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Nick Allard

Brooklyn Law School, nick.allard@brooklaw.edu

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MUST CARRY AND THE COURTS: *BLEAK HOUSE*, THE SEQUEL

NICHOLAS W. ALLARD*

*Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession. Every master in Chancery has had a reference out of it. Every Chancellor was 'in it,' for somebody or other, when he was counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers, in select port-wine committee after dinner in hall. Articled clerks have been in the habit of fleshing their legal wit upon it. The last Lord Chancellor handled it neatly when, correcting Mr. Blowers, the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, 'or when we get through Jarndyce and Jarndyce, Mr. Blowers;'—a pleasantry that particularly tickled the maces, bags and, purses.***

The Supreme Court's inconclusive decision in *Turner Broadcasting System, Inc. v. Federal Communication Commission*¹—concerning the constitutionality of requiring cable television operators to carry certain over-the-air broadcast signals² is no more surprising

* © 1994. Nicholas W. Allard, Latham & Watkins (Washington, D.C.). Mr. Allard is a former minority staff counsel to the United States Senate Judiciary Committee and Administrative Assistant to Senator Daniel Patrick Moynihan. A Rhodes Scholar, with degrees from Princeton (A.B., 1974), Oxford (B.A., 1976) and Yale (J.D., 1979), Mr. Allard has written numerous articles and is a frequent speaker on communications issues. The views expressed in this article are those of Mr. Allard's alone and do not necessarily reflect those of his clients or other parties. The author acknowledges the invaluable assistance of Constance C. LaChance and law librarian Angela D. Foley.

** CHARLES DICKENS, *BLEAK HOUSE* 4 (Oxford University Press 1991) (1853).

¹ 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993) (directing a three-judge court to resolve material factual issues in light of Court's First Amendment analysis).

² Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 [hereinafter 1992 Cable Act], inserting new §§ 614 and 615 to the Communications Act of 1934 (codified at 47 U.S.C. §§ 534, 535), obligate cable television systems to transmit local commercial and noncommercial broadcast television stations. Under the 1992 Cable Act, broadcasters may either insist on carriage ("Must Carry") or bargain for carriage ("Retransmission Consent"). The Must Carry language contained in §§ 4 and 5 of the 1992 Cable Act gives local commercial and noncommercial television broadcasters the right to mandatory carriage on "cable systems" as defined for the purposes of the Communications Act of 1934, i.e., a traditional coaxial operator, but not, for example, other multichannel video distributors employing microwave or satellite technology. The Retransmission Consent language in § 6 of the 1992 Cable Act prohibits cable operators and other multichannel distributors from carrying television stations' signals without first obtaining the broadcaster's consent. The provisions are interrelated because, once effective, broadcasters on a system-by-system basis must opt every three years between the Must Carry and Retransmission Consent regulatory regimes. If a broadcaster selects Must Carry, local cable systems must retransmit the broadcaster's signal (at no cost to either party). If a

than the litigation the decision addresses.³ Rather, *Turner* is just another indecisive battle in what could become the hundred years legal war among contending broadcast and cable rivals in the television marketplace. Despite all the *Sturm und Drang* over Must Carry⁴ and other controversial provisions of the 1992 Cable Act,⁵

broadcaster selects Retransmission Consent, or if the multichannel distributor is not subject to Must Carry, a negotiated agreement between the broadcaster and the multichannel distributor governs the retransmission rights. For a comprehensive analysis of the Must Carry law, including a reprise of its evolution, see Gary S. Lutzker, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Not Be Carried*, 12 CARDOZO ARTS & ENT. L.J. 467 (1994); the legislative history is reviewed in Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 307-11 (1993).

³ Congress expected the constitutional challenge in *Turner*. Indeed, the certainty of litigation on this subject prompted an exceptionally extensive preemptive defense of the new statutory provisions in the legislative history of the 1992 Cable Act. See S. REP. NO. 92, 102d Cong., 1st Sess. 53-62 (1991); H.R. REP. NO. 628, 102d Cong., 2d Sess. 58-74 (1992). Congress, due to the expected challenge, provided for streamlined judicial review for Must Carry by a three-judge district court panel and direct review by the Supreme Court. 1992 Cable Act § 23 (codified at 47 U.S.C. § 555(c)(1)).

⁴ Turner Broadcasting System ("TBS") filed the *Turner* complaint the morning after Congress's late-night vote to enact the 1992 Cable Act, overriding President Bush's veto. *Turner Brdcast. Sys., Inc. v. FCC*, No. 92-2247 (D.D.C. Oct. 5, 1992) (challenging the constitutionality of §§ 4, 5 and 6 of the 1992 Cable Act). In its amended complaint, filed Nov. 5, 1992, TBS was joined as plaintiff by several other cable program network owners: Arts & Entertainment Network, Black Entertainment Television, E! Entertainment Television, Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, National Cable Satellite Corp., QVC Network, The Travel Channel, and USA Networks.

⁵ *Turner* is one of five lawsuits challenging the constitutionality of fourteen different sections of the Act filed within days of enactment. See *Discovery Comm. v. United States*, No. 92-2558 (D.D.C. Nov. 5, 1992) (challenging §§ 3, 9, and 19 of the 1992 Cable Act); *National Cable TV Ass'n v. United States*, No. 92-2495 (D.D.C. Nov. 5, 1992) (challenging §§ 4, 5, and 6 of the 1992 Cable Act); *Time Warner Ent. Co. v. FCC*, No. 92-2494 (D.D.C. Nov. 5, 1992) (challenging §§ 3, 7(b)(4)(B), 7(c), 9, 10(d), 11, 15, 19, 24, and 25 of the 1992 Cable Act); *Daniels Cablevision, Inc. v. United States*, No. 92-2292 (D.D.C. Oct. 13, 1992) (challenging the constitutionality of §§ 4, 5, and 6 of the 1992 Cable Act); *Turner Brdcast. Sys., Inc. v. FCC*, No. 92-2247 (D.D.C. Oct. 5, 1992) (challenging the constitutionality of §§ 4, 5, and 6 of the 1992 Cable Act).

All the plaintiffs challenged §§ 4 and 5, the Must Carry provisions. 47 U.S.C. §§ 534, 535. All five cases were consolidated as related cases. Thereafter, all the Must Carry claims were severed for hearing, as the statute requires, by a three-judge district court. *Id.* § 555; see *Turner Brdcast. Sys., Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992); *Time Warner Ent. Co., L.P. v. FCC*, 810 F. Supp. 1302 (D.D.C. 1992) (denying preliminary relief). The three-judge district court, in a divided decision, upheld the Must Carry provisions. *Turner Brdcast. Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993), *application denied*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., as Circuit Justice) (refusing to enjoin enforcement of §§ 4 and 5 of the 1992 Cable Act).

