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COMMENT

TURNER BROADCASTING V. FCC: A FIRST AMENDMENT CHALLENGE TO CABLE TELEVISION MUST-CARRY RULES

Marc Peritz*

I. INTRODUCTION

"Cable television . . . is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"¹ Furthermore, selection of programming by cable operators involves the exercise of editorial discretion.² As such, regulations affecting members of the cable television industry are subject to First Amendment challenge.

As part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act),³ Congress included provisions mandating that cable operators devote a portion of their channel capacity to local broadcast television stations.⁴ Turner Broadcasting System, Inc. filed suit challenging the constitutionality of these so-called "must-carry" provisions less than one hour after they became law,⁵ and several other cable operators and programmers later joined the suit or had their separate actions consolidated into this case.⁶ A three-judge district court panel upheld the constitutionality of the must-carry requirements.⁷ On June 27, 1994, however, the Supreme Court vacated the lower court ruling and remanded the case for further factual development.⁸ This was the first opportunity for the Court to decide what constitutional standard to apply to government restrictions on the First Amendment rights of cable television operators.⁹ The Court decid-

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¹ *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

² *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 & n.17 (1979).

³ Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.) [hereinafter 1992 Cable Act].

⁴ 47 U.S.C. §§ 534, 535 (Supp. IV 1992).

⁵ See Brief for Appellants Turner Broadcasting System, Inc. et al. at 3, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (No. 93-44).

⁶ See *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 37 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994).

⁷ *Id.* at 36. The 1992 Cable Act requires that a three-judge panel hear "any civil action challenging the constitutionality of" the must-carry requirements, with appealing directly to the Supreme Court. 47 U.S.C. § 555 (Supp. IV 1992).

⁸ *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2472 (1994).

⁹ The Supreme Court twice previously has denied certiorari to cases declaring un-

ed that cable television regulations are subject to some degree of heightened scrutiny¹⁰ and that the must-carry provisions are content-neutral,¹¹ but it was unable to decide whether the provisions survived the applicable level of scrutiny.¹²

This Note will discuss: (1) previous attempts by the federal government to implement must-carry restrictions on cable television operators; (2) the must-carry provisions enacted as part of the 1992 Cable Act; (3) the lower court decision upholding the constitutionality of the must-carry provisions of the 1992 Cable Act; and (4) the Supreme Court decision vacating the decision below and remanding for further proceedings. This Note then will argue that the Supreme Court erred in finding the must-carry provisions to be content-neutral. Nevertheless, analyzed pursuant to that standard, the provisions violate the First Amendment rights of cable operators and cable programmers.

II. PREVIOUS ATTEMPTS AT MUST-CARRY

A. Quincy—*A Challenge to the Initial Must-Carry Rules*

The Federal Communications Commission (FCC) began to regulate the cable television industry in the mid-1960s.¹³ The FCC believed that regulation was necessary because it feared that as the cable industry grew, it would do so at the expense of local broadcast television stations by taking their audiences and revenues.¹⁴ This could “threaten the economic viability of broadcast television,” and thus “undermine the FCC’s mandate to allocate the broadcast spectrum in a manner that best serve[s] the public interest.”¹⁵ As a result, in 1962 the FCC first sought to protect ordinary broadcast television by imposing a must-carry requirement as a condition to constructing a system to transmit distant television signals to a rural cable system.¹⁶

constitutional past attempts at imposing must-carry requirements on cable operators. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

¹⁰ *Turner*, 114 S. Ct. at 2458.

¹¹ *Id.* at 2459-64.

¹² *Id.* at 2472.

¹³ For a discussion of the early history of the FCC’s regulation of the industry, see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-67 (1968).

¹⁴ *See Rules re Microwave-Served CATV*, 38 F.C.C. 683, 685, 697-716 (1965) (first report and order); *see also CATV*, 2 F.C.C.2d 725 (1966) (second report and order).

¹⁵ *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

¹⁶ *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff’d*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

This requirement was extended one year later to all cable systems that carried any broadcast signals, regardless of the method used to obtain them.¹⁷

The must-carry provisions at issue in *Quincy Cable TV, Inc. v. FCC*¹⁸ varied based on the size of the market in which the cable system operated, but they generally required a cable system to carry all commercial broadcast stations within a thirty-five mile radius of the community served by the cable system, other stations in the same market, and all stations “significantly viewed in the community.”¹⁹ The FCC saw these rules as critical to preventing the “destruction of free, community-oriented television. By forcing cable systems to carry local and significantly viewed broadcast signals, the [FCC] sought to channel the growth of cable in a manner consistent with the public’s interest in the preservation of local broadcasting.”²⁰

The FCC enacted these rules, however, without proof of their factual basis, instead relying on its “collective instinct” and intuition.²¹ Despite this, the FCC did not wait to acquire proof because it considered it irresponsible to “withhold[] action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled—i.e., by waiting ‘until the bodies pile up’ before conceding that a problem exists.”²² Although it fine-tuned the must-carry rules several times before the challenge in *Quincy*, the FCC never reconsidered or questioned its speculative basis for the rules.²³

In *Quincy*, the Court of Appeals for the District of Columbia Circuit declared unconstitutional the must-carry rules.²⁴ The court concluded that regulation of cable systems should not be reviewed pursuant to the standard used to review regulations affecting broadcasters.²⁵ Although declining to decide which standard to apply, the court held that the must-carry rules failed even pursuant to the standard used for incidental burdens on speech.²⁶

¹⁷ See *Quincy*, 768 F.2d at 1440 n.11 (citing CATV, 2 F.C.C.2d at 725 (second report and order)).

¹⁸ 768 F.2d 1434 (1985), *cert. denied*, 476 U.S. 1169 (1986).

¹⁹ *Id.* at 1440 n.12.

²⁰ *Id.* at 1441-42.

²¹ See *id.* at 1442 (quoting Inquiry into Economic Relationship Between Television Broadcasting and Cable Television, 65 F.C.C.2d 9, 14 (1977)).

²² Rules re Microwave-Served CATV, 38 F.C.C. at 701 (first report and order).

²³ *Quincy*, 768 F.2d at 1442.

²⁴ See *id.* at 1438.

²⁵ See *id.* at 1449 (“[T]he ‘scarcity rationale’ has no place in evaluating government regulation of cable television.”).

²⁶ See *id.* at 1454. An incidental regulation will be upheld if it “furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

The court first refused to apply to the must-carry rules the same standard used to review regulation of broadcast television.²⁷ The court noted that broadcasters are due less First Amendment protection than are other media because of the physical limitation on what can be carried on the electromagnetic spectrum.²⁸ Unlike broadcast television, however, the court found that "[t]he [scarcity rationale] cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent."²⁹ Although broadcast television is limited by airwaves capable of bearing a limited number of video signals,³⁰ the channel capacity of cable television is "almost infinite."³¹

The court also refused to analogize to physical scarcity by viewing cable television as a natural monopoly creating "economic scarcity."³² The court viewed this "economic scarcity" argument as unproven, resting on the doubtful assumption that cable operators are in a position to charge monopolistic prices.³³ To the extent that cable exhibited monopolistic characteristics at all, the court attributed it to the municipal franchising process rather than to economic phenomena.³⁴

Having decided that the must-carry provisions should not be reviewed pursuant to the standard used for broadcast television, the court then addressed whether they should be treated as incidental burdens on speech³⁵

²⁷ See *Quincy*, 768 F.2d at 1448-50.

²⁸ See *id.* at 1448 (citing *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984)). This has come to be known as the "scarcity rationale," based on the fact that the electromagnetic spectrum has a finite capacity. This rationale justifies increased regulation of broadcast television in two ways. First, such regulation actually furthers, rather than impedes, First Amendment interests because it allows for effective communication by replacing chaos with structure. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943). Governmental control, therefore, prevents "the cacophony of competing voices" from drowning each other out. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). Second, "such regulation assures that broadcasters, privileged occupants of a physically scarce resource, act in a manner consistent with their status as fiduciaries of the public's interest in responsible use of the spectrum." *Quincy*, 768 F.2d at 1449 (quoting *Red Lion*, 395 U.S. at 389).

²⁹ *Quincy*, 768 F.2d at 1449.

³⁰ *Id.* at 1448.

³¹ Note, *Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 135 (1976).

³² *Quincy*, 768 F.2d at 1449-50.

³³ *Id.* at 1450 (citing *GEORGE H. SHAPIRO ET AL.*, *CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION* 9-11 (1983)).

³⁴ *Id.* (citing *RICHARD POSNER*, *CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY* 4 (1970)).

³⁵ The court defined "incidental" burdens as "regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas." *Id.* at

and thus analyzed pursuant to *O'Brien v. United States*³⁶ and *Ward v. Rock Against Racism*.³⁷ Although the court expressed serious reservations as to whether the must-carry rules should be reviewed as incidental burdens on speech,³⁸ it found it unnecessary to reach that question. Instead, the court ruled that the must-carry rules clearly failed even if reviewed pursuant to the *O'Brien* test.³⁹ The court declined to rule on the substantiality of the government's asserted interest, as an abstract proposition, in the must-carry rules.⁴⁰ Instead, it stated that the FCC had failed to show that the must-carry rules served to alleviate the presumed threat to the FCC's asserted interest in preserving free local television service.⁴¹ The FCC had not proven that cable television was a threat to local broadcast television; it merely had assumed it.⁴²

Regardless of the substantiality of the government's asserted interest, the court held that the must-carry rules "represent a 'fatally overbroad response' to the perceived fear that cable will displace free, local television."⁴³ The must-carry rules sought to protect local broadcasting rather than local broadcasters, a distinction that the court regarded as critical.⁴⁴ Given the goal of protecting localism rather than local broadcasters, the court based its ruling that the must-carry rules were overinclusive on two factors: (1) the rules protected all local broadcasters regardless of the number of other local outlets offered by the cable operator or even whether the local broadcaster

1450.

³⁶ 391 U.S. 367 (1968). For a description of the *O'Brien* test imposed on incidental burdens on speech, see *supra* note 26.

³⁷ 491 U.S. 781 (1989). *Ward* recast the *O'Brien* test in similar terms: "[A]n incidental regulation upon speech should be upheld if it promotes a substantial government interest and does not burden substantially more speech than necessary in order to attain that interest." See *id.* at 799.

³⁸ *Quincy*, 768 F.2d at 1453 ("[O]ur examination of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech.").

³⁹ *Id.* at 1459.

⁴⁰ *Id.* For a discussion of the economic assumptions upon which the FCC premised the must-carry rules, see *supra* notes 14-17 and accompanying text.

⁴¹ *Quincy*, 768 F.2d at 1459 (stating that the FCC relied on "wholly speculative and unsubstantiated assumptions").

⁴² See *id.* (stating, however, that "[s]hould the [FCC] move beyond its 'more or less intuitive model,' as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment").

⁴³ *Id.* (citations omitted).

⁴⁴ See *id.* at 1460. The court made clear that "were the individual broadcasters themselves the object of the [FCC]'s favors, the objective itself would be fundamentally illegitimate." *Id.*

carried any local programming;⁴⁵ and (2) the rules indiscriminately protected all local broadcasters regardless of their financial health or whether the cable system actually posed any threat to their economic survival.⁴⁶ These factors persuaded the court that the must-carry rules, in their current form, were not tailored narrowly enough to survive review even pursuant to the *O'Brien* test.⁴⁷

B. *The FCC's Response to Quincy*

After the must-carry rules were struck down in *Quincy*, the FCC issued revised must-carry rules to take effect during a five-year "transitional" period.⁴⁸ These rules took into consideration the size of a cable system and the popularity of a local broadcast station to determine which stations and how many must be carried by each cable system.⁴⁹ The FCC believed that these rules corrected the constitutional inadequacies that caused the previous version of the rules to be struck down in *Quincy*, and that the proper standard of review was *O'Brien* because the rules were merely incidental restrictions on speech.⁵⁰

The FCC's constitutional analysis of the revised rules was based on its view that the proper issue was whether "the regulation is . . . designed to promote or suppress particular *viewpoints*," rather than to favor a particular *class* of speaker.⁵¹ This view was based in part upon the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*,⁵² in which the Court upheld a zoning ordinance that banned adult theaters in certain neighborhoods.⁵³ Just as the zoning restriction was justified without regard to the content of the affected speech,⁵⁴ the FCC believed that the must-carry rules were justified by the government's interest in promoting a diverse video marketplace without regard to the particular viewpoint affected.⁵⁵ Given this standard, the FCC argued that its new rules satisfied the test because the

⁴⁵ *See id.*

⁴⁶ *See id.* at 1461.

⁴⁷ *See id.* at 1463.

⁴⁸ *See* In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864, 887 (1986).

⁴⁹ *See id.*

⁵⁰ *See id.* at 893-94.

⁵¹ *Id.* at 893.

⁵² 475 U.S. 41 (1986).

⁵³ *See id.* at 54-55.

⁵⁴ *Id.* at 47-49 (finding the ordinance content-neutral because it was not based upon the content of the adult films, but rather upon the "secondary effects" of such films on the surrounding community).

⁵⁵ *In re Amendment of Part 76*, 1 F.C.C.R. at 893.

changes ensured that they were narrowly tailored to minimize the burden imposed on speech.⁵⁶

C. Century Communications—*A Challenge to the Revised Rules*

In *Century Communications Corp. v. FCC*,⁵⁷ the Court of Appeals for the District of Columbia Circuit ruled that the revised must-carry rules were unconstitutional.⁵⁸ As in *Quincy*, the court found that the FCC had failed to provide the factual predicate to show that the revised rules furthered a “substantial government interest . . . [or were] of brief enough duration to be considered narrowly tailored so as to satisfy the . . . test for incidental restrictions on speech.”⁵⁹ Although the must-carry rules were based on the “assumption that in the absence of must-carry rules, cable companies would drop local broadcasters, . . . [e]xperience belies that assertion.”⁶⁰ In fact, the court cited Federal Trade Commission and Department of Justice reports that concluded that “absent must-carry rules, cable systems can be expected to carry many or most local broadcast stations.”⁶¹ The court found the justification for imposing the rules for five years to be “more speculative than real,”⁶² and stated that without any evidence to show that a period of five years was necessary for the rules to accomplish their objectives, the rules were “too broad to pass muster even under the *O’Brien* test.”⁶³

The court reached this conclusion despite expressly noting that these revised must-carry rules were “far less sweeping than the regulations [it] branded as overinclusive in *Quincy*.”⁶⁴ In fact, the court expressly stated that must-carry rules are not “*per se* unconstitutional.”⁶⁵ At the end of its decision, the court declared:

[T]he government must be able to adduce either empirical support or . . . sound reasoning on behalf of its measures. As in *Quincy Cable TV*, we reluctantly conclude that the FCC has not done so in this case, but instead has failed to “‘put itself in a position to know’ whether the problem that its

⁵⁶ See *id.* at 894.

