The Supreme Court Turns Its Back on the First Amendment, the 1992 Cable Act and the First Amendment: Turner Broadcasting System, Inc. v. FCC

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Casenotes


Free speech is a fundamental right protected by the First Amendment. This guarantee is subject to only a few, narrow exceptions. Consequently, to avoid the presumption of invalidity, regulations that restrict speech are subject to exacting levels of scrutiny.

Presently, the cable television industry is subject to speech restrictions in the form of "must-carry" provisions. In 1992, Congress enacted the latest must-carry regulations in the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act). The Cable Act contains provisions requiring cable system operators to carry the signals of certain broadcast stations. In response to the promulgation of the Cable Act, Turner Broadcasting Systems, Inc. filed suit against the Federal Communications Commission (FCC) and the United States in the United States District Court for

1. U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ." Id.

2. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994). For a full discussion of relevant exceptions, see infra notes 71-74 and accompanying text (discussing regulation of newspapers), and notes 75-78 and accompanying text (discussing regulation of broadcast television).

3. Different levels of scrutiny are applied to different categories of speech. For a full discussion of the different First Amendment standards, see infra notes 23, 28-29 and accompanying text (discussing the intermediate level of scrutiny), notes 71-74 and accompanying text (discussing the most restrictive level of scrutiny) and notes 75-80 and accompanying text (discussing the least restrictive level of scrutiny).

4. "Must-carry" provisions require cable system operators to carry the signals of a specified number of local broadcast television stations. Turner Broadcasting, 114 S. Ct. at 2453.


6. 47 U.S.C. §§ 554-535 (Supp. 1993). For the pertinent text and legislative history of these provisions, see infra notes 57-65 and accompanying text.

(295)
the District of Columbia, alleging that the must-carry provisions violated the First Amendment.  

This Note will analyze the Supreme Court's holding and reasoning in *Turner Broadcasting System, Inc. v. FCC* and the implications it holds for the cable television industry concerning First Amendment protection. The first section of this Note will be an introduction to the background of this area of law, concentrating on the history of cable television as well as earlier must-carry provisions. The background will be followed by a discussion of the facts of the *Turner Broadcasting* case along with the lower court's treatment of the case. The third section of this Note will analyze the Supreme Court's reasoning in *Turner Broadcasting*, focusing on those arguments that led the Court to its holding. Finally, this Note will discuss the potential impact of *Turner Broadcasting* on future issues concerning the cable television industry and the First Amendment.

I. BACKGROUND

A. A Brief History of Cable Television

During the four and a half decades of its existence, the cable television industry has expanded from a reception tool into a video marketplace in direct competition with broadcast television. Originally, cable television was developed to enhance the reception of broadcast television in rural areas. With developments in technology however, cable television has expanded into an independent source of television programming and now, due to its advantages over broadcast television, is in direct competition with broadcast television. A wide variety of programming and clear re-

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ception are two advantages cable television has over broadcast television.\textsuperscript{12}

Regulation of cable television is controlled by the FCC, which was established by Congress in 1934 to regulate broadcasters and common carriers of wire and radio signals.\textsuperscript{13} At the outset of cable television, the FCC declined to exercise jurisdiction over the industry, maintaining that its jurisdiction did not extend to cable system operators\textsuperscript{14} and cable system programmers\textsuperscript{15} because they were not "common carriers" or "broadcasters." Due to continued pressures from broadcasters, who argued that cable television was an economic threat to broadcast television and that the FCC was charged with the economic regulation of broadcast television, the agency began to regulate the cable industry in the mid-1960s.\textsuperscript{17} The FCC's current authority over the cable industry, however, is limited to ac-

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  \item \textsuperscript{12} Id. at 2452. Cable television offers networks, such as CNN, MTV, ESPN.
  \item \textsuperscript{13} Id. These networks and many others are available only through a cable system. Id. In 1992, 90% of the homes in the country had access to cable service and over 60% of those homes subscribed to the service. S. REP. NO. 92, 102d Cong., 2d Sess. 4 at 1135 (1992), reprinted in, U.S.C.C.A.N. 1133, 1134 [hereinafter S. REP. NO. 92]. See also Michael D. Gaffney, \textit{Quincy Cable TV, Inc. v. FCC: Judicial Deregulation of Cable Television Via the First Amendment}, 20 SUFFOLK U. L. REV. 1179 (1986). When cable television was first developed, most cable systems could only offer a few stations, but with advancements in technology, the channel capacity increased. Id. Today, cable systems can carry over one hundred stations. Id.
  \item \textsuperscript{14} Gaffney, \textit{supra} note 12, at 1181. The Federal Communications Commission (FCC) was created by Congress in the Communications Act of 1934. Id. Congress established the administrative agency to regulate the airwaves and to "serve the public interest in broadcasting." Id. at 1181 n.15 (citing M. HAMBURG, ALL ABOUT CABLE 5-1, 5-12 (1981)). The agency was given the responsibility of creating a worldwide wire and radio communication system through the regulation of rates and services of common carriers and broadcasters of communication signals. Id. at 1181 n.15 (citing 47 U.S.C. §§ 151-610 (1986 & Supp. 1994)).
  \item \textsuperscript{15} Cable system operators are the entities who own the cable networks and transmit the cable signal to the viewer. \textit{Turner Broadcasting}, 114 S. Ct. at 2452.
  \item \textsuperscript{16} Gaffney, \textit{supra} note 12, at 1182. The FCC is only charged with the regulation of "common carriers" and "broadcasters." Id. In the late 1950s, however, broadcasters argued that the FCC had the authority to regulate cable because it was a threat to the financial survival of broadcast television. Id. A measure was introduced in the Senate for a congressional clarification of the scope of FCC's authority to include cable operators. Id. This measure was never passed. Id. at 1183.
  \item \textsuperscript{17} Gaffney, \textit{supra} note 12, at 1183. The FCC justified its authority over cable operators by reasoning that cable transmitters utilized microwave transmission facilities, and, because microwave transmitters were common carriers within the jurisdiction of the FCC, it therefore follows that cable operators are within the agency's jurisdiction. Id.
\end{itemize}
tions that are "reasonably ancillary" to its regulation of broadcast television.¹⁸

B. Must-Carry Provisions

The FCC began its regulation of the cable industry by implementing the first must-carry provisions in 1965.¹⁹ The provisions required cable television operators to transmit every local over-the-air broadcast station upon request, without compensation.²⁰ The must-carry provisions were modified when it was codified in the 1984 Act.²¹ The constitutionality of the 1984 must-carry provisions was challenged under the First Amendment in Quincy Cable TV, Inc. v. FCC.²²

The Quincy court subjected the must-carry provisions to the intermediate level of scrutiny test for First Amendment challenges developed by the Supreme Court in United States v. O'Brien.²³

¹⁸ United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Southwestern Cable Co. (Southwestern) transmitted broadcasting signals from Los Angeles stations into the San Diego area. Id. at 160. A San Diego broadcaster argued that Southwestern's transmission was adverse to public interest and petitioned for an order limiting respondent's transmission. Id. The FCC granted the petition. Id. Southwestern challenged the order on the grounds that the FCC lacked the authority to grant such an order. Id. at 161. The Supreme Court held that the FCC acted within the authority granted them under the Cable Communications Act of 1934. Id. at 181.

¹⁹ Cooper, supra note 10. The original must-carry rules were imposed on microwave cable systems. Id. at 110, 111. Within one year, however, the must-carry provisions were imposed on all cable television systems. Id. at 111.

²⁰ 47 C.F.R. §§ 76.57-76.61 (1984) cited in Quincy, 768 F.2d 1434, 1437. Whether a station qualified as "local" was determined by the agency's rules. Id. at 1437. See generally Cooper, supra note 10, at 110 n.18. See also, 47 U.S.C. §§ 151-610 (1988) (codifying Communications Act of 1934) [hereinafter 1984 Act].


²² The 1984 Act, however, did not retain the requirement that cable systems carry all local stations upon request and without compensation. Cooper, supra note 10, at 113. After the 1984 Cable Act, cable systems could not be required to set aside more than 15% of their channel capacity for commercial broadcast use. Id. at 113 n.60 (citing 47 U.S.C. § 612 (1988 & Supp. IV 1993)).