The constitutionality of ten other provisions including the controversial new rate regulation provisions of the 1992 Cable Act upheld when the remaining claims were decided in *Daniels Cablevision v. United States*, 835 F. Supp. 1 (D.D.C. 1993) (Jackson, J.) (upholding 10 sections of the 1992 Cable Act, overturning cable multisystem operator ("MSO") ownership limits, public service obligations for direct broadcast satellite and notice requirements for cable previews contained in §§ 11(c), 15, 25 of the 1992 Cable Act respectively), *cert. granted sub nom.* *Turner Brdcast. Sys., Inc. v. FCC*, 114 S. Ct. 38 (1993), *vacated*, 114 S. Ct. 2445 (1994). For other challenges to the 1992 Cable Act, see e.g., *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993) (indecent provisions and associated FCC rules); *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993) (indecent provisions, remanded to FCC).

Turner is but the latest droning chapter of a uniquely American version of Jarndyce and Jarndyce. For, like the often tortured history of Must Carry rules, *Turner* itself is procedurally⁶ and substantively⁷ complex.

Writing in the August 1853 preface to the first edition of *Bleak House*, Charles Dickens described his inspiration for the fictional Jarndyce and Jarndyce:

At the present moment there is a suit before the Court which was commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand

⁶ For example, the briefing schedule and oral argument were delayed because the Justice Department under the outgoing Bush Administration initially indicated that it would not defend against the Must Carry challenges. The basis for this position was presumably that the Department had concluded that the Must Carry provision was unconstitutional and had advised the President to veto the legislation. Upon the motion of several parties, and with Congress, which had adjourned *sine die* at the close of the 102d Congress, procedurally unable to defend the statute itself until it reconvened and could formally approve such participation in the litigation, the court postponed hearing the merits of the case. Under the Clinton Administration, the Justice Department reversed its position and filed a brief defending Must Carry. The day before the Justice Department entered the case, the Senate passed a resolution to file an amicus curiae brief in defense of Must Carry. 139 CONG. REC. S1145-46 (daily ed. Feb. 3, 1993).

⁷ The Court shrouds its analysis and minimizes the possible precedential impact of *Turner* in a mind spinning array of different line-ups of justices concurring and dissenting in various different parts of the decision. Abbott & Costello's most famous routine may be easier to follow:

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Parts II-A and II-B, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined, the opinion of the Court with respect to Parts II-C, II-D, and III-A, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, and SOUTER, JJ., joined, and an opinion with respect to Part III-B, in which REHNQUIST, C.J., and BLACKMUN and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and GINSBURG, JJ., joined, and in Parts I and III of which THOMAS, J., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part.

114 S. Ct. at 2450-51 ("JUSTICE STEVENS, though favoring affirmance, concurred in the judgment because otherwise no disposition of the case would be supported by five Justices and because he is in substantial agreement with JUSTICE KENNEDY's analysis of this case."); cf. *Who's on First? on HEY, ABBOTT!* (Jim Gates, Director 1978 Video) reviewed in MICK MARTIN & MARSHA PORTER, VIDEO MOVIE GUIDE 1991, at 271 (Ballantine Books 1991). It seems that *Turner* is part of a trend toward fragmented judicial opinions, a result observed particularly frequently in the Court of Appeals for the District of Columbia Circuit. This kind of decision is problematic because its outcome is hardly dispositive and has little future significance beyond the narrow confines the fragile consensus suggests, despite the magnitude of the stakes and the importance of the issues. Perhaps with a smaller caseload, the Court will be able to work toward broader accommodation and consensus in individual cases. See also Linda Greenhouse, *U.S. Justices Open Their New Session By Refusing Cases*, N.Y. TIMES, Oct. 4, 1994, at A1; Joan Biskupic, *Justices Take No New Cases As Term Starts*, WASH. POST, Oct. 4, 1994, at A1; *Not Just Another First Monday*, N.Y. TIMES, Oct. 4, 1994, at A20. Hopefully, the prospect of less material over which to disagree will not deepen divisions.

pounds; . . . and which is (I am assured) no nearer to its termination now than when it was begun.⁸

Must Carry litigation might have moved Dickens to write a multi-volume sequel. For over three decades, the cable and broadcast television industries have waged a war on several legal fronts, over the rules governing a cable operator's ability to receive and retransmit broadcast signals by wire.⁹ For years there have been interrelated battles over the retransmission of broadcast signals in the FCC, the courts, and Congress concerning Must Carry,¹⁰ Syndicated Exclusivity, and Nonduplication rules,¹¹ as well as closely re-

⁸ CHARLES DICKENS, *BLEAK HOUSE* xiii (Oxford University Press 1991) (1853).

⁹ See generally Lutzker, *supra* note 2; Mark A. Conrad, *The Saga of Cable TV's "Must-Carry" Rules: Will A New Phoenix Rise from the Constitutional Ashes?*, 10 *PAGE L. REV.* 9 (1990).

¹⁰ The FCC first instituted Must Carry obligations in 1962 when it required cable systems to carry local broadcast signals as a condition of a microwave license to a rural cable system. See *Carter Mtn. Transmission v. FCC*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). This policy evolved into the requirement that all cable system operators transmit to their subscribers, upon request and without compensation, every over-the-air broadcast signal that was "significantly viewed in the community" or otherwise that the FCC considered local. See *Rules Re Microwave-Served CATV*, First Report and Order, 38 F.C.C. 683 (1965); *CATV*, Second Report and Order, 2 F.C.C.2d 725 (1966); *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

The Court of Appeals for the District of Columbia invalidated the FCC's long-standing Must Carry rules, ruling that they violated cable operators' First Amendment rights. *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Although the court ruled that the existing Must Carry rules were unconstitutional, it did not hold that Must Carry was per se unconstitutional. The FCC refashioned the Must Carry rules. These scaled-back Must Carry rules limited the number of broadcast stations a cable system was required to carry, established a minimum viewership standard for stations to be eligible for carriage, permitted cable systems to refuse carriage of more than one broadcast station affiliated with the same commercial broadcast network, and limited the number of noncommercial stations a cable system was required to carry. The rules were to be effective for five years and then were to be eliminated entirely. In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Report and Order, 1 F.C.C.R. 864, 889 (1986). The Court of Appeals for the District of Columbia again struck down the Must Carry rules as unconstitutional. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *order clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). The court concluded that the FCC had not demonstrated a substantial governmental interest in some aspects of the rules to satisfy First Amendment requirements and that, in any event, the rules were overly broad.

The Must Carry provisions of the 1992 Cable Act are the first legislative attempt since *Century Communications* to construct a set of Must Carry rules that can survive judicial scrutiny. After the *Quincy* and *Century* decisions, the FCC opened another Must Carry inquiry, which it closed in light of the 1992 Cable Act. See Second Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4545, 4564, ¶ 99 (1991).

