance" for the court that this commodity, these signals, are used only to convey a message.[44] Indeed, the court implied a remarkable extent to which Congress might use its power over commerce as an end-run around the First

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[42] *Turner*, 819 F. Supp. at 40. This approach is directly counter to the Supreme Court's admonition the following year that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights." Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994) (holding that condition city placed on development of commercial property constituted an uncompensated taking of property).

[43] *Turner*, 819 F. Supp. at 40. The perceived dysfunction consisted of the geographic monopolization, horizontal concentration, and vertical integration in the cable industry that Congress determined "have created barriers to entry for non-cable programmers, primarily broadcasters." *Id.* These economic factors have "placed free local broadcast television in serious jeopardy." *Id.*

[44] *Id.* at 40. In concurring, Judge Sporkin was characteristically blunt on this point: "Plaintiffs 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." *Id.* at 54 (Sporkin, J., concurring). This undisguised antagonism towards a position that, after all, two unanimous panels of the court of appeals had thought likely deserving of strict scrutiny displays an unwarranted and all too prevalent attitude of "big (media) business is bad" reminiscent of Judge Greene's tenacious resistance to allowing telephone companies to provide information services. *See* United States v. Western Electric, 993 F.2d 1572 (D.C. Cir. 1993) (affirming Judge Greene's reluctant lifting of the restrictions on information services and criticizing his disparagement of the record supporting such a result).

Judge Sporkin's strange attitude also led him to term "mischievous" plaintiffs' invocation of the First Amendment: "It is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted." *Turner*, 819 F. Supp. at 56. If taken seriously, such a position would call into question much modern constitutional interpretation. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (extending Fourth Amendment to cover electronic recordings of conversations). Even as staunch an originalist as Judge Bork has recognized the need for courts to "continue to develop doctrine to fit [F]irst [A]mendment concerns . . . [and] discern how the framers' values, defined in the context of the world they knew, apply to the world we know." Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (holding alleged defamatory statements constitutionally protected expressions of opinion). Justice Kennedy also recognizes that the "First Amendment is a rule of substantive protection, not an artifice of categories" and that the Court "adjusts[ ] . . . [its application] to meet new threats to speech." Alexander v. United States, 113 S. Ct. 2779 (1993) (Kennedy, J., dissenting).

Amendment. "[N]o one doubts," suggested the court, that Congress could control the "market," for example, in newspaper printing presses—presumably mandating their availability for use by others—if that market too were somehow deemed economically "dysfunctional."[45]

Thus, while the court of appeals in both *Quincy* and *Century* had agonized about not applying strict scrutiny to must-carry, the three-judge court found the First Amendment hardly implicated. To the extent that the court discerned any constitutional issue, it was simply as a byproduct of economic regulation that was only marginally content-based, if at all. Thus, the record made by Congress in support of the 1992 Cable Act sufficed to sustain must-carry under *O'Brien*, whereas the inadequate record by the FCC in the previous cases had not.[46]

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[45] *Turner*, 819 F.Supp. at 40. The court distinguished *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), which would seem to preclude economic rationales as a basis for interfering with the editorial discretion of the print media, by describing the right-of-reply statute at issue there as expressly content-based in a way the must-carry rules are not. *Turner*, 819 F. Supp. at 45 n.25.

[46] Beyond its superficial First Amendment analysis, Judge Jackson's majority opinion displayed some unsettling inconsistencies later perpetuated in the Supreme Court's decision. First, in assessing the significance of the government's interest supporting the must-carry rules, he relied on the importance of local broadcasting to the American public, citing legislative history describing local television stations as "the leading source of news and public affairs information." *Turner*, 819 F. Supp. at 45 & n.26. Yet, just a few lines earlier, he denied that there is anything special about local broadcasters' programming in order to characterize the must-carry provisions as only marginally content-related, "to the point of de minimis." *Id.* at 44. Moreover, a few months later in *Daniels Cablevision*, 835 F. Supp. at 4, Judge Jackson again characterized the 1992 Cable Act as essentially economic regulation of the business of delivering video systems, claiming "Congress was largely unconcerned with what was being said with those signals." In his very next sentence, however, the Judge described Congress as concerned that the delivery system "remain open to transmit a diverse mix of 'voices,' not only the messages chosen for delivery by those who owned or controlled the cables." *Id.* Congress could not have been both indifferent to what was transmitted over the cables and simultaneously concerned with promoting a diversity of voices and messages. Judge Jackson's inability to make up his mind apparently stemmed from his failure to appreciate the fundamentally content-based nature of the regulations, a mistake the Supreme Court repeated.

Similarly, one of the few provisions of the 1992 Cable Act that Judge Jackson invalidated in *Daniels Cablevision* was section 25 that imposed mandatory carriage requirements on providers of direct broadcast satellite services ("DBS") with respect to "noncommercial programming of an educational or informational nature." 1992 Cable Act, Pub. L. No. 102-385, § 25, 106 Stat. 1460, 1501 (1992) (codified at 47 U.S.C. § 335 (1994)). This was unconstitutional, even under *O'Brien* analysis, since there was no justification in the record for imposing such "First Amendment burdens." *Daniels Cablevision*, 835 F. Supp. at 8-9. Indeed, Judge Jackson indicated this provision might have to be strictly scrutinized as more content-based than must-carry. *Id.* But, in *Turner*, Judge Jackson essentially ignored the specific provision in section 5 for carriage of noncommercial educational television stations, which presumably is premised on similar if not identical considerations of the content and quality of such stations. This portion of *Daniels Cablevision* was reversed in *Time Warner*, 93 F.3d at 973-77.

Finally, in *Turner* Judge Jackson minimized the burden of must-carry on cable operators by relying on the statutory limits on the number of channels that must be dedicated to this purpose. *Turner*, 819 F. Supp. at 47. In *Daniels Cablevision*, however, he upheld the

The dissent was of little solace to the cable industry. Circuit Judge Williams did view the must-carry rules as clearly content-based, a direct not incidental interference with editorial discretion, requiring strict First Amendment scrutiny.[47] Moreover, on this level of review he found none of Congress's asserted interests sufficient to justify must-carry. But in large part this was because, for Judge Williams, the one special characteristic of cable—its "bottleneck" control of access to an important medium of mass communication—would support broader, more extensive compulsory access to cable through content-neutral criteria. Thus, for example, Judge Williams would see no constitutional obstacle to Congress greatly expanding the leased access provisions of the 1984 Cable Act.[48] This sort of access applies equally to all programmers who need it—those not affiliated with the cable operator—and avoids the content-based protection under must-carry of a special class, namely local broadcasters.[49] It was only the content-driven under-inclusiveness of must-carry that prompted the dissent.[50] The prospect of losing control over even more channels, and thus being pushed under Judge Williams's analysis toward quasi-common carrier status, surely must be even more disturbing for cable operators than must-carry.[51]

The fundamental value of a free press should engender great skepticism toward, not reflexive embrace of, government regulation—even when these regulations are couched in economic terms. The range of judicial approaches sympathetic to regulation of the electronic media demonstrates just how volatile and fragile First Amendment values and freedoms are in this area, and the need for the Supreme Court to insist on strict scrutiny. Unfortunately, the Court defaulted.

PEG and leased access provisions, noting that the former are negotiable and the latter never exceed 15% of total capacity, and claiming that operators may program their remaining channels as they wish. *Daniels Cablevision*, 835 F. Supp. at 7, *aff'd on this point in Time Warner*, 93 F.3d at 967-73. In neither case did he consider the substantial *cumulative* effect of *all* the cable regulations and the First Amendment implications of the entire Act. Neither did the Supreme Court, since only must-carry was before it.

In many respects then, Judge Jackson's opinions in *Daniels Cablevision* and *Turner* were like the two proverbial ships passing in the night. The problem is that these two ships had the same captain.

47 *Turner*, 819 F. Supp. at 59-60 (Williams, J., dissenting).

48 *Id.* at 57-58, 61-62, 67. For a description of access provisions, see *supra* note 34.

49 So, for the dissent, leased access provisions "are far less burdensome—in the critical sense of minimizing government interference in the choice of *who* will have access to cable." *Id.* at 61 (emphasis in original).

50 *Cf.* R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (holding "hate speech" statute facially invalid because it punishes only a subset of otherwise proscribable fighting words based on content and viewpoint discrimination).

51 *See infra* note 222.

2. Congressional Findings

Another way in which Congress structured the 1992 Cable Act to maximize its chances of surviving judicial review was with twenty-one numbered paragraphs of detailed findings which even the Supreme Court majority found unusual.[52] In effect, Congress declared, "[w]hatever findings a court might deem necessary or useful to sustain the Act, we hereby find." This raises the important issue of the level of deference the Court owes to such congressional findings when confronted with a First Amendment challenge to portions of the legislation.[53]

Congress likely had in mind the recent decision in *Metro Broadcasting, Inc. v. FCC*,[54] an equal protection challenge to minority preference policies in licensing adopted by the FCC and specifically endorsed by Congress. The year before *Metro Broadcasting*, the Court had struck down a *municipality's* minority set-aside program on city construction contracts. The Court held that the program was insufficiently supported by the city's findings or asserted justifications.[55] Justice Brennan's fragile majority opinion in *Metro Broadcasting*, his last for the Court, therefore began by emphasizing that, "[i]t is of overriding significance . . . that the [FCC's] minority ownership programs have been specifically approved—indeed, man-

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52 *See Turner*, 114 S. Ct. at 2461.

53 Congress similarly tried to stack the constitutional deck through extensive, conclusory "findings" in an attempt some years ago to enact the fairness doctrine. *See* Fairness in Broadcasting Act of 1987, S. 742, 100th Cong. (1987). President Reagan vetoed the legislation as inimical to the First Amendment. *See* Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987).

54 497 U.S. 547 (1990); *see* S. REP. NO. 92, at 60 n.182 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135-36; H.R. REP. NO. 628, at 62 n.93, 65 nn. 96-97 & 100 (1992) (both citing *Metro Broadcasting*).

55 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *cf.* Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion) (upholding a minority set-aside program established by Congress).

In concurring in the judgment in *Croson*, Justice Scalia explained the difference between such a Congressionally mandated program, subject to greater judicial deference, and one by a state or political subdivision. *Croson*, 488 U.S. at 521-22 (Scalia, J., concurring). In addition to "the unique remedial power of Congress under section 5 of the Fourteenth Amendment" cited in Justice O'Connor's opinion, *id.* at 488, Justice Scalia relied on "social reality and governmental theory." *Id.* at 522. "Oppression from political factions" is more likely at the state and local level; it is harder for special interests to command favors from Congress. *Id.* at 522-24. Yet, in vetoing the 1992 Cable Act, President Bush described it as having "fallen prey to special interests," precisely the feared influence. *See* Message to the Senate Returning Without Approval the Cable Television Consumer Protection & Competition Act of 1992, 28 WEEKLY COMP. PRES. DOC. 1860 (Oct. 3, 1992).

The Court recently revisited the issue of *congressionally*-mandated set-asides and held that Congress also is subject to strict scrutiny when it legislates racial classifications. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). The Court termed *Metro Broadcasting* a departure from precedent and specifically overruled it on this point. *See id.* at 2113, 2116.

dated—by Congress."[56] This cue, together with the obvious need to distinguish the previously twice-invalidated FCC must-carry rules, must have prompted Congress to do directly everything it could to support its own legislation.

Thus, the threshold question in *Turner* was the role the "unusually detailed statutory findings"[57] should play in the Court's adjudication. As the Court periodically reaffirms, a basic tenet of First Amendment jurisprudence is that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[58] Otherwise, "the function of the First Amendment as a check on legislative power would be nullified."[59] Similarly, in reviewing determinations of state or federal trial courts in First Amendment cases, the Court has long considered itself under a constitutional duty to conduct its own, independent examination of the record as a whole without deference to the lower court. Again, the aim is to avoid "a forbidden intrusion on the field of free expression."[60]

Under these principles, the Court's reliance on the congressional declarations accompanying the 1992 Cable Act is rather curious. On the one hand, on the crucial issue of the appropriate level of scrutiny, the majority selectively relied on purportedly factual findings by Congress for the surprising conclusion that the must-carry rules are content-neutral and therefore require only intermediate, not strict, scrutiny.[61] At the same time, however, a plurality recognized that the government's defense of must-carry depends on assertions as to the effect on local broadcasters from an absence of such regulations. Even according "substantial deference to [such] predictive judgments of Congress," the plurality found the

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[56] *Metro Broadcasting*, 497 U.S. at 563; *see* Action for Children's Television v. FCC, 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc) (noting that an act of Congress regulating broadcast indecency is entitled to a greater presumption of constitutionality than similar regulation by the FCC), *cert. denied sub nom.* Pacifica Foundation v. FCC, 116 S. Ct. 701 (1996); *cf.* Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), in which Judge (now Justice) Thomas's opinion held that FCC gender preference policies violated equal protection, distinguishing the racial preferences upheld in *Metro Broadcasting* by the lack of empirical support in *Lamprecht* to show a substantial relationship between the sex-preference policy and the asserted governmental interest of promoting programming diversity. *But see* Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841, 874-75 (1995) (econometric study concluding that the opinion in *Lamprecht* was based on "some very primitive data analysis," though it may have been the best available to the court at the time).

[57] *Turner*, 114 S. Ct. at 2461.

[58] Sable Communications v. FCC, 492 U.S. 115, 129 (1989) (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)); *see Turner*, 114 S. Ct. at 2471.

[59] *Landmark*, 435 U.S. at 844.

[60] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2344 (1995) (quoting New York Times v. Sullivan, 376 U.S. 254, 285 (1964)).

[61] *See Turner*, 114 S. Ct. at 2460-64.

government had not yet met its burden of demonstrating genuine jeopardy to the economic health of these broadcasters.[62] The Court[63] therefore vacated the summary judgment below and remanded for resolution of the factual questions raised by the record.[64]

Thus, in relying on congressional findings, as throughout its opinion, the Court gave something to each side. But apart from the question of what weight the Court should give such findings, specifically designed to be dispositive in favor of the rules,[65] in fact the congressional approach should have backfired. The legislation itself, including Congress's extended findings and explicit policy statements, demonstrates the heavy content-based nature of the must-carry rules that should have demanded fatal strict scrutiny.

III. The Supreme Court's Give and Take

Following the three-judge district court opinion, cable operators and programmers sought an injunction on enforcement of sections 4 and 5 pending appeal to the Supreme Court. Chief Justice Rehnquist, as Circuit Justice, denied such relief because the 1992 Cable Act, like all acts of Congress, was entitled to a presumption of constitutionality. It was not indisputably clear to the Chief Justice that the operators and programmers had a First Amendment right to be free from this government regulation.[66] In doing

62 *Id.* at 2470-71; *see infra* note 227.

63 Justice Stevens would have affirmed the summary judgment of the district court, but he concurred in vacating it and remanding for further proceedings as an accommodation to produce a majority disposition of the appeal. *Id.* at 2475 (Stevens, J., concurring).

64 The government has to show that without must-carry a significant number of broadcast stations will be denied cable carriage and "will either deteriorate to a substantial degree or fail altogether." *Id.* at 2471. Moreover, the government also has to examine the effects of must-carry on cable operators and programmers and show that the rules are narrowly tailored—that is, their interference with protected speech is not substantially more than necessary to achieve their purpose of assuring the viability of broadcast television, and there are no constitutionally acceptable less restrictive means. *Id.* at 2471-72; *see infra* part IV.

65 In vetoing the legislation, President Bush stated that it "illustrates good intentions gone wrong, fallen prey to special interests," and he specifically declared the must-carry provisions unconstitutional. *See* Message to Senate, *supra* note 55, at 1860. In determining what weight to attach to congressional declarations in support of the Act's constitutionality, the Court arguably also should have considered this clear and explicit contrary position of the President. On other occasions the Court has taken account of presidential vetoes in interpreting legislation. *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 719 (1989) (plurality opinion) (noting President's objections in his veto message, and senatorial response in debating override, are "particularly illuminating"); United States v. Robel, 389 U.S. 258, 259 n.1 (1967) (holding section of Subversives Activities Control Act of 1950 violates the First Amendment and quoting President Truman's veto message criticizing the bill as too broad and too vague).

66 *See* Turner Broad. Sys., Inc. v. FCC, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers); *cf.* Viacom Int'l, Inc. v. FCC, 828 F. Supp. 741 (N.D. Cal. 1993) (granting temporary restraining order against enforcement of sections 4 and 5).

so, however, Chief Justice Rehnquist noted that, under *Miami Herald Publishing Co. v. Tornillo*,[67] must-carry for privately owned newspapers "plainly" would be unconstitutional. However, the Court had not yet determined whether cable should be treated like the print media or more like broadcasters under *Red Lion*.[68]

The Chief Justice's comment raises the fundamental question, not clearly answered in *Turner*, as to how modern regulation, "plainly" unconstitutional for the print media, can survive for the electronic media. More importantly, this "either-or" mind set seeks simply to compartmentalize the media under superficial distinctions and determine constitutional status according to a corresponding artificially created hierarchy. In many important respects this is the fundamental error, committed first in the broadcasting cases, and now perpetuated by the majority's approach in *Turner* and the plurality's approach in *Denver Area*.[69] In a dynamic technological era, the various mass media rapidly are becoming functionally equivalent from the controlling perspective of the consumer of information and therefore should be considered constitutionally isomorphic.[70] No longer can one medium thrive under the First Amendment unless all media do.

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[67] 418 U.S. 241 (1974).

[68] *See Turner*, 113 S. Ct. at 1807-08 (Rehnquist, C.J., in chambers).

[69] Justice Kennedy's role is the most curious. He wrote the majority opinion in *Turner* but dissented in part in *Denver Area*. *See supra* note 5. Generally Justice Kennedy displays an admirable sensitivity both in knowing censorship when he sees it, see Florida Bar v. Went For It Inc., 115 S. Ct. 2371, 2383 (1995) (Kennedy, J., dissenting) (upholding state ethics rule imposing 30-day waiting period for targeted direct mail solicitation letter from lawyers to accident victims), and in looking beyond traditional categories to perceive real threats to First Amendment interests from novel governmental action. A year before *Turner*, in *Alexander*, 113 S. Ct. 2766, the Court rejected a First Amendment attack on the use of RICO forfeiture provisions applied to seize and destroy extensive assets of an adult entertainment business when only a small handful of the materials had been found obscene. In his dissenting opinion, Justice Kennedy realized that whether or not such wholesale seizure of non-obscene materials constituted a traditional form of prior restraint, the "First Amendment is a rule of substantive protection, not an artifice of categories." *Alexander*, 113 S. Ct. at 2779 (Kennedy, J., dissenting). He therefore discerned a "progression in [the Court's] First Amendment jurisprudence which results from a more fundamental principle. As governments try new ways to subvert essential freedoms, legal and constitutional systems respond by making more explicit the nature and the extent of the liberty in question." *Id.* at 2782. The same should be true of Congressional attempts to intrude on the editorial freedom of speakers and listeners in any medium, however new or different it may at first appear.

