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## NOTE

### ECONOMIC REGULATION OF THE CABLE TELEVISION INDUSTRY: REIGNING IN A GIANT AT THE EXPENSE OF THE FIRST AMENDMENT

On October 5, 1992, Congress overrode a presidential veto, passing the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or the "Act"),<sup>1</sup> designed to re-regulate the cable television industry.<sup>2</sup> In response to congressional findings,<sup>3</sup> lawmakers designed the Act to correct market imbalances within the video industry,

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1. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) [hereinafter The 1992 Cable Act or the Act].

2. *Id.* §§ 2-3 (setting forth the findings for establishing the Act, the policy behind the Act, and the actual regulation of rates established by the Act); Helen Dewar & Kenneth J. Cooper, *Congress Overrides Cable TV Bill Veto*, WASH. POST, Oct. 6, 1992, at A1; Mary Lu Carnevale, *Bush's Veto of Cable-TV Bill is Overturned*, WALL ST. J., Oct. 6, 1992, at A3. President Bush's veto was overturned and the bill was approved by a vote of 74-25 in the Senate and 308-114 in the House. *Id.* Thus, Congress eclipsed the two-thirds majority required by the United States Constitution. *See id.*; U.S. CONST. art. I, § 7, cl. 2 (requiring a two-thirds majority vote by each house of Congress to override a Presidential veto).

Congress enacted the legislation after conducting extensive hearings on the cable television industry accompanied by intense lobbying by many special interest groups. S. REP. NO. 92, 102d Cong., 1st Sess. 3-4 (1991). The Senate Committee on Commerce, Science and Transportation held eleven hearings on cable television between 1989 and 1991. *Id.* The committee reviewed legislation that had been introduced in the 101st and 102nd Congresses, including S. 12, which was amended into the 1992 Cable Act. *Id.* Most significantly, the committee held three hearings in June of 1989 on competition in the video programming industry. *Id.* at 3. It held a hearing on October 18, 1989, to discuss the carriage of local broadcast stations and to review the 1984 Cable Act. *Id.* In 1991, the committee held a hearing specifically addressing S. 12. *Id.*; H.R. REP. No. 628, 102d Cong., 2d Sess. 26-27 (1992). The House Energy and Commerce Committee's Subcommittee on Telecommunications and Finance held three days of hearings on H.R. 1303 on March 20, 1991, and June 18th and 27th of the same year. *Id.* at 74. H.R. 1303 was the predecessor legislation to H.R. 4850, which was amended with S. 12 to become the 1992 Cable Act. *Id.*; *see also infra* notes 157-58 and accompanying text (detailing the groups lobbying for and against The 1992 Cable Act).

3. The findings of Congress are recounted in the Act itself. *See* The 1992 Cable Act §§ 2(a)(1)-(21). Generally, Congress determined that cable rates had increased dramatically and that the cable industry grew at the expense of the broadcast industry. *Id.* § 2(a)(1); *see also infra* notes 159-64 and accompanying text (outlining in detail the specific findings of Congress as stated in the Act).

promote competition within both the cable industry and the entire video industry, and assure the survival of free, local television broadcasting.<sup>4</sup> The Act included must-carry regulations requiring cable systems to transmit broadcast stations requesting carriage, which generated enormous controversy.<sup>5</sup>

The Federal Communications Commission (the "FCC") first promulgated must-carry regulations in a limited form in 1965.<sup>6</sup> The following year, the FCC extended the regulations to cover all cable systems.<sup>7</sup> Must-carry regulations have been expanded in subsequent years, purportedly to protect the economic survival of local broadcast stations.<sup>8</sup>

In *Quincy Cable TV, Inc. v. FCC*,<sup>9</sup> the United States Court of Appeals for the District of Columbia invalidated the FCC's must-carry rules under the First Amendment.<sup>10</sup> Applying an intermediate scrutiny analysis, the

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4. The 1992 Cable Act §§ 2(a)-(b). See also H.R. REP. NO. 628, 102d Cong., 2d Sess. 77 (1992) (providing a detailed account of the committee members' motives for passing H.R. 4850). Specifically, the House recognized that the legislation would protect consumers by promoting competition in the video industry. *Id.* at 26. The House recognized that regulatory measures were necessary to foster competition. *Id.*; see also S. REP. NO. 92, 102d Cong., 1st Sess. 1-2 (1991) (providing a detailed account of the committee members' purpose for passing S. 12). Specifically, the Senate recognized that serious problems, such as excessive rate increases, had accompanied the growth of the cable industry since deregulation in 1984. *Id.* at 2-3. The Senate stated that its purpose for the legislation was "to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service." *Id.* at 1. During floor debate, Senator Daniel Inouye, an original sponsor of the Act, stated that: "The purpose of this legislation is very simple and straightforward: to promote competition in the video industry and to protect consumers from excessive rates and poor customer service where no competition exists." 138 CONG. REC. S14,222 (daily ed. Sept. 21, 1992) (statement of Sen. Inouye).

5. The 1992 Cable Act §§ 4-5; see also *infra* notes 145-55 and accompanying text (providing a detailed description of the specific must-carry regulations of the 1992 Cable Act).

6. Rules re Microwave-Served CATV, 38 F.C.C. 683, 713-15 (1965) (discussing the need for imposing carriage and nonduplication rules with the proliferation of community antennae television systems (CATV)).

7. CATV, 2 F.C.C.2d 725, 745 (1966) (concluding that the must-carry rules should apply to all cable systems because the public interest of promoting fair competition applies equally to microwave and non-microwave CATV systems).