¹¹ The FCC promulgated Syndicated Exclusivity ("Syndex") and Nonduplication rules concurrently with its Must Carry rules. These rules protected a local broadcaster from the importation of both syndicated and network programs that duplicated programming to which the broadcaster had purchased exclusive rights. See 38 F.C.C. at 741-66; 2 F.C.C. at 803-04 (requiring all cable systems to give notice before importing any distant signal). The FCC eliminated Syndex in 1980 but retained network exclusivity. *CATV Syndicated Exclusivity Rules*, 79 F.C.C.2d 663 (1980); see *Syndicated Programs Exclusivity and Sports Telecasts*, 56 *Rad. Reg. 2d* (P & F) 625 (July 13, 1984) (denying broadcaster's petition to reconsider). Subsequently, the FCC reinstated syndex and expanded network and duplica-

lated copyright issues¹² and the cable compulsory license created in the Copyright Act of 1976.¹³ Now that the knot of interwoven disputes within the television family has become what some un-

tion rules. In re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299 (1988), *on reh'g*, 4 F.C.C.R. 2711 (1989) (rules codified at 47 C.F.R. §§ 76.151-.163 (syndicated exclusivity); 47 C.F.R. §§ 76.92-97 (1992) (non-duplication); 47 C.F.R. § 76.67 (sports broadcasts)). The Court of Appeals for the District of Columbia upheld the reinstated rule in *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). The rules remain in effect to this day.

¹² Cable retransmission began to come to a head as a copyright issue in 1965. See REGISTER OF COPYRIGHTS, THE LIBRARY OF CONGRESS, CABLE AND SATELLITE CARRIER COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS, at 7 (Mar. 1992) [hereinafter COPYRIGHT OFFICE REPORT]. In hearings before a House Judiciary Subcommittee, broadcasters argued for full copyright liability for cable retransmission of broadcast signals. *Id.* Around the same time, the FCC initiated its role as the regulator of cable television by implementing the first Must Carry rules. These rules required cable system operators to transmit to their subscribers, upon request and without compensation, every over-the-air broadcast signal that was "significantly viewed in the community" or otherwise considered local by the FCC.

As the copyright debate continued in Congress, the Supreme Court handed down two important cases impacting the retransmission issue. The first case established the FCC's authority over the cable industry. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); see also COPYRIGHT OFFICE REPORT, *supra*, at 10. In the second case, the Supreme Court held that cable retransmission of local broadcast signals was wholly outside the copyright laws. *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968); see also COPYRIGHT OFFICE REPORT, *supra*, at 11. In 1974, the Supreme Court held that cable systems were not liable under copyright laws for retransmitting either distant or imported signals. *Teleprompter Corp. v. Columbia Brdcast. Sys., Inc.*, 415 U.S. 394 (1974); see also COPYRIGHT OFFICE REPORT, *supra*, at 21-23. The *Teleprompter* and *Fortnightly* decisions completed the absolution of copyright liability for cable retransmission.

The ebb and flow of broadcast Must Carry and Retransmission rights has been in a cycle with copyright developments. See, e.g., 138 CONG. REC. H6505 (daily ed. July 23, 1992) (remarks of Rep. William J. Hughes, Chairman, House Intellectual Property Subcommittee) ("Make no mistake, retransmission consent is nothing more than a copyright in sheep's clothing. The U.S. copyright office has agreed, stating that retransmission alters the fundamental principle of the compulsory licensing scheme."); see also *Daniels*, 835 F. Supp. at 12 (noting it is not constitutionally significant that Congress "has done in the Cable Act what it otherwise could have done in the Copyright Act").

¹³ In 1976, Congress amended the 1909 Copyright Act and established a licensing system for cable retransmission. 17 U.S.C. §§ 111, 119 (1976 & Supp. 1992) (Cable systems are permitted to make secondary transmissions of copyrighted works contingent on the filing of certain notices and statements and the payment of certain fees. The program was developed as a means of accommodating two sometimes conflicting federal policies: ensuring the broad public dissemination of broadcast programs, while at the same time protecting the rights of owners of copyrighted materials). The thrust of the new licensing scheme, called compulsory licensing, was to guarantee cable operators the right to conduct their business free from the threat of liability as long as they complied with FCC regulations and paid their proper royalties. COPYRIGHT OFFICE REPORT, *supra* note 12, at 24. Cable systems were allowed to carry local signals at no charge, but had to pay royalties for retransmitting distant signals. The statutory compulsory licensing system attempted to balance the competing interests of copyright holders with those of the cable operators, or any other operator retransmitting their work, by allowing them to retransmit works from broadcasters without having to negotiate with the copyright holder of each work. *Id.* at 23-24; see *Satellite Home Viewer Act of 1994*, Pub. L. No. 103-369, 108 Stat. 3477 (1994) (extending satellite compulsory license contained in § 119 through December 31, 1999, and clarifying that microwave or so-called wireless cable transmissions are entitled to the § 111 cable compulsory license). See H.R. REP. No. 2406, 103d Cong., 2d Sess. (1994) and accompanying floor statements on the day it passed the Senate, 140 CONG. REC. S1404-06 (daily ed. Oct. 4, 1994) and on the day it passed the House of Representatives, 140 CONG. REC. H9268-72 (daily ed. Sept. 20, 1994).

charitably describe as a fight between the rich and the very wealthy, the controversy has the fuel for extended travel through the legal apparatus, no matter what the courts ultimately determine regarding the First Amendment issues raised in *Turner*.¹⁴

Perhaps *Turner's* essential significance and the greatest cause of concern, is it demonstrates that the Court has yet to develop a coherent First Amendment analysis for electronic speech that moves beyond outmoded and naive views of technology and the telecommunications market.¹⁵ The immediate heirs of this legacy of inbred constitutional analysis are the related cases now pending appeal that challenge the constitutionality of virtually all the other sections of the 1992 Cable Act,¹⁶ as well as the several recent cases involving local Bell telephone operating companies' efforts to lift to the current statutory ban on offering video services within their service areas in competition with local cable television companies.¹⁷ Actually, the issues raised in *Turner* implicate virtually every regulation that currently divides different communications businesses into separately regulated media fiefdoms.¹⁸ In addition, Congress may already have begun siring the next generation of litigation, as extraordinarily defensive portions of the legislative history of landmark telecommunications legislation—stillborn in the

¹⁴ Billions are at stake. Total 1992 revenues for broadcasters exceeded \$25 billion and for cable exceeded \$21 billion. James K. Glassman, *Big Money: Disconnecting the Competition*, WASH. POST, Sept. 28, 1994, at F1.

¹⁵ See J. Gregory Sidak, *Telecommunications: Unleashing the Industry*, AM. ENTERPRISE, Sept./Oct. 1994, at 41 (calling the "inferior protection that the Supreme Court has afforded electronic speech . . . one of the great embarrassments of contemporary constitutional jurisprudence" and arguing that electronic speech conveyed by telecommunications deserves as much protection under the First Amendment as newspapers). Compare the approach of Phillip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147 (1993), who would elevate electronic speech to full First Amendment protection afforded newspapers and thereby analogize new media technology to existing regulatory models, with other criticisms of the existing hierarchical First Amendment distinctions among different media that propose alternative technology neutral First Amendment models. See Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994) [hereinafter *Message in the Medium*]; Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329; Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212 (1987); see also Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991) (transcript available in Harvard Law School Library).

¹⁶ See *supra* note 5.