²³ 765 F.2d 1434 (D.C. Cir. 1985). The Quincy court consolidated two cases for purposes of reviewing the constitutionality of the must-carry provisions. Id. at 1438. Turner Broadcasting Systems, Inc., sought review of the FCC's denial to delete the must-carry regulations from the 1984 Act. Id. at 1437. Quincy Cable Television, Inc. sought review of an FCC order requiring the system to carry certain local broadcast stations. Id. Petitioners argued that the regulations violated their First Amendment rights by compelling and depriving speech. Id. at 1438. The FCC relied on the rationale that the must-carry provisions were imperative to the survival of local broadcast television. Id. at 1439.

²⁴ 391 U.S. 367 (1967). In protest of the Vietnam War, O'Brien burned his draft notice in a demonstration to persuade others against the war. Id. at 369.
D.C. Circuit determined that the must-carry provisions abridged cable operators' and programmers' First Amendment rights. While the Quincy court held that the cable industry was protected by the First Amendment, it declined to define the scope of such protection, enabling it to find the provisions unconstitutional without determining the appropriate level of scrutiny. The court expressed hesitation in applying the O'Brien test in the context of cable television but reasoned that, since the regulations did not pass intermediate scrutiny, there was no need to subject them to a heightened level of scrutiny. Moreover, the court held that must-carry provisions are not per se unconstitutional, providing Congress with the incentive to formulate new provisions.

The O'Brien test, as applied in Quincy, states that expressive conduct may be regulated if: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien was convicted for violating a federal statute prohibiting the destruction of draft notices. Id. O'Brien argued that his protest was a form of free speech under the First Amendment and that the statute violated his rights. Id. at 370. The Supreme Court held that the statute did not violate the First Amendment. Id. The Court set forth a four prong test to be applied when deciding whether or not a governmental regulation is sufficiently justified. Id. at 377. For a full discussion of the O'Brien test and its application, see infra notes 35-36 and accompanying text.

24. Quincy, 768 F.2d at 1448-63.
25. Id. at 1448. The court was hesitant about adopting a standard of scrutiny for cable television because the issue had not been addressed by the Supreme Court. Id.
26. Id.
27. Id. at 1462.
28. Expressive conduct is conduct that contains both speech and non-speech elements. O'Brien, 391 U.S. 367, 376 (1967). A long line of Supreme Court cases have held that expressive conduct receives the same First Amendment protection as pure speech. See, e.g., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) (holding local school boards may not remove books from school library simply because they disagree with ideas contained in those books); Healy v. James, 408 U.S. 169 (1972) (holding that state university's refusal to recognize organization because of disagreements with that organization's philosophies was violation of First Amendment); Grayned v. City of Rockford, 408 U.S. 104 (1972) (holding that public sidewalk adjacent to school grounds may not be declared off limits for expressive activity, such as picketing); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (holding prohibition on arm-bands worn in protest of war violates students' First Amendment rights).
29. Quincy, 768 F.2d at 1454-62. See also O'Brien, 391 U.S. at 377 (origin of test applied in Quincy).
The third prong of the *O'Brien* test, requiring content-neutrality, acts as a threshold requirement for the application of the remaining prongs. A regulation may be either content-based on its face or content-based as applied. Moreover, the Supreme Court has found that regulations that are "speaker partial" are content-based.

Once content-neutrality is established, the government must then satisfy the second and fourth prongs of the *O'Brien* test. The second prong requires the government to show that an important governmental interest is being furthered by the regulation. If

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30. See *O'Brien*, 391 U.S. at 375. Content-neutral regulations are unrelated to the content of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (regulations attempting to control speech content are "content-based" and subject to highest level of scrutiny).

31. See *Ward*, 491 U.S. at 795. In *Ward*, the Supreme Court developed a test to determine if a regulation is content-based on its face. *Id.* at 797-800. The *Ward* test turns on the government's purpose in adopting the regulation. *Id*. In *Ward*, Rock Against Racism (RAR) violated a New York City ordinance proscribing the noise levels for organizations using Central Park. *Id.* at 784. After violating New York City's noise ordinance, RAR's subsequent request to use Central Park was denied on the basis of the violations. *Id.* at 785. RAR argued that the guidelines were an invalid restraint on freedom of speech. *Id.* at 788. The Supreme Court held that the ordinance was valid because it was content-neutral and passed the *O'Brien* test. *Id.* at 803. The Court stated that "the principle inquiry in determining content neutrality, in speech cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791.

32. See *United States v. Eichman*, 496 U.S. 310 (1990). A regulation that is content-neutral on its face may still be content-based. *Id.* at 315. Eichman was convicted of violating a federal statute prohibiting mutilation of the United States flag. *Id.* at 312. He burned several flags in protest of various government policies. *Id*. The Supreme Court held the statute unconstitutional. *Id.* The Court found that due to Congress' attempt to suppress free expression, it was content-based and failed to meet strict scrutiny requirements. *Id.* at 315, 318. Specifically, the Court found that prohibiting the mutilation of the flag does not further the government's interest in preserving the flag as a symbol of the nation. *Id.* at 316. The Court reasoned that "[a]lthough the Flag Protection Act contains no explicit content-based limitation on the scope of the prohibited conduct, it is nevertheless clear that the Government's interest is 'related to the suppression of free expression,' and concerned with the content of such expression." *Id.* at 315 (quoting *Texas v. Johnson*, 491 U.S. 397, 410 (1989)).

33. See *Buckley v. Valeo*, 424 U.S. 1, 19-23 (1976). Speaker-partial regulations are those that favor one set of speakers over another because of the legislature's agreement with the favored speakers' speech. *Id*. These regulations have been found to be content-based and demand strict scrutiny. *Id.*

34. See *supra* note 30 and accompanying text (discussing content-neutrality as threshold *O'Brien* requirement).

35. *O'Brien*, 391 U.S. 367, 377 (1967). The *O'Brien* Court determined that there was a substantial governmental interest in preventing the destruction of draft cards. *Id.* at 380. In reaching its conclusion, the Court examined the purposes of Selective Service certificates (draft notices) and determined that destruction of the notice would defeat many of those purposes. *Id.* at 378. The purposes included proof that the individual has registered for the draft, information regarding to
demonstrated, the government then carries the additional burden of showing that the restriction on speech is an “appropriately narrow” means of furthering the interest — the fourth prong.\footnote{36}

The must-carry provisions at issue in \textit{Quincy} were struck down for their failure to meet the requirements of the \textit{O'Brien} test.\footnote{37} Specifically, the court held that the Government failed to meet its burden of showing an important government interest, because there was no proof that cable was a threat to broadcasting.\footnote{38} In the alternative, the D.C. Circuit found the regulations were overbroad, thus failing the fourth prong as well.\footnote{39} Although the \textit{Quincy} court expressed “serious doubts” over the appropriateness of applying the \textit{O'Brien} test, it reasoned that because the provisions failed under this intermediate level of scrutiny, it was not necessary to determine whether a stricter level of scrutiny was required.\footnote{40} In its holding, the court concluded that must-carry provisions were not per se unconstitutional, leaving the door open for future must-carry provisions.\footnote{41}

Following \textit{Quincy}, Congress attempted to reformulate must-carry provisions consistent with the First Amendment.\footnote{42} In Novem-

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\item[\textit{Id.}] at 379-80.
\item[36.] \textit{Id.} at 337, 382. The \textit{O'Brien} Court held that the federal statute also met the least restrictive requirements of the fourth prong. \textit{Id.} at 381. The Court determined that making destruction of a draft card illegal was the only means available to ensure that the notices would remain intact. \textit{Id.} The Court did not discuss whether or not the chosen means were required to be the least restrictive means available. Later cases, however, held that under the \textit{O'Brien} test, it was not required for the regulation to be the least restrictive means available. See \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 800 (1989) (stating that state must avoid choosing means that are “substantially broader” than necessary to further interest). \textit{See also} \textit{United States v. Albertini}, 472 U.S. 675 (1985) (holding that barring an individual from military base by commanding officer for cause did not violate that individual’s First Amendment rights, even when individual could not re-enter for an open house, because exclusion is not greater than is essential to furtherance of government interest).
\item[37.] \textit{Quincy Cable TV, Inc. v. FCC}, 768 F.2d 1434, 1454 (D.C. Cir. 1985).
\item[38.] \textit{Id.}
\item[39.] \textit{Id.} Specifically, the court found the regulations overbroad because they encompassed every broadcaster regardless of whether there was an adequate amount of local broadcasting in an area. \textit{Id.} at 1462.
\item[40.] \textit{Id.} at 1448.
\item[41.] \textit{Id.} at 1462. The significance of this conclusion is that the court was informing the FCC and Congress that it would be willing to uphold must-carry provisions if the provisions were tailored in a manner consistent with the First Amendment. \textit{See id.}
\item[42.] \textit{S. Rep. No. 92, supra} note 12, at 1172. Rather than appealing the district court’s decision, the FCC attempted to refashion the must-carry rules. \textit{Id.} at 1172. The FCC began proceedings in November 1985 and five months later a decision was reached between cable operators and broadcasters. \textit{Id.} at 1172. The rules
\end{itemize}
ber 1986, one year after the *Quincy* decision, the FCC promulgated new, less demanding must-carry provisions. Under the new provisions cable operators were no longer required to carry every station. Moreover, as part of a new justification, the FCC argued that the provisions were only required for an interim period of five years during which a new system consisting of both broadcast and cable stations would be introduced to viewers.