[70] The opening paragraph of the *Turner* opinion notes the "ongoing telecommunications revolution with still undefined potential" and the "increasing convergence" among the media, which the opinion then largely ignores. *Turner*, 114 S. Ct. at 2445, 2451. In *Denver Area* the dynamic nature of the electronic media was the plurality's excuse for not affording cable broad and definitive First Amendment protection. *Denver Area*, 116 S. Ct. at 2385.

A. *Broadcasters—Does Red Lion Still Roar?*

Many broadcasters wish to avail themselves of the must-carry provisions rather then bargain for advantageous retransmission consent terms. They gain the most from the Court's opinion in *Turner*, at least in the short term. But as is so often the case, broadcasters well may have to pay a price in terms of their ultimate First Amendment freedom for this special treatment.

In a section commanding the assent of eight Justices, the Court rejected the government's argument that the First Amendment standard applied to review of government regulation of broadcasting also should apply to cable.[71] In doing so, the Court confirmed the resolution of what once was a mystery: how, only five years apart, two unanimous[72] Courts could have resolved essentially the same issue in diametrically opposed ways for the print and broadcast media without even mentioning in *Tornillo*, let alone attempting to resolve, its conflict with *Red Lion*. Now, in *Turner*, the Court explicitly acknowledged what long had been apparent.[73] Namely, the spectrum scarcity that always has been the foundation for broadcast regulation refers only to perceived *physical* characteristics of broadcast transmission and not to economic scarcity (of broadcast frequencies, printing presses or the like), which after all is a universal condition affecting all resources.[74]

The effect of this renewed discussion of physical spectrum scarcity by a strong majority may well be to reinforce the traditional predicate for continuing to single out broadcasters as unique, second-class media citizens under the First Amendment. Previously the Court had indicated that it might be prepared to rethink this approach to broadcasting,[75] and *Turner* does include a few tantalizing hints in this direction. For example, the Court's language is that spectrum scarcity "*has* been thought to require some adjustment in traditional First Amendment analysis," not that it necessar-

[71] *See Turner*, 114 S. Ct. at 2456-58.

[72] Justice Douglas did not participate in *Red Lion*, 395 U.S. 367.

[73] *See League of Women Voters*, 468 U.S. at 377 (holding statutory ban on editorializing by noncommercial television and radio stations receiving federal funds violates the First Amendment).

[74] *See Turner*, 114 S. Ct. at 2457-58. Unfortunately, in describing the "unique physical limitations of the broadcast medium" and including among these the phenomenon of interference on the electromagnetic spectrum, *id.* at 2456-57, the Court perpetuated the confusion begun in *National Broad.*, 319 U.S. at 213. Interference ultimately is independent of scarcity and is largely irrelevant to the contentious issues of broadcast content regulation. *See* Winer, *supra* note 15, at 221-22.

[75] *See League of Women Voters*, 468 U.S. at 376 n.11; *see also* Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1442-43 (8th Cir. 1993) (holding that Congress had not codified the fairness doctrine, so the FCC need not enforce it, and suggesting that it is likely that the Supreme Court will reconsider *Red Lion* and strike a different First Amendment balance).

ily still does.[76] Similarly, the Court inconclusively says that "*whatever* [the] validity" of the rationale for less rigorous First Amendment scrutiny of broadcast regulation, it does not apply to cable.[77] Most significantly, the Court acknowledges the longstanding criticism of the scarcity rationale from other courts and commentators, which the Court then correctly concludes it need not address in this case involving cable.[78] But distinguishing cable from broadcasting in this way is a reflexive operation. It automatically distinguishes broadcasting from cable, and perhaps from the rest of the electronic media, with potentially adverse consequences in the future for the apparent, immediate beneficiaries.[79]

Thus, *Turner* must be considered a very mixed bag for broadcasters. This current reminder from the Supreme Court of broadcasting's questionable claim to a full measure of First Amendment freedom[80] comes at a sensitive time. The dream of a new fairness doctrine always remains alive in Congress.[81] Howard Stern and the intractable issue of broadcast indecency command inordinate attention;[82] similarly, television violence makes for a good political

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[76] *Turner*, 114 S. Ct. at 2457 (emphasis added).

[77] *Id.* at 2456 (emphasis added); *see also Action for Children's Television*, 58 F.3d 654 (upholding a statutory ban on broadcast indecency, except for a 10 p.m. to 6 a.m. "safe harbor"). In his lengthy dissent, addressed perhaps to potential Supreme Court review, Chief Judge Edwards opined that there no longer is any basis for affording broadcasting any different First Amendment status than cable. *See Action for Children's Television*, 58 F.3d at 671, 672-76 (Edwards, C.J., dissenting). For the majority, however, there was "no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment." *Id.* at 660.

[78] *Turner*, 114 S. Ct. at 2457. The Court, for example, cited an opinion joined by then Judge Scalia stating that distinguishing between print and broadcast media on the basis of scarcity is a "distinction without a difference" producing "analytical confusion" that "inevitably leads to strained reasoning and artificial results." Telecomm. Research and Action Ctr. and Media Access Project v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (affirming in part and reversing in part FCC's refusal to apply some political broadcast regulations to teletext technology).

[79] *Cf. Time Warner*, 93 F.3d at 973-77, in which the court analogized to broadcasting and created a new scarcity rationale for direct broadcast satellite systems ("DBS") based on the limited number of satellite positions available for the service.

[80] *Cf.* United States v. Edge Broad. Co., 113 S. Ct. 2696 (1993). In *Edge* the Court upheld, as a permissible regulation of commercial speech, enforcement of a federal statutory restriction on radio broadcast of lottery advertising, saying, "Congress has greater latitude to regulate broadcasting than other forms of communication." *Id.* at 2702.

[81] The current Chairman of the FCC, however, has made public comments suggesting that he is not inclined to further regulate the broadcast media in this way. Donna Petrozzello & Kim McAvoy, *War of words: Broadcasters, Hundt differ over "true facts"*, BROADCASTING & CABLE, Nov. 7, 1994, at 64-65.

[82] *See Action for Children's Television*, 58 F.3d 654 (upholding, over vigorous dissents, statutory ban on broadcast indecency but for a "safe harbor" of 10 p.m. to 6 a.m.). Shortly after this opinion, and facing possible threats to its plans for expansion, Infinity Broadcasting, Howard Stern's employer, "normalized" its relationship with the FCC by a substantial payment (termed "extortion" in the trade press) to settle all outstanding indecency complaints. *See* Chris McConnell, *Infinity Pays The $1.7 Million*, BROADCASTING & CABLE, Sept. 4, 1995, at 6; *Thank You, Godfather*, BROADCASTING & CABLE, Sept. 18, 1995, at 82. Pursuant to

show with accompanying threats of government censorship;[83] championing mandates in the name of "children's television" is always equally popular;[84] and every election season raises renewed interest in broadcasters' obligations regarding political programming.[85] Early in his term, the current Chairman of the FCC described his broadcasting agenda as a search for a new "social compact,"[86] and there always are some influential members of Con-

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settlement of another indecency case, the FCC reportedly is preparing a report to give broadcasters a better idea of what it considers actionable in this area. *See Indecency Guide*, BROADCASTING & CABLE, May 8, 1995, at 113.

83 Emboldened by the decision in *Action for Children's Television*, the FCC may move next to clamp down on violence. *See* Edmund L. Andrews, *F.C.C. Joining A Move To Curb Violence On TV*, N.Y. TIMES, July 7, 1995, at A1 (quoting Chairman of the FCC as saying of *Action for Children's Television*, "It calls on us to take another look at the assumptions we have about the First Amendment"); Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996); Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527 (1996). Even the author of the main dissent in *Action for Children's Television*, in also dissenting from an en banc decision upholding restrictions on indecency on cable access channels, criticized Congress for focusing on a "mere pittance" of an unproven problem regarding indecency while failing to address the far more significant issue of violence on television. *See Alliance*, 56 F.3d at 149 (Edwards, C.J., "Postscript" to dissent); *see also* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487 (1995).

Section 551 of the 1996 Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §§ 303, 330), both offers a technological "fix" in the form of requirements for a "V-chip" in new TV sets to block objectionable programming and raises additional First Amendment complications by its accompanying ratings system. *See* J.M. Balkin, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996).

84 *See* Christopher Stern, *FCC's Hundt Takes Children's Television Under His Wing*, BROADCASTING & CABLE, July 24, 1995, at 61; Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11 (1996); *cf.* Harry A. Jessell, *Quello Defends Broadcasters' Kids Efforts*, BROADCASTING & CABLE, Nov. 20, 1995, at 14 (quoting FCC Commissioner James Quello: "FCC commissioners casting judgments on what constitutes acceptable children's television programming for government approval constitutes a First Amendment intrusion in itself"). *See generally* Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rule Making, 10 F.C.C.R. 6308 (1995); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified at 47 U.S.C. §§ 303(a), 303(b), and 394 (1994)).

After much controversy and many false starts, and with considerable political pressure put on broadcasters, a compromise to increase the amount of educational television programming for children apparently has been reached. *See* Lawrie Mifflin, *TV Broadcasters Agree to 3 Hours of Children's Educational Programs a Week*, N.Y. Times, July 30, 1996, at A6; Broadcast Services; Children's Television, 61 Fed. Reg. 43,981 (1996) (codified at 47 C.F.R. § 73.671 and notes (1996)); Policy and Rules Concerning Children's Television Programming, Report and Order, 3 Communications Reg. (P & F) 1385 (1996).

85 *See, e.g.*, Fulani v. FCC, 49 F.3d 904 (2d Cir. 1995) (holding network program "Who Is Ross Perot?" satisfied the *bona fide* news interview exception from the equal opportunities rule). *See generally* Codification of the Commission's Political Programming Policies, 9 F.C.C.R. 651 (1994). The broadcast networks were pressured to offer uniform blocks of free television time for the 1996 presidential candidates. *See* James Bennet, *Free TV Time For Candidates Runs Into Snag*, N.Y. TIMES, July 27, 1996, at 1.

86 "The time has come to reexamine, redefine, restate and renew the social compact between the public and the broadcasting industry." Kim McAvoy, *Hundt's New Deal*, BROADCASTING & CABLE, Aug. 1, 1994, at 6 (quoting FCC Chairman Reed Hundt). Some might reply that the only proper such compact is that "Congress shall make no law." Hundt

gress who are similarly inclined.[87] No broadcaster can be very pleased—though surely surprised—to see Justice Kennedy describe the long history of intrusive and pervasive influence Congress and the FCC have exerted over broadcast programming as only "limited" and "minimal" control.[88] The ominous implication is that such government intervention poses few constitutional problems.

Until broadcasters are able to shed their fiduciary role under the public interest standard and instead adopt the same "compact" with the nation enjoyed by the print media,[89] they will remain second-class media citizens unable to compete fully with cable or other electronic services. Indeed, there is an ultimate irony in the must-carry rules, which ostensibly were created by Congress to aid broadcasting. Broadcasters do not need legally coerced access to cable. They need freedom from the broad and intrusive statutory and regulatory scheme that impedes their industry. Even if broadcasters ultimately have to purchase their, and our, First Amend-

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immediately sought to downplay some of the broader implications of his comments, such as Commission demands for a quid pro quo for relaxed broadcast ownership rules. *See* Kim McAvoy & Christopher Stern, *FCC Chairman Spells Out Broadcast Agenda*, BROADCASTING & CABLE, Sept. 19, 1994, at 14; Kim McAvoy, *FCC's Hundt: Sensible Dereg Needed*, BROADCASTING & CABLE, Oct. 10, 1994, at 18. More recently, the Chairman has called for a debate to "clearly define the obligations of a public trustee" broadcaster. *See* Reed Hundt, *A Letter to the Industry*, BROADCASTING & CABLE, Oct. 9, 1995, at 87; *see also* Hundt, *The Public Airwaves*, *supra* note 83.

87 *See* Kim McAvoy, *Markey Lays Out Legislative Agenda*, BROADCASTING & CABLE, Oct. 10, 1994, at 22; Kim McAvoy, *Markey's "On the Warpath"*, BROADCASTING & CABLE, Oct. 10, 1994, at 100 (describing the interest of the then Chair of the House Telecommunications Subcommittee in reinvigorating broadcasters' commitment to serving the public interest or, alternatively, imposing a spectrum fee).

The 1994 mid-term elections dramatically changed the political climate, at least temporarily. *See Telecom's New Order on Capitol Hill*, BROADCASTING & CABLE, Nov. 14, 1994, at 10; Harry A. Jessell & Kim McAvoy, *New Congress Means New Worries for FCC's Hundt*, BROADCASTING & CABLE, Nov. 14, 1994, at 11; *Reed Hundt Picks His Battles*, LEGAL TIMES, Sept. 4, 1995, at 10 (interview with the FCC Chairman). Prior to the 1996 Telecommunications Act there even were suggestions of abolishing the FCC. *See* Edmund L. Andrews, *A Conservative Group Proposes Abolishing the FCC*, N.Y. TIMES, May 31, 1995, at D4 (describing THE PROGRESS & FREEDOM FOUNDATION, THE TELECOM REVOLUTION—AN AMERICAN OPPORTUNITY (1995)); Edmund L. Andrews, *Has The F.C.C. Become Obsolete?*, N.Y. TIMES, June 12, 1995, at D1. *But cf.* Benjamin Wittes, *FCC's Next Task: Regulating Deregulation?*, LEGAL TIMES, June 5, 1995, at 1 (suggesting that proposed deregulation of the telecommunications industry will result in giving the FCC more power, not less).

It would be foolish, however, for broadcasters, or any other players in the electronic media, to rely on the vicissitudes of national politics for protection from heavy-handed government regulation. Stringent and meaningful judicial review remains essential.

88 *Turner*, 114 S. Ct. at 2462-64; *see infra* notes 141-43 and accompanying text; *cf.* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCASTING PROGRAMMING (1994) (documenting and critiquing pervasive federal regulation of broadcasting).

89 *See, e.g.*, *Miami Herald*, 418 U.S. at 255 ("The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.") (quoting the plurality in Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973)).

ment freedom from government oversight by paying reasonable and objective spectrum fees (redistributed in part to advertisers and consumers/viewers who share the benefit),[90] in the long run we all are likely to be far better off. For broadcasters, *Turner* once again indicates the shortsightedness of accepting the apparent bargain of the immediate benefit.[91]

B. *Cable Operators and Programmers—When Is Content Control Content-Neutral?*

If broadcasters wishing to invoke must-carry access to cable systems appear to be the big, immediate winners in *Turner*, then cable operators and programmers are surely the main, direct losers. But so is the viewing public. Operators now can be forced to clutter their systems with a substantial amount of full-channel programming supplied by others that neither they, the operators, nor their subscribers otherwise might choose in a competitive marketplace of ideas. New, proliferating cable programmers need access to a threshold number of cable systems and subscribers in order to be viable. Yet, now they must compete for an increasingly scarce number of available channels not preempted by must-carry broadcasters or dedicated to PEG or leased access.[92] The broadcast stations remain available over the air. In contrast, those most at risk under the congressional scheme are the more marginal, diverse programmers seeking to establish a toehold in the cable market as "narrowcasters" by appealing to a particular, significant niche of viewers.[93] These might offer unique, interesting, or off-beat programming more popular than some local broadcast stations. The

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90 *See infra* note 173.

91 *See* Thomas W. Hazlett, *The "Public Interest" Fraud*, WALL ST. J., May 6, 1996, at A12 (criticizing broadcasters for inviting government to meddle with their editorial discretion in order to curry favor for free digital TV licenses).

92 *See, e.g.*, James Lardner, *The Anti-Network*, NEW YORKER, Mar. 14, 1994, at 49, 50 (quoting journalist Brian Lamb, Chairman of C-SPAN—the Cable Satellite Public Affairs Network that carries, among other things, proceedings of Congress—decrying the channel-capacity squeeze of the must-carry rules that has cost two and a half million Americans cutbacks in, or the loss of, C-SPAN and instead replacing it with things "'that no one is asking for.'"). This preemptive effect of must-carry may be exacerbated to the extent powerful broadcasters can use the retransmission consent provision of section 6 of the 1992 Cable Act to extract "ransom channels" from cable operators. *See* Price Colman, *DBS Makes Retrans Bedfellows of Broadcasting, Cable*, BROADCASTING & CABLE, Sept. 30, 1996, at 16; *see supra* note 33.

93 *See Turner*, 819 F. Supp. at 61 (Williams, J., dissenting). Fear of this displacement effect prompted some cable religious programmers to unsuccessfully challenge the must-carry rules on establishment and free exercise grounds. *Id.* at 48-49; *see also* Aaron Barnhart, *Cable, Cable Everywhere But Not a Thing to Watch*, N.Y. TIMES, Dec. 23, 1996, at C7 (describing the difficulty "niche programming" encounters in the fierce competition for cable channel space).

result could be directly contrary to the basic congressional purpose, stated in both the 1984 and 1992 Cable Acts, of encouraging and promoting the availability to the public of an array of views and information from a diversity of sources through the electronic media.[94]

1. The "Initial Premise"

One could say, however, that the Court began by confirming an important concession to cable. Eight Justices noted that "there can be no disagreement on an initial premise" that cable operators and programmers "engage in and transmit speech" and therefore are entitled to the protection of the First Amendment.[95] This is important because it puts to rest the common argument that cable operators act mainly as a conduit for the speech of others and as such do not exercise much editorial discretion worthy of First Amendment concern.[96] Although acknowledging this predominant conduit function,[97] the Court identified substantial First Amendment activity by cable operators. They communicate either through "original programming *or* by exercising editorial discretion" in the choice of the cable repertoire.[98] But, perhaps this is not much of a concession since a contrary approach would lead to the anomalous position of questioning First Amendment protection for the movie theater owner choosing which films to show or the bookstore owner stocking his shelves. Even an average daily metropolitan newspaper is composed predominantly of advertising and syndicated material written by others.[99] Yet no one would consider mandating access to the movie theater, bookstore, or newspa-

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94 One express purpose of the 1984 Cable Act, Pub. L. No. 98-549, 98 Stat. 2779, 2780 (1984), is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521 (4). Similarly, the policy in section 2(b)(1) of the 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 1463 (1992), is to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." These policies, however, are themselves problematic from a First Amendment perspective. *See infra* part IIIB(3).

95 *See Turner*, 114 S. Ct. at 2456; *cf. id.* at 2476 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting) ("[C]able programmers and operators stand in the same position under the First Amendment as do the more traditional media.").

96 *See, e.g.*, Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 334-50.

97 *See Turner*, 114 S. Ct. at 2452.

98 *Id.* at 2456 (emphasis added) (quoting *Preferred Communications*, 476 U.S. at 494); *see Hurley*, 115 S. Ct. at 2345 ("Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others"); *see also Columbia Broad.*, 412 U.S. at 124 (public has no general right of access to broadcasting because, "[f]or better or worse, editing is what editors are for; and editing is choice and selection of material.").

99 *See* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1511 n.16 (1993)

per for works of local film makers or authors.[100]

Once past this premise, the important issue becomes the level of First Amendment protection the Court will afford cable. Here again, the Court granted small favors in rejecting the government's argument for treating cable regulation with the deference accorded broadcast regulation. This deferential approach is problematic enough when confined to the area of its origin, let alone extended to new media. But by the time the majority was done denying the content-driven purpose and effect of the 1992 Cable Act, there was little left to encourage cable interests.

