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Judicial Intrusion into Cable Television Regulation: The Misuse of O'Brien in Reviewing Compulsory Carriage Rules

Jonathan Mallamud
JUDICIAL INTRUSION INTO CABLE TELEVISION REGULATION: THE MISUSE OF O'BRIEN IN REVIEWING COMPULSORY CARRIAGE RULES

JONATHAN MALLAMUD†

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I. INTRODUCTION

Because the business of mass communications involves free speech, the first amendment limits the government's ability to regulate that industry. Consequently the courts, through the articulation of the constitutional principles protecting speech, play a major role in setting the permissible scope of governmental regulation in this area. Recent decisions by the Court of Appeals for the District of Columbia Circuit which set aside, as a violation of the first amendment, the requirements that cable television companies carry local television broadcast signals,1 raise serious questions about the proper role of the courts in reviewing governmental regulation of the mass media business. In both Century Communications Corp. v. FCC2 and Quincy Cable TV, Inc. v.

† Professor of Law, Rutgers-The State University-School of Law-Camden. A.B. 1958, Oberlin College; J.D. 1961, Harvard University.
FCC, the court of appeals found that the “must-carry” rules failed to satisfy the United States v. O'Brien test, a test that applies to regulations that only incidentally burden speech.

The test as used by the court of appeals requires such “a heavy burden of justification” that regulation of cable television has become extraordinarily difficult. Although the United States Supreme Court not long ago stated that activities of a cable television company “plainly implicate First Amendment interests,” the Court left open the question of the proper method for evaluating the regulation of cable television in the face of first amendment challenges to such regulations. Thus, lower courts, like the Court of Appeals for the District of Columbia Circuit, are left to grapple with the problem of selecting the appropriate constitutional standard of review.

II. CHANGING TECHNOLOGY AND THE NEED FOR A FLEXIBLE STANDARD OF REVIEW

The burden on the courts in choosing an appropriate standard of review is complicated by the constant changes affecting the communications industry. Technological advances in the communications media necessitate a shift in approach to the application of first amendment restrictions against government abridgment of speech. The courts must recognize that as the forms of communication change so too must governmental regulation. Consequently, they must allow some room for regulation of the business aspects of communications. The “problem” of technological advances in the mass communications industry is not entirely new. In the 1949 case Kovacs v. Cooper, the Supreme Court denied a first amendment challenge to an ordinance which prohibited the use of sound trucks and amplifiers on city streets. As the plurality explained, a compromise that kept the speakers quiet enough to avoid disturbing others would result in an inability to get their message across.

5. Century, 835 F.2d at 298; Quincy, 768 F.2d at 1454.
6. Quincy, 768 F.2d at 1462; see also Century, 835 F.2d at 295 (circuit court stated that FCC’s arguments “leave us unconvinced” that newer and less onerous version of must-carry rules were “necessary to advance substantial government interest” so as to meet O’Brien test).
8. Id. at 495.
In *Kovacs* the technological advance, sound amplification, presented a relatively simple clash of interests: speakers in need of an affordable means of mass communication versus the right of the captive listener to choose what he wanted to hear. Writing for the plurality, Justice Reed said that the greater ease the sound trucks would afford speakers did not justify using the first amendment to displace the judgment of the authorities that such equipment presented an intolerable nuisance, at least where other means of publicity were open. 10 To the plurality, the answer seemed simple: “The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.” 11

Justice Frankfurter, who concurred in the judgment, reacted strongly to Justice Reed’s use of the phrase, “preferred position.” He deemed “it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity.” 12 His objection went not to the idea of protecting speech, 13 but to the fact that using the phrase, “preferred position,” amounted to “express[ing] a complicated process of constitutional adjudication by a deceptive formula.” 14 The evil, in Frankfurter’s view, was that “[s]uch a formula makes for mechanical jurisprudence.” 15

Justice Frankfurter’s conclusion did not make the case seem any more difficult than did the plurality’s. He believed in the legislature’s power to regulate noise, so long as it refrained from prescribing what ideas might be expressed and did not discrimi-

10. Id. at 88-89.
11. Id. at 88 (footnote omitted). Moreover, even Justice Black in his dissenting opinion stated:

I would agree without reservation to the sentiment that “unrestrained use throughout a municipality of all sound amplifying devices would be intolerable.” And of course cities may restrict or absolutely ban the use of amplifiers on busy streets in the business area. A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech.

Id. at 104 (Black, J., dissenting).
12. Id. at 90 (Frankfurter, J., concurring).
13. Justice Frankfurter clearly supported a wide degree of protection for freedom of speech. He wrote that “without freedom of expression thought becomes checked and atrophied.” Id. at 95 (Frankfurter, J., concurring).
14. Id. at 96 (Frankfurter, J., concurring).
15. Id. (Frankfurter, J., concurring).
nate "among those who would make inroads upon the public peace." In other words, noise could be regulated but the legislature could not engage in censorship.

Justice Frankfurter was concerned that, since regulating noise encompassed regulating speech, courts would narrowly construe the regulations restricting speech and make government justification of the regulation very difficult. This would allow the courts to supplant legislative judgments in the guise of enforcing the first amendment. Frankfurter realized that if the "preferred position" doctrine took hold, then as the means of mass communication changed, courts could easily overstep their reviewing function and wind up regulating the mass communications industry rather than leaving the government free to make policy in accordance with the usual governmental processes. That danger is posed in the cases dealing with cable television. Because regulation of the cable business affects speech, the "preferred position" idea might lead courts to supplant appropriate legislative or governmental judgments. Indeed, the method used by the court of appeals in the "must-carry" cases amounts to a "preferred position" idea and seems to present the very dangers against which Justice Frankfurter warned in his concurring opinion in Kovacs.

Today, complex technological developments in the business structure of the mass communications industry have blurred the difference between its general economic regulation and the protections afforded to its product. As discussed above, Justice Frankfurter feared that the "preferred position" idea would involve the courts in scrutinizing business regulation more intrusively than necessary and lead to substitution of judicial judgment for legislative (and presumably also administrative) judgment with regard to the proper extent of business regulation. In other words, where speech and business activities are tied together, the danger exists that the courts might intrude unduly into the area of economic regulation and frustrate governmental regulation of the

16. Id. at 97 (Frankfurter, J., concurring).
17. Justice Frankfurter explained: "Nor is it for this Court to devise the terms on which sound trucks should be allowed to operate, if at all. These are matters for the legislative judgment controlled by public opinion." Id. (Frankfurter, J., concurring).
18. The term government as used here includes administrative agency action of a legislative nature. For discussion of the law governing an agency's rule making authority, see Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1977).
business aspects of mass communications. With regard to the noise/speech problem, Justice Frankfurter wanted to make clear that the legislative judgment on the proper regulation of noise should prevail provided that the legislature did not engage in censorship. He stressed that it is "not for this Court to devise the terms on which sound trucks should be allowed to operate, if at all." As applied to cable television, this approach warns the courts not to use the guise of a secondary first amendment issue to supplant the legislature's judgment as to the proper scope and nature of business regulation.

III. ORIGINS OF THE MUST-CARRY REQUIREMENT

Ever since the Federal Communications Commission (FCC) began regulating cable television systems, it has required those systems to carry, at a minimum, all of the over-the-air signals available to the area served. The United States Supreme Court noted the existence of these must-carry rules in the course of up-

20. Id. at 96-97 (Frankfurter, J., concurring).

holding the FCC's jurisdiction to regulate cable television.\textsuperscript{24} While the Court acknowledged that the development of cable television was unforeseeable at the time Congress created the FCC,\textsuperscript{25} it nonetheless allowed FCC jurisdiction over cable television in order to enable the FCC to preserve the system of local broadcasting that had been established pursuant to congressional policy.\textsuperscript{26} Indeed, the FCC had based the must-carry rules on the need "to ameliorate the adverse impact of CATV competition upon local stations, existing and potential."\textsuperscript{27} The Court, in recognizing the FCC's jurisdiction over cable television,\textsuperscript{28} restricted it "to that [jurisdiction] reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."\textsuperscript{29}

Because cable systems can import distant signals as well as carry local stations, there exists a real possibility that cable could undermine the traditional system of television service based on local stations serving local communities.\textsuperscript{30} Cable systems not only compete with local stations, but also, to the extent that viewers use cable as the means of receiving local stations, control the gateway to the viewers.\textsuperscript{31} As FCC Commissioner Quello recently stated, "[c]able, once installed, is a geographic bottleneck."\textsuperscript{32} Thus, by imposing the must-carry requirement, the Commission acted to ensure that cable systems did not prevent their competitors, local broadcast stations, from delivering local programming to their viewers.\textsuperscript{33}

\textsuperscript{25} Id. at 172.
\textsuperscript{26} Id. at 172-78.
\textsuperscript{27} First Report & Order, supra note 23, at 713.
\textsuperscript{28} The contention that the Court rather than Congress "gave" the FCC jurisdiction over cable television follows from the fact that Congress did not know about cable television when it defined the FCC's jurisdiction. See Mallemand, supra note 22, at 265-66. Of course, on another level the FCC's jurisdiction stems from the general provision of the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (current version at 47 U.S.C. §§ 151-155 (1986)), which applies the Act to "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a).
\textsuperscript{29} Southwestern Cable, 392 U.S. at 178.
\textsuperscript{30} See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1439-42 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); First Report & Order, supra note 23, at 700-03.
\textsuperscript{31} See First Report & Order, supra note 23, at 702.
\textsuperscript{32} '86 Report, supra note 23, at 912 (separate statement of Commissioner James R. Quello).
\textsuperscript{33} The relationship between broadcast and cable systems is not just a competitive one. Cable systems market their services to subscribers on the basis of the signals carried. Thus, their business is aided by carrying a broadcaster's sig-
The must-carry rules are also justified because they promote competition among local broadcasters. By requiring cable systems to carry all local broadcast signals, the must-carry rules prevent a cable company from giving an extraordinary competitive advantage to some local broadcast stations by refusing access to rival local stations. The transportation industry similarly has a strong tradition against permitting this type of discrimination. 34 Although the Supreme Court has held that cable may not be regulated as a common carrier, 35 the competition among local broadcasters should not be overlooked. Moreover, this interest is very different from the interests involved in the public-access cases that led the Supreme Court to hold that cable was not subject to common carrier regulation. 36

Because the court of appeals in Quincy Cable TV, Inc. v. FCC 37 found the FCC's justification inadequate to sustain the must-carry rules, it is important to focus on the basis for these rules. Originally, the television broadcast industry was founded on a system of local markets defined through the licensing process. 38 When the must-carry rules were first adopted, the FCC followed a policy
encouraging the expansion of television service through the development of UHF channels.  

