THE 1992 CABLE ACT: ACCESS PROVISIONS AND THE FIRST AMENDMENT

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I. INTRODUCTION

On October 5, 1992, Congress overrode a presidential veto and enacted the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act").[1] This legislation subjects the cable industry to extensive federal regulation.[2] Included in the 1992 Cable Act is a complex series of "must-carry" regulations that require cable operators[3] to carry local broadcast stations[4] as part of their basic service.[5] The must-carry

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[1]Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §§ 521-559 (1988 & Supp. IV 1992)).

[2]The 1992 Cable Act is designed to:

> (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;
> (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;
> (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;
> (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service;
> (5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.

1992 Cable Act § (2)(b).

[3]Cable operators own and operate cable systems. *See* 47 U.S.C. § 522(5). "The term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system . . . or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." *Id.* Cable operators that own and operate multiple cable systems are called multiple service operators (MSOs). The nation's largest MSO is Tele-Communications, Inc. (TCI) which services nearly 10 million subscribers. *Top 50 MSOs*, CABLE TELEVISION DEVELOPMENTS (National Cable Television Association, Washington, D.C.), June 1993, at 9.

[4]Broadcast stations are licensed by the Federal Communications Commission to broadcast over-the-air signals for traditional antenna reception. *See generally* A. FRANK REEL, THE NETWORKS: HOW THEY STOLE THE SHOW 148-62 (1979). Many local broadcasters are affiliated with large national broadcast networks such as ABC, NBC, CBS and Fox. *See id.* Must-carry assures a vast majority of broadcast stations access to cable systems. *See infra* notes 6-10.

[5]Cable systems often provide a number of "service tiers." A service tier is "a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(16). A cable system with 36 channels may offer a basic service tier consisting of 15-20 channels. *See id.* § 535(h).

provisions have sparked fierce debate between broadcasters and the cable industry.

The must-carry rules are contained in sections 4 and 5 of the 1992 Cable Act. Section 5 regulates the carriage of noncommercial educational broadcast stations.[6] Under section 5, cable systems of sufficient size are required to carry all local noncommercial educational broadcast stations that request carriage.[7] A cable system may be required to import the signal of a distant noncommercial educational broadcast station if no qualified local station exists.[8] Section 4 of the 1992 Cable Act regulates the carriage of commercial broadcast stations.[9] This section requires that cable systems set aside up to one-third of their channels for local commercial broadcast stations that request carriage.[10]

The must-carry regulations will have a significant impact on the cable industry and the viewing public.[11] Cable operators combine a variety of

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Once subscribers have purchased this basic tier, they can pay a separate monthly charge for additional tiers that will add groups of channels to their service. *Id.* Broadcast stations which this Act requires cable operators to carry must be "available to every subscriber as part of the cable system's lowest price service tier." *Id.*

[6]*Id.* § 535. Noncommercial educational broadcast stations are owned and operated by a public agency or nonprofit entity. *Id.* Noncommercial educational broadcast stations are also defined by the Act to include those stations which are owned and operated by a municipality and that are used for predominately educational purposes. *Id.*

[7]Systems with less than 12 activated channels are required to carry only one noncommercial educational station. *Id.* § 535(b). Systems with 13 to 36 channels are required to carry up to three noncommercial educational broadcast stations. *Id.* Systems with more than 36 activated channels must carry all qualified noncommercial educational broadcast stations. *Id.*

[8]*Id.*

[9]*Id.* § 534. Commercial broadcast stations are generally defined by the Cable Act as all full power broadcast stations not included as noncommercial educational stations in section 5. *Id.* § 534(h)(1).

[10]*Id.* § 534(b)(1)(B). Systems with twelve or less activated channels are required to carry only three local commercial television stations. *Id.* § 534(b)(1)(A).

[11]The regulations in section 5 affecting noncommercial educational stations are not expected to have a substantial impact on most cable systems. The Association for Public Broadcasting has compiled data which indicates that under these rules, eighty-four percent of the nation's cable systems would be required to carry only one public television service. H.R. REP. NO. 628, 102d Cong., 2d Sess. 71 (1992). Section 4, however, will have a significant practical impact on the cable industry and the viewing public.

broadcast and nonbroadcast[12] channels on their systems. The must-carry regulations force operators to use up their limited channel capacity carrying local broadcast stations with small viewerships. Consequently, nonbroadcast programmers will experience great difficulty and expense attempting to gain access to cable systems saturated with "must-carry" broadcast stations.

Moreover, nonbroadcast programming selected by an operator may be replaced by local broadcast programming that is less popular with viewers.[13] This legislation therefore ignores the wishes of viewers and to some extent dictates the choice of programs available to a community.

The must-carry provisions of the 1992 Cable Act present serious First Amendment implications.[14] This comment will examine the history of must-carry regulations imposed on cable operators. This comment will then analyze the purpose and effect of must-carry rules to determine the appropriate standard of judicial review. Finally, this comment will demonstrate that the specific must-carry provisions established by Congress in the 1992 Cable Act violate the Free Speech and Free Press Clause of the First Amendment.

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[12]Nonbroadcast or cable-only channels are delivered to homes exclusively through cable systems and are not available through traditional antenna reception. STEPHEN B. WEINSTEIN, GETTING THE PICTURE, A GUIDE TO CATV AND THE NEW ELECTRONIC MEDIA 67-84 (1986). Popular cable-only channels include ESPN, CNN, MTV, USA Network, and The Discovery Channel. *Id.* at 75-79. Cable-only channels compete with broadcast stations for the limited channel space available on local cable systems. *See id.* at 67-84. The must-carry provisions place no requirements on cable systems regarding cable-only or nonbroadcast channels. Those responsible for the content of cable-only stations are referred to as cable programmers. *See id.* The terms "cable-only" and "nonbroadcast" will be used interchangeably throughout this comment to refer to channels which reach viewers exclusively through cable systems.

[13]*See infra* notes 257-58 and accompanying text.

[14]The First Amendment to the United States Constitution was adopted in 1791 as part of The Bill of Rights. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

II. THE HISTORY OF MUST-CARRY CABLE REGULATIONS

A. THE EARLY HISTORY

The first cable television systems were constructed in the late 1940's.[15] These early systems were referred to as community antenna television (CATV) and functioned simply to bring broadcast television to small communities with inadequate reception.[16] Cable television was developed over the course of the next decade as a means of distributing good quality television signals to areas where reception was poor or non-existent.[17] Early CATV operators provided their service by installing antennas at desirable locations, such as high hills or mountains, and transmitting the signals by wire to less favorably situated viewers.[18] By the 1960's, more sophisticated technology allowed cable operators to transmit the signals of

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[15]Matt Stump & Harry Jessell, *Cable: The First Forty Years*, BROADCASTING, Nov. 21, 1988, at 38.

[16]John Walson is often credited with creating the first community antenna system in Mahanoy City, Pennsylvania. *Id.* at 37. Mr. Walson was the owner of an appliance store who found it difficult to sell television sets because of poor reception in the local community. *Id.* To remedy this problem and facilitate the sale of televisions, Mr. Walson erected an antenna on the top of a nearby mountain and strung wire from the antenna to the town below. *Id.* Residence of Mahanoy City were able to hook up to Mr. Walson's antenna for $2 per month. *Id.* Mr. Walson's company, Service Electric, currently services over 200,000 subscribers in Pennsylvania and New Jersey. *Id.*

[17]*Id.* For more on the early development of cable television, see generally WEINSTEIN, *supra* note 12.

[18]*See* WEINSTEIN, *supra* note 12, at 1-20. *See also* Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 517 n.16 (D.C. Cir. 1955) (describing early cable television systems). The basic design of early cable television systems is still with us today. *See generally* WEINSTEIN, *supra* note 12, at 17-66.

A cable system resembles an upsidedown tree; with programming collected at a single source and then branched out through the community. *Id* at 17. The system's main control center, where programming is received and processed, is called the headend. *Id.* at 34-37. The programming collected at the headend consists of broadcast television stations taken off-the-air, signals relayed by microwave radio or communication satellites, and material on videotape. *Id.* at 34. This programming is then placed on designated channels by the operator and sent out of the headend on several large "trunks." *Id.* at 37-42. These large trunks fan out into smaller "feeder" cables which may be strung on public telephone and utility poles through the community. *Id.* Cable is then tapped from these feeder cables and delivered into the homes of individual subscribers. *Id.* at 40-42.

distant broadcast stations to the communities they served.[19] These distant stations would then compete for viewers with the local broadcast stations licensed by the FCC to service the community.[20] Eventually cable-only channels, channels which were not licensed by the Commission to broadcast signals in any community, began to operate.[21]

Since the early 1960's, concern over the negative impact cable television might have on local broadcasting has led to significant government regulation.[22] The ability of distant broadcast stations and cable-only stations to compete with local broadcasters has steadily increased over the last thirty

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[19]Notice of Proposed Rule Making and Notice of Inquiry, 15 F.C.C.2d 417, 429-31 (1968). Originally, cable systems simply delivered the programs offered by nearby broadcasters without contributing any additional programming. *See generally* WEINSTEIN, *supra* note 12, at 67-81. In order to fill unused channels, cable systems slowly began to offer reruns of broadcast programs and old movies. *See id.* Eventually, cable operators took the next logical step and began providing subscribers with broadcast stations from distant markets. *Id.* These distant stations were acquired by cable operators through powerful antennas or microwave relay facilities. *Id.*

[20]As long as cable systems were restricted to places unable to receive broadcast television, the rest of the television industry ignored them. *See generally* REEL, *supra* note 4, at 148-62. It was not until cable systems were established in towns already being serviced by one or more broadcast television stations and cable threatened to dilute the local broadcast audience that the broadcast industry took notice. *Id.*

[21]*See supra* note 12. Originally, cable-only channels delivered their programming to operators through microwave radio transmission. *See* WEINSTEIN, *supra* note 12, at 22-24. This process required transmitters every several hundred miles, making it difficult and expensive to establish a nationwide distribution network. The major growth of cable-only network channels began in the late 1970's after Home Box Office (HBO) became the first cable-only channel to distribute its programming via satellite. *See id.* at 25-33. Satellite transmission made it possible for HBO and subsequent cable-only programmers to distribute their programs to cable systems at a reasonable cost throughout the country. *Id.* at 67-69.

[22]*See, e.g.*, First Report and Order, 38 F.C.C. 687 (1965); Second Report and Order, 2 F.C.C.2d 725 (1968). The Commission was concerned that cable television would divide the audiences and revenues available to television programmers and thereby, magnify financial difficulties being experienced by small local broadcast stations. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 176 (1968). For a discussion of the FCC's early views of cable regulation, see generally Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 81-84 (1981).

years.[23] Although initially the FCC took no interest in regulating the cable industry,[24] as the impact of cable on the overall television industry grew, broadcasters began to lobby the Commission for rules to protect their interests.[25]

The focal point of the FCC's regulations has always been must-carry provisions requiring cable systems to carry local broadcast stations. The first

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[23]The cable-only share of the television viewing audience has increased from 14% in 1983 to 30% in 1993. *Viewing Shares*, CABLE TELEVISION DEVELOPMENTS (National Cable Television Association, Washington, D.C.), June 1993, at 4.

[24]*See, e.g.*, Inquiry Into the Impact of Community Antenna Systems, 26 F.C.C. 403 (1959). The Commission concluded that there was "no present basis for asserting jurisdiction or authority over CATV's . . . ." *Id.* at 431. The 1959 Inquiry specifically determined that cable's adverse effect on broadcasting did not authorize the Commission to regulate cable. *Id.* at 430-31. *See also* Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958); Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 517 (D.C. Cir. 1955) (noting that the FCC "has not as yet determined the extent of its jurisdiction over community antenna services").

Clarksburg is one of the first cases to address the cable industry. At issue in *Clarksburg* was a FCC rule which prohibited a party from owning two broadcast stations servicing the same area. *Id.* at 515. The FCC issued a license to a company which already owned a station being imported into the community via cable television. *Id.* In issuing the license, the FCC refused to consider the affect of cable television and the additional broadcast stations it was carrying. *Id.* at 516. The D.C. Circuit Court of Appeals, giving great deference to the Commission, upheld the FCC's licensing decision. *Id.*

The court in *Clarksburg* was unfamiliar with the new cable industry and was forced to rely on the FCC for the little information it provided. *Id.* at 516-17. The court noted that "review of this aspect of the case is frustrated by the absence of any evidence in the record as to the character of these systems, their regulatory status, the manner in which they are owned and operated, the arrangements made for the broadcast of programs, and the nature of the relationship between those in control of the systems and the stations whose programs they carry." *Id.*

[25]Broadcasters' concerns over the emergent cable industry grew slowly because early cable systems were delivered to so few homes. *See* REEL, *supra* note 4, at 148-52. It was not until the mid-1960's, when cable had been installed in nearly two million homes, that the broadcast industry became seriously alarmed. *Id.* at 150. Broadcasters claimed that cable systems were diluting their audience, and that cable operators were unfair competitors who retransmitted programming without having to bear the cost of production. *Id.* Syndicators, who sold programs throughout the country on a station-to-station basis, claimed that cable was making it impossible for them to sell their programs in some cities and seriously depressing the prices in others. *Id.* If cable was importing a broadcast station from a distant market, and the station being imported already carried a syndicated program, syndicators had a difficult time selling this particular program in the market serviced by cable. *Id.*

instance of Government requiring a cable operator to carry local broadcast stations was affirmed in 1963 by the D.C. Circuit in *Carter Mountain Transmission Corp. v. FCC.*[26] In *Carter Mountain*, the court upheld an FCC decision that frustrated a cable operator's attempt to import distant broadcast stations to several small Wyoming communities.[27] The Commission compiled data indicating that competition from these stations threatened to destroy the area's only local broadcast station and thereby leave the community without over-the-air television service.[28] Consequently, the FCC reasoned that importing distant broadcast stations was detrimental to the public interest, and refused to license a microwave transmission facility[29] needed to deliver these stations.[30] The FCC decided to license the transmission facility only if the cable operator agreed to carry the signal of the area's one local broadcast station and did not duplicate its

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[26]321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

[27]Carter Mountain Transmission Corp. v. FCC, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963). Microwave transmission facilities were used to transmit television signals great distances. *See generally* REEL, *supra* note 4, at 25-30. Microwave facilities in large cities would transmit local broadcast stations to receiver facilities forty to ninety miles away. *Id.* These receiver facilities could then provide the programming to cable operators or re-transmit the signals to microwave facilities located even further from the station's origin. *Id.*

Carter Mountain was a private microwave transmission company servicing multiple cable systems in Wyoming. *Id.* at 460. A Riverton, Wyoming television station, KWRB-TV petitioned the FCC to limit Carter Mountain's expansion of service to the Riverton area. *Id.* KWRB-TV claimed that competition from distant broadcasts would bankrupt the struggling station and leave the Riverton area without any local broadcast television service. *Id.* at 460-61. In 1961, a FCC hearing examiner stated "whatever impact the operations of the CATV systems may have upon protestant's operation of station KWRB-TV . . . are matters of no legal significance to the ultimate determination made that a grant of the subject application of Carter . . . will serve the public interest." *Id.* at 461. The examiner's decision was indicative of the Commission's position before this case. *See supra* note 24.

[28]The court noted that this would leave large segments of the local population with no television service at all. *Carter Mountain,* 32 F.C.C. at 461. Although the local cable operator would have continued to offer a broad range of programming to those living in urban areas, people located in rural areas, where it was too costly to install cable service, would be left without television. *Id.*

[29]For a discussion of microwave transmission facilities, see *supra* note 27.

[30]*Carter Mountain*, 32 F.C.C. at 465.

programming.[31]

Two years later, the FCC issued an order which codified its decision in *Carter Mountain*.[32] The First Report and Order, issued in 1965, required any cable system using microwave technology to carry local broadcast stations.[33] Less than a year later, noting that it was "contrary to sound regulation" for mandatory carriage requirements to be applicable only to the microwave systems, the FCC extended these regulations to include all cable operators.[34] These regulations required cable systems, within the limits of their channel capacities, to carry the signals of all local commercial and educational stations.[35] Systems with limited channel capacity now had to afford priority to stations based on the strength of their broadcast signals.[36] The cable operator was given a choice in which broadcast stations to carry only when two stations of equal priority provided substantially duplicative programming.[37]

The FCC premised these early must-carry regulations on the belief that, left unchecked, the growth of cable would adversely impact broadcast television.[38] The Commission feared that by importing distant broadcast signals, cable companies would dilute the audiences and revenues available to local stations.[39] The FCC reasoned that this would put many small local

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[31]*Id.* at 465.

[32]First Report and Order, 38 F.C.C. 687 (1965).

[33]*Id.* at 688.

[34]Second Report and Order, 2 F.C.C.2d 725, 728 (1966). In 1966 cable systems using microwave technology comprised approximately 25% of the entire cable industry. *Id.*

[35]*Id.* at 752-53. The Commission also adopted procedures to entertain petitions from individual local broadcasters seeking greater protection than provided by these rules or from cable operators seeking waivers in specific cases. *Id.* at 746.

[36]*Id.* at 753. If a system, because of limited capacity, was unable to carry all local broadcast signals, the cable operator was required to provide subscribers with an A/B switching device on request. *Id.* These devices allowed subscribers to switch between cable and non-cable (antenna) reception. *Id.* For a further discussion of A/B switches, see *infra* notes 126-30 and accompanying text (explaining the FCC's 1986 Report and Order).

[37]*Second Report and Order*, 2 F.C.C.2d at 753.

[38]First Report and Order, 38 F.C.C. 687, 712-13 (1965).