8. Cable Television Report and Order, 36 F.C.C.2d 143, 164 n.32 (1972) (noting that the 1972 rules were adopted to encourage the growth of cable while "preserving a healthy broadcast service").

9. 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

10. *Quincy*, 768 F.2d at 1454. The court noted that it need not decide what standard of First Amendment review was applicable to analyze must-carry regulations because the rules failed the lower intermediate level of scrutiny analysis as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* At the outset, the court noted that the government did not carry its burden because the "substantial governmental interest" was stated in the abstract. *Id.* The court held that the government must do more than allege a problem. *Id.*

*Quincy* court determined that the rules were overly broad.<sup>11</sup> The court noted, however, that the must-carry rules were not *per se*<sup>12</sup> unconstitutional and invited the FCC to redraft the rules.<sup>13</sup> Approximately one year after the FCC conformed the rules to be consistent with the *Quincy* decision, the same court in *Century Communications Corp. v. FCC*<sup>14</sup> set aside the must-carry regulations as still inconsistent with the First Amendment.<sup>15</sup> The court re-emphasized that must-carry regulations were not *per se* unconstitutional and, if drafted properly, would pass constitutional muster.<sup>16</sup>

The 1992 Cable Act included must-carry provisions similar to those previously declared unconstitutional in *Century Communications*.<sup>17</sup>

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at 1455. Furthermore, the court noted that the FCC had not proven the underlying assumptions for the must-carry regulations. *Id.* at 1457. The court stated that:

[T]he FCC has failed to "put itself in a position to know" whether the problem the rule seeks to cure — the destruction of free, local television — "is a real or merely a fanciful threat." That approach, we have concluded, falls far short of the burden the government must affirmatively bear to prove the substantiality of the interest served by the rules.

*Id.* (citation omitted) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977)).

11. *Quincy*, 768 F.2d at 1460-61. The court concluded that the rules were overinclusive because they protected all broadcasters regardless of whether they were adversely affected by a cable system. *Id.*; see *infra* notes 131-39 and accompanying text (discussing *Quincy* in detail and concluding that the must-carry rules as written were overly broad and unconstitutional under the First Amendment).

12. *Per se* is defined as "by itself; in itself . . . in its own nature without reference to its relation." BLACK'S LAW DICTIONARY 1142 (6th ed. 1990).

13. *Quincy*, 768 F.2d at 1463. Specifically, the court invited the FCC to redraft the rules consistent with the opinion, and stated that the court would reconsider the must-carry rules if the FCC did so. *Id.*

14. 835 F.2d 292 (D.C. Cir. 1987), cert. denied sub nom. *Office of Communication of United Church of Christ v. FCC*, 486 U.S. 1032 (1988).

15. *Id.* at 304 (affirming the unconstitutionality of the must-carry rules under the *O'Brien* standard without determining if the strict level of scrutiny was appropriate); see *infra* notes 140-44 and accompanying text (discussing in detail the court's decision in *Century Communications* which concluded that the must-carry rules were unconstitutional under the intermediate scrutiny standard).

16. *Century Communications*, 835 F.2d at 304. As previously noted in *Quincy*, the court stated that the must-carry regulations were not *per se* unconstitutional, but that this particular draft of the rules was unconstitutional. *Id.* In discussing the government's burden of proving empirical support or sound reasoning for its position, the court noted: "[W]e reluctantly conclude that the FCC has not done so in this case. . . . Accordingly, we have no choice but to strike down this latest embodiment of must-carry." *Id.* at 304-05 (emphasis added).

17. Gary S. Lutzker, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried*, 12 CARDOZO ARTS & ENT. L.J. 467, 488 (1994) (noting that the must-carry regulations imposed by the 1992 Cable Act "bear a striking resemblance" to those previously declared unconstitutional in *Century Communications*). Cable operators, programmers, and suppliers argue that these must-carry regulations are more restrictive and less narrowly tailored than the previous regulations. *Id.* at 488 n.136.

Upon enactment of the Cable Act, several cable operators filed suits challenging the constitutionality of specific provisions of the Act, including the must-carry provisions.<sup>18</sup>

In *Turner Broadcasting, Inc. v. FCC*,<sup>19</sup> the United States District Court for the District of Columbia upheld the must-carry provisions in sections four and five of the Cable Act.<sup>20</sup> The *Turner Broadcasting* court held that must-carry regulations are consistent with the First Amendment under the intermediate scrutiny test developed in *United States v. O'Brien*,<sup>21</sup>