39 Without the must-carry rules, the FCC saw a very real possibility that cable subscribers would not maintain television aerials, and that cable would thereby displace local station service.  

40 Thus, an entire industry would be restructured through technological change despite the fact that this industry had been created by governmental regulation and served important public functions. Indeed, the recognition of these important interests formed the basis for decision in United States v. Southwestern Cable, where the Supreme Court held that the FCC had jurisdiction to regulate cable television. Thus, even if one views the FCC's early regulation of cable television as a misguided attempt to stifle the growth of cable for the benefit of the broadcasting industry, the must-carry rules stand on a different footing from other regulations of the cable industry. Unlike restrictions on the importation of distant signals, which were at issue in Southwestern Cable, the must-carry rules do not prevent a cable system from carrying any particular signal. The rules do not prevent a cable operator from using a channel to deliver any message the operator would like to distribute. The restriction of "editorial discretion" arises only to the extent that the system's signal capacity is limited.  

41 Thus, a major issue in the must-carry controversy is the tension between the limitation that arises from


40. Id. at 702. As the FCC explained, if the cable service, for example, carried a distant station that broadcast a network program, the cable subscriber would have little incentive to obtain that network program from the local network affiliate. Id. at 702 n.26. Even if the programming on a local station were different, a cable viewer might not try a non-cable station. This would be especially true of UHF stations. Consider also the problem of a new station that was not carried on the local cable system. Furthermore, the FCC believed that there was a possibility that many subscribers would not even maintain an aerial after subscribing to cable. Id. at 702. This would be especially true in areas where cable was sold to improve signal quality.  

41. 392 U.S. 151, 175-78 (1968).  

42. See Quincy, 768 F.2d at 1439 n.10. Professor Powe has said: "By the 1970's, it had become clear that the Commission's hostility toward cable was aimed solely at advancing the economic interests of broadcasters." L. Powe, supra note 22, at 195.  

43. See Southwestern Cable, 392 U.S. at 156-60.  

44. In Quincy, the court said: "The more certain injury stems from the substantial limitations the rules work on the operator's otherwise broad discretion to select the programming it offers its subscribers." 768 F.2d at 1452 (citing Miami Herald Co. v. Tornillo, 418 U.S. 241 (1974)). The less certain injury is the possibility that local broadcasters will "act as a mouthpiece for ideological perspectives the [cable operators] do not share." Id. (footnote omitted) (citing Wooley v. Maynard, 430 U.S. 705 (1977)). Although the court raises the editorial discretion idea, this author has yet to come across any argument by a cable
cable's limited channel capacity over and above the number of over-the-air signals in the area and the possible inability of a broadcast station to reach an audience due to a cable system's failure to carry it.

At the time the must-carry rules were first formulated, the primary concern of both the FCC and the broadcast industry was that as the number of television viewers who subscribed to cable increased, more and more viewers would rely solely on cable as the means for receiving television signals. The actual likelihood was that most cable subscribers would not maintain their ability to receive off-the-air signals and that cable systems would fail to voluntarily carry all off-the-air signals. The original version of the must-carry rules reflected the FCC's belief that most people would not maintain aerial capacity. Although switching devices which allowed an antenna and cable to be connected simultaneously existed, the FCC believed that "the sheer inconvenience of switching" would be "an obvious deterrent to its use by a subscriber." With regard to the likelihood of signal discontinuance, the FCC admitted that it did not know the answer, but pointed to the dependence of the broadcasters on cable in the context of their competitive relationship. Insofar as the FCC was without hard data as to the actual effects cable would have on broadcasting, the Commission concluded:

[I]t would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service

45. Ironically, the Quincy court spoke of "cable's virtually unlimited channel capacity." As a student commentator pointed out, "It is difficult to reconcile the court's assertion that cable enjoys nearly unlimited channel capacity with its concern that cable systems may suffer from overcrowding due to the must-carry regulations." Note, Quincy Cable TV, Inc. v. FCC: Judicial Deregulation of Cable Television Via the First Amendment, supra note 21, at 1199.

46. Several interests weigh in favor of preserving a broadcaster's ability to obtain access: "[T]hese interests are the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets." '86 Report, supra note 23, at 868. (summarizing views of Senator John C. Danforth which were set forth in his letter to the FCC dated July 22, 1986).

47. First Report & Order, supra note 23, at 702.

48. Id. at 702. In a footnote, the Commission stated: "One of the standard selling points of CATV service is the subscriber's ability to dispense with expensive or unsightly outdoor antennas." Id. at 702 n.25.

49. Id. at 714.
had been significantly impaired. Corrective action after the damage has already been done, if not too late is certainly much more difficult . . . .

In evaluating the FCC's decision regarding the adequacy of switching devices, it is useful to draw a comparison to the treatment of UHF tuning devices. Pursuant to authority granted to the FCC under the All-Channel Receiver Act of 1962, the FCC has required television sets to have UHF tuners that are reasonably similar to VHF tuners.

Consider the following picture of viewer activity held by the FCC, and expressed in support of compatible tuning regulations:

For many persons, to a degree varying with the individual, the greater difficulty in tuning UHF stations diminishes the likelihood that the user will opt for programming offered by such stations. Assuming the user does decide on viewing UHF programming, moreover, it is more difficult for him to tune the UHF station properly. As a result, the picture obtained on a UHF channel is likely to be inferior to its VHF counterpart—even though the receiver, if properly tuned, is capable of producing a picture of comparable quality. This factor, in addition to the intrinsically more complicated and time-consuming nature of continuous tuning, tends to deter the use of UHF channels.

Given this model of the typical television viewer, one can understand why the FCC did not think that switching devices (A/B switches) would be an adequate substitute for mandatory signal-carriage rules.

Because the Quincy court emphasized the A/B switch as an alternative to the must-carry rules, without recognizing any of the difficulties in use of the switch, it is important to deal with this issue. By examining the FCC's view of the all-channel receiver problem, it becomes apparent that the Commission's position re-

50. Id. at 713.
52. See, e.g., Improvements to UHF Television Reception, 90 F.C.C.2d 1121 (1982); Amendment of Part 15 of the Rules and Regulations With Regards to All-Channel Television Broadcast Receivers, 21 F.C.C.2d 245 (1970) [hereinafter '70 Report].
53. '70 Report, supra note 52, at 248 (footnote omitted).
54. See First Report & Order, supra note 23, at 702.
55. Quincy, 768 F.2d at 1441.
Regarding the A/B switch was in line with a broader notion that easy tuning is directly related to a broadcast station's ability to capture market share. Thus, viewed against the all-channel problem, the FCC's lack of interest in an A/B switch seems in keeping with an over-all policy rather than a strange idea utilized to deprive cable operators of their first amendment rights. The Quincy court, however, took the following view of the problem:

Although the cable attaches to the television set through the VHF outlet, an inexpensive switch (the "A/B switch") would enable a viewer to alternate between cable and off-air VHF signals. Indeed, connection of the cable typically has no direct effect at all on receipt of UHF signals. Thus, in principle, a cable subscriber with little or no effort could still view local broadcasts even without the benefit of the must-carry rules. If that were the case, cable's gain would not necessarily mean broadcast television's loss, and the Commission's reasoning would be deprived of its major premise. 56

Of course, there are other justifications for the must-carry rules. In some areas a major purpose of cable is to provide viewers with improved reception. In addition the Quincy court recognized that the A/B switch is of no value where an outdoor antenna is needed and it is either disconnected or never installed. 57 Thus, even without the difficulty-of-use issue, there are strong interests in assuring that local television stations are carried by cable systems.

Before discussing the constitutional standard to be utilized, the above interests should be placed in the context of the technological change at issue. By controlling viewer access without FCC regulation, cable systems could seriously undermine the ability of local stations to operate. At the same time, cable systems do have a right to transmit programming owned and broadcast by others. 58 We tend not to think of regulations which require telephone companies to provide service to individuals, or regulations which require television sets to be capable of carrying all channels as raising a first amendment question. While it is true that cable systems are not common carriers, this should not end the inquiry. Because the characterization of the business of cable television

56. Id. (footnotes omitted).
57. Id.
service affects one's evaluation of the interests involved in its regulation, it is important to make that characterization explicit.

Although a cable system can originate its own programming, the court of appeals recognized that “most of their viewing fare consists of retransmissions of signals generated by independent entities.” The court also recognized that although the technology existed for carrying upwards of 100 channels, most systems carried 12 to 36. Since the first amendment injury consists of restricting a cable system's choice of programming, the must-carry injury stems from preventing a choice on the channels occupied by the local signals. But it is hard to characterize that as an injury in light of the fact that cable systems enter a local market and, at least in the context of the present system of local broadcasting, sell their service in large part on the delivery of those local signals.

In some respects cable has become a new and independent means of distributing programming to the viewers. In other respects cable serves as a means of delivering broadcast programming. When cable began it was a “passive conduit of broadcast signals.” As a passive conduit with the ability to bring signals from any place around the country to any particular area, it had the potential to totally disrupt the television broadcasting business and the local broadcast policy on which it had been founded. Today, cable delivers both local programming and the programming of over forty independent cable networks.