The constitutionality of the new must-carry provisions was challenged in *Century Communications Corp. v. FCC*. As in *Quincy*, the *Century* court applied the *O'Brien* test and held that the provisions violated the First Amendment because the Government failed to demonstrate that the provisions furthered a substantial government interest. Again, the court qualified its holding by stating that it

adopted by the FCC in November 1986, however, contained a new purpose and new line of reasoning. *Id.* at 1172.

43. Century Communications Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987). The 1986 provisions were less demanding than their 1934 counter-parts. *Id.*

44. *Id.* at 297. First, a broadcast station had to qualify to be included in the "must-carry pool" by demonstrating that it attained a certain percentage of viewing hours in the community. *Id.* at 296-97 (citing 47 C.F.R. § 76.56 (1986); 47 C.F.R. § 76.5(d)(1)(ii) (1986)). Also, cable systems did not have to carry more than one station affiliated with the same commercial network. *Id.* at 297 (citing 47 C.F.R. § 76.56 (1986)). Systems with less than twenty channels did not have to carry any broadcast stations. *Id.* at 297 (citing 47 C.F.R. § 76.56 (1986)). A system with fewer than 54 channels had to carry one noncommercial station and a system with 54 or more stations was required to carry two stations. *Id.* at 297 (citing 47 C.F.R. § 76.56 (1986)).

45. *Century*, 835 F.2d at 296. A new device called an "input-selector device" would be attached to the television and would enable a viewer to, by the flick of a switch, choose between shows offered by the cable system and those programs offered by the broadcast stations. *Id.* The FCC estimated that five years would be ample time to introduce viewers to the device and allow them to become comfortable with its use. *Id.* The result of the implementation of the device would be a combined system that would allow the viewer to choose between broadcast and cable television. *Id.*

46. *Century*, 835 F.2d 292. Century Communications Corporation, along with 13 other plaintiff groups, consisting of cable operators, presented three arguments to the United States Court of Appeals for the District of Columbia Circuit: (1) the provisions violated the First Amendment freedom of speech; (2) they violated the due process clause of the Fifth Amendment by taking property without just compensation; and (3) the FCC did not have the jurisdiction to promulgate such regulations. *Id.* at 297.

47. *Id.* at 303. In finding that the FCC failed to meet the second prong of the *O'Brien* test, the court reasoned that the FCC was making a broad assumption - i.e., that without must-carry provisions cable operators would not carry broadcast stations. *Id.* The court required direct evidence to support this assumption. *Id.* The FCC, however, failed to provide it. *Id.* Additionally, the court declined to define the scope of the cable industry's First Amendment protection because the Supreme Court had not yet addressed the issue. *Id.* For a full discussion of the *O'Brien* test, see *supra* notes 35-36 and accompanying text.
did not hold must-carry provisions per se unconstitutional; Congress, again, attempted to formulate provisions that would hold up against the First Amendment.48

C. Cable Television Consumer Protection and Competition Act of 1992

The FCC's third attempt at constitutional must-carry provisions resulted in the Cable Television Consumer Protection and Competition Act of 1992 enacted on October 5, 1992.49 During the three years preceding promulgation of the Cable Act, Congress conducted a fact-finding process to determine the state of the television industry.50 Congress's principal finding was that the cable industry had a powerful and growing market power.51 They concluded that broadcast television was being jeopardized by the strength of the cable industry and that governmental regulation was necessary to

48. Century, 835 F.2d at 304. By qualifying its holding, the Century court demonstrated, as it had in Quincy, that it would be willing to uphold must-carry provisions if the FCC was able to produce proof in support of its allegations that the broadcast medium suffered at the hands of cable. Id. "[T]he government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures. As in Quincy Cable TV, we reluctantly conclude that the FCC has not done so in this case ...." Id. (emphasis supplied). See also S. Rep. No. 92, supra note 12.

49. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2452 (1994). The Cable Act was enacted by Congress over a Presidential veto. Id.


51. S. Rep. No. 92, supra note 12, at 1135. The Committee determined that the source of this power was derived from cable operators who enjoy a monopoly over the local area they serve. Id. at 1141. The Committee recognized that alternative sources of programming would decrease the power of cable operators. Id. at 1144.

A further concern was that the industry had become "horizontally concentrated," meaning that many cable systems were commonly owned. Id. at 1165. A 1990 study showed that the five largest cable systems controlled half of the nation's cable subscribers. Id. at 1165. The two major concerns with horizontal concentration are that: (1) information will be biased in favor of the views of the operators in control and there will be no outlet for unpopular speech; and (2) the seller (programmer) does not have the benefit of a competitive market. Id. at 1166.
protect the longstanding view that "television broadcasting plays a vital role in serving the public interest." 52

Congress attempted to harness the cable industry's power by imposing various new burdens on both cable system operators and cable system programmers. 53 The most controversial of these burdens are the must-carry provisions. 54 The must-carry provisions regulate the speech of both operators and programmers. 55

Section four of the Cable Act requires cable operators to carry the signals of local commercial television stations and qualified low power stations. 56 A cable system with twelve or fewer channels and

52. S. Rep. No. 92, supra note 12, at 1174. The Committee accepted evidence showing that cable systems had and would continue to use their market power to refuse to carry local broadcast stations. Id. at 1175. They relied on a study performed by the Mass Media Bureau to support its conclusion. Id. at 1175 n.102. See "Cable Systems Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988 (containing findings on cable systems' voluntary carriage of local broadcast stations). Also, the Committee found that those systems that granted carriage often repositioned the channels, making it difficult for the audience to find the channel. Id. at 1177.

53. See 47 U.S.C. § 535 (Supp. 1993). Aside from the "must-carry" provisions, the Cable Act subjects the cable industry to rate regulation by the FCC and by the municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators. Turner Broadcasting, 114 S. Ct. at 2453 (citing 47 U.S.C. title V-A). This note will discuss only the "must-carry" provisions.


55. Turner Broadcasting, 114 S. Ct. at 2456. The must-carry provisions regulate speech in two ways. Id. One way affects cable operators and the other affects cable programmers. Id. First, in requiring an operator to carry a certain number of stations, the law reduces the number of stations over which the operator has editorial control, i.e. choosing what programs are aired. Id. Second, with less channels available on cable systems, there are less channels to carry the programs of the cable programmers, thus the programmers are forced to compete for the reduced space. Id.


"Local commercial television station" means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 535(l)(1) of this title, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular system, is within the same television market as the cable system. Id. § 534(h)(1)(A) (Supp. 1993).

"Qualified low power station" means any television broadcast station conforming to the rules established for Low Powered Television stations contained in part 74 of title 47, Code of Federal Regulations, only if —

(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations; (B) such station meets all obligations and requirements applicable to television broadcast stations . . .
more than 300 subscribers are required to carry at least three local commercial television stations.\textsuperscript{57} A system with more than twelve channels is required to carry up to one-third of the local commercial stations that request carriage.\textsuperscript{58} If more stations request carriage than a system is required to carry, the cable operator is left with the discretion of determining which stations will be carried.\textsuperscript{59} Further, stations must be carried in their entirety and on the same channel position as when broadcast over the air, unless the cable system and broadcaster come to an agreement.\textsuperscript{60}

Section five of the Cable Act imposes similar requirements with respect to qualified local noncommercial educational television stations and qualified noncommercial educational television stations.\textsuperscript{61} A cable system with twelve or fewer channels must-carry

(C) such station complies with interference regulations . . .

(D) such station is located no more than 35 miles from the cable systems's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, . . .

(F) there is no full power television broadcast station licensed to any community within the country or other political subdivision (of a State) served by the cable system.

\textit{Id.} § 534(h)(2) (Supp. 1993).