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18. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C.) (upholding the must-carry provisions as consistent with the First Amendment), *vacated and remanded*, 114 S. Ct. 2445 (1993), *vacated and remanded sub nom.* National Interfaith Cable Coalition v. FCC, 114 S. Ct. 2730 (1994). Four other plaintiff groups brought similar suits challenging the must-carry provisions. *Id.* at 37 n.8 (citing cases in which plaintiffs challenged §§ 4, 5, and 6 of the 1992 Cable Act). Section 6, the retransmission consent provision of the 1992 Cable Act, prohibits cable operators from retransmitting the signals of any commercial broadcasting station without first securing the station's consent. The 1992 Cable Act § 6. In conjunction with § 4, § 6 provides local broadcasters with an option to elect either mandatory carriage on a cable system or to negotiate under the retransmission consent provision. *Id.* Prior to the 1992 Cable Act, cable operators "were free to carry the signals of local broadcasters subject only to the 'compulsory license' provisions of the copyright law." *Turner Broadcasting*, 819 F. Supp. at 37 n.6; see 17 U.S.C. § 111(a) (1994) (providing an exception to broadcasters' exclusive copyrights on broadcast programming to the cable industry). Under § 4 and § 6, "operators may transmit broadcast signals if they pay royalty fees determined pursuant to an administrative schedule." *Turner Broadcasting*, 819 F. Supp. at 37 n.6. On November 23, 1992, the United States District Court for the District of Columbia consolidated the cases challenging the must-carry provisions and retransmission consent provisions to determine the provisions' constitutionality. *Id.* at 37. On December 15, 1992, the same court declined to exercise jurisdiction over any claims besides the must-carry claims. *Id.* at 37-38 (citing *Turner Broadcasting Sys., Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (three-judge panel)). The plaintiffs argued that §§ 4, 5, and 6 were not severable. *Turner Broadcasting*, 810 F. Supp. at 1315. Because the court held § 4 and § 5 constitutional, the plaintiffs could not challenge § 6. *Id.*

19. 819 F. Supp. 32 (D.D.C.), *vacated and remanded*, 114 S. Ct. 2445 (1993), *vacated and remanded sub nom.* National Interfaith Cable Coalition v. FCC, 114 S. Ct. 2730 (1994).

20. *Id.* at 57. The Act specified in § 23 a mechanism for judicial review by a three-judge panel of the district court pursuant to 28 U.S.C. § 2284. *Id.* at 37. The statute states that "any civil action challenging the constitutionality of . . . any provision [of this Act] . . . shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code." The 1992 Cable Act § 23(c)(1).

The court deferred to congressional findings in holding the must-carry regulations constitutional. *Turner Broadcasting*, 819 F. Supp. at 39-40. The court recognized that Congress had the power to regulate the industry pursuant to its economic regulatory powers. *Id.* at 40. The court concluded that Congress was attempting to regulate the medium, and not the content of the messages being conveyed. *Id.*

21. 391 U.S. 367 (1968). Specifically the *O'Brien* Court stated that a government regulation is justified if:

[The regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

and further defined in *Ward v. Rock Against Racism*.<sup>22</sup> The district court reasoned that the regulations furthered a “significant government interest” in the survival of local broadcasting by promoting fair competition within the video industry.<sup>23</sup> The court also found that the must-carry provisions were “sufficiently . . . tailored” to achieve Congress’ objective, even though less restrictive means may be available.<sup>24</sup> Therefore, the regulations did not unnecessarily burden a substantial amount of the plaintiffs’ speech.<sup>25</sup> Turner Broadcasting appealed, and the Supreme Court granted certiorari to determine whether the must-carry provisions violated the First Amendment.<sup>26</sup> Significantly, the Court determined the

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

*Id.* at 377.

22. 491 U.S. 781 (1989); see *Turner Broadcasting*, 819 F. Supp. at 45 (holding that the intermediate level of scrutiny test established by *O’Brien* and *Rock Against Racism* should be applied to determine whether the must-carry regulations are constitutional under the First Amendment).

The standard of intermediate scrutiny was first articulated by the Court in *Craig v. Boren*, 429 U.S. 190 (1976); see CRAIG R. DUCAT & HAROLD W. CHASE, *CONSTITUTIONAL INTERPRETATION* 633 (4th ed. 1988). In *Craig*, a majority of the Court agreed that a “middle-tier” or “intermediate scrutiny” analysis applied to regulations based on gender. *Id.* Under this analysis, the regulations “‘must serve important governmental objectives and must be substantially related to the achievement of those objectives.’” *Id.* This test has been employed in other areas of constitutional adjudication, such as in cases where regulations are based on illegitimacy and alienage. *Id.* at 634. This standard should be compared with the concept of strict scrutiny first articulated by Justice Stone in *United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152-53 n.4 (1938).

The rights of speech, press, association, assembly, and other liberties essential to the democratic process are “preferred freedoms.” DUCAT & CHASE, *supra* at 67. If legislation abridges a “preferred freedom,” the legislation is presumed unconstitutional under a strict scrutiny analysis. *Id.* at 68. The government must then satisfy a two-prong test where the regulation must advance a compelling interest and the policy adopted by the government advancing this interest must be the least restrictive means available. *Id.* Furthermore, the test of strict scrutiny has also been applied to review legislation targeting “suspect classifications” such as race-based regulations. *Id.* at 69.

23. *Turner Broadcasting*, 819 F. Supp. at 45.

24. *Id.* at 47.

25. The court concluded that:

The 1992 Cable Act represents a major congressional effort to bring order and stability to an industry that significantly, and often profoundly, touches American lives . . . . Simply put, the governmental intention evinced by the must-carry provisions is economic, not ideologic, and raises no suspicion of the type of ominous government interference with speech against which the First Amendment protects.

*Id.* at 47-48.