When the FCC regulates cable by requiring cable systems to carry all of the over-the-air signals in the area served, it is regulating the means of distribution of the programming within its jurisdiction. It is not preventing a cable system from expressing itself or from carrying any other programming services. The injury of limiting the cable system's choice arises primarily because a cable system chooses to install cable capability of a given number of channels. In fact, a cable system actually operates two businesses: rebroadcasting local channels and importing selected non-broadcast programming. While the FCC cannot regulate cable as a

59. Quincy, 768 F.2d at 1438.
60. Id. at 1439.
61. Id. at 1452.
62. See By the Numbers, Broadcasting, Mar. 6, 1989, at 16 (shows cable penetration at 54.8%).
63. Quincy, 768 F.2d at 1452.
64. Id.
common carrier, it can regulate cable systems insofar as they are an adjunct to the distribution of television broadcast programming. When Congress finally enacted a cable television statute, it preserved current FCC regulations, and reaffirmed the Commission's power to modify those regulations as it deemed necessary.

By viewing cable as two businesses, and taking into account the fact that the broadcast industry is still a vital part of the basic television mass communications industry, the must-carry rules can be seen as limited to regulating the distribution of television signals within the FCC's jurisdiction. Cable systems voluntarily entered the business of distributing television signals, and so long as they still depend on off-the-air television signals, the mandatory carriage rules can be seen as regulating the physical means of distributing those signals rather than regulating cable operators' speech. There is no intrusion into a cable system's editorial judgment that could not be cured by expanding that system's capability. Of course, if a cable system did not carry any broadcast signals, that might well be a different case, but it is certainly not the case presented in *Quincy*.

Because the television industry is in transition, and many consumers are still dependent on broadcast programming, the suppression by courts of the FCC's attempts to preserve an orderly system of transition is a serious matter. It is disturbing to think that because speech is involved, the courts will engage in overly simplistic analysis and will require the FCC to meet an extremely difficult burden in order to justify its regulation of cable. Such a process seems like "mechanical jurisprudence" and should be avoided. In light of this background, an examination of the

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[A]ll Federal rules, regulations and orders in place on September 21, 1983, including those of the FCC, remain in effect as they were in place on that date. Such rules, regulations and orders may be amended, but not in a manner inconsistent with the express provisions of this title.

Regulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements...
IV. Choosing an Appropriate Standard of Review

A. Determining Cable's Key Characteristic

Ever since Red Lion Broadcasting Co. v. FCC,68 in which the Supreme Court sanctioned a reduced level of first amendment protection for the broadcast media, some courts and commentators have treated the level of protection to be applied to cable as a question of determining whether cable is more like broadcasting or more like the print media.69 In Quincy, the court's discussion regarding the applicable standard70 suggests that the analysis should be somewhat more sophisticated than simply making the above comparison. Indeed, Judge J. Skelly Wright was not prone to simplistic analysis. In past opinions Judge Wright had used a highly sophisticated and sensitive analysis of the free speech guarantee.71 In Quincy, too, Judge Wright states that the court is "mindful" of the need to consider each new communications medium carefully when applying "the broad principles of the First Amendment"72 and makes reference to Justice Jackson's opinion

70. Quincy, 768 F.2d at 1447-54.
71. See Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609 (1982). In this article Judge Wright states:

Like constitutional law generally, first amendment thinking must necessarily adapt to the changing needs and evolving perceptions of society. But while theoretical formulation and emphasis may change, the core notion of the first amendment remains the protection of diverse, antagonistic, and unpopular speech from restriction based on substance. To invoke the first amendment, not to protect diversity, but to prevent society from defending itself against the stifling influence of money in politics is to betray the historical development and philosophical underpinnings of the first amendment.

Id. at 636 (footnote omitted).

In criticizing the Supreme Court’s applications of the first amendment to the regulation of campaign expenditures, Judge Wright noted: "by ritual incantation of the notion of absolute protection, by applying it to the quantity as well as the content of political expression, and by making the unexamined and unprecedented assertion that money is speech, the Court elevated dry formalism over substantive constitutional reasoning.” Id. at 633.

72. Quincy, 768 F.2d at 1448. On this point Judge Wright observes:

The suggestion is not that traditional First Amendment doctrine falls
Nevertheless, while the opinion demonstrates the court’s sophisticated knowledge of the cable industry, its analysis of the proper standard of review simply distinguishes cable from the broadcast media on the basis of scarcity, and then concludes that FCC regulation should be subject to substantial scrutiny. A closer look at the opinion is necessary to explain this conclusion.

The court’s discussion of the proper standard of review is divided into two parts: first, the scarcity rationale and second, whether the must-carry rules should be treated as an incidental burden on speech. In its discussion of the scarcity rationale, the court also rejected the idea that cable could be regulated because it is a natural monopoly or because it involves use of a public way. The court failed to see how “the ‘natural monopoly characteristics’ of cable could create economic constraints on competition comparable to the physical constraints imposed by the limited size of the electromagnetic spectrum.” Furthermore, in the court’s mind, the “fact that cable operators require use of a public right of way” does not justify regulations which “extend to the controlling nature of the programming that is conveyed over the system.” But these points are really peripheral and do not add very much to the court’s analysis. The court’s approach acted by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate the increasingly diverse mechanisms through which a speaker may express his view.

Wright, supra note 71, at 638.

73. Quincy, 768 F.2d at 1438 (citing Kovacs, 336 U.S. 77 (1949)). Justice Jackson concurred in Kovacs because he believed “that operation of mechanical sound-amplifying devices conflicts with quiet enjoyment of home and park . . . . Freedom of speech for Kovacs does not . . . include freedom to use sound amplifiers to drown out the natural speech of others.” Kovacs, 336 U.S. at 97 (Jackson, J., concurring).

74. Quincy, 768 F.2d at 1450.
75. Id. at 1448-50.
76. Id. at 1450-54.
77. Id. at 1449.
78. Id. at 1449-50.
79. Id. at 1449. The court compares the must-carry rules with the regulation of vending machines, concluding that any regulation of what must be placed in the vending machines would be invalid. Id. That statement was unexceptionable at the time, and certainly correct in light of City of Lakewood v. Plain Dealer Pub. Co., 108 S. Ct. 2138 (1988) (statute giving mayor of city unbridled discretion over whether to grant or deny newsrack permits held unconstitutional). For a further discussion of City of Lakewood, see Note, City of Lakewood v. Plain
ally centers on its conclusion that "[i]n light of cable's virtually unlimited channel capacity, the standard of First Amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable." 80

An argument can be made that the court addressed the wrong issue. A conclusion that cable systems are more like newspapers than broadcasting says very little about the relationship shared by cable systems, television broadcasting and the must-carry rules. The real question is whether the must-carry rules constitute an abridgment of speech, not whether cable systems have limited capacity. Indeed, the court itself recognized that most systems carry far fewer channels than is technologically possible.81 In Kovacs, the regulation of sound trucks was upheld without any indication that sound trucks represented a means of communication with limited capacity. The plurality approved the regulation of one particular means of communication in order to protect homes and businesses from indiscriminate noise because the legislature was not restricting the discussion of ideas or issues by other means of communication.82 Justice Frankfurter thought that the authorities were free to limit noise provided content was not limited.83 Justice Jackson said simply, that "[f]reedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others." 84 In other words, in Kovacs the plurality did not exercise any special level of scrutiny in examining the government regulation. Rather, it expressly reserved a heightened level of scrutiny for regulations which threatened to discriminate on the basis of ideas or form of expression, not means of communications.

Another way of illustrating the point is to view cable systems as newspapers. Then the question becomes in what way can newspapers be regulated? In Associated Press v. NLRB 85 (Associated Press I) and Associated Press v. United States 86 (Associated Press II) the Supreme Court upheld the regulation of newspapers despite incidental effects on speech. Thus, it can be said that "[i]n most cases

80. Quincy, 768 F.2d at 1450.
81. Id. at 1439.
83. Id. at 96-97 (Frankfurter, J., concurring).
84. Id. at 97 (Jackson, J., concurring).
the incidental effect on communication of a generally applicable regulatory scheme is not considered to raise first amendment problems." 87 One commentator viewing communications in the context of technological change, has said:

\[ A \text{ distinction should be made } \text{between the situation in which an entity enters the communications business to express its own constitutionally protected ideas, and that in which the entity treats its ownership and use of a communications medium merely as a property interest. } \text{On a theoretical level, it seems that the first amendment should afford its full protection in the former case; in the latter situation, however, the medium should be subject to regulation to the same extent as are businesses in noncommunications fields.} \] 88

Of course, that statement goes too far, as even its author recognizes. 89 The point is, however, that the economic regulation must be separated from speech regulation. Where economic regulation has only incidental effects on speech, as almost any regulation of the communications industry will have, these regulations should be subject to a standard which grants substantial deference to the governmental authority.

After concluding that "cable's virtually unlimited channel capacity" made the first amendment standard applied to the broadcast media "inapplicable," 90 the Quincy court said that the question was whether to review the must-carry regulations under the O'Brien 91 test or under the test used for evaluating regulations that are aimed at suppression of ideas. 92 The court summarized its choice of standard this way:

Concluding that cable television warrants a standard of review distinct from that applied to broadcasters, we

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87. Schauer, Book Review, 84 Colum. L. Rev. 558, 569 (1984) (footnote omitted). Schauer suggests that in the newspaper regulation cases the "incidental effects . . . receive, apparently, nothing more than mere rationality scrutiny." Id. at 570 n.46. See also, Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 91 (1967).


89. Id. at 593-94. The author goes on to say: "[T]his duality creates a tension in the real world. To the extent that government regulates the conduit owner in his non-speech capacity, such regulation is likely to affect his and others' use of the medium for speech purposes. I am not sure that anyone can fully resolve this problem . . . ." Id.

90. Quincy, 768 F.2d at 1450.


92. Quincy, 768 F.2d at 1450-51.
next consider whether the must-carry rules merit treatment as an "incidental" burden on speech and therefore warrant analysis under the balancing test set out in *United States v. O'Brien*. Although our review leaves us with serious doubts about the appropriateness of invoking *O'Brien*'s interest-balancing formulation, we conclude that the rules so clearly fail under that standard that we need not resolve whether they warrant a more exacting level of First Amendment scrutiny.\(^93\)

The court neglected to discuss the question of whether the nature of the must-carry regulations are such that they should be examined as the Supreme Court examined the regulations in *Kovacs*,\(^94\) *Associated Press I*\(^95\) and *Associated Press II*.\(^96\) Those cases consider whether various regulations constitute an abridgment of speech, or regulation within the power of the legislature. Except for *Kovacs*, these cases involve the application of general business regulations to the press. The appropriateness of the standards used in those cases as applied to the must-carry rules requires discussion.