Congress found that local broadcasting is "vital" because it provides the community with local news, public affairs and emergency broadcasts. S. Rep. No. 92, \textit{supra} note 12, at 1175. Ensuring the carriage of this type of station furthers the government's interest that local broadcast television remains viable and available to viewers. 47 U.S.C. § 521(a)(8) (Supp. 1993). The Committee believed that without regulation, cable operators would have no incentive to carry local stations because by carrying a station, the cable system is increasing the potential advertising revenue for the broadcasting station and decreasing the operator's own chances of earning that revenue. \textit{Id.} § 521(a)(15). Furthermore, the Committee reasoned that cable systems would also benefit from the must-carry provisions because consumers often subscribe to cable to obtain or improve local stations; broadcast programming remains the most popular programming on cable systems. \textit{Id.} § 521(a)(17), (19).


59. \textit{Id.} § 534(b)(2).

60. S. Rep. No. 92, \textit{supra} note 12, at 1177. "Channel repositioning has a direct and negative impact on the competitive viability of local broadcast stations . . . ." \textit{Id.} The Committee found that channel repositioning (1) made it difficult for the audience to locate the channel and (2) not all channels are equal so stations positioned higher than 14 may not get through to some viewers. \textit{Id.}


[A]ny television broadcast station which - (A) (i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit founda-
one qualified local noncommercial television educational station.\textsuperscript{62} A cable system with thirteen to thirty-six channels must-carry between one to three qualified stations.\textsuperscript{63} A cable system with more than thirty-six channels must-carry all qualified stations that request carriage.\textsuperscript{64}

D. Right of Access: First Amendment Protection and the Cable Industry

The central issue surrounding First Amendment protection of the cable television industry is whether the characteristics of cable television are more like the print media or more like broadcast television.\textsuperscript{65} Determination of cable's likeness to one of these media identifies which level of scrutiny should be applied to cable television regulation.\textsuperscript{66}

Relying on an established First Amendment right of access to "public forums,"\textsuperscript{67} speakers have argued that they also have First

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\textsuperscript{62} Id. § 535(b) (2).

\textsuperscript{63} Id. § 535(b) (3)(A).

\textsuperscript{64} Id. § 535.

\textsuperscript{65} Lutzker, supra note 8, at 467. Newspapers and broadcasters enjoy different levels of First Amendment protection. Id. For a complete discussion of the different levels of protection afforded to each medium, see infra notes 70-73 and accompanying text (discussing highest level of scrutiny) and notes 74-77 and accompanying text (discussing lowest level of scrutiny).

\textsuperscript{66} Gaffney, supra note 12. Broadcast television regulations are subjected to a low level of scrutiny, while the print media enjoys the highest level of First Amendment protection. Id. at 1189.

Amendment based rights to certain “private forums,” specifically, the media. The Supreme Court has, in certain limited circumstances, granted this right. However, as a consequence to this right, when a speaker asserts his or her right to use a private forum against the owner’s will for expressive purposes, the owner’s First Amendment rights are also implicated.

The Supreme Court has never recognized a First Amendment based right of access to the print media. Newspaper editors enjoy the highest level of First Amendment protection. Consequently, regulations that restrict the discretion of newspaper editors are subject to strict scrutiny. Strict scrutiny requires regulations that impinge on an editor’s discretion to be narrowly tailored to further a substantial governmental interest. In Miami Herald Publishing Co. v. Tornillo, the Supreme Court struck down a Florida statute requiring newspapers to allow political candidates the opportunity to respond to criticism.

The broadcast media, on the other hand, has received different treatment by the Supreme Court which has allowed the public

69. The First Amendment also carries with it a right not to speak. See Pacific Gas & Elec. Co., v. Public Util. Comm’n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977) (A state may not “require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”).
71. See id. at 248.
72. Id. at 258.
73. Id.
74. Id. The statute in question in Tornillo required newspapers to give political candidates an opportunity to reply to criticism. Id. at 243. Miami Herald printed criticisms of Tornillo. Id. Tornillo relied on the Florida “Right to Reply” statute and demanded that the newspaper allow him equal space to rebut the criticisms. Id. at 245. Miami Herald argued that the statute violated the First Amendment because it attempted to control the newspaper’s content. Id. at 275. Tornillo, in turn, argued that the government had an obligation to ensure diversity of viewpoints. Id. at 248. The Court struck down the statute because it was an “intrusion into the function of editors.” Id. at 258. The Tornillo Court reasoned that the “choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment.” Id. at 258. The Court recognized that the economic growth of the newspaper industry made access to the press almost impossible and that minimal governmental action may be required to enforce a right of access. Id. at 251, 254. The action must be tailored in a manner that does not impinge on editorial control and judgment. Id. at 258. See also New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (standing for proposition that debate on public issues should be “uninhibited, robust and wide-open”).
certain rights of access to the airwaves.\textsuperscript{75} Relying on a “scarcity rationale,”\textsuperscript{76} the Court in \textit{Red Lion Broadcasting Co. v. FCC} held that access regulations of broadcast television were required for the preservation of “an uninhibited marketplace of ideas, in which truth will ultimately prevail . . .”\textsuperscript{77} Consequently, regulation of the broadcast media is subjected to the least amount of First Amendment scrutiny.\textsuperscript{78}

The cable industry is also entitled to First Amendment protection.\textsuperscript{79} In \textit{Leathers v. Medlock}, the Supreme Court held that cable programmers and operators are entitled to First Amendment protection because they transmit speech.\textsuperscript{80} The Court reasoned that because cable provides news, information and entertainment, it was engaged in speech and received protection from the First Amendment.\textsuperscript{81} The Court, however, did not define the scope of this protection until \textit{Turner Broadcasting}.\textsuperscript{82}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{75} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). See also CBS, Inc. v. FCC, 453 U.S. 367 (1981) (upholding statute granting “limited right to reasonable access”).
\item \textsuperscript{76} Because scarcity of resources is unique to broadcasting, it is set apart from other media and commands that the government regulate the airwaves. See FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (spectrum scarcity in broadcast demands special consideration); \textit{Red Lion}, 395 U.S. at 376 (scarcity of resources demands lower level of scrutiny).
\item \textsuperscript{77} \textit{Red Lion}, 395 U.S. at 390 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times & Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). In \textit{Red Lion}, a radio station owned by Red Lion Broadcasting violated the “fairness doctrine” which required radio and television broadcasters to allow proponents of both sides of an issue equal time by refusing to allow air-time to an author whose book had been criticized over the air. \textit{Id.} at 371-72. The station argued that the statute violated its First Amendment rights. \textit{Id.} at 370-71. The Supreme Court upheld the statute by relying on the scarcity rationale when determining the appropriate review of broadcast regulation. \textit{Id.} at 376. The Court reasoned that broadcast frequencies are a limited resource and, therefore, a low level of scrutiny should be applied to regulations with this purpose. \textit{Id.} at 376, 386.
\item \textsuperscript{78} \textit{Id.} at 390.
\item \textsuperscript{79} See infra note 80 and accompanying text (discussing Supreme Court’s position that cable operators are entitled to First Amendment protection).
\item \textsuperscript{80} 499 U.S. 439 (1990). In \textit{Leathers}, cable operators, cable programmers and cable subscribers brought a class action suit challenging an Arkansas sales tax on cable television services. \textit{Id.} at 442. The cable operators and subscribers argued that their activities were protected by the First Amendment. \textit{Id.} The Court, however, found that the tax did not abridge those rights because it was neither specifically directed at cable television nor was it content based. \textit{Id.} at 447, 449.
\item \textsuperscript{81} \textit{Id.} at 444.
\item \textsuperscript{82} See \textit{Turner Broadcasting}, 114 S. Ct. 2445 (1994). Until \textit{Turner Broadcasting}, the Supreme Court had never defined the scope of First Amendment protection of cable.
\end{enumerate}
\end{footnotesize}
II. FACTS

On October 5, 1992, Turner Broadcasting Systems, Inc. filed suit against the United States and the FCC in the United States District Court for the District of Columbia, challenging the must-carry provisions in sections four and five of the Cable Act. Turner argued that the must-carry provisions, on their face, violated its First Amendment right to freedom of speech and that the regulations should be subjected to a strict scrutiny test, similar to the test developed in *Tornillo*. Plaintiffs asserted that the must-carry requirements impinged on the cable programmers' "editorial discretion" to decide which programs to carry and which not to carry. Moreover, plaintiffs argued that the regulations were content-based and demanded strict scrutiny.