[39]*Id.*

broadcast stations in serious jeopardy. Therefore, as part of its efforts to protect the television broadcast industry, the Commission forced cable systems to carry all local broadcast stations.[40]

Cable companies resisted this unfavorable Government intervention and it was not long before they challenged these regulations in federal court. In *Southwestern Cable Co. v. United States*,[41] the Ninth Circuit reviewed an FCC order prohibiting Southwestern Cable from importing distant broadcast television stations pursuant to these new regulations.[42] Southwestern Cable had challenged the order by, *inter alia*, attacking the FCC's general authority to regulate the cable industry.[43]

The FCC premised its authority to regulate cable television on the

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[40]Second Report and Order, 2 F.C.C.2d 725, 745-76 (1966). These rules assured small local stations that were struggling to attract an audience an opportunity to gain acceptance in all households with or without cable. *See id.* at 745. These regulations afforded local broadcasters significant protection in the television marketplace while at the same time requiring cable operators to carry stations they might otherwise chose not to carry. *See id.*

The Commission noted that cable television provided valuable public services and offered viewers a wide variety of program choices. *Id.* at 745. This was especially true in small markets that were not currently receiving the three major broadcast networks (ABC, CBS, and NBC). *Id.* The Commission maintained that it was not the purpose of these rules to deprive the public of these benefits or to restrict the enriched programming selection which cable made possible. Rather, the Commission explained that its goal was to:

> [I]ntegrate the [cable] service into the national television structure in such a way as to promote the maximum television service to all people of the United States, . . . both those who are cable viewers and those dependent on off-the-air service. The new rules . . . are the minimum measures we believe to be essential to insure that CATV continues to *perform its valuable supplementary role without unduly damaging of impeding the growth of television broadcast service.*

Id. at 746-47 (emphasis added).

[41]Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).

[42]Less then two weeks after the Second Report and Order was adopted, the licensee of a San Diego broadcast station petitioned the FCC for an order to prohibit a San Diego cable operator from importing Los Angeles television stations. *Id.* at 120. Pursuant to these new regulations, the FCC granted the order and thereby limited the number of Los Angeles stations the cable operator could carry. *Id.*

[43]*Id.* at 120-21. The circuit court agreed with Southwestern Cable and held that the FCC had no authority to regulate cable. *Id.*

Communications Act of 1934 ("the Communications Act").[44] The Communications Act gave the FCC broad powers to regulate radio and television but made no specific mention of the emergent cable industry.[45] Southwestern Cable claimed that because the Communications Act did not specifically address cable, the FCC lacked statutory authority to regulate the cable industry and issue these orders.[46] The FCC argued that these rules were necessary to protect broadcasters and that the Commission's jurisdiction over cable was ancillary to its broad authority to regulate the broadcast industry.[47] On appeal, the Supreme Court upheld the Commission's authority under the Communications Act to regulate cable.[48] The opinion did not specifically address the validity of must-carry or any First Amendment implications posed by these regulations, because the FCC's authority to regulate cable was the only claim before the Court.[49]

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[44]Pub. L. No. 73-416, 48 Stat. 1064 (1934). Congress created the FCC as the single government authority responsible for making broadcast communication available to the nation. *See id.* The Communications Act authorized the FCC to regulate interstate communication by wire and radio that was conducted by either common carriers or broadcasters. 47 U.S.C. § 151 (1988).

[45]In 1958 Congress considered legislation that would have authorized the FCC to regulate cable television. S. 2653, 86th Cong. 1st Sess. (1959). In 1966, the Commission unsuccessfully petitioned Congress to specifically authorize the FCC to regulation cable. *See* H.R. 1635, 89 Cong. 2d Sess. (1966). The report issued by the House Committee on Interstate and Foreign Commerce in 1966 specifically declined to speculate on the Commission's authority to issue the Second Report and Order. *Id.* at 9. The Committee commented only that "the question of whether or not . . . the Commission has authority under present law to regulate [cable television] is for the courts to decide." *Id.*

[46]The Court of Appeals for the Ninth Circuit noted that the FCC's power to regulate broadcasting was specifically in the form of licensing. *Southwestern Cable*, 378 F.2d at 121. The court found that the order issued by the Commission did not involve licensing but was rather "prohibitive in nature." *Id.*

[47]*See supra* notes 44-45 and accompanying text.

[48]United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The Court noted that Congress had charged the Commission with creating a system of broadcasting such that all communities of appreciable size would have at least one broadcast television station "as an outlet for local expression." *Id.* at 174 (quotation omitted). The Court explained that these goals were being jeopardized by the unregulated explosive growth of cable television. *Id.* at 175. The Court therefore concluded that the Commission could not "discharge its overall responsibilities without authority over this important aspect of television service." *Id.* at 177 (quotation omitted).

[49]*Id.* at 167.

By the late 1960's, cable was enjoying substantial growth and increased acceptance in the marketplace.[50] The FCC was impressed by cable's technological promise and was especially interested in cable's ability to deliver to viewers a great number of channels with virtually unlimited diversity.[51] The Commission also realized that cable's popularity would have a considerable impact on broadcast television.[52] With these ideas in mind, the FCC undertook procedures to implement an extensive set of guidelines governing the industry.[53]

In 1972, the FCC unveiled the Cable Television Report and Order ("the 1972 Report and Order") providing new and more comprehensive regulation of cable.[54] Included in the 1972 Report and Order was a new series of

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[50]By 1970, the cable industry consisted of over 2,500 cable systems servicing 4.8 million homes. *See generally* DON R. LE DUC, CABLE TELEVISION AND THE FCC 221 (1974). Growth would have been even more dramatic if not for the FCC's regulation of the industry. *See generally id.* at 115-83. FCC rules often allowed new to systems to offer subscribers little more than improved signals for the reception of local broadcast stations. *Id.*

[51]Cable Television Report and Order, 36 F.C.C.2d 143, 146-47 (1972).

[52]*Id.* at 168-69. The FCC made it clear, however, that the actual impact cable television would have on the broadcast industry was uncertain. In its report, the Commission noted:

> The conflicting conclusions of these [impact] studies make abundantly clear the difficulties involved in attempting to predict the future where there are so many variables and unknowns. While the reports and studies have been useful . . . we cannot rely on any particular report or study as a sure barometer of the future. We would simply point out there is no consensus, and we do not pretend that we can now forecast precisely how cable will evolve in major markets. There is inherent uncertainty.

Id. at 169.

[53]Notice of Proposed Rule Making and Notice of Inquiry, 15 F.C.C.2d 417 (1968). The FCC concluded that a "far-ranging, overall view is necessary if the Commission is to come to grips with this dynamic field and succeed in its efforts to assure the public of the most efficient and effective nationwide communications service possible." *Id.* at 417.

[54]*Cable Television Report and Order*, 36 F.C.C.2d at 146. In its 1972 Report and Order, the Commission noted that increasingly sophisticated cable technology, cost reductions, and improvements in the quality of program origination equipment made available increased channel capacity and low cost nonbroadcast programming. *See id.* The Commission concluded: "[t]he confluence of these developments provides the basis for the next stage in cable television's evolution with which the rules now adopted are

must-carry regulations designed to protect local broadcasters.[55] These regulations required cable systems to carry all broadcast stations licensed to operate within 35 miles of a cable system's community or otherwise significantly viewed in that community.[56] Additionally, systems were required to carry educational television stations of sufficient ("Grade B") signal strength.[57]

The FCC also promulgated several rules encouraging, and in some cases mandating, the carriage of cable-only channels.[58] The FCC required that all operators make available to the community at least three access channels on a first come, first serve non-discriminatory basis.[59] These channels became known as "access channels" because they guaranteed cable access to individuals and groups in the local community. Access channels were the "video equivalent of the speaker's soapbox," providing a television voice to those in the minority and those with unpopular views.[60] Operators were forbidden to exercise any control over the content of programming carried

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concerned." *Id.*

[55]*Id.* at 170-76. The Commission mentioned two objectives in promulgating these "signal carriage" rules: "(1) to assure that 'local' stations are carried on cable television systems and are not denied access to the audience they are licensed to serve; and (2) to gauge and, where appropriate, to ameliorate the competitive impact of 'distant' signal carriage." *Id.* at 173.

[56]*Id.* at 175. These regulations separated cable systems into four categories according to the markets they served: (1) cable systems located outside all television markets; (2) cable systems located in the first fifty major markets; (3) cable systems located in the second fifty major markets; and (4) cable systems located in smaller television markets. *Id.* at 170-71. Must-carry provisions varied only slightly between the categories.

[57]*Id.* at 175. Grade B was one of three grades created by the FCC to describe the strength of a television station's broadcast signal in a particular community. *See* United States v. Southwestern Cable, 378 F.2d 118, 120 n.1 (9th Cir. 1967). The three grades in descending order of strength were designated as: Principal City Grade; Grade A; and Grade B. *Id.* To qualify as Grade B, signals had to be adequately received by ninety percent of the community for at least twelve hours each day. *Id.*

[58]Cable Television Report and Order, 36 F.C.C.2d 143, 189-93 (1972).

[59]*Id.* at 190.

[60]H.R. REP. NO. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

on these channels.[61]

The 1972 Report and Order required cable systems to designate a single access channel each for public,[62] educational,[63] and local government.[64] Cable systems had to make additional channels available as the demand arose to encourage the use of these access channels.[65] Further, to facilitate the use of these channels, the Commission required cable operators to maintain an "inhouse capacity" for members of the public to record cable programming.[66] This provision ensured individuals and small groups access to the facilities necessary to produce a cable television program.

In 1976, noting that most access stations were at best "sporadically programmed," the Commission amended these rules to allow access channels to be shared among the various access users.[67] Unless an increased demand for access dictated otherwise, these new rules allowed cable operators to

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[61]*Cable Television Report and Order*, 36 F.C.C.2d at 195. The Commission provided that a cable operator "must not censor or exercise program content control of any kind over the material presented on the leased access channels." *Id.*

[62]Public access channels were designed to foster local television service. The Commission believed that there existed "[an] increasing need for channels for community expression." *Id.* at 191. The Commission concluded that public access channels would fill that need by offering "a practical opportunity to participate in community dialogue through a mass medium." *Id.*

[63]The FCC intended educational access channels to promote community involvement in school affairs. *Id.* The Commission was uncertain, however, about the specific benefits that these channels could offer. *See id.* The Commission explained that after a five year development period "we will be in a more informed position to determine in consultation with state and local authorities whether to expand or curtail the free use of channels for such purposes or to continue the developmental period." *Id.*

[64]The Commission did not establish precise guidelines for the use of government access channels but rather gave local governments "maximum latitude" in determining how these channels would be used. *Id.* at 191.

[65]When a system's current capacity was substantially "used up," the cable operator would have six months in which to make one new channel available. *Id.* at 192.

[66]*Id.* at 196. The Commission noted that "[the] goal of creating a low-cost, nondiscriminatory means of access cannot be attained unless members of the public have reasonable production facilities available to them." *Id.*

[67]Report and Order, 59 F.C.C.2d 294, 314 (1976).

fulfill their access requirements through a single channel.[68] The Commission also altered these rules so as to apply only to systems servicing 3,500 or more subscribers regardless of what markets these systems served.[69]

The Supreme Court invalidated the FCC's rules requiring cable systems to provide access channels in *FCC v. Midwest Video Corp.*[70] Writing for the majority, Justice White first stated that in many cases, the FCC rules eliminated a cable operator's editorial discretion to choose what programming would be shown on its system.[71] The Justice observed that control over programming shown on access channels was reserved to the individuals or groups that were utilizing these stations at any given time.[72] Justice White concluded that these rules had the effect of imposing common-carrier[73] obligations on cable systems.[74] The Court then struck these access provisions on statutory grounds, holding that the Communications Act prohibited the FCC from relegating cable operators to common carrier status.[75] The First Amendment implications of access provisions were not

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[68]*Id.* at 314. In addition to lessening the hardship on cable operators, the Commission believed that these new rules would "foster the success of access efforts by enhancing viewer identification with a channel which is more fully programmed, rather than dispersing individual access efforts among several channels which are not." *Id.*

[69]*Id.* at 302-05.

[70]440 U.S. 697 (1979).

[71]*Id.* at 700.

[72]*Id.*

[73]A common carrier provides nondiscriminating service to the public without "individualized decisions, in particular cases, whether and on what terms to deal." *Id.* at 701 (quoting National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641, *cert. denied*, 425 U.S. 992 (1976)). Common carriers such as interstate railroads and local bus companies decide what passengers to carry on a non-discriminating, first come, first serve basis. *See id.* at 702. The Communications Act of 1934 included special provisions to govern common carriers. *See* 47 U.S.C. §§ 201-224 (1988).

[74]FCC v. Midwest Video Corp., 440 U.S. 697, 701 (1979).

[75]The Communications Act provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h) (1988). The Court opined that, therefore, the Communications Act "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems." *Midwest Video Corp.*, 440 U.S. at 705. The

before the Court. Nevertheless, in a ominous closing footnote, Justice White commented that these provisions raised serious Constitutional concerns.[76]

In 1984, Congress enacted the Cable Communications Policy Act of 1984 ("the 1984 Cable Act").[77] This legislation amended the Communications Act to specifically include regulation of cable communications.[78] The 1984 Cable Act established a national policy regarding cable, and authorized the FCC to implement its goals.[79] Thus, the Act set the stage for the regulation of cable to move beyond the statutory difficulties confronted in the past.[80] Consequently, courts could no longer evade the constitutional implications of must-carry provisions or access channels.

The 1984 Cable Act contained two provisions specifically designed to promote diversity on cable systems.[81] First, the Act required cable systems

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Court then went on to hold that the Commission "may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcaster." *Id.* at 708-09.

Justice Stevens, joined by Justice Brennan and Justice Marshall, dissented. *Id.* at 709 (Stevens, J., dissenting). Justice Stevens agreed with the majority that section 3(h) makes it clear that broadcast stations are not to be treated as common carriers. *Id.* at 710 (Stevens, J., dissenting). The dissent concluded, however, that this section did not forbid the Commission from formulating rules merely because they might be termed common carrier obligations. *Id.* at 711 (Stevens, J., dissenting). Justice Stevens explained that Congress had given the FCC "flexibility to experiment with new ideas as changing conditions require," and that these access provisions were therefore well within the Commission's authority. *Id.* at 713 (Stevens, J., dissenting) (quoting CBS v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973)).

[76]*Id.* at 709 n.19. "The [circuit] court below suggested that the Commission rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous . . . ." *Id.*

[77]The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-559 (1988)) (amended 1992).

[78]The 1984 Cable Act added a new subchapter V-A entitled "Cable Communications" to the Communications Act. *See* 47 U.S.C. §§ 521-559 (1988 & Supp. IV 1992).

[79]*Id.* § (3)(a)(1).

[80]*See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 697 (1979). For a discussion of *Midwest*, see *supra* notes 70-76 and accompanying text.

[81]The 1984 Cable Act specifically ruled out treating cable systems as common carriers, stating: "[a]ny cable system shall not be subject to regulations as a common carrier or utility be reason of providing any cable service." 47 U.S.C. § 541(c). This section was

to designate up to fifteen percent of their channels for commercial use by persons unaffiliated with the operator.[82] Second, this legislation authorized municipalities to require cable systems to make access channels available for public, educational, or governmental use.[83] The 1984 Cable Act did not, however, specifically address must-carry beyond affirming the FCC policy already in place.[84] Less than a year later, in July of 1985, the Circuit Court of Appeals for the District of Columbia held that the FCC's must-carry rules were unconstitutional.[85]

B. The Circuit Court of Appeals for the District of Columbia Addresses Cable Access Provisions and the First Amendment

The Circuit Court of Appeals for the District of Columbia has extensively addressed the First Amendment implications of cable regulation and must-carry. In *Home Box Office, Inc. v. FCC*,[86] Home Box Office[87] challenged

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not altered by the 1992 Cable Act.

[82]*Id.* § 532.

[83]*Id.* § 531. The access channels authorized by this section are very similar to the access channels invalidated by the Supreme Court in *Midwest*. *See supra* notes 58-68 and accompanying text. In *Midwest*, the Court held that the FCC rules violated the FCC's statutory authority. *See supra* note 75. Congress responded to *Midwest* by enacting section 531 expressly authorizing access channels. *See* 47 U.S.C. § 531. Unlike the early FCC rules, section 531 gives local authorities the discretion to decide what access channels they will require local cable systems to carry. *Id.*

[84]Section 624(F)(2)(a) of the 1984 Cable Act left FCC rules regarding cable in force. *See also* H.R. REP. NO. 934, 98th Cong., 2d Sess. 40, 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4677, 4685 (noting must-carry's affect on various provisions of the 1984 Cable Act); S. REP NO. 67, 98th Cong., 1st Sess. 11-12 (1983) (explaining the need to leave in place the existing must-carry rules in order to protect the public interest).

[85]Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[86]567 F.2d 9 (D.C. Cir.) (per curiam), *cert denied*, 434 U.S. 829 (1977). The court explained that the opinion was issued *per curiam* only because "the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the panel." *Id.* at 17 n.1.

portions of the FCC cable regulations limiting the programming that a cable system could carry on a "pay-per-program"[88] or "pay-per-channel"[89] basis.[90] These regulations were designed to prevent cable from siphoning out of the broadcast industry popular programs, for which viewers might be willing to pay.[91] HBO claimed that these regulations, which protected broadcasters at the expense of the cable industry, violated the First Amendment.[92] The court in *Home Box Office* agreed, and invalidated the FCC regulations as "arbitrary, capricious, and unauthorized by law in all other respects."[93]

The court began its detailed analysis of HBO's First Amendment claim by addressing the level of judicial scrutiny that would be appropriate for reviewing these rules. The court specifically declined to apply strict scrutiny, which would have required the FCC to demonstrate that these rules

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[87]Home Box Office, Inc. (HBO) began operating in 1972 as cable television's first pay service. *Directory of National Cable Networks*, CABLE TELEVISION DEVELOPMENTS (National Cable Television Association, Washington, D.C.), June 1993, at 22. Subscribers wishing to receive HBO must pay an additional monthly charge to their cable operator. HBO currently has over 17 million subscribers and is carried on over 9,000 cable systems. *Id.*

[88]"Pay-per-program" or "pay-per-view" refers to the method by which cable operators bill subscribers to view a specific movie or event. Most cable systems currently offer subscribers popular movies, championship prize fights, and live concerts for between $4 and $40 per program. *See Home Box Office*, 567 F.2d at 18-19.