**B. The Associated Press Standards and O'Brien**

Notwithstanding the applicability of the above cases, it is too simplistic to pose the must-carry question as a choice between strict scrutiny and a balancing test based solely on cable's superficial resemblance to a non-scarce means of communication. The more important question concerns the relationship of the must-carry regulations to the legitimate regulatory authority of the FCC. The *Quincy* court, without considering the question of whether the regulations amounted to an abridgment of speech at all, simply concluded that because the regulations affected speech they must be judged as either incidental burdens (*O'Brien*) or direct burdens (strict scrutiny). To say that any incidental effect on

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\(^93\) *Id.* at 1448 (citations omitted). The more exacting level of first amendment scrutiny to which the Court refers is reserved for that government regulation "which restrains orderly discussion and persuasion, [conducted] at [an] appropriate time and place." *Kovacs*, 336 U.S. at 94 (citing *Thomas v. Collins*, 323 U.S. 516, 548 (1944)). To sustain such regulation the government must show a compelling governmental interest, supported by a showing of "public danger, actual or impending . . . [which amounts] to gravest abuses, endangering paramount interests." *Id.*

\(^94\) *Kovacs*, 336 U.S. 77.

\(^95\) *Associated Press v. NLRB*, 301 U.S. 103 (1937).

speech authorizes a court to evaluate the wisdom of the regulations and decide whether they are closely enough tailored to achieving their purpose is a mechanical approach that puts the court, perhaps unnecessarily, in a policy-making role. For that reason a discussion of the must-carry regulations as compared to the regulations at issue in these other cases follows.

Since the court of appeals utilized the *O'Brien* test, perhaps the best place to start is with *O'Brien*. David O'Brien burned his draft card on the steps of the South Boston Courthouse in order, he said, to influence others to adopt his antiwar beliefs. He was convicted of violating a statute that made it a crime to knowingly destroy or mutilate a draft card. O'Brien argued that his action of burning his draft card constituted "communication of ideas by conduct" and was protected by the first amendment. Chief Justice Warren, writing for the Court, could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Nevertheless, the Court went on to say:

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Not only was O'Brien engaged in conduct aimed at protesting government policies, the statutory provision that formed the basis for his conviction was enacted by Congress in the face of continuing antiwar demonstrations. The first amendment issues in *O'Brien* are, therefore, very different from what is involved

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98. *Id.*
99. *Id.* at 376.
100. *Id.*
101. *Id.*
102. *Id.* at 371. Indeed, the Supreme Court said that the court of appeals in O'Brien's case had "concluded that the [provision] ran afoul of the First Amendment by singling out persons engaged in protests for special treatment." *Id.*
in the must-carry regulations. While the FCC might be seen as protecting the local broadcasters through the must-carry regulations, in *O'Brien* the government could be seen as suppressing the expression of antiwar sentiment.

Thus, if one views *O'Brien* as one line of analysis and *Kovacs* and the two *Associated Press* cases as another, an issue is presented as to which line should apply to the must-carry rules. The must-carry rules do not constitute general business regulations applicable to all businesses, and that is the one factor in favor of applying *O'Brien*. At the same time, however, nothing in the must-carry rules serves to suppress controversial speech. Indeed, cable companies under must-carry rules remain free to express whatever ideas they like. Furthermore, the must-carry regulations serve to ensure continued free competition in a market that is somewhat more complex than the usual market for goods. While the balance seems to weigh in favor of applying the *Associated Press* line of cases, at a minimum the court of appeals should have made this comparison before deciding to apply *O'Brien*.

In *Associated Press* I\(^{103}\) the Supreme Court upheld the application of the labor laws to the Associated Press to require the reinstatement of an editorial employee who had been fired for his union activities. The Court defined the issue as whether the statute as applied abridged the Associated Press' freedom of speech.\(^{104}\) The Associated Press argued that its product, impartial news reports, necessitated its freedom to choose its editorial employees.\(^{105}\) The majority of the Court disagreed and held that application of the National Labor Relations Act (NLRA) to the press did not violate the first amendment. It is easy, as the dissenters in *Associated Press* I did, to characterize the application of the labor laws in this context as a restriction on the freedom of speech.\(^{106}\) It is certainly reasonable to assume that active members of a union might have pro-union sympathies, and therefore that forbidding a newspaper to fire editors due to union membership intrudes to some extent on the first amendment rights of the newspaper. As Justice Sutherland explained in his dissent:

> Strong sympathy for or strong prejudice against a given cause or the efforts made to advance it has too often led to suppression or coloration of unwelcome facts. It

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104. *Id.* at 130.
105. *Id.* at 131.
106. *Id.* at 137-38 (Sutherland, J., dissenting).
would seem to be an exercise of only reasonable prudence for an association engaged in part in supplying the public with fair and accurate factual information with respect to the contests between labor and capital, to see that those whose activities include that service are free from either extreme sympathy or extreme prejudice one way or the other.\textsuperscript{107}

While the application of the labor laws did, to some degree, restrict editorial discretion, the Court simply found that the first amendment rights of the Associated Press were not abridged. The Court did not discuss the nature of the need for labor laws, or whether the labor laws were sufficiently tailored so that they achieved their purpose without abridging the editorial discretion of the newspapers to which they applied.\textsuperscript{108} Where the Associated Press reported on labor-management relations, the incidental effect of requiring employment of unionized editors intruded far more into the content of the material printed than did the must-carry regulations. The effect in \textit{Associated Press I} was clearly not content-neutral.

In \textit{Associated Press II},\textsuperscript{109} the Associated Press' restrictive news and membership practices were challenged as violating the antitrust laws. These practices prevented non-members from obtaining news from the Associated Press or their members. In addition, it was difficult for newspapers in competition with Associated Press members to become members themselves. The Associated Press argued that the "clear and present danger" test afforded newspapers some immunity from the antitrust laws because they were in the business of distributing news and information.\textsuperscript{110} The Supreme Court responded: "Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield..." \textit{Id.} at 123.

107. \textit{Id.} at 138 (Sutherland, J., dissenting).
108. \textit{Id.} at 131-33. The Court did state that the labor laws being challenged "do[] not compel the petitioner to employ anyone; [they] do[] not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." \textit{Id.} at 132.

The Court went on to observe that "[t]he business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws." \textit{Id.}

110. \textit{Id.} at 7.
for business publishers who engage in business practices condemned by the Sherman Act."\(^{111}\)

The claimed free speech right amounted to a right to decide to whom to sell or not sell news once gathered. Furthermore, while the refusal of the Associated Press and its members to give news to non-members did not prevent the non-members from gathering and distributing news themselves, the Supreme Court nevertheless thought the competitive disadvantage to which it subjected the non-members justified government action.\(^{112}\) In response to the argument that government action forbidding these restrictive practices amounted to an abridgment of the freedom of the press, the Supreme Court replied:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. 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, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interfer-

111. *Id.*

112. *Id.* at 17-18. Speaking of the competitive environment created by the Associated Press, the Court stated that: "It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals." *Id.* at 17 (emphasis added). The Court here took a pragmatic view of a monopoly by stating that "[m]ost monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose...." *Id.* at 17 n.17 (emphasis added). The must-carry rules respond to this view of a monopoly and its detrimental effects, but the *Quincy* court failed to recognize the practical impact of the signal selection power cable systems now enjoy.
ence under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.113

Although there are considerable differences between the must-carry rules and the laws at issue in the Associated Press cases, there are also similarities. The most apparent difference is that while the must-carry rules apply only to a particular industry, both the antitrust and labor laws are general and apply to many industries. Both Associated Press I and Quincy involved regulations which intrude on content. Although Associated Press I did not involve the total ouster of control over content as did the must-carry rules, by approving the application of labor laws to the press, the Supreme Court upheld a much greater content-related intrusion than the must-carry rules present. Moreover, Associated Press II touches on the restraint issue which is at the heart of the cable controversy. In the antitrust case the restraint involved the possession of the news, that is, the content of the newspaper. With the must-carry rules the restraint involves preventing broadcast stations from reaching their viewers by the now dominant method of signal reception.114

After reviewing these two competing lines of cases, the question arises as to which offers the better doctrinal framework to be applied to the must-carry rules. In O'Brien the governmental regulation had a clear impact against a particular point of view and a specific means of communicating that view. However, the Court upheld the regulation, rejecting the position which equated action with speech, and characterizing any impact on O'Brien's freedom of expression as incidental. In the case of the must-carry rules the government is regulating the economic aspects of cable companies. Because the business is that of communications, speech is incidentally affected but not in a manner which discriminates or silences unpopular viewpoints. The must-carry regulations are completely content-neutral. This contrasts sharply with the draft card situation in which burning the draft card was meant to constitute a protest to the war and a refusal to serve as a military participant. Rather, the must-carry rules represent an attempt to regulate only the competitive relationships among those

113. Id. at 20 (footnote omitted).
114. For further discussion of this point, see supra note 62 and accompanying text.
in the business of delivering television signals to the public. Because must-carry rules deal with the regulation of the business aspects of the communications media, the Associated Press cases represent a far better source of guidance to evaluate the constitutionality of the must-carry rules than does O'Brien.