⁵⁷ 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

⁵⁸ *Id.* at 304.

⁵⁹ *Id.*

⁶⁰ *Id.* at 303.

⁶¹ *Id.* (quoting In re Amendment of Part 76 of the Commission’s Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864, 871 (1986)).

⁶² *Id.* at 300.

⁶³ *Id.* at 304.

⁶⁴ *Id.* at 299 n.4.

⁶⁵ *Id.* at 304.

regulations seek 'to solve is a real or fanciful threat.'"⁶⁶

This admonition to get support for its conclusions set the stage for the government's next attempt at must-carry.

III. MUST-CARRY IN THE 1992 CABLE ACT

A. *Details of the Must-Carry Provisions*

The must-carry provisions in the 1992 Cable Act are contained primarily in section 4, dealing with mandatory carriage of local commercial stations,⁶⁷ and section 5, dealing with local noncommercial educational stations.⁶⁸ Cable systems with twelve or fewer usable activated channels must carry at least three local commercial stations⁶⁹ and one qualified local noncommercial educational station.⁷⁰ Systems with between thirteen and thirty-six usable activated channels must carry all local commercial stations, up to one-third of their total channel capacity,⁷¹ plus all qualified local noncommercial educational stations, up to a total of three.⁷² If no local noncommercial educational stations exist, then cable systems with fewer than thirty-six usable activated channels must import one.⁷³ Cable systems with more

⁶⁶ *Id.* at 304-05 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977)), *cert. denied*, 476 U.S. 1169 (1986)).

⁶⁷ 47 U.S.C. § 534 (Supp. IV 1992). A "local commercial television station" is defined as "any full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the [FCC] that, with respect to a particular cable system, is within the same television market as the cable system." *Id.* § 534(h)(1)(A).

⁶⁸ *Id.* § 535. A "qualified noncommercial educational television station" is defined as a station that either: (1) was licensed by the FCC as a noncommercial station as of March 29, 1990, is owned by a public or nonprofit entity, and is eligible to receive community service grants from the Corporation for Public Broadcasting; or (2) "is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes." *Id.* § 535(l)(1). Predominance is satisfied by devoting at least 50% of the broadcast week to noncommercial programs for educational purposes. See 47 C.F.R. § 76.55(a) (1990). Such a station is "local" if either: (1) it is licensed to a community whose reference point, as defined in 47 C.F.R. § 76.53 (1990), is within fifty miles of the cable system's principal headend; or (2) its Grade B contour, as defined in 47 C.F.R. § 73.683(a) (1990), encompasses the cable system's principal headend. 47 U.S.C. § 535(l)(2) (Supp. IV 1992).

⁶⁹ 47 U.S.C. § 534(b)(1)(A).

⁷⁰ *Id.* § 535(b)(2)(A).

⁷¹ *Id.* § 534(b)(1).

⁷² *Id.* § 535(b)(3).

⁷³ *Id.* § 535(b)(2)(B), (3)(B).

than thirty-six usable activated channels must carry all local commercial stations, up to one-third of their total channel capacity,⁷⁴ and all qualified local noncommercial educational stations.⁷⁵ Only cable systems with 300 or fewer subscribers are immune from the must-carry requirements.⁷⁶

Furthermore, cable operators no longer may select the channel positioning of broadcast stations. Local commercial stations may choose to be carried on (1) the channel on which they are broadcast over the air; (2) the cable channel on which they were carried on July 19, 1985; or (3) the cable channel on which they were carried on July 1, 1992.⁷⁷ Noncommercial stations, however, are given only two channel positions from which to choose: either (1) their over-the-air broadcast channel; or (2) the cable channel on which they were carried on July 19, 1985.⁷⁸

Cable operators must carry the signals of must-carry stations in their entirety.⁷⁹ In addition, they are prohibited from deleting or repositioning a broadcast station without giving the broadcaster at least thirty days written notice.⁸⁰ Furthermore, cable operators may neither demand nor accept payment for carriage of must-carry stations.⁸¹ Lastly, the FCC is charged with resolving any disputes about carriage arising between broadcasters and cable operators.⁸²

⁷⁴ *Id.* § 534(b)(1)(B).

⁷⁵ *Id.* § 535(b)(1). Systems of this capacity, however, are not required to carry the signal of a qualified local noncommercial educational station whose programming "substantially duplicates" that of another such station that requests carriage. *Id.* § 535(e). The FCC has stated that "substantial duplication" exists if more than 50% of two stations' weekly prime time programming is the same and more than 50% of non-prime time programming is the same over a three month period, regardless of whether the duplicated programming is broadcast on the same day or at the same time on each station. *See* 47 C.F.R. § 76.56(a) (1990).

⁷⁶ 47 U.S.C. § 534(b)(1)(A). Even one of these systems, however, becomes subject to the must-carry requirements if it deletes a broadcast station's signal from its system. *Id.*

⁷⁷ *Id.* § 534(b)(6). The date July 19, 1985 is important because it was the date on which *Quincy* was decided. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (striking down the FCC's must-carry rules), *cert. denied*, 476 U.S. 1169 (1986).

⁷⁸ 47 U.S.C. § 535(g)(5).

⁷⁹ *Id.* §§ 534(b)(3), 535(g)(1).

⁸⁰ *Id.* §§ 534(b)(9), (10)(B), 535(g)(3). Also, under no circumstance may a cable operator delete or reposition a local commercial station during a "sweeps" period, defined as "a period in which major television ratings services measure the size of audiences of local television stations." *Id.* § 534(b)(9).

⁸¹ *Id.* §§ 534(b)(10), 535(i)(1). Noncommercial stations, however, can be required to pay for any increased copyright costs resulting from the carriage of a signal "considered [to be] a distant signal for copyright purposes." *Id.* § 535(i)(2).

⁸² *Id.* §§ 534(d), 535(j).

Although payment for carriage of must-carry stations is prohibited, section 6 of the 1992 Cable Act provides for "retransmission consent."⁸³ Cable systems now are prohibited from carrying commercial broadcast stations without their consent, unless such stations elect must-carry status.⁸⁴ Stations must choose between reserving the right to retransmission consent or asserting their must-carry rights every three years,⁸⁵ and any station electing retransmission consent forfeits its right to must-carry during that three-year period.⁸⁶ Broadcasters, therefore, are given enormous power. Large, popular stations are able to elect retransmission consent and demand payment from cable operators to retransmit their broadcasts, while less popular stations still can be guaranteed carriage by electing must-carry status.⁸⁷

B. Congressional Findings as a Basis for Must-Carry

Apparently learning its lesson after *Quincy* and *Century Communications*, Congress predicated the must-carry provisions in the 1992 Cable Act on three years of extensive legislative hearings.⁸⁸ As a result, rather than relying on the FCC to enunciate the basis for the must-carry rules, Congress made clear its purposes⁸⁹ and included several findings of fact directly in the text of the 1992 Cable Act.⁹⁰

⁸³ See *id.* § 536.

⁸⁴ *Id.* § 325(b)(1).

⁸⁵ *Id.* § 325(b)(3)(B).

⁸⁶ *Id.* § 325(b)(4).

⁸⁷ See *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 37 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994). As a result, retransmission consent has exacerbated the effects of must-carry by devoting even more channels to the local broadcasters. "Powerful broadcasters have leveraged their retransmission rights to demand carriage of new broadcaster-affiliated cable program networks—now referred to in the industry as 'ransom' channels—in exchange for retransmission of their signals." Brief for Appellants *Turner Broadcasting System, Inc. et al.* at 15 n.31, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (No. 93-44).

⁸⁸ *Turner*, 819 F. Supp. at 39 (citing *Hearings before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. (1991); *Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1991); "Must-Carry": *Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); 138 CONG. REC. S400, S635 (daily ed. Jan. 30, 1992) (statement of Sen. Inouye) ("[T]he bill before us is the result of 13 days of hearings and 113 different witnesses. We have had countless numbers of communications experts and lawyers look over the measure. We have conferred with . . . at least 500 knowledgeable citizens.")).

⁸⁹ See 47 U.S.C. § 521 (Supp. IV 1992).

⁹⁰ See 1992 Cable Act, *supra* note 3, § 2.

Congress's purposes, as applicable to the must-carry rules, are to: (1) "establish a national policy concerning cable communications;"⁹¹ (2) "encourage the growth and development of cable systems and . . . assure that cable systems are responsive to the needs and interests of the local community;"⁹² (3) "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;"⁹³ and (4) "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."⁹⁴ These purposes evince a desire to foster the growth and development of the cable industry, while also ensuring that local communities are protected and provided with diverse sources of information. The must-carry rules, therefore, presumably are designed with these goals in mind.

Congress inserted factual findings into the 1992 Cable Act, the vast majority of which seem geared toward defending the must-carry provisions.⁹⁵ Of the twenty-one separate findings contained in section 2(a), nineteen relate directly to must-carry, and the other two relate indirectly.⁹⁶ Many of the findings fall into several broad categories:⁹⁷ (1) the anti-competitive dominance achieved by cable television;⁹⁸ (2) government interests

⁹¹ 47 U.S.C. § 521(1).

⁹² *Id.* § 521(2).

⁹³ *Id.* § 521(4).

⁹⁴ *Id.* § 521(6).

⁹⁵ See 1992 Cable Act, *supra* note 3, § 2(a), (b).

⁹⁶ Of the two findings that do not relate directly to must-carry, the first is a statement detailing the large rise in monthly subscriber rates since the deregulation of cable franchises in 1986, indicating that cable operators are doing very well financially. *Id.* § 2(a)(1). The second finding that is only indirectly related to must-carry laments the regulatory-caused difficulties experienced by franchising authorities in denying franchise renewals to cable operators which are not adequately serving their subscribers' needs, implying that other means, such as must-carry, are needed to ensure that cable operators meet the needs of local communities. *Id.* § 2(a)(20).

⁹⁷ Some of the findings do not fit into these general categories. For the remainder of the findings, see generally *id.* § 2(a).

⁹⁸ *Id.* § 2(a)(2)-(5). Four subsections deal with cable's ascension to market dominance and its potential for abuse. Congress stated:

(2) For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

(3) There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage

in must-carry, including diversity,⁹⁹ access to noncommercial educational television,¹⁰⁰ access to local commercial television,¹⁰¹ and the continuation of free and informative locally-originated television;¹⁰² and (3) cable's threat to the economic viability of local broadcast television.¹⁰³

is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.

(4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

Id.

⁹⁹ *Id.* § 2(a)(6).

¹⁰⁰ *Id.* § 2(a)(8). Congress claimed an interest in mandating carriage of public television because it educates the nation's citizens and is responsive to the needs of local communities which have contributed over \$10,800,000,000 to it since 1972. Furthermore, the federal government has invested over \$3,000,000,000 in public television since 1969, and those who have supported it probably will be deprived of it without must-carry. *Id.*

¹⁰¹ *Id.* § 2(a)(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 . . . of providing a fair, efficient, and equitable distribution of broadcast services." *Id.*

¹⁰² *Id.* § 2(a)(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." *Id.* Congress also said that the local origination of broadcasting was a primary objective of the system of television regulation, *id.* § 2(a)(10), and there was a "substantial government interest" in ensuring that free television continues to be available, particularly for those who cannot afford to pay to receive programming. *Id.* § 2(a)(12).

¹⁰³ *Id.* § 2(a)(14)-(16). After reporting the large market share shift from broadcast television to cable television, *id.* § 2(a)(13), Congress stated:

(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, refuse 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, addition-

Congress also included in the 1992 Cable Act a statement of policies which gives insight into the role of the must-carry provisions. These policies included: (1) promoting diverse views and information;¹⁰⁴ (2) relying on the marketplace, to the extent feasible;¹⁰⁵ (3) ensuring the expansion of cable, where economically justified;¹⁰⁶ (4) protecting consumers from a lack of competition in cable;¹⁰⁷ and (5) ensuring that cable does not achieve undue market power at the expense of consumers and broadcasters.¹⁰⁸

C. Evidence Not Included in Congress's Findings

Despite Congress's predictions of doom for local broadcasters in the absence of must-carry rules, actual data paint a different picture. Congress asserted in the 1992 Cable Act that cable poses a threat to the economic viability of local broadcasting,¹⁰⁹ but local broadcasters seem to be thriving since the fall of the previous must-carry provisions in *Quincy Cable TV, Inc. v. FCC*.¹¹⁰ Since the decision in *Quincy* in July of 1985, the number of commercial broadcast stations actually has increased by more than twenty-five percent.¹¹¹ Similarly, during the same period there was a twenty-one percent growth in noncommercial stations,¹¹² and the number of low power local stations increased during that period by 282%.¹¹³ Furthermore, the

al 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, coupled 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.

Id.

¹⁰⁴ *Id.* § 2(b)(1).

¹⁰⁵ *Id.* § 2(b)(2).

¹⁰⁶ *Id.* § 2(b)(3).

¹⁰⁷ *Id.* § 2(b)(4).

¹⁰⁸ *Id.* § 2(b)(5).

¹⁰⁹ *Id.* § 2(a)(16).

¹¹⁰ 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). For a discussion of the decision in *Quincy*, see *supra* notes 13-47 and accompanying text.

¹¹¹ Brief for Appellants Turner Broadcasting System, Inc. et al. at 40 n.67, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (No. 93-44) (citing FCC NEWS RELEASE: BROADCAST STATION TOTALS AS OF DECEMBER 31, 1992 (1993); FCC NEWS RELEASE: BROADCAST STATION TOTALS FOR JULY 1985 (1985)).