[89]Cable companies offer a number of cable-only channels on a "pay-per-channel" basis. *See id.* Under this arrangement, cable operators charge subscribers an additional monthly fee to access "premium" channels such as HBO, Cinemax, Showtime and The Disney Channel. *See id.*

[90]The rules addressed by the court were issued by the Commission in 1975. *See id.* at 18-19. These rules prohibited the pay exhibition of: (1) feature films more than three, but less than 10, years old; (2) specific sports events such as the World Series; and (3) all series programs. *Id.* In addition, these rules prohibited commercial advertising in conjunction with pay exhibition of programming and limited the overall number of hours of pay operation which could be devoted to sports and feature films. *Id.*

[91]*Id.* at 21. The FCC feared that the revenue derived from pay programming would be sufficient to allow operators of these services to bid away the best programs, thus reducing the quality of conventional broadcast television. *Id.*

[92]*Id.* at 43.

[93]*Id.* at 18.

were carefully tailored to achieve a compelling government interest.[94] Instead, the court employed a more lenient standard of review, introduced by the Supreme Court in *United States v. O'Brien*.[95]

The test established in *O'Brien* was designed to evaluate government regulation of conduct that has only an incidental impact on First Amendment freedoms.[96] In *O'Brien*, the Supreme Court upheld the conviction of a man who was arrested for publicly burning his Selective Service registration certificate to protest the Vietnam War. The defendant, O'Brien, was convicted under a federal statute which prohibited destroying, mutilating or in any way altering a registration certificate.[97] O'Brien argued that the statute was unconstitutional in this context because burning his registration certificate was a form of expression protected by the First Amendment.[98] The Court rejected this argument, explaining that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[99] The Court determined that the statute was appropriately designed to promote a substantial Government interest (i.e. raising an army).[100] Thus, the Court

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[94]Strict scrutiny refers to the highest level of inquiry which a court may employ when considering the constitutionality of a speech based statute or regulation. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 595-96 (1989). When strict scrutiny applies, government must demonstrate that it has narrowly tailored the statute or regulation to achieve a compelling interest. *Id. See, e.g.*, Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); Boos v. Barry, 485 U.S. 213, 321 (1988).

[95]Home Box Office, Inc. v. FCC, 567 F.2d 9, 48 (D.C. Cir. 1977) (citing United States v. O'Brien 391 U.S. 367 (1968)).

[96]United States v. O'Brien, 391 U.S. 367, 376 (1968). In *O'Brien*, the Supreme Court upheld the conviction of a man who was arrested for burning his Selective Service registration certificate on the steps of a Boston Courthouse to protest the Vietnam War. *Id.* at 369. O'Brien was convicted under a federal statute which prohibited destroying, mutilating or in any way altering a registration certificate. *Id.* at 370. The Court held the Government was justified in applying this statute to O'Brien despite the incidental impact on First Amendment freedoms. *Id.* at 382.

[97]*Id.* at 370.

[98]*Id.*

[99] *Id.* at 376.

[100]*Id.* at 377.

held that the Government was justified in applying this statute to O'Brien despite the incidental impact on First Amendment freedoms.[101]

The threshold issue in *O'Brien* was whether the abridgment of First Amendment freedoms merited treatment as "incidental."[102] The Court explained that a government regulation having only an incidental effect on speech can pass constitutional muster if: (1) the regulation furthers a substantial government interest unrelated to suppressing free speech, and (2) interference in First Amendment freedoms is no greater than necessary to further that interest.[103] Applying *O'Brien* to the pay programming rules in *Home Box Office*, the court found that the FCC regulations were grounded in speculation, "grossly overbroad," and consequently violated the First Amendment.[104]

Eight years after deciding *Home Box Office*, the D.C. Circuit Court of Appeals addressed the First Amendment implications of the FCC's must-carry rules in *Quincy Cable TV, Inc. v. FCC*.[105] Similar to *Home Box Office*, *Quincy* involved a Government effort to protect broadcasters by regulating cable. In *Quincy*, however, the court was uncertain about the correct standard of review to employ and declined to definitively adopt *O'Brien* as the test for evaluating the FCC's must-carry provisions.[106]

The court in *Quincy* recognized that must-carry might have more than an

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[101]*Id.* at 382.

[102]*Id.* at 377.

[103]*Id.* Specifically, the Court opined:

> [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 the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

[104]Home Box Office, Inc. v. FCC, 567 F.2d 9, 50-51 (D.C. Cir. 1977).

[105]768 F.2d 1434, (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Judge Wright authored the opinion of a unanimous court, which was joined by Judge Ginsburg and Judge Bork. *See id.*

[106]*Id.* at 1454.

"incidental" impact on First Amendment rights.[107] Writing for the court, Judge Wright noted that these rules "severely impinged" upon the editorial discretion of cable operators and favored local broadcasters over other voices competing to be heard.[108] Judge Wright posited that if the impact on free speech was substantial, *O'Brien* would be inappropriate, and these rules would warrant more exacting judicial review.[109]

The court in *Quincy* avoided the difficult task of establishing the appropriate standard of review. Judge Wright explained that the must-carry rules were not premised on a substantial government interest and were fatally overbroad and could not, therefore, be justified under even the more lenient *O'Brien* standard.[110] Accordingly, although the three judge panel had "serious doubts" about applying *O'Brien* in this context, the court concluded 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."[111]

Judge Wright determined that the must-carry provisions failed under both prongs of the *O'Brien* test.[112] Analyzing the first prong, the court held that the Commission had failed to demonstrate an important or substantial government interest to justify its regulations.[113] The FCC claimed that its regulations were necessary to protect and preserve free local broadcast television from the threat posed by the growth of cable.[114] Judge Wright

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[107]*Id.* at 1451-52. The court noted that the FCC's objective in promulgating the must-carry rules was "a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech." *Id.* at 1451. The court explained that the rules favored broadcasters over other cable programmers, infringed editorial discretion and coerced speech on the part of cable operators. *Id.* at 1451-52. Most importantly, the court was concerned that the must-carry rules could prevent cable-only channels from reaching viewers "even if that result directly contravenes the preference of cable subscribers." *Id.* at 1453.

[108]*Id.*

[109]*Id.* at 1451.

[110]*Id.* at 1463.

[111]*Id.* at 1448.

[112]For a discussion of the *O'Brien* analysis, see *supra* note 103.

[113]Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454 (D.C. Cir. 1985).

[114]*Id.*

noted, however, that the Commission had never undertaken substantial fact finding to determine if the perceived threat to broadcast television was real.[115] Avoiding the question of whether, as an abstract proposition preserving the broadcast industry qualifies as a substantial government interest, the court held that the "wholly speculative and unsubstantiated assumptions" relied upon by the Commission could not justify an abridgment of First Amendment freedoms.[116]

Respecting the second prong, the court held that these rules were drafted too broadly to be upheld under *O'Brien*.[117] Judge Wright opined that the must-carry rules provided indiscriminate protection to broadcasters "regardless of whether or to what degree the affected cable systems poses a threat to its economic well-being."[118] Further, Judge Wright determined that if the Commission's goal was to protect the local nature of television rather than the broadcasters themselves, the rules were equally

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[115]*Id.* at 1457. *See supra* note 52 (noting that FCC was not sure what impact cable would have on the broadcast industry).

[116]*Id.* at 1459. The court went on to note that the FCC had the burden of justifying rules which burden free speech. *Id.* at 1458. The court explained that "in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured." *Id.* at 1455. The court was therefore unwilling to "defer to the Commission's admittedly unproven belief that the must-carry rules in fact serve the substantial interest of protecting local broadcasting." *Id.* The court concluded that despite the heavy burden placed on the FCC to justify must-carry, the Commission had compiled no proof that the broadcast industry was in any real danger. *Id.* at 1459.

[117]*Id.* Federal agencies are typically granted broad discretion in choosing means to accomplish legitimate objectives. *Id.* Nevertheless, the court noted that while "[f]ully aware of the breadth of the agency's discretion and the concomitant limits on the scope of our review, our analysis leaves us with no doubt that the must-carry rules, as currently drafted, represent a 'fatally overbroad response' to the perceived fear that cable will displace free, local television." *Id.* The court stressed that it was "not quibbling over fine-tuning. For, as we now show, it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives." *Id.* (quoting Federal Election Comm'n v. National Conservative Pol. Action Comm., 470 U.S. 480, 501 (1985)).

[118]Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1461 (D.C. Cir. 1985).

overinclusive.[119]

Consequently, the court held that the Commission had failed to demonstrate that the must-carry rules were sufficiently tailored to justify their interference with First Amendment freedoms.[120] The court emphasized that its decision had not addressed whether any version of must-carry rules would be unconstitutional.[121] In so doing, the court appears to have encouraged the Commission to redraft the rules in a manner more sensitive to First Amendment concerns.[122]

The Federal Communications Commission suspended enforcement of the must-carry regulations immediately following the decision in *Quincy*.[123] The Commission did not attempt to challenge this decision or recraft the rules.[124] Nevertheless, in 1986, under pressure from various outside groups, the FCC unveiled new, more limited must-carry provisions.[125]

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[119]*Id.* at 1460. The Judge commented that pursuant to these regulations, a cable operator could be forced to add a local broadcast station to its system even if the system was already providing adequate local service to the community. *Id.*

[120]*Id.* at 1562. The court held that must-carry was not "sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with First Amendment rights." *Id.* (quoting FCC v. League of Women Voters of California, 468 U.S. 364, 392 (1984)). Interestingly, the court chose to quote the "substantial interference" language of *League of Women Voters* in its holding, not the "incidental restriction" language of *O'Brien*.

[121]*Quincy*, 768 F.2d at 1463.

[122]*Id.* at 1463.

[123]*See generally* H.R. REP. NO. 628, 102d Cong., 2d Sess. 49 (1992).

[124]*Id.* The House Report noted: "[t]he FCC did not seek review of the *Quincy* decision. Its apparent acquiescence in the elimination of must-carry regulations was challenged by industry groups, and the Congress . . . . [T]he FCC remained skeptical of new carriage regulations and delayed acting on the new rules until November 1986." *Id.*

[125]Report and Order, 1 F.C.C.R. 864, 887-89 (1987). The new must-carry rules principally affected cable systems with 20 or more usable channels. *Id.* at 888. The rules required these systems to devote up to twenty five percent of their available channels to "qualified" broadcast stations. *Id.* Cable systems with 20 or less channels were only required to carry one local noncommercial educational station. *Id.*

In order to qualify for must-carry, broadcast stations had to be licensed to operate within 50 miles of the cable community and viewed in at least five percent of the community's non-cable households. *Id.* at 887. New stations, however, were exempt from the minimum viewing standard for their first twelve months of operation. *Id.* Noncommercial educational broadcasters were not required to meet a minimum viewing

The 1986 must-carry rules were issued as part of a new program designed by the Commission to protect the broadcast industry. Pursuant to this plan, cable operators were required to provide customers with an input selector device (A/B switch),[126] which enabled subscribers to toggle between signals received from cable and a broadcast antenna.[127] The FCC reasoned that the threat to local broadcasters from cable would be eliminated once the public became acclimated to the use of these switches.[128] The new must-carry rules were implemented only as an interim measure, designed to protect local broadcasters until the public could become accustomed to using A/B switching devices.[129] The FCC planned for the must-carry rules to be in effect for five years — the time the Commission believed that it would take these switches to be accepted by the public.[130]

The 1986 must-carry rules quickly made their way to the D.C. Circuit Court of Appeals where they were held unconstitutional in *Century Communications Corp. v. FCC*.[131] Once again, the court avoided resolving the "vexing question" of what standard of First Amendment review should be employed in assessing these regulations.[132] The court concluded that these new rules, much like their predecessors, could not pass even the undemanding analysis of *O'Brien*.[133] The court noted that the FCC's judgment was predicated on "several highly dubious assertions" and that

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standard. *Id.* Cable operators were required to provide subscribers with the entire program schedule of all qualified stations. *Id.* at 889.

[126]*Id.* at 886.

[127]*Id.*

[128]*Id.*

[129]*Id.* at 890-91.

[130]*Id.* at 886. The Commission believed that limiting the must-carry provisions to five years made these rules more narrowly tailored and less intrusive on an operator's editorial discretion then the rules invalidated in *Quincy*. *Id.*

[131]835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988).

[132]The court noted, however, that "[t]he precise level of first amendment protection due a cable television operator is clearly an issue of much moment to the industry and ultimately to viewers." *Id.* at 298.

[133]*Id.*

"speculative fears alone have never been held sufficient to justify trenching on [F]irst [A]mendment liberties."[134]

Thus, echoing the holding of *Quincy* two years earlier, the court held that factual deficiencies in the Commission's justification rendered these particular rules unconstitutional.[135] Shortly thereafter, the FCC suspended enforcement of the 1986 must-carry rules.[136]

C. The Cable Television Consumer Protection and Competition Act of 1992

The Cable Communications Act of 1992 has breathed new life into must-carry regulation. After an exhaustive study of the cable industry, Congress concluded that must-carry rules were essential to the "preservation and further development of the benefits which the television industry has brought to the public."[137] The must-carry rules are included in sections 4 and 5 of the 1992 Cable Act.[138] These sections require cable operators to carry the signals of local commercial and noncommercial broadcast stations.

Section 4 of the 1992 Cable Act regulates the carriage of commercial broadcast stations.[139] Pursuant to this section, cable operators with twelve

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[134]*Id.* at 300.

[135]*Id.* at 303-04.

[136]4 F.C.C.R. 4552 (1989).

[137]H.R. REP. NO. 628, 102d Cong., 2d Sess. 50 (1992). The 1992 Cable Act was the culmination of extensive hearings over a three year period. *See* Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 39 n.14 (D.C.C. 1993).

[138]47 U.S.C. §§ 534, 535.

[139]*Id.* § 534. Section 534 provides in pertinent part:

> (b) Signals Required. —
>
> (1) In general. — (A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 of fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.
>
> (B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.
>
> (2) Selection of signals. — Whenever the number of local commercial

or fewer activated channels must carry at least three local commercial

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television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system . . . .

(3) Content to be carried. — (B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system . . . .

. . . .

(5) Duplication not required. — Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television stations which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation).

(6) Channel positioning. — Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator.

(7) Signal availability. — Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system.

. . . .

(10) Compensation for carriage. — A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section . . . .

. . . .

(h) Definitions. —

(1)(A) For purposes of this section, the term "local commercial television station" means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of [47 U.S.C. 535(l)(1)] . . . within the same television market as the cable system.

Id.

stations.[140] Operators with more than twelve activated channels are required to set aside up to one-third of their channels for local commercial broadcast stations requesting carriage.[141] In either case, if the number of local commercial broadcast stations exceeds the number of channels a cable operator is required to carry, the cable operator is permitted to choose which stations to carry.[142]

Section 5 regulates the carriage of local, noncommercial broadcast stations.[143] Under section 5, cable systems with twelve or fewer activated

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[140]*Id.* § 534(b)(1)(A). Cable systems with 300 or fewer subscribers are not subject to any must-carry provisions so long as they do not drop broadcast stations they are currently carrying. *Id.*

[141]*Id.* § 534(b)(1)(B).

[142]*Id.* § 534(b)(2).

[143]*Id.* § 535. Section 535 provides in pertinent part:

(b) Requirements to carry qualified stations. —

(1) General requirement to carry each qualified station. — Subject to paragraphs (2) and (3) of subsection (e), each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

(2)(A) Systems with 12 or fewer channels. — Notwithstanding paragraph(1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of on qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station — (i) the cable operator shall import and carry on that system the signal of one qualified noncommercial educational television station.

(3) Systems with 13 to 36 channels. — (A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels — (i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and (ii) may, in its discretion, carry additional such stations.

(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

(c) Continued carriage of existing stations, — Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to

channels must carry at least one noncommercial educational station.[144] Systems with thirteen to thirty-six activated channels must carry all noncommercial educational stations up to a maximum of three.[145] Systems with greater than thirty-six activated channels are required to carry all qualified noncommercial educational stations that request carriage.[146] A cable system may be required to import the signal of a distant noncommercial educational broadcast station if no qualified local station exists.[147]

The 1992 Cable Act stipulates that cable operators must carry the entire program schedule of any broadcast station provided for in these sections.[148] Additionally, operators are prohibited from receiving any form of

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all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990 . . . .

. . . .

(g) Conditions of carriage. —

(1) Content to be carried. — A cable operator shall retransmit in its entirety . . . each qualified local noncommercial educational television station whose signal is carried on the cable system . . . .

. . . .

(5) Channel positioning. — Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator.

Id.

[144]*Id.* § 535(b)(2).

[145]*Id.* § 535(b)(3).

[146]*Id.* § 535(b)(1).

[147]*See id.* § 535(b)(2)(B) (regulating systems with 12 or fewer channels); *Id.* § 535(b)(3)(B) (setting out rules for systems with 13 to 36 channels). Congress placed no equivalent requirement on systems with over 36 channels.