C. Application of Associated Press Cases to Must-Carry Rules

Despite the above conclusion that application of the Associated Press cases is more appropriate to the must-carry situation, the outcome under such an approach requires further discussion. These cases stand for the proposition that despite some incidental effects on speech, government is free to apply legitimate economic regulations to the mass communications industry. Thus, a news service may not violate the antitrust laws when deciding how to distribute the information it has in its exclusive editorial control. Similarly, legitimate labor laws apply to the news services even though there may be incidental effects on the content of the material in the newspaper. In both cases the fact that the governmental regulations in question applied to all businesses was significant in upholding the regulations despite some infringement upon the freedom of the press.115

As the court of appeals in Quincy recognized, cable television started as a passive conduit of broadcast signals and has now added to that function the ability of delivering signals originated primarily for cable.116 If the Quincy court were skeptical of the legitimacy of the FCC regulation of cable television, then one could understand why the court might choose O'Brien rather than the Associated Press cases as the means of analysis. However, the court should have come to grips with this problem rather than framing the question as whether cable should be regulated in the same manner as the broadcast media.117 The only hint of the possible illegitimacy of the regulation surfaces when the court

115. No attempt is being made to distinguish between freedom of speech and freedom of the press. Presumably, editorial discretion could be exercised by a writer of a letter free from government control, although it is true that the concept of editorial discretion is most easily supported by reference to the Court's decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (statute requiring newspapers to allow free space for rebuttal by criticized political candidates unconstitutional).

116. Quincy, 768 F.2d at 1452.

117. The Quincy court summarized its findings as follows: "Nor do we discern other attributes of cable television that would justify a standard of review analogous to the more forgiving First Amendment analysis traditionally applied to the broadcast media." Id. at 1449.
concludes that cable does not have a natural monopoly status to justify the regulation and suggests that the tendency toward monopoly "may well be attributable more to governmental action—particularly the municipal franchising process—than to any 'natural' economic phenomenon." To justify applying O'Brien, the court should have shown that rather than regulating the business aspects of cable television operations, the FCC was trying to stifle the speech of the cable operators. After all, O'Brien claimed that burning his draft card constituted "symbolic speech" and that by making that act criminal, the government not only abridged his first amendment rights, but did this to further its own interests. Since Associated Press II held that the government could interfere with the way the communications industry distributed its services, it might have been hard for the court of appeals to contend that the FCC could not mandate that a cable company distribute local stations to local viewers. Must-carry certainly does not amount to the suppression of antigovernment speech as was involved in O'Brien. Nevertheless, it could be argued that what started as necessary regulation has now been made obsolete by the maturation of over-the-air broadcast markets, and the natural evolution of the cable industry into equal competitors with the broadcasters. However, this argument's foundation is rooted in an economic/political foundation, to be addressed by Congress, not the courts.

This argument demonstrates why the court of appeals should not have decided Quincy as it did. The impact of must-carry rules on free speech is no more intrusive than in the Associated Press cases, and these rules serve to permit local stations to continue to compete on a reasonable basis for the attention of viewers. In that sense, as in the antitrust setting of Associated Press II, the must-carry rules further first amendment interests. In any event, by striking down the FCC's rules, the court of appeals involved itself in defining the business of cable television, and decided that cable had progressed to a point that warranted repeal of the must-carry rules. In effect, the Quincy case involved a business judgment and regardless of whether the judgment of the court was good or bad, it was a judgment that should have been left to the FCC and Congress.

The rationale of the court of appeals for doing away with the

118. Id. at 1450 (citation omitted).
119. See O'Brien, 391 U.S. at 376.
must-carry rules—the existence of so-called A/B switches that would allow listeners to switch between cable and over-the-air reception\textsuperscript{121}—seems somewhat simplistic. Given the fact that the television industry is still in a state of transition, and the regulations at issue are designed to deal with the problem of delivery of signals to viewers, a strong case exists for the application of the methodology of the \textit{Associated Press} cases. Application of this standard would lead to a recognition that the must-carry rules are really in line with the objectives of the first amendment, as well as to the sustaining of the rules by giving deference to the decision of the FCC.

D. \textit{The Court's Misapplication of O'Brien}

In \textit{O'Brien} the Supreme Court established the test to be applied when speech and non-speech elements are combined.\textsuperscript{122} Under that test:

\begin{quote}
[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{123}
\end{quote}

Clearly, in \textit{O'Brien} the raising of armies was a substantial government interest.\textsuperscript{124} Although O'Brien argued that the draft card did not serve an important function in the system beyond notification of registrants that they had registered or received a particular classification, the Court was able to list a number of functions served by the continued possession of the cards by registrants.\textsuperscript{125}

\begin{footnotes}
\begin{enumerate}
\item The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected de-
\end{enumerate}
\end{footnotes}
Having established that continued availability of the cards served an important governmental interest, the Court said: "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction."

The Court avoided deciding whether the prohibition against destroying the draft card was narrowly tailored to achieving the government purpose by articulating the possession of the draft cards as a purpose unto itself, rather than discussing the interests of the government in raising armies and maintaining a draft system. Thus, even in O'Brien the Court was able to frame the opinion in a way that gave considerable deference to the governmental decision.

In Quincy the court of appeals began its consideration of the must-carry rules under the O'Brien standard by considering whether the limits on speech were incidental. In the court's view, the object of the must-carry rules was "to assure that the rise of a potentially monolithic national television industry not undermine the economic vitality of free, locally-controlled broadcasting." Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

Id.

126. Id. at 381.
127. Quincy, 768 F.2d at 1451.
mental goal, seriously skews the analysis. Later in the opinion the court found the rules defective because of insufficient proof of harm to local broadcasting. 128 In discussing whether the rules were overbroad, the court suggested that their purpose was to protect "localism" and not "local broadcasters," 129 and found them overinclusive because they "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." 130 The court's position fails to recognize that absent the must-carry rules a cable system's refusal to carry a particular station places that station at a competitive disadvantage. This power to distort the competitive balance in the local marketplace amounts to a license for extortion as well as a threat to the integrity of the local licensing system. Thus, a primary goal of the must-carry rules was to protect the FCC's allocations of stations to markets. 131 Arguably, the must-carry rules were so effective when in force, that the FCC was without evidence of the ill-effects of an unregulated market at the time Quincy was decided. In Quincy, the FCC seems to have fallen victim to its own efficiency and foresight.

Another problem in Quincy was the court's refusal to recognize that cable systems occupy a dual status. On the one hand cable operators distribute the programming of local broadcasters and on the other they obtain additional television programming for the viewers either by importing distant broadcast signals or obtaining television signals originated for distribution by cable. The must-carry rules affect the first function of cable systems; in retransmitting the local signals the cable systems are not engaged in programming decisions. If the court had viewed the situation

128. Id. at 1458-59. The court stated: "We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat." Id. at 1459.

129. Id. at 1460. The court observed that "if the goal is to preserve 'localism' and not 'local broadcasters,' the must-carry rules are 'grossly' overinclusive." Id. (citation omitted).

130. Id.

131. Id. at 1441-42. The court seemed to recognize the basis for the rules when it said: "Only if local broadcasters were assured access to the whole of their allocated audience, the FCC believed, could the risk of audience fragmentation and the concomitant threat to free, local television be forestalled." Id. at 1441. The FCC's allocation to local markets is based on a statutory directive. 47 U.S.C. § 307(b) (1982). See also '86 Report, supra note 23, at 912 (separate statement of Commissioner James B. Quello).
this way, the cable business would be one in which the cable operator (1) delivered local broadcast signals to its subscribers' homes and (2) gave to the subscriber such additional programming as the cable operator chose to provide. The limitations on the amount of additional programming available would then be properly viewed as a function of the system's channel capacity—a factor dependent on the cable operator's initial decision as to the desired capacity of the system.

Instead, in considering whether the rules have only an incidental effect on speech within the meaning of O'Brien, the court found two intrusions into free speech interests. The first was that cable programmers might be shut out of the market served by a given cable system to the extent that the must-carry signals filled the available cable channel space. The second was the intrusion into the editorial freedom of the cable operators. Because of these intrusions, the court was reluctant to treat the rules as having only an incidental effect on freedom of speech. However, since the court found the regulations to be impermissible under O'Brien, it never reached the question of "whether a more exacting standard" was appropriate.

While recognizing mandatory carriage of local stations as an intrusion on first amendment rights, the court did not recognize the need for cable systems to carry the stations for homes using cable. Since the local broadcast signals can be received off the air, the court was skeptical that the must-carry rules were necessary. The court viewed the A/B switch as the way to ensure cable subscribers' access to local broadcasting. The premise was that viewers would maintain both cable and an aerial, allowing them to switch back and forth between the two. One might think that such a factual assumption would be something to leave to the FCC. But the court's interpretation of the O'Brien test enabled it to make such an assumption on its own initiative.

The major problem with the court's application of O'Brien is

132. *Quincy*, 768 F.2d at 1451-52.
133. *Id.* at 1452.
134. *Id.*
135. *Id.* at 1454. The court said that "the Supreme Court's prior treatment of other laws and regulations that impinged on the editorial function engenders at least some doubt about the appropriateness of shunting the must-carry rules onto the analytical track reserved for other incidental burdens on expression."
136. *Id.* at 1441.
137. *Id.*
that it places "a heavy burden of justification" on the FCC.\footnote{138} As the court put it: "In the context of this case the question becomes whether the Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable."\footnote{139}

It is doubtful that \textit{O'Brien} requires the level of proof mandated by the court of appeals in \textit{Quincy}. In \textit{O'Brien}, the Supreme Court itself seemed to find the governmental purpose that justified the requirement at issue—the Court certainly did not require proof that the draft cards served a governmental purpose.\footnote{140} The Supreme Court in \textit{O'Brien} merely stated:

\begin{quote}
We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also \textit{apparent} that the Nation has a vital interest in having a system for raising armies that functions with the maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.\footnote{141}
\end{quote}

Professor Tribe discussed this rationale by stating: "While Selective Service regulations required registrants to have their cards in their possession at all times, the requirement had not been seriously enforced. . . . The Selective Service had been quite casual about the possession requirement and had expressed no concern for the efficiency of the draft laws."\footnote{142} Thus, \textit{O'Brien} would be better understood in the context of a regime in which courts gave a very high degree of deference to the government's assertions that the regulation was justified by a legitimate governmental purpose.\footnote{143} In that context \textit{O'Brien} can be seen as calling for the

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\begin{itemize}
\item 138. \textit{Id.} at 1462.
\item 139. \textit{Id.} at 1455.
\item 140. See \textit{O'Brien}, 391 U.S. at 378-81.
\item 141. \textit{Id.} at 381 (emphasis added).
\item 142. L. Tribe, \textit{American Constitutional Law} § 12-6, at 825 (2d ed. 1988).
\item 143. See, e.g., McDonald v. Board of Comm'rs, 394 U.S. 802 (1969) (Court upheld Illinois absentee ballot system which excluded unsentenced inmates awaiting trial finding that the law had a "rational relationship to a legitimate state end" through the presumption of constitutionality afforded legislative action, and lack of any evidence to the contrary); Williamson v. Lee Optical of
courts, where the case applies, to find that there is *in fact* a substantial governmental purpose for the regulation rather than simply presuming that such a purpose exists.

