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Panel II: Cable Versus Broadcast TV: The "Must Carry" Provisions of the Cable Television Consumer and Competition Act of 1992

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Panel II: Cable Versus Broadcast TV: The "Must Carry" Provisions of the Cable Television Consumer and Competition Act of 1992

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MR. TYLER: Good morning. This is the second panel. We're discussing what are known as the "must carry" provisions that were passed by Congress in 1992, pursuant to the Cable Act of that year.[1] I'm the moderator of this panel. My name is John Tyler, and I'm the senior trial counsel at the United States Department of Justice in Washington, D.C. I acted as the attorney on behalf of the government before the three-judge district court that heard this case, *Turner Broadcasting Systems, Inc. v. FCC*,[2] in Washington, D.C., last spring. I also assisted in the preparation of

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1. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-81 (1992) (codified at 47 U.S.C. §§ 534-535 (Supp. IV 1992)).

2. 819 F. Supp. 32 (D.D.C.), *cert. granted*, 114 S. Ct. 38 (1993).

the briefs before the Supreme Court, which was orally argued by our Solicitor General, Drew S. Days, III, I think it was the second week of January of this year.

We will be hearing from panelists on both sides of this issue, including Mr. Gregory Buscarino, who is with the National Broadcasting Company here in New York. I assume he will be making remarks in support of the "must carry" provisions. We will also hear from Mr. Steven Hyman, who is a private counsel. He represented the National Interfaith Cable Coalition in the *Turner* litigation. As opposed to speech issues, he brought claims pursuant to the religion clauses of the First Amendment, and I think he, better than I, will be able to articulate specifically what those issues are, and what his concerns were as an intervening plaintiff in the *Turner* litigation.

We'll hear also from Mr. Robert Joffe, who is with Cravath, Swaine and Moore here in New York, who brought a complaint on behalf of Time Warner. I most especially remember Mr. Joffe's complaint, because it was over one hundred pages in length and it argued case law. That's the first time I had ever seen that; I guess because Time Warner is a multimedia concern, Mr. Joffe would bring those interests to the pleadings as well.

Lastly we'll hear from Mr. Marc Apfelbaum. He is also with Time Warner, in-house counsel, and I believe he deals with litigation matters on behalf of that corporation.

Now, Ted Hirt said earlier today that we at the Justice Department do not speak on behalf of the administration, the Federal Communications Commission ("FCC"), or the United States. The views I will express this morning are mine, although I will be biased certainly on behalf of the government's position in this litigation.

For purposes of introduction, I'll just give a broad-view background as to the interests involved and the players involved, and possibly also speak to the growth of the cable industry which is certainly what Congress is concerned about. Cable operators have come a long way, or the cable industry certainly has come a long way since it's beginning when it acted solely as a conduit for

broadcast television. Beginning in the early 1960s, the FCC took note of the growth of the cable industry and started to assert its regulatory authority in this area under the 1934 Communications Act.[3] For example, the FCC promulgated a rule which prohibited cable operators from importing distant broadcasting signals into local markets.[4] I, for a time, lived up in Vermont and the cable operators up there would bring into the local broadcast area of Vermont, Channel 9 and Channel 11 of New York City. But, at least in certain markets, the FCC prohibited this upon the principle that if cable operators were to import broadcast signals from afar, that would create a market imbalance or that would be prejudicial to the interests of the local broadcasters. Whether or not the FCC had this statutory authority to promulgate these rules went before the Supreme Court in the *United States v. Southwestern Cable Co.*,[5] and the Court found that the FCC did have this authority and issued the decision so stating in 1968.[6]

Thereafter, the FCC became a little more aggressive and promulgated other rules.[7] For example, one rule required that if you the cable operator are to be permitted to carry broadcast signals, so too must you create your own programming.[8] Now, in First Amendment parlance this would be known as compelled speech,

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3. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (current version at 47 U.S.C. §§ 151-613 (1988 & Supp. IV 1992)). The Communications Act of 1934 established the FCC as the primary federal regulatory mechanism for the telecommunications industry.

4. 47 C.F.R. § 74.1107 (1967); *see* United States v. Southwestern Cable Co., 392 U.S. 157, 166-67 (1968) (citing *Second Report and Order*, 2 F.C.C.2d 725, 781-85 (1966)).

5. 392 U.S. 157 (1968).

6. *Id.* at 178 (holding that the FCC has regulatory authority "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting").

7. *See Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C.2d 417 (1968).

8. 47 C.F.R. § 74.1111(a) (1970) (repealed 1974) (providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services"); *see* United States v. Midwest Video Corp., 406 U.S. 649, 653-54 (1972).

yet the Supreme Court affirmed the FCC's authority to promulgate such a rule in 1972 in *United States v. Midwest Video Corp.*,[9] without even touching upon the First Amendment.

In 1984, Congress passed a Cable Act[10] which in essence deregulated the cable industry and let free market forces determine the winners and losers, if you will. However, at the same time, while the cable industry was generally deregulated, the FCC continued to have concerns about the competitive or anticompetitive impact of cable operators on broadcasting concerns and promulgated variations of these "must carry" rules,[11] which were each struck down by unanimous panels of the D.C. Circuit. First in the *Quincy*[12] decision, which was issued in 1985, and subsequently in the *Century*[13] decision, which was issued by a second panel of the D.C. Circuit in 1988.

Interestingly, the judges on these panels represented both spectrums of the, or all aspects of the political spectrum, if you will, and possibly most interesting, included, I forget on which panel, Judge Ruth Bader Ginsberg, who of course now sits on the Supreme Court.

After the D.C. Circuit had struck down the FCC's "must carry" rules, in 1992 Congress picked up this baton and promulgated or enacted its own "must carry" provisions, citing the fact that now the cable industry has grown into a titan—it's vertically and horizontally concentrated.[14] In the vast majority of local markets, there exists only one cable operator.[15] We, the viewers, have no choice as to who our cable company is. Also, Congress found that cable

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9. 406 U.S. 649 (1972) (plurality opinion).

10. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. §§ 521-559 (1988 & Supp. IV 1992)).

11. 47 C.F.R. §§ 76.57-.61 (1984); *Report and Order*, 1 F.C.C.R. 864 (1986).

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

13. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

14. *See* Pub. L. No. 102-385, § 2(a)(4)-(5), 106 Stat. at 1460 (codified at 47 U.S.C. § 521 (Supp. IV 1992)); *see generally* H.R. REP. NO. 628, 102d Cong., 2d Sess. (1992); S. REP. NO. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133.

15. H.R. REP. NO. 628, *supra* note 14, at 45.

now "passes"—that's a term of art—I think somewhere towards 95 percent of the television households.[16] That is, cable is now available to 90 percent of us.[17] Fifty-six million of us, over 60 percent of the households with televisions, are hooked up to cable.[18] Congress further found that once we subscribe to cable, it becomes our only means of receiving video programming.[19] In other words, your cable company in 60 percent of the market now determines what we will and will not watch.

More frighteningly, at least as found by Congress, cable companies are engaging in anticompetitive practices.[20] What they are able to do, in effect, is have their cake and eat it too. Basically cable companies receive their revenues from subscriber fees. But Congress found disturbing incidences of cable companies dropping broadcast television signals, because by doing so, they could pick up the advertising revenues of the broadcasting competitors.[21] Congress referred most principally to a 1988 FCC study to that effect, and I think—if my memory serves me correctly—Congress or that FCC study found that upwards towards 20 percent of cable companies had engaged in this practice of dropping broadcast signals.[22]

On the basis of these findings, Congress enacted what we refer to in shorthand as sections 4 and 5 of the 1992 Cable Act.[23] Section 4 goes to commercial broadcast stations. It requires—pursuant to certain formula that I knew like the back of my hand a year ago but I just have a sketch of it now in my mind—that cable compa-

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16. *Id.* at 30.

17. *Id.*; S. REP. NO. 92, *supra* note 14, at 3, *reprinted in* 1992 U.S.C.C.A.N. at 1135.

18. S. REP. NO. 92, *supra* note 14, at 3, *reprinted in* 1992 U.S.C.C.A.N. at 1135; *see* 138 CONG. REC. S712-01, S714 (daily ed. Jan. 31, 1992) (statement of Sen. Wirth).

19. H.R. REP. NO. 628, *supra* note 14, at 54.

20. *Id.* at 52.

21. *In re Inquiry Into the Availability of Broadcast Television Signals on Cable Television Systems, Notice of Inquiry*, 3 F.C.C.R. 2698 (1988).

22. H.R. REP. NO. 628, *supra* note 14, at 52-53; S. REP. NO. 92, *supra* note 14, at 42-43, *reprinted in* 1992 U.S.C.C.A.N. at 1175-76.

23. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-81 (1992) (codified at 47 U.S.C. §§ 534-535 (Supp. IV 1992)).

nies carry local broadcast commercial stations on up to one-third of their channels.[24] Section 5 goes to public broadcast, or noncommercial stations, and usually in most markets by impact, section 5 cable companies are going to be required to carry from one to three public broadcasting stations on their channel systems.[25]

Before, or the same day that Congress passed, over George Bush's veto, the 1992 Cable Act, Turner Broadcasting System delivered the complaint to the district court—I think it was on October 5 or around October 4 of 1993—which was then subsequently delivered to my desk, and thereafter, four other plaintiffs came in and intervened. These cases were all consolidated in what we now know as *Turner*.[26] They were briefed to death. I think the *New York Times*, as somebody this morning also remarked, counted the number of lawyers involved in these cases. I think there were 126 before the Supreme Court. I don't know that there were that many in the lower court, but nearly that many, and we went at it.

The cable companies wanted to wrap themselves in the editorial page of newspapers and insisted before the three judges in the district court that they stand shoulder-to-shoulder with their brethren and sisters in the print media.[27] And just as the Supreme Court has never countenanced any kind of regulation over the print media,[28] so too should it not countenance regulation of cable programmers. In other words, the cable operators, cable programmers, the cable industry wanted to get as far away from the broadcast standard announced in *Red Lion*[29] as possible and declared that there were two principal evils that were committed by the "must carry" provisions. First, that it infringes upon cable operators' editorial control of what goes over their channel. It is for cable operators, and certainly not government, to make these decisions.