Initially, plaintiffs asserted First Amendment challenges to the "retransmission provisions" contained in section six of the Cable Act. The retransmission provision prohibits cable operators from carrying a station without first obtaining the broadcaster's consent. Under the provision broadcasters negotiate carriage agreements with cable operators. The court restricted its analysis, however, to the challenges made against sections four and five of the Cable Act. No determination was made concerning the constitutionality of section six because the basis of plaintiffs' argument was that section six was not severable from section four and if section four was struck down, then section six would follow. The court, however, found section four to be constitutional and declined to address the severability issue.

83. Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32, 37 (D.D.C. 1993). Turner Broadcasting System, Inc. is the owner of several cable programming operations. *Id.* Turner Broadcasting filed suit on the same day that the Cable Act was signed into law. *Id.* Four other plaintiff groups consisting of cable operators and programmers, brought similar suits. *Id.* The groups included Daniels Cablevision Inc., Time Warner Entertainment Co., National Cable Television Association and Discovery Communications, Inc. *Id.* at 37 n.8. Turner Broadcasting amended its brief to include the other plaintiffs and the court consolidated the five groups into one. *Id.* at 37 n.7.

Initially, plaintiffs asserted First Amendment challenges to the "retransmission provisions" contained in section six of the Cable Act. *Id.* at 36. The retransmission provision prohibits cable operators from carrying a station without first obtaining the broadcaster's consent. *Id.* at 37. Under the provision broadcasters negotiate carriage agreements with cable operators. *Id.* The court restricted its analysis, however, to the challenges made against sections four and five of the Cable Act. *Id.* at 38. No determination was made concerning the constitutionality of section six because the basis of plaintiffs' argument was that section six was not severable from section four and if section four was struck down, then section six would follow. *Id.* The court, however, found section four to be constitutional and declined to address the severability issue. *Id.* at 32 n.10.

84. *Id.* at 39. Strict scrutiny is the standard applied to regulations that attempt to control newspapers. For a full discussion of *Tornillo* and the development of the strict scrutiny standard, see supra note 60 and accompanying text. See also Sable Communications v. FCC, 429 U.S. 115, 126 (1989); Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue, 460 U.S. 575, 585 (1983).


86. *Turner Broadcasting*, 819 F. Supp. at 39. Plaintiffs argued that the government was favoring one set of speakers (broadcasters) over another (cable operators). *Id.* at 42. In some instances, regulations that favor one set of speakers over another are content-based and demand strict scrutiny. *Id.* See also Buckley v. Valeo 424 U.S. 1 (1976) (noting that speaker partial regulations based on content of favored speaker's speech demand strict scrutiny). Regulations that favor a set of speakers because of the message conveyed by those speakers are content-based. *Buckley*, 424 U.S. at 19-23. Turner argued that the government's purpose behind...
In opposition to Turner's argument for strict scrutiny, the FCC presented congressional findings to the court to sustain the FCC's promulgation of the must-carry provisions.\textsuperscript{87} In support of their argument for the least restrictive scrutiny test, the test applied in \textit{Red Lion}, the Government argued that the regulations are content-neutral and impose only an incidental burden on speech.\textsuperscript{88} The court dismissed each of Turner's arguments and held that the regulations were valid based on the \textit{O'Brien-Ward} formula.\textsuperscript{89} The court relied on congressional findings that the broadcast medium was in serious danger of eradication and regulation was a necessary savior.\textsuperscript{90} The court did not view the must-carry provisions in a regulatory manner.\textsuperscript{91} Rather, it distinguished the provisions as economic regulations "designed to create a competitive balance in enactment of the regulations, to preserve local broadcasting, was content-based. \textit{Turner Broadcasting}, 819 F. Supp. at 43.

\textsuperscript{87} \textit{Turner Broadcasting}, 819 F. Supp. at 46. Congress conducted a series of hearings before enacting the Cable Act. See S. Rep. No. 92, supra note 12. In support of the regulations, the FCC relied heavily on Congress' finding that the economic strength of the cable industry was harming broadcast television. \textit{Turner Broadcasting}, 819 F. Supp. at 39. For a discussion of the relevant hearings and findings, see supra note 12 and accompanying text.

\textsuperscript{88} \textit{Turner Broadcasting}, 819 F. Supp. at 39. The government relied on \textit{United States v. O'Brien} and \textit{Ward v. Rock Against Racism} to support its argument that content-neutral regulations that impose an incidental burden on speech should be subjected to an interest balancing test. \textit{Id.} at 44-45. This has become known as the \textit{O'Brien-Ward} formula. For a full discussion of the balancing analysis applied in \textit{United States v. O'Brien} and \textit{Ward v. Rock Against Racism}, see supra notes 31 & 35-36 and accompanying text.

\textsuperscript{89} \textit{Turner Broadcasting}, 819 F. Supp. 47, 51. The court applied a standard composed of the \textit{O'Brien} and the \textit{Ward} tests. \textit{Id.} at 45. The court dismissed the plaintiffs' content-based argument on the grounds that the provisions are at most marginally "content related" and do not raise a First Amendment concern. \textit{Id.} at 44.

The dissent took the view that the regulations were content-based. \textit{Turner Broadcasting}, 819 F. Supp. at 58 (Williams, J., dissenting). Judge Williams looked to the legislative history of the Cable Act, which characterized local broadcasting as "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate," and concluded that the regulations were content-based. \textit{Id.} at 58 (Williams, J., dissenting) (citing 1992 Act, § 2(A)(11)). Judge Williams went on to analyze the must-carry provisions under the strict scrutiny test applied to content-based regulations. \textit{Id.} at 59 (Williams, J., dissenting). He determined that the fit between the interest and the regulations was too weak to survive strict scrutiny standards. \textit{Id.} at 61 (Williams, J., dissenting). Furthermore, he found that even if there was a substantial interest, less restrictive alternatives were available. \textit{Id.} at 63 (Williams, J., dissenting).


\textsuperscript{91} \textit{Turner Broadcasting}, 819 F. Supp. at 40.
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the video industry as a whole . . . ."92 The court found the promotion of fair competition in the video industry to be a significant government interest.93

In applying the fourth prong of the O'Brien test, which requires that the regulation be "appropriately narrow," the court held that the Government did not have the burden of showing that it chose the least restrictive means available to satisfy its interests, only that the regulations were narrowly tailored.94 The court, again, deferred to congressional findings and held that the regulations were narrowly tailored.95

Following the district court's decision, Turner appealed directly to the Supreme Court.96 The Supreme Court granted certiorari and held that the appropriate level of First Amendment scrutiny for the must-carry provisions is the O'Brien-Ward intermediate standard.97 The Court determined, however, that there were unanswered questions of fact and remanded the case to the district court for further fact-finding.98

IV. ANALYSIS

A. Narrative Analysis

1. The Majority Opinion

The scope of First Amendment protection afforded to cable television was an issue of first impression before the Supreme Court in Turner Broadcasting.99 Arguing in favor of a minimal amount of protection, the Government offered three arguments which fo-

92. Id. The court viewed the must-carry provisions as economic regulations designed to promote competition in the video industry. Id. at 40. The cable industry's monopoly over the video industry was detrimental to broadcasting and Congress, by enacting the Cable Act, was exercising its regulatory powers over the economy. Id. The court termed the regulations as "industry specific antitrust and fair trade practice regulatory legislation" and found that the First Amendment was only involved because "video signals have no other function than to convey information." Id.

93. Id. at 45. The finding of a substantial governmental interest satisfies the first prong of the O'Brien test. For a discussion of the four-prong O'Brien test, see supra notes 35-36 and accompanying text.

94. Turner Broadcasting, 819 F. Supp. at 47.

95. Id. at 47. The court recognized that alternatives did exist but held that the government was not required to adopt a less efficient alternative simply because it was less restrictive. Id. at 47, relying on Ward v. Rock Against Racism, 491 U.S. 781 (1989).


97. Id. For a discussion of the O'Brien-Ward test, see supra note 89.

98. Turner Broadcasting, 114 S. Ct. at 2472.

cused on cable's likeness to broadcast television. At the other end of the spectrum, however, appellants argued that cable, like the print media, deserved the highest level of First Amendment protection. The Turner Broadcasting Court found that cable shared characteristics of both the print media and the broadcast media. Consequently, there is a limited First Amendment-based right of access to cable television; the right of access is determined by applying the O'Brien-Ward intermediate standard of scrutiny test. The case, however, was remanded for further fact-finding to determine whether cable is in fact a threat to the survival of broadcast television.

Relying upon its holding in Leathers v. Medlock, the Court began its analysis by acknowledging that cable is entitled to First Amendment protection. The Court then went on to distinguish cable television from broadcast television in its dismissal of the Government's arguments in favor of the least restrictive level of scrutiny.