¹¹² *Id.*

¹¹³ *Id.* at 40 n.68 (citing FCC NEWS RELEASE: BROADCAST STATION TOTALS AS OF DECEMBER 31, 1992 (1993); FCC NEWS RELEASE: BROADCAST STATION TOTALS FOR JULY 1985 (1985)). The must-carry rules mandate carriage of low power stations if there is an insufficient number of full power local commercial stations to fulfill the must-carry requirements. 47 U.S.C. § 534(c) (Supp. IV 1992). For a detailed definition

average pre-tax profits of independent broadcast stations nearly doubled during the year preceding the imposition of the 1992 Cable Act's must-carry rules.¹¹⁴ Likewise, there was a thirty-six percent increase in the average pre-tax profit of network affiliates during the same period,¹¹⁵ and their profits had increased an average of twenty-four percent during the entire period since the demise of must-carry in 1985.¹¹⁶ In the absence of any must-carry rules, therefore, local broadcasters have experienced both growth and profitability.

Although Congress asserted that must-carry rules were needed, in part, to promote diversity in programming,¹¹⁷ the diversity of programming choices actually has increased substantially since the previous must-carry rules were invalidated in *Quincy* in 1985.¹¹⁸ A 1991 Senate Report concerning must-carry said that "programming choices have . . . grown about 50 percent" since 1984.¹¹⁹ In addition, cable programmers increased their investment in new programming from \$340 million in 1984 to \$1.5 billion in 1991.¹²⁰ In fact, the FCC itself has acknowledged that cable programmers have contributed greatly to the diversity of programming choices available.¹²¹

In addition, although Congress was seeking to protect local broadcasting from cable's suspected anti-competitive conduct and supposed incentive to

of "qualified low power station," see *id.* § 534(h)(2).

¹¹⁴ Brief for Appellants Turner Broadcasting System, Inc. et al. at 40 n.68, *Turner* (No. 93-44) (citing NATIONAL ASS'N OF BROADCASTERS, TELEVISION FINANCIAL REPORT 64, 181 (1993)).

¹¹⁵ *Id.* at 40 n.69 (citing NATIONAL ASS'N OF BROADCASTERS, *supra* note 114, at 33, 150).

¹¹⁶ For a comparison of pre-tax profits of network affiliates during those years, see the National Association of Broadcasting's *Television Financial Report* for each of the years 1986-1993.

¹¹⁷ See 47 U.S.C. § 521(4); see also 1992 Cable Act, *supra* note 3, § 2(b)(1).

¹¹⁸ S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991).

¹¹⁹ *Id.*

¹²⁰ H.R. REP. NO. 628, 102d Cong., 2d Sess. 31 (1992). In particular, the news programming budget of CNN and Headline News increased from \$65 million in 1984 to an estimated \$181 million in 1993. See Brief for Appellants Turner Broadcasting System, Inc. et al. at 15 n.24, *Turner* (No. 93-44). In addition, the programming investment by the Arts & Entertainment network increased 450% during that period; Lifetime's investment in programming had grown to 10 times what it was in 1984; and USA Network increased its programming investment from \$29 million in 1985 to \$193 million in 1992. *Id.*

¹²¹ See *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C.R. 864, 880 (1986); Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 196-221 (1985); see also *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5051-54 (1987).

drop local broadcasters,¹²² it acknowledged that it “has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations”¹²³ In fact, of all cable systems included in a 1988 FCC staff report relied upon by Congress, eighty percent of such systems did not discontinue or deny carriage of any local stations, and another ten percent only did so with one station.¹²⁴ Another report relied upon by Congress detailed that of all local stations qualifying for mandatory carriage under the rules struck down in *Century Communications*,¹²⁵ a full ninety-eight percent of them were being carried, and ninety-four percent of all cable systems carried all local stations that would have qualified for mandatory carriage.¹²⁶ The same report showed that many cable operators actually added broadcast stations to their systems after the previous must-carry rules were struck down.¹²⁷ The supposed incentives to drop local broadcast stations that Congress believed cable operators would have in the absence of must-carry¹²⁸ have existed since the demise of must-carry in 1985, but Congress’s supposition simply has failed to materialize.

IV. THE LOWER COURT DECISION IN *TURNER*

A. *The Position of the Parties*

The cable operators and programmers contended that the must-carry provisions should be subjected to strict scrutiny and upheld “only if found to [have been] precisely drawn to serve a compelling government interest, and to [have gone] no further.”¹²⁹ Essentially, the programmers’ claim was that the must-carry rules favor the speech of local broadcasters over their own speech.¹³⁰ This rendered the regulations, they believed, unconstitu-

¹²² See 1992 Cable Act, *supra* note 3, § 2(a)(13)-(17).

¹²³ H.R. REP. NO. 628 at 52. “[M]ost cable systems have continued to carry a number of local over-the-air signals.” *Id.* at 67.

¹²⁴ POLICY AND RULES DIVISION, MASS MEDIA BUREAU, FCC, CABLE TELEVISION BROADCAST SIGNAL CARRIAGE SURVEY REPORT, STAFF REPORT 13 (1988).

¹²⁵ 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

¹²⁶ S. REP. NO. 92 at 43 (citing NATIONAL CABLE TELEVISION ASS’N, BROADCAST STATION CARRIAGE SURVEY 8 (1988)).

¹²⁷ *Id.*

¹²⁸ See 1992 Cable Act, *supra* note 3, § 2(a)(15), (16).

¹²⁹ *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 39 (D.D.C. 1993) (citing *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983)), *vacated and remanded*, 114 S. Ct. 2445 (1994).

¹³⁰ *Id.* at 42.

tional on their face.¹³¹ Even if *O'Brien*-level scrutiny¹³² was used, however, they contended that the FCC could not show that the must-carry rules served the government's asserted interest, even assuming it to be an important one.¹³³ Furthermore, they argued that the provisions were not narrowly tailored to accomplish the government's goal.¹³⁴

The FCC responded by asserting that the must-carry rules should be reviewed pursuant to *O'Brien* as an incidental burden on speech, if a burden at all.¹³⁵ Pursuant to this standard, the FCC argued, the rules should be upheld if they are "shown to promote a significant government interest and not to burden substantially more speech than necessary to vindicate that interest."¹³⁶ The FCC argued that the must-carry rules survived this review because they are essential to ensure that cable subscribers retain the ability to view programming with a local "flavor" and to "preserve the vitality of a free source of over-the-air programming to television viewers unwilling or unable to obtain a cable connection."¹³⁷

B. *The Opinion of the Court*

Writing for the court, Judge Jackson held that the must-carry rules in the 1992 Cable Act do not violate the First Amendment.¹³⁸ Early in the opinion, Jackson stated: "the [c]ourt holds that the must-carry provisions are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of the cable operators' anti-competitive practices."¹³⁹ By justifying the regulation as unrelated to the content of speech,¹⁴⁰ Jackson was able to dismiss the plaintiffs' call for strict scrutiny and employ the less rigorous test set forth in *O'Brien* and its progeny.¹⁴¹ Using that test, he then held that the must-carry rules are constitutional.¹⁴²

In declaring the must-carry rules simply to be economic regulation, Jackson stated that "[t]he commodity Congress undertook to regulate is the means of delivery of video signals to individual receivers. It is not the information the video signals may be used to impart. That the video signals

¹³¹ *Id.* at 38.

¹³² *See supra* note 26.

¹³³ *Turner*, 819 F. Supp. at 46.

¹³⁴ *Id.* at 47.

¹³⁵ *Id.* at 39.

¹³⁶ *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

¹³⁷ *Id.* at 38.

¹³⁸ *Id.* at 36.

¹³⁹ *Id.* at 40.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 41.

¹⁴² *Id.* at 47-48.

could only be used to convey a message is of no particular significance.”¹⁴³ Strict scrutiny would apply, Jackson said, only if the must-carry rules were content-based or if they presented an opportunity for government censorship.¹⁴⁴ Regulations compelling speech or restricting the discretion to say what a speaker wants (the effect that the cable programmers and operators claimed the must-carry rules had on them) are reviewed with strict scrutiny only if “the government has prescribed the content—either the message or the subject matter—of the speech to be spoken.”¹⁴⁵ Jackson then stated that regulations favoring one group of speakers over another, “speaker-partial” regulations, also are not subject to strict scrutiny review unless they are content-based.¹⁴⁶ He then declared the must-carry rules to be content-neutral because they were designed to “assure a functional market in the distribution of video signals, whatever might be said with those signals”¹⁴⁷ and because Congress’s protection of local broadcasters “rests on its assumption that [local broadcasters] have as much to say of interest or

¹⁴³ *Id.* at 40.

¹⁴⁴ *Id.* at 42.

¹⁴⁵ *Id.* Judge Jackson distinguished the must-carry rules from the compelled speech and editorial discretion cases cited by the cable programmers and operators. He said that all of the other cited cases “involved regulation telling the speaker what to say or at least what to talk about.” *Id.* (citing *Riley v. National Fed’n of the Blind*, 487 U.S. 781 (1988) (involving statute that required charities to disclose the percentage of receipts from fundraising actually going to charitable uses); *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 10-11 & n.7 (1986) (plurality opinion) (involving statute that required a utility to mail its rate-making opponents’ fundraising appeals); *Wooley v. Maynard*, 430 U.S. 705 (1977) (involving statute that required motorist to display state motto on license plate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (involving statute that required newspaper to print replies of political candidates whom it had opposed in editorials)).

¹⁴⁶ *Id.* Judge Jackson again distinguished a case cited by the cable programmers and operators, *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating a statute limiting to \$1,000 the amount that an individual could contribute to a particular political candidate). In *Buckley*, the Supreme Court stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment . . .” *Buckley*, 424 U.S. at 48-49. Jackson, however, said that implicit in the Court’s decision was a determination by Congress that the speech of those spending over \$1,000 was “louder” and somehow more sinister than the speech of those spending less than \$1,000. *Turner*, 819 F. Supp. at 43 (citing *Buckley*, 424 U.S. at 16-17). In Jackson’s view, *Buckley* was a case in which the government attempted to suppress an idea, but strict scrutiny was not warranted because the regulation was based upon speaker partiality, not upon what the speakers were saying. *Id.*

¹⁴⁷ *Turner*, 819 F. Supp. at 43. “A regulation is deemed to be content-neutral if it is addressed to ends unrelated to the content of expression upon which it may have an effect.” *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Texas v. Johnson*, 491 U.S. 397, 407 (1989)).

value as the cable programmers who service a given geographic market audience, not on any recognition that there is a discrete 'local' subject-matter."¹⁴⁸ In other words, there is nothing special about the content of the local signals that prompted Congress to mandate their carriage. Based on this content-neutrality, Jackson reviewed the must-carry rules pursuant to *O'Brien* and *Ward*.¹⁴⁹

After determining the level of scrutiny to utilize, Jackson proceeded to apply the test. The must-carry rules would survive if the government could show that they furthered a significant government interest and that they were narrowly tailored to serve that interest.¹⁵⁰ The government's asserted interest was "to promote fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not."¹⁵¹ Although the courts in *Quincy* and *Century Communications* declined to rule on the significance of this interest, Jackson found that the importance of local broadcasting to the public clearly had been established by other cases.¹⁵² Even assuming the importance of this interest, however, the cable programmers and operators cited evidence that the must-carry rules did not further that interest because the factual basis of the rules—that the local broadcasting industry is in danger—was incorrect.¹⁵³ Nevertheless, Jackson found the record compiled by Congress sufficient to demonstrate that cable operators routinely denied carriage to local broadcasters, attached conditions to their

¹⁴⁸ *Id.* at 44.

¹⁴⁹ *Id.* at 45. Once again, Judge Jackson found it necessary to distinguish a case, this time *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a law requiring a newspaper to print replies of political candidates whom it had opposed in editorials). *Turner*, 819 F. Supp. at 45 n.25. In *Tornillo*, the Court rejected the government's assertion that economic barriers to newspaper access justified the compelled speech. *See id.* The regulation in *Tornillo*, however, was content-based because it "exact[ed] its penalty on the basis of the antecedent publication of one message and it compelled carriage of another." *Id.* (citing *Tornillo*, 418 U.S. at 256-58). The must-carry rules were different, Jackson reasoned, because their goal is to provide the public with "access to diverse kinds of communications in order to overcome technological, structural, and historic, as well as economic factors." *Id.* Basing his decision to use relaxed scrutiny on these "contextual factors unique to cable" even though the must-carry provisions may be "marginally content-related," Jackson acknowledged that his conclusion depended in part upon Congress's factual findings. *Id.*

¹⁵⁰ *See United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Ward*, 491 U.S. at 798.

¹⁵¹ *Turner*, 819 F. Supp. at 45.

¹⁵² *Id.* at 45-46 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn.38 & 39 (1968); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984)).

¹⁵³ *Id.* at 46. For a discussion of the evidence cited by the cable programmers and operators, see *supra* notes 109-28 and accompanying text.

carriage, and repositioned them to remote channels.¹⁵⁴ Based on the congressional record, Jackson stated:

[E]ven if the state of the broadcasting industry is not now as parlous as the [government] contend[s], . . . cable operators have attained a position of dominance in the video signal distribution market, and can henceforth exercise the attendant market power. . . . [T]his market power provides cable operators with both incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy.¹⁵⁵

As a result of this prospect of abuse of market power, Jackson held that the must-carry rules furthered a substantial government interest.¹⁵⁶

Jackson next held that "the must-carry provisions are sufficiently, if not surgically, tailored to Congress's larger economic market-adjusting objective."¹⁵⁷ Although Jackson admitted that Congress could have protected local broadcasting with means less restrictive than the must-carry provisions, he stated that "under *O'Brien*, the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome."¹⁵⁸ He then refused to question Congress's conclusion that the must-carry rules were necessary to protect local broadcasting.¹⁵⁹ In effect, Jackson simply deferred to the congressional belief that these particular must-carry rules were needed. He concluded that the provisions did not "unnecessarily burden a substantial amount" of the speech of cable operators because they retain discretion over the majority of their available channels, they must devote no more than one-third of their channels to local commercial broadcast stations, they do not have to carry more than three local noncommercial educational stations, and they need not carry duplicative programming.¹⁶⁰ Thus, because the must-carry provisions leave plentiful alternative channels available to the cable programmers and operators, they are narrowly tailored to serve the government's interest.¹⁶¹ As a

¹⁵⁴ *Id.* (citing S. REP. No. 92, 102d Cong., 1st Sess. 42-43 (1991)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 47.