2. Viewpoint-Neutral But Still Content-Based

If the must-carry rules are content-based, as the *Quincy* and *Century* courts believed them to be, they would be subject to almost surely fatal strict scrutiny.[101] It is questionable enough whether the government can withstand the intermediate scrutiny the Court required,[102] let alone demonstrate that must-carry is narrowly drawn and necessary to achieve a compelling state interest. Everything therefore turned on the majority's conclusion that the rules in fact are content-neutral, a conclusion facilitated by the selective language the Court used to describe this concept. In effect, contrary to precedent and contemporaneous other cases, the majority saw must-carry simply as not viewpoint-based and therefore not content-based.[103]

Acknowledging the difficulty in sometimes distinguishing content-based and content-neutral regulation, the Court quoted from its opinion upholding time, place, and manner restrictions in *Ward*

("some ordinary newspapers try to maintain a ratio of 70% advertising to 30% editorial content") (citing generally C. FINK, STRATEGIC NEWSPAPER MGMT. 43 (1988)).

[100] *See Turner*, 114 S. Ct. at 2475-76 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting); *cf. Hurley*, 115 S. Ct. at 2346.

[101] *See Turner*, 114 S. Ct. at 2478-79 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."); Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115 (1991); *cf.* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding, as a "rare case" that survives strict scrutiny, a content based regulation of campaigning within 100 feet of polling places).

[102] *See Turner*, 114 S. Ct. at 2479-80 (O'Connor, Scalia, Ginsburg, JJ., dissenting).

[103] It is a bit odd that Justice Kennedy authored this restrictive interpretation of the concept of content-based regulation. He recently has been critical even of the compelling interest test for such regulation, adopted in First Amendment cases "by accident," as conceding too much room for state censorship. *Simon & Schuster*, 502 U.S. at 125 (Kennedy, J., concurring). Rather, Justice Kennedy has expressed the view that no content-based proscription of speech is proper unless the speech in question falls within "one of a limited set of well-defined categories." *Burson*, 504 U.S. at 211-12 (Kennedy, J., concurring); *see Simon & Schuster*, 502 U.S. at 124 (cataloging these categories); *see also supra* note 69.

v. Rock Against Racism:[104] "[T]he 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."[105] The same passage in *Ward*, however, goes on to say: "The government's purpose is the controlling consideration . . . . Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'"[106] Three days after *Turner*, the Court reiterated this precise formulation, again in the context of time, place, and manner restrictions on expressive activity.[107] In *Turner*, however, decidedly far more than just a time, place, or manner case, the Court made a subtle shift in language to facilitate its conclusion: "[L]aws that confer benefits or impose burdens on speech without reference *to the ideas or views expressed* are in most instances content-neutral."[108]

No one suggests that Congress benefitted local broadcast and public broadcasting system ("PBS") stations over cable channels with formats such as movies, sports, comedy, adult entertainment or the like because Congress necessarily favored certain ideas or viewpoints on the broadcast stations, or disfavored ideas and viewpoints found on some cable channels. This argument would confuse the notions of viewpoint-neutrality and content-neutrality,[109] and is not necessary to make the must-carry rules impermissibly content-based.[110] On the other hand, Congress did not just ran-

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104 491 U.S. 781 (1989) (holding municipality's regulation of sound (volume and mix) at concerts in a public park is valid time, place, and manner of regulation).

105 *Turner*, 114 S. Ct. at 2459 (quoting *Ward*, 491 U.S. at 791) (brackets in original).

106 *Ward*, 491 U.S. at 791 (emphasis in original) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding sleeping in public park as part of a demonstration may be prohibited)).

107 *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994) (upholding as content-neutral a 36-foot, speech-free injunctive buffer zone around abortion clinic entrances and driveway). *Compare Ward*, 491 U.S. at 791 (indicating this approach applies in speech cases generally) *with Burson*, 504 U.S. at 211-13 (Kennedy, J., concurring) (suggesting it is more limited to time, place, and manner cases).

108 *Turner*, 114 S. Ct. at 2459 (emphasis added). The D.C. Circuit now has followed *Turner* in focusing narrowly on whether cable regulation favors or disfavors speech based on the "ideas" or "views" expressed. The court held the regulation at issue content-neutral and applied only intermediate scrutiny. *Time Warner*, 93 F.3d at 969.

109 *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1518 (1995) (holding that state prohibition of anonymous campaign literature, although evenhanded and viewpoint neutral, is content based and invalid); *Perry Educ.*, 460 U.S. at 55-63 (Brennan, J., dissenting) (describing Court's precedents on viewpoint discrimination and distinguishing the related concept of content-neutrality).

110 As the Court recently put it, discriminatory treatment is suspect under the First Amendment not only "when the legislature intends to suppress certain ideas." Rather, "our cases have consistently held that '[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.'" *Simon & Schuster*, 502 U.S. at 117 (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)); *see*

domly pick the programmers entitled to must carry, or simply extend some form of leased access to cable for all unaffiliated programmers.[111] Rather, on the face of the 1992 Cable Act, Congress clearly meant to, and did, favor the genre of programming it thought local broadcasting and PBS stations provide—news, public affairs, and other programming with distinctly local and educational flavor—over the entertainment genre of many cable channels.[112] The legislation favors certain classes of speakers over others based on the subject matter of their programming.[113] This is content-based regulation by any "common sense" meaning of that term.[114]

First Amendment values face more than just the narrow danger of government suppression of unpopular ideas or information that Justice Kennedy focused on.[115] Rather, regulation like the must-carry rules distorts the marketplace of ideas by displacing free choice by speakers and viewers and replacing it with government

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Turner, 114 S. Ct. at 2459 (reiterating this principle); *cf.* Rosenberger v. Rectors and Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2516 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

Even in the less demanding context of commercial speech, the Court recently struck down a city's news-rack policy that banned distribution of "commercial handbills" but not ordinary newspapers. The policy was based on safety and aesthetic considerations, not on any demonstrated animus towards the contents of the handbills. Nonetheless, the Court found that "by any commonsense understanding of the term," the selective, categorical ban in terms of the subject matter of the handbills was "content-based." *Discovery Network*, 113 S. Ct. at 1516-17.

111 *See* 47 U.S.C. § 532 (commercial leased channels).

112 After describing the congressional findings which she presumed stated the justifications for must-carry, Justice O'Connor concluded: "Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content." *Turner*, 114 S. Ct. at 2477 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting).

113 *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (invalidating a city ordinance that prohibited picketing near a school except for labor picketing) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its . . . subject matter, or its content."); Carey v. Brown, 447 U.S. 455 (1980) (invalidating similar selective prohibition of picketing based on subject matter). *See generally* Geoffrey Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

114 *See supra* note 110; *see also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) (state sales tax imposed on general interest magazines, but exempting newspapers and religious, professional, trade, and sports journals, was unconstitutional, content-based discrimination even though viewpoint-neutral).

115 *Turner*, 114 S. Ct. at 2458. This danger, however, is all too real. In *Turner* the Court considered must-carry viewpoint-neutral and therefore not content-based. In the next step, in *Denver Area* Justice Breyer referred to the "viewpoint-neutral application" of one of the challenged cable indecency provisions to support its constitutionality. *See Denver Area*, 116 S. Ct. at 2387; *see also id.* at 2399 (Stevens, J., concurring); *cf. id.* at 2404-05, 2414-15 (Kennedy, J., concurring in part and dissenting in part). Whatever this might mean, in practice it was just a way of shielding from strict scrutiny a statute clearly reflecting Congress's animus towards sexual, patently offensive programming. Such is how freedom of expression is eroded through incremental balancing.

fiat.[116] The effect is similarly pernicious; it gives the government's imprimatur to officially favored speakers and impedes the ability of willing speakers and viewers to communicate and access the information and messages they, not the state, choose.[117]

The Court's statement in *Turner* that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech"[118] is simply wrong and had the support of only five Justices.[119] On its face, and particularly with regard to must-carry, the 1992 Cable Act is replete with content regulation.[120] Leaving aside the carriage obligation for inherently local low-power stations,[121] only "*local* commercial television stations" and "qualified *local* noncommercial educational television stations"

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116 *See Leathers*, 499 U.S. at 465 (Marshall, Blackmun, JJ., dissenting) (upholding differential state tax imposed on cable) ("Under the First Amendment, government simply has no business interfering with the process by which citizens' preferences for information formats evolve.").

117 The same day it decided *Turner*, the Court recognized the problem of improperly based governmental favoritism in another First Amendment context, that of the Establishment Clause, and dealt with it appropriately. In *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994), New York had created a separate school district to accommodate the special educational needs of handicapped children of the Satmar Hasidic sect. One "fundamental source of constitutional concern" for the Court was that the legislature "may fail to exercise governmental authority in a religiously neutral way." *Id.* at 2491. In ruling that the statute at issue failed this test of neutrality, and responding to the dissent's argument for a permissible accommodation of religion, the majority did not impugn the legislature's motives. But it said, "we simply refuse to ignore that the method it chose is one that aids a particular religious community" rather than all groups similarly situated. *Id.* at 2494. The same reasoning applied to must-carry should have led the Court to scrutinize strictly the non-neutral, content-based scheme that preferred some television programmers over others.

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

119 *See id.* at 2478 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting) (specifically contradicting the majority on this point).

120 The legislative history reflects this as well. *See, e.g.*, S. REP. No. 92, at 45-46 (1991) (noting must-carry focuses on the carriage of local broadcast signals because they deliver "information of import to communities"); *id.* at 60 (noting governmental interest at stake in must-carry involves "access to local television stations' programming"); *id.* at 61 (defining geographical boundaries for must-carry as encompassing the "area in which most television stations' public service programming is directed"); H.R. REP. No. 628, at 50 (1992) (noting local television stations are "central" to the public interest as they are "both the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium"); *id.* at 51-52 (finding noncarriage of local broadcasters by cable forces "reductions in local news, public affairs, and other public interest programs"); *id.* at 56 (noting the importance of local programming); *id.* at 69 (noting local public television stations "provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for cultural and artistic groups, and coverage of local and state government activities and personalities").

121 The requirements for low power stations are set forth in the 1992 Cable Act, Pub. L. No. 102-385, § 4(c), 106 Stat. 1460, 1473 (1992) (codified at 47 U.S.C. § 534(c)), and apply only if there are not enough full-power stations to fill the must-carry quota. Only "qualified" low power stations are eligible, *id.* § 4(c), and these are defined in terms not only of the "local news and informational" programming needs they address, but also by whether they meet explicitly content-based programming requirements of federal regulation. *Id.* § 4(h)(2) (codified at 47 U.S.C. § 534(h)(2)). Indeed, the language defining low power stations eligible for must carry is so content-laden that the Court thought the district court

are eligible for must-carry.[122] Thus, contrary to the Court's assertion, the rules do not benefit all full-power broadcasters requesting carriage, and they are not based simply on the manner of transmission over the airwaves.[123] The so-called "superstations," distant broadcast signals imported into an area by satellite or microwave relay, are not eligible for the preferred treatment of the rules.[124] Although apparently defined just in terms of geographical television markets, both the local and the noncommercial educational criteria are suffused with content concerns that the Court should have condemned as a "subtle means of exercising a content preference" among speakers.[125]

In three key provisions of the 1992 Cable Act Congress specifically "finds and declares":

> (10) 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.
> (11) 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. . . .
> (16) As a result of [economic incentives absent must-carry] the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.[126]

What could be more explicit statements of Congress's perception of the important, distinctive nature of the programming content of the local broadcast stations it was legislating to benefit?[127]

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should consider the issue on remand. *See Turner*, 114 S. Ct. at 2460 n.6; *see infra* note 140. In fact, however, the situation is not much different for all stations entitled to must-carry.

122 1992 Cable Act §§ 4(a) and 5 respectively (codified at 47 U.S.C. §§ 534, 535 respectively) (emphasis added).

123 *See Turner*, 114 S. Ct. at 2460.

124 In some cases, if a local qualified noncommercial educational station is not available, the cable operator may have to import and carry at least one distant noncommercial station. 1992 Cable Act § 5(b)(2), (3) (codified at 47 U.S.C. § 615 (1994)).

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

126 1992 Cable Act § 2(a)(10), (11), (16) (codified at 47 U.S.C. § 521 note).

127 In addition to the examples in the text, Congress also acknowledged it wanted to encourage cable systems to carry any local low-power station that "creates and broadcasts, as a substantial part of its programming day, local programming." 1992 Cable Act § 2(a)(21) (codified at 47 U.S.C. § 521 note).

Moreover, the 1992 Cable Act specifically permits the FCC to grant must-carry status in a community to an otherwise ineligible broadcaster that requests it in order "to better effectuate the purposes" of must-carry. In passing on such a request the Commission must pay "particular attention to the value of localism" by considering factors including which stations "provide[ ] news coverage of issues of concern to such community or provide[ ] carriage or coverage of sporting and other events of interest to the community." *Id.* § 4(h)(1)(C)(ii)(III) (codified at 47 U.S.C. § 614 (1994)). This judgment is so blatantly

There is nothing particularly new or remarkable about this. As paragraph (10) indicates, this approach simply reflects the key value of localism—promotion of local outlets serving local community needs and interests—that has been a primary basis for the regulation of broadcasting since at least the 1952 Table of Assignments of television stations established a hierarchy based on preference for local outlets.[128] This value found even clearer expression in the FCC's 1960 En Banc Programming Inquiry that required, as a "principle ingredient" of the obligation to operate in the public interest, that a broadcast licensee "discover and fulfill the tastes, needs and desires of his service area."[129] The requirement that broadcasters ascertain and program for local community needs was reiterated and elaborated in 1971[130] and only more recently relaxed on the theory that proliferating, competing stations can be relied on to appropriately serve a community.[131] Thus in the 1992 Cable Act, Congress was simply continuing the long-standing policy of viewing local *broadcast* television as serving a particularly important function because of the perceived distinctive content of its programming, and then trying to selectively preference it by regulating *cable* in an impermissible way.[132]

Congress was equally explicit in its findings as to local public television stations. Their "unique noncommercial, educational programming services" advance a "substantial governmental and First Amendment interest."[133] This is because public television "provides educational and informational programming to the Na-

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content-based that the Supreme Court had to allow the district court, that previously ignored this provision, to address it on remand. *Turner*, 114 S. Ct. at 2460 n.6. Once again, however, as with a similar determination for low-power stations, *see supra* note 121, the real point is that this section is just one of a package of provisions in the 1992 Cable Act through which Congress tried to dictate the content of a significant portion of cable channels. Viewed as a whole, as the Act should be, the First Amendment problems are apparent.

[128] *See generally* DOUGLAS H. GINSBURG ET AL., REGULATION OF THE ELECTRONIC MASS MEDIA 158ff (2d ed. 1991).

[129] 1960 En Banc Programming Inquiry, 44 F.C.C.2d 2303, 2312 (1960), *aff'd sub nom.* Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962).

[130] *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

[131] *See* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984), *modified on reconsideration*, Memorandum Opinion and Order on Reconsideration of the Report, 104 F.C.C.2d 358 (1986), *modified and aff'd*, Action for Children's Television v. F.C.C., 821 F.2d 741 (D.C. Cir. 1987).

[132] Congress further demonstrated its continuing strong concern for the "principle of localism" in the 1992 Cable Act by directing the FCC to study the opportunities for advancing this principle through the establishment of direct broadcast satellite service ("DBS"). *See* 1992 Cable Act § 25(a) (codified at 47 U.S.C. § 335). For a description of DBS, *see infra* notes 216-18 and accompanying text.

[133] 1992 Cable Act § 2(a)(7) (codified at 47 U.S.C. § 521 note).

tion's citizens, thereby advancing the Government's compelling interest in educating its citizens," and it "provides public service programming that is responsive to the needs and interests of the local community."[134] Again, what justification for must-carry could be more dependent on the subject matter of programming and therefore more content-based?[135]

In addition to the specific local or educational content of broadcast programming that Congress sought to promote, the fact that Congress preferred broadcast programmers over cable programmers is, itself, another significant indication of the content-driven nature of what it was trying to achieve.[136] Unlike cable programmers, broadcasters are subject to a host of substantive content regulations stemming from their traditional obligation to operate in the public interest as defined in Washington, not in the marketplace. As surveyed by the Court, these include requirements regarding children's programming, restrictions on indecent programming, affirmative access obligations for qualified candidates for federal elective office, the personal attack corollary of the now-defunct fairness doctrine, and the general, catch-all public interest requirement.[137] To these one might add the prime-time access rule;[138] the recent threats to regulate television violence; the ever-present threat of a re-imposed fairness doctrine; and perhaps the most pernicious because the least assailable, the constant possibility of *sub rosa* chilling of broadcast speech by a mere "raised eyebrow" of disapproval from the licensing authority.[139] The fact that

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[134] *Id.* § 2(a)(8)(A), (B) (codified at 47 U.S.C. § 521 note).

[135] Some argue that precisely because of its unique and valuable content, must-carry for public broadcasting is especially legitimate. *See* Price & Hawthorne, *supra* note 9, at 65. Indeed, these authors report that Justice Kennedy suggested as much at oral argument. *Id.* at 69. Such a conclusion represents one debatable position as to the proper role of the state in shaping the mass media. At a minimum, however, it should be tested under strict scrutiny.

[136] Thus Judge Williams on the district court said the preference for broadcast stations "automatically entails content requirements," *Turner*, 819 F. Supp. 32, 58, a conclusion the Supreme Court rejected. *Turner*, 114 S. Ct. at 2462.

[137] *See Turner*, 114 S. Ct. at 2462 n.7.

[138] The Commission repealed the twenty-five year old prime-time access rule effective August 30, 1996, finding it no longer necessary to promote sources of independent television programming, or the growth of independent stations, or new networks. *See* Review of the Prime Time Access Rule, Report and Order, 11 F.C.C.R. 546 (1995).

[139] *See* Illinois Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 406 (D.C. Cir. 1975) (statement of Bazelon, C.J., describing as "legion" a "whole range of 'raised eyebrow' tactics" of FCC regulation); *see also* CHARLES D. FERRIS ET AL., CABLE TELEVISION LAW ¶ 3.11 n.5 (1985) (describing the origin of the "raised eyebrow" view of FCC regulation). *See generally* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

A good example of current regulation by "raised eyebrow" (or administrative extortion) may be the effort by Westinghouse Electric Corporation to ease approval of its acquisition of the CBS network by pledging to increase its amount of children's educational programming to just that level that had been urged by the Chairman of the FCC and

Congress had exactly these sorts of content distinctions in mind when deciding to favor broadcast programmers is apparent from its definition, using just such criteria, of a "qualified low power station" that might be eligible for must-carry.[140]

Somewhat incredibly, and no doubt to the considerable amazement of broadcast licensees, the Court minimized the content restraints imposed on broadcasters that distinguish their programming as a class from that of most cable programming. Justice Kennedy acknowledged that intrusive federal control over the content of broadcast programming might lend weight to the content-based nature of must-carry.[141] His revisionist view thus concluded that Congress and the FCC influence broadcast programming only to a "minimal extent."[142] Despite the plethora of broadcast content issues, and the long history of contentious litigation over them, the Court in effect reduced the obligation to that of "only" adhering to the general public interest standard.[143]

Of course, even if described in this seemingly benign way, one could ask why this public interest obligation alone is not an imper-

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supported in a public letter from the President. *See* Lawrie Mifflin, *More Children's Shows, Westinghouse Pledges*, N.Y. TIMES, Sept. 21, 1995, at C13; Edmund L. Andrews, *At The F.C.C., Friction Over Westinghouse*, N.Y. TIMES, Sept. 27, 1995, at D4; Lawrie Mifflin, *Media*, N.Y. TIMES, Oct. 9, 1995, at C5. Westinghouse denies that it "cut a deal with the FCC." *See* Chris McConnell, *Westinghouse Makes Kids Commitments*, BROADCASTING & CABLE, Sept. 25, 1995, at 16. The Commission ultimately approved the purchase without making it formally contingent on Westinghouse's pledge. *See* Edmund L. Andrews, *F.C.C. Approval Seen Today For Westinghouse-CBS Deal*, N.Y. TIMES, Nov. 22, 1995, at C2. The children's television issue has been resolved for now through compromise. *See supra* note 84.