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24. 47 U.S.C. § 534(b)(1) (Supp. IV 1992).

25. 47 U.S.C. § 535(b) (Supp. IV 1992).

26. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C.), *cert. granted*, 114 S. Ct. 38 (1993).

27. Time Warner's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment at 9, *Turner* (No. 92-2247).

28. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1979).

29. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

The second evil—the second principal evil—is that Congress, in effect, pursuant to the "must carry" provisions, favors one group of speakers, that is broadcasters, over the other, and in support of this, the cable operators were able to refer to the legislative history behind the 1992 Act. There, Congress, or the committees involved, expressed approval or stated their approval and their intent to preserve the speech of commercial broadcasters because Congress believes that local broadcasting stations serve a great purpose in our communities, and so, too, Congress expressed its approval of noncommercial or public broadcasting, speaking most especially to the educational value that noncommercial broadcast stations provide.

In essence, the cable operators argued before the Court that these "must carry" provisions are content-based and are subject to heightened scrutiny and as somebody remarked earlier this morning, if a regulation or law is subject to heightened scrutiny, it shall not survive. I personally am not aware of a single case in which heightened scrutiny has been applied to a regulation and it has been affirmed in any court. I might be wrong, but I'm not aware of such a case.

We, on behalf of the government's interests and on behalf of your interests, came in before the Court and said, this is all absolute nonsense. What Congress was principally concerned about were gross anticompetitive practices by cable operators. They are not like newspapers. Remember, newspapers oftentimes have no competition in a local market. We have many of what are known as one-newspaper towns due to natural monopoly. Most communities can only support one newspaper. This town, of course, has several. Washington, D.C. has two. But who wins in these markets wins by their own competitive efforts. How many voices or how many people will their voice appeal to? The more newspapers we buy, of course, the more attracted advertisers will be to those newspapers.

In the cable market, in what I believe to be sharp contrast, cable companies have a technological advantage. They now control the principal means by which video programming reaches 60 percent of the American households, and for that reason, by that

advantage, they can—I'm speaking to the cable operators—cut off the signal of their broadcast competitors, and for that reason they have this unnatural monopoly, if you will. Congress found that they've taken advantage of this power, and for that reason, Congress passed the "must carry" rules to address this anticompetitive conduct.

I've been told I've already overstepped my allotted time, so I will then, for that reason, turn it over to Bob Joffe, who will tell you that what I've said so far is utter nonsense, and he will tell what really is going on here.

MR. JOFFE: Good morning. We're all lucky as citizens to have such a skilled advocate as Mr. Tyler purporting to represent our interests. One of the indicia of his great ability as an advocate is the fact that the Justice Department, only eighteen months ago, was advising the President of the United States that the "must carry" provisions of the law were unconstitutional. And that is the advice the Department of Justice gave to President Bush, and President Bush vetoed the Act based on that advice. In fact, the Justice Department informed the court in this very case that they would not defend this Act because of the advice they had given the President.[30] It was only with the change of administration that the Justice Department's view of constitutionality changed. Mr. Tyler would have argued the opposite position equally skillfully, I'm sure, had the administration not changed.

The "must carry" provisions of the 1992 Cable Act subject cable operators and cable programmers to substantial government interference in deciding what news, information and entertainment will be available to the public.[31] Twice the FCC has tried to im-

30. *See* letter from Stuart Gerson, Ass't Attorney General, to Dan Quayle, President of the Senate (Nov. 4, 1992) ("[w]e will promptly notify [the three-judge] court of the Justice Department's decision not to defend the constitutionality of sections 4 and 5 of the Act") (on file with panelist).

31. Section 4 of the Act requires most cable operators—those operating systems with more than twelve activated channels—to devote up to one-third of their channel capacity to carriage of local commercial broadcast stations. 47 U.S.C. § 534(b)(1)(B) (Supp. IV 1992). When there is an insufficient quantity of full power local commercial broadcast stations to fulfill the required "set asides," cable operators also must carry "low power"

pose these mandatory carriage rules and twice the D.C. Circuit has struck down the rules as unconstitutional.[32] Such regulation is unheard of for a member of the media, which suffers from none of the limitations of spectrum scarcity, the only rationale which has thus far justified less than full First Amendment protection for a member of the media.[33]

The Act is justified as an attempt to create a level playing field between broadcast interests and cable interests. It's important to bear in mind, however, that the First Amendment is a limit on government's power. "Congress shall make no law . . . ."[34] It is not a source of power by which Congress can achieve socio-economic or even communications benefits. It's not like the Fourteenth Amendment. It doesn't have a provision in it saying that Congress shall have the power to implement this or to enforce it. The First Amendment is a limit on Congress' power.

Today, cable serves over 54 million homes[35] and is an important source for a wide array of news, information and entertainment. The importance of the case now pending before the Supreme Court is that it will help decide whether cable is to be treated like a First Amendment speaker or some sort of a stepchild.

In providing this news, information and entertainment, a cable

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broadcast stations. 47 U.S.C. § 534(c)(1) (Supp. IV 1992).

In addition to the required one-third allocation of channel capacity for commercial stations, section 5 requires cable operators to carry local noncommercial educational stations. 47 U.S.C. § 535(a)-(b) (Supp. IV 1992). Any cable system with more than thirty-six channels generally "must carry" any qualifying local noncommercial station. 47 U.S.C. § 535(b)(3)(D) (Supp. IV 1992). Cable systems with between thirteen and thirty-six channels are required to carry up to three noncommercial stations. 47 U.S.C. § 535(b)(3)(A)(i) (Supp. IV 1992).

32. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

33. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

34. U.S. CONST. amend. I.

35. *See* Pub. L. No. 102-385, § 2(a)(3), 106 Stat. at 1460 (codified at 47 U.S.C. § 521 (Supp. IV 1992)) (finding that nearly 56 million households subscribe to cable).

operator engages in a variety of activities, much like those engaged in by a newspaper or bookstore owner in selecting programming, determining how to package these services to subscribers, and deciding what tier to put these services on. Cable has also developed a large number of new programming services. There are now eighty national and forty-eight regional programming networks, and many cable operators create their own services. If you subscribe here in New York, you undoubtedly see New York-1, a 24-hour local news channel which is offered on local cable systems.

In his concurring opinion below—I guess sort of overwhelmed by the force of John's argument—Judge Sporkin said that our invocation of the First Amendment was mischievous, and I quote, "It is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted."[36]

I suggest Judge Sporkin was myopically literal. Unless the First Amendment is held to apply to cable, we'll enter the next century with the most important means of communication unprotected by that amendment which our forefathers and our foremothers thought was the bedrock of all our liberties.

Let me turn for a second to the "must carry" provisions. They compel cable operators to allocate up to 40 percent of their channels to local television stations.[37] They mandate the particular channel on which such stations are carried,[38] and they require that broadcast channels be carried and sold by an operator in the basic tier, which all the subscribers must receive.[39] This kind of regulation obviously would be totally unacceptable if we were talking about a newspaper.

Let's turn to the critical issue—the proper First Amendment standard to apply here. We, of course, say that it's strict scrutiny

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36. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 56 (D.D.C.) (Sporkin, J., concurring), *cert. granted*, 114 S. Ct. 38 (1993).

37. *See* 47 U.S.C. §§ 534(b)(1), 535(b) (Supp. IV 1992).

38. 47 U.S.C. §§ 534(b)(6), 535(g)(5) (Supp. IV 1992).

39. 47 U.S.C. §§ 543(b)(7)(A) (Supp. IV 1992).

which, as John says, is a standard that rarely is surmounted by subject legislation.[40] What kind of regulations are subject to strict scrutiny? First of all, regulations that are content-based, regulations that compel speech—which is another form of content-based regulation—regulations which restrict the voice of some people in order to enhance the voice of others, and provisions that single out the press or some portion of the press for especially harsh treatment.

The "must carry" rules embody all of these types of fatal flaws. To determine whether the provisions are content-based requires that a court look beyond the legislature's mere recitation that they're not engaging in content-based regulation. Otherwise, Congress could shield virtually any statutory scheme from review by coming up with an appropriate set of content-neutral findings.

Applying a common sense understanding to the "must carry" regulations, we come inescapably to the conclusion that they are content-based. They necessarily alter a cable operator's programming and replace it with a government decision as to what to carry. Even the congressional findings themselves make clear a content related judgment was being made to favor local broadcast speech rather than cable speech. Congress didn't hide its intent here. For example, section 2(a)(11) of the Act emphasizes the preservation of local news and public affairs programming[41] and there are other provisions like that.[42]

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40. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991); Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781 (1988); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986) (plurality opinion); Minneapolis Star & Tribune Co. v. Minnesota Comm'r, 460 U.S. 575 (1983).

41. *See* Pub. L. No. 102-385, § 2(a)(11), 106 Stat. at 1461 (codified at 47 U.S.C. § 521 (Supp. IV 1992)).

42. *See, e.g., id.* § 2(a)(7), 106 Stat. at 1461 (codified at 47 U.S.C. § 521 (Supp. IV 1992)) (finding substantial interest in ensuring access to "local noncommercial educational stations" and stating that "distribution of unique noncommercial, educational programming services advances that interest"); *id.* § 2(a)(8)(B) (codified at 47 U.S.C. § 521 (Supp. IV 1992)) ("public television . . . provides public service programming that is responsive to the needs and interests of the local community"); *id.* § 2(a)(8)(C) (codified at 47 U.S.C. § 521 (Supp. IV 1992)) (specifying public television's "integral role in serving the educational and informational needs of local communities"); *id.* § 2(a)(10) (codified at 47

The cases are clear that not just an outright ban of a particular viewpoint causes strict scrutiny to apply. Other restrictions such as those that are involved here do as well. Regulations which compel speech, *Riley*,[43] *Pacific Gas & Electric*,[44] the *Tornillo* case,[45] are all examples of cases where strict scrutiny was invoked.