¹⁷ *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993); *U.S. West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994); *BellSouth v. United States*, No. CV 93B2661-S (N.D. Ala. Sept. 23, 1994); see Charles Haddad, *BellSouth Wins Key Victory in Cable Push*, ATLANTA J. & CONST., Sept. 24, 1994, at B1; COMM. DAILY, Sept. 27, 1994, at 5; Dennis Wharton, *Alabama Judge OKs BellSouth Cable Entry*, VARIETY, Oct. 9, 1994, at 50.

¹⁸ See Michael Schrage, *In the Emerging Multimedia Age, The 1st Amendment Must Come First*, WASH. POST, Sept. 30, 1994, at B3.

103rd Congress, and likely to be reborn in the 104th Congress—self-consciously betrays.¹⁹ Another contest over the standards for the gateway technology now contained in set-top boxes²⁰ is being played quietly by inside-the-beltway rules for back room deals, but it has the potential to spill out into the biggest bare knuckle First Amendment brawl of all because it will determine who controls the flow of information into the home.²¹

Ultimately, *Turner* will not dramatically or lastingly influence the market relationships among broadcast and cable television, even with respect to the fundamental issue of whether cable continues to be a major outlet for broadcast programming. After all, the Must Carry and especially the Retransmission Consent statutory provisions themselves have been something of a fizzle in terms of shaping the marketplace.²² Rather, the accelerating technological

¹⁹ See, e.g., REPORT OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON S. 1822, S. REP. NO. 367, 103d Cong., 2d Sess. 12-16, 40-46 (1994) (section by section analysis laboring to justify proposed public access provisions that would require all "telecommunications networks"—broadly defined—to make five percent of their capacity available at preferential rates to qualified public interest entities, including educational institutions and § 501(c)(3) organizations). The analysis specifically addresses and anticipates challenges that could be raised under *Turner*. Comparable set asides for direct broadcast satellite contained in § 25 of the 1992 Cable Act were overturned in the related consolidated cases and are now on appeal to the Court of Appeals for the District of Columbia. *Daniels Cablevision v. United States*, 835 F. Supp. 1 (D.D.C. 1993). The set aside requirements in S. 1822 can be traced to a bill introduced by Senator Daniel Inouye, The National Public Telecommunications Infrastructure Act of 1994, S. 2195, 103d Cong., 2d Sess. (1994), which proposed setting aside twenty percent of network capacity for use of public entities at no charge. See 140 CONG. REC. S6942 (daily ed. June 15, 1994) (remarks of Sen. Inouye). Although the new Chairman of the Senate Commerce Committee, Senator Larry Pressler, indicates he intends to reintroduce telecomm reform legislation along largely nonpartisan lines early in the 104th Congress, he has predicted that the five percent set aside would be stripped out of any future Senate bill. See Senator Larry Pressler, Remarks before 12th Annual Private and Wireless Cable Show (Nov. 13, 1994) (transcript on file with Senator Pressler's office).

²⁰ Set-top boxes are the computer controlled switching devices that will sit atop televisions and function as the software operating system for the advanced interactive multimedia services soon to be available over cable. The industry battle concerns the extent to which the government will be involved in setting standards for the boxes' underlying software and communications protocols. Several companies and organizations are concerned that if one or two companies control the standards, they may have an unfair advantage in developing content. See, e.g., John Markoff, *Microsoft Organizes Its Interactive TV Team*, N.Y. TIMES, Nov. 2, 1994, at D6; Don Clark, *Microsoft Adds 10 Partners, Discloses Plans for New Interactive-TV Software*, WALL ST. J., Nov. 3, 1994, at B8.

²¹ See Elizabeth Corcoran, *A 'Battle of the Box' is Brewing*, WASH. POST, Oct. 15, 1994, at D1.

²² Trade press accounts generally described the impact of retransmission consent as anti-climactic. See, e.g., Joe Flint, *Stations Stay for No Pay: TV Stations Prefer Barter Deals Over Cash in Retransmission-Consent Deals*, BROADCASTING & CABLE, Oct. 11, 1993, at 6; Rachel W. Thompson, *Consent Wars Over, But Who Won What?*, MULTICHANNEL NEWS, Oct. 11, 1993, at 1; Linda Moss, *October 6 Was No Doomsday*, MULTICHANNEL NEWS, Oct. 11, 1993, at 14; Rich Brown, *Few Stations Have Retrans Coverage Gaps*, BROADCASTING & CABLE, Nov. 1, 1993, at 14; *Cablers Cut Only 4 Percent of Stations*, HOLLYWOOD REP., Oct. 28, 1993; *Retransmission Consent Truces Declared*, TELEVISION DIGEST, Oct. 11, 1993; *95% Unaffected: Some Heated Retransmission Consent Skirmishes Emerge, But Most Are Settled*, COMM. DAILY, Oct. 10, 1993, at 1; Noel

change and the rapid evolution and explosive growth of information age businesses will determine the market. Courts are not well suited to keep pace with the dramatic technological changes in the telecommunications industry.²³ For example, the ability to increase channel capacity through fiber optic cable and other innovations could be expected to create new incentives for increasingly program hungry cable operators to carry broadcast channels. Upcoming FCC video dialtone decisions, which could authorize the telephone companies to offer competing video service, including transmission of broadcast signals,²⁴ and the indirect consequences of the FCC's cable rate regulations²⁵ are also both likely to have a

Holston, *Key Deadline in TV Industry Passes with Hardly a Glitch*, STAR TRIB., Oct. 7, 1993, at 2B; *CBS Winds Down Retransmission Consent Fight*, TELEVISION DIGEST, Oct. 4, 1993. The tone of this coverage in the trade press generally is consistent with a sample of several hundred news articles from across the country the author found in a NEXIS search.

There were, however, some hot spots, which apparently are the exception rather than the rule. See, e.g., Rachel W. Thompson, *Embers Still Burning from Texas to Maine*, MULTICHANNEL NEWS, Oct. 11, 1993, at 60; Rachel W. Thompson, *Little Retransmission Consent Progress in S.F. Suburb*, MULTICHANNEL NEWS, Nov. 15, 1993, at 18.

Must Carry's most controversial impact has been some cable operators' apparent decision to drop C-Span to make room for other programming for a variety of reasons. See Timothy J. Burger, *Less Congress on Cable, C-Span Warns; 1.5 Million Feel Cutbacks After Cable Bill*, ROLL CALL, Sept. 9, 1993, at 10; Jane Hall, *Fx Affects C-Span's Viewership*, L.A. TIMES, May 30, 1994, at 1; Christopher Stern, *Fx Factor: C-Span Minus 200,000 Subs; Cable Systems Drop Public Affairs Channels for New Fox Network*, BROADCASTING & CABLE, May 9, 1994, at 53; see also Michael Applebaum, *Now You C-Span, Now You Don't*, SV, Sept./Oct. 1994, at 77.