[148]*Id.* §§ 534(b)(3), 535(g)(1).

compensation from broadcasters in return for signal carriage.[149] Finally, these stations must be carried on the same channel position that they are broadcast over-the-air.[150]

Congress is confident that the constitutional infirmities contained in the earlier must-carry regulations invalidated by the D.C. Circuit in *Quincy* and *Century* have been remedied.[151] Much like the FCC, Congress justifies its regulations on the need to preserve and protect local over-the-air broadcast television.[152] Unlike the FCC orders, however, the congressional record is replete with evidence demonstrating how, absent regulation, broadcasters and the public will be harmed by cable.[153]

The must-carry provisions of the 1992 Cable Act were addressed by a

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[149]Although cable operators are given little flexibility with regard to the must-carry provisions, section 6 of the 1992 Cable Act provides local broadcasters an option to refuse mandatory carriage and negotiate a compensated carriage agreement with the operator. *See* 47 U.S.C. 325 (1988 & Supp. IV 1992).

[150]47 U.S.C. § 534(b)(6) (regulating the carriage of commercial stations); *Id.* § 535(g)(5) (regulating the carriage of noncommercial educational stations).

[151]S. REP. NO. 92, 102d Cong., 1st Sess. 53 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1186. *See also* H.R. REP. NO. 628 at 58. The 1992 Cable Act provides that any decision by a district court which holds the must-carry provisions contained in Sections 4 or 5 unconstitutional is reviewable as a matter of right by direct appeal to the Supreme Court. 47 U.S.C. § 555(2)(c). Perhaps not as confident as they might appear, Congress has apparently decided to take no chances with the troublesome D.C. Circuit Court of Appeals.

[152]*See* S. REP. NO. 92, at 41-44, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1174-77; *see also* H.R. REP. NO. 628, at 51-55.

[153]S. REP. NO. 92, at 42-46, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175-79; *see also* H.R. REP. NO. 628, at 51-55. Congress has provided studies to support the contention that if left unregulated, cable companies will drop many local broadcast stations from their system. S. REP. NO. 92, at 42-43. The record also shows that in the past, some systems required payment from broadcasters or other consideration in exchange for signal carriage. Further, these studies show that operators have often harmed the local broadcast stations they carry by moving them to new channels. *Id.* at 43-44. Congress has also provided statistics demonstrating that cable customers will not use A/B selection switches and that these switches are therefore not a feasible solution to protecting over-the-air broadcast television. *Id.* at 45. The Commission noted that broadcast and cable industry representatives agree that most subscribers will simply not use A/B switches, thereby eliminating them as a viable alternative to must-carry. *Id.*

federal district court in *Turner Broadcasting System, Inc. v. FCC*.[154] On the same day that the 1992 Cable Act became law, Turner Broadcasting,[155] the nation's largest cable programmer, filed suit against the FCC and the United States alleging that sections 4, 5, and 6 of the Act violated the First Amendment and were unconstitutional.[156] Within a short time a host of other cable programmers and operators joined Turner in challenging the must-carry provisions of the new legislation.[157]

Plaintiffs first claimed that sections 4 and 5 of the 1992 Cable Act violate their First Amendment rights because the Act singles out broadcasters for preferential treatment.[158] Cable programmers, who compete with broadcast programmers for access to cable systems, argued that they are being left to grapple among themselves over whatever channels remain once the local broadcasters are provided for.[159] Operators claimed that these regulations remove their editorial discretion, effectively obviating any choice over what

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[154]Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.C.C. 1993) (2-1 decision), *prob. juris. noted*, 114 S. Ct. 38 (1993).

[155]Turner Broadcasting is owned by Ted Turner and a consortium of cable operators including Tele-Communications, Time-Warner, United Artists, United Cable, Cablevision, and Continental. Geraldine Fabrikant, *Fighting for Visibility in a Proliferating Industry*, N.Y. TIMES, Feb. 4, 1990, at C10. Turner Broadcasting's holdings include Cable News Network (CNN), Headline News, Superstation TBS, and Turner Network Television (TNT). *Id.* Each of these cable networks reaches over 50 million subscribers. *Id.*

[156]*Turner*, 819 F. Supp. at 37.

[157]Turner amended its complaint to add several other cable programmers as plaintiffs. *Id.* at 37 n.7. In addition, four other suits were filed by cable operators and programmers. *Id.* at 37 n.8. Pursuant to section 23 of the 1992 Cable Act, these cases were consolidated and brought before a three judge panel in federal district court. *Id.* at 37. Section 23 states: "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of Section [4] or [5] of this Act or any provision thereof shall be heard by a district court of three judges . . . ." 47 U.S.C. § 555(c)(1).

[158]*Id.* at 38.

[159]*Id.* at 38. Cable programmers also attacked provisions of the 1992 Cable Act requiring cable operators to carry broadcast stations on the same channel that they are being broadcast over-the-air. *Id.* Broadcast stations are generally licensed by the FCC to broadcast on low number channels; channels which are considered favorable in the cable industry. Cable programmers argued that these provisions exalt broadcasters to a preferred status by awarding them the most desirable cable channel positions. *Id.*

programming will be carried over a large portion of their system.[160]

Plaintiffs also challenged section 6 of the 1992 Cable Act.[161] This section contains "retransmission consent" provisions which provide local commercial broadcasters with an option to decline must-carry status.[162] Broadcasters who decline must-carry can instead negotiate with cable operators for compensation in return for allowing their stations to be carried.[163] Plaintiffs contended that section 6 is inseparable from the must-carry provision in section 4, and that if the court invalidated section 4 as unconstitutional, section 6 should be struck as well.[164]

The district court held that sections 4 and 5 of the 1992 Cable Act do not violate the First Amendment.[165] Judge Jackson, writing the opinion of the court, began the analysis of must-carry by discussing the appropriate standard of review.[166] Plaintiffs contended that the must-carry regulations are content-based, thereby making *O'Brien*'s lenient standard of review inappropriate.[167] The court rejected plaintiff's argument, positing that a regulation is not content-based if "it is addressed to ends unrelated to the content of expression upon which it may have an effect."[168] The court held that the must-carry provisions do not address speech but rather are

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[160]*Id.*

[161]*Id.* at 39.

[162]47 U.S.C. § 325(b).

[163]Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 39 (D.C.C. 1993).

[164]*Id.* at 37.

[165]*Id.* at 36. The decision of the court was written by Judge Jackson with a sperate concurring opinion written by Judge Sporkin. Judge Williams dissented. The court concluded that the must-carry provision are "simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information." *Id.* at 40.

[166]*Id.* at 43-45.

[167]Content-based regulations, regulations which make any distinction based on the content of the message that speakers attempt to convey, are subject to the "most exacting scrutiny." *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988); Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 508 (1991).

[168]*Turner*, 819 F. Supp. at 43 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

"essentially economic regulation . . . unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver."[169]

The court, therefore, analyzed sections 4 and 5 under the test for incidental restrictions on speech set forth in *O'Brien* and its progeny.[170] Addressing *O'Brien*'s first prong,[171] the court held that Government has an important interest in assuring the survival of local broadcast television.[172] In so doing, the court contrasted the expansive fact finding effort undertaken by Congress to the meager record which had been compiled by the FCC

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[169]*Id.* at 40. The court pointed to the congressional reports accompanying the 1992 Cable Act to justify its position. These reports note that cable operators have an economic incentive to deny access to their systems to unaffiliated stations and that must-carry is an attempt to remedy the resulting unfair trade practices. S. REP. NO. 92, at 42, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175.

The Senate report maintained that cable operators commonly denied access to broadcasters and shifted broadcast stations to less desirable channel positions. *Id.* at 43. The report concluded that these actions effectively stifled competition and were likely to continue. *Id.* The Commission explained:

> Cable operators will continue to compete with local broadcasters for local advertizing revenues . . . . Moreover, cable operators have acquired, and will continue to acquire, ownership interests in programming services that are exhibited on cable systems. As a result, there will be a continued incentive to deny carriage and reposition local broadcast stations.

Id. at 44, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1177.

[170]*Id.* at 45. Judge Jackson specifically noted Ward v. Rock Against Racism, 491 U.S. 781 (1989), in which the Supreme Court applied the *O'Brien* test to content-neutral regulations governing the use of a public forum. In *Ward*, the Court upheld a New York City regulation requiring performers appearing at a public concert facility in Central Park to use sound equipment and a technician furnished by the City. *Id.* at 784. The use guidelines were a response to numerous complaints regarding excessive sound volume emanating from this facility. *Id.* at 785. The Court explained that the regulation was content neutral and narrowly tailored to serve significant governmental interests. *Id.* at 796. The Court explained further that these regulations had only an incidental impact on speech. *Id.* Consequently, applying *O'Brien*, the Court held that the City's use guidelines were valid time, place and manner restrictions on the use of a public forum. *Id.*

[171]The district court noted that, under *O'Brien*, Government had to demonstrate that the must-carry provisions: (1) further a significant government interest, and (2) are narrowly tailored to serve that interest. *Turner*, 819 F. Supp. at 45. For a discussion of *O'Brien*, see *supra* notes 96-103 and accompanying text.

[172]Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 46 (D.C.C. 1993).

several years earlier.[173] The court concluded that unlike the must-carry rules invalidated in *Quincy*, this legislation is a well thought-out response to a real and substantial danger.[174]

The court then analyzed the 1992 Cable Act under *O'Brien*'s second prong and determined that the must-carry provisions are sufficiently tailored.[175] The court specifically noted that the regulations only affect approximately one-third of a system's channel capacity.[176] Accordingly, the court concluded that the regulations therefore leave open "adequate — in fact plentiful — alternative, intra-medium channels of communications for cable speakers to deliver whatever messages they choose. The Constitution requires no more."[177]

Judge Williams dissented, concluding that the must-carry provisions are content-based because they require cable operators to carry speech that the operators would otherwise not choose to carry.[178] The Judge noted that the preferential treatment given broadcasters involves more than an incidental burden on speech, and that the regulations should therefore be subject to

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[173]*Id.* The court explained that before enacting the 1992 Cable Act, Congress elicited extensive reports and testimony on the status of the local broadcast industry. *Id.* Judge Jackson noted that these reports demonstrated that a significant number of cable operators were denying access to local broadcasters. The Judge cited reports demonstrating that by denying carriage to broadcasters, cable operators were diminishing the audiences and decreasing the revenues of these local broadcast stations. *Id.*

Judge Jackson explained that only after carefully evaluating these facts, did Congress conclude that local broadcast television was in serious jeopardy. *Id.* The court then declined to review the facts upon which Congress had based their conclusion, deciding instead to give Congress the deference they felt was due a co-equal branch of government. *Id.*

[174]*Id.*

[175]*Id.* at 47. The court noted that *O'Brien* does not require the government to "settle for means that serve its interests less effectively merely because an alternative might be less burdensome." *Id.* at 47 (citations omitted). The A/B selector switches proposed by the FCC in 1986 were a less burdensome alternative means of assuring broadcasters access to cable subscribers. The court noted that Congress had specifically found the A/B selector switches to be ineffective and that under *O'Brien*, Congress was not required to attempt this solution. *Id.*

[176]*Id.*

[177]*Id.*

[178]Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 59 (D.C.C. 1993) (Williams, J., dissenting).

strict scrutiny.[179] Applying strict scrutiny, Judge Williams determined that while the Government has a compelling interest in promoting diversity of views on cable television, the must-carry rules are not reasonably tailored to achieving that goal.[180]

Shortly after the district court's decision in *Turner*, Turner Broadcasting unsuccessfully petitioned the Court of Appeals for an injunction barring enforcement of the 1992 Cable Act's must-carry provisions.[181] Acting as a circuit judge for the District of Columbia Circuit, Chief Justice Rehnquist explained that forced access provisions like cable's must-carry, could not be imposed on privately owned newspapers.[182] Conversely, Chief Justice Rehnquist noted that the Supreme Court has upheld similar regulations imposed on broadcasters.[183] The Chief Justice concluded by emphasizing that the Court has not yet decided "whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters."[184]

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[179]*Id.* at 59-60 (Williams, J., dissenting).

[180]*Id.* at 62 (Williams, J., dissenting).

[181]Turner Broadcasting Sys., Inc. v. FCC, 113 S. Ct. 1806 (Rehnquist, Circuit Justice 1993) [hereinafter *Turner Injunction*].

[182]*Id.* at 1807-08 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)). For a discussion of *Miami Herald*, see *infra* notes 214-17 and accompanying text.

[183]*Turner Injunction*, 113 S. Ct. at 1808 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)). For a discussion of *Red Lion*, see *infra* notes 200-06 and accompanying text.

[184]*Turner Injunction*, 113 S. Ct. at 1808. The Supreme Court will address the must-carry provision of the 1992 Cable Act in early 1994. *See* Turner Broadcasting Sys., Inc., 114 S. Ct. 38 (1993) (noting probable jurisdiction in Turner Broadcasting's appeal from the district court's decision in Turner Broadcasting Co. v. FCC, 819 F. Supp. 32 (D.C.C. 1993)). Although the Supreme Court has not yet addressed the First Amendment implications of must-carry cable regulations, the Court has consistently posited that cable operators are part of the press and are engaged in speech protected under the First Amendment. *See, e.g.*, Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991) (noting that cable television is part of the press and is engaged in speech protected by the First Amendment); Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-95 (1986) (noting that cable television "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers, and pamphleteers"); FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) (explaining that cable operators exercise significant editorial discretion regarding the content of their programming).

In *Preferred Communications*, the Court addressed a First Amendment claim brought by a cable operator who was refused a license to operate by the City of Los Angeles.

III. THE APPROPRIATE STANDARD OF JUDICIAL REVIEW

The threshold issue in evaluating the must-carry provisions of the 1992 Cable Act is the appropriate standard of judicial review. Analysis of this issue must begin by determining "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."[185]

A. *RED LION* AND *MIAMI HERALD:* RE-EXAMINING ACCESS PROVISIONS IN BROADCASTING AND NEWSPAPERS

In the past, cable operators and programmers were often grouped with broadcasters for the purposes of evaluating regulations against First Amendment challenges.[186] For example, in *Black Hills Video Corp. v. FCC*,[187] the Court of Appeals for the Eighth Circuit summarily dismissed a cable operator's challenge to the early FCC must-carry rules.[188] The

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Preferred Communications, 476 U.S. at 490. Preferred Communications was unable to obtain a cable franchise because Los Angeles had previously awarded an exclusive franchise for the city. *Id.* The United States District Court of the Central District of California dismissed the complaint brought by Preferred Communications for failure to state a claim. *Id.* In Preferred Communications, Inc. v. Los Angeles, 754 F.2d 1396 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit reversed the district court and held that the First Amendment prohibited the city's exclusive franchising policy. The court concluded that if the city had the facilities to support multiple cable systems, the city could not issue just one exclusive license. *Id.* at 1411. The Supreme Court unanimously upheld the Court of Appeals and remanded the case to the district court for further proceedings. *Preferred Communications*, 476 U.S. at 496. Writing the opinion of the Court, Justice Rehnquist noted that a cable operator's activities "seem to implicate First Amendment interests as do the activities of wireless broadcasters . . . ." *Id.* at 494.

[185]Los Angeles v. Preferred Communications, Inc., 488 U.S. at 496 (Blackmun, J., concurring).

[186]Quincy Cable TV v. FCC, 768 F.2d 1434, 1443 (D.C. Cir. 1985).

[187]Black Hill Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

[188]In *Black Hills Video*, several cable operators challenged the must-carry provisions of the FCC's First and Second Report and Order. *Id.* at 66. The court held that National Broadcasting Co. v. United States, 319 U.S. 190 (1943), where the Supreme Court had upheld access regulations in the early broadcast industry, was controlling. *Id.* at 69. The court explained that it was irrelevant that cable systems did not themselves use the air waves to deliver television to viewers. *Id.* Instead, the court considered it crucial that

court determined that these rules were similar to access provisions already familiar to broadcasting and held that Supreme Court precedent involving broadcast television was controlling.[189] The circuit court posited that cable television occupied "the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations."[190]

Substantial Government intrusion into the broadcast industry has been upheld by the Supreme Court.[191] Regulations, unprecedented in more conventional methods of communication, have survived First Amendment challenges before the Court.[192] In 1927, when the first legislation regulating broadcasting was enacted, Congress considered imposing common carrier obligations on broadcasters.[193] This idea was eventually rejected in

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cable television did somehow use broadcast signals and that cable had a impact upon and relationship with television broadcast service. *Id.* For a detailed discussion of the FCC's First Report and Order, see *supra* notes 32-33 and accompanying text. For a detailed discussion of the FCC's Second Report and Order, see *supra* note 40. *National Broadcasting* is discussed *infra* notes 195-99 and accompanying text.

[189]*Black Hills,* 399 F.2d at 69.

[190]*Id.* at 68.

[191]*See, e.g.,* National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). For a discussion of the lessened First Amendment protection afforded the broadcast media, see generally H. Kalven, Jr., *Broadcasting, Public Policy and the First Amendment,* 10 J.L. & ECON. 15 (1967); Henry Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise,* 10 HARV. J.L. & PUB. POL'Y 87 (1987).

[192]FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) (noting that "of all forms of communications, it is broadcasting that has received the most limited First Amendment protection"). *See also* Omega Satellite Products Co. v. Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982). In *Omega,* the court addressed a request for an injunction brought by the City of Indianapolis to prevent an unlicensed cable operator from operating in the city. *Id.* at 121. The cable operator, Omega Satellite Products, responded by claiming that the city's licensing procedures violated the First Amendment. *Id.* The court rejected the city's claim that constitutionally intrusive regulatory procedures upheld in broadcasting could be directly applied to cable television. *Id.* at 126-27. The court explained that broadcasting received unique First Amendment treatment: "[t]he Supreme Court has interpreted the First Amendment to allow more stringent regulation of television than of theaters, movies, books, newspapers or open-air addresses." *Id.* at 127.