26. *Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994). The Court noted that “because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions.” *Id.*

appropriate standard of review for the must-carry regulations under the First Amendment.<sup>27</sup>

The Court defined the must-carry regulations in the 1992 Cable Act as content-neutral rules that impose an incidental restriction on speech.<sup>28</sup> The rules, accordingly, were subject to intermediate scrutiny under the First Amendment, similar to the analysis used for reviewing "time, place and manner" restrictions.<sup>29</sup>

The dissent in *Turner Broadcasting* disagreed, finding that the must-carry regulations imposed by the 1992 Cable Act were content-based regulations.<sup>30</sup> The dissent, therefore, subjected the rules to the strict scrutiny analysis,<sup>31</sup> and concluded that the must-carry regulations did not survive the strict scrutiny test.<sup>32</sup> Even assuming that the regulations were content-neutral, therefore applying an intermediate scrutiny analysis, the dissent found that the must-carry regulations were unconstitutional.<sup>33</sup>

This Note analyzes the impact of the Supreme Court's decision in *Turner Broadcasting* on fundamental principles of First Amendment jurisprudence. Initially, this Note distinguishes between content-neutral and content-specific governmental regulations, and examines the levels of First Amendment protection afforded to each. Next, this Note analyzes the levels of First Amendment protection provided to the media and the justifications for these different standards. Scrutinizing regulation of cable television in general, and the must-carry regulations in particular, this Note supplies a basis for analyzing the Supreme Court's decision in

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27. *Id.* at 2469.

28. *Id.* at 2462.

29. *Id.* at 2469. The Court has never held that speech is completely free from governmental regulation. *GEORGE H. SHAPIRO ET AL., "CABLESPEECH": THE CASE FOR FIRST AMENDMENT PROTECTION 25* (1983). Thus, the government may regulate the "time, place, and manner" of the speech to maintain order in public places. *Id.*; see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (providing that the test applicable to such regulations is that the regulation must be "justified without reference to the content of the regulated speech . . . serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information").

30. *Turner Broadcasting*, 114 S. Ct. at 2476 (O'Connor, J. concurring in part and dissenting in part). The dissent argued that the must-carry provisions were content-based, stating that "I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content." *Id.* In reaching this conclusion, the dissent reasoned that Congress' findings demonstrated a content-based justification. *Id.* For example, Congress found that the Act furthered substantial governmental interests in promoting a diversity of views, and in providing educational programming. *Id.*

31. *Id.* at 2478. The dissent noted that content-based restrictions, even if benignly motivated, cannot escape the strict scrutiny standard. *Id.* at 2477.

32. *Id.* at 2478-79. Specifically, the dissent argued that the regulations were overly broad under both the strict scrutiny and intermediate scrutiny analyses. *Id.* at 2479-80.

33. *Id.*

*Turner Broadcasting*. Next, this Note examines the Supreme Court's decision regarding the must-carry rules and concludes that these regulations are content-neutral regulations promulgated primarily for economic reasons. Finally, this Note argues that because the economic health of the broadcasting industry is not in jeopardy, the economic premise on which the must-carry regulations are based is invalid.

## I. THE BASIS FOR FIRST AMENDMENT JURISPRUDENCE

The First Amendment forbids Congress from passing laws that regulate speech or the press.<sup>34</sup> A recurrent problem in modern First Amendment jurisprudence is whether the First Amendment provides absolute protection for speech, or merely requires a balancing of the competing interests.<sup>35</sup> To determine the specific level of First Amendment protection

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34. U.S. CONST. amend. I. Specifically, "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

35. GERALD GUNTHER, *CONSTITUTIONAL LAW* 1004 (12th ed. 1991). Justice Black advocated an absolutist position, stating that "I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done." *Konigsberg v. State Bar of California*, 366 U.S. 36, 61 (1961) (Black, J., dissenting). Contrast this position with Justice Harlan's majority opinion in *Konigsberg*, which advocated a balancing approach:

[W]e reject the view that freedom of speech and association . . . are "absolutes" . . . general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

*Id.* at 49-51 (citations omitted). Other proponents of the balancing approach included Justice Frankfurter and Justice Powell. GUNTHER, *supra* at 1004.

Another popular approach to First Amendment adjudication is the categorization approach, which the Court uses to find fighting words and obscenity speech unprotected by the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (holding "fighting" words are not protected by First Amendment); *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding obscenity not protected by First Amendment); *Beauharnais v. Illinois*, 343 U.S. 250, 258 (1952) (holding libelous utterances directed at a defined group not protected by the First Amendment); see also SHAPIRO, *supra* note 29 at 20-23 (explaining the categorical approach taken by the Supreme Court in *Chaplinsky v. New Hampshire*). This approach excludes from First Amendment protection speech which is "lewd and obscene, profane, and libelous" and "fighting words," due to their slight social value, and words that "present a clear and present danger" under *Abrams v. United States*, 250 U.S. 616 (1919). *Id.*; but see *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (affording First Amendment protection to defamation of a public servant acting in official capacity unless "actual malice" is established); *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 347 (1974) (refusing to extend the *New York Times* standard of "actual malice" to media defamation of private individuals, but allowing states to define the appropriate standard of liability); *Miller v. California*, 413 U.S. 15, 23-24 (1973) (limiting the obscenity

from governmental interference, courts increasingly distinguish regulations that are content-based from those that are content-neutral.<sup>36</sup>

A. *Content-Specific vs. Content-Neutral Regulations and the Applicable First Amendment Standards*

The First Amendment prevents the government from restricting speech or expressive conduct based on the ideas expressed.<sup>37</sup> Nevertheless, within certain narrowly defined categories of speech, courts have allowed

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exception). For the view that the balancing controversy is misleading and unnecessary, see Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 441-44 (1967) (arguing that the Court utilizes a balancing approach to the First Amendment only when examining a regulation that incidentally affects speech); see also SHAPIRO, *supra* note 29, at 21-24 (providing the balancing test used to analyze a First Amendment problem). Courts currently employ a two-step analysis under the First Amendment. *Id.* at 23. First, courts must assess the impact of the regulation to determine if, and to what extent, the regulation infringes upon speech. *Id.* Next, the court balances the speaker's First Amendment interest against the asserted governmental interest. *Id.* at 24. Under this test, the government bears the burden of proving the existence of its asserted interest. *Id.*