¹⁵⁸ *Id.* (citing *Ward*, 491 U.S. at 799).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

result, Jackson concluded that the must-carry rules do not violate the First Amendment.¹⁶²

C. Judge Sporkin's Concurrence

Judge Sporkin wrote a concurring opinion to emphasize that he did not believe that the case implicated the First Amendment to the extent claimed by the cable programmers and operators.¹⁶³ He stated that "this case is not about protecting free speech and the First Amendment. This case is about market domination and control."¹⁶⁴ To the extent that the First Amendment was implicated at all, Sporkin agreed with Jackson that the relaxed scrutiny of *O'Brien* and *Ward* should apply.¹⁶⁵

To demonstrate that the must-carry rules are content-neutral, Sporkin likened this case to *Regan v. Taxation with Representation*.¹⁶⁶ *Regan* held constitutional section 501(c)(3) of the Internal Revenue Code, which bases tax-exempt status on the purposes for which organizations operate.¹⁶⁷ Although section 501(c)(3) distinguishes between different groups, "[f]inding 'no indication that the statute was intended to suppress any ideas,' the Court found that section 501(c)(3) is not a content-based restriction on speech."¹⁶⁸ As a result of Congress's economic, rather than content-based, motive in enacting the must-carry provisions, Sporkin did not question Congress's method of furthering its interest.¹⁶⁹

D. Judges Williams' Dissent

Circuit Judge Williams filed a dissenting opinion in which he argued that the must-carry rules are content-based and thus should be reviewed using strict scrutiny.¹⁷⁰ He believed that the interests advanced by the government in support of the provisions were insufficient to justify them.¹⁷¹ As a result, Williams would have declared the must-carry provisions unconstitutional.¹⁷²

¹⁶² *Id.* at 47-48.

¹⁶³ *Id.* at 51 (Sporkin, J., concurring).

¹⁶⁴ *Id.* at 52 (Sporkin, J., concurring).

¹⁶⁵ *Id.* at 54 (Sporkin, J., concurring).

¹⁶⁶ 461 U.S. 540 (1983).

¹⁶⁷ *Id.* at 550.

¹⁶⁸ *Turner*, 819 F. Supp. at 55 (Sporkin, J., concurring).

¹⁶⁹ *Id.* at 57 (Sporkin, J., concurring).

¹⁷⁰ *Id.* at 59-60 (Williams, J., dissenting).

¹⁷¹ *Id.* at 60-65 (Williams, J., dissenting).

¹⁷² *Id.* at 65, 67 (Williams, J., dissenting).

Williams first examined the standard of review to be applied to the must-carry rules and concluded that precedent mandated the use of strict scrutiny.¹⁷³ In his view, the way in which local broadcasting is defined automatically renders the must-carry provisions content-based.¹⁷⁴ Congress explicitly rested its decision to benefit the stations upon the stations' programming content, finding that they are "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."¹⁷⁵ More importantly to Williams, however, the FCC licensing requirements that allowed the local stations to broadcast legally bound them to "provide programming responsive to issues of concern to its community."¹⁷⁶ They would not be local broadcasters, therefore, if not for the content of their programming.

Williams believed that the case was controlled by *Riley v. National Federation of the Blind*.¹⁷⁷ The statute at issue in *Riley* was deemed content-based because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."¹⁷⁸ In the case of must-carry, cable operators were being forced to replace their chosen programming with programs chosen by local broadcasters.¹⁷⁹ Examining more closely the possibility that the rules were merely incidental burdens on speech, Williams concluded that "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' about the burden."¹⁸⁰ To seal the issue, Williams noted that strict scrutiny applies to the control of editorial discretion, which surely, in his view, comprises choice of programming.¹⁸¹

¹⁷³ *Id.* at 60 (Williams, J., dissenting).

¹⁷⁴ *Id.* at 58 (Williams, J., dissenting).

¹⁷⁵ *Id.* (Williams, J., dissenting) (quoting 1992 Cable Act, *supra* note 3, § 2(a)(11)).

¹⁷⁶ *Id.* (Williams, J., dissenting) (quoting Revision of Programming and Commercialization Policies, Ascertaining Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1091-92 (1984) (report and order) [hereinafter *Commercial TV Stations*]).

¹⁷⁷ 487 U.S. 781 (1988) (involving a statute that required charities to disclose the percentage of receipts actually going to charitable uses).

¹⁷⁸ *Id.* at 795.

¹⁷⁹ *Turner*, 819 F. Supp. at 59 (Williams, J., dissenting).

¹⁸⁰ *Id.* (Williams, J., dissenting). Williams noted that cable systems serving one-third of all subscribers do not have any excess channel capacity, and many cable programmers would be dropped from cable systems to make room for local broadcasters receiving preferential treatment. *Id.* at 59 n.3 (Williams, J., dissenting).

¹⁸¹ *Id.* (Williams, J., dissenting) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) ("[Cable] is engaged in 'speech' under the first amendment, and is, in much of its operation, part of the 'press.'"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (noting that cable operators exercise significant editorial

After determining that strict scrutiny was the correct standard of review, Williams applied the test. He said that a regulation of speech could survive strict scrutiny if it "serve[s] a 'compelling' governmental purpose and its 'means [are] carefully tailored to achieve those ends.'" ¹⁸² He consolidated the government's asserted interests into two categories, diversity and the preservation of local broadcasters, ¹⁸³ and addressed each in turn.

Williams assumed that the promotion of diversity in broadcasting was a compelling government objective, but he concluded that the fit between that interest and the must-carry regulations was too weak. ¹⁸⁴ One reason that he found the fit to be too weak was the availability of alternatives. ¹⁸⁵ Williams saw a less restrictive alternative to be the "leased access" provisions, which apply only to use by "persons unaffiliated with the [cable] operator." ¹⁸⁶ In Williams' view, this was less burdensome than the must-carry provisions because the leased-access provisions include all programmers who may need access to cable, "except the ones that don't need it—the affiliates of a cable operator." ¹⁸⁷ The leased access provisions designate a certain portion of a cable operator's channel capacity for use by those unaffiliated with the operator, ¹⁸⁸ and they give the FCC the authority to determine reasonable rates and conditions for such use. ¹⁸⁹ A House Report stated that a legislative committee holding hearings about the 1992 Cable Act "belie[ved] that access requirements establish a form of content-neutral structural regulation which will foster the availability of a diversity of viewpoints to the listening audience." ¹⁹⁰ Given this less restrictive alternative method to achieve Congress's diversity goal, Williams reasoned that the

discretion)). Williams then distinguished *Leathers*, which held that the First Amendment is not implicated by differential taxation of speakers unless it is aimed at particular ideas or presents the danger of suppressing them. *Leathers*, 499 U.S. at 450. He said that *Leathers* involved a "broad-based, content-neutral sales tax," the analysis of which "cannot be transported to the context of a burden imposed on one set of speakers for the direct and explicit advantage of a limited class of competitors—a class whose programming must, as a matter of law, include content of a type specified by the government." *Turner*, 819 F. Supp. at 60 (Williams, J., dissenting).

¹⁸² *Turner*, 819 F. Supp. at 60 (Williams, J., dissenting) (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

¹⁸³ *Id.* at 60-61 (Williams, J., dissenting).

¹⁸⁴ *Id.* at 61 (Williams, J., dissenting).

¹⁸⁵ *Id.* (Williams, J., dissenting) (citing *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.")).

¹⁸⁶ 47 U.S.C. § 532(b)(1) (1988).

¹⁸⁷ *Turner*, 819 F. Supp. at 61 (Williams, J., dissenting).

¹⁸⁸ 47 U.S.C. § 532(b)(1).

¹⁸⁹ *Id.* § 532(c)(4)(A)(i)-(ii) (Supp. IV 1992).

¹⁹⁰ H.R. REP. NO. 628, 102d Cong., 2d Sess. 40 (1992).

must-carry provisions do not provide a reasonable fit to achieve this goal.¹⁹¹

Turning next to the government's asserted interest in preserving local broadcasting, Williams found that the portion of this interest associated with the *content* of local broadcasting is plainly impermissible to justify the must-carry rules.¹⁹² As for the preservation of over-the-air television, Williams saw no evidence that access to it was in jeopardy.¹⁹³ He noted that since the fall of must-carry in *Quincy Cable TV, Inc. v. FCC*,¹⁹⁴ the abstract risk of the demise of over-the-air television simply had failed to materialize; instead the number of commercial broadcast stations increased by twenty-two percent, the number of educational stations increased by fifteen percent, and the number of cities receiving broadcast television increased by sixteen percent.¹⁹⁵ In addition, despite the "marked shift in market share from broadcast television to cable television"¹⁹⁶ and the structural relationships giving cable operators an incentive to drop local broadcasters from their channel lineups,¹⁹⁷ both of which were specifically found by Congress, Williams said that the evidence led to a different conclusion.¹⁹⁸ Evidence presented to Congress showed: (1) eighty percent of all cable operators had never dropped a local broadcaster;¹⁹⁹ (2) approximately 3600 instances in which cable operators had dropped local stations, although this figure was taken from a total of over 64,000 local stations being carried on cable systems;²⁰⁰ and (3) ninety-eight percent of all local broadcast stations that would have qualified pursuant to the invalidated must-carry rules were still being carried even without any must-carry requirement in effect.²⁰¹

¹⁹¹ *Turner*, 819 F. Supp. at 62 (Williams, J., dissenting).

¹⁹² *Id.* (Williams, J., dissenting). Assuming *arguendo* that an interest in local content somehow could be compelling, Williams said that a simple subsidy provided to local broadcasters would be a less restrictive means of achieving that goal. *Id.* (Williams, J., dissenting) (citing *Rust v. Sullivan*, 500 U.S. 173, 200 (1991)). With this alternative available, "Congress cannot advance specific content by requiring a competing class of first amendment speakers to carry the favored speech." *Id.* (Williams, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

¹⁹³ *Id.* (Williams, J., dissenting).

¹⁹⁴ 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). For a discussion of *Quincy*, see *supra* notes 13-47 and accompanying text.

¹⁹⁵ *Turner*, 819 F. Supp. at 63 (Williams, J., dissenting).

¹⁹⁶ 1992 Cable Act, *supra* note 3, § 2(a)(13).

¹⁹⁷ *Id.* § 2(a)(12), (14)-(15).

¹⁹⁸ *Turner*, 819 F. Supp. at 63-65 (Williams, J., dissenting).

¹⁹⁹ *Id.* at 63 (Williams, J., dissenting) (citing S. REP. NO. 92, 102d Cong., 1st Sess. 43 (1991)).

²⁰⁰ *Id.* at 63-64 (Williams, J., dissenting) (citing S. REP. NO. 92, 102d Cong., 1st Sess. 43 (1991)).

²⁰¹ *Id.* at 64 (Williams, J., dissenting) (citing Plaintiff Klein's Affidavit ¶12, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (No. 93-44)).

Furthermore, Williams asserted that the supposed incentive for cable operators to drop local broadcasters is unsound.²⁰² He stated that cable television remains dependent on the supply of programming contributed by local broadcasters, which accounts for over two-thirds of the total viewing hours on cable systems.²⁰³ Furthermore, the competition for advertising revenue is not nearly as dangerous to local broadcasters as Congress presumed because cable operators receive twenty-five times as much revenue from subscription fees as they do from advertising revenue.²⁰⁴ As long as local broadcasting remains as popular as it is, Williams said that cable operators cannot afford to drop local broadcasters to the point of endangering the local broadcasters' economic viability.²⁰⁵

In general, therefore, Williams believed that the must-carry provisions in the 1992 Cable Act suffered from deficiencies similar to the ones in prior attempts at must-carry. He simply was not satisfied that there was an adequate factual basis justifying the must-carry restrictions on speech. Although Congress inserted several findings into the text of the Act, Williams found that the findings did not "support the inferences needed to sustain must-carry."²⁰⁶ As a result of these failures, Judge Williams determined that the must-carry rules violate the First Amendment.

V. THE SUPREME COURT DECISION IN *TURNER*

A. *Opinion of the Court*

A divided Court vacated the lower court's decision and remanded the case for further proceedings.²⁰⁷ The Court held that the must-carry provisions are content-neutral and, therefore, are subject to intermediate scrutiny pursuant to the test set forth in the *United States v. O'Brien*²⁰⁸ and *Ward v. Rock Against Racism*²⁰⁹ decisions.²¹⁰ In applying the test to the must-carry provisions, however, the Court was unable to determine whether the

²⁰² *Id.* at 64-65 (Williams, J., dissenting).

²⁰³ *Id.* (Williams, J., dissenting) (citing S. REP. NO. 92, 102d Cong., 1st Sess. 35) (1991)).

²⁰⁴ *Id.* (Williams, J., dissenting).

²⁰⁵ *Id.* (Williams, J., dissenting). Williams also noted that less intrusive means are available to safeguard the survival of local broadcasters. As with the goal of promoting diversity, if evidence of a risk to the existence of local broadcasting appeared, Congress could provide subsidies or expand the leased access provision of § 612 of the 1984 Cable Act. *Id.* at 64-65 (Williams, J., dissenting).

²⁰⁶ *Id.* at 65 (Williams, J., dissenting).

²⁰⁷ *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2472 (1994).

²⁰⁸ 391 U.S. 367 (1968).

²⁰⁹ 491 U.S. 781 (1989).