[193]*See, e.g.,* 67 CONG. REC. 12497, 12499-12507 (1926). The Committee on Interstate Commerce issued a proposal that would have required:

favor of a less restrictive approach requiring only that broadcasters provide adequate and fair coverage to public issues.[194]

A number of regulations enacted by the FCC to enforce this general policy have withstood constitutional challenges. In *National Broadcasting Co. v. United States*,[195] the Court upheld rules designed to restrict the influence of large networks in the radio broadcast industry.[196] The FCC rules required licensees to limit their contractual obligations to national networks in order to promote local programming and better service to local communities.[197] In *National Broadcasting*, broadcasters filed suit against the Government arguing, *inter alia*, that these rules violated the Free Speech Clause of the First Amendment.[198] The Court rejected the First Amendment challenge reasoning that, "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, *unlike other modes of expression, it is subject to governmental*

> If any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any public office, or for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce.

Id. at 12503. Senator Howell explained:

> We are all familiar with the results of propaganda, its dangers and its advantages; and the question which we are called upon to settle now is how the public may enjoy the advantages of broadcasting and avoid the dangers that may result therefrom . . . . I think it was the view of the committee that if any subject was to be presented to the public by any of the limited number of stations, the other side should have the right to use the same forum; and if such privilege were not to be granted, then there should be no such forum whatever.

Id.

[194]*See generally* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 104-10 (1973) (presenting a history of the Radio Act of 1927 and the various ideas considered for assuring diversity in broadcasting).

[195]319 U.S. 190 (1943).

[196]*See id.*

[197]*Id.* at 194.

[198]*Id.* at 226.

regulation."[199]

More recently, in *Red Lion Broadcasting Co. v. FCC*,[200] the Supreme Court upheld a series of rules promulgated by the FCC known as the Fairness Doctrine.[201] The Fairness Doctrine required that: "(1) [A broadcaster] devote a reasonable percentage of . . . broadcast time to the coverage of public issues, and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view."[202]

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[199]*Id.* (emphasis added).

[200]395 U.S. 367 (1969).

[201]For a detailed history of the Fairness Doctrine, see generally Linda Harowitz, *Laying the Fairness Doctrine to Rest: Was the Doctrine's Elimination Really Fair?*, 58 GEO. WASH. L. REV. 994, 995-99 (1990).

[202]FCC, Fairness Doctrine and Public Interest Standards: Handling of Public Issues, 39 Fed. Reg. 26371, 26374 (1974). The FCC reasoned that the Fairness Doctrine expanded and enriched public debate in broadcasting. *Id.* The Commission opined that while the doctrine might be viewed as a restriction on the broadcaster as a businessman, "there is no doubt that it is a positive stimulus to broadcast journalism." *Id.*

In a 1985 inquiry, however, the Commission reversed its position concluding that the fairness doctrine was unnecessary and detrimental to the public interest. Inquiry into the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 225 (1985). The Commission noted three reasons for this conclusion. First, the Commission explained that there had been a significant increase in the number and types of communication sources allowing the public access to a wide range of viewpoints "without the need or danger of regulatory intervention." *Id.* Second, the FCC reasoned that the fairness doctrine actually inhibited the presentation of controversial issues. *Id.* Finally, the Commission opined that the doctrine was unconstitutional, noting: "[t]he First Amendment does not require and may well not permit a neat apportionment, dictated by the government, in the marketplace of ideas, with equal space assigned to every viewpoint." *Id.* at 226.

The Fairness Doctrine was abolished by the Federal Communications Commission in In re Complaint of Syracuse Peace Council against Television Station WTVH, 2 F.C.C.R. 5043 (1987). In *Syracuse Peace Council*, the Commission held that the Fairness Doctrine "contravenes the First Amendment and thereby disserves the public interest." In 1987, President Bush vetoed an effort by Congress to enact a new Fairness Doctrine. *See* PRESIDENT BUSH, VETO — S. 742, S. Doc. No. 10, 100th Cong., 1st Sess. (1987) (explaining that the Fairness Doctrine "simply cannot be reconciled with the freedom of speech and the press secured by our Constitution").

Subsequent efforts by Congress to resurrect this doctrine have so far been unsuccessful. *See, e.g.*, FAIRNESS IN BROADCASTING ACT OF 1989, S. REP. NO. 141, 101st Cong., 1st Sess. (1989); *Broadcasters' Public Interest Obligations and S. 217, The Fairness in Broadcasting Act of 1991, Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 102d

In *Red Lion*, broadcasters challenged the portion of the Fairness Doctrine requiring them to present contrasting points of view, claiming that this "right to reply" rule violated the First Amendment guarantees of free speech and a free press.[203] The Court, per Justice White, unanimously rejected this argument and held that the government could force a broadcaster to carry a limited right to reply without violating the First Amendment.[204] Justice White characterized the broadcast media as fiduciaries who hold the scarce frequencies they have been licensed to control in trust for the public at large.[205] The Justice postulated that without these rules,

> station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.[206]

In *Red Lion*, Justice White expressed concern over the prospect of a

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Cong., 1st Sess. (1991). For a discussion of the present status of the Fairness Doctrine, see generally Jerome A. Barron, *What Does the Fairness Doctrine Controversy Really Mean*, 12 HASTINGS COMM. & ENT. L.J. 205 (1990).

[203]*Red Lion*, 395 U.S. at 387. The actual FCC rules at issue in *Red Lion* were called "right of reply" rules because they forced broadcasters to air replies to certain personal attacks or political viewpoints. *Id.* Broadcasters argued that the First Amendment protected members of the press, including broadcasters, from having to present views against their will. *Id.* Consequently, broadcasters believed that by interfering with their ability to exercise editorial discretion, the Fairness Doctrine abridged their First Amendment rights. *Id.*

[204]*Id.* at 392-93.

[205]*Id.* at 389. This rational for upholding access regulations in broadcasting is called "the scarcity rationale" because it is based on the inherent scarcity of available broadcast frequencies. *See* FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984) (noting that the scarcity rationale was still a valid approach to First Amendment analysis in broadcasting). The scarcity rational has been the subject of much criticism in recent years. *See generally* Andrew A. Bernstein, Note, *Access to Cable, Natural Monopoly, and the First Amendment*, 86 COLUM. L. REV. 1663 (1986).

[206]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

powerful media, such as broadcasting, being dominated by a select few.[207] This concern also deserves serious attention in the print media, where journalistic power and control is concentrated in the hands of a small minority of publishers.[208] The nature of the print media has changed dramatically from the days of our founding fathers.[209] Today, newspapers are big business, and a relatively small number of newspapers exist to serve an ever-growing population.[210] Competing newspapers have been eliminated in most large cities.[211] Consequently, modern newspapers

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[207]*Id. See generally* James A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). *But see* Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972) (opining that the development of constitutional doctrine should not be based on an "hysterical overestimation of media power and underestimation of the good sense of the American public").

[208]A prominent First Amendment commentator recently noted:

> [T]he idea of competing daily newspapers [is dead] in all but the major cities . . . . [E]ven Los Angeles and Miami have become single-daily-newspaper cities, and other cities, most recently Detroit and Seattle, have had their daily newspapers join forces in an anticompetitve arrangement that promises great profits and, perhaps, the continued existence of a second paper in partnership with its former competitor. Furthermore, the great profits from ending competition hold special allure for newspaper chains, thereby reinforcing the view that chains don't like competition in the first place. While the number of chains has diminished, the reason is chain mergers with chains, thereby creating even larger concentrations.

LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 289 (1991).

[209]*See* Barron, *supra* note 207, at 1642-47 (chronicling how changing technology has created ever increasing difficulties in obtaining access to the press).

[210]*See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249 (1974).

[211]The Court in *Miami Herald* observed that effective competition operated in only four percent of the nation's large cities. *Id.* at 249 n.13. In the early 1960's, Justice Douglas voiced his concern over the effect of newspaper monopolies which were increasingly becoming a reality in many communities. WILLIAM O. DOUGLAS, THE GREAT RIGHTS 124-27 (1963). Justice White noted that where a newspaper has a monopoly in an area, it usually presents only one side of an issue. *Id.* The Justice noted that rather than educate people and promote debate, these monopoly newspapers often attempt only to "inculcate in its readers one philosophy, one attitude — and to make money . . . . And the problem promises to get worse . . . ." *Id.*

command a resource at least as scarce as the broadcast frequencies operated by television broadcasters.[212] Views expressed in either media must be presented through a limited number of vehicles controlled by a small number of individuals.[213]

Nevertheless, newspapers have remained immune to any form of government imposed access requirements. Indeed, in *Miami Herald Publishing Co. v. Tornillo*,[214] the Supreme Court struck a Florida newspaper "right of reply" statute which created an obligation in the newspaper industry nearly identical to that upheld in broadcasting only six years earlier.[215] Writing for a unanimous Court in *Miami Herald*, Chief Justice Burger noted that the recent development of the newspaper industry had placed "in a few hands the power to inform the American people and

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[212]*See* Bruce Fein, *First Class First Amendment Rights for Broadcasters*, 10 HARV. J.L. & PUB. POL'Y 81 (1987). Fein noted that in 1987 there were over 12,000 radio and television stations operating throughout the United States, with approximately 6,000 new low power stations being planned. *Id.* at 83. In contrast, the nation had only 1,700 daily newspapers. *Id.* Fein concluded that "generally speaking, a person has more exposure to differing broadcast views than to differing newspaper views." *Id.*

[213]*See* Barron, *supra* note 207, at 1666. Jerome Barron argued the case for access provisions in newspapers before the Supreme Court in *Miami Herald*. Barron contends that consolidated control justifies access regulations in any mass media and that the distinction between newspapers and broadcasting drawn by the Court is "dubious." *Id.* Barron noted:

> Consolidation is the established pattern of the American press today, and the need to develop means of access to the press is not diminished because the limitation on the number of newspapers is caused by economic rather than technological factors. Nor is the argument that other newspapers can always spring into existence persuasive — the ability of individuals to publish pamphlets should not preclude regulation of mass circulation, monopoly newspapers any more than the availability of sound trucks precludes regulation of broadcast stations.

Id.

[214]418 U.S. 241 (1974).

[215]The statute addressed by the Court in *Miami Herald* allowed a candidate whose personal character or official record had been attacked by any newspaper to demand that the newspaper print a unedited reply to the charges. *Id.* at 244-45 n.2. The reply could take up the same amount of space used by the offending article, had to be printed in the same type, and was to be placed in a similar position in the newspaper. *Id.* The reply was to be published free of charge. *Id.*

shape public opinion."[216] Despite the practical similarities between access to broadcasting and the print media, however, the Court in *Miami Herald* rejected the idea of subjecting newspapers to access requirements.[217]

To explain why access provisions were constitutional in broadcasting but not in newspapers, the Court has relegated broadcasting to second-class First Amendment status — receiving lesser protection than other media.[218] Current First Amendment analysis presents a more desirable solution to the unique difficulties presented by broadcasting.[219] Reviewing courts need

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[216]*Id.* at 250.

[217]*Id.* at 258. The Court explained:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair of unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id.

[218]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969). Justice White opined that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." This theory permeates the Court's First Amendment jurisprudence. In Kovacs v. Cooper, 336 U.S. 77, 97 (1949), the Court explained that for each method of communicating courts must develop a unique body of law that reflects the "differing natures, values, abuses, and dangers" of each method. *Id.* Subsequent decisions have echoed this rational. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (quoting *Kovacs*, 336 U.S. at 97); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

[219]It is not desirable to invoke the unique characteristics of a particular media to justify different levels of judicial review. The powerful words of the First Amendment lend no support for such a theory. Nor does the history of importance placed on free speech and a free press. *See generally* LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-215 (1987). Strict scrutiny analysis, focusing on narrowly tailored means of furthering compelling government interests, provides a more consistent First Amendment analysis.

In *Red Lion*, the Court explained that "the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the fours and places of use, of sound trucks . . . ." *Red Lion*, 395 U.S. at 387. The relevant distinction between an individual's voice and the sound truck is volume, and regulations limiting volume are valid as applied to any source of speech. *See* Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (stating that "it can no longer be doubted that government has a substantial interest in protecting its citizens from unwelcome noise"); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) (noting that

only recognize that government has a compelling interest in enforcing access provisions on broadcasters that it does not have in other, more traditional, media. This compelling interest allows access provisions in broadcasting to survive the most exacting judicial review.[220]

Government has a compelling interest in promulgating access regulations in broadcasting because of the Government control which underlies the industry.[221] Unlike newspapers, which are affected primarily by economic

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Government has a compelling interest in "proscribing intrusive and unpleasant formats for expression"). There is no reason to create a new First Amendment body of law to deal individually with every mode of communication.

Two recent decisions by the Court have laid a groundwork for proper First Amendment treatment of broadcasters. In Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), the Court invalidated a Congressional ban on obscene telephone messages. *Id.* at 117. Writing for the majority, Justice White observed that a restriction on obscene broadcasting had been upheld by the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *Id.* at 127. Justice White briefly compared the attributes of telephone communications to the "unique attributes of broadcasting," however, the Justice ultimately distinguished *Pacifica* with reference to strict scrutiny analysis. *See id.* Justice White noted that unlike the regulations upheld in *Pacifica*, Congress's ban on obscene phone messages was not the least restrictive method available to protect children. *See id.* at 128.

In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Court upheld an FCC program that promoted minority participation in broadcasting. *Id.* at 552. Writing for the majority, Justice Brennan rejected a claim brought by a nonminority applicant that alleged that the FCC's program violated his equal protection rights. *Id.* The Court evaluated the FCC program under less than strict scrutiny, but did not rely on unique characteristics of the broadcast media to justify this treatment. *See id.* at 556. Justice Brennan presented a brief history of regulations designed to promote diversity in broadcasting, but only as a means of demonstrating that the FCC's program was "at the very least, an important governmental objective." *Id.* at 556-58.

[220]For a detailed analysis of why access provision should be subject to strict judicial review, see *infra* Part III.C of this comment.

[221]*See generally Red Lion*, 395 U.S. at 388-95. *Red Lion* pre-dates the use of strict scrutiny in First Amendment analysis and therefore, does not contain the terms "compelling interest" or "narrowly tailored" which are touchstones for the Court today. *See* Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 513 (1991) (Kennedy, J., concurring). In *Simon & Schuster*, Justice Kennedy opined that strict scrutiny analysis is ill-suited to First Amendment jurisprudence. *Id.* The Justice explained how strict scrutiny analysis has inadvertently found its way into First Amendment jurisprudence beginning with Carey v. Brown, 447 U.S. 455 (1980). *Id.* Justice Kennedy noted:

> [In *Carey*] the Court was making a statement about equal protection: "When government regulation discriminates among speech-related activities in a public

forces, the concentration of power in the broadcast industry is a direct result of Government control in the form of FCC licensing.[222] If use of the broadcast spectrum is not carefully controlled, the competing voices of persons wishing to broadcast will drown each other out, thereby frustrating the use of broadcast frequencies entirely.[223] The unique technology of broadcasting and its inherent limitations have therefore forced Government into the role of umpire, carefully controlling who has access to the airwaves.[224]

An unfortunate by-product of this necessary regulation is that some voices will be heard and some will not — there are simply not enough

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> forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interest, and the justifications offered for any distinctions is draws must be carefully scrutinized." Thus was a principle of equal protection transformed into . . . [a] general First Amendment statement about the government's power to regulate the content of speech.

Id. at 513 (Kennedy, J., concurring) (quoting *Carey*, 447 U.S. at 461-62).

Justice White's explanation for upholding access provisions in *Red Lion* presents the case for what would be deemed a compelling government interest under modern standards. For a detailed discussion of broadcast regulation and the Constitution, see generally Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

[222]Congress has authorized the Federal Communications Commission to issue broadcast licenses where "the public interest, convenience and necessity will be served." 47 U.S.C. § 309(a) (1988).

[223]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969). *See also* National Broadcasting Company v. United States, 319 U.S. 190, 212 (1943). In *National Broadcasting*, Justice Frankfurter outlined the difficulties which lead to first broadcast regulations in 1927. *Id.* According to Justice Frankfurter, in July, 1926, the Secretary of Commerce issued a statement urging radio stations to undertake self-regulation:

> But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard.

Id.

[224]*Red Lion*, 395 U.S. at 388.

broadcast frequencies available to accommodate everybody.[225] Consequently, the FCC's control over the airwaves presents a difficult constitutional dilemma: To promote free speech in broadcasting, Government has been forced into a role seemingly forbidden by the First Amendment.

Access provisions in broadcasting temper the adverse effects of Government regulations which are the industry's foundation.[226] Many persons are left unable to gain access to the broadcast media, and therefore, Government policy requires that broadcasters act as fiduciaries with obligations to present views and voices which are representative of the broadcasters' communities.[227] Federal courts have consistently upheld government regulation designed to pursue this policy, thereby preserving an uninhibited marketplace of ideas.[228]

In many ways, the First Amendment difficulties confronted in cable television resemble those of broadcasting.[229] Government regulation plays

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[225]*National Broadcasting*, 319 U.S. at 213.

[226]*See supra* note 224.

[227]*Red Lion*, 395 U.S. at 389.

[228]*See id.* at 389. In *Red Lion*, Justice White noted that "as far as the First Amendment is concerned those who are licensed stand no better then those to whom licenses are refused . . . . There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . ." *Id.*

[229]*See* Omega Satellite Products Co. v. Indianapolis , 694 F.2d 119, 127 (7th Cir. 1982). In comparing the need for regulation in broadcasting and the cable industries, the court in *Omega* noted that the increased regulation of broadcasting upheld by the Supreme Court has been premised on "the need to regulate broadcast frequencies to prevent frequency interference . . . [b]ut cable regulation involves another type of interference — interference with other users of telephone poles and underground ducts." *Id.*

Cable systems do not have the same technological restraints inherent in broadcast television. *See generally* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (1985). Cable is capable of delivering an enormous number of channels to subscribers. The average system currently delivers about 36 channels, S. REP. NO. 92, at 3, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135, and advanced technology currently installed in several large markets gives subscribers access to over 150 channels. NATIONAL CABLE TELEVISION ASSOCIATION, TWENTY FIRST CENTURY TELEVISION: CABLE TELEVISION IN THE INFORMATION AGE 6-10 (1992) [hereinafter TWENTY FIRST CENTURY TELEVISION].