140 Under the 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992), a "qualified low power station" must meet

> all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials and personal attacks; programming for children; and equal employment opportunity; and the Commission [must] determine[ ] that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations.

Id. § 4(h)(2)(B) (codified at 47 U.S.C. § 534). The Court recognized that the district court on remand could consider whether this last condition is content-based. *See Turner*, 114 S. Ct. at 2460 n.6. But the lower court glossed over the issue, saying simply that the low power provisions "are very close to content-based legislation triggering strict scrutiny" but are "viewpoint-neutral" and "do not . . . cross the line." *Turner*, 910 F. Supp. at 750.

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

142 *Id.* The Court's new view of the FCC's limited oversight responsibilities for broadcasting surprised even the most senior member of the Commission. James H. Quello, now in his fourth term on the FCC and a longtime advocate of at least some direct content control, has indicated that the Court's "strong messages" in *Turner* will cause him to reconsider and perhaps soften his position on issues such as children's television and indecency enforcement. *See* James H. Quello, *Q's World: The Future of Broadcast Regulation*, 47 FED. COMM. L.J. 341, 345 (1994).

143 *See Turner*, 114 S. Ct. at 2463.

missible intrusion into the editorial discretion of broadcasters, as any such imposition on newspapers surely would be. Or, at a minimum one could ask why the public interest standard is now being applied to cable, at least in the sense of being the distinguishing feature that marks those programmers cable operators must carry. The answer apparently is that, although the Court in *Turner* acknowledged modern doubts about the premises and scheme of broadcast regulation,[144] it was not prepared to pull on that Gordian knot. It therefore had to minimize broadcast content regulation so that it could downplay the content-based nature of the public interest standard and thus conclude that must-carry is content-neutral.

Ironically, however, to the extent that the purpose of must-carry is to ensure the continuing viability of broadcasting as it competes with cable,[145] continuation of the pervasive, content-related regulation that stems from the public interest standard may be the single greatest impediment to broadcasting's ability to so compete.[146] *Turner* thus is another good example of the interdependency among the media; under Congress's approach cable will not be free of must-carry unless broadcasting is free of public interest obligations. So, broadcasters cannot insist on must-carry and yet object to their public trustee responsibilities. Alternatively, each medium will achieve proper First Amendment status free of government intrusion only when its functional similarity is appreciated and all media are treated alike as essentially one, unified medium, that is no different from print.

3. The Interest in Diversity

On a much broader level, Congress further betrayed its overriding content-based purpose behind much of the 1992 Cable Act. Together with the specific provisions for must-carry of local commercial and educational stations, this Congressional gestalt should have demanded strict scrutiny of these rules.

Among Congress's stated purposes behind the 1984 Cable Act was to "assure . . . the widest possible diversity of *information sources and services* to the public."[147] In the 1992 Cable Act, however, Con-

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[144] *See supra* notes 76-78 and accompanying text.

[145] *See infra* notes 166-73 and accompanying text.

[146] For example, the requirement in the 1996 Telecommunications Act, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139 (1996) (to be codified at 47 U.S.C. §§ 303, 330), for a "V-Chip" in all television sets that parents can program to block certain objectionable programs, could adversely affect broadcasters' ability to attract advertisers. *See* Lawrie Mifflin, *Spurned By Industry, V-Chip Retains Some Mighty Friends*, N.Y. TIMES, July 17, 1995, at D7.

[147] 47 U.S.C. § 521(4) (emphasis added); *see* Associated Press v. United States, 326 U.S.

gress made a subtle shift and declared, "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of *views* provided through multiple technology media."[148] This is not just a matter of semantics; there is a world of difference between the two formulations.[149] And in the latter Congress has it exactly backwards. The overwhelming First Amendment interest is in precluding the government from concerning itself with content, with the views (diverse or not) expressed in the marketplace of ideas. Private media aggregations of power may limit diversity of viewpoints, but these tend to offset each other. The state, however, with a monopoly on the use of coercion and a sorry history of abuse, is not to be trusted and has no business making such judgments.[150] This is why "Congress shall make no law."[151]

The difference between the two statements is the difference between permissible, even sometimes appropriate, structural regulation of the marketplace, on a par with antitrust or other general business regulations, and impermissible content regulation. Blurring this fundamental distinction is what made *Metro Broadcasting Inc. v. FCC*[152] troubling from a First Amendment viewpoint. There the Court upheld minority preferences in comparative broadcast license proceedings and distress sales of licenses. If the purpose of such policies is just to increase minority ownership and participation in the broadcast industry, as a matter of equalizing opportu-

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1, 20 (1945) (noting that the First Amendment is no shield from application of the Sherman Act because that Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.").

148 1992 Cable Act, Pub. L. No. 102-385, § 2(a)(6), 106 Stat. 1460, 1461 (1992) (codified at 47 U.S.C. § 521 note) (emphasis added); *see also id.* § 2(b)(1) (codified at 47 U.S.C. § 521 note) (stating the policy of Congress to "promote the availability to the public of a diversity of *views and information* through cable television and other video distribution media") (emphasis added).

149 *See Time Warner*, 93 F.3d at 968 ("[d]iversity" as used in the 1984 Cable Act "referred not to the substantive content of the program . . . but to the entities—the 'sources'—responsible for making it available").

150 "[T]he First Amendment . . . rests on the premise that it is government power, rather than private power, that is the main threat to freedom of expression." *Turner*, 114 S. Ct. at 2480 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting). All too often, government "intonation of the rubric 'diversity' is a thinly disguised reference to its preference for [certain] editorial content." *Time Warner Cable*, 943 F. Supp. at 1397 (enjoining efforts by the Mayor of New York City to force Time Warner's cable system to carry Rupert Murdoch's Fox News Channel). As to government excesses, see generally POWE, *supra* note 139.

151 Tracking language used by the majority in *Turner*, Justice O'Connor did not focus on the linguistic distinction drawn here, but she certainly appreciated the basic point: "The interest in assuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say." *Turner*, 114 S. Ct. at 2477 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting).

152 497 U.S. 547 (1990).

nity as in other industries, then such programs have to be measured by equal protection and due process principles applicable to such set-asides.[153]

But these minority preferences were justified and upheld as serving the "important governmental objective" of promoting diversity in broadcast programming.[154] The Court accepted the FCC's conclusion that there is an empirical nexus between minority ownership and programming diversity.[155] Perhaps because of the main interest in the equal protection issues, there was disappointingly little discussion of the First Amendment implications from government trying to engineer the content of broadcast programming in this way.[156]

Section 19 of the 1992 Cable Act also speaks in terms of promoting diversity in the multichannel video programming market.[157] But these "program access" provisions focus on structural regulation to preclude unfair methods of competition, or unfair or deceptive acts or practices, in the distribution of programming among competing providers of multichannel video services, many of whom are vertically integrated.[158] As in the 1984 Cable Act, this

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[153] The Court now has overturned *Metro Broadcasting* on this point and subjected even such congressional mandates to strict scrutiny. *Adarand Constructors*, 115 S. Ct. at 2113.

[154] *See Metro Broadcasting*, 497 U.S. at 566-68. Justice Kennedy, however, termed the interest in broadcast diversity "trivial." *Id.* at 633 (Kennedy, J., dissenting).

[155] *Id.* at 569. This asserted nexus is troubling, not only for its stereotyping potential; *see id.* at 579, 617-620 (O'Connor, J., dissenting); *cf. Lamprecht*, 958 F.2d 382 (opinion by Judge, now Justice, Thomas, rejecting such a nexus between FCC's gender preference policies and programming diversity). All broadcasters must meet market demand to sell advertising and survive. As they are *broad*casters, this generally means appealing to a mass audience with bland, conventional common-denominator programming. Regardless of a station's ownership, its "minority" programming, if any, is likely to be only at the margins. *But see* Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293 (1991) (describing a basic model of programming choice by profit-maximizing broadcasters that suggests two possible reasons why minority and female owners might program differently from white males); Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (econometric study concluding that increasing the number of minority- or female-owned broadcasting stations would increase the amount of minority-oriented programming).

Cable operators too must satisfy their subscribers' desires. But as *narrow*casters they add channels, often without concern for selling advertising, to appeal to the next underserved segment of the market. Cable operators, therefore, may be more willing to experiment with additional channels devoted to "minority" programming. Of course, to the extent that must-carry obligations limit the ability of operators to do this, they impede rather than advance any interest in diverse television programming.

[156] *See Metro Broadcasting*, 497 U.S. at 566-67. The Court merely cited its major scarcity rationale broadcasting cases to reduce the First Amendment concerns. *Cf. id.* at 616 (O'Connor, J., dissenting) (noting the asserted interest in diversity presents an "unsettled First Amendment issue" even for the "peculiarly constrained broadcasting spectrum").

[157] 1992 Cable Act, Pub. L. No. 102-385, § 19(a), (c), 106 Stat. 1460, 1494 (1992).

[158] *See generally* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming and Carriage), First Report and Order, 8 F.C.C.R. 3359 (1993), *recon-sid. denied in part*, 10 F.C.C.R. 1902 (1994).

approach seeks to ensure diverse sources and services, which may have some tangential effect on diversity of programming, but does not involve the government in impossible and improper tasks.[159] For if one does regulate more directly in the name of diversity of programming, as Congress proposes generally in the 1992 Cable Act, how does one measure such a quality—along what set of political, social, economic, educational, or similar axes?

We used to have three, and now have four, vigorously competitive broadcast networks. Do they provide meaningfully diverse programming?[160] Does a large cable system with fifty or more active channels create a diverse marketplace of ideas, or is there still basically nothing worthwhile to watch, only more channels on which to watch it?[161] How can we address such a question if the reason for asking it is not just for the sake of social commentary, but to evaluate intrusive government regulation in the face of the First Amendment? The potential for state distortion and manipulation of the marketplace of ideas in the name of diversity is manifest.[162] Diversity in the abstract may be a good thing, but—as with most issues of press fairness, accuracy, and responsibility—the central problem

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159 But for a discussion of some intriguing issues raise by such program access provisions, see Wendy J. Gordon & Anne E. Gowen, *Mandated Access: Commensurability and the Right to Say "No"*, 17 HASTINGS COMM. & ENT. L.J. 225 (1994). Section 19 has been sustained under intermediate scrutiny. *Time Warner*, 93 F.3d at 977-79.

160 Over thirty years ago the Chairman of the FCC offered a conventional answer, terming television a "vast wasteland," one that he now says we have managed to fill largely with "toxic waste." NEWTON N. MINNOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND 7 (1995); *cf.* Robert Corn-Revere, *Would You Take First Amendment Advice From Newton Minow?*, BROADCASTING & CABLE, Nov. 27, 1995, at 24.

161 As one American cultural icon puts it, "[t]here's fifty-seven channels and nothin' on." BRUCE SPRINGSTEEN, *57 Channels (And Nothin' On)*, *on* HUMAN TOUCH (Columbia Records 1992). For some, evoking scenes from *A Clockwork Orange*, it seems there never will be enough "diversity" until people actually can be made to watch that which bureaucrats think they ought to watch (C-SPAN perhaps?). *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 22 (1993) ("It is also important to ensure not merely that diversity is available, but also that a significant part of the citizenry is actually exposed to diverse views about public issues."); Owen M. Fiss, *Why The State?*, *in* DEMOCRACY AND THE MASS MEDIA 136, 144 (Judith Lichtenberg ed., 1990) (arguing the issue is not market failure but market reach; the purpose of the state is not to supplant or perfect the market, but to supplement it). To be fair to Professor Sunstein, later in his book he does state that, "[o]f course we should not compel people to watch public-affairs programs." SUNSTEIN, *supra*, at 70. But much of the discussion of a "New Deal" for speech, see sources cited *supra* note 9, has the distinct and troubling paternalistic (not to mention elitist) flavor of "we" know best what speech is good for people and society and therefore "we" collectively can decide to ensure its availability. What cannot be ensured, however, is an actual audience; that has to be earned by someone saying something that someone else *wants* to hear.

162 *See supra* note 150. Even the seminal case in broadcast regulation recognized the constitutional difficulty posed by government choosing among potential broadcast licensees "on the basis of their political, economic or social views." *National Broad.*, 319 U.S. at 226; *see also Leathers*, 499 U.S. at 465 (Marshall, Blackmun, JJ., dissenting) (upholding differential state tax imposed on cable) ("[O]ur precedents recognize that the Free Press Clause imposes a special obligation on government to avoid disrupting the integrity of the information market.").

arises when we enlist the power of the state on its behalf, as so beautifully captured in Justice Stewart's admonition of the "dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.'"[163] At a minimum, the must-carry provisions of the 1992 Cable Act, especially when premised on the interest in diversity that pervades the Act, required strict judicial scrutiny.

Instead, the Court in *Turner* never discussed these broader content-based aspects of the 1992 Cable Act[164] and dismissed the importance of its specific provisions detailing the nature of favored programming as local, educational, or public interest broadcasting. These descriptions indicate, said the Court, only that Congress recognized that broadcasting has some "intrinsic value" worth preserving, not that it is more valuable than cable programming.[165] It is not at all clear what this statement means, and it appears to make little sense. Congress selectively privileged local and public broadcasting as a class at the expense of cable programming, and the Court admits what is both implicit in such an approach and explicit in the legislation—that this was based on a judgment about the particular value of such broadcast programming. This is content-based regulation subject to strict scrutiny.

4. The Interest in Free Television

Perhaps because of the weakness of this "intrinsic value" argument, the Court tried to shift the emphasis. Congress, the majority declared, was not trying to advance any particular programming because of the nature of its content—local, educational or otherwise—but simply trying to "preserve access to *free* television programming for the 40 percent of Americans without cable."[166] It is

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163 CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (holding no general public right of access to purchase broadcast time).

164 *Cf.* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

165 *See Turner*, 114 S. Ct. at 2462. Later in its opinion, however, the majority acknowledged the long-standing, special importance of local broadcasting. *Id.* at 2469.

166 *Turner*, 114 S. Ct. at 2461 (emphasis added); *see* 1992 Cable Act, Pub. L. No. 102-385, § 2(a)(12), 106 Stat. 1460, 1461 (1992) (codified at 47 U.S.C. § 521 note) ("There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.").

A year before *Turner*, however, the FCC itself recognized that the "fundamental purpose" of Congress's must-carry scheme was "the preservation of local television service and the local public interest *programming* provided by these broadcast stations." Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992: Home Shopping Station Issues, Report and Order, 8 F.C.C.R. 5321, 5324 (1993) (citing section 2(a)(9)-(11) of the 1992 Cable Act) (emphasis added).

true that Congress perceived an economic threat to broadcasting from cable's developing dominance as a nationwide video medium.[167] Cable and broadcasting, for example, increasingly compete for television advertising revenues.[168] The concern is that cable operators have vertically integrated into programming and therefore have the ability and incentive to favor their affiliated programmers over others, including broadcasters.[169]

But, broadcast programming remains the most popular television programming, and cable systems derive "great benefits" from carrying these local stations.[170] Still, Congress feared that cable operators have a strong economic incentive to disfavor broadcasters by refusing to carry new signals, deleting those they carry or repositioning them to less advantageous channel locations.[171] Because Congress also mistakenly perceived cable operators as exercising "bottleneck" control over the video marketplace, including even broadcasting,[172] it concluded that absent must-carry the economic viability of free local broadcast television would be "seriously jeopardized."[173]

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[167] *See* 1992 Cable Act § 2(a)(3) (codified at 47 U.S.C. § 521 note); *see also*, Lawrie Mifflin, *Cable TV Continues Its Steady Drain Of Network Viewers*, N.Y. TIMES, Oct. 25, 1995, at B1.

[168] *See* 1992 Cable Act § 2(a)(14) (codified at 47 U.S.C. § 521 note). Congress, however, contradicted itself on this point. If cable and broadcasting compete for advertising, then presumably they also compete for viewers. Yet a few paragraphs earlier the Act states that cable faces no local competition. *Id.* § 2(a)(2) (codified at 47 U.S.C. § 521 note). This latter point becomes especially important on the "bottleneck" control argument. *See infra* part IIIB(5).

[169] *See* 1992 Cable Act § 2(a)(5) (codified at 47 U.S.C. § 521 note).

[170] *See* 1992 Cable Act § 2(a)(19) (codified at 47 U.S.C. § 521 note). So, prior to the Act Congress thought there was an "effective subsidy of the development of cable systems by local broadcasters" and a "competitive imbalance" because cable was able to use these broadcast signals without the broadcasters' consent or any copyright liability. *Id.* Any such imbalance, however, is addressed in the retransmission consent provision of section 6 of the 1992 Cable Act that allows broadcasters to forsake must-carry and bargain with cable systems for compensation for use of their signals. *See supra* note 33.

[171] *See* 1992 Cable Act § 2(a)(15) (codified at 47 U.S.C. § 521 note); *cf. Turner*, 819 F. Supp. at 64 (Williams, J., dissenting) (noting that cable operators derive 25 times the revenue from subscription fees than from advertising, and that cable "appears to continue to be dependent on local broadcasters as critical suppliers of programming").

[172] *See* 1992 Cable Act § 2(a)(2), (17), (18) (codified at 47 U.S.C. § 521 note).

[173] *Id.* Congress's solicitude for the economic viability of broadcast television is about to be tested in the controversy over giving existing broadcasters additional spectrum, worth perhaps $70 billion on the open market, for the transition to digital, advanced television services rather than auctioning it off. *See* Edmund L. Andrews, *Media*, N.Y. TIMES, Jan. 22, 1996, at C7. As Majority Leader, Senator Dole allowed action on the 1996 Telecommunications Act only on condition that this giveaway, or "corporate welfare," not occur until Congress has a chance to address it in separate legislation. *See* Edmund L. Andrews, *Dole Frees Communications Bill, Opening Way to Quick Vote*, N.Y. TIMES, Feb. 1, 1996, at C22. Congressional leaders now have asked the FCC to begin lending broadcasters the additional spectrum they need. *See* Joel Brinkley, *Congress Asks F.C.C. to Begin Lending Channels for Digital TV Broadcasts*, N.Y. TIMES, June 24, 1996, at C4. But the Chairman of the Commission seems intent on extracting a social agenda quid pro quo. *See* Mark Landler, *Capitol Hill Fiat On HDTV Isn't The Last Word*, N.Y. TIMES, July 1, 1996, at C1; *cf.* Policies and Rules Concern-

In many respects this purported Congressional concern with free television for the American public is a rather strange one.[174] First, broadcast television is not really free in a true economic sense. The substantial costs of broadcast advertising are passed along to consumers in the pricing of advertised products, although not in any direct relationship to television viewing.[175] The disutility of time-consuming and annoying commercial interruptions, the editing of programs to fit between neatly defined commercial segments, the scheduling constrictions imposed by the need to advertise, and substantial restrictions on content are other "costs" of broadcast television borne directly by viewers.