The lower court here—again undoubtedly swayed by John's argument—refused to recognize that compelled speech is another form of content-based regulation, unless the government not only compels speech but also compels speech of a particular content.[46] That's what's called viewpoint-based regulation. That decision really is wrong. It's unnecessarily restrictive. A decision to compel speech necessarily involves some kind of line drawing which determines which speech will be carried and which speech shall not be carried, and that is content-based regulation. In *Riley*, the Supreme Court said, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech and is content-based."[47] You couldn't describe the "must carry" rules any better than that.

The "must carry" rules obviously intrude into the cable operator's editorial discretion. In *Tornillo*, the Supreme Court held that

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U.S.C. § 521 (Supp. IV 1992)) (citing the objective and benefit in "local origination of programming").

The legislative history likewise reveals similar content-based judgments. *See, e.g.*, H.R. REP. NO. 628, *supra* note 14, at 56 (discussing the "importance of local programming," including local news); *id.* at 69 (discussing array of noncommercial programming, such as "Sesame Street," "3-2-1 Contact," "The McNeil/Lehrer NewsHour," and "Nova"); *id.* at 51-52 (discussing the harm noncarriage poses to local broadcasters in the form of "forced reductions in local news, public affairs, and other public interest programs"); S. REP. NO. 92, *supra* note 14, at 59, *reprinted in* 1992 U.S.C.C.A.N. at 1192 (citing potential audience loss by broadcasters who might be "unable to continue to provide local public service programming . . . [t]hat would . . . lead to diminished diversity of opinion").

43. Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781 (1988).

44. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986).

45. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

46. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 42 (D.D.C.) ("A compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken."), *cert. granted*, 114 S. Ct. 38 (1993).

47. 487 U.S. at 795.

a statute which impaired that discretion cannot survive judicial review.[48]

We focused on the effect on cable operators until now, but there's also an impact on cable programmers, like HBO, CNN or Discovery, who are discriminated against. Congress has made a choice that it prefers the speech of broadcasters, even if they are home-shopping stations, to that of cable programmers like Discovery or C-SPAN, even if the cable operator feels that the cable services would better enhance his package.

"[T]he concept that the 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."[49] That's a direct quote from the Supreme Court. Despite all of these factors compelling the application of strict scrutiny, the government and the broadcast industry would tell you that cable speakers are not entitled to full or perhaps any First Amendment protection. What is the argument they put forth to support that proposition? It's something that they often call the "bottleneck" theory. Now this theory argues that cable operators will exercise their supposed monopoly power to deny carriage to local broadcast stations. The government is therefore justified—the argument goes—to intervene.

The argument is wrong. It's wrong on two levels. There's a factual predicate that's missing. The government study that John referred to said that only 20 percent of the cable operators had ever dropped any station, and of that, 50 percent had only dropped one station. Ninety-eight percent of the stations would be carried anyway. There is, of course, a big difference—one of constitutional dimensions—whether you carry stations because you want to or you carry stations because you're forced to.

But put aside for the moment the factual predicate for the congressional finding. It doesn't work as a matter of law. There is no physical scarcity here, and that is the only instance that the Supreme Court has said which justifies intruding on the speaker's

48. 418 U.S. at 258 (statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors").

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

right to speak.[50]

Here, there is no physical limitation. The evidence was uncontested. The number of cable systems available in an area is not a physical limitation. There's enough room on telephone poles or in ducts for more than one cable system. The reason generally there is not more than one cable system in an area is for economic reasons.

Tornillo makes clear that economic scarcity, even something called "natural monopoly," is not a sufficient basis to curtail the First Amendment right of speakers.[51] The argument in favor of the right of reply statute in Florida was virtually the same as the argument that's made here in support of the "must carry" statute, but it was held insufficient there, and it ought to be insufficient here.

There was a so-called natural monopoly phenomenon with respect to newspapers. Most towns in America had one major newspaper; some only had one newspaper, period. Only 4 percent of our large cities have more than one newspaper. It was argued in *Tornillo* that the First Amendment interest of the public in being informed was in peril because of this horrible thing called vertical integration[52]—horrible in the government's words. But the same thing was happening in the newspaper industry.

The Supreme Court rejected all of these arguments and said, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[53]

Let's turn now to balancing. Let's assume for a minute that strict scrutiny applies, although I think I will be able to convince you that no matter what standard applies, the legislation should fall.

The asserted government interest here is protection of broadcasters whose very existence—it's said by Congress—is jeopar-

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50. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

51. *See* 418 U.S. at 249 n.13 (any right of access imposed by government "at once brings about a confrontation with the express provisions of the First Amendment" even where one-newspaper towns are the rule).

52. *Id.* at 249-50.

53. *Id.* at 256.

dized by the power of cable.[54] The lower court below just accepted this.[55] If the court had applied any kind of heightened scrutiny, as it is obliged to do when First Amendment rights are at stake,[56] it would have been readily apparent that there is no factual basis for the conclusion that local broadcasting is in need of special protection in order to preserve it. A legislature can't insulate its unconstitutional policies from judicial review by making up an appropriate set of legislative findings. As then-Judge Thomas said in *Lamprecht v. FCC*,[57] if a legislature could make a statute constitutional, simply by finding that black is white, or freedom slavery, judicial review would be an elaborate farce.[58]

On the undisputed record in this case, broadcast television is healthy and thriving, as Judge Bork said at the oral argument in the *Quincy* case[59] when he was told that these FCC rules had to be sustained because the broadcast industry would otherwise fall, he said, "Where are the cadavers?" There have been no "must carry" rules in effect for the last ten years, and there are no cadavers. Broadcast station licenses are not going begging; the broadcast industry is thriving.[60]

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54. *See* Pub. L. No. 102-385, § 2(a)(16), 106 Stat. at 1462 (codified at 47 U.S.C. § 521 (Supp. IV 1992)) (stating that "the economic viability of free local broadcast television" will be "seriously jeopardized").

55. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 46-47 (D.D.C.) (the majority, "unwilling to second-guess Congress' determination," concluded that "the danger perceived by Congress is real and substantial"), *cert. granted*, 114 S. Ct. 38 (1993).

56. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").

57. 958 F.2d 382 (D.C. Cir. 1992).

58. *Id.* at 392.

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

60. As noted by Judge Williams, the number of commercial broadcast stations has increased by 22 percent (from 919 in 1986 to 1,118 in 1992), the number of noncommercial educational broadcast stations increased by 15 percent (from 316 in 1986 to 363 in 1992), and the number of cities receiving broadcast television has increased by 16 percent (from 514 cities in 1985 to 594 in 1992). *Turner*, 819 F. Supp. at 63 (Williams, J., dissenting).

This legislation is overbroad. It helps the strong stations as well as the weak stations. It doesn't say those stations which are on the verge of bankruptcy, or which are suffering economically, are the ones Congress is going to protect. It protects the strong and the weak alike—it protects them against decisions which are anticompetitive and it protects them against decisions which are competitive. This legislation is not limited to saying to cable operators, you can't favor those programming services that are your own; it isn't limited to saying, you can't favor those programming services where you're going to get ad revenue; it just says, whatever the basis for your editorial decision as to what service to carry, you must favor broadcast services. In that respect the legislation is clearly too broad. That is one way of putting it. The other way of putting it is that there is no governmental interest sufficiently strong to justify such sweeping legislation. Whether you use the heightened scrutiny standard, or whether you use the very relaxed *O'Brien*[61] standard, it's clear to me that the "must carry" legislation cannot survive.

MR. TYLER: You know, both Bob Joffe and I were present at the oral argument before the Supreme Court and I think it was Justice Souter who said, when speaking to what standard should we apply to this, he was reflecting, well, you're not quite a newspaper and you're not a common carrier, you're somewhere in between—where do you lie?—and that really was the conclusion of his remarks. Of course, if the Supreme Court were to agree with Mr. Joffe that these provisions are content-based, heightened scrutiny would apply, and I would assume that might be the end of it. Or if they agree with the government's point of view that at the very least these provisions be viewpoint-neutral, maybe we could get into the *O'Brien* analysis. I'd like to ask Bob, however, in the popular press, at least, they've been saying this case has gotten so much interest because people are expecting a so-called cable rule from the Supreme Court, much like the so-called broadcast rule announced by the Supreme Court in *Red Lion*.[62] I ask Bob, regard-

61. United States v. O'Brien, 391 U.S. 367 (1968).

62. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

less of whether he wins or loses—his client wins or loses—who comes out on top in the litigation, does he expect a cable rule, or for the Supreme Court to use this opportunity to enact a cable rule?

MR. JOFFE: I don't really. The Supreme Court has already said in a number of cases, *Preferred*[63] being one of them, that cable operators are speakers and entitled to some First Amendment protection. The Court hasn't defined exactly how wide that protection will be. I doubt in this case they will set out the full parameters of that right. The Supreme Court generally strikes down legislation on the narrowest possible grounds, and I would think that if it does strike down the legislation here, it will do so on as narrow grounds as it can find. However, if it does strike down the legislation, it obviously will be setting the boundaries out further than they have been in the past in the cable area, and it will be up to further litigation and future cases to say how far this case goes. But I don't expect the Court to legislate in their decision. They will act in a judicial fashion and that will probably be pretty narrow.

MR. TYLER: We'll next hear from Mr. Buscarino, who as I said earlier is with NBC. I don't want to put him on the spot, but I think it was Justice Scalia in the oral arguments, who stated his doubt as to whether the broadcasting industry is really in peril at all. They continue to have very profitable years, and there seems to be no lack of competitors in the broadcasting industry. Mr. Joffe says, "Where are the bodies?" Maybe you can tell us where they are.

MR. BUSCARINO: Thank you, John. As introduced, my name is Gregory Buscarino. I'm a 1992 graduate of Fordham University School of Law, and I've been employed with the National Broadcasting Company for the past six-and-a-half years. Currently I'm a financial administrator for NBC's television stations division.