In *Quincy* the court of appeals framed the main issue as "whether the Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable."144 In order to show the problems with the court's application of *O'Brien* to this case, it is necessary to go into some detail.

The court began its analysis by referring to the fact that the FCC had recently deregulated broadcast and cable television, although the must-carry rules remained in effect.145 On the question of the FCC's continued adherence to a policy of localism the court rightly said:

> It simply does not follow that deregulation, even massive deregulation, implies a wholesale abandonment of the goal of preserving local broadcast television. Although the Commission of late has pursued different means to that end—preferring to rely on the free market rather than active administrative oversight—it has never wavered from its view that preservation of local television is a cornerstone of its regulatory policy.146

The court went on to consider that when the FCC rescinded some substantial limitations on cable systems, the FCC found that the broadcasting industry was in good financial health and that cable did not appear to be a negative force.147 The FCC responded that the rescission of a number of cable regulations was premised on the continuance of the must-carry rules.148 The court seemed to reject this argument, however, and responded that at least in the case of VHF broadcasting, the FCC's analysis "appears to deny their major premise—that unfettered growth of cable television threatens the economic vitality of local broadcasting."149

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144. *Quincy*, 768 F.2d at 1455.
145. *Id.* at 1455-56.
146. *Id.* at 1455 n.45.
147. *Id.* at 1456. *See also Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632, 861 (1979).
148. *Quincy*, 768 F.2d at 1456.
149. *Id.*
But the court did not rest any conclusions on this statement. Instead the court said:

But even if we accept the Commission's position that it continues to stand by the economic assumptions on which the must-carry rules are premised, we would still be unable to conclude that it has adequately carried its heavy burden of justification. For if the FCC has not repudiated the rules' underlying assumptions, neither has it proved them.150

At this point it is useful to focus on the nature of the points that the FCC was required to prove. As the court put it:

[The FCC] has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.151

The court ignored the fact that because of the FCC rules, the cable systems did carry the signals. The court also ignored the fact that it is difficult to prove that people would not watch local broadcast television stations if those stations were not carried by cable unless the FCC actually did away with the rules to see what would happen.152 Furthermore, the FCC's experience with UHF tuning153 would seem to indicate that people might not watch broadcast television if they had to change to a different kind of

150. Id. at 1457.
151. Id.
152. Since the must-carry rules have ceased to exist, information has been collected about the number of stations that have been dropped by cable systems. See, e.g., Tis the Season of Must-Carry Surveys, Broadcasting, Aug. 15, 1988, at 97; Real-World Data on a Post-Must-Carry World, Broadcasting, Sept. 5, 1988 at 30-31; NCTA Study Shows Cable Carrying Most Stations, Broadcasting, Sept. 19, 1988 at 59-60; Local TV Stations Still Carried by Cable, 15 Media L. Rep. (BNA) No. 24 at 1 (Sept. 20, 1988) (reporting that six percent of cable systems surveyed had "dropped or opted not to carry at least one station since the rule lapsed."). No surveys were found which examined how many cable subscribers viewed the dropped stations after they were no longer carried on their cable system.
153. For further discussion of the FCC's experience with VHF tuning, see supra notes 51-53 and accompanying text.
tuner. In any event, this is an issue that should have been left to the Commission to decide. The court, on the other hand, takes the position that a simple A/B switch will enable subscribers to switch between antenna (assuming they have one) and cable and that whether subscribers will actually do so "is almost certainly susceptible of empirical proof." Thus, the issue seems to turn on some assumptions about human behavior and the extent to which loss of cable viewers would actually result in economic harm to non-cable broadcasters. For this reason, it is useful to look at another case in which this kind of predictive judgment was at issue.

In *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court reviewed the FCC's regulations proscribing newspaper/broadcasting cross-ownership, that is, ownership by one entity of a newspaper and a broadcasting station in the same market. In adopting a proscription on such combinations for the future, the FCC allowed existing combinations to continue. The Court of Appeals for the District of Columbia Circuit set aside the Commission's failure to break up the existing combinations. In justifying its ruling the court of appeals stated:

"The Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a show of harm. And, since the record does not disclose the extent to which divestiture would actually threaten these values, the Commission could not have rationally concluded, if it did, that their potential impairment overcame the presumption against cross-ownership." The Supreme Court reversed the court of appeals on this point on grounds that the factual determinations involved "were primarily of a judgmental or predictive nature . . . [and therefore] complete factual support in the record . . . is not possible or required." While the points on which proof might have been required in that case differ from the points at issue in *Quincy*, they are similar with respect to the kind of speculation in which the

154. *Quincy*, 768 F.2d at 1457 n.48.
157. *Id.* at 965 (footnote omitted).
FCC had to engage. By stating the issue in terms of proof required, the Quincy court acted as if it were simply seeking support in the record for the FCC's decision, while in fact the court made the type of value judgment expressly reserved for the FCC by the Supreme Court in NCCB. Under the Associated Press line of cases, a court would first have to decide whether there was an infringement of free speech rights before being called on to make the value judgments. Because with compulsory carriage rules it would appear that the FCC is simply regulating the business aspects of cable delivery of television signals, the value judgments made by the court of appeals in Quincy should have been left to the FCC.

In response to this type of argument, the Quincy court stated that NCCB did not apply because the issues involved in compulsory carriage rules were capable of factual support. While that is correct, it is arguably correct in the NCCB situation also. In both cases the issues could only be proved after adopting a policy contrary to that actually adopted by the Commission. The Commission should not have to adopt what it determines is the wrong policy in order to establish that the policy is in fact wrong. Although the must-carry rules are discrete enough so that the error could probably be corrected after a number of broadcasting stations suffer severe damage, that type of cost should not be required before allowing economic regulation.

The "proof" requirement is exacerbated by the addition of the overbreadth finding by the court. In addition to failing to find sufficient proof of harm to establish a proper purpose, the court stated:

Moreover, because the must-carry rules indiscriminately sweep into their protective ambit each and every broad-

159. The Supreme Court gave the following examples of prospective policy decisions properly within the scope of the FCC's rule-making authority:
whether a divestiture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing crossowners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local programming.

160. Id. at 814 (citation omitted).

161. For further discussion of the proof requirement, see supra notes 127-31 and accompanying text. See also Quincy, 768 F.2d at 1459-62.
caster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community, the rules are insufficiently tailored to justify their substantial interference with First Amendment rights.\textsuperscript{162}

Thus, to justify the rules not only does it appear that the FCC would have to show that people would not be as likely to watch stations not carried on cable, but also that the failure to view those stations would lead to an inadequate amount of local broadcasting.

Although the court appeared to subject the FCC to an unattainable standard of proof, it took pains to point out that "we have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment."\textsuperscript{163} The court confined its declaration of invalidity to the must-carry rules "in their current form."\textsuperscript{164}

Given this limiting statement it is not surprising that the FCC modified the must-carry rules.\textsuperscript{165} This time the FCC limited the rules to five years and tied them to a requirement that A/B switches be furnished and the public educated to their use.\textsuperscript{166} Applying the level of proof articulated in \textit{Quincy}, the court of appeals set aside the revised rules in \textit{Century Communications Corp. v. FCC} by stating:

Although the FCC has eliminated the more extreme demands of its initial set of regulations, its arguments in this case leave us unconvinced that the new must-carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech under the test set forth in \textit{United States v.}

\textsuperscript{162} \textit{Quincy}, 768 F.2d at 1463.

\textsuperscript{163} \textit{Id}. The court noted: "We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat . . . ." \textit{Id.} at 1459.

\textsuperscript{164} \textit{Id.} at 1463.


Again, the court seemed to hold the door open to still another version of the must-carry rules saying: "It may well be that upon a suitable record showing, the justification offered by the FCC, that interim regulations are needed to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold, would satisfy the O'Brien standard." 168

Once again the O'Brien standard skews the argument and lets the court act as if its decision is rooted in a failure of the record rather than a difference in value judgments. The court faulted the FCC for not offering evidence that consumers would fail to obtain A/B switches on their own once stations are dropped from cable. 169 By the time the court heard Century Communications, however, the National Association of Broadcasters had come up with a survey that showed that many cable subscribers had taken down their aerials when they got cable, that only about 10% of the cable subscribers presently switch between cable and their antenna, and that only about 1% of cable subscribers actually had both an outdoor antenna and an A/B switch. 170 Nonetheless, the court found that even that information was insufficient to support the FCC's five-year requirement of must-carry. 171

167. Id. at 293 (emphasis added) (citation omitted).
168. Id. at 300.
169. Id.
170. See id. at 301. The FCC's discussion of the survey data can be found at '86 Report, supra note 23, at 880-85.
171. The court dealt with the FCC's data as follows:

Among its melange of disparate facts and findings, the study includes four items of information that arguably could be said to point to a need for interim must-carry rules: (1) only about 1% of cable subscribers presently have both the outdoor antenna and A/B switch needed to gain access to noncarried local programming in the absence of must-carry rules; (2) many cable viewers originally owning antennas have taken them down, because they were unsightly, and only about 10% of cable subscribers presently switch back and forth between cable and antennas; (3) a third of cable homes have video cassette recorders and thus may face some increased difficulty attaching the A/B switch; and finally, (4) about half of cable subscribers doubted that if local broadcast stations were dropped from cable they would buy what the survey termed a "special switch" enabling them to go back and forth between cable and their antennas. Primarily on the basis of these findings, and particularly the finding that relatively few homes are presently equipped with both antennas and switches, the report concludes that the transition to a world without must-carry could force consumers as a
In fact, the court seemed to act as if the regulatory process is very different from what it is. In a proceeding such as the one formulating the new must-carry rules, the rule-making process involves the submission of views and comments by affected industry groups.\(^{172}\) As the FCC pointed out, "[t]hese interim must-carry rules are a modified version of the proposed industry agreement that was filed jointly by several of the major broadcast and cable trade associations."\(^{173}\) Because these regulatory issues are decided in a highly political process in which the major participants are those who are being regulated, the need for judicial protection seems to be much less than the usual first amendment situation. The industries are interdependent and have common as well as competing interests. In such a situation it is hard to understand why the court would want to set aside an industry compromise which had FCC approval and did not silence the expression of any party. Cable companies remain free to choose the programming on most of their channels, and are able to en- whole to expend millions of dollars. It does not, however, suggest that the new technology would be especially costly to consumers on an individual basis. Nor does it estimate how long it would take for most households to acquire and install the required switch and antenna.