Moreover, why should any form of television be "free"? All other forms of mass media are not free and no one expects them to be.[176] And most of these books, magazines, newspapers, computer services, artistic performances, and the like, are far more meaningful and substantive (if less popular) than television for fostering a well-educated, well-informed, and engaged public. Public access to certain media in terms of "universal service" is an important, evolving component of advanced telecommunications and information services that will require much careful thought and planning to implement in an efficient and cost-effective manner, supported equitably by all players in the market.[177] In its grandest formulation, universal service involves maintaining the ability of a broad segment of the American public to interactively "participate effectively in the economic, academic, medical, and democratic

ing Children's Television Programming, Notice of Proposed Rule Making, 10 F.C.C.R. 6308, 6360 (1995) (Separate Statement of Commissioner James H. Quello) (terming such a "social compact" quid pro quo "nothing more than regulatory extortion").

[174] It also is reminiscent of the FCC's misguided and detrimental approach of once stifling the early development of cable out of fear for its impact on free broadcast television. *See* Thomas W. Hazlett, *How Washington "Saved" Us From Cable*, WALL ST. J., Mar. 23, 1995, at A14.

[175] *See* 1992 Cable Act § 2(a)(12) (codified at 47 U.S.C. § 521 note) (noting that, but for advertising, broadcast programming is "otherwise free").

[176] *See A Look At The Media Universe*, WALL ST. J., Sept. 15, 1995, at R21 (surveying all mass media and their associated costs, of which basic cable is one of the least expensive (after radio and broadcast television)). Many countries impose a television license fee on viewers. *See, e.g.*, Andrew Culf, *Brit Pleads for Bigger License Fee*, GUARDIAN, Aug. 24, 1996, at 2 (describing increase sought in England's TV license fee for viewers).

The physical availability of multichannel video programming is not an issue. Physically, cable or satellite TV is available to almost all television households. *See* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992: Inquiry into Sports Programming Migration, Further Notice of Inquiry, 9 F.C.C.R. 1649, 1651 & n.9 (1994) (noting that, based on trade press statistics, more than 95% of United States television households are passed by cable, and many that are not have home satellite dish systems).

[177] *See, e.g.*, 1996 Telecommunications Act, Pub. L. No. 104-104, § 101, 110 Stat. 56, 61, (1996) (to be codified at 47 U.S.C. § 254) (universal service).

processes of the Nation."[178] Simply the ability to receive "free" broadcast television programming, however, especially when imposed through a mandated, direct subsidy at the expense of cable operators and programmers (and their viewers), pales by comparison.[179]

a. Sports Program Migration

In fact, a far more mundane economic (and political) consideration seems to have motivated key portions of the 1992 Cable Act. To a good extent this was "Jane six-pack" legislation, designed to respond to complaints of couch-potato constituents who found themselves having to pay more for what they were used to getting cheaply, or for free—especially sports coverage. Indeed, rate regulation of cable was one of the main motivations behind the Act and perhaps its most prominent and popular feature.[180] Congress's appeal to the "public interest" represented by constituents' pocketbooks is most blatantly evident in the Act's requirement that the FCC study and report to Congress on the migration of sports programming from "free" broadcast carriage to cable networks and, even worse, to pay-per-view systems.[181]

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[178] Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. § 253(b) (1995) (universal service).

[179] Taking seriously Congress's notion of the "substantial governmental interest in promoting the continued availability of such free television programming," 1992 Cable Act § 2(a)(12) (codified at 47 U.S.C. § 521 note), might make viewing television a "fundamental right" that the state is expected to underwrite.

[180] 1992 Cable Act § 2(a)(1) (codified at 47 U.S.C. § 521 note) (findings regarding escalating cable rates); *id.* § 3 (codified at 47 U.S.C. § 623 (1994)) (imposition of rate regulation for all cable systems that do not face "effective competition"); *see* S. REP. No. 92, at 4-8 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, and H.R. REP. No. 628, at 26-34 (1992) for the concern over rates.

When, following enactment, cable rates for many subscribers actually increased (as predicted in President Bush's Veto Message, 138 CONG. REC. S16,676 (daily ed. Oct. 5, 1992)), widespread protest led to increased FCC regulation to reduce the charges. *See* Thomas W. Hazlett, *Why Your Cable Bill Is So High*, WALL ST. J., Sept. 24, 1993, at A10; Edmund L. Andrews, *Cable Rates Have Risen For Many, F.C.C. Says*, N.Y. TIMES, Oct. 22, 1993, at D2. The scheme for rate regulation was upheld in virtually all respects. *See* Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996); *Time Warner*, 93 F.3d 957. Arguably, however, a main effect of such regulation is a decline in the quality of cable offerings to the detriment of consumers. *See* Thomas W. Hazlett, *Cable: Lower Costs, Lower Quality*, WALL ST. J., July 14, 1995, at A12. Indeed, rate regulation and its effect on the development of programming has its own First Amendment implications. *See* Stanley M. Besen & John R. Woodbury, *Rate Regulation, Effective Competition, and the 1992 Cable Act*, 17 HASTINGS COMM. & ENT. L.J. 203 (1994).

The importance, at least politically, of cable rate regulation is illustrated by the fact that the Clinton Administration threatened to block efforts at comprehensive telecommunications reform over this issue (among others). *See* Mark Landler, *Gore Assails Bill to Revise Telecommunications Laws*, N.Y. TIMES, Sept. 13, 1995, at D2. The final legislation nonetheless phases in cable rate deregulation. *See* 1996 Telecommunications Act § 301(b) (to be codified at 47 U.S.C. § 543(c), (d)).

[181] *See* 1992 Cable Act § 26 (codified at 47 U.S.C. § 521 note). In its final such report to

It is doubtful there is any legitimate, substantive public interest in the government infringing on editorial discretion to promote free access to sports programming, either because of its "intrinsic value" or because access to such entertainment should be free. Any contrary argument would be inescapably content based. The same is true of the must-carry rules, despite the Court's attempted alternative emphasis. Congress was far more concerned with the content of the broadcast programming it was favoring than with just preserving free broadcast stations for their own sake. This is evident from the explicit provisions of the Act discussed above (the import of which the Court dismissed), from the Act's emphasis on the value of diversity, from the concern over sports programming, and from several other specific features of the legislation.

b. Substantially Duplicated Programming

First, in order to alleviate one of the major problems with the earlier versions of must-carry, Congress specified that cable operators would not be required to carry stations whose programming "substantially duplicates" that of stations already carried.[182] This makes a good deal of sense if the goal is to provide consumers access to certain programming, and it indicates once again the content-based concerns of Congress, as there is no point in providing multiple opportunities to access the same programming.[183] It makes far less sense, however, on the asserted goal of assuring access to free broadcasting. By Congress's own reasoning, those broadcasters left out under this scheme presumably will be at a competitive disadvantage with respect to both cable programmers and the lucky broadcasters that are carried. Their consequent loss to the broadcast marketplace, if in fact that occurs, could reduce competition and weaken that industry in the long run. This under-

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Congress, the Commission found little evidence generally of sports programming migration. *See* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992: Inquiry into Sports Programming Migration, 9 F.C.C.R. 3440 (1994). More importantly, and to its credit, the FCC acknowledged the serious First Amendment implications of content-based sports anti-siphoning rules, and discerned no basis for additional government intervention in the sports programming market. *Id.* at 3507; *see also* Home Box Office v. FCC, 567 F.2d. 9 (D.C. Cir. 1977) (noting anti-siphoning rules applicable to all entertainment programming violate even the *O'Brien* standard).

[182] *See* 1992 Cable Act § 4(b)(5) (duplication not required for local commercial television stations and network affiliates); *id.* § 5(e) (duplication of public television programming not required for cable operator with more than 36 usable activated channels already carrying three qualified local noncommercial educational television stations). A cable operator generally has discretion to choose among duplicating signals. *Id.* §§ 4(b)(2), 5(b)(2). And if an operator elects to carry duplicating commercial signals, they will count towards his must-carry quota. *Id.* § 4(b)(5).

[183] *See* S. REP. NO. 92, at 61 ("carriage of duplicative signals would do little to increase the diversity of local voices").

inclusiveness in the Act, while perhaps an attempt to accommodate competing interests, undermines the notion that Congress was trying to preserve free television rather than favoring local broadcast television because of the nature of its programming.

c. Retransmission Consent

This underinclusiveness with respect to the avowed purpose of must-carry is compounded by the retransmission consent provision of section 6. Congress allowed broadcasters to opt out of must-carry and bargain with cable operators for a better deal.[184] Perhaps Congress anticipated that only the more popular stations with bargaining power would attempt this. But even such broadcasters can miscalculate and lose, with potential negative effect on the availability of free television. In one community, for example, the local affiliates of the three major television networks were missing from cable for a while.[185] The Court, however, simply ignored any such possible impact from retransmission consent as section 6 was not formally before it.[186]

d. Home Shopping Stations

Finally, Congress segregated one genre of broadcast television for special treatment in a way that, perhaps more than any other single aspect of the Act, conclusively demonstrates the legislators' primary concern with programming content, not the viability of free television per se. Home shopping stations—those that are "predominantly utilized for the transmission of sales presentations or program length commercials"—did not automatically qualify for must-carry status like other local broadcasters.[187] Rather, the FCC was charged to determine if such stations serve the "public interest, convenience, and necessity," the basic regulatory touchstone for broadcasting.[188] If so, they would qualify for must-carry; otherwise such stations would be allowed a reasonable period within which to provide different programming.[189]

The Commission decided the issue after the district court opinion in *Turner* but before the anticipated Supreme Court review. In doing so the Commissioners were quite candid in their concern for not jeopardizing the constitutionality of must-carry by

184 1992 Cable Act § 6 (codified at 47 U.S.C. § 325); *see supra* note 33.
185 *See Turner*, 910 F. Supp. 787 (Williams, J., dissenting); *see also infra* note 238.
186 *See Turner*, 819 F. Supp. at 38 n.10.
187 *See* 1992 Cable Act § (4)(g).
188 *Id.*
189 *Id.*

overtly excluding home shopping stations based on their programming. Such a result "would place the content-neutrality of the must-carry rules into serious doubt."[190] In finding that home shopping stations do serve the public interest and therefore qualify for must-carry, the FCC thus joined Congress in posturing the must-carry provisions of the Act in an unwarranted favorable constitutional light.[191] The very fact that Congress mandated such a review for home shopping, regardless of the somewhat contrived outcome, should have confirmed that the must-carry legislative enterprise was suffused with content-based concerns and judgments necessitating strict judicial scrutiny.

If Congress is concerned about preserving free broadcast television, perhaps it can find a way to subsidize the entire industry—all stations, commercial or public, local or imported—in a truly content-neutral manner. Free use of the electromagnetic spectrum is one already existing subsidy,[192] although it is accompanied by the many content-related public interest obligations currently imposed on licensees. Indeed, any governmental largess bestowed on the media always includes the peril of state interference in editorial matters.[193] But the must-carry rules are particularly noxious because they constitute an explicitly content-based subsidy for selected local broadcasters, the cost of which is imposed directly on another segment of the media to the detriment of cable operators and programmers as speakers and the public as viewers.

5. "Gatekeeper" Control—The New Scarcity

The Court's crucial holding that the must-carry rules are not content-based allowed it to dismiss two corollary arguments for their invalidity. First the Court distinguished the important princi-

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190 Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 5321, 5329 (1993); *see also id.* at 5333 & n.1 (separate Statement of Chairman James H. Quello); *id.* at 5340 (dissenting statement of Commissioner Ervin S. Duggan).

191 One might try to justify special treatment for home shopping stations on the basis of the constitutionally subordinate position commercial speech often has occupied. *See* Michael I. Myerson, *The First Amendment and FCC Rule Making Under the 1992 Cable Act,* 17 HASTINGS COMM. & ENT. L.J. 179, 195-201 (1994). But this in no way lessens the inherent content-based nature of must-carry, which was the issue before the Court in deciding to abandon strict scrutiny. Moreover, the First Amendment status of commercial speech is improving considerably. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) (invalidating state ban on price advertising for alcoholic beverages).

192 This subsidy would be substantially enhanced by the free allocation to broadcasters of additional spectrum for the transition to digital, advanced television services. *See supra* note 173.

193 *See League of Women Voters,* 468 U.S. 364 (holding that requirement that any public television station that receives a grant from the Corporation for Public Broadcasting not engage in editorializing violates the First Amendment).

ple from *Buckley v. Valeo* that government may not "restrict the speech of some elements of our society [cable programmers] in order to enhance the relative voice of others [broadcast programmers]."[194] The political campaign expenditure limitation at issue in *Buckley* was aimed at equalizing the communicative impact of political speech across economic classes. According to the Court in *Turner*, such a speaker preference by Congress reflected a content preference, requiring strict scrutiny. Since the Court viewed the must-carry privileges as aimed not at content preference but at the perceived economic peril of broadcast television, *Buckley* was not controlling.[195]

Secondly, as Chief Justice Rehnquist had indicated in denying injunctive relief, Congress clearly could not impose a must-carry regime on private newspapers.[196] So the Court next had to distinguish *Tornillo*. It did so by noting that the access to the newspaper's columns provided by the Florida right-of-reply statute was triggered only when the paper first criticized a political candidate. Such a contingent right of access exacts a penalty based on content and thus can exert an impermissible chilling effect on the newspaper's editorial discretion. In contrast, according to the *Turner* majority, the affirmative access rights under must-carry are "content-neutral in application" and are not premised on counterbalancing other messages distributed on cable.[197] Moreover, the Court felt that the viewing public does not identify a cable system with the ideas and messages it transmits as the public may with a newspaper. A cable operator therefore is not forced to disassociate itself from, or otherwise respond to, broadcast stations it carries.[198]

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194 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

195 *See Turner*, 114 S. Ct. at 2466-67. In this way the Court, in effect, "collapsed the speaker-based inquiry into the content-based one." US WEST, Inc. v. United States, 48 F.3d 1092, 1100 (9th Cir. 1994), *cert. granted, vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996).

196 *Turner*, 113 S. Ct. at 1807-08 (Rehnquist, C.J., in chambers).

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

198 Here the Court engaged in some bootstrap analysis: because cable has a long history of carrying broadcast stations, it can be required to continue doing so since the public has come to appreciate its mere conduit function. *Id.*; *see Hurley*, 115 S. Ct. at 2348-49 (reiterating the "neutral[ ]" presentation of material on cable).

The Court, however, ignored the significant tendency to blame the messenger for the message despite the messenger's distinct, formal identity. Both broadcasters and cable operators long have been held accountable, not only for programming they choose to transmit, but for that which they are required to carry and from which they have difficulty disassociating themselves. *See, e.g.*, Petition for Declaratory Ruling Concerning Section 321(a)(7) of the Communications Act, Memorandum Opinion and Order, 9 F.C.C.R. 7638 (1994) (discussing whether broadcast licensee that must carry uncensored political advertisement containing graphic, but not indecent, anti-abortion message still has discretion to channel it to late night hours); Becker v. FCC, 95 F.3d 75 (D.C. Cir. 1996) (denying broadcast licensee the discretion to channel graphic, anti-abortion political campaign advertise-

These two arguments followed from the Court's misguided characterization of must-carry as content-neutral. More significantly, the Court also relied on an argument about the "special [technological] characteristics of the cable medium" that threatens to be the analogue for cable of the physical scarcity rationale for broadcast regulation. This involves the so-called "bottleneck" or "gatekeeper" control that cable operators supposedly exert over television programming coming into a subscriber's home. The Court invoked this notion not only to complete its distinction of *Tornillo*,[199] but also to justify Congress's imposition of must-carry on cable but not other competing, multi-channel video programming media.[200] Moreover, the bottleneck theory is the implicit, flawed rationale behind the Court's reliance on the need to preserve the viability of free, traditional broadcasting. This theory is as inade-

ments to a late night safe harbor); Missouri Knights of the Ku Klux Klan v. Kansas City, 723 F. Supp. 1347 (W.D. Mo. 1989) (holding that a group wishing to use public access cable channel to disseminate "racialist" message stated claim for attempt to preclude such opportunity). Cable operators can expect increased pressure, both from those who find certain programming objectionable and those who oppose censorship, now that the Court has sustained section 10(a) of the 1992 Cable Act that grants operators greater control over (and imposes greater liability for) indecent programming on leased access channels. *See Denver Area*, 116 S. Ct. 2374. Time Warner Inc. already has been sued over its plans to restrict access to sexually explicit programming on its local access channel in Manhattan. *See* James C. McKinley, Jr., *Court Will Weigh Plan to Scramble Cable Sex Shows*, N.Y. TIMES, Sept. 16, 1995, at A6. The Court in *Turner* thus was a bit too facile in dismissing any associational effect on a cable operator from being forced to carry broadcast stations and their public interest programming.

199 *Turner*, 114 S. Ct. at 2465. More difficult to distinguish in this way is *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (plurality opinion). There, a utility had "extra space" in its monthly billing envelopes for communications with customers at no extra postage. The utility included its own newsletter, but a group of customers ("TURN") wanted their counter-messages periodically sent instead. The state utility commission ordered such access be provided, subject only to TURN including a disclaimer disassociating its messages from Pacific Gas. Relying mainly on *Tornillo*, a plurality found such compelled access a violation of the utility's First Amendment rights.

Pacific Gas had far more effective bottleneck control over practical dissemination of TURN's messages to the relevant audience than any cable operator enjoys with respect to over-the-air broadcast stations. Thus, all the Court in *Turner* said about *Pacific Gas* was that, unlike must-carry, access there was content-based, reserved for opponents of the utility, to which the utility might feel compelled to respond despite TURN's disclaimer.