While I am not an attorney for NBC, I speak to you today as an attorney and as a member of the broadcast profession, a profession with a vested interest in the constitutionality of the "must

63. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

carry" rules. My discussion this morning is divided into three major areas. First, an overview of the "must carry" rules. Second, historical development and the market power of cable. And third, the First Amendment analysis of the "must carry" rules.

"Must carry" legislation has come in a variety of forms. Its most recent expression is in sections 4 and 5 of the 1992 Cable Act.[64] "Must carry" allows the broadcasters an option to demand carriage on cable systems within the television station's market, otherwise known as "ADI." Under "must carry," stations are assured carriage on local cable systems without monetary compensation for their signal.[65] Cable systems are required, under section 4, to reserve cable channels to meet "must carry" obligations.[66] A cable operator with more than twelve channels is required to reserve one-third of its usable activated channels to carry local television stations.[67] Systems with twelve or fewer channels are required to carry at least three such stations, unless the system has less than three hundred subscribers, in which case it is exempt from "must carry" requirements.[68]

Section 4 of the Act contains provisions for the carriage of low power television stations,[69] while section 5 contains "must carry" provisions for noncommercial educational stations.[70] Additionally, each signal carried in satisfaction of "must carry" requirements may, at the broadcaster's option, be carried on the channel number on which the local commercial television station broadcasts over the air.[71]

What these "must carry" provisions have done is prevent your local cable company from exclusively deciding what voices it wants you, the consumer, to hear. You turn on your television set and you can flip to channel 2, channel 4 (WNBC), channels 5, 7,

64. 47 U.S.C. §§ 534-535.
65. 47 U.S.C. §§ 534(b)(10), 535(i).
66. 47 U.S.C. § 534(a).
67. 47 U.S.C. § 534(b)(1)(B).
68. 47 U.S.C. § 534(b)(1)(A).
69. 47 U.S.C. § 534(c).
70. 47 U.S.C. § 535(a).
71. 47 U.S.C. §§ 534(b)(6), 535(g)(5).

9, 11 and 13, and hear a chorus of community voices. It is the intent of the "must carry" provisions that despite the growing dominance of cable, you will always be able to turn to your local television stations.

As Congress has laid out in the 1992 Cable Act, the "must carry" rules preserve the benefits of free broadcast television, they promote widespread information from diverse sources, and they insure continued competition in the video marketplace.[72] Without "must carry," Congress has stated the economic viability of local broadcast television and its ability to originate quality local programming will be seriously jeopardized.[73]

Not everyone has cable. Forty percent of American households depend on over-the-air broadcast signals.[74] Unless broadcasting is protected, a large segment of the population will receive no television at all. If cable systems are given the choice whether to allow broadcast stations onto its systems, we all will suffer.

If mandatory access legislation stinks of First Amendment implications, let's look at the historical development of cable and cable's incredible market power to demonstrate what is masked as a First Amendment argument really has an economic face.

When cable developed in the late 1940s, it served an important purpose of expanding television coverage. The FCC at the time had placed a freeze on the allocation of broadcast signals, and cable allowed TV to reach areas otherwise missing out.[75] Despite cable's humble beginnings, Congress was well aware of the threat that cable presented to the broadcast industry. Early "must carry" bills before Congress expressed concern that unrestricted growth of cable could have a negative impact on the development of broadcast television.[76] A balance had to be struck, Congress found,

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72. *See id.* § 2(a)(6)-(11), 106 Stat. at 1460-61 (codified at 47 U.S.C. § 521 (Supp. IV 1992)).

73. *Id.* § 2(a)(16), 106 Stat. at 1462 (codified at 47 U.S.C. § 521 (Supp. IV 1992)).

74. *See id.* § 2(a)(3), 106 Stat. at 1460 (codified at 47 U.S.C. § 521 (Supp. IV 1992)).

75. *See* Notice of Proposed Rulemaking, 13 Fed. Reg. 5860 (1948).

76. *See, e.g., Cable Television Report and Order*, 36 F.C.C.2d 141 (1972).

between allowing new technologies to expand television services and preserving local broadcasting. If cable's growth remained unchecked, it could destroy the economic support of broadcast stations with the resulting loss to local communities.

Early regulation of cable came from the FCC. Its jurisdiction over cable was affirmed early on by the Supreme Court as being ancillary to the FCC's responsibility to regulate television. That was in the *Southwestern Cable* case.[77] The FCC determined that cable's unrestricted importation of distant signals could destroy the services offered by broadcasters. Consistent with that, exercising its jurisdiction, the FCC promulgated "must carry" rules in the late '60s and early '70s.[78]

Now with "must carry" regulations finally in place to protect local broadcasting, Congress opted to assist the growth of cable.[79] By the mid-1970s, cable was only reaching 12 to 15 percent of American homes. Its slow growth was basically due to programming restrictions and local franchise burdens. So to assist the competitive development of cable, in 1976, Congress granted cable systems compulsory copyright license to re-transmit broadcast programming without liability.[80] In 1978, Congress also authorized the FCC to resolve pole attachment disputes, as cable needed access to local utility lines to operate their systems.[81]

But the most significant legislation passed to assist the growth of cable, was the Cable Act of 1984.[82] This was an act synonymous with deregulation. It lifted burdensome franchise restrictions to allow for cable expansion, under the premise that cable could develop only if freed of unnecessary restrictions. Under the 1984

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77. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

78. 47 C.F.R. §§ 21.710, 21.712(c)-(f), 91.557, 91.559(a)-(d) (1966); 47 C.F.R. § 74.1101-.1105 (1967); 47 C.F.R. § 76.55, .57(a), .59(a), .61(a), .63 (1972).

79. H.R. REP. NO. 934, 98th Cong., 2d Sess. 21 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4658.

80. 47 C.F.R. § 76.61(b)(2) (1976).

81. Communications Act Amendments of 1978, Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (1978) (codified as amended at 47 U.S.C. § 224 (1988)).

82. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. §§ 521-559 (1988 & Supp. IV 1992)).

Act, rates were deregulated for 97 percent of cable systems.[83] Franchise fees were restricted, and procedures were established for the franchise renewal process. The result of all this legislation is that in assisting cable growth, Congress created a monster. Under a deregulated environment, rates charged by cable systems skyrocketed, with the average cable rate increasing 40 percent for 28 percent of cable subscribers since 1986.[84] Some systems reported rate hikes as high as 186 percent.[85] Additionally, cable faced no competition because the barriers to entry for cable systems were so high and communities could only fit so many cable systems. So cable had been granted a virtual monopoly. Of over eleven thousand cable communities, only fifty-three had competing systems in the same community.[86]

At the time the 1984 Act was passed, Congress also expected direct broadcast satellite to become a major competitor. Unfortunately, DBS, as it's known, never got off the ground in the 1980s. Additionally, the cable industry was becoming vertically integrated—the cable operators and programmers having common ownership. With cable operators owned by the cable programmers, program supply would never become a concern. Cable operators had incentive and ability to favor their affiliated programmers over anyone else seeking access to their system.

These vertically integrated companies concentrate power in the hands of a few people, and these few people are controlling viewing selections of millions. For example, TCI, one of the nation's largest multiple system operators ("MSO"), reaches 22.5 percent of the nation's cable homes and is run by one man, John Malone.[87] The five largest MSO's reach almost 50 percent of all cable households, and are run by relatively few individuals.

Additional catalysts in cable's growing market power were the

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83. Pub. L. 102-384, § 2(a)(1), 106 Stat. at 1460 (codified at 47 U.S.C. § 521 (Supp. IV 1992)).

84. *Id.*

85. S. REP. NO. 92, *supra* note 14, at 7, *reprinted in* 1992 U.S.C.C.A.N. at 1139.

86. *Id.* at 13, *reprinted in* 1992 U.S.C.C.A.N. at 1145.

87. Affirmation of Jack M. Goodman, Special Counsel to the National Association of Broadcasters at 5, *Turner* (No. 92-2247) [hereinafter Goodman Affirmation].

district court decisions in *Quincy Cable*[88] and *Century Communications*.[89] In both cases in 1985 and 1987, the D.C. Circuit struck down the FCC's consecutive attempts at "must carry" rules. In both cases, it was held that the FCC record had not been substantiated demonstrating the government's interest in "must carry," yet in neither case did the court ever hold that the "must carry" regulations are per se unconstitutional.

Ladies and gentlemen, between 1988 and 1992, we lived in a world without "must carry." The behavior of cable systems during these years gave Congress the substantiated record that the district court was looking for in *Quincy* and *Century*.

Following the demise of the "must carry" rules in the '80s, the FCC conducted a survey in 1988. Of 4,303 cable systems that voluntarily disclosed data, 869 cable systems admitted denying coverage to 704 television stations in over eighteen hundred instances.[90] 241 cable systems denied coverage to three or more local stations, and 113 systems had denied coverage to four or more stations.[91] WCOM-TV, Mansfield, Ohio, after having spent three million dollars to get on the air, went dark after sixteen months, having been financially squeezed as a result of not obtaining coverage on cable systems in its area.[92]

Along with dropping television stations, cable systems were also repositioning stations on their system. In an FCC survey, 974 cable systems admitted shifting channel positions of one or more stations in over 3,000 instances.[93] For the broadcaster, channel repositioning results in significant audience loss to a television station, and is done to enhance the competitive position of the cable system.

KBHK in San Francisco is carried on TCI systems in San

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

89. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

90. S. REP. NO. 92, *supra* note 14, at 42, *reprinted in* 1992 U.S.C.C.A.N. at 1175.

91. *Id.* at 43, *reprinted in* 1992 U.S.C.C.A.N. at 1176.

92. Goodman Affirmation, *supra* note 87, at 14.

93. S. REP. NO. 92, *supra* note 14, at 44, *reprinted in* 1992 U.S.C.C.A.N. at 1177.

Carlos, Fremont and Sunnyvale. It's marketed as Bay Area Cable 12, but you could find KBHK on Channels 12, 19, 20, 21, 22, 23 and 24 depending where TCI Systems opted to place the station in a particular month.[94]

Cable's motivation for dropping and/or repositioning broadcast stations is advertising revenue. When a cable system carries a local broadcaster, it's assisting the station to increase viewership.[95] Increased viewership means increased revenue that would have otherwise been earned by the cable operator. So why should cable operators slice up the advertising pie if they can just drop the stations? The economic motives of cable operators can potentially destroy broadcasting.