The Government's first argument was that the similarities between broadcast television and cable television mandate that the two media be subjected to the same level of scrutiny. The Turner Court held that the "scarcity rationale" used by the Red Lion Court was not applicable to cable television because the scarcity

100. Id. at 2456. The Government argued three points: (1) cable and broadcast are similar in character; (2) cable and broadcast both suffer from a "market dysfunction;" and (3) the must-carry provisions are merely economic legislation. Id.

101. Id. at 2464. The highest level of First Amendment protection is strict scrutiny. Id. at 2455, 2466. For a discussion of strict scrutiny, see supra notes 70-73 and accompanying text.

102. Id. at 2469.

103. Id. at 2469. The O'Brien-Ward test is an intermediate level of scrutiny test applied to content-neutral regulations which have an incidental effect on speech. Id. See Ward v. Rock Against Racism, 491 U.S. 781 (1989) (establishing test for content-neutrality); United States v. O'Brien, 391 U.S. 367 (1968) (establishing intermediate scrutiny test).

104. Turner Broadcasting, 114 S. Ct. at 2469.


108. Id. at 2456. There is no discussion in the opinion of the specific similarities relied on by the Government.

109. Id. at 2456. The Red Lion holding was based on a "scarcity rationale." Id. at 2457. The physical structure of broadcast television creates a scarcity of broadcast frequencies which limits the amount of speakers who can gain access to the
of resources that plagues the broadcast medium is not present in the cable medium.\textsuperscript{110}

The Government's second argument for application of the \textit{Red Lion} standard was that the "market dysfunction" characteristic of both cable and broadcast brings them under the same First Amendment protection.\textsuperscript{111} The Court dismissed this argument on two grounds. First, the Court reiterated that the physical, not the economic characteristics, of broadcast television is the basis for the Court's broadcast jurisprudence.\textsuperscript{112} Second, the Government offered no proof in support of the assertion that cable television suffers from a market dysfunction.\textsuperscript{113}

A third argument advanced by the Government urged the use of a rational basis test.\textsuperscript{114} The Government rested its argument on the assertion that the must-carry provisions were no more than "industry-specific" antitrust legislation.\textsuperscript{115} The Court refused to apply a standard for general laws and stated that laws that single out the press are subject to "heightened First Amendment scrutiny."\textsuperscript{116}

\begin{quote}
airwaves. \textit{Id.} Therefore, more leniency is given to broadcast regulations than to other regulations. \textit{Id.} For a full discussion of \textit{Red Lion} and the "scarcity rationale" theory, see \textit{supra} notes 76-77 and accompanying text. \textit{See also} FCC \textit{v. League of Women Voters}, 468 U.S. 364 (1984) (holding that ban on editorials violated First Amendment as there is public interest in presenting various viewpoints).

110. \textit{Turner Broadcasting}, 114 S. Ct. at 2456. The cable medium does not suffer from the same structural impediments that the broadcast medium suffers from. \textit{Id.} at 2457. Technological advances could make it possible to have an unlimited number of speakers using the cable medium. \textit{Id.} \textit{See also} Gaffney, \textit{supra} note 11 (discussing expansion of the cable medium).

111. \textit{Turner Broadcasting}, 114 S. Ct. at 2457. The government, however, acknowledged the technological differences between cable and broadcast but asserted that the economic characteristics of the media are similar. \textit{Id.}

112. \textit{Id.} The scarcity rationale is based on the physical structure of the broadcast industry. \textit{Id.} at 2456.


114. \textit{Id.} The "rational basis" test is the lowest standard of scrutiny in First Amendment claims and is applied to economic regulations. The test requires simply that there be a rational relationship between the regulation and its purpose. \textit{See} Red Lion Broadcasting Co. \textit{v. FCC}, 395 U.S. 367 (1969).

115. \textit{Turner Broadcasting}, 114 S. Ct. at 2458. The government maintained that Supreme Court precedent dictates that regulations whose purpose is to correct market dysfunction in a market whose commodity is speech, are subjected to a rational basis test. \textit{Id.} The Court found that the government's reliance on the market dysfunction theory was misplaced because the cases cited in appellee's brief involved straight antitrust issues and not First Amendment issues.

116. \textit{Id.} (citing Minneapolis Star & Tribune Co. \textit{v. Minnesota Comm'r of Revenue}, 460 U.S. 575 (1983)). Laws of general application are laws that are not
After dismissing the Government’s least restrictive scrutiny arguments, the Court decided that the must-carry provisions are content-neutral.117 The Court reasoned that, although cable operators are compelled to carry stations they may otherwise not choose to carry, demand of carriage is not dependant on the content of a particular cable operator’s programming.118 Relying on precedent, the Court asserted that facially content-neutral regulations may still be content-based if the purpose of the regulation is to control the message being conveyed by the regulated speech.119 Accepting the congressional reports as evidence of the purpose behind the regulations, the Court held that there was no attempt by the Government to control the content of cable programming.120

The Court next considered and dismissed Turner’s three arguments in favor of application of the Tornillo strict scrutiny test.121


Justice O’Connor, joined by Justices Scalia, Ginsburg and Thomas, dissented from the majority’s view that the provisions are content-neutral. Id. at 2476 (O’Connor, J., dissenting). O’Connor based her opinion on the congressional findings cited throughout the Cable Act that focus on the valued importance of local broadcast television. Id. at 2476 (O’Connor, J., dissenting). Specifically, in the operative sections of the Cable Act, the FCC, when determining if a station qualifies for carriage, must “afford particular attention to the value of localism by taking into account such factors as... whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage of sporting or other events of interest to the community.” Id. (quoting 47 U.S.C. § 534(h)(1)(C)(ii) (Supp. 1993)).

118. Turner Broadcasting, 114 S. Ct. at 2460. The must-carry obligations apply to all cable operators regardless of the content of the stations offered by the cable operator. Id. The only determination made is according to channel capacity. Id. The same reasoning was applied to the reduction of channels argument. Id.


120. Turner Broadcasting, 114 S. Ct. at 2462. The Court recognized that the purpose of the regulations was to prevent cable television from having complete economic control over broadcast television and to allow viewers access to free television. Id. Justice O’Connor’s dissent relied on the same legislative findings but concluded that the Government was attempting to regulate the content of cable programming by requiring operators to carry local and educational programs. Id. at 2476-77 (O’Connor, J., dissenting). “The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.” Id. at 2477.

121. Id. at 2464.
Turner's first argument was that the must-carry regulations intrude upon the cable operators' "editorial discretion" by requiring operators to carry programs not of their own choosing. Moreover, Turner argued that viewers would instinctively accept the viewpoints of the programs as the viewpoints of the cable operator. This argument was based on the Supreme Court's decisions in Tornillo and Pacific Gas, both of which held that speech regulations that impinge on editorial discretion must be narrowly tailored to further a substantial governmental interest.

The Court identified three flaws in Turner's reliance on Tornillo and Pacific Gas. First, the cases Turner relied on contained content-based regulations, setting them apart from the content-neutral must-carry provisions. Second, the Court determined that Turner's concern that viewers would accept the views of the broadcast stations as those of the cable operator or programmer was unfounded due to regulations requiring local broadcast stations to periodically identify themselves. Finally, the Court noted that the structure of newspaper distribution and availability is different from cable because readers are more likely and better able to have access to various publications in the same area, whereas one cable company usually has a monopoly over an entire area.