²¹⁰ *Turner*, 114 S. Ct. at 2458-69.

provisions meet the test's requirements.²¹¹ As a result, the Court remanded the case for further factual development as to whether the must-carry provisions actually further the government's asserted interests and how they actually affect the speech of cable operators and programmers.²¹²

Justice Kennedy, writing for the Court, began by addressing the appropriate standard of review applicable to the regulation of cable television.²¹³ The Court rejected the government's assertion that regulation of cable television should receive the same scrutiny as does regulation of broadcast television.²¹⁴ The Court agreed with the lower court's declaration that the relaxed scrutiny applicable to regulation of broadcast television is justified by the physical scarcity of the electromagnetic spectrum,²¹⁵ a limitation which does not hamper cable television.²¹⁶ In doing so, the Court made clear that its decisions regarding regulation of broadcast television are based upon the physical limitations of the technology, rather than any dysfunction in the market.²¹⁷ Because cable television does not share these physical characteristics, the Court ruled that regulations burdening cable operators or programmers must be subjected to some degree of heightened scrutiny.²¹⁸ The particular level of review would be selected based upon whether the must-carry provisions are content-neutral or content-based.²¹⁹

Five justices agreed that the must-carry rules, insofar as they apply to full power broadcasters, are content-neutral.²²⁰ The Court found that the

²¹¹ *Id.* at 2469-72.

²¹² *Id.*

²¹³ The District of Columbia Circuit expressly declined to rule on the appropriate level of review in both previous must-carry cases. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

²¹⁴ *Turner*, 114 S. Ct. at 2456-57.

²¹⁵ For a discussion of the "scarcity rationale," see *supra* notes 28-33 and accompanying text.

²¹⁶ *Turner*, 114 S. Ct. at 2456-57.

²¹⁷ *Id.*

²¹⁸ *Id.* at 2458.

²¹⁹ *Id.* at 2458-59.

²²⁰ *Id.* at 2458-64. The Court explicitly refused to rule on the must-carry provisions that mandate carriage of low power broadcast stations and directed the lower court to consider the matter on remand. *Id.* at 2460 n.6 (citing 47 U.S.C. § 534(c) (Supp. IV 1992)). In doing so, however, the Court intimated that it considered the rules regarding low power stations to be content-based, stating:

[A] low power station may become eligible for carriage only if, among other things, the FCC determines that the station's programming "would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license." . . . We rec-

must-carry provisions are not content-based on their face because "[a]lthough the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming."²²¹ Similarly, the burden placed upon cable programmers by reducing the number of available channels on which they may be carried is unrelated to content because "it extends to all cable programmers irrespective of the programming they choose to offer viewers."²²² Finally, the Court found that the privileges conferred by the must-carry provisions also are content-neutral because they apply to all full power broadcasters, "be they commercial or noncommercial, independent or network-affiliated, English or Spanish language, religious or secular."²²³ The effect of the rules as a whole, therefore, is "to make every full power commercial and noncommercial broadcaster eligible for must-carry, provided only that the broadcaster operates within the same television market as a cable system."²²⁴

The Court next examined whether, despite their facial neutrality, the must-carry rules are content-based because their "manifest purpose is to

ognize that this aspect of § 4 appears to single out certain low power broadcasters for special benefits on the basis of content.

Id. (quoting 47 U.S.C. § 534 (h)(2)(B) (Supp. IV 1992)). Likewise, the Court noted that in determining whether to grant must-carry privileges to otherwise geographically ineligible broadcasters, the FCC must consider "the value of localism" and whether the broadcast station "provides news coverage of issues of concern to such community . . . or coverage of sporting and other events of interest to the community." *Id.* (citing 47 U.S.C. § 534(h)(1)(C)(ii)). The Court directed the lower court also to address this provision on remand. *Id.*

²²¹ *Id.* at 2460. In this regard, the Court distinguished *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). In *Tornillo*, the Court found that newspapers could avoid the law's access requirements by altering the content of its speech—"by refraining from speech critical of political candidates." *Turner*, 114 S. Ct. at 2460. In this case, however, the Court declared that cable operators are unable to avoid the mandatory carriage requirements by altering their programming. *Id.*

²²² *Turner*, 114 S. Ct. at 2460 (distinguishing *Boos v. Barry*, 485 U.S. 312, 319 (1988) (plurality opinion) (involving ban on picketing in front of foreign embassy with signs critical of that embassy's government)).

²²³ *Id.*

²²⁴ *Id.* Based on this finding, the Court essentially agreed with the lower court that although

the must-carry provisions distinguish between speakers in the television programming market . . . they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

Id. at 2460-61. For a discussion of the Court's rejection of a strict scrutiny standard of review based on speaker preference, see *infra* notes 247-50 and accompanying text.

regulate speech because of the message it conveys.”²²⁵ The Court rejected the assertion that the purpose of the must-carry provisions is to favor particular speech based upon its content.²²⁶ Instead, the Court found that Congress’s manifest purpose is to “preserve access to free television programming for the 40 percent of Americans without cable.”²²⁷ Recounting what it called “unusually detailed statutory findings,” the Court then set forth the statutory provisions supporting its finding of such an overriding purpose.²²⁸ The Court then stated that this purpose is unrelated to the content of speech affected by the regulations.²²⁹

In a key portion of its opinion, the majority attempted to rebut arguments used by the dissent and by Judge Williams below supporting their beliefs that the must-carry provisions are content-based.²³⁰ First, the Court declared that Congress’s references to the value of local broadcasting in the 1992 Cable Act²³¹ do not render the must-carry provisions content-based because such references “do[] not indicate that Congress regarded broadcast programming as *more* valuable than cable programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast

²²⁵ *Id.* at 2461 (citing *United States v. Eichman*, 469 U.S. 310, 315 (1990) (“Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted interest is related to the suppression of free expression.”)).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* For a discussion of Congress’s statutory findings related to the protection of free broadcast television, see *supra* notes 97-103 and accompanying text.

²²⁹ *Id.* at 2461 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (“[P]rotecting noncable households from loss of regular television broadcasting service due to competition from cable systems . . . [is an] important and substantial federal interest.”)).

²³⁰ *Id.* at 2461-64. Before responding to any particular argument, the Court characterized the general design of the must-carry rules, stating:

The rules . . . confer must-carry rights on all full power broadcasters, irrespective of the content of their programming. They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.

Id. at 2461-62.

²³¹ See 1992 Cable Act, *supra* note 3, § 2(a)(11) (noting that broadcast television is “an important source of local news[,] public affairs programming[,] and other local broadcast services critical to an informed electorate”); *id.* § 2(a)(10) (noting that the local origination of broadcasting is a primary objective of the system of television regulation); *id.* § 2(a)(8) (noting that noncommercial television “provides educational and informational programming to the Nation’s citizens”).

television have some intrinsic value and, thus, are worth preserving against the threats posed by cable."²³² In response to the contention that the must-carry rules are content-based because preferring broadcast television stations "automatically entails content requirements"²³³ due to what the majority called "limited content restraints imposed by statute and FCC regulation,"²³⁴ the Court declared that the FCC's oversight responsibilities are too limited to affect the content of broadcast programming.²³⁵ Importantly for the Court, those responsibilities "do not grant [the FCC] the power to ordain any particular type of programming that must be offered by broadcast stations."²³⁶ Based upon the government's minimal influence over programming content, "it would be difficult to conclude that Congress enacted must-carry in an effort to exercise content control over what subscribers view on cable television."²³⁷ The Court considered suggestions of a content-based purpose to be little more than speculation, noting that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."²³⁸

The Court also rejected three additional arguments that the Appellants believed warranted strict scrutiny review of the must-carry rules. First, relying on *Miami Herald Publishing Co. v. Tornillo*²³⁹ and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,²⁴⁰ the Appellants

²³² *Turner*, 114 S. Ct. at 2462.

²³³ *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994)).

²³⁴ *Id.* at 2462-63 (citing 47 U.S.C. § 303b (Supp. IV 1992) (directing FCC to consider extent to which license renewal applicant has "served the educational and informational needs of children"); 47 U.S.C. § 312(a)(7) (1988) (allowing FCC to revoke broadcast license for willful or repeated failure to allow reasonable access to broadcast airtime for candidates seeking federal elective office); Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (restricting indecent programming); *En Banc Programming Inquiry*, 44 F.C.C.2d 2303, 2312 (1960) (requiring broadcasters to air programming that serves "the public interest, convenience or necessity"); 47 C.F.R. § 73.1920 (1993) (requiring broadcasters to notify victims of on-air personal attacks and to provide victims with opportunity to respond over the air)).

²³⁵ *Id.* at 2462-63.

²³⁶ *Id.* at 2463 (quoting *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960) and citing *Commercial TV Stations*, 98 F.C.C.2d 1076, 1091-92 (1984), *modified*, 104 F.C.C.2d 358 (1986), *remanded on other grounds sub nom.* *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987)).

²³⁷ *Id.* at 2464.

²³⁸ *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

²³⁹ 418 U.S. 241 (1974) (invalidating a statute requiring newspapers to print the reply, free of charge, of any political candidate of whom the newspaper was critical).

²⁴⁰ 475 U.S. 1 (1986) (plurality opinion) (invalidating a rule requiring a utility company to include in its bills a newsletter from a consumer group critical of the utility

asserted that the must-carry rules compel speech by cable operators.²⁴¹ The Court disagreed, distinguishing *Tornillo* and *Pacific Gas & Electric* on three bases.²⁴² First, the must-carry rules apply in a content-neutral manner, whereas the statutes at issue in the other two cases conferred benefits based upon speaker viewpoint.²⁴³ Second, little risk exists that viewers will associate the ideas expressed on broadcast stations with the cable operators who are required to carry those stations, thereby obviating the need for cable operators to alter their own messages to respond to messages conveyed on broadcast stations.²⁴⁴ Finally, the Court noted the technological differences between cable television and newspapers, which were the subject of the regulation at issue in *Tornillo*.²⁴⁵ Although newspapers, even those enjoying a natural local monopoly, cannot obstruct access to competing publications, "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."²⁴⁶ As a result, the Court declined to apply *Tornillo*'s strict scrutiny review.

Refusing to accept the Appellants' second contention that strict scrutiny was mandated by the speaker preference favoring broadcasters over cable programmers,²⁴⁷ the Court distinguished *Buckley v. Valeo*.²⁴⁸ "*Buckley* . . . stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."²⁴⁹ Referring back to its preceding determina-

company's ratemaking practices).

²⁴¹ See *Turner*, 114 S. Ct. at 2464.

²⁴² *Id.* at 2464-66.

²⁴³ *Id.* at 2465.

²⁴⁴ *Id.* at 2465-66 (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (noting that the views expressed by speakers who are granted a right of access to a shopping center would "not likely be identified with those of the owner")).

²⁴⁵ *Id.* at 2466.

²⁴⁶ *Id.* "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." *Id.* In drawing this technological distinction between cable television and newspapers, and the technological distinction between cable television and broadcast television, the Court implicitly recognized that regulations affecting cable television should be reviewed pursuant to a distinct standard, rather than one simply borrowed from another medium. See *id.* at 2456-58.

²⁴⁷ *Id.* at 2466-67.

²⁴⁸ 424 U.S. 1 (1976) (invalidating federal law limiting individual spending to \$1,000 per year to support or oppose a political candidate).

²⁴⁹ *Id.* at 2467. The Court stated that *Buckley* "stands for the proposition that speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what disfavored speakers have to say)." *Id.* To support this proposition, the Court cited *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983), which let stand tax laws that treat-

tion that the must-carry provisions are content-neutral, the Court found that *Buckley* did not command strict scrutiny in this case.²⁵⁰

The last challenge made by the Appellants and rejected by the Court alleged that strict scrutiny was required because the must-carry provisions single out cable operators for disfavored treatment.²⁵¹ Differential treatment laws, however, are "constitutionally suspect only in certain circumstances."²⁵² The Court explained that although strict scrutiny would apply to differential treatment laws structured in a way that suppressed certain ideas, strict scrutiny is inappropriate "when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."²⁵³ As the Court previously stated, the must-carry provisions are justified by "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."²⁵⁴ Moreover, unlike the tax provisions in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*²⁵⁵ and *Arkansas Writers' Project, Inc. v. Ragland*,²⁵⁶ the must-carry provisions apply broadly to almost all cable systems, eliminating the dangers of suppression and manipulation posed by narrowly targeted laws.²⁵⁷

After finding the must-carry provisions to be content-neutral and rejecting the application of strict scrutiny review, the Court selected intermediate

ed veterans groups differently from other charitable organizations. *Turner*, 114 S. Ct. at 2467. The Court noted, however, that *Regan* 'would have been decided differently if there had been any "indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Id.* (quoting *Regan*, 461 U.S. at 548).

²⁵⁰ *Turner*, 114 S. Ct. at 2467.

²⁵¹ *Id.* at 2467-69. To support this argument, the Appellants relied on cases involving discriminatory taxation of the press. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating a sales tax imposed upon general interest magazines other than exempted religious, professional, trade, and sports magazines, because it operated against a limited number of magazines and was based upon subject matter); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (invalidating a use tax levied upon paper and ink used to produce newspapers because it applied only to the press and affected only a small number of newspapers); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating a tax imposed upon publications whose weekly circulations exceeded 20,000 where such tax applied to only 13 of 135 newspapers distributed in the state).

²⁵² *Turner*, 114 S. Ct. at 2468 (quoting *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (upholding application of general tax to cable television despite exemption for print media and scrambled satellite broadcast television)).

²⁵³ *Id.* (quoting *Minneapolis Star*, 460 U.S. at 585).

²⁵⁴ *Id.*

²⁵⁵ 460 U.S. 575 (1983).

²⁵⁶ 481 U.S. 221 (1987).

²⁵⁷ *Turner*, 114 S. Ct. at 2468 (citing 47 U.S.C. § 534(b)(1) (Supp. IV 1992) (exempting only systems with less than 300 subscribers)).

scrutiny as the appropriate standard of review.²⁵⁸ Pursuant to the *O'Brien* test, which applies to laws subjected to intermediate scrutiny, the Court will uphold a content-neutral law if "it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."²⁵⁹ As an initial matter, the Court identified three interrelated interests asserted by Congress to justify the must-carry provisions: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."²⁶⁰ The Court had no trouble finding these interests to be important and unrelated to content.²⁶¹

The Court had considerable trouble, however, in deciding whether the must-carry provisions actually advance Congress's asserted interests.²⁶² In this regard, the Court declared that the government must show that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry . . . [and] that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"²⁶³ Given the state of the record developed below, the Court was unable to decide whether the government had met either burden.²⁶⁴

The Court first noted that "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must . . . demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."²⁶⁵ Conversely, the Court also recognized that the predictive judg-

²⁵⁸ *Id.* at 2469 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968)).