Now let's discuss cable's so-called First Amendment arguments. The "must carry" rules of the 1992 Cable Act do not infringe upon the First Amendment right of cable systems. Signal carriage requirements are economic regulations intended to promote competitive balance between cable and broadcast television. The Supreme Court has held that economic regulations designed to promote competition and diversity of voices can survive First Amendment scrutiny.[96] The question is whether the government has adopted a regulation because it disagrees with the message that's being conveyed. If so, strict scrutiny applies to the legislation. In *Miami Herald Publishing Co. v. Tornillo*,[97] a Florida right of reply statute granted political candidates a right to equal newspaper space to answer criticisms the newspaper took on their record. The Supreme Court found the statute unconstitutional as mandating access solely on the basis of what the newspaper had said.

Contrast that to FCC regulations prohibiting newspapers from operating broadcast stations in their local areas. The regulation was found justified and constitutional on diversity grounds and not

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94. Goodman Affirmation, *supra* note 87, at 14.

95. Pub. L. No. 102-385, § 2(a)(15), 106 Stat. at 1461 (codified at 47 U.S.C. § 521 (Supp. IV 1992)).

96. Associated Press v. United States, 326 U.S. 1 (1945).

97. 418 U.S. 214 (1974).

content-related. That was in *FCC v. National Citizens Committee for Broadcasting*.[98]

So in ascertaining the appropriate standard of review, it's been found the government's regulatory purpose is what is controlling. "Must carry" is not content-related legislation. It prohibits no content and it regulates no content. Its purpose is to assure more than one media voice in the local community. Strict scrutiny does not apply to "must carry." The standard of review is the four-pronged standard in *United States v. O'Brien*.[99] We'll take the prongs one at a time.

First, is the regulation within the constitutional power of the government? Clearly the power of Congress to regulate interstate communications is well founded in the Commerce Clause.[100]

Second, whether the regulation furthers an important or substantial government interest? The government has a substantial interest in preserving the broadcast industry for cable and non-cable homes alike. The government has a substantial interest in promoting a diversity of views in local communities. The government has a substantial interest in promoting fair competition in the video marketplace. These interests have been the guiding light of broadcast regulation and cable wants the power to snuff out the flame.

Third, whether the incidental restriction is no greater than essential to the furtherance of that interest? The "must carry" regulations are not overly broad. The requirements impact only one-third of most cable operators' channel capacity, if they can fill that, leaving a majority of the channels to the discretion of the cable operators. The cable operator retains discretion over which stations to carry if more stations are available than the operator is required to carry. And in addition, cable operators are not required to carry substantially duplicative stations.

And fourth, which we've already discussed, whether the interest is unrelated to the suppression of free expression? As noted, "must

98. 436 U.S. 775 (1978).
99. 391 U.S. 367 (1968).
100. U.S. CONST. art. I, § 8, cl. 3.

carry" is clearly not content-related.

So having passed the four prongs of the *O'Brien* test, the "must carry" rules survive the most stringent First Amendment standard which can be applied to these rules.

Cable is the dominant media it is today solely because Congress saw fit to create a competitive environment to foster its growth. Cable has accepted the benefits of regulation, but does not want the burdens. "Must carry" regulations serve a very important interest. To place the future of broadcast television in the hands of cable operators under the mask of First Amendment challenge will have dire consequences for all. Thank you.

MR. TYLER: I thank Mr. Buscarino who very ably set forth the argument on behalf of the "must carry" provisions and again underscored what I think is a critical point, that the cable operators have this technology; they have supplanted the electromagnetic airwaves, and they have now the technology to black out the voice of their competitors. The *New York Times*, in order to compete with the *New York Post*, does not have the ability to remove copies of the *Post* from news racks or news stores, but in effect, that is the capability the cable operators now have. I interject this editorial content, because I'm about to introduce Mr. Apfelbaum, who is also with Time Warner, I believe in-house counsel. This will be the second voice you will hear on behalf of Time Warner; we are a horizontally concentrated panel.

MR. APFELBAUM: Thank you. Since you already heard from my lawyer, I'm going to try to be brief, and also since many of our speakers today started out with disclaimers, I'd like to start out with one also. I'm not speaking on behalf of the United States Government.

Unfortunately, Time Warner Cable is required to speak on behalf of the United States Government by the "must carry" provisions of the 1992 Cable Act and by other parts of the law. And that's really what this case is all about. The case is about who decides what to put on a private instrument of the media, which is what we are.

In our view, the First Amendment answers that question quite

clearly that it's the publisher or the owner of that instrumentality of the media who decides. As Bob Joffe said, the First Amendment is not something that empowers the government, it's something that limits the government. If instead the principle is that the government can do anything it wants in order to increase diversity or to make sure that, in its view, the proper views are getting through, I think we're all in very big trouble. The other justification we hear for this law is all this talk of market dysfunction and how powerful the cable industry is, and I find that interesting coming from someone who works for General Electric. But aside from that, that's also a very dangerous principle—that the government can decide, as it tried to do in the *Tornillo* case[101] in Florida, that the newspaper market is in dysfunction, and come along and pass a law that says, we're going to require that the newspaper open up its pages to others. The Supreme Court in *Tornillo* said no, that's not what the First Amendment is all about. Rather, the First Amendment means that it's the press that decides what to print or carry. And as some of the people said on the earlier panel and here, this is especially important precisely because, as the government says, cable is becoming such an important medium. If the First Amendment is left only to apply to newspapers, there's not going to be much of the First Amendment left in the years ahead. So if cable is truly as important as the government says, it's precisely for that reason that we need the First Amendment to apply there more than anywhere else.

Another rationale that's put forward in favor of this law is supposedly that it promotes diversity. I find that to be absolutely ludicrous, the notion that requiring cable operators to carry every broadcast station, as opposed to cable services such as C-SPAN or Court TV that get knocked off by this law, increases diversity. This makes absolutely no sense. During the years before cable really took off, there were only three television choices for most Americans, and one former Chairman of the FCC called broadcast television "The Vast Wasteland."[102] Now the government is saying

101. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

102. Newton N. Minow, *The Vast Wastland: Address to the 39th Annual Convention*

that there is no diversity, that cable has somehow destroyed diversity, and that the way to fix that is to put back on those same three broadcast networks. I know Bruce Springsteen said that there are fifty-seven channels with nothing on,[103] but I think with fifty-seven channels there's certainly a lot more than there was in the days of "The Vast Wasteland," and I think as cable grows and its capacity grows, there's going to be even more choice than there was before. So this is really just a special interest law that's meant to protect broadcasters who, as Bob pointed out, don't really need any protection. Because, in fact, cable operators are already carrying most broadcast stations—and generally I think the ones that cable operators don't carry, the real reason is that nobody wants to see those stations. How many independent broadcast stations does anybody really want to see, or how many home-shopping channels?

I think the government in its brief even acknowledged that this law can't really work because it can't make people watch these broadcast channels. It can, if the courts allow them, require that cable operators put those channels on, but I don't think even the government would say that it would be constitutional to pass a "must watch" law. Maybe the National Association of Broadcasters would say that, but I don't think the government would say that.

I'd also like to respond to one thing that Greg said about how cable operators admitted to dropping broadcast stations. He said it like it was something that a cable operator should be ashamed of. We confessed, okay, we did it. But, that's just another way of saying we've exercised our editorial discretion. What cable operators have to do is decide from among all kinds of available programming sources and programming we make ourselves, like New York-1 here in Manhattan, what we are going to put on. It's the same thing that NBC does. Every producer in America would love it if NBC were required to carry every program that that producer

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of the National Association of Broadcasters (May 9, 1961), in EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST 52 (Lawrence Laurent ed., 1964).

103. BRUCE SPRINGSTEEN, *Fifty-Seven Channels (and Nothing On), on* HUMAN TOUCH (Columbia Records, 1992).

wanted to make. I don't think NBC would like that kind of law. So NBC denies carriage to all kinds of producers every year, every day. And that's as it should be, it's exercising its editorial discretion, and that's what we want to be able to do.

Also, Greg said it's "only" one-third of the channels. You can put "only" in front of any number you want, but one-third is an extraordinary amount of our channel capacity for the government to take up. Also, other parts of the 1992 Cable Act and 1984 Cable Act take up a lot of other space.[104] Time Warner is challenging some of those parts of the law as well, but I don't think anybody would say if there were a similar "must carry" law for newspapers such as the *New York Times* that it's "only" taking up one-third of their pages. So I think this case is fundamentally about what the First Amendment means as we go forward into an era where print means much less, and if it's really going to have the meaning that it's had up until now, the only correct answer is that cable operators are fully protected by the First Amendment. Thanks.

MR. TYLER: It might be a cynical view, but I've heard others express it, that are we truly talking about First Amendment interests here or are we talking about money? Are cable operators the sort of cigar chewing editorialists that we envision, or Hollywood envisions for us in our editorial rooms? Do they want and are they frustrated in getting out their populist message, or their anti-populist message, as a result of "must carry"? In other words, if they have a point of view, if they have a political message, if they have any message at all of any import, does "must carry" in any way frustrate Time Warner's ability or anybody else's ability to get that message known to all people in America? Proponents or the defenders of "must carry" would, of course, say that the "must carry" does not serve any such purpose and does not frustrate the voice of these people. In essence, what "must carry" does is establishes a

104. *See, e.g.*, 47 U.S.C. § 531 (1988 & Supp. IV 1992) (franchise authorities can require franchisee to designate any number of channels for "PEG" (Public, Educational and Governmental) purposes); 47 U.S.C. § 532 (1988 & Supp. IV 1992) (designating channels for commercial leased access).

level playing field. It allows broadcast signals to be heard; if they are unpopular, these home-shopping stations are unpopular, you, all of us have the ability to vote on that. If they're unpopular, we will not watch them.