This increased capacity to carry programs does not mean that scarcity of stations has been eliminated entirely from the industry and courts have often been too quick to dismiss the problem of scarcity as it applies to cable television. *See, e.g.*, Home Box Office Inc. v. FCC, 567 F.2d 9, 45 (D.C. Cir. 1977) (noting that broadcast First Amendment theory "cannot be directly applied to cable television since an essential precondition of that theory

a large role in determining which individuals or groups exercise control in the cable industry. Local communities are still in the position to license individual cable operators.[230] Licensing remains necessary so that municipalities may control the number of operators allowed to excavate channels for underground cable, string unsightly wire above ground, and gain access to utility poles.[231]

— physical interference and scarcity requiring an umpiring role for government — is absent"); Preferred Communications, Inc. v. Los Angeles, 754 F.2d 1396, 1404 (9th Cir. 1985) (explaining that "the physical scarcity that could justify increased regulation of cable operations does not exist in this case"). *Cf. Freedom of Expression & the Electronic Media: Hearings Before the Senate Committee on Commerce, Science & Transportation*, 77th Cong., 2d Sess. 20 (1982) (statement of William Van Alstyre) (stating that "scarcity may exist despite the existence of many channels just as there may be no scarcity though there were but one channel — which no one had the slightest interest in exploiting").

Clearly, there are more programmers seeking access to cable then there are channels on most systems. If this were not the case, must-carry provisions would be of little consequence. Judge Williams, dissenting in *Turner*, noted that approximately 2000 cable systems, serving one-third of all subscribers, have no excess channel capacity. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 59 n.3 (D.C.C. 1993) (Williams, J., dissenting) (citation omitted). Further, whereas the average cable system supports about 36 channels, there are 64 commercial cable networks as well as 20 pay-cable networks currently in existence. *Directory of National Cable Networks*, CABLE TELEVISION DEVELOPMENTS (National Cable Television Association, Washington, D.C.), June 1993, at 14.

[230]47 U.S.C. § 541 (1988 & Supp. IV 1992). Section 541 prohibits cable operators from providing cable service without being licensed by the local franchising authority. 47 U.S.C. § 541(b)(1). This section provides that: "[a] franchising authority may award, in accordance with the provisions of this title, one or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonable refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). *See also* Cable Television Serv.; Cable Television Relay Serv., 37 Fed. Reg. 3251, 3276 (1972) (explaining that local governments are "inescapably involved" in the franchising process because cable requires the use of streets and rights-of-way and because local authorities have special expertise in such matters).

[231]A cable operator must make use of public rights-of-way and easements to string cable and reach viewers. *See* 47 U.S.C. § 541(a)(2) (specifically authorizing licensed cable operators to construct cable systems over public rights-of-way and through easements). *See also* Community Communications Co., Inc. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981). In *Community Communications*, the court explained:

> [A] cable operator must lay the means of him medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity,

An overwhelming majority of communities are currently serviced by only one cable operator.[232] The 1992 Cable Act discourages this trend, and instead encourages competition between cable operators.[233] Toward that end, Congress has specifically forbidden franchise authorities from granting exclusive licenses.[234] Nevertheless, in communities where exclusive franchises were awarded and allowed to operate for a number of years, the competitive disadvantage faced by a potential new operator has been overwhelming.[235]

As long as government regulates the granting of cable franchises with the result that all potential operators cannot gain access to the market, cable will be faced with a First Amendment dilemma similar to that found in the

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> precede such disruptive use of the public domain . . . . A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.

Id. *See also* Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D.Fla. 1991). In *Telesat*, a Florida cable operator challenged Riviera Beach's constitutional authority to regulate cable franchises in the city. The federal district court rejected the operators claim holding that the city's regulations were constitutional because the construction of a cable system would reasonably tend to disrupt the city's rights-of-way. *Id.* at 398.

[232]S. REP. NO. 92 at 13, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1145-46. There are currently over 11,000 cable systems operating throughout the country. *Id.* Only 53 communities are served at least in part by more than one cable operator. *Id.*

[233]A cable system which is installed in a community to compete with an already existing cable company is called an overbuild. *See* S. REP. NO. 92 at 12-13, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1145-46 (discussing the present state of overbuilds in the cable industry). Despite encouragement from Congress, it is unlikely that cable operators will overbuild in substantial numbers. John Malone, President and Chief Executive Officer of TCI, the nation's largest cable operator, testified before the Senate Committee on Commerce, Science, and Transportation that it is not economically feasible to have two cable systems serving the same community. *Oversight of Cable TV, Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 166 (1989) [hereinafter *Oversight of Cable*] (testimony of John Malone, Chairman, TCI). Mr. Malone explained that "all you do there is double the capital cost, double the operating expenses, or raise them by 150 percent and split the revenues in half." *Id.*

[234]47 U.S.C. § 541(a)(1).

[235]*See Oversight of Cable, supra* note 233, at 165-66 (testimony of John Malone, Chairman, TCI).

broadcast industry.[236] Government regulation underlying the cable industry places the power to control this media in a select few persons. Similar to broadcasting, government regulation is therefore indirectly promoting the speech of some individuals while suppressing the speech of others. This First Amendment anomaly constitutionally justifies some degree of government regulation. To the extent that government has had a hand in creating the problem, government must be allowed to mitigate its effects in a way most consistent with the First Amendment. Rather then presenting an answer, however, this conclusion simply begs the more difficult question of how much and what type of regulation should be permitted in cable television.

B. EVALUATING THE MUST-CARRY PROVISIONS UNDER *O'BRIEN*: AN INAPPROPRIATE FIRST AMENDMENT STANDARD OF REVIEW

The absolute necessity for a healthy and robust marketplace of ideas and a press unfettered by government intervention are fundamental tenets of a democratic society.[237] The role of free speech and a free press cannot be overstated.[238] Without such freedoms, the very foundation of a self-

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[236]*See* Preferred Communications, Inc. v. Los Angeles, 754 F.2d 1396, 1404-05 (9th Cir. 1985) (citing cases which have recognized the need for public easements as a factor in assessing First Amendment claims in the cable industry).

[237]The concept of a marketplace of ideas was introduced by Justice Holmes in Abrams v. United States, 250 U.S. 616 (1919). Justice Holmes reasoned that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution." *Id.* at 630 (Holmes, J., dissenting). This metaphor is based on the belief that ideas complete for acceptance much like products in a marketplace. According to this theory, "good" ideas eventually gain acceptance, while unworthy ideas will be cast aside and replaced. *Id.*

[238]*See* Palko v. Connecticut, 302 U.S. 319, 325-27 (1937). In *Palko*, Justice Cardozo explained that free expression, guaranteed by the First Amendment, is "the indispensable condition, of nearly every other form of freedom." *Id.* at 327. Justice Cardozo opined that the First Amendment holds a special place among the Bill of Rights and that neither liberty nor justice could exist without the freedoms it secures. *Id. See also* Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979) (explaining that the guarantee of freedom of expression deserves a special place among the Bill of Rights).

The guarantees of free speech and a free press serve many important functions. An open and robust market place of ideas is essential for the advancement of society. There is no better way to discover scientific or political truths than through the trial and error of a free market. *See supra* note 237. Free speech also occupies an important role in democratic government by assuring that votes are cast by an informed electorate. *See generally* A. Bickel, THE MORALITY OF CONSENT 62 (1975). Finally, a free press acts

governing society is reduced to mere pretense.[239] A free democratic government can only be crafted from independently minded individuals; individuals inspired by free debate and informed by a free press.[240]

The must-carry provisions contained in sections 4 and 5 of the 1992 Cable Act present substantial interference in First Amendment freedoms. In *Turner*, the district court used the *O'Brien* analysis to uphold these sections of the Act.[241] Nevertheless, government action so boldly impinging on

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as a watchdog over government — checking the abuse of official power. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (documenting the role of a free press in checking the abuses of power by government).

[239]Associated Press v. United States, 326 U.S. 1, 20 (1944). In *Associated Press*, Justice Black explained that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic source is essential to the welfare of the public, that *a free press is a condition of a free society.*" *Id.* (emphasis added). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The maintenance of the opportunity for free political discussion . . . [is] an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech . . . are in a preferred position").

[240]In *Whitney v. California*, 274 U.S. 357 (1927), Justice Brandeis, in an eloquent concurrence explained:

> Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of public truth . . . . They believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievance and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76 (Brandeis, J., concurring).

[241]*See* Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 45 (D.C.C. 1993). For a further discussion of *Turner*, see *supra* notes 154-180 and accompanying text. The test originally set forth by the Supreme Court in *O'Brien*, and later refined in *Ward v. Rock Against Racism*, has become a popular method of evaluating First Amendment

First Amendment freedoms should be subject to strict judicial scrutiny.[242] The relaxed standard of review adopted by the Court in *O'Brien* and used to evaluate government regulations which have an incidental burden on speech is inappropriate in this context.[243]

In *O'Brien*, the First Amendment implications were minimal and the suppressed expression was completely unrelated to the legislation's legitimate purpose.[244] Further, *O'Brien* involved a law generally applicable to all

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challenges to cable regulation. In Erie Telecommunications v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988), a Pennsylvania Federal Court upheld local cable access regulations using *O'Brien*. In Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 (7th Cir. 1989), the Seventh Circuit Court of Appeals used *O'Brien* to uphold "local origination" provisions of Chicago cable franchise agreements. These provisions required Chicago cable operators to produce at least nine hours of programming specifically designed for the local community each week. In Telesat Cablevision v. City of Rivera Beach, 773 F. Supp. 383 (S.D. Fla. 1991), a Florida District Court upheld local franchising regulations against a First Amendment challenge by using *O'Brien*.

[242]*See* Simon & Schuster, Inc., v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 509 (1991).

[243]*See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1451-52 (D.C. Cir. 1985). The court in *Quincy* explained that the objective of must-carry rules "is a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech . . . . [T]he rules are explicitly designed to favor certain classes of speakers over others." *Id.* at 1451 (quotation omitted).

[244]United States v. O'Brien, 391 U.S. 367, 375 (1968). The Court noted at the outset:

> The [challenged statute] plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. The [statute] does not distinguish between public and private destruction and it does not punish only destruction engaged in for the purpose of expressing views.

Id. The Court went on to hold that Government has a compelling interest in "having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." *Id.* at 381.

The *O'Brien* standard applies in situations where "'speech' and 'nonspeech' elements are combined in the same course of conduct." *Id.* at 376. The Supreme Court reasoned that in these situations, a substantial government interest involving the 'nonspeech' element can justify an incidental burden on speech. *Id.* *O'Brien* itself, provides an excellent example of speech and nonspeech elements combined. O'Brien was arrested for burning his Selective Service registration card to protest the war in Vietnam. *Id.* at 369. The Federal Government had criminalized destroying these certificates in order to promote their substantial interest in raising an army. *Id.* The Court held that the government was justified in enforcing its legislation even though in this particular instance enforcement

individuals irrespective of whether the individuals were engaged in any form of speech.[245] Like most general laws, the Selective Service statute at issue in *O'Brien* had the opportunity to sweep some individuals engaged in protected expression within its scope. The statute itself, however, was not aimed at speech or any activity protected by the First Amendment.[246]

Conversely, the must-carry rules are industry specific and are meaningless outside the context of regulating speech.[247] Further, the must-carry regulations, undertaken by Government to preserve and protect broadcaster's speech, are not "unrelated to the suppression of free expression."[248] Congress cannot mask the reality of these rules by using only positive terms such as "preserving" and "promoting."[249] In a forum capable of accommodating only a limited number of speakers, promoting the speech of one person will suppress the speech of another.[250]

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interfered with expression otherwise protected by the First Amendment. *Id.* at 382.

[245]The Supreme Court has continually noted the distinction between generally applicable regulations and regulations specifically targeting speech or the press and has subjected generally applicable regulations to more lax judicial review. *See, e.g.*, Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (invalidating state tax specifically targeting the press). This approach to generally applicable laws is similar to the Court's recent treatment of claims brought under the Free Exercise clause of the First Amendment. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2232 (1993).

[246]*O'Brien*, 391 U.S. at 375.

[247]According to the Senate, the primary purposes of must-carry are: "(1) preserving the benefits of local television service, particularly over-the-air television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace." S. REP. NO. 92, at 58, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191.

[248] *O'Brien*, 391 U.S. at 377.

[249]*See, e.g.*, S. REP. NO. 92, at 58, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191.

[250]The difficulty with the must-carry provisions is not that they open up access to broadcasters but that they will at the same time close off access to nonbroadcast programmers. *Cf.* PruneYard Shopping Center v. Robins, 475 U.S. 74 (1980). In *PruneYard*, the Court upheld a California Supreme Court decision that interpreted the State Constitution as guaranteeing pamphleteers access to privately owned shopping centers. *Id.* at 78-79. The Court in *PruneYard*, however, was not confronted with a government provision that suppressed free speech. *See id.* at 88. The most difficult First Amendment issue in that case was whether the state was forcing shopping center owners to "participate

Congress is remarkably callous toward the fate of cable-only channels. The Congressional Record is conspicuously absent of any studies indicating the impact of these regulations on nonbroadcast or cable-only programmers.[251] Nonbroadcast channels, for whom cable is the sole source of distribution, are in more danger from reduced access to cable systems than broadcasters. Nor has Congress addressed the importance of these cable-only programs to local communities now or in the future.[252] Cable-only channels are more likely to represent novel or unpopular views than their broadcast counterparts.[253] The must-carry rules, however, require a cable operator to carry broadcast stations regardless of their content and "irrespective of whether the operator considers them appropriate programming for the community it serves."[254]

As a consequence of the 1992 Cable Act, nonbroadcast channels are faced with an "overwhelming" competitive disadvantage in the video marketplace.[255] Must-carry regulations are forcing nonbroadcast channels to compete amongst themselves for channels remaining on a cable system after the broadcast stations have been provided for.[256] Even more

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in the dissemination of an ideological message." *Id.* at 86-88. The Court held that the provisions did not coerced speech in violation of the First Amendment. *Id.* at 87.

The Court then turned to the specific issue of forced access in light of *Miami Tornillo*. *Id.* Writing for the majority, Justice Rehnquist specifically distinguished *Miami Tornillo*, noting that the Court in *Miami Herald* had been concerned about the Florida Statute ultimately inhibiting speech. *Id.* at 88. Justice Rehnquist explained: "These concerns are obviously not present here." *Id.* The 1992 Cable Act, by potentially inhibiting the speech of nonbroadcast programmers, presents a problem similar to that in *Miami Herald.*

[251]*See* H.R. REP. NO. 628; S. REP. NO. 92, *reprinted in* 1992 U.S.C.C.A.N. 1133.

[252]*See generally* H.R. REP NO. 862, *reprinted in* 1992 U.S.C.C.A.N. 1231; S. REP. NO. 92, *reprinted in* 1992 U.S.C.C.A.N. 1133.

[253]*See* Barron, *supra* note 207, at 1641 (noting that mass media has developed an antipathy to ideas that will prevent novel and unpopular ideas from ever being aired).

[254]Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985).

[255]*Id.* at 1451.

[256]*Id.* The effect of these regulations has been seriously exaggerated by the "retransmission consent" provisions contained in section 6 of the 1992 Cable Act. 47 U.S.C. § 325. This provision allows broadcast stations to decline must-carry and instead negotiate with cable operators to be compensated for allowing their stations to be carried. *Id.* Most cable operators have been adamant in their refusal to provide cash payments to broadcasters, threatening instead to delete these stations from their systems. To circumvent

disturbing, these regulations infringe upon cable subscribers' choice of what to view, thereby undermining the First Amendment goal of "putting the decision as to what views shall be voiced largely into the hands of each of us."[257] Certain cable networks or programs, popular among subscribers, may be removed entirely from a system and replaced with less popular local broadcast stations.[258] Programs removed from a cable lineup by these provisions will have no equivalent means of presentation, and the ideas which they represent may be effectively removed from the marketplace. Consequently, the First Amendment implications of must-carry are far too substantial to allow these rules to be analyzed under the lenient *O'Brien* standard.

Finally, the district court in *Turner* was greatly influenced by Congress's characterization of sections 4 and 5 of the 1992 Cable Act as "primarily economic regulation."[259] Nevertheless, must-carry regulations are only

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this problem, broadcast stations affiliated with national networks are allowing cable systems to retransmit their programming in return for the system's agreement to carry new cable stations developed and operated by the networks. Since, in reality, cable operators can not afford to drop any of the major networks, this arrangement is forcing them to carry additional stations owned by broadcast networks at the expense of smaller cable programmers.

[257]Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 508 (1991) (quoting Cohen v. California, 403 U.S. 15, 24 (1971)). The Court explained:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

[258]*See Quincy*, 768 F.2d at 1453. The court in *Quincy* noted that the must-carry rules "prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers." *Id.* These rules, therefore, create serious First Amendment concerns. As the court in *Quincy* explained, "[t]his conscious disregard of subscribers' viewing preferences is difficult, if not impossible to reconcile with the Supreme Court's repeated admonition that the interest of viewers should be considered paramount in the First Amendment calculus." *Id.* (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 371, 390 (1969)).