²⁵⁹ *Id.* (quoting *O'Brien*, 391 U.S. at 377). To satisfy the narrow tailoring component, the regulation at issue need not be the least restrictive means of promoting the governmental interests; rather, it is sufficient if the "means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (quoting *Ward*, 491 U.S. at 799).

²⁶⁰ *Id.* (citing 1992 Cable Act, *supra* note 3, § 2(a)(8), (9), (10); H.R. REP. NO. 628, 102d Cong., 2d Sess. 63 (1992); S. REP. NO. 92, 102d Cong., 1st Sess. 58 (1991)).

²⁶¹ *See id.*

²⁶² *Id.* at 2470-72.

²⁶³ *Id.* at 2470 (citing *Ward*, 491 U.S. at 799).

²⁶⁴ *Id.*

²⁶⁵ *Id.* (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985) (striking down previous version of must-carry rules);

ments of Congress deserve substantial deference,²⁶⁶ although a judicial inquiry still is necessary to determine whether "Congress has drawn reasonable inferences based on substantial evidence."²⁶⁷ Given this framework for examination, the Court stated that the government's contention that the must-carry provisions are needed to protect the economic viability of broadcast television is based upon two propositions: "(1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."²⁶⁸

Examining the record with which it was presented, the Court essentially found two groups of deficiencies preventing it from deciding the constitutional validity of the must-carry provisions.²⁶⁹ First, the record was insufficient to determine whether broadcast television was in jeopardy.²⁷⁰ The Court recognized that conflicting conclusions could be drawn from statistics presented to show that cable systems dropped or repositioned broadcast stations.²⁷¹ The Court also saw no evidence that broadcasters dropped from cable systems would suffer financially as a result of being dropped.²⁷² Sec-

Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.")).

²⁶⁶ *Id.* at 2471 (citing *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (stating that the "judgment of the Legislative Branch" should not be ignored "simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment")).

²⁶⁷ *Id.* (citing *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987) (striking down second attempt at must-carry rules)).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 2471-72.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 2471. The Government presented a 1988 FCC study showing that approximately 20 percent of cable systems dropped or refused carriage to at least one local broadcast station, and 23 percent of cable systems moved the channel position of at least one local broadcast station. *Id.* (citing S. REP. NO. 92, 102d Cong., 1st Sess. 42-43) (1991)). "The record does not indicate, however, the time frame within which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage." *Id.*

²⁷² *Id.* at 2472. The Court asked for "elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty" *Id.* The Court then gave some insight into what kind of evidence would be sufficient:

We think it significant, for instance, that the parties have not presented any evidence that local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues as a result of being dropped from, or otherwise

ond, the Court believed that the record did not disclose “the actual effects of must-carry on the speech of cable operators and cable programmers”²⁷³ In the absence of such evidence, the Court was unable to assess accurately the narrow tailoring component of the *O’Brien* test.²⁷⁴ As a result of these deficiencies, the Court vacated the judgment below and remanded the case for the development of the factual record and the resolution of any outstanding factual disputes.²⁷⁵

B. Justice O’Connor’s Opinion Concurring in Part and Dissenting in Part

Justice O’Connor, joined by Justices Scalia, Thomas, and Ginsburg, believed that the must-carry provisions are content-based and invalid pursuant to strict scrutiny review.²⁷⁶ Furthermore, Justices O’Connor, Scalia, and Ginsburg agreed that even if the must-carry provisions are content-neutral, they violate the First Amendment when analyzed pursuant to intermediate scrutiny.²⁷⁷ Accordingly, four Justices would have reversed the decision of the lower court.²⁷⁸

Although the four dissenting Justices concurred in the portion of Justice Kennedy’s opinion demanding some measure of heightened scrutiny and setting forth the general framework for distinguishing between content-based and content-neutral laws,²⁷⁹ their agreement ended there. The dissenters concluded that the content-based character of the must-carry provisions is apparent on the face of the statute.²⁸⁰ Although agreeing with the majority that content-neutral speaker preferences are not subject to strict scrutiny, the dissenters thought that Congress’s findings included in the 1992 Cable

disadvantaged by, cable systems.

Id.

²⁷³ *Id.* Specifically, the Court wanted evidence in the record indicating the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters.

Id.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2475-82 (O’Connor, J., concurring in part and dissenting in part).

²⁷⁷ *Id.* at 2479-80 (O’Connor, J., concurring in part and dissenting in part). Justice Thomas chose not to join this portion of Justice O’Connor’s opinion.

²⁷⁸ *Id.* at 2480-81 (O’Connor, J., concurring in part and dissenting in part).

²⁷⁹ For a discussion of this section of the opinion, see *supra* notes 213-219 and accompanying text.

²⁸⁰ *Id.* at 2478 (O’Connor, J., concurring in part and dissenting in part).

Act²⁸¹ made clear that the preference for broadcasters over cable programmers was content-based.²⁸² The must-carry provisions themselves also provided evidence to the dissenters of a content-based justification.²⁸³ In responding to the Court's refusal to address the provisions that affect low power stations and those that grant must-carry privileges to otherwise geographically ineligible broadcast stations,²⁸⁴ the four dissenting Justices stated that "[t]hese provisions may all be technically severable from the statute, but they are still strong evidence of the statute's justifications."²⁸⁵ These portions of the statutes demonstrated to the dissenters that the preferences for broadcasters over cable programmers, although perhaps not reflective of viewpoint discrimination, are justified only by reference to content.²⁸⁶

²⁸¹ See 1992 Cable Act, *supra* note 3, § 2.

²⁸² *Turner*, 114 S. Ct. at 2476 (O'Connor, J., concurring in part and dissenting in part) (citing 1992 Cable Act, *supra* note 3, § 2(a)(6) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); *id.* § 2(a)(8)(A) ("[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the government's compelling interest in educating its citizens"); *id.* § 2(a)(10) ("A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation"); *id.* § 2(a)(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.")).

²⁸³ *Id.* (O'Connor, J., concurring in part and dissenting in part) (citing 47 U.S.C. § 534(h)(1)(C)(ii) (Supp. IV 1992) (directing the FCC, in determining a broadcast station's eligibility for must-carry, to "afford particular attention to the value of localism" by considering "whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage of sporting and other events of interest in the community"); *id.* § 534(h)(2)(B) (directing the FCC, in determining the must-carry eligibility of a low power station, to consider whether the station "would address local news and informational needs which are not being adequately served by full power television broadcast stations")). Justice O'Connor also noted the distinction drawn between commercial television stations and noncommercial educational television stations. *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part).

²⁸⁴ See *id.* at 2460 n.6.

²⁸⁵ *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part).

²⁸⁶ *Id.* (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor stated:

Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.

Id. (O'Connor, J., concurring in part and dissenting in part) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

Moreover, the dissent argued that the Court's conclusion that Congress's interest in diversity is content-neutral was wrong because "[t]he interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say."²⁸⁷

The dissenting Justices also were unpersuaded that an additional, permissible justification by Congress could rescue the content-based must-carry provisions from strict scrutiny review.²⁸⁸ They took issue with the Court's characterization of Congress's findings as "nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable."²⁸⁹ The dissent reasoned that Congress would not have taken care to include such detailed findings directly in the statute simply to show that broadcast television has some intrinsic value.²⁹⁰ With the content-based character of the findings apparent on the face of the statute, it was irrelevant to the dissenters whether Congress had additional, content-neutral purposes for enacting the statute, because "[the Court] ha[s] often struck down statutes as being impermissibly content-based even though their primary purpose was indubitably content-neutral."²⁹¹

²⁸⁷ *Id.* (O'Connor, J., concurring in part and dissenting in part). In reaching this conclusion, the dissenters noted that "[t]he First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable." *Id.* (O'Connor, J., concurring in part and dissenting in part). As a result, even if the must-carry provisions are not related to the suppression of free expression, they are "related to the content of speech—to its communicative impact." *Id.* (O'Connor, J., concurring in part and dissenting in part) (citing *Arkansas Writers' Project*, 481 U.S. at 221 (noting that giving tax breaks to religious, sports, and professional magazines is not related to the suppression of speech); *Carey v. Brown*, 447 U.S. 455, 466-68 (1980) (invalidating exemption for labor picketers from a general picketing ban, even though the exemption is unrelated to the suppression of speech); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (same)).

²⁸⁸ *Id.* (O'Connor, J., concurring in part and dissenting in part).

²⁸⁹ *Id.* (O'Connor, J., concurring in part and dissenting in part) (quoting *id.* at 2462); see also *supra* note 232 and accompanying text.

²⁹⁰ *Turner*, 114 S. Ct. at 2477-78 (O'Connor, J., concurring in part and dissenting in part) ("[I]t does not seem likely that Congress would make extensive findings merely to show that broadcast television is valuable. The controversial judgment at the heart of the statute is not that broadcast television has some value—obviously it does—but that broadcasters should be preferred over cable programmers.").

²⁹¹ *Id.* at 2478 (O'Connor, J., concurring in part and dissenting in part) (citing *Arkansas Writers' Project*, 481 U.S. at 221 (striking down content-based exemptions in a general revenue measure); *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (striking down content-based exemptions in a general anti-counterfeiting statute); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (plurality opinion) (striking down on content discrimi-

After concluding that the must-carry provisions are content-based, the four dissenting Justices then subjected them to strict scrutiny review.²⁹² "Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest."²⁹³ The dissenters concluded that the interests in localism and diversity, although legitimate and perhaps important, do not qualify as compelling state interests.²⁹⁴ In addition, without deciding the difficult question of whether the interests in educational and public affairs programming are compelling, the dissenters found that the must-carry provisions are not tailored narrowly enough to serve those interests because they burden cable programmers that offer educational and public affairs programming, as well as cable entertainment programmers.²⁹⁵ With regard to the burden imposed on cable operators, the dissenters concluded that because the must-carry provisions are content-based they constitute "an impermissible restraint on the cable operators' editorial discretion"²⁹⁶ As a result, the four dissenting Justices determined that the must-carry provisions infringed the First Amendment rights of cable programmers and cable operators.²⁹⁷

Justices O'Connor, Scalia, and Ginsburg went beyond their strict scrutiny analysis and stated that even if the must-carry provisions are content-neutral, they still are invalid pursuant to intermediate scrutiny because they restrict too much speech unrelated to "the content-neutral interests in fair competition and the preservation of free television"²⁹⁸

nation grounds a general urban beautification statute); *Carey*, 447 U.S. at 466-68 (striking down on content discrimination grounds an ordinance aimed at preserving residential privacy)). "[W]hen a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present." *Id.* (O'Connor, J., concurring in part and dissenting in part).

²⁹² *Id.* at 2478-79 (O'Connor, J., concurring in part and dissenting in part).

²⁹³ *Id.* at 2478 (O'Connor, J., concurring in part and dissenting in part) (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

²⁹⁴ *Id.* at 2478-79 (O'Connor, J., concurring in part and dissenting in part) (suggesting that although the government may subsidize speakers who offer localism or a novel point of view, it may not restrict other speakers who do not).

²⁹⁵ *Id.* at 2479 (O'Connor, J., concurring in part and dissenting in part) (naming CNN, C-SPAN, the Discovery Channel, and the New Inspirational Network as examples of cable programmers that offer educational and public affairs programming).

²⁹⁶ *Id.* (O'Connor, J., concurring in part and dissenting in part). "For reasons related to the content of speech, the rules restrict the ability of cable operators to put on the programming they prefer, and require them to include programming they would rather avoid." *Id.* (O'Connor, J., concurring in part and dissenting in part) (citing *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14-15 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974)).

²⁹⁷ *Id.* (O'Connor, J., concurring in part and dissenting in part).

²⁹⁸ *Id.* (O'Connor, J., concurring in part and dissenting in part).

If Congress wants to protect those stations that are in danger of going out of business, or bar cable operators from preferring programmers in which operators have an ownership stake, it may do that. But it may not, in the course of advancing those interests, restrict cable operators and programmers in circumstances where neither of these interests is threatened.²⁹⁹

Because in their view the must-carry provisions do precisely that, the three Justices found the must-carry provisions to be "fatally overbroad."³⁰⁰ Despite the majority's contention that the record is insufficient to analyze properly the narrow tailoring component of the intermediate scrutiny test,³⁰¹ Justices O'Connor, Scalia, and Ginsburg stated that "[n]one of the factfinding that the District Court is asked to do on remand will change this [overbreadth]."³⁰² According to these three Justices, even if on remand the lower court learns precisely how many broadcasters would be in economic jeopardy without must-carry privileges, the constitutional remedy will not change: "Protect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event."³⁰³ Based on this overbreadth, Justices O'Connor, Scalia, and Ginsburg believed that remand was not necessary to find the must-carry provisions unconstitutional even pursuant to intermediate scrutiny applicable to content-neutral regulations.³⁰⁴

C. Justice Blackmun's Concurring Opinion

Justice Blackmun filed a brief concurring opinion in order "to emphasize the paramount importance of according substantial deference to the predictive judgments of Congress"³⁰⁵ Nonetheless, despite the extensive legislative record compiled by Congress in enacting the 1992 Cable Act, Justice Blackmun agreed that it was appropriate to remand for further development of the record below.³⁰⁶

²⁹⁹ *Id.* (O'Connor, J., concurring in part and dissenting in part).

³⁰⁰ *Id.* (O'Connor, J., concurring in part and dissenting in part).

³⁰¹ *See id.* at 2472.

³⁰² *Id.* at 2480 (O'Connor, J., concurring in part and dissenting in part).

³⁰³ *Id.* (O'Connor, J., concurring in part and dissenting in part).

³⁰⁴ *Id.* at 2480-81 (O'Connor, J., concurring in part and dissenting in part).