122. Id.
123. Id.
124. Id. at 2464, relying on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Tornillo Court held that regulations that intrude upon editorial discretion are either per se invalid or must meet the highest level of scrutiny. Tornillo, 418 U.S. at 258. This level of scrutiny requires that the chosen restriction be the least restrictive means available to further a substantial government interest. Turner Broadcasting, 114 S. Ct. at 2464. For a complete discussion of Tornillo, see supra note 59 and accompanying text. Appellants also relied on a similar holding in Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 21 (1974). Turner Broadcasting, 114 S. Ct. at 2465. In Pacific Gas, the Court applied strict scrutiny to a statute that allowed a newsletter critical of the gas company to be mailed with each bill to the consumer. Pacific Gas, 475 U.S. at 20-21. The Court held the gas company's First Amendment right includes the right not to speak and by requiring them to include the newsletter compromised this right. Id.
126. Id. at 2465. In both Tornillo and Pacific Gas, the statutes at issue afforded benefits to the speaker based on viewpoint. Id.
127. Id. Federal regulations require that broadcast stations identify themselves every hour. Id. at 2465-66 (citing 47 C.F.R. § 73.1201 (1993)).
128. Id. at 2466. Cable operators have more control over access than newspaper editors. Id. A newspaper is unable to prevent readers from purchasing and reading other publications. Id. In contrast, cable operators with a local monopoly have "gatekeeper" control over the television programming that enters a subscriber's home and can use this control to "silence the voice of competing speakers with a mere flick of the switch." Id. In the print media, the availability of various publi-
Turner’s second argument was that the must-carry provisions are speaker-partial regulations and require strict scrutiny.129 Relying on Buckley v. Valeo, Turner reasoned that the must-carry regulations favor broadcast programmers over cable programmers, making them speaker-partial.130 The Court rejected appellant’s interpretation of Buckley, because strict scrutiny is only required for speaker-partial regulations when the law is also content-based.131 Speaker-partial laws are content-based if they “reflect the Government’s preference of what the favored speaker has to say (or aversion to what the disfavored speaker has to say).”132

Turner’s final argument in favor of strict scrutiny was that the must-carry regulations single out cable operators for disfavored treatment.133 In dismissing this final argument, the Court relied on Leathers v. Medlock which held that a law that singles out a certain medium does not heighten First Amendment scrutiny unless it is “constitutionally suspect.”134 Furthermore, even in cases where there may be a need for heightened scrutiny, such scrutiny may be unwarranted if there are “special characteristics” of the medium that require differential treatment.135 The Court found that cable operators’ bottleneck monopoly was a “special characteristic,”

129. Id. at 2466. In support of its argument, Turner relied on Buckley v. Valeo, 424 U.S. 1 (1976). Id. Turner interpreted Buckley to require all speaker-partial regulations to be subject to strict scrutiny. Id. at 2466.

130. Turner Broadcasting, 114 S. Ct. at 2466.

131. Id. at 2466-67. The regulation at issue in Buckley was invalid because it concerned the “communicative impact” of the speech. Id. at 2467.

132. Id. (citing Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983)).

133. Id. at 2467. Turner argued that the type of burdens imposed on cable has not been imposed on analogous video delivery systems. Id. In support of this argument, appellants offered a line of cases that invalidated discriminatory taxation of the press. Id. (citing Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936)).

134. Turner Broadcasting, 114 S. Ct. at 2468 (citing Leathers v. Medlock, 499 U.S. 439 (1991)). Leathers held that laws that single out a certain medium are “constitutionality suspect only in certain circumstances.” Id. at 2468 (quoting Leathers, 499 U.S. at 444). There was no further discussion of what factors are necessary for a regulation to be constitutionally suspect.

135. Id. at 2468 (citing Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575 (1983)).
therefore the must-carry provisions escaped strict scrutiny.136 Moreover, the Court found that the must-carry regulations are aimed at the entire cable industry rather than a select few operators or programmers.137

In part three of its opinion, the Court discusses the adoption and application of the O'Brien-Ward intermediate level of scrutiny test.138 The Government's first burden under the test was to show that the economic health of local broadcasting was in jeopardy and in need of the type of relief offered by must-carry provisions.139 The Government failed to meet their burden because it was unable to show that the problem they sought to remedy actually existed.140

The Government relied on congressional findings and maintained that even when predictive, legislative findings must be afforded great deference.141 The Court responded, however, that while congressional findings do deserve a certain level of deference, they do not preclude judicial review.142 It is the Court's duty

136. Id. at 2468. No argument was made that other forms of media are afflicted with the problem of a bottleneck monopoly. Id. On these grounds, the Court justified differential treatment of cable. Id.


138. Turner Broadcasting, 114 S. Ct. at 2469. The Court agreed with the district court that the intermediate level of scrutiny was the appropriate standard for the must-carry provisions because the must-carry provisions are content-neutral regulations and impose only an incidental burden on speech. Id.

139. See id. 114 S. Ct. at 2470; United States v. O'Brien, 391 U.S. 367 (1968). The Turner Court referred to the House and Senate reports to find the purpose behind the Cable Act and found that Congress believed that the must-carry provisions served three governmental interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a variety of resources, and (3) promoting fair competition in the market for television programming." Turner Broadcasting, 114 S. Ct. at 2469. The Court viewed these interests in the abstract and recognized them as important and substantial. Id.

140. Id. at 2470. Precedent required factual support for assertions that a governmental interest existed. Id. (citing Edenfield v. Fane, 113 S. Ct. 1792 (1993); Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977)).

141. Turner Broadcasting, 114 S. Ct. 2470-71. See also CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (noting that deference is given to legislative findings in First Amendment cases); FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (holding that, in some instances, Congress better suited than the court to answer specific complex questions).

142. Turner Broadcasting, 114 S. Ct. at 2471, relying on Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). Specifically, the Court held that "in First Amendment cases the deference afforded to legislative findings does not foreclose our independent
to determine whether or not factual findings are supported by substantial evidence. In First Amendment cases, the Court must exercise independent judgment and decide if Congress has “drawn reasonable inferences based on substantial evidence.”

The Government relied on a 1988 FCC study and concluded that without must-carry regulations, a number of broadcast stations would be denied carriage and would be unable to survive. The Court determined that the study was inconclusive because even if both parties accepted the study as evidence, there was no direct proof that the protected stations would suffer financially without must-carry provisions. The Court suggested that the Government offer evidence showing that, as a result of being dropped, local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations or suffered a serious reduction in operating revenues.

Significantly, the Court did not directly address the Government's attempt to satisfy the fourth prong of the O'Brien test, which requires a showing that the regulations be narrowly tailored to serve their purpose. They did, however, state that direct evidence would be required to satisfy this burden.

The Court remanded the case to the district court to give the Government an opportunity to provide factual evidence in support of its assertions that the broadcast medium is suffering at the hands

judgment to the facts bearing in an issue of constitutional law.” Turner Broadcasting, 114 S. Ct. at 2471 (internal quotes omitted). 143. Turner Broadcasting, 114 S. Ct. at 2471 (citing Century Communications Corp. v. FCC, 835 F.2d 292, 304 (C.A.D.C. 1987)). 144. Id. The Court, however, is not to review the evidence de novo. Id. 145. Id. at 2471. The report showed that during a period when must-carry provisions were not in effect, 20% of cable systems dropped or refused carriage to one or more local broadcasters. Cable System Broadcast Signal Carriage Survey, Staff Report by the Policy and Rules Division, Mass Media Bureau, p. 10, Table 2 (Sept. 1, 1988), cited in S. Rep. No. 92, supra note 12, at 102-92. 146. Turner Broadcasting, 114 S. Ct. at 2471-72. The parties were in disagreement over the significance of the statistics contained in the study. Id. at 2471. 147. Id. at 2472. 148. For a discussion of the four-prong O'Brien test, see supra notes 33-34 and accompanying text. 149. Id. The Court found that there was a lack of evidence showing that the must-carry provisions would be effective. Id. Evidence showing the scope of interference with speech and also showing the existence of less restrictive means would be required to satisfy the final prong of the O'Brien test. Id. In his concurrence, however, Justice Stevens wrote that the Court should afford great deference to the legislative findings. Id. at 2473 (Stevens, J., concurring). Moreover, he suggested that if proper deference were given to the findings, further factual findings would be unnecessary to sustain the constitutionality of the must-carry provisions. Id. at 2474-75.
of cable's power and that the must-carry provisions are an appropriate remedy to the problem.  

2. The Dissenting Opinion

Justice O'Connor, writing for the dissent, focused on the majority's finding that the must-carry provisions are content-neutral. Justice O'Connor reasoned that each of the justifications offered in support of the must-carry provisions refers to content. In particular, Justice O'Connor focused on the benefits afforded noncommercial educational television stations; Justice O'Connor reminded the majority that in addition to prohibiting the suppression of speech, the First Amendment "generally prohibits the government from excepting certain kinds of speech from regulation because it thinks that the speech is especially valuable." Moreover, Justice O'Connor stated that the existence of content-neutral justifications does not allow the Court to ignore the content-based justifications.

In the alternative, Justice O'Connor stated that even if the regulations were in fact content-neutral, they would fail the O'Brien intermediate scrutiny test. Justice O'Connor determined that even if the asserted interest in the preservation of free television was an important interest, the regulations restrict more speech than was necessary.

B. Critical Analysis

The Supreme Court's finding that the must-carry provisions of the Cable Act are content-neutral ignored established precedent.

150. Id. at 2472. The opinion was broken down into the majority, two concurrences and one dissent. The three dissenters concurred in part and dissented in part (dissenting in judgment). Id.