[259]Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 40 (D.C.C. 1993) (citing 1992 Cable Act § 2(a)(14)-(15)). The court explained that in enacting the must-carry rules, Congress "employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a

marginally related to economics. The economic consequences which flow from them are nothing more than the natural by-product of laws which substantially impact any large industry.[260] Must-carry regulations are primarily regulations of speech and of the press. Congress's mischaracterization of this legislation is a blatant attempt to dictate the level of judicial scrutiny and thereby circumvent appropriate constitutional review.[261]

C. Establishing Strict Scrutiny as the Appropriate Standard of Review

Sections 4 and 5 of the 1992 Cable Act must be subject to the most exacting judicial review. It is firmly established that regulations which discriminate among speakers based on the content of their speech violate the First Amendment.[262] At first blush, the must-carry rules appear content-neutral, and there is no reason to believe that Congress intended them to

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market in 'speech.'" *Id.*

[260]Congress is not interested in simply creating an open market-place where broadcast and cable channels complete for viewers on equal footing. *But cf. Turner*, 819 F. Supp. at 46. After all, the open market could reject all local broadcast stations in favor of cable-only channels. This clearly is not the intent of Congress. Rather, Congress intends to assure that local broadcast stations continue to exist regardless of whether they are competitively accepted.

[261]Substantial deference must be given to Congress's finding of facts. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 569 (1990). Nevertheless, extending this deference to factual conclusions and the characterization of legislation would effectively emasculate a federal court's power of judicial review. Often, in current constitutional litigation, the battle is won or lost when the standard of review is established. For a more detailed discussion of the deference due Congress, see *infra* note 292.

[262]Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 508 (1991) (quoting Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984)). In *Simon & Schuster*, the Court invalidated New York's "Son of Sam" statute that authorized government to confiscate a criminal's income derived from works describing his crime. *Id.* The money was placed in escrow and eventually distributed to victims of crime. The Court determined that the New York statute was content based and subject to strict scrutiny because it was directed at works with a specific content. *Id.* at 508-09. Writing for the majority, Justice O'Connor concluded that the statute was "to say the least, not narrowly tailored to achieve the State's objective . . . ." *Id.* at 512.

discriminate among speakers.[263] The fact that Congress did not intend to regulate the content of cable television programming does not, however, protect this legislation from being highly suspect.[264]

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[265] the Supreme Court held that regulations designed to affect specific elements of the press carry with them a heavy burden of justification.[266] *Minneapolis Star* involved a state tax specifically imposed on the cost of paper and ink products used to produce newspapers and other periodic publications. The Court began by noting that government can subject the press to "generally applicable economic regulations" without violating the First Amendment.[267] Writing for the majority, Justice O'Connor then observed that the Minnesota tax was not generally applicable to all businesses but rather singled out the press for special treatment. The Justice recognized that such laws have the potential to be used as a powerful weapon against the press.[268] Therefore, the Court held that regulations specifically targeting the press place a heavy burden of justification on the State because the regulations suggest that "the goal of the regulation is not

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[263]Government regulation of speech is considered to be content-neutral "so long as it is justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). In *Ward*, the Court determined that a New York City regulation requiring performers at a public concert facility to use sound equipment and a technician furnished by the City was content neutral. *Id.* at 784.

[264]Simon & Schuster, 112 S. Ct. at 509 (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)) (noting that Supreme Court cases have consistently held that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"); *see also* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516-17 (1993) (explaining that government need not be acting with animus toward specific ideas to violate the First Amendment).

[265]460 U.S. 575 (1983).

[266]Justice O'Connor wrote the opinion of the Court. Justice White authored an opinion in which the Justice concurred in part and dissented in part. Justice Rehnquist wrote a separate dissenting opinion.

[267]*Id.* at 581. *See also* Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991); Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969); Associated Press v. United States, 326 U.S. 1, 19-20 (1945).

[268]*Minneapolis Star*, 460 U.S. at 585.

unrelated to suppression of expression."[269]

Congress contends that the current state of the cable industry compelled affirmative government action to diffuse the monopolistic control exercised by cable operators and promote competition in the industry.[270] Rather than addressing this problem by applying generally applicable antitrust laws, Congress chose to enact legislation specifically designed to regulate the cable industry. Under the holding in *Minneapolis Star*, these regulations must be subject to rigorous judicial review.[271]

Furthermore, must-carry rules require strict scrutiny because they employ preferential treatment within the press.[272] Congress enacted this legislation at least in part to promote and preserve local broadcasting.[273] The must-carry provisions of the 1992 Cable Act ensure broadcasters ample exposure so that they may remain economically viable and continue to be heard. In many cases, however, this "benefit" will be achieved at the direct expense of nonbroadcasters and their speech.

Targeting broadcasters for special protection presents a powerful potential for government abuse.[274] Regulations that provide differential treatment for specific factions of the press raise the specter of government control forbidden by the First Amendment.[275] Reviewing courts must subject

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[269]*Id.*

[270]S. REP. NO. 92, at 42, *reprinted in* 1992 U.S.C.C.A.N. 1175.

[271]*See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

[272]*Id.* at 591.

[273]1992 Cable Act § 2(12) (1992).

[274]*See Minneapolis Star*, 460 U.S. at 591-92. Writing for the majority, Justice O'Connor explained:

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press *presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.*

Id. (emphasis added).

[275]*Minneapolis Star*, 460 U.S. at 592.

regulations such as these to strict scrutiny.[276]

The must-carry provisions warrant even further concern because of the specific group targeted for special treatment. Must-carry regulations give Government sanctioned speakers a favored status in the video marketplace. Broadcasters, unlike other cable programmers, are licensed by the Government to operate. The Federal Communications Commission is authorized by Congress to oversee almost all aspects of broadcast television including issuing and renewing of the licenses required to broadcast.[277]

The broadcast industry cannot help but be affected by its close ties to government.[278] It is logical to assume that broadcasters, under constant supervision of the FCC, will be more responsive to direct and indirect

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[276] *Id.* at 592-92. *Cf.* Leathers v. Medlock, 111 S. Ct. 1438, 1447 (1991) (noting that differential taxation of members of the press may, at times, not present the danger of suppressing particular ideas).

[277] *See supra* note 44. Congress has authorized the Federal Communications Commission to issue broadcast licenses where "the public interest, convenience and necessity will be served." 47 U.S.C. § 309(a). Congress has further authorized the Commission to evaluate other subjective qualifications:

> All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, *and other qualifications of the applicant* to operate the station . . . . The Commission . . . may required from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked.

Id. § 308(b) (emphasis added). The potential for abuse inherent with such discretion is inconsistent with the First Amendment.

[278] The FCC, through the power to grant, revoke and renew licenses, retains a certain degree of control over broadcast stations. *See* Bowsher v. Synar, 478 U.S. 714 (1986). At issue in *Bowsher* was legislation designed to guarantee a balanced federal budget. *Id.* at 717. The statute gave Congress the authority to remove an officer it had appointed to execute legislation. *Id.* at 720. The Court struck down this provision as a violation of the separation of powers. Writing for the Court, Chief Justice Burger noted that by having the ability to remove this officer, Congress had retained practical control over the exercise of his duty. *Id.* at 726. "[I]t is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey." *Id.* (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.C.C. 1986)).

coercion from government.[279] Considerably more disincentive exists for a broadcaster to attack government officials and criticize government policy. This reality stands in sharp contrast to America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[280]

The Supreme Court has noted that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[281] Whatever force this statement carries as a general principal must be amplified in a context where the voice enhanced is controlled by government. Regulations that promote the broadcast industry at the expense of unlicensed nonbroadcast programmers should therefore bear the burden of a content-based presumption and be subject to the most exacting judicial scrutiny.

IV. EVALUATING MUST-CARRY UNDER STRICT SCRUTINY

To justify the must-carry rules contained in the 1992 Cable Act, the Government must demonstrate "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[282]

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[279]Government regulation of broadcasting presents an inherent danger that does not exist in other forms of unregulated media. A reviewing court must be sensitive to the possibility of Government abusing its licensing power in broadcasting; a concern not applicable to newspapers or other unlicensed factions of the press. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949)).

[280]New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[281]Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In *Ward*, the Court explained "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Justice Kennedy's statement in *Ward* is not relevant to the analysis of must-carry. Far from incidental, Congress's differential treatment of broadcast and nonbroadcast channels is purposeful and significant.

[282]Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991) (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)). *See also* Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that government must demonstrate a compelling interest, and then show that they have chosen "the least restrictive means to further the articulated interest"); Boos v. Barry, 485 U.S. 213, 321 (1988) (quoting Perry Educ. Ass'ns v. Perry Local Educators' Ass'n, 460 U.S.

Congress has offered several justifications for the Cable Act's must-carry regulations:[283] "(1) preserving the benefits of local television service,

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37, 45 (1983)).

[283]Congress's findings, contained in section 2(a)(6)-(16) of the 1992 Cable Act, include the following:

> (6) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.
>
> (7) There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations . . . . The distribution of unique noncommercial, educational programming services advances than interest.
>
> (8) The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because
>
> (A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;
>
> (B) pubic television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of $10,800,000,000 since 1972, that provides public service programming that is responsive to the needs and interest of the local community;
>
> (C) the Federal Government, in recognition of public television's integral role in serving the educational and informational needs of local communities, has invested more than $3,000,000,000 in public broadcasting since 1969; and
>
> (D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services . . . .
>
> (9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.
>
> (10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial government interest in ensuring its continuation.
>
> (11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.
>
> (12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.
>
> (13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

particularly over-the-air television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace."[284] The objectives established by Congress are sufficiently important to pass constitutional muster under current First Amendment standards.[285] Nevertheless, the regulations are not narrowly tailored to accomplishing these objectives and are therefore

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(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, reuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, couple with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

1992 Cable Act § (2)(a)(6)-(16).

[284]S. REP. No. 92, 102d Cong., 1st Sess. 58 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191. The Senate Report commented that the substantiality of these interests cannot be seriously questioned. *Id.*

[285]In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), the Court invalidated an Oklahoma law requiring Oklahoma cable operators to delete all wine advertising from out-of-state programming. *Id.* at 694-95. The Court held that the 1984 Cable Act preempted the State's authority to issue such signal carriage regulations. *Id.* at 716. Writing for the majority in *Capital Cities,* Justice Brennan opined:

> There can be little doubt that the comprehensive regulations developed over the past 20 by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest. In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non cable households from the loss of regular television broadcasting service due to competition from cable systems and assuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers.

Id. at 714.

unconstitutional.

A. PRESERVING THE BENEFITS OF THE BROADCAST INDUSTRY

The Government has a compelling interest in ensuring the survival of broadcast television. Traditional over-the-air broadcasting is essential to assure that those who are unwilling or unable[286] to subscribe to cable continue to have access to television. For these people, broadcast television is an important source of news, public affairs programming and other local broadcast services.[287] The nation also has a security interest in continuing a system of wireless video broadcasting in the event of natural disaster or local emergency.[288]

Nevertheless, Government cannot rely on protecting broadcast television as a compelling interest if no danger to the industry exists.[289] Congress cannot abridge First Amendment rights to remedy a non-existent problem premised solely on unsubstantiated fears and speculation.[290] The House and Senate engaged in substantial fact finding before enacting the 1992 Cable Act, but the facts compiled do not justify Congress's conclusion that "absent legislative action, the free local off-air broadcast system is endangered . . . ."[291] Although substantial deference should be given to Congress's factual findings, the conclusions Congress draws from those facts, and the resulting actions Congress undertakes, must be subject to strict scrutiny.[292]

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[286]Cable television is currently unavailable to approximately 10% of the nation. S. REP. NO. 92, at 3, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135.

[287]1992 Cable Act § 2(11).

[288]Cable television relies upon miles of under and above ground cable making this mode of communication much more susceptible to disruption than broadcasting. *See generally* WEINSTEIN, *supra* note 12, at 37-41.

[289]*See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1457-59 (D.C. Cir 1985). In a context such as this, where a serious First Amendment challenge has been raised, Congress must affirmatively bear the burden of proving the need for regulation. *See id.* at 1458.

[290]*See supra* notes 114-16 and accompanying text.

[291]S. REP. NO. 92, at 42, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175.

[292]Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 129 (1989) ("[W]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"). *See also* Landmark

The Government's conclusions are based primarily upon irrelevant statistical data. Congress has set forth evidence that since the FCC's must-carry rules were struck down in *Quincy*, approximately twenty percent of cable systems have dropped at least one local broadcast station and approximately five percent have dropped three or more local broadcast stations.[293] The Government, however, makes no correlation between these stations being dropped from cable lineups and a reduced availability of broadcast programming.[294] An individual broadcaster's inability to gain access to a cable system presents no basis for any conclusion as to the

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Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").

In *Sable Communications*, the Court addressed a First Amendment challenge to legislation that banned obscene commercial telephone messages known as "dial-a-porn." The FCC contended that the Supreme Court should defer to Congress's factual findings. *Id.* at 129. Writing for the majority, Justice White noted that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.* Justice White explained that while "the federal parties suggest that we should defer to Congress's conclusion about an issue of constitutional law, our answer is that while we do note ignore it, it is our task in the end to decide whether Congress has violated the Constitution." *Id.*

In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Court noted that with regard to complex empirical questions, "we are required to give great weight to the decisions of Congress and the experience of the Commission." *Id.* at 569 (quoting CBS v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)). Nevertheless, the Court explained that "we do note defer to the judgment of the Congress and the Commission on a constitutional question, and would not hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity . . . ." *Id.*

Finally, the experience of the FCC, noted in *Metro*, has lead the Commission to conclude that must-carry provisions are unjustified. Report and Order, 1 F.C.C.R. 864, 886 (1986). The Commission recognized that must-carry rules are a stringent form of regulation that intrude on cable operators' First Amendment rights. *Id.* The Commission therefore concluded that "must-carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers." *Id.*

[293]S. REP. NO. 92, at 43, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175.

[294]Evidence of reduced viewerships or profits would not by itself justify government intervention. As the FCC acknowledged in Direct Broadcast Satellites Inquiry, 90 F.C.C.2d 676, 689 (1982), the government "cannot reject a new [video] service solely because its entry will reduce the revenues or profits of existing licensees." *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 49 nn.96, 97 (D.C. Cir. 1977).

general state of the broadcast industry.[295] If, for example, a cable operator adds two newly licensed stations to its system while dropping an older unpopular station, Government statistics will correctly show that the cable operator had dropped a local broadcast station. What these statistics will not reflect, however, is that even if the dropped broadcaster is economically forced to halt operation, the broadcast industry as a whole has actually grown.

Further, even assuming that every broadcast station dropped from cable ceased broadcasting and that the FCC was unable to find a new licensee to take its place, the Government's statistics are hardly evidence of an industry in serious jeopardy.[296] Indeed, these statistics indicate that almost eighty percent of all cable systems have never dropped any local broadcast stations.[297] Despite the instances of difficulty suffered by individual broadcasters that have been noted by Congress, in the eight years since must-carry was struck down by the D.C. Circuit in *Quincy*, the broadcast industry has grown.[298] The facts compiled by Congress provide no indication of actual harm to the broadcast industry. Accordingly, Congress's efforts to correct this 'harm' can not provide a compelling justification for interfering in First Amendment freedoms.

Even accepting the Government's conclusion that the broadcast industry is in serious jeopardy, the scope of the must-carry provisions contained in the 1992 Cable Act travel well beyond that which will be tolerated by the First Amendment. To preserve and protect the broadcast industry from ruin is a

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[295]Congress does not have a compelling interest in protecting *individual* broadcasters but rather the broadcast industry as a whole. *See* National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (noting that "existing licensees have no entitlement that permits them to deflect competitive pressure from innovative and effective technology").

[296]It is important to note that the substantial government interest involved here is not the protection of particular local broadcasters but the broadcast industry in general. "Plainly it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

[297]S. REP. NO. 92, at 43, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175.

[298]Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 63 (D.C.C. 1993). According to uncontradicted evidence presented by the National Cable Television Association, the number of commercial and educational broadcast stations has grown by over 22% and 15% respectively. *Id.*

legitimate goal[299] — to gratuitously foster its growth at the expense of its competitors is not. Unfortunately, the latter is a more apt description of the new must-carry provisions. Congress has placed no limit on the number of broadcast stations a cable system is required to carry as the system's channel capacity grows.[300] For example, if a cable system has sixty available channels and is currently carrying eighteen local broadcast stations, this system can be forced to add additional local broadcast stations at the expense of other programming.

It is difficult to justify as compelling, the government interest in ensuring twenty or more local over-the-air broadcast stations servicing a particular community.[301] The number of stations necessary to preserve the benefits of local broadcasting should not be limited by the capacity of a cable system. Rather, this number should be determined by the size of a community and the minimum number of stations necessary to service that community. Instead of defining the level of broadcasting which must be preserved, Congress has chosen to protect the entire industry regardless of the industry's future growth and subject only the channel capacity of a particular cable system.

Therefore, the must-carry regulations represent a "fatally overbroad response to the perceived fear that cable will displace free, local television."[302] This is not, however, a reflection of must-carry as an abstract proposition. There is no reason to doubt that legislation, designed to preserve free over-the-air broadcasting, which is sufficiently tailored

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[299]*See supra* notes 286-88 and accompanying text.

[300]*Cf.* 47 U.S.C. § 532. Like the must-carry provisions, section 532 is designed to promote competition in the cable industry and "assure that the widest possibility of information sources are made available to the public from cable systems . . . ." *Id.* § 532(a). This section, however, does not favor any particular group but instead requires a cable operator to set aside approximately fifteen percent of its channel capacity for use by programmers unaffiliated with the operator. *Id.* § 532(b).