³⁰⁵ *Id.* at 2472 (Blackmun, J., concurring) (citing *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973)).

³⁰⁶ *Id.* (Blackmun, J., concurring).

D. *Justice Stevens' Opinion Concurring in Part and Concurring in the Judgment*

Justice Stevens went even further than the majority and concluded that the lower court decision should be affirmed based on the current factual record.³⁰⁷ He, like Justice Blackmun, emphasized the substantial deference to be given to the judgments of Congress.³⁰⁸ Such deference prevented him from questioning Congress's decision to protect broadcast television from cable's rapidly increasing market power before broadcast television is "in its death throes."³⁰⁹ Although Justice Stevens' view required affirmance, he concurred in the judgment vacating and remanding as an accommodation in order to secure a majority disposition.³¹⁰

E. *Justice Ginsburg's Decision Concurring in Part and Dissenting in Part*

Justice Ginsburg joined fully Justice O'Connor's opinion, but wrote separately to stress her agreement with the dissenting opinion of Judge Williams below.³¹¹ Justice Ginsburg noted that although the must-carry provisions do not constitute viewpoint discrimination, they are content-based.³¹² Because the must-carry provisions prefer local broadcasters based upon the content of their programming, and because they "hypothesize[] a risk to local stations that remains imaginary,"³¹³ Justice Ginsburg joined Justice O'Connor's opinion.³¹⁴

VI. ANALYSIS

A. *Appropriate Standard of Review*

The Court's selection of the appropriate standard of review turned primarily on whether it viewed the must-carry rules as content-based or content-neutral regulations.³¹⁵ Content-based regulations can survive only if

³⁰⁷ See *id.* at 2473-75 (Stevens, J., concurring in part and concurring in the judgment).

³⁰⁸ *Id.* (Stevens, J., concurring in part and concurring in the judgment).

³⁰⁹ *Id.* (Stevens, J., concurring in part and concurring in the judgment).

³¹⁰ *Id.* at 2475 (Stevens, J., concurring in part and concurring in the judgment).

³¹¹ *Id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 57 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994)).

³¹² *Id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part).

³¹³ *Id.* (Ginsburg, J., concurring in part and dissenting in part).

³¹⁴ *Id.* (Ginsburg, J., concurring in part and dissenting in part).

³¹⁵ The parties argued this issue partly based upon the similarity of cable television to

the government can prove that they serve a "compelling" interest and that they use "the least restrictive means to further the articulated interest."³¹⁶ Content-neutral regulations, however, will survive if they further a significant government interest and are narrowly tailored to serve that interest.³¹⁷

Based on the specific design of the 1992 Cable Act's must-carry provisions, they must be considered content-based. As Judge Williams noted in his dissent below,³¹⁸ part of the reason that Congress chose to mandate the carriage of local stations is their content—they are "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."³¹⁹ In addition, the content of the protected programming is also prescribed by the FCC licensing requirements that bind local broadcasters to "provide programming responsive to issues of

other media. The cable programmers and operators contended that cable should be treated like newspapers, and thus the regulations should have been subjected to the exacting scrutiny applied in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("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."). The government asserted that cable is more like broadcast television, and thus the regulations should be examined pursuant to the less demanding standard applied in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (allowing even content-based restrictions on broadcast television to survive review based on the scarcity rationale). The Court, however, repeatedly has cautioned that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.* at 386. Based on this direction from the Court and the difficulties of comparing the characteristics of different media relying upon different technology, analysis of the appropriate standard of review can more easily be achieved by applying the general standards used for content-based and content-neutral restrictions, while looking to the other media paradigms merely for guidance. The Court, without explicitly citing this reasoning, adopted a heightened level of scrutiny for the regulation of cable television, somewhere between the paradigmatic levels of scrutiny given to newspaper and broadcast television regulations. *See Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2469 (1994).

³¹⁶ *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

³¹⁷ *O'Brien v. United States*, 391 U.S. 367, 377 (1968). A restriction is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," even if it is not the least restrictive means of promoting the interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The government may not, however, "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799 (citing *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil.")).

³¹⁸ *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994).

³¹⁹ 1992 Cable Act, *supra* note 3, § 2(a)(11).

concern to [their] community."³²⁰ Furthermore, the must-carry rules make clear that the very act of asserting must-carry rights depends upon the content of the broadcaster's programming.³²¹ In addition, the legislative reports concerning must-carry confirm the content-based nature of the government's goals by asserting an interest in promoting particular types of programming based on their content.³²² The must-carry provisions, therefore, require cable operators to carry broadcasters which are compelled by law to provide programming with a particular content as directed by the government. Viewed in that light, the must-carry rules are clearly content-based regulations.³²³

³²⁰ *Turner*, 819 F. Supp. at 57 (Williams, J., dissenting) (citing Commercial TV Stations, 98 F.C.C.2d 1076, 1091-92 (1984) (report and order)).

³²¹ In considering a request to alter the scope of a broadcaster's local market to include other communities, the FCC must consider whether the broadcaster "provides coverage or other local service to such community" and whether other broadcasters "provide[] news coverage of issues of concern to such community or provide[] . . . coverage of sporting and other events of interest to the community." 47 U.S.C. § 534(h)(1)(C)(ii) (Supp. IV 1992). Furthermore, the non-duplication rules allowing non-commercial stations to assert must-carry rights are explicitly content-based in that the carriage decision is based on whether 50% of a station's typical weekly programming is distinct from the programming of another noncommercial station. *See* 47 C.F.R. § 76.56(a) (1990). In addition, in order to qualify for must-carry rights, low power television stations must broadcast "nonentertainment programming; programming . . . involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; [and] programming for children," and the FCC must determine that the low power station would "address local news and informational needs which are not being adequately served by full power television broadcast stations" 47 U.S.C. § 534(h)(2)(B) (Supp. IV 1992). In other words, if the content of programming provided by full power stations does not meet the needs of the local community, then low power stations can assert must-carry rights if their programming contains the appropriate content.

³²² *See* H.R. REP. NO. 628, 102d Cong., 2d Sess. 69-70 (1992) ("[M]andatory carriage of noncommercial television stations would further th[e] important goal" of "increasing the amount of educational, informational, and local public interest programming available to the nation's audiences . . ."); *see also id.* at 69 ("Local public television stations also provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities."); *id.* at 51-52 (noting that there would be a reduction in local news and public interest programming without mandatory carriage requirements).

³²³ *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."). The must-carry rules cannot be considered content-neutral because they are not justified "without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The broadcasters that are given preferential treatment are specifically defined based upon the content of their speech; if they did not broadcast content required by the

The Supreme Court's conclusion to the contrary is unconvincing. First, the Court divorced the provisions dealing with low power stations and otherwise geographically ineligible broadcasters from the provisions dealing with full power local broadcast stations,³²⁴ refusing to consider the other provisions despite admitting that they appear to grant "special benefits on the basis of content."³²⁵ The same congressional justifications that the Court believed supported the content-neutral character of the provisions applicable to full power broadcasters, however, presumably were used by Congress in support of the other provisions that the Court virtually admitted were content-based. The Court placed heavy emphasis on the detailed statutory findings in holding the purpose behind the must-carry provisions to be content-neutral,³²⁶ but if ostensibly content-neutral findings could result in some facially content-based provisions, then why not others? The majority completely ignored the provisions concerning eligibility requirements and low power stations, notwithstanding their value as "strong evidence of the statute's justifications."³²⁷

In addition, the majority noted that the must-carry provisions confer privileges in a manner unrelated to content.³²⁸ "The aggregate effect of the rules thus is to make every full power commercial and noncommercial broadcaster eligible for must-carry, *provided only that the broadcaster operates within the same television market as a cable system.*"³²⁹ In order to obtain a license to operate within a particular television market, however, those broadcasters must "provide programming responsive to issues of concern to their community."³³⁰ This content-based licensing requirement, however, suspiciously was absent from the statutes and regulations cited by the Court in order to demonstrate the FCC's "minimal" influence over the content of the programming offered by broadcasters.³³¹

Furthermore, it is incorrect to assert that the must-carry rules are merely economic restrictions because they only regulate the means of delivery of speech—the broadcasters' video signals—rather than the speech itself.³³²

FCC licensing rules, they could not be local broadcasters.

³²⁴ See *Turner*, 114 S. Ct. at 2460 n.6.

³²⁵ *Id.*

³²⁶ *Id.* at 2461-62.

³²⁷ *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part).

³²⁸ *Id.* at 2460.

³²⁹ *Id.* (emphasis added).

³³⁰ See *Turner*, 819 F. Supp. at 58 (Williams, J., dissenting) (quoting Commercial TV Stations, 98 F.C.C.2d 1076, 1091-92 (1984) (report and order)).

³³¹ See *Turner*, 114 S. Ct. at 2463-64.

³³² See, e.g., *id.* at 2460 (stating that the must-carry provisions distinguish between speakers based only on the manner in which they transmit their messages); *Turner*, 819 F. Supp. at 40 (characterizing the must-carry rules as merely economic regulations rather than regulations of speech).

Other regulations, such as the grant of public rights-of-way to lay cable, deal with the *means* of delivery of the video signals. The must-carry rules, however, dictate the *identity* of the signals that are delivered, based on the local programming content of those signals. Furthermore, even the economic goals of the regulations are defined to further particular programming based on its content, in that the regulations are designed to "ensure the economic viability of free *local* broadcast television and its ability to originate quality *local* programming."³³³

Despite Judge Jackson's attempt to distinguish *Riley v. National Federation of the Blind*³³⁴ in the lower court opinion,³³⁵ that case provides solid guidance against viewing the must-carry provisions as merely incidental burdens on speech. In *Riley*, the Court struck down a law that limited the fees that professional fundraisers could charge to charities because it restricted both groups' "ability to speak."³³⁶ The Court rejected the argument that the law was merely an economic regulation having an incidental burden on speech, stating that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech."³³⁷ Similarly, the must-carry provisions must be viewed as direct, not incidental, restrictions on speech because they directly affect the choice of programming that a cable operator may transmit. In fact, the interest asserted by the government in *Riley* was the prevention of fraud,³³⁸ which relates less directly to speech than does the promotion of local programming through must-carry.³³⁹ If the statute in *Riley* was a direct burden on speech, then surely the must-carry provisions are as well.

Another reason to examine the must-carry provisions using strict scrutiny is that they interfere with the editorial discretion of cable operators.³⁴⁰ The FCC has previously acknowledged that "cable operators now function as independent media voices exercising broad editorial control over con-

³³³ 1992 Cable Act, *supra* note 3, § 2(a)(16) (emphasis added).

³³⁴ 487 U.S. 781 (1988).

³³⁵ See *Turner*, 819 F. Supp. at 42. See also the Supreme Court's cursory treatment of *Riley*. *Turner*, 114 S. Ct. at 2465.

³³⁶ *Riley*, 487 U.S. at 794.

³³⁷ *Id.* at 788-89 & n.5. Although the Court rejected the argument that the economic purposes of the statute in *Riley* were sufficient to warrant a relaxed level of scrutiny, this is precisely the reasoning used by Judge Jackson in his lower court opinion. See *Turner*, 819 F. Supp. at 42.

³³⁸ *Riley*, 487 U.S. at 788.

³³⁹ See Brief for Appellants Turner Broadcasting System, Inc. et al. at 31-32 n.52, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (No. 93-44).

³⁴⁰ Although the Supreme Court rejected this contention, it did so based upon its belief that the must-carry provisions are content-neutral. See *Turner*, 114 S. Ct. at 2464-65.

tent," and that the "editorial function whereby cable operators select and tailor their program mix . . . is akin to that performed by publishers of print media."³⁴¹ In addition, the Supreme Court has stated that cable operators are engaged in speech protected by the First Amendment and are, in much of their operations, part of the press.³⁴² These declarations seem to call for the use of the almost insurmountable scrutiny applied to restrictions on the editorial discretion of newspapers.³⁴³ Such virtual per se unconstitutionality should not be carried over from newspapers to the cable television medium, however, because the government has played a role in creating and maintaining monopolies in the cable industry.³⁴⁴ This factor creates a difference between the newspaper and cable industries—a difference that counsels against expanding *Tornillo* beyond the newspaper industry. The limit on editorial discretion in this case, however, is still a content-based restriction because the limit is being placed on the discretion to deny carriage to stations broadcasting local content. As such, strict scrutiny remains the appropriate standard of review.

The appropriateness of using strict scrutiny is best demonstrated by the dilemma caused by choosing whether to interpret the must-carry provisions as a preference for local *broadcasters* or for local *broadcasting*. If the provisions mandate carriage of local *broadcasting*, then they clearly are based on the content of what is being broadcasted and should be reviewed using strict

³⁴¹ In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864, 879-80 (1986). In fact, in concluding that the previous must-carry rules should be discontinued, the FCC conceded that must-carry "protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers." *Id.* at 880.

³⁴² *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

³⁴³ *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 ("It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.").

³⁴⁴ Other than the economies of scale associated with entering the cable industry, local monopolies for cable television occur largely as a result of the government's elaborate system of franchise requirements for cable operators. *See* 47 U.S.C. §§ 541, 542 (Supp. IV 1992). When the government grants a franchise, a cable operator normally "enjoys a virtual monopoly over its area, without the threat of an alternative provider." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1550 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). Furthermore, analogizing to broadcast television and radio, when the government grants a communicative monopoly to a single speaker, it has the power to regulate speech in order to ensure at least minimal levels of diversity of speech and speakers. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *see also Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *Columbia Broadcasting Sys., Inc. v. FCC*, 453 U.S. 367 (1981). Cable television, however, does not share in common with these media the limitation of physical scarcity of the electromagnetic spectrum. *See supra* notes 28-33 and accompanying text.

scrutiny.³⁴⁵ If instead, however, the must-carry rules are targeted toward local *broadcasters*, then they constitute a naked preference for the speech of one group by restricting the speech of another group.³⁴⁶ The government would be choosing which speakers are to be heard, directly contravening the principle that "[t]he 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"³⁴⁷ Such content-based distinctions between groups of speakers are subject to strict scrutiny regardless of their neutrality toward any ideas expressed.³⁴⁸ Either formulation of the must-carry rules, therefore, leads directly to strict scrutiny.