200 In the Court's view, services such as multichannel multipoint distribution systems ("MMDS") using microwave transmissions and satellite master antenna television systems ("SMATV" or "private cable") do not enjoy bottleneck monopoly control and do not threaten the viability of broadcast television. So, discussing a line of cases dealing with differential taxation of various elements of the media, the Court concluded that strict scrutiny is not necessary when there is some special characteristic justifying different treatment. For must-carry that special characteristic is bottleneck control. *See Turner*, 114 S. Ct. at 2467-68. The Court therefore relied on the antitrust case, *Associated Press*, 326 U.S. 1, for the principle that private interests that control access to a critical pathway of communication should not be able to restrict the free flow of information. *See Turner*, 114 S. Ct. at 2466. *Associated Press*, however, involved no governmental infringement on editorial discretion, *see Associated Press*, 326 U.S. at 20 n.18, and broadening access in that case displaced no one else, unlike the inevitable effect of must-carry.

quate for cable as the scarcity rationale is for broadcasting, and is particularly inappropriate as a justification for cable's must-carry of broadcast stations.[201]

a. Cable's Monopoly Power

The Court acknowledged that daily newspapers, as well as cable systems, may enjoy monopoly status in a given locale. The majority, however, thought that a cable operator can thereby exercise control over video programming in the home and, in particular, can silence competing speakers in a way that a daily monopoly newspaper cannot dominate the print media.[202] But if such a newspaper "does not possess the power to obstruct readers' access to *other competing publications*," neither does a cable operator.[203]

First, a cable operator faces considerable economic pressure to fill its available channels with programming most desired by subscribers, including many broadcast stations.[204] This constrains in the most appropriate way an operator's freedom of choice, including its ability to "silence" a voice for which there is an appreciable audience. More importantly, the basic mistake in this aspect of the Court's opinion is its description of a cable operator's bottleneck control as deriving from its "ownership of the essential pathway *for cable speech*."[205] This is the fundamental mistake of segmenting the

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[201] In order to bolster their argument regarding the censorial effect of the cable indecency provisions at stake in *Denver Area*, the petitioners there unfortunately invoked the supposed gatekeeper power of cable operators, reinforcing the Court's view in *Turner*. *See Denver Area*, 116 S. Ct. at 2383 (describing cable as the "primary or sole source of video programming" in cable households). Yet the plurality in *Denver Area* itself noted that "[o]ver-the-air broadcasting and direct broadcast satellites already provide alternative ways for programmers to reach the home, and are likely to do so to a greater extent in the future." *Id.* at 2387; *see also id.* at 2422 n.3 (Thomas, Scalia, JJ., Rehnquist, C.J., concurring in part, dissenting in part) (technological developments "suggest that local cable operators have little or no monopoly power and create no programming bottleneck problems.").

[202] The Court repeated this monopoly view of cable in *Hurley*, 115 S. Ct. at 2349, in upholding the right of the private organizers of the annual St. Patrick's Day Parade in Boston to exclude a gay and lesbian group ("GLIB") from participating in the parade. Although acknowledging that this notable parade "makes an enviable vehicle for the dissemination of GLIB's views," a unanimous Court found the parade had no monopoly power to deny GLIB access to spectators because GLIB presumably could apply for its own parade permit. *Id.* This attempt to distinguish *Turner* is far from persuasive. As the discussion in the text shows, the realistic ability of a group like GLIB to duplicate the communicative opportunity of participating in the St. Patrick's Day Parade pales in comparison to the continued, widespread availability and reach of local broadcast stations regardless of must-carry. *Hurley* is rightly decided for the same reason that *Turner* is wrong: the state should not be able to intrude in such ways on private editorial autonomy.

[203] *Turner*, 114 S. Ct. at 2466 (emphasis added).

[204] Even in cable television households, two-thirds of prime-time viewing is of retransmitted broadcast stations. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 F.C.C.R. 7442, 7492 (1994) [hereinafter 1994 Annual Assessment]. *See supra* note 170 and accompanying text.

[205] *Turner*, 114 S. Ct. at 2466 (emphasis added).

mass media, focusing on perceived different characteristics and problems of various segments, assigning these differences disproportionate significance, and accordingly fashioning an artificial hierarchy of First Amendment treatment.[206] A corollary is the either/or mistake: is cable more like print or more like broadcasting?[207]

In any discussion of monopoly power the crucial first step is the proper definition of the appropriate product market in terms of the alternatives reasonably available to consumers.[208] Here, the market cannot be simply "cable speech" as the Court would have it.

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[206] *See Time Warner*, 93 F.3d at 973-77, in which the court analogized DBS to broadcasting because of the physical limitations in the number of satellite positions available for DBS use. The court therefore applied broadcasting's "less rigorous standard of First Amendment scrutiny" and upheld a requirement that a DBS provider reserve a portion of its channel capacity exclusively for noncommercial programming of an educational or informational nature. The court did so without considering the current availability of such programming on all other media—broadcasting, cable, VCR tapes, and the like. Judge Williams, the dissenter from the lower court opinions in *Turner*, wrote a strong dissent from the denial of rehearing en banc in *Time Warner*, arguing that "*Red Lion* should not be extended to this medium." *Time Warner*, 1997 U.S. App. LEXIS 2016, at *2 (Feb. 7, 1997).

[207] *See Time Warner*, 56 F.3d at 183 ("Cable systems are not functionally equivalent to newspapers"; *Turner* teaches that regulation of cable need not be tested as if it governed newspapers), *cert. denied*, 116 S. Ct. 911 (1996). The court in *Time Warner* upheld most aspects of cable rate regulation established by section 3 of the 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 1464 (1992) (codified at 47 U.S.C. § 623). *See also supra* note 180. In its First Amendment analysis the court adopted *Turner*'s intermediate level of scrutiny, relying on the distinguishing bottleneck characteristic of cable. *See Time Warner*, 56 F.3d at 181-84.

Time Warner illustrates the possible, curious effects of *Turner*. One the one hand, rate regulation has much less impact than must-carry on the content of cable programming, especially since the FCC's rate rules insulate cable operators from incidental effects on content. *See Time Warner*, 56 F.3d at 183. So, such purely economic regulation of the media might be less worrisome from a First Amendment perspective, even though selectively applied just to cable. *See Leathers*, 499 U.S. 439 (extending generally applicable state sales tax to cable television services while exempting print media does not violate First Amendment). Yet, the basic tier of cable service, required for access to any other tier and consisting of the must-carry broadcast signals, the PEG channels, and additional channels at the operator's discretion, is regulated while rates for premium channels and pay-per-view programs are not. *See* 1992 Cable Act § 3(b) (codified at 47 U.S.C. § 623). "Cable programming service," which is any cable programming other than in these two latter categories, also is subject to regulation of "unreasonable" rates. *Id.* § 3(c), (l); *see Time Warner*, 56 F.3d at 162; *see also* 1996 Telecommunications Act, Pub. L. No. 104-104, § 301(b), 110 Stat. 56, 115 (1996) (to be codified at 47 U.S.C. § 534(c)(d)) (cable rate deregulation).

On the bottleneck justification this scheme seems backwards, particularly since the whole theory of cable rate regulation is premised on the absence of "effective competition." 1992 Cable Act § 3(a)(2)). Over-the-air broadcasting is a readily available, reasonable alternative to most of the mandated portions of the basic tier; substitutes for premium and pay-per-view programming are far less accessible. Thus the bottleneck theory, taken from *Turner* and invoked in *Time Warner*, might be relevant to rate regulation of those cable services the Act specifically *excludes* from such regulation, but not to those which *are* regulated. As with the scarcity rationale in broadcasting, the bottleneck theory has the potential for producing "strained reasoning and artificial results." *Telecomm. Research and Action Ctr.*, 801 F.2d at 508; *see supra* note 78.

[208] *See* 1994 Annual Assessment, 9 F.C.C.R. at 7462-63 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956)).

This defines away the issue. Rather, the far more appropriate market to consider consists of the delivery of an audio/video signal to the home. Or, even more appropriate in an increasingly broadband, digital world in which voice, data, text, and video are rapidly becoming integrated and interchangeable,[209] the proper market to consider is, or very soon will be, the delivery to the home of an electronic stream of ubiquitous and virtually endless 0's and 1's.[210] In this market there is today little monopoly power to exclude, and there will be even less tomorrow. The Court recognized that monopoly daily newspapers cannot exclude competing publications, such as out-of-town papers or weekly local newspapers from the home.[211] It might as well have listed magazines, newsletters, books, and the like. But they also cannot exclude the electronic "newspaper" available to anyone with a computer, modem, telephone line, and appropriate software. Cable has no meaningful preclusive power either. The Court's view of the information marketplace is a troubling anachronism.

b. Other New Electronic Media

The Court paid scant attention to other electronic media, but Congress did consider their effect in fashioning the 1992 Cable Act, particularly in regard to the existence of effective competition and the need for cable rate regulation.[212] Cable currently enjoys ninety-one percent of the subscribership market among multichannel video programming distributors,[213] but alternative technologies

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[209] For some time the FCC has recognized the impending convergence of previously separate information markets and the need for regulatory policy that facilitates such development. *See* Telephone Company—Cable Television Cross-Ownership Rules, First Report and Order, 7 F.C.C.R. 300, 305 (1991); *see also* Mark Landler, *Where On Line Is On Cable*, N.Y. TIMES, Jan. 31, 1996, at C1 (describing access to the Internet through a cable company); John Markoff, *A Little Something Extra Beside Your TV Image*, N.Y. TIMES, Oct. 23, 1995, at C1 (describing a new technology that will turn personal computers into television receivers and allow broadcasters to deliver computer data along with their television programs). *See generally* NICHOLAS NEGROPONTE, BEING DIGITAL (1995).

[210] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 F.C.C.R. 2060, 2142 (1995) [hereinafter, 1995 Annual Assessment] (noting that digital technology not only allows for compressing bandwidth and expanding offerings, but also makes it "economically feasible for voice, video and data to be transported simultaneously over the same network").

[211] *See Turner*, 114 S. Ct. at 2466.

[212] Section 19(g) of the 1992 Cable Act (codified at 47 U.S.C. § 548(g)), directs the FCC to report annually to Congress on the status of competition in the market for the delivery of video programming. In its first such study, the Commission considered a broad range of media technologies, including broadcasting, to develop a full economic analysis of the entire market for the delivery of video programming. *See* 1994 Annual Assessment, 9 F.C.C.R. at 7448-49; *see also Future of Satellite Based Services, Hearing before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 103d Cong. (1993).

[213] *See* 1995 Annual Assessment, 11 F.C.C.R. at 2062.

are developing and expanding rapidly. Multichannel Multipoint Distribution Service ("MMDS" or "wireless cable") uses line of sight microwave transmissions to deliver a limited number of video channels.[214] MMDS's current technical and economic characteristics make it largely a "niche competitor," though with the clear potential for a greater role.[215] In contrast, the satellite dish industry, which circumvents terrestrial cable operations with direct satellite to home transmission, has experienced "explosive growth."[216] Most exciting in this regard is the realistic prospect of widespread development of Direct Broadcast Satellite ("DBS") systems. These use higher power satellites with small, fairly inexpensive receiving dishes easily mounted unobtrusively on a home.[217] In just the past few years, DBS is beginning to emerge as a true competitor to cable.[218] Similarly, in a market that evolves almost daily, on-line mass entertainment via the Internet may be just around the corner.[219] Moreover, the FCC appropriately considers video cassette

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214 The current maximum of 32 or 33 available MMDS channels, using current analog transmission technologies, might increase to several hundred through the use of a digital signal combined with compression algorithms. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, 10 F.C.C.R. 7805, 7810, 7811 n.58 (1995) [hereinafter 1995 Annual Assessment, Notice of Inquiry].

215 *See* S. REP. No. 92, at 14-15 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133; H.R. REP. No. 628, at 44-45 (1992); *see also* 1994 Annual Assessment, 9 F.C.C.R. at 7482-88 (noting two of wireless cable's most significant problems—lack of credibility, and therefore access to capital, and insufficient channel capacity—now are being alleviated). Recently the FCC acknowledged that microwave wireless cable is emerging as an "effective competitor to wired cable in many locations," and adopted rules to "facilitate the development and rapid deployment" of such services and accelerate such competition. *See* Multipoint Distribution Service, Report and Order, 10 F.C.C.R. 9589, 9590, 9593 (1995).

216 *See* H.R. REP. No. 628, at 45; *see also* 1995 Annual Assessment, Notice of Inquiry, 10 F.C.C.R. at 7814 (noting the home satellite dish industry "reportedly had a record year in 1994 in terms of systems sold and subscriptions to packaged programming services"). *See generally* 1994 Annual Assessment, 9 F.C.C.R. at 7478-82.

217 *See* 1995 Annual Assessment, Notice of Inquiry, 10 F.C.C.R. at 7812-13; 1994 Annual Assessment, 9 F.C.C.R. at 7473-78.

218 *See* Mark Landler, *Deal by Murdoch for Satellite TV Startles Industry*, N.Y. TIMES, Feb. 26, 1997, at A1 (describing a new satellite service that will include local broadcast stations and "could be the first full-fledged competitor to cable"); Mark Robichaux, *Dishing it Out: Once a Laughingstock, Direct-Broadcast TV Gives Cable a Scare*, WALL ST. J., Nov. 7, 1996, at 1; Jim McConville, *DBS Competition Takes Off*, BROADCASTING & CABLE, Sept. 16, 1996, at 6 (describing DBS dish price war); Mark Landler, *AT&T Enters TV Business Via Satellite Broadcasting*, N.Y. TIMES, Jan. 23, 1996, at D1 (noting that AT&T's plans to invest in a leading satellite broadcasting service has "galvanized" that industry); Mark Landler, *The Dishes Are Coming: Satellites Go Suburban*, N.Y. TIMES, May 29, 1995, at 37 (explaining DBS "has mounted a startling assault on cable . . . successfully selling itself as a quantum leap over cable").

219 *See* Mark Berniker, *Microsoft Sees "Broadcast PC" Evolving Soon*, BROADCASTING & CABLE, Sept. 18, 1995, at 60 (noting that future personal computers will include digital receivers and evolve into interactive television); Lisa Bannon, *Watching On The Web*, WALL ST. J., Sept. 15, 1995, at R17 ("Despite considerable technical and financial difficulties, a number of entertainment companies plan to use the Internet as a medium for entertainment programming.").

recorders to be competitors of some cable services.[220] Finally, as described below, telephone companies, entities with the economic and technical resources to compete with cable head-on, are finally losing the legal shackles that until now have kept them on the video programming sidelines. These developments make the Court's very narrow focus on "cable speech" and alleged monopoly characteristics of that industry all the more perplexing.

c. Broadcasting and the A/B Switch

Of course, as Congress recognized, considerable uncertainty remains as to just how this new, competitive video marketplace will emerge.[221] There seem to be rapidly expanding opportunities for developing, transmitting, and receiving information of all kinds. Still, at some point Congress might perceive a need to impose general access requirements on cable or other media as suggested by Judge Williams in his district court dissents.[222] These would be problematic enough in their own right. There is, however, no uncertainty about the continuing availability of broadcast signals, the only issue at stake with the must-carry rules. They are omnipresent, indeed "uniquely pervasive,"[223] and accessible by each of the ninety-eight percent of United States households with television, regardless of what cable operators carry.[224]

Both the *Quincy* and *Century* courts appreciated the signifi-

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220 *See* 1994 Annual Assessment, 9 F.C.C.R. at 7509-10.

221 *See* H.R. REP. NO. 628, at 43-44; S. REP. NO. 92, at 18 (1991).

222 *Turner*, 819 F. Supp. at 67 (Williams, J., dissenting); *Turner*, 910 F. Supp. at 782-85 (Williams, J., dissenting). Indeed, general content-neutral access requirements, at regulated rates, which treat cable operators, and perhaps other services, as quasi common carriers may be the Achilles heel of editorial discretion for these entities, especially without strict scrutiny. Both the majority in *Turner*, 114 S. Ct. at 2464-66, and the dissent, *id.* at 2480 (O'Connor, Scalia, Ginsburg, Thomas, JJ., concurring in part, dissenting in part), suggest that they might uphold broad access requirements imposed on cable operators. *But see Denver Area*, 116 S. Ct. 2386 (plurality opinion); *id.* at 2423-24 (Thomas, Scalia, JJ., Rehnquist, C.J., concurring in part, dissenting in part) (both indicating access provisions raise significant First Amendment issues). The Court may have to resolve this issue if it reviews *Time Warner*, 93 F.3d 957.

223 *See Denver Area*, 116 S. Ct. at 2386 (plurality opinion) (quoting FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978)).

224 The advent of digital television may give each broadcaster four or five channels to program. This could greatly enhance broadcasting's ability to compete with cable, particularly since some of these additional channels could be devoted to specific themes (sports, for example), as with cable. At the same time, this might increase the burden on cable depending on which broadcast channels have to be carried. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, 10 F.C.C.R. 10540, 10552-554 (1995) [hereinafter Advanced Television Systems, Notice of Proposed Rule Making]; *see also* Edmund L. Andrews, *New TV System Is Endorsed But Its Future Is Questioned*, N.Y. TIMES, Nov. 29, 1995, at 1; Edmund L. Andrews, *Quest for Sharper TV Is Likely to Bring More TV Instead*, N.Y. TIMES, July 10, 1995, at D8.

cance of the availability of over-the-air broadcast signals in undercutting the rationale for must-carry.[225] A simple and inexpensive A/B switch ("input selector") allows one to connect a television simultaneously to both a regular indoor or outdoor antenna as well as a cable, and to toggle between the two sources with a flick of the switch. Most modern television sets now have such switching capability built in, often controlled by that epitome of consumer comfort, the remote control.[226] The most salient lapse in the *Turner* majority's discussion of both the bottleneck or monopoly characteristics of cable, and the need to preserve the availability of free broadcast television, is its failure to address this basic and well-known feature of the technology. Congress did its best to elide this troublesome reality, and the Court simply catalogued the congressional findings early in its opinion and then ignored the point.[227]

Congress simply asserted that most cable subscribers "do not or cannot maintain [broadcast] antennas" and do not have input selector switches. Thus, reliance on an A/B input selector system "is not an enduring or feasible method of distribution and is not in the public interest."[228] This unwarranted conclusion[229] is so counterfactual, and so obviously designed solely to fill a glaring gap in the justification for must-carry, that it was entitled to little deference from the Court.[230] This is particularly so since the real issue is

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225 *Quincy*, 768 F.2d at 1441; *Century*, 835 F.2d at 296.

226 *See* S. REP. No. 92, at 48; 1992 Cable Act, Pub. L. No. 102-385, § 17(b)(1), 106 Stat. 1460, 1491 (1992) (codified at 47 U.S.C. § 544(b)(1)) (compatibility among televisions, cable systems, and VCRs) and § 17(c)(2)(A) (codified at 47 U.S.C. § 544(c)(2)(A)) (requiring FCC to specify technical requirements for a television receiver to be considered "cable compatible" or "cable ready"). Congress encouraged such technology, which can be made compatible with various components of home electronics, while incongruously maintaining "the presence or absence of these switches does not affect the need for must carry requirements." S. REP. No. 92, at 48; *cf.* Dennis H. Leibowitz, *Direct Broadcast Satellites: Will They Be Cable's First Real Competition?*, CABLE TV & NEW MEDIA, Apr. 1995, at 8 (noting that DBS does not provide off-air local channels, but in most cases an antenna can be installed in the receiver to allow switching between the two sources with a handheld remote).

In dissenting on remand in *Turner*, Judge Williams ridiculed the notion that must-carry could be justified by some "consumers' occasional need to 'get up'" from the couch to flick a switch. *Turner*, 910 F. Supp. at 786-87 (Williams, J., dissenting). This would carry the image of the American couch potato too far.

227 *Turner*, 114 S. Ct. at 2454. Justice O'Connor, however, suggested that Congress could encourage use of A/B switches to address the bottleneck problem. *Id.* at 2480 (O'Connor, Scalia, Ginsburg, Thomas, JJ., dissenting).

228 1992 Cable Act § 2(a)(17), (18) (codified at 47 U.S.C. § 521 note).