36. GUNTHER, *supra* note 35, at 1211 (stating that the Court scrutinizes content-based regulations more carefully than content-neutral regulations). One scholar notes that a First Amendment analysis begins with the idea that "communication is presumptively protected from government interference." SHAPIRO, *supra* note 29, at 20. Therefore, as a consequence, the government must remain neutral when it regulates speech. *Id.*

37. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) (protecting speech from content-based regulations); *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (protecting expressive conduct from content-based regulations). The Court has noted that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding a Chicago law that barred picketing within 150 feet of a school to be unconstitutional within the meaning of the First Amendment); see also *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a similar picketing restriction under the First Amendment).

content-based restrictions.<sup>38</sup> Examples of content based restrictions include the prohibitions against fighting words,<sup>39</sup> obscenity,<sup>40</sup> and libel.<sup>41</sup>

Content-based laws distinguish speech by reference to the ideas expressed; content-neutral laws, on the other hand, impose burdens or confer benefits without reference to the substance of the expression.<sup>42</sup> To determine whether a regulation is content-neutral or content-based, the initial inquiry is whether the government imposed the regulation because of the message communicated.<sup>43</sup> This motive may be evidenced from the face of the regulation, or from its effect.<sup>44</sup>

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38. See *infra* notes 39-41 (providing examples of content-based restrictions).

39. The Court has allowed government regulations of speech characterized as "fighting words." JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW*, 954 (2d ed. 1983). The Court first recognized this limitation on the First Amendment right to free speech in 1942. *Id.*; see *Chaplinsky*, 315 U.S. at 571-73 (upholding a state statute that proscribed "fighting words" that are likely to ignite breaches of the peace, citing their slight social value). However, the Court subsequently limited the reach of this broad "fighting words" doctrine from *Chaplinsky*. NOWAK, *supra* at 955-57; see *Cohen v. California*, 403 U.S. 15, 20 (1971) (upholding the First Amendment right of an individual to wear a jacket bearing the words "Fuck the Draft" because "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"). Therefore, the modern Court generally has upheld the First Amendment right of freedom of expression and has left in doubt the validity of the fighting words doctrine. NOWAK, *supra* at 957-58.

40. Generally, the courts have allowed government regulation of obscene speech. NOWAK, *supra* note 39, at 1008-12. To determine whether speech is obscene and, therefore, not constitutionally protected, it is necessary to determine if the speech, "appeals to a prurient interest in sex, . . . has no serious literary, artistic, political, or scientific merit, . . . and is on the whole offensive to the average person under contemporary community standards." *Id.* at 1011; see also *Roth v. United States*, 354 U.S. 476, 485, 487 (1957) (outlining the definition of obscenity for First Amendment purposes and holding that obscenity is not speech protected by the First Amendment); *Miller v. California*, 413 U.S. 15, 26 (1973) (clarifying the third prong of the obscenity definition).

41. In *Beauharnais v. Illinois*, 343 U.S. 250, 266-67 (1952), the Court upheld the constitutionality of a state statute that prohibited libel. See NOWAK, *supra* note 39, at 943. In *New York Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), however, the Court held that the First Amendment limits a state's power to award damages in a libel action brought by a public official. *Id.* at 944-45. Specifically, the Court required a showing of "actual malice" as a prerequisite to an award of damages. *Id.*

42. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2459 (1994).

43. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The threshold inquiry is whether the government has regulated the speech "because of disagreement with the message it conveys." *Id.*

44. *Turner Broadcasting*, 114 S. Ct. at 2459. A law can be determined to be content-based from its face and will be held unconstitutional even if a content-neutral purpose is asserted. *Id.* Sometimes a facially content-neutral law will be content-based in its effect. *Id.* In these instances, it is important to examine the legislative motive in imposing the law to determine if the law is constitutional under the First Amendment. See *id.*; but see *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (stating that an invalid legislative motive does not constitute a *per se* violation of the First Amendment); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (explaining that judicial inquiries

### 1. Content-Based Regulations: Presumptively Unconstitutional Under a Standard of Strict Scrutiny

The First Amendment is a barrier against the government restriction of speech or expressive conduct because of the ideas expressed.<sup>45</sup> A law that infringes First Amendment rights based on the content of ideas articulated will be upheld only if it passes a strict scrutiny analysis.<sup>46</sup> Under this analysis, the law must address a “compelling government interest”<sup>47</sup> and must be “narrowly tailored”<sup>48</sup> to serve that interest.<sup>49</sup>

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into congressional motives are appropriate to interpret legislation, but that courts should not examine congressional intent in enacting an otherwise facially constitutional law). Furthermore, even regulations that have a proper governmental aim may still unconstitutionally restrict speech under the First Amendment. *Simon & Schuster*, 502 U.S. at 117.

45. *Simon & Schuster*, 502 U.S. at 116. In his concurrence, Justice Kennedy stated that “the sole question is, or ought to be, whether the restriction is in fact content-based.” *Id.* at 125. He rejected the use of the strict scrutiny analysis and adopted a *per se* rule of unconstitutionality if the regulation is content-based. *Id.* at 126. However, Justice Kennedy did recognize that certain traditional categories, such as obscenity, defamation, incitement, or situations presenting some grave and imminent danger that the government may prevent, are outside the scope of First Amendment protection. *Id.* at 127 (citations omitted); see also GUNTHER, *supra* note 35, at 1069-89 (detailing the traditional categories of “speech” such as obscenity and defamation that fall outside the scope of First Amendment protection); *Turner Broadcasting*, 114 S. Ct. at 2459 (stating that the highest level of judicial scrutiny is applied to content-based regulations); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (invalidating a District of Columbia regulation that prohibited political speech within 500 feet of an embassy because it was found to be a content-based restriction on political speech, and therefore, subject to the strict scrutiny standard).