152. Id.


154. Id. at 2478.

155. Id. at 2479 (stating that regulations are too restrictive regarding speech).


157. See United States v. Eichman, 496 U.S. 310 (1990) (regulation that is content-neutral on face may be content-based as applied); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (regulations attempting to control speech are content-based and demand strict scrutiny); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1975) (restrictions that impinge on editorial discretion must
The must-carry provisions are content-based because they are speaker-partial rules that favor one set of speakers over another based on viewpoint. Because the must-carry provisions seek to serve First Amendment goals, however, they are not facially invalid; rather, they must pass a strict scrutiny test.

The most exacting level of scrutiny is applied to content-based regulations. Furthermore, First Amendment protection applies equally to regulations that compel speech. The must-carry provisions are content-based regulations that compel speech.

The majority held that the must-carry provisions were content-neutral on their face, based on the Ward test. The Ward Court held that if a form of speech is regulated because of the government's agreement or disagreement with the message it conveys, then the regulation is content-based on its face. The Turner Broadcasting majority, however, reasoned that the must-carry provisions are content-neutral because the regulated entities, cable operators, are regulated without regard to the content of the programs they run and the broadcasters are benefitted without regard to their type of programming. This reasoning is flawed.

First, the type of programming protected by the must-carry provisions is local commercial programming and public educational programming. One of the main purposes in mandating carriage of local and educational programming, as articulated in the Congressional Report, was the substantive value of this type of programming. Under the Ward test, if the government regulates

be narrowly tailored); Buckley v. Valeo, 424 U.S. 1 (1976) (speaker-partial laws are content-based).

158. See Buckley, 424 U.S. 1 (regulations that favor one set of speakers over another demand strict scrutiny).


165. Turner Broadcasting, 114 S. Ct. at 2476 (O'Connor, J., dissenting). Justice O'Connor relied on the legislative intent found in the Cable Act to support her holding that the must-carry provisions are content-based. Id. Throughout the legislative reports Congress stresses the importance of preserving the viewpoints pro-
speech because of agreement (or disagreement) with the message it conveys, the regulation is content-based.\textsuperscript{166}

Second, after restating its holding in \textit{Buckley}, the Court applied the holding incorrectly. As the Court stated, \textit{Buckley} only applies to speaker-partial laws that are content-based.\textsuperscript{167} The test is whether the speaker-based laws "reflect the Government's preference for the substance of what the favored speakers have to say... ."\textsuperscript{168} The must-carry provisions are speaker-partial because they favor one set of speakers (local and educational broadcasters) over another (cable operators and programmers); they are content-based because they reflect the Government's belief that local educational broadcasting is invaluable.\textsuperscript{169} Thus, a proper application of \textit{Buckley} would have resulted in finding that the must-carry provisions do "reflect the Government's preference for the substance of what the favored speakers have to say" and require application of strict scrutiny.\textsuperscript{170}

Other content-neutral purposes will not save the must-carry provisions from strict scrutiny. Admittedly, preservation of local broadcasting was not the sole purpose behind the must-carry provisions.\textsuperscript{171} Effectuating a more competitive video market was also a major purpose behind the Cable Act.\textsuperscript{172} Clearly, economic regulation of this type is content-neutral. The existence of content-neutral purposes, however, does not lessen the "impropriety" of content-based purposes.\textsuperscript{173}

\hspace{1em}vided for by local broadcasting. \textit{Id.} For a full discussion of the legislative intent and history, see \textit{supra} note 13 and accompanying text.

\hspace{1em}166. \textit{Ward}, 491 U.S. at 791.

\hspace{1em}167. \textit{Turner Broadcasting}, 114 S. Ct. at 2467.

\hspace{1em}168. \textit{Id.} at 2467.

\hspace{1em}169. \textit{Id.} at 2462.

\hspace{1em}170. \textit{Id.} at 2467. \textit{See also} \textit{Buckley} v. \textit{Valeo}, 424 U.S. 1, 143 (1976) (holding that speaker-partial laws that reflect the government's preference demand strict scrutiny).

\hspace{1em}171. \textit{See}, \textit{e.g.}, \textit{Turner Broadcasting}, 114 S. Ct. at 2471 (discussing protection of broadcast industry from financial harm); \textit{S. Rep. No. 92, supra} note 12 and accompanying text (discussing legislative intent behind Cable Act).

\hspace{1em}172. \textit{See} \textit{S. Rep. No. 92, supra} note 12 and accompanying text (discussing legislative intent behind Cable Act).

Content-based restrictions must be narrowly tailored to serve a compelling state interest. Therefore, under this level of scrutiny, the government must show that the must-carry provisions: (1) further a substantial government interest; and (2) are the least restrictive means available to further the interest.

The asserted interest protected by section four of the Cable Act is the preservation of localism. The first prong of the strict scrutiny test requires the interest to be substantial and compelling. In dissent, Justice O'Connor questioned whether the protection of localism is anything greater than an important interest. It is more likely that the reasons behind section five of the Cable Act would be viewed as a compelling government interest. Section five requires carriage of educational programming. The asserted governmental interest of educating its citizenry has in the past been found to be a compelling governmental interest.

Assuming arguendo, that both sections passed the first prong of strict scrutiny analysis, the Government must then show that the must-carry provisions are the least restrictive means available. The effects of the must-carry provisions extend beyond local cable programmers and operators. Various networks dedicated to particular types of educational information which are only available through cable may suffer. The Cable Act provides no protection for these stations. It is argued that content-based restrictions should not be allowed to extend to other speech that is as valuable as the speech being protected. It is unlikely that the means adopted in the must-carry laws are the narrowest means available to insure diversity of viewpoints in the cable medium.

177. See Tornillo, 418 U.S. at 256.
178. Turner Broadcasting, 114 S. Ct. at 2478 (O'Connor, J., dissenting). Justice O'Connor recognized that the interest is important but stated that it is not compelling. Id.
182. Networks such as CNN, C-Span and the Discovery Channel, for example, have their basis in educating the viewer. Turner Broadcasting, 114 S. Ct. at 2479 (O'Connor, J., dissenting). A decrease in channel availability resulting from the carriage rules could have adverse effects on these types of networks. Id.
183. Id.
Both Justice O’Connor and Judge Williams agree that the government may have a viable concern in the abstract.\(^{184}\) To this end, both offered constitutional solutions. Justice O’Connor suggested that the government consider subsidizing broadcasters who provide programming deemed to be valuable.\(^{185}\) Justice O’Connor also looked to technological solutions such as creating new forms of media in the form of satellite broadcasting or fiber optic networks with unlimited channels.\(^{186}\) Judge Williams suggested that the government look no further than section nine of the Cable Act, where leased access is presently employed as a speech-neutral solution.\(^{187}\) In its urgency to dismantle long-standing First Amendment precedent, the Supreme Court overlooked the possibility of alternative solutions.

IV. IMPACT

Regardless of the district court’s holding concerning the constitutionality of the present must-carry provisions, the damage has been done. The Supreme Court’s determination that the must-carry provisions are subject to intermediate scrutiny has the potential to chill speech in areas of communication that have not yet fully developed.

Since its inception, a central goal of the First Amendment has been to maximize access to diverse sources of information and minimize government regulation of speech.\(^{188}\) The *Turner* decision is contrary to this goal. New sources of information are being developed daily. It is essential in this Age of Information that these new sources are allowed to develop and expand to their full potential. Pervasive regulation, such as the must-carry provisions, will prevent this from being achieved. In fact, those Senators who opposed the Cable Act warned that such measures of regulation would hinder efforts to expand information technologies.\(^{189}\)


\(^{185}\) *Turner Broadcasting*, 114 S. Ct. at 2480 (O’Connor, J., dissenting).

\(^{186}\) Id.


\(^{189}\) See S. REP. NO. 92, supra note 12, at 1227. “We are deeply concerned that the net, albeit unintended, effect of many of S. 12’s provisions - including rate regulation and program access - would be to curtail greater investment in increased channel capacity, new technologies, and programming.” Id. at 1230.
Turner was the Supreme Court's first opportunity to determine what position cable television, a relatively new source of information, occupies in First Amendment jurisprudence. It was an opportunity for the Court to open the door to new technologies by allowing these technologies full First Amendment protection. The Court, however, declined this invitation. The Turner decision indicates that the Court struggled with the determination. In fact, the Court pushed and pulled on established First Amendment models - e.g., Tornillo, Red Lion and O'Brien, in order to find a place for cable. Unfortunately, the Court took the wrong approach.

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