229 *See* H.R. REP. No. 628, at 54 (1992) and S. REP. No. 92, at 44-45 (1991), for the basis for the conclusion, critiqued in the text, that "technical and economic complexities involved with an A/B switch make it an unworkable solution."

230 *See supra* notes 57-60 and accompanying text. As the Court itself recognized, "[W]e have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Turner*, 114 S. Ct. at 2471 (quoting *Sable Communications*, 492 U.S. at 129). The Court said this in the context of declining to rely on the predictive judgments of

whether the "public interest"—and First Amendment values—are better served by relying on the technology or by governmental interference with editorial discretion. Of course, as Congress noted, very few cable subscribers do use an A/B switch or outdoor antenna. So long as broadcast stations are voluntarily or mandatorily carried on basic cable, the required threshold for subscribing to any cable service,[231] there is no reason to do so. Moreover, while broadcast reception difficulties or other conditions might lead one to prefer cable reception,[232] cable service outages are not uncommon and complaints about cable service and technical quality are legion.[233] The approximately thirty-eight percent of television households to whom cable is available, but who do not subscribe,[234] seem to manage quite well with good, old-fashioned, over-the-air reception via roof-top or set-top antennas, as do the four percent of television households not passed by cable.[235]

One need only pose a simple question to refute Congress's position on consumers' inability or reluctance to use antennas. Suppose, as in the early days of cable, only broadcast signals were carried to improve their reception; would anyone with adequate over-the-air reception pay to subscribe? Equivalently, if the basic tier of cable were limited to just local broadcast stations and not required for access to higher tiers, who would pay a significant monthly fee for basic cable, rather than incur the minimal expense and inconvenience of reverting to an antenna and a simple switch?[236] In an era when sophisticated electronic equipment,

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Congress about the effect on broadcasters of an absence of must-carry. Such predictions, and the "availability and efficacy of 'constitutionally acceptable less restrictive means,'" inevitably must take account of A/B switch technology. *Id.* at 2472 (quoting *Sable Communications*, 429 U.S. at 129). Indeed, on remand Judge Williams properly dismissed these Congressional findings and concluded: "Neither switch nor antenna is so mysterious, costly or unworkable as to be beyond the means of a private citizen who values access to a program at the price of a diminutive capital investment and the ongoing cost of pushing the switch when necessary." *Turner*, 910 F. Supp. at 788 (Williams, J., dissenting).

231 *See* 1992 Cable Act § 3(b)(7)(A) (codified at 47 U.S.C. § 543(b)(7)(A)).

232 Broadcast television reception has improved considerably in the last decade due to technological advances in television receivers and broadcast stations' transmitting antennas. In some cases the broadcast signal sent direct to television receivers may be superior to a reprocessed cable signal. Telephone Interview with Al Hillstrom, retired Vice President of Engineering and Operations for KSAZ-TV, Channel 10, Phoenix, Ariz. (Nov. 17, 1995). Digital broadcasting also will improve the quality of the over-the-air signal. *See* Advanced Television Systems, Notice of Proposed Rule Making, 10 F.C.C.R. 10540, 10545 & n.29 (1995).

233 *See* S. REP. NO. 92, at 20-23; H.R. REP. NO. 628, at 34-38.

234 *See* 1994 Annual Assessment, 9 F.C.C.R. 7442, 7451-52 (1994).

235 *Id.* at 7451; *see Alliance*, 56 F.3d at 139 n.14 (Wald, J., dissenting) (noting most cable households "could and would receive television broadcasts if they terminated cable service").

236 Inconsistent with its position on must-carry, Congress understood the answer to this question when it sought to justify extending rate regulation beyond just basic service:

from camcorders to VCRs to computers, is becoming commonplace with a huge segment of the American public, it is hard to imagine that having to push another button on the remote is much of an impediment to viewing one's favorite broadcast station.[237]

It might be a different matter if somehow the development of the technologies were reversed and the advent of cable video transmission and home reception preceded that of broadcasting. Then we might be more skeptical, in the absence of must-carry, in relying on consumers' switching to a new and unproven broadcast technology to maintain access to stations no longer carried on cable. But every member of the Court is old enough to be part of the first generation of television viewers well acquainted with the easy availability of local broadcast service as an alternative to cable. Just a few years ago that was all we had, and the wonder of the technology was demonstrated by its virtually universal penetration. How then can it be that today we have forgotten this technology and cannot be expected to use it in the quite unlikely event that a significant number of broadcast stations are no longer available on cable?[238] And, given the substantial erosion of First Amendment freedom a government edict like must-carry represents, how could the majority in *Turner* silently have avoided the conclusion of the court in *Century*: "[I]t begs incredulity to simply assume that consumers are so unresponsive that . . . they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows?"[239]

C. *Video Programming by Telephone Companies*

Telephone companies[240] also were left in a strange sort of

"When a viewer subscribes to cable, he's generally not paying for access to the local broadcast stations, because he can get those free without cable." S. REP. No. 92, at 19 (quoting comments of the National Cable Television Association).

[237] One DBS service, for example, provides its subscribers with a remote-controlled A/B switch so that they can receive local broadcast signals through an antenna. *See* 1995 Annual Assessment, 11 F.C.C.R. 2060, 2086 (1995).

[238] A "controlled experiment in consumer resourcefulness" in Corpus Christi, Tex., proved the efficacy of A/B switches. The three main broadcast networks there were absent from cable for three months yet suffered no appreciable audience decline among cable subscribers who were given A/B switches. *See Turner*, 910 F. Supp. at 786-87 (Williams, J., dissenting); *see also The Bad Old Days*, CABLE VISION, Aug. 19, 1996, at 58.

[239] *Century*, 835 F.2d at 302.

[240] The telephone companies, or "telcos," referred to here are the local exchange carriers ("LECs") that transport calls within a local exchange area and provide customers access to long distance telecommunications services. These include the Regional Bell Operating Companies ("RBOCs," "BOCs," or "Baby Bells") formed from the divestiture of AT&T pursuant to the Modified Final Judgment ("MFJ"), in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

limbo from the Supreme Court's give and take opinion in *Turner.* Some of their immediate concerns regarding entry into video programming services have been addressed in the 1996 Telecommunications Act.[241] But the story of the FCC's recent attempts to maintain tight regulatory control, and the thin (though widespread) judicial support for the telcos' constitutional position following *Turner,* does not bode well for the future First Amendment status of the electronic media.

1. The Section 533 Cross-Ownership Ban

For some time the telcos have been anxious to expand beyond their traditional telephone operations into providing various enhanced electronic communication services through the "pipeline" they maintain to residences and businesses. The telephone industry has a long tradition of scientific and technological advances, and innovations such as fiber optics now make possible the provision of a wide variety of integrated digital communications services.[242] Moreover, the telcos combine their technological expertise and experience with the economic resources necessary to enter and successfully compete in such a capital intensive industry as cable. If a prime goal is to introduce meaningful competition into

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241 The 1996 Telecommunications Act repeals the statutory ban on telcos entering cable, discussed in this section, and terminates the FCC's video dialtone approach, also discussed below. *See* 1996 Telecommunications Act, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (1996) (repealing 47 U.S.C. § 533(b)); *id.* § 302(b)(3). In their place Congress has established Open Video Systems. *Id.* § 302(a) (to be codified at 47 U.S.C. §§ 651-53). Under this approach telcos have a variety of options for providing video programming services, other than acquiring an existing cable system (but for some exceptions). These options come with corresponding regulatory obligations depending on whether the telco elects to operate as a radio communicator (wireless cable), a common carrier, a traditional cable operator, or as an open video system ("OVS"). *Id.*

The new concept of an OVS is designed to encourage telcos (and others) to provide additional competition in video programming services in return for more flexible entry and less burdensome regulation. *See* 1996 Telecommunications Act § 302(a) (to be codified at 47 U.S.C. § 653); *see also* S. CONF. REP. No. 230, 104th Cong., 2d Sess., at 177-79 (1996); Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems), Second Report and Order, 3 Communications Reg. (P & F) 196 (1996); Open Video Systems (Third Report and Order and Second Order on Reconsideration), 4 Communications Reg. (P & F) 380 (1996). An OVS, for example, need not obtain a local franchise (though it may be liable for local payments in lieu of franchise fees), but simply needs to certify to the Commission that it is complying with the OVS regulations. But an OVS also must provide a non-discriminatory carriage platform for unaffiliated programmers, may not control more than one-third of its channel capacity (if demand exceeds capacity), and is bound by must-carry and PEG access requirements (which do not count against its one-third of channels). *See* 1996 Telecommunications Act § 302(a) (to be codified at 47 U.S.C. §§ 651-53); Implementation of Section 302 of the Telecommunications Act of 1996, *supra.* Inevitably, this new approach creates its own host of issues. *See* Monroe E. Price, *Open Video Systems and the Telecommunications Act,* N.Y.L.J., Aug. 27, 1996, at 1.

242 *See* Telephone Company—Cable Television Cross Ownership Rules, Third Report and Order, 10 F.C.C.R. 7887, 7889-90 (1995) [hereinafter Cross Ownership Rules, Third Report and Order].

the cable industry as proclaimed in the 1984 Cable Act,[243] the most natural and sensible approach seems to be to encourage entry by the telcos, the logical competitors for cable.

Historically, however, the approach was just the opposite. The telephone companies, with a considerable history of anti-competitive practices,[244] had been prohibited from entering enhanced communication services, specifically including cable, essentially for fear that they would be too successful.[245] The last major obstacle was a provision of the 1984 Cable Act which simply codified, with little independent consideration by Congress, an old FCC rule that barred telcos from cable.[246] This section 533(b) cross-ownership ban, then, was a vestige from the fledgling days of cable when it was feared that telephone companies, if allowed to compete, would quickly overrun the new and relatively weak independent cable companies.[247]

The premise was that the telephone companies could leverage their regulated, local exchange monopoly positions to compete unfairly with cable companies in two main ways. First is the danger of cross-subsidization by which telephone companies could attribute costs of their cable operations to their rate-of-return regulated telephone rate bases, while attributing revenues to the cable division. This obviously harms telephone ratepayers, and the resulting supra-competitive profits could be used to unfair competitive advantage, ultimately driving independent cable companies out of business and leaving an even greater telephone/video monopoly.[248] This potential was compounded by the second fear that telcos would discriminate in favor of their own affiliates and against independent providers in granting access to telephone poles and

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243 47 U.S.C. § 521(6).

244 *See generally* MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW (1992) (Ch. 3—*Antitrust*).

245 *See generally* Laurence H. Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case For Entry Into Cable*, 8 CARDOZO ARTS & ENT. L.J. 257, 259-72 (1990) (discussing the overlapping FCC, statutory, and court bans on telco entry into cable). The MFJ prohibition of BOC provision of information services was removed in 1993. United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993).

246 *See* 47 U.S.C. § 533(b); 47 C.F.R. §§ 63.54, 63.58 (1996); *see also* Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 926 (E.D. Va. 1993) (describing the predecessor FCC rule, the "sparse" legislative materials relating to § 533(b), and Congress's intent simply to codify the FCC rule), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036 (1996).

247 *See* Telephone Company—Cable Television Cross Ownership Rules, Fourth Further Notice of Proposed Rule Making, 10 F.C.C.R. 4617, 4617-18 (1995) [hereinafter Cross Ownership Rules, Fourth Further Notice]; *cf. Chesapeake & Potomac*, 42 F.3d at 200 ("The theory behind section 533(b) is far from apparent.").

248 *See* US WEST, Inc. v. United States, 48 F.3d 1092, 1096 n.4 (describing cross-subsidization). *See generally* KELLOGG ET AL., *supra* note 244, § 3.2.4 at 144, § 9.3.4 at 437.

conduits for cable. This latter concern over network discrimination was largely addressed in the Pole Attachments Act of 1978 which, while it does not mandate access, does control for discriminatory pricing or practices.[249]

For these reasons Congress emulated the FCC and in 1984 prohibited telephone companies from providing "video programming" directly or indirectly to subscribers within their telephone service areas.[250] The prohibition was geographically limited in this way since outside its service area a telco has no unfair advantage from a monopoly common carrier position. The cable industry soon developed into an economic powerhouse, however, with widespread penetration, vertically integrated sources of programming, and concentrated ownership by large chains of multiple systems operators ("MSO") that themselves enjoy cable monopolies in most local communities. The FCC therefore began to rethink the exclusion of potentially beneficial competition from telcos.

Indeed, by the summer of 1992 the FCC concluded that the considerable benefits from telco entry into a dramatically evolved cable marketplace would outweigh any remaining attenuated risks from their potential anticompetitive behavior.[251] Strict separation of cable and telephone services was no longer thought necessary to prevent cross-subsidization in light of strengthened accounting rules for allocating the joint costs of regulated and non-regulated activities.[252] And, the nearly universal physical availability of cable demonstrated that the problem of network discrimination had diminished greatly under the Pole Attachments Act.[253] So, a deregulatory-minded FCC formally recommended that Congress remove the cross-ownership prohibition in section 533(b) "subject to ap-

249 *See* 47 U.S.C. § 224 (1994); *see also* FCC v. Florida Power Comm'n, 480 U.S. 245 (1987) (holding that Pole Attachments Act does not effect a taking of property).

250 47 U.S.C. § 533(b) (1994). This section also prohibited telco provision of video transport service to an affiliated programmer within the telephone service area. The ban was subject to a rural area exemption and FCC waiver authority.

The earlier FCC rules had prohibited telco provision of cable service, while the 1984 statute precluded "video programming," defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522 (1994). Applying the statute, then, required a comparison of the content proposed to be offered by a telco with broadcast television fare as of 1984. Nonetheless, consistent with the *Turner* majority approach, courts considered the statute content-neutral, subject only to intermediate scrutiny, without considering the broader basis for strict scrutiny suggested *infra* notes 264-67 and accompanying text. *See Chesapeake & Potomac*, 830 F. Supp. at 924-26.

251 Telephone Company—Cable Television Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. 5781, 5848-49 (1992) [hereinafter Cross Ownership Rules, Second Report and Order].

252 *Id.* at 5828-29.

253 *Id.* at 5849; *see US WEST*, 48 F.3d at 1102.

propriate safeguards."[254] Congress, however, failed to do so in the 1992 legislation.[255]

2. The FCC's Video Dialtone Approach

In the meantime, the FCC proceeded on its own through its "video dialtone" approach.[256] This enhanced version of video common carriage allowed a measure of telco involvement with cable intended to be consistent with the statutory restrictions. Under this approach, telephone companies could provide a package of video services through a basic common carrier platform available to multiple video programmers on a non-discriminatory basis.[257] This basic platform consisted of a common carrier transmission service coupled with the means by which consumers (end users) could access any or all video programming carried on that plat-

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254 Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. at 5847. These safeguards included, in addition to the cost accounting provisions, the requirements that a telco use a separate video programming subsidiary, that it provide video programming through a video dialtone platform that provides service to multiple programmers (*see infra* note 258 and accompanying text), and that the telco's own programming be limited to a specified percentage of the platform's overall common carrier capacity. *Id.*

Two other federal agencies, the Antitrust Division of the Department of Justice and the National Telecommunications and Information Administration, agreed that the ban should be eliminated. *See* US WEST, Inc. v. United States, 855 F. Supp. 1184, 1188-89 (W.D. Wa. 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *cert. granted, vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996).

255 *See* S. Rep. No. 92, at 18 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133 (suggesting this issue should be considered separately from the 1992 Cable Act); *see also Chesapeake & Potomac*, 830 F. Supp. at 914 (describing congressional activity in this regard).

The 1996 Telecommunications Act, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124, (1996) (repealing 47 U.S.C. § 533(b)), finally removed the restriction. *See supra* note 241.

256 The Commission adopted its video dialtone policies in Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice of Inquiry, 7 F.C.C.R. 300 (1991) [hereinafter Cross Ownership Rules, First Report and Order], *aff'd*, Memorandum Opinion and Order on Reconsideration, 7 F.C.C.R. 5069 (1992), *aff'd*, National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994); Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. 5781 (1992), *aff'd in part and modified in part on reconsid.*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rule Making, 10 F.C.C.R. 244 (1994) [hereinafter Cross Ownership Rules, Third Further Notice]; Cross Ownership Rules, Fourth Further Notice, 10 F.C.C.R. 4617 (1995); Cross Ownership Rules, Third Report and Order, 10 F.C.C.R. 7887 (1995).

The 1996 Telecommunications Act § 302(b)(3) terminated the Commission's video dialtone regulations and instead established open video systems. *See supra* note 241.

257 The Commission articulated three specific goals for its video dialtone approach: "[F]acilitating competition in the provision of video services; promoting efficient investment in the national telecommunications infrastructure; and fostering the availability to the American public of new and diverse sources of video programming." Cross Ownership Rules, Third Further Notice, 10 F.C.C.R. at 244. Not surprisingly, these were the same goals behind the FCC's recommendation that Congress eliminate the cross-ownership ban entirely. *See* Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. at 5847-48.

form.[258] Under the Commission's proposal a telephone company would have had no editorial control over the programming others provided over its transport infrastructure.

The Commission also determined that the visual images that might accompany the enhanced services telcos would provide directly did not meet the statutory definition of "video programming."[259] In this way, the FCC concluded that its video dialtone proposal would not violate section 533(b).[260] Similarly, the Commission ruled that neither a telco offering video dialtone nor the independent customer-programmers of its transport platform needed a cable franchise under section 621(b) of the 1984 Cable Act.[261] This was because video dialtone service was not "cable service" under that Act, and neither the telcos nor the programmers were "cable operators."[262]

3. First Amendment Challenges

Entry into video dialtone service would not have satisfied the telephone companies. They want editorial discretion; that is, they want to be able to offer and control programming. They perceive that the real future of the industry is on the programming side, not just in transporting bits. Moreover, the telcos argue that they need entry into programming in order to have the incentive for the mas-

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258 *See* Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. at 5783. The Commission defined this concept more broadly, if vaguely, as an

> "[E]lectronic platform" or "window" that opens to a broader network, giving the user access to video and non-video communication services provided by a multiplicity of competitive service providers. Through this platform, consumers could gain access to video programs (*provided by entities other than the local exchange carrier*), information services, competing video and videotext gateways, videophone, and other communications services.

Cross Ownership Rules, First Report and Order, 10 F.C.C.R. at 314 (emphasis added). While this "first level platform" would be regulated as a common carrier, a second, unregulated level could provide competing gateways for video and related services, offering the subscriber "advanced electronic navigational aids of the gateway provider's own design," including menus, key word and subject matter search capabilities, and other information to facilitate consumer use. *Id.* at 315. Telcos could offer these enhanced services provided that they complied with regulatory safeguards. *See* Cross Ownership Rules, Fourth Further Notice, 10 F.C.C.R. at 4617 & n.15.

259 *See* Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. at 5781, 5822; *see supra* note 250 and *Chesapeake & Potomac,* 830 F. Supp. at 923 (questioning the clarity of the distinction that the FCC was asserting).

260 *See* Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. at 5790. A telco also could not "provide" others' video programming by playing any role in determining how it was presented for sale, including making decisions about tiering, price, terms, or other conditions on which the programming was offered to subscribers. *Id.* at 5817; Cross Ownership Rules, Third Further Notice, 10 F.C.C.R. at 275; Cross Ownership Rules, Fourth Further Notice, 10 F.C.C.R. at 4618.