B. *Application of the Test*

The must-carry rules can survive strict scrutiny only if they are designed to serve a "compelling" government interest and use "the least restrictive means to further the articulated interest."³⁴⁹ The government, however, did not assert that the must-carry rules could survive this level of scrutiny; rather, it argued that strict scrutiny did not apply.³⁵⁰ Analysis of the regulations using the intermediate level scrutiny of *O'Brien*,³⁵¹ however, demonstrates that must-carry cannot even survive that more permissive standard. As a result, even after finding the must-carry provisions to be content-neutral, the Supreme Court should have reversed the lower court decision and declared the must-carry provisions unconstitutional.

To pass muster pursuant to intermediate scrutiny, the government first must demonstrate that the must-carry provisions further a significant gov-

³⁴⁵ See *supra* notes 318-23 and accompanying text.

³⁴⁶ See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[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."). The Supreme Court distinguished *Buckley* because of its belief that the must-carry provisions are content-neutral. Given that local broadcasters are required by the FCC to broadcast local programming content in order to qualify for a broadcasting license, see *Turner*, 819 F. Supp. at 58 (Williams, J., dissenting) (quoting *Commercial TV Stations*, 98 F.C.C.2d 1076, 1091-92 (1984) (report and order)), that distinction fades away.

³⁴⁷ *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). "[F]ree and robust debate cannot thrive if directed by the government." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 791 (1988).

³⁴⁸ *Buckley*, 424 U.S. at 39.

³⁴⁹ *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

³⁵⁰ See Brief for Federal Appellees at 30-33, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (No. 93-44).

³⁵¹ 391 U.S. 367 (1968). For a discussion of *O'Brien's* intermediate scrutiny test, see *supra* note 26 and accompanying text.

ernment interest.³⁵² The government's asserted interests are, broadly, promoting diversity in programming and preserving free local broadcasting.³⁵³ Assuming *arguendo* that these interests are significant, it is less clear whether the must-carry rules further them.³⁵⁴ As for the interest in diversity, in the absence of must-carry "programming choices have . . . grown about 50 percent" since the court in *Quincy Cable TV, Inc. v. FCC*³⁵⁵ invalidated the previous attempt at must-carry rules.³⁵⁶ These figures strongly suggest that must-carry rules do not contribute to diversity as the government asserts. Furthermore, even if still more diversity is the goal, the FCC has found previously that cable programming contributes substantially to diversity in video programming.³⁵⁷ Why is it more diverse to have ten channels showing local news rather than nine channels of local news and CNN? Why are five local noncommercial educational channels more diverse than four such channels and the Discovery Channel? The government has failed to sustain its burden of demonstrating that the must-carry rules further the interest of promoting diversity in programming; rather, it seeks to ensure that local broadcasters are heavily represented in the overall diversity of programming that already exists. This objective is closely related to the government's second asserted interest—preserving free local broadcasting.

The interest of preserving free local broadcasting clearly will be furthered by rules requiring that cable operators carry stations with local programming content. The difficulty arises, however, when the must-carry rules are examined to determine whether they are narrowly tailored to achieve that objective. Although narrow tailoring does not require use of the least restrictive means available, "[g]overnment may not regulate expression in

³⁵² *Id.* at 377.

³⁵³ See generally 1992 Cable Act, *supra* note 3, § 2(a), (b).

³⁵⁴ Even pursuant to review under the *O'Brien* test, the government bears the burden of showing that its asserted interests "[are] sufficiently substantial to justify the effect" of the regulation on protected speech. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). Furthermore, the government must show more than an unsubstantiated assertion of the importance of its interest, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-73 (1981); it "must demonstrate that the harms it recites are real" rather than mere "speculation or conjecture," *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); see also *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 & n.12 (1993) ("[W]e require the government goal to be substantial, and the cost to be carefully calculated.") (quoting *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

³⁵⁵ 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

³⁵⁶ S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991).

³⁵⁷ See *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Sys.*, 1 F.C.C.R. 864, 880 (1986); *Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 196-221 (1985); see also *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, N.Y.*, 2 F.C.C.R. 5043, 5051-54 (1987).

such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”³⁵⁸ An examination is necessary, therefore, into what portions of the must-carry rules advance the goals of preserving free local broadcasting.

In this case, the must-carry rules are “substantially broader than necessary”³⁵⁹ to achieve the government’s goals. Broad prophylactic regulations are suspect in the area of free expression; “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”³⁶⁰ Here, Congress has adopted a broad prophylactic rule that grants special carriage privileges to all local broadcasters in an effort to remedy the perceived economic danger to such broadcasters,³⁶¹ rather than restricting the regulation to communities in which local broadcasting actually faces extinction. The number of local broadcasters and their profitability have both increased substantially in the absence of any must-carry rules since *Quincy* was decided in 1985.³⁶² To achieve the goal of preserving free local broadcasting, presumably only broadcasters facing financial difficulties would need special carriage rights. Regulation protecting all local broadcasters regardless of their popularity or economic well-being, therefore, is substantially broader than necessary to achieve the goal of preserving local broadcasting.

Other provisions of the must-carry rules also indicate their overinclusiveness. If a noncommercial educational station is not available locally, a cable operator is required to import the signal of another from non-local communities.³⁶³ This carriage requirement, by definition, does not advance the goal of preserving free local broadcasting—it specifically mandates carriage of a broadcaster from a non-local market.³⁶⁴ In addition, the retransmission consent³⁶⁵ option given to broadcasters demonstrates

³⁵⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citing *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

³⁵⁹ *Id.* at 802 (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)). The regulation may target “no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

³⁶⁰ *Edenfield v. Fane*, 113 S. Ct. 1792, 1803-04 (1993) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

³⁶¹ For a discussion of the Congressional findings concerning danger to the economic viability of local broadcasting, see *supra* note 103 and accompanying text.

³⁶² See *supra* notes 109-16 and accompanying text.

³⁶³ 47 U.S.C. § 535(b)(2)(B)(i) (Supp. IV 1992).

³⁶⁴ This provision reinforces that the must-carry rules are content-based—they are aimed at the protection of local *broadcasters* rather than local *broadcasting* because this provision protects local content of programming in general, even though the station is not local to the particular community into which it is imported. See *supra* notes 318-48 and accompanying text.

³⁶⁵ If broadcasters do not choose to assert their must-carry rights, then cable operators may not broadcast their signals without first receiving consent to do so. See *supra*

that the must-carry rules are substantially broader than necessary. In enacting retransmission consent, Congress realized that many local stations are strong enough and popular enough that cable operators would pay them for the privilege of carrying their signals. Although such stations surely are not in need of the protection of must-carry, the must-carry rules apply to them, allegedly in order to preserve the "economic viability"³⁶⁶ that they so clearly already possess.

The must-carry rules also are substantially overbroad because they seek to preserve free local broadcasting based on Congress's belief that cable operators are engaging in "anticompetitive conduct"³⁶⁷ despite evidence to the contrary. Congress found that because of the vertical integration of cable operators who increasingly offer their own programming and the competition between cable and local broadcasters for advertising revenue, cable operators have an incentive to deny carriage to local broadcasters.³⁶⁸ As a result, Congress enacted must-carry rules, which apply to *all* cable operators, regardless of their individual treatment of local broadcasters or whether they own any cable programming.³⁶⁹ Congress did this despite acknowledging that it had "not found that cable systems are engaging in a widespread pattern of denying carriage" to local broadcasters.³⁷⁰ In addition, the vertical integration of the cable industry does not, in reality, provide an incentive for cable operators to drop local broadcasters. Cable operators derive the overwhelming portion of their revenue from subscription fees, rather than from advertising revenues.³⁷¹ Moreover, "broadcast programming that is carried remains the most popular programming on cable sys-

notes 83-87 and accompanying text. In effect, Congress gave broadcasters the license to nullify the asserted government interest in preserving local broadcasting by withholding their signals from cable operators unless the broadcasters are paid or granted other privileges.

³⁶⁶ See 1992 Cable Act, *supra* note 3, § 2(a)(16).

³⁶⁷ See *id.* § 2(a)(17).

³⁶⁸ See *id.* § 2(a)(13)-(16).

³⁶⁹ Judge Williams noted in his dissent that the leased access provisions, 47 U.S.C. § 532 (1988), are much more appropriate to target the supposed dangers of vertical integration. See *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 61 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994). If Congress is concerned that cable operators will grant preferential treatment to programmers with whom they are affiliated, then the appropriate remedy is to empower unaffiliated broadcasters, not local broadcasters. Congress presumably already has done so with the leased access provisions, rendering must-carry rules unnecessary to counter vertical integration in the cable industry. The must-carry rules, therefore, clearly are not targeted to "eliminate[] no more than the exact source of the evil [they] seek[] to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

³⁷⁰ H.R. REP. NO. 628, 102d Cong., 2d Sess. 52 (1992).

³⁷¹ See *Turner*, 819 F. Supp. at 64 (Williams, J., dissenting) (noting that the ratio of subscription fees to advertising revenue is twenty-five to one).

tems, and a substantial portion of the benefits for which consumers pay cable systems is derived from the carriage of the signals of network affiliates, independent television stations, and public television stations."³⁷² The true economic incentive for cable operators, therefore, is to attract as many subscribers as possible by offering the most appealing programming available.³⁷³ Furthermore, since must-carry ended in 1985, ninety-four percent of all cable operators carried all local stations that would have qualified for carriage pursuant to must-carry, and ninety-eight percent of all local stations were being carried.³⁷⁴ Clearly, in presuming an incentive for cable operators to drop local broadcasters, Congress failed to "demonstrate that the harms it recites are real" rather than mere "speculation or conjecture."³⁷⁵

As a result of these deficiencies, the must-carry rules are substantially broader than necessary to serve the government's interests. Given that overbreadth, they are not tailored narrowly enough to further the interests asserted by Congress.³⁷⁶ Must-carry rules do not satisfy intermediate scrutiny, therefore, and they surely must fail when reviewed with strict scrutiny. As a result, given a second chance to address the must-carry provisions on remand,³⁷⁷ the District Court panel should recognize that the must-carry rules violate the First Amendment rights of cable operators and programmers.

³⁷² 1992 Cable Act, *supra* note 3, § 2(a)(19).

³⁷³ See Brief for Appellants Turner Broadcasting System, Inc. et al. at 44, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (No. 93-44).

³⁷⁴ S. REP. NO. 92, 102d Cong., 1st Sess. 43 (1991) (referring to NATIONAL CABLE TELEVISION ASS'N, BROADCAST STATION CARRIAGE SURVEY 8 (1988)).

³⁷⁵ *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). Although deference is due to the legislative findings of Congress, "[d]eference to a legislative finding cannot limit judicial inquiry when first amendment rights are at stake." *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989) (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)). Courts must exercise their "independent judgment of . . . facts bearing on an issue of constitutional law" *Id.*

³⁷⁶ See generally *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 802 (1989) (defining narrow tailoring).

³⁷⁷ Although the Court did not believe that the record contained any "findings concerning the actual effects of must-carry on the speech of cable operators and cable programmers," see *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2472 (1994), the record apparently was sufficient enough to allow Judge Williams below to find that many cable programmers will be dropped from cable systems because cable systems serving one-third of all subscribers do not have any excess channel capacity. See *Turner*, 819 F. Supp. at 59 n.3 (Williams, J., dissenting).

VII. CONCLUSION

With its ruling in *Turner*, the Supreme Court determined the appropriate level of scrutiny to be used in reviewing must-carry provisions. The Court did not blindly adopt the standard used to review restrictions on other media, such as the exacting scrutiny of *Tornillo* or the relaxed scrutiny of *Red Lion Broadcasting*.³⁷⁸ Each new medium presents a unique set of factors based on different uses of technology, and as technology quickly evolves the First Amendment must do its best to keep up with it. Accordingly, restrictions on cable television must be reviewed pursuant to a standard suited for its unique attributes. That standard is one of heightened scrutiny. In turn, the particular rigorousness of the standard must be based upon whether the regulation under review is content-neutral or content-based.

Although content-neutral regulations affecting cable television should be evaluated with a more forgiving standard, the must-carry rules at issue in *Turner* are content-based restrictions on the First Amendment freedoms of the cable industry. Congress granted a special privilege to local broadcasters based on the content of their programming, mandating that cable operators carry their signals regardless of the cable operator's wishes. Must-carry is not economic regulation designed to regulate the means by which video signals are carried; rather, it dictates which signals a cable operator must carry. Congress sought to protect local programming content, but it tried to do so at the expense of the First Amendment freedoms of cable operators and programmers.

This sweeping directive was based on Congress's desire to protect local broadcasters from extinction as a result of so-called "anti-competitive conduct" engaged in by the cable industry. All evidence, however, suggests that local broadcasters are thriving in the absence of must-carry rules. Although Congress found that cable operators have an incentive to deny carriage to local broadcasters because they compete for advertising revenue, cable operators derive the overwhelming majority of their revenue from subscription fees, giving them the incentive to offer the most popular mix of programming available. Because local broadcast stations are among the most popular stations carried by cable systems, it is in cable operators' economic interests to carry local broadcast stations. A danger to the economic viability of local broadcasting simply does not exist.

The fatal flaw in the must-carry provisions is that Congress enacted them in a grossly overinclusive and content-based manner. Ostensibly, Congress's goal was to protect broadcasters in danger of economic ruin and broadcasters unaffiliated with cable operators. They sought to achieve that goal, however, by protecting many more broadcasters than those which fit

³⁷⁸ See *supra* note 315 and accompanying text.

into either of these categories. Targeting local broadcasters for protection based on the content of their programming is unacceptable. Targeting unfiliated broadcasters in financial distress regardless of the content of their programming may be acceptable, if crafted narrowly enough. Although the Supreme Court already has determined that the must-carry provisions in the 1992 Cable Act are content-neutral, on remand the lower court should recognize that they are “fatally overbroad”³⁷⁹ and decline to uphold them.

³⁷⁹ *Turner*, 114 S. Ct. at 2480 (O'Connor, J., concurring in part and dissenting in part).