MR. APFELBAUM: But in the meantime you're going to tell us to take Court TV off to put these broadcast stations on and wait for however many years it takes them to die their death if no one wants to watch them. I don't think that's the right answer. Also, I don't think anywhere in the First Amendment it says you have to chew a cigar to be protected by it. And you talk about money. Everybody in the media business is out there to make money for themselves and their shareholders. That's how this country works, and so there's nothing wrong with a cable operator trying to make money too. But the way a cable operator tries to make money is by satisfying its customers, which includes giving those customers what they want to see, and I think the First Amendment is better served by letting somebody who's out there trying to make a profit make the decision of what to put on than by letting legislators in Washington decide that this broadcaster is more worthy than Court TV or C-SPAN, which lets those viewers see what is going on in Congress.

MR. TYLER: On one issue again that was addressed in the court is, is there any real record out there establishing that the cable operators have acted in a discriminative or an anticompetitive manner against broadcast interests or does the Congressional Record really reveal very little at all? I think we can get into that later, but I think lastly we want to hear from Mr. Hyman, who was a litigant in the *Turner* case below before the three-judge panel, but who did not speak to speech issues on behalf of his client, but instead brought arguments under the religion clauses of the First Amendment, and why don't we hear from him, and he can explain what his concerns are, and what his client's concerns are in this regard.

MR. HYMAN: Hi, it's a pleasure to be here and to be on a panel in which there is no hyperbole and we're not talking about snuffing out the flame of freedom, as Mr. Buscarino said.

I come at this differently because you see, I'm not worried

about horizontal—I'm vertical. We speak to a higher authority. The Faith and Values Channel called Vision is my client, and we came to this case somewhat peripherally because we are not a cable operator. We are a programmer, and we program on network cable by having interfaith religious programming. It's a growing channel but something happened to its future.

What happened was when "must carry" came, suddenly Vision was being dropped. It was being dropped by cable operators across the country as they faced the prospect of having to put on religious programming.

You see, we've heard a lot about local broadcast television, and you talk about Channel 4 or Channel 2, but there's also another form of local broadcast television and that's the local religious broadcaster, and that creates a very serious problem, I think, that Congress either did not want to address or did so sub-silentio when it enacted the law because it was heavily lobbied, as I will discuss, by the local religious broadcaster.

You talk about local stations, you have a local religious broadcaster maybe on a low power television, going to a very limited audience. As a result of "must carry," that low power television station will now have a fantastic audience for which it did not pay and for which it now will have the opportunity to present its sectarian message.

Let me try to do this in a little concrete form, just so you can see the problem as we see it and why we raise the issue of the freedom of religion clauses as another factor. Admittedly, we are ancillary to the major issue which is the First Amendment speech clause. We, too, are part of that, but we believe that this issue should be presented in the form of religion as well, because it deals with, as Mr. Joffe says, content-based speech and we are the result of what "must carry" can cause. Vision and one interfaith national network are being taken off the air and being supplanted by the local religious broadcaster which may, in many instances, represent a particular sectarian view. And why is that? Because there is limited space on a cable system and when a cable operator must put on a local religious broadcaster, it's not going to want to have two taking up its channels, that is, two religious programmers, so

to speak—one goes, one stays. The government, through "must carry," has mandated which one that is. And you have to take it in the factual context it's presented.

There are over 350 religious broadcast stations—local religious broadcast stations.[105] They're both low power and they're commercial. They go to small audiences and they are, in the main, directed at particular evangelical or fundamentalist viewpoints. They have, as they are entitled to, proselytizing and on-air fundraising. They deliver and intend to deliver a very sectarian message. That is their right. They have access to the airwaves through the FCC. The FCC cannot discriminate, as it should not, with the award of licenses for religious broadcasting,[106] and these broadcasters have the right to obtain a license they can afford and bring the message they want within that context.

But that is a far cry from what has now happened on "must carry." These 350 religious broadcasters, who were able at best to get 40 percent of community market as an off-air broadcaster,[107] now will be guaranteed 100 percent of the television market in a community by reason of "must carry." It is a very serious problem when you realize that the government is taking this content-based issue, a sectarian message, and saying to a cable operator, carry it. You "must carry" this particular sectarian message, and it is—I submit—as direct a form of aid to a religious institution as if you paid money, in fact far greater. For money could not buy the access that "must carry" has given to these stations.

The impact is substantial and it is not something that we in Vision are exaggerating. According to Trinity Broadcasting Network, which is an off-air network of 250 religious stations, the result of "must carry" in their own words is that there will be ten million new households reached, thirty-six million new viewers they will be able to speak to, and they will have access to 80 per-

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105. DIRECTORY OF RELIGIOUS BROADCASTING (National Religious Broadcaster Publishers, 1992).

106. *See* Noe v. FCC, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959).

107. Affidavit of Nelson Price at 6-7, *Turner* (No. 92-2247).

cent of the American TV audience. Does that mean that we not bring about government support of a religious institution? Has the government not created a pulpit with this law for these religious stations to bring their views to a far greater number of households than they could get otherwise?

Now, they have the opportunity to proselytize to a greater number. That's not bad in itself. It's not wrong; they have the right to proselytize but does the government have the power to require the cable operator to carry that station so that the proselytizing can be done? Does the government have the right to give this station the ability to now raise funds for its particular religious sect from 100 percent of the TV viewing audience, rather than that audience it reached, or could reach, through its FCC license?

The fact is that the issue, I think, when put in this context, does raise free exercise and establishment questions. And that's why Vision became involved, and that is the issue we have raised. The Supreme Court, I should note, has not yet taken this issue. We intervened and filed a separate jurisdictional statement. We are still pending jurisdiction. One will assume that when *Turner* is decided, we will be decided without argument, but I think it's important that we have presented the issue and that it should be considered in the context of what happens when government becomes involved in mandating speech and in mandating the carriage of particular types of stations.

The law in this area is an interesting one. We are dealing with —and I won't bore you with discourse on it—the *Lemon v. Kurtzman*[108] three-pronged test that has been used in deciding whether or not the religious clauses have been violated. Does the statute have a secular purpose? Is its primary effect to advance a religious mission? And, is there government entanglement?

Taking those three, if you apply them rigidly, as the district court did below—Judge Jackson—"must carry" appears to be secular. It doesn't have a primary effect of advancing religion, said Judge Jackson, it's only incidental.[109] That is, it's something that

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108. 403 U.S. 602 (1971).

109. *See* Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 48-49 (D.D.C.),

just comes about because we have it, and of course there's no government entanglement. But if you look behind what we really have here, I submit that, in fact, you do have much more entanglement, much more advancement of a religious mission than Congress would have, would recognize and should have recognized when it enacted the law.

The real impact of the statute is that it will provide a significant boon to the religious broadcaster, and that is not an insignificant number of the local stations that are going to be carried. The number is not insignificant or incidental. Its primary effect, well one of its effects certainly, will be to advance religion. It will advance the religious message of a particular broadcaster in a way that money can't buy, and this issue is not one that can be lightly dismissed.

Finally, the *Lemon* test has been under attack recently and I think Justice Scalia, in *Lambs Church*,[110] declared it dead, but he is only one of nine. The fact remains that I ask you to consider whether the government has not provided pulpits for a particular religious viewpoints at the expense of networks such as Vision. Consider the issue and think about whether government, in its zeal to try to rectify wrongs, creates other more serious problems that have to be addressed. Thank you.

MR. TYLER: All right, Steven, thank you very much. As you said, this matter was not briefed and orally heard before the Supreme Court and I guess we just have to await to see if they issue a decision concerning these or addressing these religion clause issues at the same time they address the speech issues.

I would like to go back to the speech issues. Marc earlier made the point that the First Amendment can never countenance a provision, a regulation, a law that allows the government in effect to tell a speaker what voice he has to carry or cable operators carry on these cable channels. But let me put it to you this way, assume as I think you have to, the fact that cable operators do have this

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cert. granted, 114 S. Ct. 38 (1993).

110. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

technology—this capability to silence the voice of their competitors—and assume further that there is at least a record, or the record does exist, showing a pattern and practice of this kind of behavior by cable operators in the past. Would it still, or is it still your position, under *Miami Herald v. Tornillo*, or whatever precedent is out there, that regardless of cable operators' ability to take this anticompetitive action, and regardless of their alleged past history in taking this action, is our federal government prevented from enacting prophylactic measures against such action?

MR. APFELBAUM: Well first of all I'll go on and accept your assumptions, but I don't think there is anything in the record that supports what you say.

MR. TYLER: We can come back to that point.

MR. APFELBAUM: If that were the record I would say "yes," that Congress is free to go out and pass a special purpose law that applies to only a single industry, but if that industry is a member of the press, that law is then subject to strict scrutiny. If it can pass under strict scrutiny, and I believe some laws have passed under strict scrutiny, fine. But government is not powerless to stand by and watch any such abuses, if there were such abuses. There are also laws of general applicability, such as the antitrust laws, which can be applied to cable operators just like they can be applied to anyone else.

MR. TYLER: Can you be specific in that regard? If the government, the Antitrust Division in the Department of Justice, for example, were to find specific incidences in which a cable operator, in whatever community, in fact, blacked out its broadcast competitors for purposes principally of getting the advertising revenues of that broadcast competitor, what, by your compass, can the federal government do, what action can it take that will not infringe or violate First Amendment?

MR. APFELBAUM: I don't know that such action would necessarily violate any antitrust law. It would depend on a lot of circumstances. That's why the antitrust laws are there to be enforced by courts rather than having broad, prophylactic rules applicable to members of the press. A court can assess the facts. I think it's

easy for us to say a cable operator took somebody off because it wanted more advertising dollars. I think the truth is, you'll never find anything as straight-forward as that. Why does the *New York Times* take out one columnist and put in another? Probably making more money has something to do with that decision, and the antitrust laws don't say that it's wrong to do things to try to make more money. It's only in certain narrow circumstances where something would violate the antitrust laws. But again, Congress isn't powerless because it can pass specific laws aimed at the press, but then the First Amendment and the Supreme Court cases say, if it does so, those laws are subjected to strict scrutiny. If they can withstand strict scrutiny, fine. If not, then those laws should not be allowed to stand. And then we do have laws of general applicability which can be enforced as they should be on a case-by-case basis.