46. See, e.g., *Simon & Schuster*, 502 U.S. at 124-25 (Kennedy, J., concurring) (discussing the strict scrutiny analysis in relation to a New York statute regulating authors and publishers); *Boos*, 485 U.S. at 321 (noting the application of the strict scrutiny analysis).

47. See, e.g., *Simon & Schuster*, 502 U.S. at 120-23 (finding a compelling interest in the compensation of victims from the “fruits of crime”); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (finding that the state’s interest in maintaining privacy in the home justified the statute against picketing).

48. See, e.g., *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 131 (1989) (finding a state regulation preventing minors from exposure to indecent telephone calls was not narrowly tailored).

49. *Simon & Schuster*, 502 U.S. at 118; see also *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 224, 232-33 (1987) (holding unconstitutional under a strict scrutiny standard an Arkansas tax on receipts from sales of tangible personal property, but exempting newspapers, “religious, professional, trade and sports journals and/or publications printed and published within this State”); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (protecting expressive conduct from content-based regulations through the strict scrutiny standard); *Boos*, 485 U.S. at 324 (finding a District of Columbia regulation prohibiting political speech within 500 feet of an embassy to be a content-based restriction on political speech that did not meet the strict scrutiny standard); *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 46 (1983) (holding that a state may reserve, for its intended purposes, public property that is not by tradition or governmental designation a forum for public communication, so long as the regulation on speech is reasonable and not meant to suppress expression solely because public officials oppose the speaker’s view); *Carey*, 447 U.S. at 460-61. The *Carey* Court held an Illinois statute unconstitutional under the Equal

As a corollary, the Court has held that the compelled access requirements of the media, which demand that a speaker provide a forum for views other than its own, must also pass a strict scrutiny analysis under the First Amendment.<sup>50</sup> Although compelled access requirements appear to promote a wide range of diverse ideas, these requirements actually tend to inhibit debate.<sup>51</sup> The Court has concluded, therefore, that compelled access requirements may not be imposed by the government absent narrowly tailored means that serve a compelling governmental interest.<sup>52</sup>

Further, under the First Amendment, the government may not restrict the speech of certain individuals or groups in society to enhance the voice of others.<sup>53</sup> Laws enacted to restrict either the speaker or the content of the message are analyzed under a strict scrutiny standard, and such laws generally are held to be unconstitutional.<sup>54</sup> As an outgrowth of this prop-

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Protection Clause of the Fourteenth Amendment because it prohibited the picketing of residences or dwellings, but exempted the peaceful picketing of a place of employment involved in a labor dispute. *Id.* at 471. The Court noted that this regulation impermissibly depended solely on the message being conveyed and, therefore, was unconstitutional under the strict scrutiny analysis. *Id.*; see also SHAPIRO, *supra* note 29, at 24-25 (distinguishing the tests used for content-neutral and content-specific regulations).

50. See e.g., *Pacific Gas & Elec. Co. v. Public Util. Comm'n.*, 475 U.S. 1, 20 (1986) (holding that it was unconstitutional under the First Amendment to require an electric and gas company to include in its newsletter, contained in its billing envelopes, viewpoints with which the company disagreed); see also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding Florida's "right of reply" statute, compelling newspapers to provide equal access to political candidates covered in the newspaper, unconstitutional); *Pacific Gas*, 475 U.S. at 9 (finding that compelled access "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); but see *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980) (holding that state constitutional provisions allowing individuals to exercise their rights of free speech on the property of a privately owned shopping center, open to the public, does not violate the owner's First Amendment rights). In *Pruneyard Shopping Center*, the Court distinguished *Wooley v. Maryland*, 430 U.S. 705 (1977), and stressed that the views disseminated by the protesters would most likely not be identified with the owner of the shopping center. *Id.* at 86-87. Furthermore, the court noted that the owner was free to disassociate himself from these particular views. *Id.* at 87.

51. See *Tornillo*, 418 U.S. at 257; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (stating, in part, that a law compelling one to guarantee the absolute truth of all assertions would lead to "self-censorship" and would limit public debate).

52. *Pacific Gas*, 475 U.S. at 19.

53. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1975). The *Buckley* Court held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" and to its underlying principles. *Id.* As a result, the Court found that certain expenditure limitation provisions of the Federal Election Campaign Act of 1971, as amended in 1974, were unconstitutional under the First Amendment. *Id.* at 51.