261 47 U.S.C. § 541(b) (mandating that cable operator generally may not offer cable service without a local franchise).

262 *See* Cross Ownership Rules, First Report and Order, 10 F.C.C.R. at 325-26.

sive investments in infrastructure necessary for economically viable development of the fabled information superhighway. Frustrated by the statutory and regulatory constraints limiting even the FCC's video dialtone proposal, the telcos finally invoked constitutional arguments against the cross-ownership ban.

The telcos' First Amendment position should have been compelling. They were willing speakers with no mass media position in their local service areas.[263] They wished to enter an electronic medium of unquestioned importance, and in doing so would have advanced their own as well as public interests.[264] Indeed, the FCC itself recognized the beneficial effects on both competition and diversity in the media marketplace from telco entry.[265] While the statutory cross-ownership prohibition was not explicitly based on content, as the must-carry rules are, the curtailment of editorial freedom from a complete ban on entry was far more draconian than the more limited intrusion of must-carry. It entirely foreclosed telcos from the important mass medium of expression consisting of creating, selecting, assembling, and packaging video programming for provision directly to local subscribers who choose them as an information source. It would be perverse to simply label this total exclusion of speech "content-neutral" and therefore consider it constitutionally less problematic than a more specific limitation.[266] Whether viewed as a restriction on *all* content, or as a prohibition imposed on a specific speaker, the ban on telco entry into cable ought to have been presumptively unconstitutional and subject to strict scrutiny.

It is not surprising, therefore, that when the telephone companies finally began asserting their First Amendment rights they met with consistent success. What is surprising, however, and troubling, is how narrow and fragile that success was in most instances,

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263 The telcos' First Amendment interest is in establishing an editorial media presence in their service areas. This cannot be accommodated by relegating them merely to producing programming and marketing it to others for distribution, or through reliance on public access opportunities, any more than one's desire to start a newspaper can be satisfied by resort to the "op-ed" or letters-to-the-editor pages of others' papers. *Compare Chesapeake & Potomac*, 830 F. Supp. at 923 n.19, *with Chesapeake & Potomac*, 42 F.3d at 189, 203. *See* Ladue v. Gilleo, 114 S. Ct. 2038, 2045, 2046 & n.16 (1994) (invalidating a city ordinance banning one "important and distinct medium of expression"—residential signs—although homeowner had other means of communicating her message).

264 *See* Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. at 5850 (concluding that the "public will benefit greatly from the resulting increased competition in the video marketplace" from telco entry into cable).

265 *See supra* note 257.

266 *But cf. Chesapeake & Potomac*, 830 F. Supp. at 922, where the court suggests that a total ban on communication mechanically falls into the content-neutral pigeonhole, and therefore escapes strict scrutiny, without considering the disturbing First Amendment implications of such a censorial approach.

attributable in large part to the majority's approach in *Turner.* In the leading case, *Chesapeake & Potomac Telephone Co. v. United States,*[267] for example, the Fourth Circuit relied on *Turner's* description of cable's bottleneck control as the "peculiar technological characteristic[ ] of the cable medium" that creates the need to regulate telco entry.[268] In a problematic lapse, forgetting about broadcasting, microwave, traditional and DBS satellite systems, and the Internet, the court termed the telcos' common carrier networks "the *only* electronic means of access to American homes and businesses" other than cable.[269] From here it was a short step, again following *Turner,* to the conclusion that, because of the "peculiar economic and physical characteristics inherent in the provision of cable service," the section 533(b) ban was not content-based and did not impermissibly target a particular group of speakers.[270] Thus relegated to an intermediate level of scrutiny, the ban failed only because it was not narrowly tailored to meet its declared goals and did not leave the telephone companies ample available alternatives for communication.[271]

Similarly, in *US WEST, Inc. v. United States*[272] the Ninth Circuit was "heavily influenced" by *Turner* and applied an *O'Brien/Ward* level of intermediate scrutiny.[273] Only after detailed analysis did the court conclude that the section 533(b) ban failed the narrow tailoring requirement. A number of other courts followed suit, all consistently applying and thereby ingraining the content-neutral, intermediate scrutiny approach and, more or less forcefully, striking the statutory ban.[274] Thus, "bottleneck control" quickly is be-

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267 42 F.3d 181.

268 *Chesapeake & Potomac,* 42 F.3d at 189; *cf. League of Women Voters,* 468 U.S. at 377 (describing frequency scarcity as the "fundamental distinguishing characteristic" of broadcasting that requires different First Amendment analysis).

269 *Chesapeake & Potomac,* 42 F.3d at 189-90 (emphasis added).

270 *Id.* at 197.

271 The court indicated that Congress might instead limit telcos' editorial control to a fixed percentage of the video channels they carry. Telcos would have to lease the rest to others on a common carrier basis, though the court acknowledged that this would raise its own constitutional questions. *Id.* at 202 & n.34; *see* Cross Ownership Rules, Second Report and Order, 7 F.C.C.R. 5781, 5850-51 (1992).

272 48 F.3d 1092.

273 *Id.* at 1097, 1100.

274 *See, e.g.,* Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994), *appeal docketed,* No. 95-1223 (7th Cir. 1995); Bellsouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994), *appeal docketed,* No. 94-7036 (11th Cir. 1994); Southern New England Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995), *appeal docketed* No. 95-6137 (2d Cir. 1995); NYNEX Corp. v. United States, No. Civ. 93-323-P-C (D. Me. Dec. 8, 1994), *appeal docketed,* No. 95-1183 (1st Cir. 1995); United States Tel. Ass'n v. United States, No. 1:94CV1961 (D.D.C. Jan. 27, 1995) (Kessler, J., ruling from the bench), *appeal docketed,* No. 95-5117 (D.C. Cir. 1995); Southwestern Bell Corp. v. United States, C.A. No. 3:94-C-0193-D (N.D. Tex. Mar. 27, 1995), *appeal docketed,* No. 95-10478 (5th Cir. 1995); *cf.* GTE Ca., Inc. v. FCC, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (Section 533(b) "does not

coming the talisman for cable that spectrum scarcity once was for broadcasting.[275]

Prior to the 1996 Telecommunications Act, the FCC promptly responded in two ways to these cases and the weak constitutional barrier they created to the Commission's continuing ability to regulate telco entry into cable. First the Commission determined that even a telco against which it was judicially enjoined from enforcing the section 533(b) ban[276] still had to obtain "section 214" authorization before constructing any facilities for the provision of video programming in its telephone service area.[277] Such a proceeding preserved the FCC's opportunity to regulate and impose conditions on telco entry. However, having discovered in the section 533(b) cases that they could successfully invoke the First Amendment, several telephone companies disputed their need for section 214 authorization for providing direct, non-common carrier video programming service. They asserted that requiring telephone companies to obtain such federal approval, in addition to the municipal franchise any cable operator needs, unconstitutionally abridged their freedom of speech.[278]

Secondly, the FCC sought to avoid an adverse constitutional ruling from the Supreme Court on section 533(b), much as Con-

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even survive rationality review. It is an irrational obstruction to the exercise of free speech.").

275 *See Time Warner*, 93 F.3d at 967, 978; *see also supra* notes 206 and 207.

276 The Commission announced that, pending further judicial review, it would not enforce the cross-ownership restriction against any telephone company operating in the *Chesapeake & Potomac* or *US WEST* Circuits (4th and 9th) or any party to the other cases enjoining enforcement of section 533(b). *See* Public Notice, 10 F.C.C.R. 7346 (Apr. 3, 1995, as corrected).

277 *See* Cross Ownership Rules, Fourth Further Notice, 10 F.C.C.R. 4617, 4621-22, 4625-26 (1995); Public Notice, 10 F.C.C.R. 7346. Under 47 U.S.C. § 214(a) (1994), a carrier needed Commission authorization, consistent with the public convenience and necessity, to construct a new "line" of interstate communication, where a "line" was "any channel of communication." *See In re* Chesapeake & Potomac Telephone Company of Virginia, 10 F.C.C.R. 2975 (1995) (granting § 214 authorization for telcos to provide video dialtone services on a trial basis, including direct video programming, under the injunction on enforcement of § 533(b) in *Chesapeake & Potomac*).

The Commission indicated that it was serious about preserving its regulatory options by issuing a sharply worded Notice of Apparent Liability for a $200,000 forfeiture, for a company's apparently willful violation of § 214 in constructing cable facilities without prior authorization. *See* Ameritech Corp. Apparent Liability for Forfeiture, 10 F.C.C.R. 10559 (1995). At the same time, however, the Commission approved special temporary authority for the construction conditioned upon the prompt filing of an appropriate § 214 application. *See* Application of Ameritech New Media Enter., Inc., Order and Authorization, 10 F.C.C.R. 10873 (1995).

278 *See* United States Tel. Ass'n v. FCC, C.A. No. 95-533-A (E.D. Va., filed Apr. 27, 1995); Ameritech New Media Enters., Inc. v. United States, No. 95 C 2575 (N.D. Ill., filed Apr. 28, 1995). The 1996 Telecommunications Act, Pub. L. No. 104-104, § 302(a), 110 Stat. 56, 118 (1996) (to be codified at 47 U.S.C. § 651(c)), then eliminated this requirement for § 214 authorization.

gress tried to pre-determine the constitutional status of must-carry. To "obviate[ ] the constitutional infirmities" with section 533(b) identified by the lower courts, the FCC announced that it had broad authority to waive the statutory restriction for "good cause." It planned to "routinely grant" such waivers to telcos agreeing to abide by regulations the Commission would establish for their provision of video dialtone programming.[279] In the Commission's view this would have been a less burdensome alternative to enforcement of the ban and would have provided telephone companies abundant opportunities to speak. It also, of course, might have preserved the FCC's regulatory authority while avoiding strict judicial review.

In granting review in *Chesapeake & Potomac*, the Supreme Court declined the government's request to vacate the lower court opinion and remand for further consideration in light of the Commission's new position on the granting of waivers. With this action, and the new challenges to FCC regulation through the section 214 process, it appeared that the Supreme Court was set to consider the constitutional position of telcos as cable speakers at the same time that it agreed to reconsider the must-carry rules.

The telcos' immediate concerns were addressed and *Chesapeake & Potomac* became moot when President Clinton signed the 1996 Telecommunications Act on February 8, 1996. Yet, while arguing two months earlier before the Supreme Court on behalf of Chesapeake & Potomac, Professor Laurence Tribe told Justice Kennedy, "[Y]ou're talking about the future of the First Amendment."[280] As tenacious government attempts to maintain control demonstrate, the future of the First Amendment for the electronic media is indeed still very much at stake. *Turner* and the must-carry issue on remand remain the immediate, central focus. But as *Denver Area* now confirms, major abridgements of free speech nonetheless may be deemed content-neutral and therefore accorded less than strict scrutiny. Thus the prospect of continuing this crucial

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279 Cross-Ownership Rules, Third Report and Order, 10 F.C.C.R. 7887, 7888, 7891 (1995). The FCC also greatly streamlined the § 214 authorization process for the construction of stand-alone cable facilities by carriers against which it was not enforcing the cross-ownership ban pursuant to court rulings. *See* Telephone Company—Cable Television Cross-Ownership Rules, Fourth Report and Order, 11 F.C.C.R. 818 (1995). All such a telco had to do was certify that the system would be a stand-alone one not used for common carrier service, that it would comply with Commission rules to ensure that telephone ratepayers did not subsidize the cable system, and that it had secured a local cable franchise. *Id.*

280 *Chesapeake & Potomac*, 116 S. Ct. 1036, Official U.S. Supreme Court Transcript, 1995 WL 733396, at *42 (Dec. 6, 1995).

dialogue in such a context is unsettling at best for the future of a vibrant, robust, and uncensored electronic media.

IV. *TURNER* ON REMAND

Given the Supreme Court's fractured approach in *Turner* and its weakened level of scrutiny for must-carry, it is hardly surprising that on remand the district court panel was hopelessly split, reflecting the previous positions of the individual judges.[281] The first question on remand was whether there is a genuine threat to "the economic health of local broadcasting" that must-carry will alleviate.[282] The district court, however, could not even agree as to what this means; that is, they could not even agree as to the question put to it. Judge Sporkin rejected the idea that the Supreme Court was referring to an economic threat to the broadcasting industry as a whole. Rather, for him the relevant inquiry was whether "the health of those broadcasters protected by the must-carry provisions would be in jeopardy without the provisions."[283] In contrast, Circuit Judge Williams took his cue from the overriding goal of must-carry to "preserve access to free television programming for the forty percent of Americans without cable."[284] Thus for him the only sensible and non-tautological interpretation of the Supreme Court's mandate was to focus on the economic health of the broadcast industry as a whole. And, in a sophisticated analysis, he found that the continued viability of broadcasting as a whole was abundantly clear from all the undisputed economic data and the government's concessions.[285]

In evaluating the other side of the Supreme Court's intermediate scrutiny mandate, Judge Sporkin found that the burden on cable from must-carry is small, now focusing on *that* industry as a whole. Moreover, he concluded that the regulatory goal could not adequately be served by some less speech-restrictive alternative.[286] Judge Williams, however, found that must-carry imposes tangible burdens on both cable operators and programmers[287] and that leased, non-discriminatory access to cable would burden far less

281 *See supra* part IIB(1).

282 *Turner*, 114 S. Ct. at 2470.

283 *Turner*, 910 F. Supp. at 741 n.11.

284 *Id.* at 756 (Williams, J., dissenting) (quoting *Turner*, 114 S. Ct. at 2461).

285 *Id.* at 758-67; *see* Geraldine Fabrikant, *Television Stations, Always Lucrative Ventures, Are Suddenly Hotter Than Ever*, N.Y. TIMES, Aug. 19, 1996, at C8 (despite their "antique technology," television stations currently are "the hottest properties in the media world").

286 *Turner*, 910 F. Supp. at 745-49.

287 *Id.* at 780-82 (Williams, J., dissenting).

speech and better fit legitimate regulatory goals.[288] He also ridiculed the arguments that A/B switches are not a practical alternative for cable subscribers to access those broadcast programs they desire.[289]

Left to referee between his two irreconcilably opposed colleagues, Judge Jackson essentially threw up his hands. Rather than treat the matter as one of summary judgment for either side, he would have set the case for trial. But to avoid so prevailing by "stalemate,"[290] he concurred with Judge Sporkin. This is no way for such an important free-speech issue to be decided. Yet, such is the jurisprudence spawned by the Supreme Court's failure to insist on strict scrutiny in favor of the malleability of intermediate review.

The Court should remedy this untenable situation when it rehears *Turner*. Ideally the Court should re-evaluate the content-based nature of must-carry and the level of its review.[291] If it does not specifically opt for strict scrutiny, the Court at least should avoid reinforcing its intermediate approach. Perhaps the best to be hoped for is essentially a return to the approach of *Quincy* and *Century*. That is, the Court could indicate some doubt now about not applying strict scrutiny, but decide the case on the failure of must-carry to pass even a lower level of review. This at least would improve the chances for First Amendment claims of the electronic media to be governed by strict scrutiny and bolster freedom of expression in the next generation. But the Court's confusing misstep in *Denver Area* is not encouraging.

V. CONCLUSION

The Court in *Turner* never properly addressed the Chief Justice's question of whether cable should be treated more like print or broadcasting[292] or, more pointedly, what justifies denying cable the full freedom enjoyed by newspapers. Instead the majority ignored the clear content-based nature of the must-carry rules, and

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288 *Id.* at 782-85; *see supra* note 222.

289 *See supra* notes 225-39 and accompanying text.

290 *Turner*, 910 F. Supp. at 752 (Jackson, J., concurring).

291 The first opinion in *Turner* may be the law of the case for further Supreme Court consideration following remand. *But see* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (reversing the court of appeals for having done on remand precisely what the Supreme Court had ordered it to do). Even if so, its precedential effect may not be much of an impediment for a Court inclined to extend broader First Amendment protection to cable or other media in a future case. *See* Payne v. Tennessee, 501 U.S. 808, 827-29 (1991) (explaining that considerations in favor of stare decisis are at their nadir as to constitutional cases "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions").

292 *See supra* note 68 and accompanying text.

their intrusion on editorial discretion, and opted for intermediate scrutiny.

Even more portentous is the mind-set the Court seems locked into of emphasizing "dubious" distinctions among the media, choosing among competing analogies, and creating a corresponding First Amendment hierarchy—a "doctrinal wasteland."[293] Most recently the plurality in *Denver Area* resisted making a definitive choice of the most fitting analogy for cable without appreciating the inappropriate nature of such a task. From a constitutional perspective there are not different electronic media, there is only one. Technological convergence is confirming what has been apparent for some time. This medium suffers no scarcity; it enjoys abundance and diversity. There is no gatekeeper problem; there is freedom of choice, but for government interference. As with any industry, there may be some competitive or monopoly issues appropriate for structural management. By and large, however, there is no justification for treating content-related issues differently based upon perceived, but essentially inconsequential, differences among participants in the electronic media. When the Court comes to recognize the unity of the electronic media it should also appreciate that there is only one First Amendment that protects it.

The Court recently acknowledged the importance of strict scrutiny when fundamental rights such as equal protection are compromised even for arguably "benign" reasons.[294] It should be no less solicitous of First Amendment interests. Otherwise the Court abdicates its crucial role in checking federal legislative power. This point really is not lost on the Justices. Even while joining the plurality in *Denver Area,* Justice Souter appreciated that strict First Amendment scrutiny "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."[295] Or, as Justice Kennedy put it given his longstanding misgivings about judicial balancing under the First Amendment, "strict scrutiny at least confines the balancing process in a manner protective of speech."[296] The pity is that as majority author in *Turner* Justice Kennedy did not honor his usual sensitivity to the First Amendment as a rule of substantive protection even when confronted with "governments try[ing] new ways to subvert essential freedoms."[297]

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[293] *See Denver Area,* 116 S. Ct. at 2420 (Thomas, J., dissenting).
[294] *See Adarand Constructors,* 115 S. Ct. at 2113.
[295] *Denver Area,* 116 S. Ct. at 2401 (Souter, J., concurring).
[296] *Id.* at 2406 (Kennedy, J., concurring in part, dissenting in part).
[297] *Alexander,* 113 S. Ct. at 2782 (Kennedy, J., dissenting); *see supra* note 69.

Regardless of the result on remand in *Turner*, must-carry itself may not be an issue of lasting endurance. The proliferation of converging yet competing technologies for the (interactive) exchange of information of all kinds may well create "channels" of communication that outstrip the "programming" available to fill them. Soon there may be no practical impediments to any willing speaker accessing any willing viewer and vice versa. But just as the fairness doctrine is a quaint relic of the past, the effect of *Red Lion* lives on. So too *Turner* may cast its pall on the future.

The freedom of expression cornucopia promised by an electronic, digital age needs nurturing, not the frustrating effect of government intervention. The government needs to stop tinkering with the electronic media simply because it thinks it knows what is best for programmers and viewers. And the Court needs to constrain these attempts through strict scrutiny. In short, rather than a "New Deal" for speech in the electronic age, we need to fully implement the old, original deal—that of the First Amendment.