MR. TYLER: I think, Bob Joffe, you also want to speak on this?

MR. JOFFE: Yes, on the legal point, I agree with Marc, not just because he's my client, but because he's right. It seems to me if you have a cable operator who was an essential facility within the meaning of the antitrust laws, and he was trying to monopolize advertising in a particular community and excluded a particular local broadcaster in order to further his monopoly power in advertising—assuming all those things could be shown—the broadcaster could get an injunction preventing the operator from excluding the broadcaster under the antitrust laws. You don't need to go to the "must carry" rules.

The broadcaster, however, would never be able to win that case, because in most communities, somewhere between 40 and 60 percent of the people watch broadcast television with a rooftop antenna or rabbit ears. Cable is not an essential facility. Broadcasters can and do get to their customers without cable operators.

There was a whole to-do in Congress about the validity of the "A/B" switch, which is probably something most people in New York are not familiar with, but that's a little switch that you can use to switch from cable to your rooftop antenna or rabbit ears. So even in addition to the fact that there are 40 or 60 percent of the

people in a particular community who don't have cable, the other 40 or 60 percent of the people who do have cable can still watch this broadcast station by merely flipping the switch to the A or the B position and getting their signal on the rooftop antenna.

Now Congress found that the A/B switches weren't being used, but why is it that they weren't being used? The reason they weren't being used is because the cable operators were carrying the broadcast stations. As the study shows, fewer than 20 percent of the cable operators ever dropped broadcast stations, and only 50 percent of those that did drop broadcast stations, dropped more than one, so there was no need for people to use their A/B switches; they could see all the broadcast stations on their cable system.

So I think Congress and the Justice Department and the broadcaster are not powerless if the cable operator is behaving in an anticompetitive way. The problem with the "must carry" statute is that it doesn't prohibit just anticompetitive behavior. It prohibits all decisions to drop a broadcast station for whatever reason.

Now this whole issue of the entrepreneurial nature of the editorial decision has been raised both by NBC's representative, which I'm sure is in the business for purely pro bono reasons, and the government. The First Amendment doesn't protect just highbrow editorial decisions by the *New York Times*, it protects decisions by the editors of *Gentleman's Quarterly* ("*GQ*") and *Cosmopolitan* ("*Cosmo*") as well, and yet no one would say that we could force *GQ* or *Cosmo* to carry 30 or 40 percent of their pages for fashion people who can't get their clothes shown elsewhere.

I think the framers intended that these editorial decisions be made by independent speakers, and whether they have a profit motive in their decision or not is just totally immaterial to the First Amendment, unless they're acting in some sort of way that violates the antitrust laws.

MR. BUSCARINO: One of the things I think has been overlooked, and I mentioned in my points is, if you turn to any broadcast station, you're going to see a diversity of programming. You're going to see community shows. You're going to see reli-

gious shows. You're going to see local news. We don't do this because we're nice guys. We do this because the federal government has created the broadcast industry to give you a diversity of voices. We do it because we are obligated, in consideration for receiving a broadcast signal, to send you this information. We have to send you a variety. The point of instituting a prophylactic measure is so that we can continue to give you that variety. Theoretically, although it would not be economically wise for any cable system, they could program all channels with the Sci-Fi Channel. They have that power. The federal government has created a situation where broadcasters will always give you diversity of programming. The intent is to make sure that there is still a diversity of voices, and not allow one operator to control the switch.

With new technologies, video compression, fiber optics, we are not too far away from 500-channel capacity systems. The number of local broadcast stations in the local community may be five, six, or seven. The burden that's going to put on the cable operator to insure this diversity of voices in the local area is minimal. "Must carry" is for the smaller systems in Kansas, or the State of Washington, where we want local voices, and we don't want a cable operator to say it's not economically wise to carry you, so we're going to snuff out the required local voices. That's the purpose of all of this.

MR. APFELBAUM: I would disagree with what you say motivates broadcasters. I think to some extent broadcasting is more regulated than other areas of the press, because the *Red Lion* case[111] said that could be done, and whether that's right or wrong is not the issue before us today. I don't think even in broadcasting, however, there is such content-based regulation that dictates precisely the kind of programming you have to have on at any particular time, and my strong suspicion would be that when NBC decides to drop "Cop Rock" and put on "Seinfeld," it has very little to do with the obligations of the FCC, but has to do with what they think is going to attract more viewers. And that's the same thing that cable operators are doing in making their programming decisions.

111. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

MR. BUSCARINO: We carry "Seinfeld" because you all watch "Seinfeld," but that is not our exclusive programming, and when it comes up for license renewal, the public is allowed to challenge the fact that it hasn't been getting the programming that addresses the concerns in the New York community. You can challenge our license renewal based on that premise. We have to give you the diversity and if we don't give you the diversity, we might not have a license again.

MR. APFELBAUM: Has anyone ever successfully challenged an NBC-owned station, and is the answer no because of the fact that NBC is doing such a great job in providing diversity or is it that there are really no teeth to those regulations? And probably that's for the best.

MR. BUSCARINO: I don't think the issue is whether anyone has successfully done it or not. The potential is there to snuff out the broadcasters' signals if we don't do our job, and to tell you the truth, I think broadcasting is doing a good job of giving you community voices.

MR. JOFFE: But the whole reason, the whole justification whether it's right or wrong for doing that is there's scarcity in the physical spectrum in the broadcast area.[112] It's considered that the broadcast spectrum belongs to the public and the government is going to auction it off. There isn't that same physical scarcity in the cable area. You can run more than one wire.

Now there isn't at the moment, in most towns, more than one wire, but there's certainly more than one way of getting cable programming. You can get it with backyard earth dishes, there are two major direct to the home satellite services that are going up this spring, there are C-band dishes, you can rent video cassettes at the video store, you can use an antenna, there is not just one way of getting to the home; there is no physical scarcity.

The fact that there's one cable operator in most areas is no more constitutionally relevant than in most towns there's one newspaper.

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112. *Id.* at 390.

MR. TYLER: The FCC, in assisting me in preparing for this case, explained that a broadcaster, in order to renew his or her license, is subject to public opinion and would-be competitors can come forth and explain how they might be better able to serve the public interests. In anticipation of that, broadcasters do provide possibly a greater diversity of voices on their station, and do address matters of local interest that are of concern to their broadcast area. Government, in other words, has always had its hand in the broadcast industry, and it is principally for purposes of ensuring the greatest diversity of voices. What's of interest in the *Turner* case is, because cable operators are wrapping themselves in the editorial pages of newspapers and they insist that they should be treated in kind, it raises this specter, if the Supreme Court does agree with them, that television will slip out from under this direction by the government, if you will, this modest regulation, and if that happens, is that for better or is that for worse?

MR. APFELBAUM: Well I think this whole notion that broadcasting is regulated by the FCC is another of the many troubling things behind the "must carry" law—that the Supreme Court has said that there's a relaxed First Amendment standard that applies to broadcasting, so government is able to encroach more on broadcasting than it is on any other members of the press. Now you have the "must carry" law bootstrapping on that and taking those government-regulated speakers and giving them a favored position in another medium. So that's just another part of why this law is offensive to the First Amendment.

MR. JOFFE: We don't suggest that there aren't things the government can do to promote diversity. For instance, if the government really thought that some broadcast stations were in danger of failing, direct subsidies to those broadcast stations would undoubtedly be constitutional. There are things the government can do to help the broadcast industry if it really feels the industry is in peril. What it can't do is favor the voice of one speaker at the expense of another. That's the constitutional flaw in "must carry."

MR. TYLER: It's interesting. First Amendment litigants always come argue before the Court that there's something else that the government can do, it just can't do this. And so when the

government is told that by the Court, it goes out and does something else, and then the same plaintiff litigants argue, "No, no, they still have it wrong."

MR. JOFFE: They don't always get it right, no matter how hard they try. That's why we're trying to keep the government small; you see how successful we've been.

AUDIENCE MEMBER: I have a question for Mr. Joffe regarding support of the constitutionality of the telco-cable ban[113] but attacking the non-constitutionality of the "must carry" provisions. I'm just curious to hear your thoughts on the consistency of those two positions.

MR. JOFFE: I think they are perfectly consistent. The purpose of the cross-ownership rules is to prevent the telephone companies from cross-subsidizing their own program services. As long as telephone companies are only carrying somebody else's services, there isn't any danger of cross-subsidization because they have no reason to carry somebody else's services. Once they begin to favor their own services, then there is great incentive for cross-subsidization. I'm not suggesting that there shouldn't be a way of getting telephone companies to be able to carry program services. It just has not been worked out in a way that's satisfactory to protect all the other people who they would carry.

AUDIENCE MEMBER: The services you're referring to are program services?

MR. JOFFE: Right.

AUDIENCE MEMBER: How is that different than in "must carry" situation, a cable operator prevented from carrying his own programming services because he has to carry the programming services of another? What's the difference?

MR. JOFFE: Well the cable operator isn't a common carrier. The cable operator is a speaker. It's as if you told the *New York Times* you have to carry someone. The telephone company isn't

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113. 47 U.S.C. § 533(b) (1988); *see* Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *appeal docketed*, No. 93-2340 (4th Cir. Oct. 15, 1993).

a speaker unless you let them into that business; it's a common carrier which has regulated rates. It's a utility, and the danger is that everybody's phone service will be used to subsidize this other business.

I think there are constitutional ways of allowing the telephone company into the business. It's obviously an issue that Congress has to work out with the proper safeguards and regulations. The only issue in the Fourth Circuit is, was the judge below correct in saying that the cross-ownership ban violated *O'Brien*? And I think a good argument can be made that the judge below was incorrect.