Even accepting the NAB's findings as accurate, it requires an inferential leap of some distance to arrive at a need for five more years of must-carry. Only through the rosiest of broadcasters' lenses can the NAB study's first salient finding—that there is a dearth of antenna-and-switch setups in American households—be seen as pointing to the difficulty of installing such gear or to the inability of consumers to learn of their availability. More likely, the absence of such equipment from most homes reflects the obvious reality that, so long as the government requires cable companies to offer local broadcasting through the must-carry regime, such supplemental equipment is unnecessary. The FCC's own determination that the consumer misperception upon which it so heavily relies "is a direct result of the former must carry rules," . . . seriously undercuts the NAB's implication that the unavailability of switch-and-antenna gear is an endemic or long-term problem.

The NAB study's second finding, that few of those with switch-and-antenna capability currently switch back and forth between cable and broadcast with any regularity, can most reasonably be accounted for by the fact that, in a must-carry world, the need to do so is slight. Like the fact that few households have installed switches and antennas, this finding merely describes present reality without offering any glimpse into how the change of one key variable—the lapse of must-carry regulations—would affect that reality.

\(^{172}\) See, e.g., '87 Memorandum, supra note 23, at 3594-99.

\(^{173}\) '86 Report, supra note 23, at 864 (footnote omitted). The groups were listed in the footnote, as follows: National Association of Broadcasters, The Association of Independent Television Stations, Television Operators Caucus, National Cable Television Association and Community Antenna Television Association. Id. at 898 n.84.
hance this freedom as economic conditions allow for expanded channel capacity. For the court to promote another battle after a truce is somewhat beyond the court’s proper reviewing function.\textsuperscript{174}

It is also hard to refrain from suggesting that the court lacks candor when it states:

> Our decision . . . is a narrow one. We hold simply that, in the absence of record evidence in support of its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the \textit{O'Brien} test for incidental restrictions on speech. We do not suggest that must-carry rules are \textit{per se} unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests. But when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures.\textsuperscript{175}

\textsuperscript{174} Abolition of the must-carry rules affects competitive relationships and complicates other issues. For example some have questioned cable's right to use broadcast signals, that is, the compulsory license. \textit{See Must Carry, Must Pay in the Works}, \textsc{Broadcasting}, June 19, 1989, at 29; \textit{FCC wants Congress to Dump Compulsory Licenses}, \textsc{Broadcasting}, Oct. 31, 1988, at 29-30; \textit{Wrong Premise in "Closed Circuit"}, \textsc{Broadcasting}, July 4, 1988, at 6. In other words, broadcasting supplies programming to cable, and, as one cable executive explained, there is a public trust in keeping the broadcasters in business, because if they were not kept in business the government might see cable as a monopoly and regulate it as such. \textit{Broadcasters, Cable Operators Come Together}, \textsc{Broadcasting}, June 6, 1988, at 31. There is also the issue of whether networks should be allowed to own cable systems with the attendant possibility that a network-owned cable system might decide not to carry a local station. \textit{See Choosing Sides on Network-Cable Crossownership}, \textsc{Broadcasting}, Oct. 31, 1988, at 57-58; \textit{F.C.C. to Reconsider Cable Proposal}, \textsc{N.Y. Times}, Aug. 5, 1988, at D1, col. 3-4. Another issue concerns syndicated exclusivity rules. \textit{See Broadcast, Cable Groups Propose Opposite Syndex Changes}, \textsc{Broadcasting}, Aug. 29, 1988, at 56-57. Still another is whether telephone companies should be allowed into the cable television business. \textit{See, e.g., FCC's Patrick Urges Telco Entry into Cable}, \textsc{Broadcasting}, June 12, 1989, at 57; infra note 175 and accompanying text.

\textsuperscript{175} \textit{Century}, 835 F.2d at 304. In addition, the effect of \textit{Quincy} may be to push broadcasters into an alliance with telephone companies, a development with uncertain consequences for the public interest. \textit{See Glimmers of Carriage Compromise Between Telcos}, \textsc{Broadcasters}, \textsc{Broadcasting}, Feb. 6, 1989, at 27; \textit{Quello Having Second Thoughts About Telco Entry}, \textsc{Broadcasting}, Jan. 16, 1989, at 98. The question of allowing telephone companies into the television business is under active consideration. \textit{See The Evolution of Cable's Anti-Telco Strategy}, \textsc{Broadcasting}, Mar. 6, 1989, at 30; \textit{NAB to Congress: Put Telco Entry on Hold}, \textsc{Broadcasting}, Feb. 13, 1989, at 121.
In contrast to the seemingly insurmountable level of proof required in Quincy and Century Communications, the method used in the Associated Press cases would require the court to decide whether the FCC was regulating speech or regulating the business of distributing information. The must-carry rules, as explained, would seem more properly to fall under the regulation of business. The problem for the court is that if the must-carry rules are classified as business regulation, it would not be able to insist upon "record evidence." Thus, by applying O'Brien in the way it did, the court was able to make value judgments that should be left to the FCC, and, at the same time, was able to write the opinion as if the disagreement with the FCC is only with the sufficiency of the record. Indeed, the court of appeals did here what, arguably, the Supreme Court said it could not do in NCCB. 

In justifying the revised must-carry rules, the FCC pointed to City of Renton v. Playtime Theatres, Inc. and suggested that the Renton analysis would be more appropriate in this context, and if applied would result in judicial affirmation of the rules. Renton involved a constitutional challenge to a zoning ordinance that prohibited adult motion picture theaters within 1,000 feet of residential zones, dwellings, churches, parks and schools. The

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176. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1977). In Vermont Yankee the Court considered the extent to which a court could reverse an administrative agency's ruling (here the Atomic Energy Commission's licensing of a nuclear power plant) when the agency had complied with the Administrative Procedure Act, but had failed to establish what the Court considered an adequate record to support the agency's position. The Court in reversing the court of appeals stated:

This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings. . . .

Importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule.

. . .

In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory minima, a matter about which there is no doubt in this case.

Id. at 547-48.


Supreme Court reversed the court of appeal's invalidation of the ordinance. The court of appeals had used *O'Brien* to find that the City of Renton had improperly used the experience of other cities in formulating its ordinance rather than using "evidence" about the effects of adult theaters on Renton. The Supreme Court criticized the court of appeals' approach. According to the Supreme Court, the court of appeals had imposed "an unnecessarily rigid burden of proof." The case differs from the must-carry cases because the city was relying on the experience of other cities, rather than using its experience with an industry as its main guide. In holding that the city used a permissible method to further its objective, the Supreme Court pointed out that it was not the court's job to assess the "wisdom" of the ordinance. Even though the court found that the restriction of first amendment rights was "a motivating factor" in passing the ordinance, the Supreme Court held that since the district court found that the "predominate" motivation was pursuit of legitimate zoning interests, the ordinance was unrelated to "the suppression of freedom of expression."

Certainly the method used in Renton is more in line with the Associated Press cases. Moreover, it enables the courts to review governmental action to see whether it impedes freedom of speech while preventing those courts from applying their own values to determine whether the governmental action should be upheld.

The foregoing analysis of the decisions on the must-carry rules should illustrate what is wrong with the court of appeals' application of *O'Brien* in the Quincy case. Difficulties arise whenever there is need to regulate the business aspects of a communications business. If courts continue to use the Quincy

180. The Court specifically overruled the heavy burden of proof imposed on the City by the court of appeals: We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings," summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. *The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

Renton, 475 U.S. at 51-52 (emphasis added).

181. *Id.* at 50.
182. *Id.*
183. *Id.* at 51.
184. *Id.* at 52.
185. *Id.* at 48.
methodology, it will put the courts in the position of passing on the wisdom of regulations. It also changes the focus of the analysis and makes the courts consider a factual basis at a level of specificity beyond the proper scope of the courts. Instead, courts should focus on whether the regulation interferes with speech to the point of constituting an interference with the freedom of speech. In Renton and the Associated Press cases one can find some interference with speech, but the regulation goes mainly to zoning in Renton and business in the Associated Press cases.

V. IMPLICATIONS OF QUINCY

In City of Los Angeles v. Preferred Communications,186 the Supreme Court held that a city’s award of an exclusive franchise to a cable company had first amendment implications. However, the Court left open the question of the methodology to be used in resolving the first amendment attack on the cable franchising process.187 Nevertheless, in the wake of Quincy, there is substantial sentiment for applying O’Brien to cases involving challenges to exclusive franchises on first amendment grounds.188 While differ-
ences exist between a prohibition on operation without a franchise and the must-carry regulations, the application of *O'Brien* puts the courts into a similar kind of policy-making role. If used as the court of appeals did in *Quincy*, it could easily lead to a wrong decision because it requires "proof" of a governmental justification rather than a belief and understanding on the part of the court that a governmental purpose is being advanced and that the regulations are not *abridging* the freedom of speech.