[301]*See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1461 (1985). ("Until [Government] establishes a baseline for its general objective of preserving free, community-oriented television — measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion with its discretion to choose — we simply cannot know whether the rules are adequately tailored to pass constitutional muster.").

[302]*Id.* at 1459 (quoting Federal Election Comm'n v. National Conservative Pol. Action Comm., 470 U.S. 480, 501 (1985)).

would be constitutionally valid.[303]

B. PROMOTING THE WIDESPREAD DISSEMINATION OF INFORMATION FROM DIVERSE SOURCES

Congress has a compelling interest in ensuring that cable operators provide "a balanced presentation of information on issues of public importance."[304] This goal is consistent with the First Amendment and the important role it has occupied throughout this nation's history.[305]

Cable operators contend that the cable industry deserves the same sweeping First Amendment protection afforded newspapers in *Miami Herald*.[306] The Supreme Court has encouraged representatives of the cable industry by likening the role of a cable operator to that of a newspaper

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[303]*See Quincy*, 768 F.2d at 1463. Congress is also free to subsidize broadcasters to assure their survival. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1774 (1991). In *Rust*, the Court upheld Federal Government regulations that prohibited government funded projects from engaging in pro-abortion activities. *Id.* at 1764. The Court held that these Department of Health and Human Services' regulations did not violate the First Amendment. *Id.* at 1776. Plaintiffs contended that once the government chooses to subsidize speech favorable to one side of a public issue, it must subsidize other sides of this same issue. *Id.* at 1772. Chief Justice Rehnquist, writing for the majority disagreed:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.

Id. at 1773. Government has a compelling interest in preserving the benefits of broadcast television. Under *Rust*, government is free to pursue that goal by subsidizing broadcast stations without acquiring a further duty to subsidized nonbroadcast channels. *See id.*

[304]FCC v. League of Women Voters of California, 468 U.S. 364, 377 (1984) (commenting on the role of Congress in regulating broadcasters). *See also* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990) (noting that "the interest in enhancing broadcast diversity is, at the very least, an important government objective").

[305]For a detailed discussion of the First Amendment and the special role it occupies in safeguarding constitutional liberties, see *supra* notes 237-240.

[306]*See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 54-55 (D.C.C. 1993) (Sporkin, J., concurring).

publisher.[307] With traditional, unlicensed media such as newspapers, the Court has repeatedly held that the best method to promote free speech and a free press is to remain faithful to the uncompromising tone of the First Amendment and allow almost no government interference.[308] Nevertheless, the goals of the First Amendment will be best served in the cable industry by allowing Congress to enact limited regulations designed to promote fairness

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[307]Leathers v. Medlock, 111 S. Ct. 1438, 1449 (1991). In *Leathers*, the Court noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." *Id.* *See also* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (noting that "[c]able television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers"); FCC v. Midwest Video, 440 U.S. 689, 707 (1979) (opining that cable operators exercise considerable control over their system's programming).

Despite these statements, the editorial functions exercised by a cable operator are completely unrelated to those exercised by their counterparts in more traditional media. Newspaper, magazine, or periodical editors exercise direct control over all aspects of the publication. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). This includes the look and feel of the publication as well as the issues it chooses to cover and the ideas and editorial opinions that it communicates. *Id.* Similarly, the producers of a local broadcast stations determine precisely how and what will be broadcast on a day-to-day and hour-to-hour basis. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382-83 (1969).

Conversely, cable operators exercise very little control over the content of programming presented on their systems. A cable operator simply selects particular programmers based on financial viability, and then allows these programmers to determine the content of programming they wish to deliver. A cable operator is not involved in the day-to-day decisions of selecting what issues to cover or how these issues will be covered. Further, a subscriber is not likely to attribute the views carried by an independent programmer as having been expressed or advocated by the owner or operator of a cable system. In reality, a cable operator functions much more like a conduit of ideas than as a traditional media editor.

[308]*See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Miami Herald*, the Court made clear that the First Amendment is fiercely protective of a newspaper publisher's editorial judgment. *See id.* The Court opined that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials-whether fair of unfair — constitute the exercise of editorial control and judgment." *Id.* at 258. The Court noted that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising," and that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." *Id.* (quotation omitted).

and diversity.[309]

Congress has a compelling interest in requiring cable operators to provide diverse programming. To reach cable subscribers, information must pass through a government licensed "bottle neck" controlled by cable operators.[310] The First Amendment permits government to dissipate this control by placing restraints on licensees in favor of others whose views would otherwise not be represented in this medium.[311] In evaluating these restraints, it is the right of the viewer to receive suitable access to a variety of ideas that is crucial.[312] Any First Amendment rights an operator might have to control the flow of information which passes through their cable system must be subordinated to the First Amendment rights of the system's

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[309]There is an inherent degree of government control over the programming available to a cable subscriber. *See supra* notes 229-31. Unlike a newspaper publisher, a cable programmer does not have direct access to subscribers. *See* Community Communications Co., Inc. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981). Only those who are licensed by local governments will be able to provide cable service to a community. *Id.* Much like the broadcast industry, the government grants "franchises for speech, and the number of franchises is necessarily limited." S. REP. NO. 92, at 51, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1184 (citing Omega Satellite Products v. City of Indianapolis, 694 F.2d 119, 127 (1982)). It is, therefore, a logical extrapolation of current First Amendment jurisprudence that the same government which grants licenses to cable operators has a compelling interest in promulgating regulations that will dampen adverse First Amendment impacts of the licensing process.

Some commentators have suggested that the First Amendment places an affirmative obligation on government to assure access to the mass media. *See generally* Barron, *supra* note 207. Indeed, the committee's report stated that: "[t]he Committee believes the First Amendment implies an affirmative role for the government to encourage a diversity of voices." S. REP. NO. 92, at 50, *reprinted in* 1992 U.S.C.C.A.N. at 1183. In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court expressly rejected the idea that the First Amendment required Congress to promote fairness and diversity in broadcast television.

[310]S. REP. NO. 92, at 51, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1184.

[311]*See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), where the Court explained that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 389 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[312]*Id.* at 390.

subscribers.[313]

Nevertheless, the must-carry provisions contained in the 1992 Cable Act are unjustifiably broad and can not be reconciled with the First Amendment. To promote diversity, Congress has emphasized the particular importance of preserving and protecting local broadcast programming.[314] Although promoting diversity by protecting local programmers is appropriate,[315] Congress has produced no evidence to explain why local cable programming must be supplied by broadcast stations.[316] Rules providing for a certain percentage of programming originating locally and servicing the needs of the local community would be far less intrusive and be at least as effective.[317] Affording federally licensed broadcast programmers special protection to accomplish this objective is unwarranted.[318]

Moreover, it is illogical to assume that commercial broadcast stations will provide more diverse programming than their cable-only counter-parts.[319] Cable-only channels are better geared to providing diversity in the modern

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[313]*Id.* at 389. Ultimately, the First Amendment is concerned with individuals having access to information. *Id.* As Justice White noted in *Red Lion*, under the First Amendment, "[i]t is the right of the viewers and listeners . . . which is paramount." *Id.*

[314]1992 Cable Act § (2)(a)(10)-(11).

[315]A cable system dominated by large network programmers will primarily present a national voice. The views and concerns of local communities can only be addressed properly through local programming. Without government regulation dictating otherwise, the voice of the nation's majorities, living in large programming centers would dominate television to the exclusion of all others.

[316]*See* Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 62 (D.C.C. 1993) (Williams, J., dissenting).

[317]*See, e.g.*, Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). In *Chicago Cable*, the Seventh Circuit Court of Appeals upheld "local origination" provisions of the City of Chicago's cable franchise agreements. *See id.* These provisions required Chicago cable operators to produce weekly at least nine hours of programming specifically designed for the local community. *Id.* at 1544.

[318]*See Turner*, 819 F. Supp at 62 (Williams, J., dissenting).

[319]*See generally* Report and Order, 1 F.C.C.R. 864, 886 (1986) (concluding that must-carry rules would impede the Commission's objective of maximizing program choices to viewers).

television market.[320] Recognizing that they exist on cable systems with 20, 50, or 100 other channels, cable-only channels tend to cater to particular audiences.[321] Cable-only channels can remain economically feasible with a relatively small following in any particular community because, unlike local broadcast stations, these channels are marketed throughout the entire country.[322] Accordingly, these cable-only channels find it practical to gear programming to novel or unpopular ideas which broadcast stations cannot afford to air.

By carrying cable-only channels, rather than local broadcast stations, cable operators provide subscribers with greater overall diversity. Sections 4 and 5 of the 1992 Cable Act are therefore not narrowly tailored to promoting the widespread dissemination of information from diverse sources.

C. PROMOTING FAIR COMPETITION IN THE VIDEO MARKETPLACE

Congress contends, and the district court agreed,[323] that the must-carry rules are "economic regulations, similar to antitrust laws, intended to promote a competitive balance between cable and over-the-air television as distribution systems, and to . . . counterbalance cable systems' commercial or economic incentives to exclude [broadcast] signals."[324] This characterization is intended to bring these regulations within the holding of

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[320]The broadcast industry is financially dependant on commercial revenue and broadcast stations must therefore reach a minimum number of households to remain financially viable. These economic realities discourage broadcasters from presenting minority views in order for them to reach the largest possible audience. *See generally* Barron, *supra* note 207, at 1645-47.

[321]Examples of cable channels catering to specific audiences are: Music Television (MTV), The Weather Channel, Cable News Network (CNN), Comedy Central, Courtroom Television, Sci-Fi Channel, and The Cartoon Network. *Directory of National Cable Networks*, CABLE TELEVISION DEVELOPMENTS (National Cable Television Association, Washington D.C.), June 1993, at 15.

[322]For advertisers, cable channels that target specific audiences present an attractive alternative to broadcast television. *See* Nikhil Hutheesing, *Let the 500 Flowers Bloom!*, FORBES, Sept. 13, 1993, at 84. Many companies consider programming demographics as a much more important factor in placing commercials than the actual size of an audience. *See id.* Advertizing executives would rather reach 1,000 people all of whom are potential purchasers of their product that 100,000 random viewers. *See id.*

[323]Turner Broadcasting Co., Inc. v. FCC, 819 F. Supp. 32, 40 (D.C.C. 1993).

[324]S. REP. NO. 92, at 55-56, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1188-89. For a detailed discussion of Congress's rational, see *supra* note 169.

Associated Press v. United States[325] and its progeny.[326] In *Associated Press*, the Court held that "[f]reedom of the press from governmental interference 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."[327] The strong language in *Associated Press* encourages affirmative government action to divest monopolies, thereby supporting Congress's attempt to promote fair competition in the video marketplace.

Nevertheless, the must-carry rules are only marginally related to restricting anti-competitive behavior. Under these rules, a cable operator can wield his monopoly mercilessly so long as he carries the required local broadcast stations. In fact, the 1992 Cable Act encourages a dangerous monopolistic alliance between cable operators and broadcasters. In the one year after this legislation was enacted, a substantial number of cable operators have struck deals with broadcast networks which enhance the presence of these networks on cable systems at the expense of small cable programmers.[328]

Finally, the must-carry rules are unnecessary in light of generally

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[325]326 U.S. 1 (1945).

[326]S. REP. NO. 92, at 55, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1188. In *Associated Press*, the Supreme Court held that applying the Sherman Antitrust Act to publishers did not violate the First Amendment. *Associated Press,* 426 U.S. at 4. Associated Press was a cooperative association of publishers that gathered and distributed news to its members around the world. *Id.* at 3-4. The association's by-laws prohibited members from furnishing news to non-members and gave each member power to veto non-member competitors from joining the association. *Id.* at 4. The Court found that these provisions violated the Sherman Act by hindering and restraining the sale of news. *Id.* at 13 The Court then rejected Associated Press's claim that applying federal antitrust laws in this case violated the First Amendment. *Id.* at 20. Writing for the majority, Justice Black noted that the First Amendment is designed to protect freedom of the press and promote a free flow of ideas. *Id.* Justice Black noted that it would be "strange" to interpret the First Amendment in a manner that would leave government powerless to stop individuals or groups from frustrating these goals. *Id.*

[327]*Id.* at 20.

[328]In return for their consent to be carried on cable systems, broadcast networks have negotiated to have these systems carry new cable networks owned by the broadcast networks. For an explanation of the retransmission consent regulations codified at 47 U.S.C. § 325, see *supra* note 162 and accompanying text.

applicable federal laws currently available to Government.[329] The compelling interest that government has in divesting cable monopolies is better addressed through the Sherman Antitrust Act[330] than by industry-specific antitrust laws targeting the press.[331] Moreover, Congress has already enacted legislation to promote competition in the cable industry that is less intrusive than must-carry.[332] Since 1984, cable systems have been required to designate approximately fifteen percent of their available channels for use by persons unaffiliated with the cable operator.[333] This type of

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[329]*See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (noting the distinction between generally applicable regulations and regulations which specifically target the press). For a detailed discussion of the constitutional implications of legislation targeting the press, see *supra* note 266 and accompanying text.

[330]15 U.S.C. §§ 1-7 (1988).

[331]Federal antitrust laws can be applied to the press without violating the First Amendment. *See Associated Press*, 326 U.S. at 19-20 (upholding the application of the Sherman Antitrust Act to newspapers).

[332]*See* 47 U.S.C. § 532.

[333]*See id.* Section 532 provides in pertinent part:

> (a) The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.
> (b)(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:
>
> (A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.
>
> (B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.
>
> (C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.
>
> (D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable systems is required to provide such channel capacity under the terms of a franchise in effect on the date of the enactment of this title.

regulation is more acceptable than must-carry under current First Amendment standards because these regulations do not single out specific elements of the press for special treatment.[334]

V. CONCLUSION

The cable industry is rapidly evolving. Cable systems utilizing advanced technologies such as fiber optics[335] and digital compression[336] are currently providing subscribers access to over 150 channels.[337] Systems are being built today that will be capable of carrying over 1000 channels.[338] These systems are being licensed by the FCC to operate under common carrier obligations, making the need for access provisions such as must-carry

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Id.

[334]*See Minneapolis Star,* 460 U.S. at 585.

[335]Fiber Optic technology employs thin strands of glass to carry light signals generated by laser transmitters. *See* TWENTY FIRST CENTURY TELEVISION, *supra* note 229, at 7-8. The nation's first completely fiber-optic video service is being installed by New Jersey Bell in Morris County, New Jersey. *See* Lisa Fried, *Fiber-optic Video Service to Morris Delayed by FCC,* DAILY RECORD, July 29,1993, at A1. This system is expected to deliver 384 channels by the Fall of 1994 and 1,500 channels by 1997. *Id.* Fiber-optics represents a dramatic break-through in cable technology, but is currently a very expensive. In the near future, fiber-optic cable systems will most likely be installed exclusively in large urban areas. *See generally* TWENTY FIRST CENTURY TELEVISION, *supra* note 229, at 7-11.

[336]Digital compression can dramatically increase the number of channels on cable systems. *See generally* TWENTY FIRST CENTURY TELEVISION, *supra* note 335, at 12-14. Digital converters transform an analog video signal into a digital picture. *Id.* at 12. This digital picture is comprised of a series of zeros and ones in the same manner computers store a scanned video image. *Id.* The digital picture is then transmitted through a cable system taking up only a fraction of the space occupied by the original video image. *Id.* Upon arriving at a subscriber's home, the digital picture is re-converted to an analog video signal. *Id.* Using this technique, up to 20 digital channels can be transmitted through a cable system while taking up the same space that historically delivered only one channel. *Id.* at 14. Significantly, a cable operator does not have to rewire an entire community to take advantage of this technology. *Id.*

[337]*See generally* TWENTY FIRST CENTURY TELEVISION, *supra* note 335, at 6-20.

[338]*See supra,* notes 335-36.

obsolete.[339]

Nevertheless, we cannot confront the realities of today by looking to the promises of tomorrow. The must-carry provisions promulgated by Congress affect the most powerful form of communication this world has ever known. These provisions are designed to protect one facet of this industry, at the expense of another. This legislation will have serious consequences on the content of television programming which reaches homes throughout the United States. The variety of purposes served by television and the incredible impact it has on the nation requires that any significant government interference be reviewed under the most exacting judicial scrutiny.[340]

The must-carry provisions of the 1992 Cable Act address substantial and in some instances compelling government interests. To justify this legislation, however, Congress must demonstrate more than compelling interests. Congress must also demonstrate that it has selected the least restrictive means to further its articulated goals. This, Congress has failed to do. Consequently, the must-carry provisions enacted by Congress cannot be reconciled with the Free Speech and Free Press Clause of the First Amendment. Therefore, sections 4 and 5 of the 1992 Cable Act are unconstitutional.

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[339]These fiber-optic systems are being constructed by local telephone companies and are subject to regulations promulgated by the FCC in its 1992 Report and Order. *See* In the Matter of Telephone Company — Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5781 (1992). The 1992 Report and Order requires local telephone companies to provide a basic, common carrier platform to programmers as a prerequisite to entering the video marketplace. *Id.* at 5782. This platform must have sufficient capacity to serve multiple video programmers. *Id.* These regulations may pave the way for broadcast and nonbroadcast programmers to contract directly with subscribers. Individual subscribers may someday be able to create their own personalized television menu with local telephone companies providing billing services. *See id.* For a discussion of common carrier obligations, see *supra* note 73 and accompanying text.

[340]*See* Barron, *supra* note 207, at 1641. Powerful forms of mass media present a dangerous opportunity for government to control the market-place of ideas and must therefore be given special attention by reviewing courts. Elements of the press reaching small groups of people create less of an opportunity for abuse than television which informs a significant percentage of this nation.

> An analysis of the first amendment must be tailored to the context in which ideas are or seek to be aired. This contextual approach requires an examination of the purpose served by and the impact of each particular medium . . . . The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact.

Id. at 1653.