²³ The courts themselves seem to acknowledge this point. See, e.g., *Fortnighly*, 392 U.S. at 402 ("With due regard to changing technology, we hold that the petitioner did not under that law 'perform' the respondent's copyrighted works."); *Teleprompter*, 415 U.S. at 414 (following *Fortnighly*, but noting that "[d]etailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.") (footnote omitted); see also *Chesapeake & Potomac Tel. Co. of Va. v. United States*, No. 93-2340 (4th Cir. June 15, 1994) (The Fourth Circuit refused to review a decision invalidating the 1984 Cable Act's cross-ownership restriction barring telephone company entry into cable business. The court "places this case in abeyance pending [further] congressional action possible on repeal of 47 U.S.C. § 533(b). The parties are directed to inform the Court immediately, in writing of any legislative action on the matter."). In the intellectual property context, a government "Green Paper" recently addressed the difficulty of courts' stretching copyright laws to fit rapidly changing technology. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (July 1994); see, e.g., *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) and *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994) (courts seemed unable to decide whether unauthorized transmission of copyrighted work via the Internet infringes the copyright holder's distributor rights or reproduction rights); see also Tribe, *supra* note 15 (regarding the Court's difficulty with technology).

²⁴ See *In re Telephone Company-Cable Television Cross Ownership Rules*, §§ 63.54-63.58, Mem. Op. and Order on Recons. and Third Further Notice of Proposed Rulemaking, No. 87-266 (released Nov. 7, 1994); Second Report and Order, Recommendation to Congress, and Second Notice of Proposed Rulemaking, 7 F.C.C.R. 5781 (1992). Simply put, if low cost broadcast signals are available to viewers from an alternative subscription service offered by telephone companies, cable companies that fail to carry such signals will do so at their own risk.

²⁵ See 47 C.F.R. § 76.100.621 (1994); see also *In re Implementation of Sections of the*

large impact on the actual carriage of broadcast signals by cable regardless of the ultimate resolution of *Turner*.

Meanwhile, while waiting for a crumb of amusement to fall from the Must Carry litigation, which was squeezed dry years upon years ago, and with the certainty that the American cousins of Dickens' barrister Mr. Tangle will press on into the future in pursuit of adjudicated truth, the economic performance of both the broadcasting and cable television sectors appears quite disconnected from the cause at hand in *Turner*. Broadcasters are gearing up for the best season in recent memory.²⁶ Broadcast revenues and station values are rebounding²⁷ and advertising revenues are increasing.²⁸ The cable business also is growing.²⁹ Cable advertising

Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, 8 F.C.C.R. 510 (1992) (amended by Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631 (to be codified at 47 C.F.R. pt. 76), *aff'd*, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 58 Fed. Reg. 46,718 (1993) (to be codified at 47 C.F.R. pt. 76)). By controlling what cable operators can charge for the programming they carry and how much they can mark-up new programming for profit, the new rate regulations impact on program line-up choices. Rate regulations create additional incentives for cable operators to carry popular low cost programs such as broadcast programming. Soon the FCC will modify the pricing constraints to increase incentives for cable operators to expand offerings with new programming. See Edmund L. Andrews, *Looser Cable Pricing Rules Weighed to Spur Investment*, N.Y. TIMES, Oct. 8, 1994, at 39; *A Window for New Cable TV Fare*, WASH. POST, Oct. 9, 1994, at C6. For a provocative analysis of the impact of rate regulation on what programming cable operators carry, see THOMAS W. HAZLETT, REGULATORY CABLE TELEVISION RATES: AN ECONOMIC ANALYSIS (July 1994) (Working Paper No. 3 Institute of Government Affairs, U.C. Davis).

²⁶ FCC Chairman, Reed E. Hundt, Remarks before the Broadcasting and Cable Interface VIII (Oct. 4, 1994); Julie Zier, *Economic Forecast: Blue Skies Ahead*, BROADCASTING & CABLE, Oct. 10, 1994, at 27; Paul Farhi, *Advertisers, Suitors Zoom In on TV Networks*, WASH. POST, Oct. 31, 1994, at A1.

²⁷ Hundt, *supra* note 26; see also Geoffrey Foisie, *ABC, CBS Tie for TV Network 1993 Revenue Honors*, BROADCASTING & CABLE, May 16, 1994, at 6; *Migration to Digital—Part 3: Awakening to a New Era*, BROADCASTING & CABLE, May 16, 1994, at S3 (broadcast networks are rebounding in audience share; revenues are headed upwards once again) (citing TV executive Harold Simpson: COMM. DAILY, Aug. 17, 1994, at 3 (If revenue growth rates continue, "we could see the first double-digit [growth] year since 1984." (quoting Goldman Sachs media analyst Barry Kaplan in Warren Getler, *Media Deals Expected to Trickle Down*, WALL ST. J., Sept. 6, 1994, at C1 ("TV is back in vogue. The pace of the business has improved . . . [T]here's growing appreciation for the robust cash-flow capabilities of successful television and radio companies . . .")))); Elizabeth Jenner, *Still Kicking*, WALL ST. J., Sept. 9, 1994, at B3 ("In the past year, Wall Street analysts have upgraded their opinions of network stocks to reflect strong operating results . . . As a result, broadcast stocks have soared.")

²⁸ Hundt, *supra* note 26; Alan Breznick, *Upfront '94 Wrapup, Cable Clears 1B Mark for First Time, but Broadcast is No Slouch*, CABLE WORLD, Aug. 29, 1994, at 40, (quoting ad executive Paul Schulman, in Bill Carter, *Ad Bonanza Has Networks Feeling Flush*, N.Y. TIMES, Sept. 5, 1994, at 33 ("I haven't seen a network market like this in 15 years . . . [E]verything is hot.")); *RAB reports average 9% revenue gain*, BROADCASTING & CABLE, Sept. 12, 1994, at 41.

²⁹ Hundt, *supra* note 26 (noting that cable growth rate for top fifty MSOs has increased from 2.6% in 1992 to 3%, accelerating 13.3% in the last year). Recent acquisitions have been at multiples of eleven times cash flow. *Id.*; John M. Higgins, *Re-Reg Credited for Helping Subs Gains*, MULTICHANNEL NEWS, Sept. 5, 1994, at 1.

revenues are rising,³⁰ subscription and subscriber levels continue to increase,³¹ and projected revenues per subscriber also are moving up.³²

The Must Carry rules challenged in *Turner* closely resemble the rules determined to be unconstitutional in *Century Communications v. FCC*.³³ The *Turner* plaintiffs argued that Must Carry is an impermissible restraint on their free speech rights because it forces cable operators to use some of their finite channel capacity to carry competing "speakers" (broadcasters), while leaving cable operators with fewer channels to carry programming of their choice. In this way, the plaintiffs asserted, Must Carry inhibits cable operators' editorial discretion to determine which programming to deliver to

³⁰ Paul Kagan Associates, Inc. projects the 1994-95 up-front ad market to be \$1.07 billion, a 19% increase over the 1993-94 \$895 million. Breznick, *supra* note 28, at 40.