At the same time, the question of whether cable franchising is permissible in light of the first amendment is a much harder one than the validity of must-carry rules. The *O'Brien* test in this context tends to obscure for the decision-maker the need to weigh carefully the necessity for business regulation against its particular inroads on free speech. Cable systems represent a hybrid between a broadcaster and a common carrier. A court needs to be aware of cable's bifurcated function. If the cable business were limited to stringing wires between homes and a distribution center, cable franchising would probably not raise first amendment issues. The fact that this function is combined with the ability to choose what signals to provide, however, is the key that adds the first amendment dimension to the problem. It is important to keep the functions separate. The distribution function really does not raise the free speech issue. That issue is raised by the choice of what to distribute. If a community is permitted to license the distribution function, then the question becomes whether that licensing function should be limited by the first amendment because it is more convenient to give the cable operator the ability to choose programming also. It is not the purpose of this article to reach a conclusion about the constitutionality of cable franchises. Rather, it seems that there is a danger that if the *O'Brien* test is used as the basis for analyzing the problem, the wrong result may very well be reached.

VI. Conclusion

Cable television, which originated as a means of distributing television signals to viewers, has now reached the point where it provides a substantial amount of additional programming. When with competing first amendment interests, must be guided by a search for the actual regulation's suppressive effects on opportunities for expression." *Id.*  Although Brenner, in his discussion of access channels appears to accept *Quincy* as the applicable law, *id.* at 373-77, he also appears to recognize that the *Quincy* court may have misapplied *O'Brien*. *Id.* at 363 n.148.
cable television started, a system of local television broadcasting was already in place. That system was comprised of local stations that were required to serve the needs and interests of the local communities. Because cable could totally undercut the local television system, the FCC acted to protect the broadcasting system that was already in place by instituting compulsory carriage rules.\textsuperscript{189} Although the Commission at one time could be seen to be unduly stifling the growth of cable in order to protect the broadcasters,\textsuperscript{190} by the time Quincy was decided the major limitation on cable systems was the must-carry rules. Even the court in Quincy recognized the values involved in the preservation of the system of local broadcasting by stating:

> [U]nfettered growth of new video services may well threaten other deeply ingrained societal values. In particular, the complete displacement of expressive outlets attuned to the needs and concerns of the communities they serve not only would contravene a long-standing historical tradition of a locally oriented press but might itself disserve the objective of diversity.\textsuperscript{191}

In retaining the must-carry rules the FCC preserved the local television broadcasting market by facilitating the ability of all stations licensed in a market to reach the television audience in that market. Given their experience with UHF stations, the FCC continued the must-carry rules out of concern that once people had cable, they would confine their viewing to the stations carried on cable. If a station was not carried on a cable system, that station (especially now that over 50\% of television homes use cable) would have a difficult time surviving. One must also be concerned about a new station. If that station had no access to cable, or if cable charged an exorbitant carrying fee, that would create an unjust competitive advantage in favor of established broadcast stations and cable channels.

While it is true that at some time cable may eclipse broadcast television as the primary means of distributing television signals, that time has not yet come. It seems to make very good sense to preserve the ability of broadcast stations to operate in the market without being dependent on cable systems. It is hard to under-

\textsuperscript{189} The FCC's authority to do so was upheld in United States v. Southwestern Cable, 392 U.S. 151, 167-68 (1968).
\textsuperscript{190} See Quincy, 768 F.2d at 1439 n.10.
\textsuperscript{191} Id. at 1462.
stand why a programming competitor of the local broadcasters, who also controls a primary means of distribution, should be allowed to dictate which of its competitors will be allowed access to this distribution. While it is true that the FCC is without jurisdiction to impose public access requirements on a cable system because cable is not considered a common carrier, the must-carry rules are ancillary to the FCC's jurisdiction to regulate broadcasting and thus within its jurisdiction. In other words, the access is not afforded to the public generally, but to those people who possess an interest in serving a particular market that is supported by a federal license.

The analysis of the Associated Press cases would uphold the must-carry rules. One can easily view an obligation to carry local television stations as one part of the cable television business, which markets improved reception of local stations as a feature of its product. The other part of the business is transmitting whatever additional channels the cable operator selects. The question of how many additional channels to offer is a matter within the control of the cable operator who decides how large a system to build. After all, when cable operators entered the field they did so with the must-carry rules in effect. Cable operators still market their product in two parts: local signals and additional services. Keeping the local signal requirement intact does not limit the cable operator's choice of what other signals to distribute. Certainly, the FCC, by requiring local signals to be carried, was not suppressing controversial speech.

One must also keep in mind the realities of the regulatory process in this area. First, cable systems have grown and developed in large part through the use of broadcast signals. Second, the two industries, cable and broadcasting, are also in competition. Third, broadcasting is dependent on cable for distribution to cable homes. The regulation of these two industries through the FCC and Congress is carried out through negotiations between the industry representatives of both groups. Thus, Congress and the FCC are involved in balancing the interests of those industries while bringing to bear considerations of the public interest. Regulations are going to be compromises that cannot

194. In this connection it is important to keep in mind what Judge Wald (now Chief Judge) said in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981):
Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no
be justified by the kind of rational decision-making engaged in by courts. Furthermore, justifications for each compromise are based on prospective analyses by each party, and therefore, nearly impossible to document with proof of historical data.

By applying O'Brien in the manner it did, the Quincy court manipulated the FCC's burden of proof in such a way that the court was able to use its value judgments rather than those of the FCC and Congress in deciding whether the must-carry rules should be upheld. For example, the court denounced the rules because they required protection for every broadcaster, not just those actually harmed. The Court in Quincy paid lip service to the proper role of the FCC saying that "it is for the Commission and not this court to ascertain which broadcasters or classes of broadcasters are sufficiently at risk to warrant protection." But then the court went on to say: "We observe only that the Commission's failure to draw any lines at all makes it impossible to conclude that it has satisfied its affirmative obligation to prove that the rules are 'sufficiently tailored to the harms it seeks to prevent to justify its substantial interference' with First Amendment rights." The court failed to recognize that the purpose of this protection was to preserve the local market system and to see that the local stations' ability to compete was not diminished by allowing the cable systems to decide which stations would and which stations would not get access to the homes served by the cable system. The failure of the court to view the problem in this way was evidenced by the court's reliance on the A/B switch and

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small part upon the openness, accessibility, and amenability of these officials; to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated.

Id. at 400-01 (footnotes omitted).

195. Quincy, 768 F.2d at 1462. The Quincy court noted:
Yet, oblivious to the must-carry rules' primary object of protecting local broadcasters from competitive injury (and thus preserving localism), each and every broadcaster from the struggling UHF educational station to the most profitable VHF network affiliate—no matter how profitable, no matter how invulnerable to significant cable-induced revenue losses—can demand mandatory carriage.

196. Id.
197. Id. (citation omitted).
its assumption that people would continue to maintain aerials after subscribing to cable. By using O'Brien, the court relied on that factor without proof simply by saying that the FCC failed to show that people would not maintain their aerials. Similarly, after a compromise was reached and the FCC promulgated temporary must-carry rules, the court in Century Communications invalidated these rules because it was "unpersuaded" by the proof offered by the FCC that the five-year interim period was the amount of time needed to educate consumers about the A/B switch.198

If O'Brien remains the standard in these cases, then it becomes easy for a court to set aside agency action by skillfully framing the questions posed. But it is hard to see that the questions posed by the court of appeals relate at all to the question of whether the FCC abridged cable operators' freedom of speech. The must-carry rules really do not suppress, or even inhibit, speech. The FCC, in promulgating the must-carry rules, was acting to protect the position of the broadcast stations within its jurisdiction, and the governmental purpose of promoting the local broadcast system is certainly well established and substantial. It is also not hard to view the continuation of that system, pending the supplanting of it totally by cable television, as a substantial governmental objective. The means of doing so, by ensuring that cable systems are not in a position to decide which of the local broadcasting stations will reach its audience, also seems to be a rational response that relates to the business aspects of cable television.

On the surface, the first amendment argument articulated by the court of appeals seems plausible. It is appealing to suggest that since broadcasters continue to enjoy the over-the-air market any protection of them is unjustified. This argument, however, loses its force when the dual aspects of the cable industry are made explicit. Additionally, the fact that cable grew and developed by selling off-the-air programming to its own customers in addition to selling newer programming developed for the cable systems, makes it more apparent that the surface argument is based on a somewhat simplistic view of the industries involved.

198. Century, 835 F.2d at 304. The court specifically stated:
[1]In the absence of any empirical support for the new must-carry rules, the FCC falls back on what it terms a "sound predictive judge," that it will take about five years for consumers to learn about the switch-and-antenna mechanism, and thus that a five-year transition period is needed during which the agency will provide consumer education.

Id.
It is also important to keep in mind that the FCC is dealing with an industry in transition. The must-carry rules are a means of regulating competitive relationships in an industry threatened by technological change. If cable had totally supplanted the broadcasters there would certainly be no reason to continue to protect them. But that is not the case. The situation now is one of rapid change and development. The must-carry rules are a means of easing the transition.

By using O'Brien to evaluate the rules, the court of appeals doomed the rules to failure. In this context O'Brien is not a standard for insuring free speech. Rather it provides courts with a means of evaluating economic regulation and setting aside those regulations they do not like. Given the nature of regulation in this context it is very difficult for the FCC to come up with the "proof" necessary to justify the rules. In that way the application of O'Brien is a decision to strike down the rules, rather than a means of weighing the interests involved.

As suggested, the Supreme Court has, in the past, dealt with regulations in the communications area in a way that permits the preservation of free speech without forcing the courts into evaluating the wisdom of particular regulations. Methods like those used in Kovacs and the Associated Press cases allow the courts to decide whether the government is suppressing speech or carrying out a legitimate governmental purpose such as protecting people against noise or regulating business. Because of developments in technology, such as cable television systems, it has become harder to sort out what is the regulation of speech and what is the regulation of business. The application of O'Brien to situations like those involved in the must-carry controversy does very little to aid the analysis and does a great deal to allow the courts to intrude into the sphere of policy-making—the area properly reserved for the administrative agencies and the legislature. Quincy and Century Communications were mistakes, and it is hoped that the methodology used will be abandoned in cases involving economic regulation of the business of communications.