54. See *id.* at 44-45.

osition, the Court has declared regulations that set apart members of the press for disfavored treatment are also presumptively unconstitutional.<sup>55</sup>

## 2. *Content-Neutral Regulations and the Application of an Intermediate Level of Scrutiny*

Regulations that are not related to the content of speech are subject to an intermediate level of scrutiny.<sup>56</sup> When elements of speech and non-speech are combined, an important governmental interest, unrelated to the suppression of the expression, may justify intrusions on the First Amendment.<sup>57</sup> The means chosen need not be the least restrictive means

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55. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r. of Revenue*, 460 U.S. 575, 591-93 (1983). The Supreme Court held that a Minnesota tax on the cost of paper and ink products used in the production of periodic publications, which exempted the first \$100,000 worth of paper and ink used in a year, discriminated against newspapers with a large circulation. Therefore, the Court held that the tax was invalid under the First Amendment. *Id.* The Court asserted that "differential treatment, *unless justified by some special characteristic of the press*, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585 (emphasis added); *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). *Ragland* involved a tax scheme that exempted from the tax newspapers and "religious, professional, trade, and sports journals and/or publications printed and published within the State." *Id.* at 224. The Court applied a strict scrutiny standard and stated that if such regulations were to be upheld, the state would have to show that the regulation was "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 231. The Court stated that differential taxation was contrary to First Amendment principles, and, therefore, unconstitutional. *Id.* at 229. Specifically, the Court found that the differential taxation was based on the content of the publication. *Id.*

56. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). According to *Turner Broadcasting*, the application of an intermediate scrutiny is justifiable because, in most cases, non content-based regulations do not pose a substantial risk of "excising certain ideas or viewpoints from the public dialogue." *Id.*

57. *United States v. O'Brien*, 391 U.S. 367, 370, 376-77 (1968) (holding the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act, which made it a crime when a person "forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes" a selective service registration certificate, constitutional under the First Amendment intermediate level of scrutiny). O'Brien was convicted under the statute when he burned his draft registration certificate as a means of anti-war protest. *Id.* at 369-70. He attacked the statute as unconstitutional under the First Amendment, and, therefore, argued that his conviction was invalid. *Id.* at 376. However, the Court upheld the statute and, consequently, O'Brien's conviction. *Id.* at 386.

The Court articulated the intermediate scrutiny standard to be used when government regulations have an incidental effect on speech. *Id.* at 376. A governmental regulation will be upheld:

If it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

available; however, they cannot burden substantially more speech than is necessary.<sup>58</sup>

Content-neutral “time, place, and manner” restrictions of otherwise protected speech are treated similarly under the First Amendment.<sup>59</sup> In *Ward v. Rock Against Racism*,<sup>60</sup> the Court employed an intermediate level of scrutiny to uphold New York City’s sound-amplification guidelines designed to regulate excessive noise at outdoor concerts in Central Park.<sup>61</sup> In so doing, the Court emphasized that the government may not substantially burden speech to a greater extent than is necessary under the circumstances.<sup>62</sup> The Court clarified that a regulation will not be invalidated solely because a less restrictive means to achieve the governmental objective exists.<sup>63</sup>

### *B. The Media and Three Different Levels of First Amendment Protection*

In response to advancing technologies, different levels of First Amendment protection apply to the media depending upon the specific medium

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*Id.* at 377; see also SHAPIRO, *supra* note 29, at 25 (explaining that, in cases where a regulation is directed at noncommunicative activities and indirectly regulates speech, the Court has subjected that regulation to an intermediate level of scrutiny analysis test).

58. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989). The Court held that “[s]o long as the means chosen are not substantially broader than necessary to achieve the government’s interest . . . the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Id.* at 800. The Court upheld New York City’s sound-amplification regulations regarding “time, place, or manner of protected speech” as consistent with the First Amendment. *Id.* at 798-803. The Court determined that these elements were content neutral and, therefore, the regulations were afforded intermediate scrutiny protection. *Id.* at 792.

59. *Rock Against Racism*, 491 U.S. at 798. The *Rock Against Racism* Court reaffirmed that:

[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”

*Id.* at 798-99 (footnote omitted) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)); see also SHAPIRO, *supra* note 29, at 25 (providing a description of time, place and manner regulations).

60. 491 U.S. 781 (1989).

61. *Id.* at 798-800.

62. *Id.* at 799.

63. *Id.* at 800. The *Rock Against Racism* Court held that it is not the job of the judge to second-guess the legislature’s determination so long as the regulation in question is not overly broad. See *id.*; see also *supra* note 58 (indicating that government regulations must not be overly broad, but that a court will not fashion its own less restrictive means).

of communication utilized.<sup>64</sup> Traditionally, the highest level of First Amendment protection has been afforded to newspapers and other print media.<sup>65</sup> In contrast, Congress and the courts have permitted extensive regulation of the broadcast industry.

1. *Print Media and the General Application of the Strict Scrutiny Standard*

Beginning with *Associated Press v. United States*,<sup>66</sup> government regulations of the press have been strictly scrutinized.<sup>67</sup> In *Associated Press*, the Court applied the strict scrutiny standard, but noted that the First Amendment does not provide immunity for the press from antitrust laws.<sup>68</sup> In the seminal case of *Miami Herald Publishing Co. v. Tornillo*,<sup>69</sup> the Court struck down Florida's right-of-reply statute under the strict scrutiny analysis.<sup>70</sup> The *Tornillo* Court reiterated the principle that a government may not usurp a newspaper's editorial control by requiring it to print an article that otherwise it would not print.<sup>71</sup>

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64. See Lutzker, *supra* note 17, at 467 (stating that different standards developed because of the law's response to various new technologies); see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). The Court noted that each medium of communication must be assessed individually to determine the amount of First Amendment protection from governmental regulations. *Id.* To determine the level required, a court examines the medium, the FCC's purpose for instituting the regulations and the history of the regulations, as well as prior judicial decisions on the constitutionality of the regulations. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438 (1985), *cert. denied sub nom. National Ass'n. of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986). Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969) (applying a more deferential standard and allowing greater broadcast regulations) with *Quincy Cable TV Inc.*, 768 F.2d at 1448 (holding must-carry regulations unconstitutional after subjecting the regulations to an intermediate level of scrutiny).