AUDIENCE MEMBER: Both of the gentlemen from Time Warner have suggested the antitrust laws as an adequate substitute for "must carry," but it strikes me we've got more than an antitrust problem here. It's not simply a question of anticompetitive conduct. It's a question of preserving a free medium of mass communication so as not to create a class of information have-nots in our society.

MR. JOFFE: Well the problem is, there is no showing of that kind of danger. The record before Congress and in the Court doesn't show that the broadcast industry is in peril. There is no indication that the "must carry" legislation is necessary to save the broadcast industry.

AUDIENCE MEMBER: Well let's assume for purposes of discussion, as John was assuming before, that that showing has been made.

MR. APFELBAUM: The place then to make that showing is in the courts. I didn't say that the antitrust laws would lead to the same result as "must carry." What I said is, if there really was anticompetitive conduct that violated the antitrust laws, then the antitrust laws could deal with it.

AUDIENCE MEMBER: What I'm saying is that regardless of whether the withering of the broadcast industry is the result of anticompetitive conduct or not, is there . . .

MR. APFELBAUM: As Bob said, if Congress wants to pass a press-specific law, then strict scrutiny applies. Congress can also help broadcasting if there really is a problem by doing other things

like subsidizing broadcasting.

MR. JOFFE: It could give them subsidies, it could give them tax abatements, it could do all sorts of other things for the broadcaster.

MR. APFELBAUM: And it does. It gives them free licenses, for example, which is an incredibly valuable gift from the government. But when we say that government should subsidize broadcasters if they really think there's a problem, they say, well that costs too much money. So you have Congress saying, that costs too much money, so we'll just violate your First Amendment rights instead. That doesn't seem to be the right answer.

MR. JOFFE: There are sort of two problems. One, there isn't the factual predicate to show that the broadcast industry is in peril, but, two, the legislation is far too broad. It doesn't help just those who are in peril. It helps every broadcast station. WNBC, in New York, we are forced to carry it. Now we would carry it anyway. So you say, what's the difference? Is all this a big to-do over nothing? Well that question was asked at the Supreme Court argument, and Bartow Farr, who represented the cable industry, responded by saying: probably everyone in this room would say the Pledge of Allegiance to the flag voluntarily, but that's quite different than having a law which says, you must say the Pledge of Allegiance.

MR. TYLER: At which point I wanted to jump up before the Supreme Court and say . . .

MR. JOFFE: But fortunately he didn't.

MR. TYLER: And I wanted to say, yes, but the Pledge of Allegiance is a political oath, is content-based in the truest sense of the word, as opposed to these "must carry" rules.

MR. JOFFE: I agree it is not just that it's content-based, it probably is viewpoint-based. But that doesn't really matter. Being forced to utter something that's content-based is sufficient to make the law unconstitutional. Being forced to carry a broadcast station that we don't want to carry when we think we should carry something else is a constitutional problem. Even if cable were a monopoly, and it's not, but even if it were, it is only watched by

somewhere between 40 and 60 percent in any given franchise area. It is going to be able to sell more cable subscriptions if it can put together a more attractive package of services. There is a driving economic incentive on a cable operator to put together the best package of services. And if he's in the middle of Ohio and there are eleven broadcast stations there, some of whom are dying on the vine and running the fifth re-run of "I Love Lucy," the operator can decide that he's going to have a more attractive package if he puts on Comedy Central instead. He has plenty of economic incentive to create diversity without the government coming and telling him what to do.

MR. BUSCARINO: The truth of the matter in response to that —cable operators have this discretion to program the system the way they would like, what is economically intelligent for them to do. This also includes in giving a variety of programs, an idea known as multiplexing, where you're going to see pay-per-view channels on fifteen, twenty options on your cable system. They decided that they are going to put the same type of program on fifteen or twenty channels. They have this capability to offer pay-per-view movies on many channels. They must have spare capacity on their systems which they're excluding other cable services that want to also get on the system, but they're opting to put the same stuff on many channels.

MR. APFELBAUM: Yes, they're exercising editorial discretion.

MR. JOFFE: Right, and it is also entrepreneurial. But surely the cable operator in Ohio who decides he would rather put on an extra pay-per-view channel than put on this fifth local broadcast channel will only do that if he thinks that's going to be an attractive package to his viewers. If his viewers want to watch that broadcast channel and will pay more for his cable service if he carries it, that's what he's going to do.

MR. TYLER: I think we have a question from the audience.

AUDIENCE MEMBER: It seems to me critical to this discussion, and something that hasn't been mentioned, is the rights of listeners, which has always been recognized by the Supreme Court

to distinguish broadcasters from other members of the press, like newspapers. And I think the fact that hasn't been recognized on the panel is critical to this discussion.

MR. APFELBAUM: I think we have recognized it by saying that the purpose of the First Amendment is to keep government out of the process of deciding what listeners can hear, and that ultimately that's the best way to serve the needs of the listener.

AUDIENCE MEMBER: But it seems to me that because, although Mr. Joffe recognizes the fact that cable operators are not absolute monopolies, it's certainly a concentrated industry and it seems to me that the government is in an unenviable position of either—in order to create variety for the listeners, as NBC supposedly does, in order to create that—either they have a thing like a "must carry" rule as they do now, or they regulate the cable operators and make sure that they create the variety that the broadcasters do now.

MR. JOFFE: But they do that now in the newspapers. You have one newspaper in Des Moines. No one would suggest that the government should come in and tell that newspaper what to carry. Why should they tell the only cable system in Des Moines what to carry.

AUDIENCE MEMBER: As I said before, because broadcasting is different than newspapers.

MR. APFELBAUM: How so?

AUDIENCE MEMBER: You have the right of the listeners to receive a variety of shows.

MR. APFELBAUM: Newspaper readers don't have that right?

MR. JOFFE: First of all, the First Amendment says that "Congress shall make no law abridging freedom of speech"—it's directed at the speaker. Now the listener benefits from free speech, but I think our system is based on the notion that the way you protect the listeners' interests is by letting the speaker speak unhindered by the government.

MR. TYLER: I think the gentleman is right, that cable operators are different from newspapers, and again I go back to my

principal point, and I highlight this, as opposed to newspapers, cable operators do have the technology to black out the voice . . .

MR. APFELBAUM: John, why is the technology any different for the cable operator's ability to block someone out than the ability of a newspaper in a one-newspaper town to block out any column, any news source, that it doesn't want people to see?

MR. TYLER: You make my point. In order for the *Washington Post* to compete with the *Washington Times*, it has to appeal to you, the reader. You, the reader, make that choice.

MR. APFELBAUM: Is that true in a one-newspaper town? Nobody's going to be able to start another newspaper. That's precisely why the state of Florida passed the statute in *Tornillo*.

MR. TYLER: If the *Washington Post* is able to convince you, the reader, that its voice is the only voice that should be listened to or read, then the *Washington Times* will fail and die on the vine, and that will result in a natural monopoly.

MR. APFELBAUM: Every argument you're making is the same as in *Tornillo*.

MR. TYLER: My point being that Congress has found that what cable operators are able to do is, even if their opposing voice is popular, by the flick of a switch, it's gone, and there's nothing you, the listeners can do about that.

MR. APFELBAUM: You can choose to subscribe to DBS, you can go to your video store, you can watch over the air broadcasting.

MR. BUSCARINO: In response to the newspaper argument, because we've heard it several times over and over again, if you want access to a newspaper, the newspaper can turn you away. What this democracy is premised upon is that if you can't get access to the newspaper, you are entitled to put your view on a little piece of paper and go to a private shopping center and hand out your views to everybody, and the private shopping center cannot tell you, "Don't do that because you're on my private property."

MR. TYLER: It's the *Pruneyard* case.[114]

MR. BUSCARINO: It's the *Pruneyard* case, and you can get . . .

MR. APFELBAUM: And how many people are going to read that?

MR. BUSCARINO: That's not the issue.

MR. APFELBAUM: Well, it is the issue according to John.

MR. BUSCARINO: You have a message to send out to the public, you put it on this piece of paper, you can get it out.

MR. APFELBAUM: You can make a video and you can sell it in the shopping center. People do that today.

MR. TYLER: We're about to act like the Cripps and Bloods up here and I was wondering if anybody else has any question?

AUDIENCE MEMBER: You had mentioned earlier that a cynical view might be that this is all about money, and that brought up two questions to my mind. First of all, with or without this "must carry" rule, wouldn't the market kill off broadcasters who didn't come up with a product that people wanted to watch? And second of all, does the "must carry" rule really make a difference to the general public in that instead of now paying forty dollars for cable to see "Seinfeld," should this "must carry" rule be struck down, they would then find themselves paying eighty dollars to watch "Seinfeld" on a cable channel.

MR. TYLER: Well I agree, I think your first point being that even if a broadcast station is able to get on the cable system by "must carry," it still must compete. I mean if its voice is unpopular, it will not attract viewers, of course, and then it won't attract revenues and advertisers, and it will die on the vine, so "must carry" does not guarantee that broadcasters' voice shall be heard forever and always. Market forces do prevail.

MR. APFELBAUM: But it does guarantee that cable programmers will be denied the chance to be heard when the cable operator

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114. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that an owner of a private mall cannot exclude speakers because its a quasi-public forum).

who is running the system has made the editorial judgment that viewers would prefer that cable programmer. So that was precisely my point that this "must carry" law can't even serve the purpose it's supposed to. If the programming is popular, the cable operator is going to carry it anyway. If it's not, it's going to die anyway. The difference is that, in the meantime, cable programming that people do want to see is going to be denied to those people.

MR. BUSCARINO: I gave you two instances in my remarks on stations in smaller markets that were dropped. Those were only two, because I have only a fifteen-minute presentation. The list is a lot longer than that, and it's not the WNBCs in the New York market—it's the smaller communities who don't have the media alternatives that we do in this major market. That's the problem. It's not for New York.

MR. JOFFE: But it's Steve's client who gets bumped off when the operator who only wants one religious channel has to put on this little religious broadcast station in Tennessee. The operator bumps Steve's service off and puts on this little broadcast station because Congress has said that's what the operator has to do even if our viewers would prefer to watch Steve's client.

MR. TYLER: We might end on a note of religion.