³¹ See Hundt, *supra* note 26 (according to the National Cable Television Association, the number of subscribers rose from 57.2 million in 1992 to 58.8 million in 1994); John M. Higgins, *Some Rates Rising, Many Ops Hold Back*, MULTICHANNEL NEWS, Sept. 19, 1994, at 3; COMM. DAILY, Apr. 20, 1994, at 1 (Based on data collected for Warren Publishing's *Cable & TV Fact Book*: for the top fifty MSOs, which have about 85% of all subscribers, growth rates averaged about 5% for the twelve months ending March 1994, most of which is due to merger/acquisitions. Without mergers and acquisitions, the growth rate is only about 3%, but industry-wide growth for 1992 (the last pre-regulation year) was 2.6%.).

³² Recently reported, Paul Kagan Associates, Inc. which initially predicted that average monthly revenue per subscriber would rise from \$29.76 in 1994 to \$46.05 in 2000 has now boosted that projection to \$47.74.

³³ 835 F.2d at 293. In fact, cable operators and program suppliers have argued that they are more restrictive and less narrowly tailored. See Mem. of Points and Authorities in Supp. of Pl.'s Mot. for Prelim. Inj. at 36, *Turner Brdcast. Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247).

Under § 4 of the 1992 Cable Act, cable systems with more than twelve usable activated channels must allocate up to one-third of such channels for the carriage of local commercial stations, while systems with twelve or fewer usable activated channels are required to carry the signals of at least three local commercial stations. Cable systems with fewer than 300 subscribers are exempt from the Must Carry rules, so long as they do not delete from carriage any broadcast television station's signal. 1992 Cable Act § 614(b)(1). If the number of local commercial stations exceeds the number of channels that the system is required to allocate, the 1992 Cable Act allows the system operator, with some exceptions, discretion in selecting which of these stations shall be carried on its system. § 614(b)(2).

Section 5 of the 1992 Cable Act describes the cable operators' non-commercial educational ("NCE") Must Carry obligations. § 615 (inserting a new section into the Communications Act of 1934) (codified at 47 U.S.C. § 535). The 1992 Cable Act defines NCE as (1) a station licensed by the FCC as an NCE that is owned by either a public agency or non-profit entity and that is eligible for grants from the Corporation for Public Broadcasting; or (2) a municipally owned and operated station that transmits primarily non-commercial programs for educational purposes. § 615(1)(1) (codified at 47 U.S.C. § 535(1)(1)). Systems with a capacity of greater than thirty-six channels are required to carry every NCE that requests carriage, unless its programming is substantially duplicated by another station on the system. Systems with twelve or fewer channels must carry one qualified NCE, while those with between thirteen and thirty-six channels must carry either one, two, or three NCEs. § 615(b). As with the commercial Must Carry provisions, system operators are required to carry the station's entire broadcast schedule, and are prohibited from accepting compensation for such carriage. In addition, every NCE Must Carry station may elect either its current broadcast channel position or the channel position it occupied prior to July 19, 1985. § 615(g)(5).

their customers. Plaintiffs also argued that Must Carry violates the First Amendment because it elevates broadcasters to a preferred status not afforded to other non-broadcast programmers by guaranteeing broadcasters access to cable channels.³⁴ The district court panel below, however, upheld Must Carry, granted the Government summary judgment, and dismissed the Turner plaintiffs' claims,³⁵ ruling that Congress merely had "employed its regulatory powers over the economy to impose order upon a market in dysfunction."³⁶

Judge Jackson's majority opinion applied the same *O'Brien*³⁷ standard the Court of Appeals for the District of Columbia Circuit used in *Century*³⁸ to overturn the earlier version of Must Carry, but reached a different result. Rejecting the plaintiffs' contention that Must Carry amounted to content-based regulation warranting "strict scrutiny," the panel sustained the rules under the intermediate *O'Brien* First Amendment standard.³⁹ The district court ruled that the preservation of local broadcasting is an important government interest and that the must-carry provisions are sufficiently tailored to serve that interest.⁴⁰ Distinguishing both *Quincy* and *Century* on the basis that in those previous cases the FCC had not established an adequate record,⁴¹ the *Turner* majority found that Congress had built a record sufficient to justify the rule and, in the absence of any material facts in dispute, granted summary judgment.⁴²

The Supreme Court disagreed, deciding that the panel below had applied the correct test⁴³ but had made insufficient factual findings on the record to warrant granting summary judgment.⁴⁴ In its complex ruling, the Court vacated the district court panel

³⁴ See Judge Jackson's analysis of these two assertions in *Turner*, 819 F. Supp. at 41 n.18. There are many ironies in the various arguments.

³⁵ 819 F. Supp. at 40, 47, 51. All three judges wrote opinions, Judge Sporkin concurring in Judge Jackson's majority opinion, and Judge Williams dissenting. *Id.* at 51, 57.

³⁶ *Id.* at 40. Must Carry is "essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Id.*

³⁷ *United States v. O'Brien*, 391 U.S. 367 (1968) (The Court established an intermediate level of scrutiny when reviewing government regulations primarily aimed at "non-speech" conduct that restrict First Amendment freedoms. Under the intermediate standard, the regulation must further an important or substantial government interest that is unrelated to the suppression of free expression, and the incidental restriction on free expression must be no greater than essential to further that interest.).

³⁸ *Century Communications Corp. v. FCC*, 835 F.2d at 298-304.

³⁹ 819 F. Supp. at 42-45.

⁴⁰ *Id.* at 45-47.

⁴¹ *Id.* at 41.

⁴² *Id.* at 47, 51 (Sporkin, J., concurring).

⁴³ 114 S. Ct. at 2469.

⁴⁴ *Id.* at 2472.

decision upholding *Must Carry*, remanded the case back to the panel for further factual findings, and instructed the court to (1) determine whether *Must Carry* is necessary to preserve the viability of the local broadcast industry and (2) examine the effect *Must Carry* has had on cable program networks and operators.⁴⁵

Each side could find some good news in the result. For cable and cable programmers, eight out of nine justices apparently found that the *Must Carry* rules had not been justified factually, questioned whether the broadcasters' business is in jeopardy, and queried whether *Must Carry* was an appropriate solution if such a problem exists.⁴⁶ For broadcasters, the Court did not hold *Must Carry* rules to be unconstitutional; in fact, *Turner* demonstrates that, given an adequate record, *Must Carry* could be constitutional.⁴⁷ Additionally, *Must Carry* remains effective pending a final resolution of this long case. Finally, the Court remanded the case to the panel that already upheld *Must Carry*.⁴⁸

Turner may be more noteworthy for what it did not do than for what it accomplished. The Court declined the opportunity to reexamine the validity of the "scarcity rationale," which it long has held to justify more intrusive regulation of broadcasting than of other media.⁴⁹ The scarcity rationale focuses on the physical characteristics of the microwave spectrum that determine the availability and ability to use microwave frequencies to broadcast signals. The Court's discussion of the technical differences between broadcast and cable and of advances in communications technology is simplistic and unconvincing, if not just wrong.⁵⁰ The technology-spe-

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* Indeed, both Judges Jackson's and Sporkin's defense of the *Must Carry* law were quite vigorous. *Turner*, 819 F. Supp. at 40-44, 53-57.

⁴⁹ According to the spectrum scarcity rationale, because demand for space on the broadcast spectrum is greater than the supply, licensees serve as "proxies or fiduciaries with obligations to present those views and voices which are representative of [their] community." *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 389 (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." *Id.* at 388. Courts are much less willing to permit government regulation of other media in which the problem of spectrum scarcity does not exist.

Compare *Red Lion*, 395 U.S. 367 (1969) (holding that the fairness doctrine, requiring broadcasters to provide a free opportunity to respond to personal attacks, did not violate the First Amendment); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *NBC v. United States*, 319 U.S. 190 (1943) (upholding FCC rules prohibiting radio licensees from entering restrictive contracts with national networks) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding Florida law mandating a right to equal space for a political candidate to answer newspaper criticism and attacks on his or her record violated the First Amendment).

⁵⁰ The Court explains:

cific, scarcity based approach oddly suggests that First Amendment protection rises or falls with innovations that increase or impede the traffic that can travel on any of the five lanes of the information superhighway — broadcast, cable, wireline telephone, cellular telephone, and satellite — or vary with the multiplying number of users and new computer applications of the various communications delivery systems. Like the awkward common law classifications of trespassers, licensees, and invitees once used to determine landowner's tort liability, rigid categories that courts belatedly replaced with general negligence principles better suited to the circumstances of modern life,⁵¹ the technology-specific, scarcity approach is bound to yield convoluted reasoning and peculiar results.⁵² Should a rural "mom and pop" cable system with limited channel capacity and unable to finance the upgrade to fiber optic technology be entitled to less First Amendment protection than a well financed multi-system cable operator that can offer its subscribers one hundred or more channels of programming? Should a communications company's First Amendment status hinge on whether or not it elects to invest in technology upgrades that increase the amount of information it can transmit? For First Amendment purposes, does scarcity of delivery capacity provide any compelling reason to afford different First Amendment status to various providers of multichannel video services: coaxial cable services; fiber optic cable services; video services delivered over telephone lines; microwave subscription television services, known popularly as "wireless cable" television that can deliver up to thirty-

[t]he broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

114 S. Ct. at 2457 (citations omitted); see also Justice Kennedy's opinion describing the differences between broadcast and cable Part I, 114 S. Ct. 2445, text at notes 10-14 and compare with Justice O'Connor's dissent describing the limits of cable capacity, *id.* at 2480.

⁵¹ See, e.g., Judge Bazelon's breakthrough opinion in *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. Cir. 1972) (deciding health inspector's slip and fall case against one of Washington's most missed eateries involving greasy condition of metal stairs leading to kitchen's barbecue pits). For general discussions of the evolution of modern negligence theory out of rigid common law categories, see CHARLES O. GREGORY & HARRY KALVEN, *CASES AND MATERIALS ON TORTS*, ch. 6 (3d ed. 1977); WILLIAM L. PROSSER, *TORTS*, ch. 10, ¶ 62; S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW*, chs. 11 & 13 (2d ed. 1969).

⁵² See *Arbaugh's Restaurant*, 469 F.2d at 100 n.10 (discussing harsh results of inflexible tort classifications).

three over-the-air channels to subscribers in any market; or direct broadcast satellite services, which can provide over 150 channels of satellite-delivered subscription video programming directly to home viewers? All of these distribution technologies are providing a functionally similar, look-a-like video service to subscribers, and all of the services can expect innovations and regulatory changes to affect the current limitations on their channel capacity. There may be First Amendment grounds for distinctions, but a snapshot of the channel capacity of each service at any point in time is not one of them.

Turner also did not articulate a new approach for applying First Amendment values to information age media. The opinion does not reveal a grasp of the central fact of the modern communications era: different distribution technologies are interchangeable. Once content is converted and transmitted in a digital format, legal distinctions among different kinds of conduits become obsolete. The current balkanization of the marketplace into telephone, broadcast, movie, cable, computer, newspaper, and a host of other separate communication and information entities is a regulatory hangover, not an incurable technological condition. The breakdown of increasingly inappropriate artificial barriers is well underway and will make even the notion of distinct telephone companies, television companies, or computer companies out of date—soon it will be easier simply to think of communications companies that provide these various services through a variety of different appliances. In the emerging multimedia age, it is time for the Court to apply the First Amendment in a way that addresses operators' and technology users' speech rights without being distracted by the nature of the technologies.⁵³

If the Court fails to move toward a technology neutral First Amendment analysis, the courts could increasingly issue decision in conflict with the current efforts in Congress and the Executive branch, including the independent FCC, to overhaul the existing telecommunications laws. Recent proposals would regulate similar services similarly regardless of the delivery technology, moving the

⁵³ See *Message in the Medium*, *supra* note 15. The author rejects the current scarcity based First Amendment jurisprudence for the electronic media as being inapplicable to the forthcoming information superhighway. The author forecasts that the information superhighway will allow virtually limitless channels. *Id.* at 1067. The Note proposes a non-technology based First Amendment jurisprudence that depends on basic First Amendment values. "Ultimately, regulation of the information superhighway should be premised on the fundamental principle that the First Amendment protects messages, not media." *Id.* at 1083.

regulatory focus from entities to services.⁵⁴ On the other hand, by breaking out of the old molds the judiciary could have a powerful complementary role in rationalizing outdated communications laws,⁵⁵ and enforcing fairness and First Amendment values when reviewing the new telecommunications reform laws that Congress surely will adopt eventually.⁵⁶

Ironically, the courts indirectly are playing a role in overcoming the inertia and political obstacles that have frustrated Congress' and the Administration's efforts to rewrite current communications laws. In fact, while focusing on Judge Harold Green's long supervision of the AT&T consent decree as something of a *cause celebre*, there is a growing consensus that it is time for Congress to take management of the communications business out of the judiciary's hands and put primary regulatory responsibility in the hands of an expert agency, the Federal Communications Commission.⁵⁷ A spate of recent judicial rulings is reinforcing this momentum by highlighting the inadequacies of the Communications Act of 1934.⁵⁸

In one case, the United States Court of Appeals for the District of Columbia ruled that the FCC could not require local exchange companies, including the regional Bell operating companies, to share their physical space with their competitors.⁵⁹ The FCC's so-

⁵⁴ See, e.g., H.R. 3636, 103d Cong., 2d Sess. (1993); S. 1822, 103d Cong., 2d Sess. (1994).

⁵⁵ The communications field might, or might not, provide some applications for Guido Calabresi's theories about how courts can modernize statutorily petrified law. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (Harvard University Press 1982).

⁵⁶ In the words of one of the principle sponsors of landmark telecommunications reform legislation, upon the failure to enact legislation in the 103d Congress, "this should not be a wake, however, but a wake up call." Remarks of Representative Edward J. Markey, Chairman, House Telecommunications and Finance Subcommittee (Sept. 27, 1994). Both the House and the Senate authors of the legislation intend to reintroduce their bills early in 1995. See Statement of Senator Ernest F. Hollings, Chairman, Senate Commerce Committee (Sept. 23, 1994); Ted Hearn, *Telecomm Proponents Look Toward '95*, MULTICHANNEL NEWS, Oct. 3, 1994, at 3; see also Vice President Al Gore, Remarks at the Center for Communication (Oct. 17, 1994) (transcript on file with *Cardozo Arts & Entertainment Law Journal*). Similarly, already the new Republican Chairman of the Senate Commerce Committee has already indicated he intends to press forward on comprehensive communications legislation early in 1995. See Remarks of Senator Pressler, *supra* note 19; Mike Mills, *Pressler Wants Phone, Cable Brakes Off*, WASH. POST, Nov. 16, 1994, at C2.

⁵⁷ See, e.g., Remarks of John Dingell, Chairman, House Energy and Commerce Committee, upon introduction of H.R. 3626, 140 CONG. REC. H10911 (Nov. 22, 1993 daily ed.); Remarks of Representative Edward J. Markey, 140 CONG. REC. H5204 (June 28, 1994 daily ed.); Remarks of Senator Ernest F. Hollings, upon introduction of S. 1822, 140 CONG. REC. S771 (Feb. 3, 1994 daily ed.); Remarks of Senator John Breaux, 140 CONG. REC. S5686 (May 12, 1994 daily ed.). But see Remarks of Senator Robert Dole, 140 CONG. REC. S6770 (June 10, 1994) (in light of FCC cable rate regulations, Congress needs to espouse clear-cut policy to avoid overregulation and fancy mechanisms).

⁵⁸ 47 U.S.C. §§ 151-611 (1988).

⁵⁹ *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

called "co-location rules" were designed to encourage competition in local telephone markets by giving new entrants to local telephone service the right to pay to connect their networks to established carriers' networks.⁶⁰ The court did not rule on the policy, but instead held that under the Communications Act of 1934 the FCC does not have statutory authority to order this kind of interconnection of new competitors with established networks.⁶¹

Three other courts have ruled that the Cable Communications Policy Act of 1984's ("1984 Cable Act")⁶² provision barring telephone companies from providing cable television service in their local service area is unconstitutional.⁶³ There is broad, bipartisan agreement in Congress, in the Administration, at the FCC, and among commentators that it is time to allow the telephone companies to compete with cable over video services.⁶⁴ The problem with litigating this result case by case—aside from the enormous cost and delay and uncertain signals sent to capital markets—is that a court ruling merely invalidates the existing regulatory structure without specifying terms and conditions for fair competition or ensuring that telephone entry occurs in a way that promotes the public interest. Promulgating such regulation clearly is Congress' responsibility and role. The Court of Appeals for the Fourth Circuit even took the unusual step of urging Congress to repeal the 1984 Cable Act restriction on telephone entry into cable, refusing to review Judge Ellis' decision in *C&P* until Congress did.⁶⁵

The same week that the Fourth Circuit acted the Supreme Court sent a similar message to Congress. The Court ruled 5-3 that the FCC did not have the statutory authority to relieve AT&T's smaller rivals in the long distance market of the need to file expensive and unnecessary paperwork at the FCC.⁶⁶ Justice Scalia wrote that the FCC's policy "may well be a better regime, but it is not the

⁶⁰ *Id.* at 1444.

⁶¹ *Id.* at 1446.

⁶² Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-559 (1988)).

⁶³ *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993); *U.S. West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994); *BellSouth v. United States*, No. CV 93B2662-S (N.D. Ala. Sept. 23, 1994).

⁶⁴ The cable television industry has a different view, in that it has opposed every video dialtone application at the FCC, filing opposition papers amounting to 33,000 pages, a twelve foot high stack of paper, containing enough words that if the words were placed end to end, they would reach from Washington, D.C. to Philadelphia. FCC Chairman, Reed E. Hundt, Remarks at the Networked Economy Conference, Washington, D.C. (Sept. 26, 1994).

⁶⁵ *Chesapeake & Potomac Tel. Co. of Va. v. United States*, No. 93-2340 (4th Cir. June 15, 1994).

⁶⁶ *MCI Telecomm. v. American Tel. & Tel.*, 114 S. Ct. 2223 (1994).

one that Congress established."⁶⁷ In other words, fix the Communications Act of 1934.

* * *

For many years, the—a—I would say the flower of the Bar, and the—a—I would presume to add, the matured autumnal fruits of the Wool-sack—have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and if the country have the adornment, of this great Grasp, it must be paid for in money or money's worth, sir.

...

*Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?*⁶⁸

Well, whatever the ultimate outcome in Must Carry litigation, historic change is afoot. For over six decades, the model of the regulated natural monopoly has dominated United States communications law and policy. Now all three branches of the federal government are working in tandem, sometimes consciously, sometimes inadvertently, at legal changes that will replace the monopoly model with a competition model. In the competition model, the government's role becomes that of a referee, not a player or a cheerleader. Markets are opened to multiple players from the private sector who vigorously compete with each other. Playing the game, rather than regulation, determines how business is conducted and checks market power abuse.⁶⁹ Congress' inability to pass comprehensive telecommunications reform legislation has delayed the advent of competition.

Without legislation the FCC and the courts will continue to address many of the issues willy nilly. Congress can do much to rationalize the existing legal framework and to streamline regulatory and judicial proceedings by making the tough policy choices and enacting legislation. *Turner* type litigation, while inevitable, is not the way to drive national telecommunications policy. When Jarndyce learned that his case was over with the entire estate consumed by litigation costs he remarked, "to have done with the suit

⁶⁷ 114 S. Ct. at 2233.

⁶⁸ DICKENS, *supra* note 8, at 866-67.

⁶⁹ Somewhat ironically, some note that the Keynesian economic model, including its concept of "perfect competition," that has dominated the era of regulated monopoly has given way to a more realistic model based on game theory. Peter Pasell, *Game Theory Captures a Nobel*, N.Y. TIMES, Oct. 12, 1994, at D1; Will Hutton, *Game Theorists Who Undermined Free Market Win the Nobel Prize*, THE GUARDIAN, Oct. 12, 1994, at 15; David Warsh, *Game Theory Plays Strategic Role in Economics' Most Interesting Problems*, CHICAGO TRIB., July 24, 1994, at 9; see generally ADAM M. BRANDENBURG AND BARRY J. NALEBUFF, CHANGING THE GAME (Currency/Doubleday forthcoming 1994); AVINASH K. DIXIT AND BARRY J. NALEBUFF, THINKING STRATEGICALLY (W.W. Norton & Co. New York 1991).

on any terms is a greater blessing that I had looked for."⁷⁰ Just so. Must Carry litigation might prompt the same sentiments. Still, important First Amendment issues arising over new telecommunications laws will and should be before the Court. Congress soon will be the engine for this change. It is up to the Court, as its First Amendment treatment of new technology evolves, to supply the constitutional guideposts.

⁷⁰ *Id.* at 867.