65. See T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 19-25 (1986) (explaining that prior restraint of the press is akin to censorship and, therefore, unconstitutional under a First Amendment analysis).

66. 326 U.S. 1 (1945).

67. *Id.* at 19-20. The *Associated Press* Court held that the application of the Sherman Antitrust Act to publishers attempting to restrain trade in news does not abridge the freedom of the press guaranteed by the First Amendment. *Id.*

68. *Id.*

69. 418 U.S. 241 (1974).

70. *Id.* at 258. The Florida statute granted a political candidate the right to reply, in an equal amount of space and free of cost, to criticism and attacks on his record or character by the newspaper. *Id.* at 244. The statute made it a misdemeanor for the newspaper to fail to comply. *Id.*

71. *Id.* at 256. The Court has consistently held that the government may not require a newspaper to print material that it otherwise would not print. *Id.* Specifically, the *Tornillo* Court stated that "[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." *Id.*

## 2. *Broadcast Regulations and the Most Relaxed Scrutiny Standard: The Scarcity and Pervasiveness Rationales*

The current legal structure permits extensive regulation of the broadcast media.<sup>72</sup> Courts have justified these regulations under the scarcity and pervasiveness rationales.<sup>73</sup> Justice Frankfurter first articulated the scarcity rationale in *National Broadcasting Co. v. United States*.<sup>74</sup> Due to the scarcity of broadcast frequencies, Congress and the FCC may constitutionally regulate and license stations based on a “‘public interest, convenience, or necessity’” standard.<sup>75</sup> This rationale justifies content-based broadcast regulations.<sup>76</sup> Furthermore, it has been invoked to justify legislation that imposes affirmative duties on broadcasters relating to content, such as requiring children’s educational programming.<sup>77</sup> It has also been

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The Court has long debated the issue of whether the “freedom of the press” clause in the First Amendment entitles the media to special constitutional protection. See GUNTHER, *supra* note 35, at 1456. This “freedom of the press” has created special problems including prior restraints by the government on the press, attempts by the government to compel journalists to divulge information, possible existence of a special right of press access to courtrooms, jails and the like, and issues of whether or not the press enjoys a special immunity from government attempts at regulation. *Id.* at 1455-1500.

72. See Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1072 (1994); see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (stating that broadcasting has received the most limited First Amendment protection).

A broadcaster is licensed by the FCC under a “public interest, convenience, and necessity” standard. See 47 U.S.C. § 309(a) (1988) (stating that the FCC may grant a station’s license application in part on whether the “public interest, convenience, and necessity” will be served by the granting of the license); 47 U.S.C. § 312(a)(3)(1988) (stating that the FCC may revoke a station’s license “for willful or repeated failure to operate substantially as set forth in the license”). Compare *Tornillo*, 418 U.S. at 258 (invalidating right of reply statutes with respect to print media as inconsistent with the First Amendment) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969) (upholding the application of the fairness doctrine in the context of broadcast regulations); see also FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 192-97 (1976) (arguing that *Tornillo* and *Red Lion* are indistinguishable).

73. See *infra* notes 74-99 and accompanying text (outlining the scarcity and pervasiveness rationales used to justify extensive broadcast regulations based on content).

74. 319 U.S. 190, 193 (1943). The *National Broadcasting* Court noted that since “the radio spectrum simply is not large enough to accommodate everybody,” regulation is necessary to prevent interference between signals. *Id.* at 213.

75. *Id.* at 216-17 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n.2 (1940)).

76. See Note, *supra* note 72, at 1072.

77. *Id.*; see *Children’s Television Act of 1990*, 47 U.S.C. § 303a(a)-(b) (Supp. II 1990) (requiring children’s programming and regulating advertising during that programming); 18 U.S.C. § 1464 (1988) (criminalizing the radio broadcast of “obscene, indecent, or profane language”).

invoked to justify prohibitions, such as the restrictions on indecent broadcasts.<sup>78</sup>

In *Red Lion Broadcasting Co. v. FCC*,<sup>79</sup> the Court justified the fairness doctrine under the scarcity rationale.<sup>80</sup> The fairness doctrine required radio and television broadcasters to present public issues on their stations, and to give fair and equal coverage to each side of the issue.<sup>81</sup>

78. The pervasiveness rationale has also been invoked to justify heavy regulations, especially with regards to indecent programming. See *infra* notes 88-99 and accompanying text (explaining the pervasiveness rationale that justifies extensive content-based broadcast regulations).

79. 395 U.S. 367 (1969).

80. *Id.* at 400-01. The Court upheld the Fairness Doctrine because “of the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views.” *Id.* at 400.

81. *Id.* at 369. The fairness doctrine (repealed in 1987) placed an affirmative obligation on broadcasters to identify and broadcast controversial public issues and to provide contrasting viewpoints on these issues. *Nat’l. Ass’n. of Broadcasters, The Fairness Doctrine: A Primer* (1993) 1 (hereinafter NAB Fairness Doctrine Primer). This doctrine developed from a long history of attempts to regulate broadcast discussions of political issues and editorializing. *Id.* Stations originally were prohibited from editorializing. *Id.* In 1949, however, the FCC issued its Report on Editorializing, which in effect formalized the fairness doctrine. *Id.* The FCC allowed partisan speech so long as contrary positions were aired. *Id.* In 1959, Congress amended the Communications Act to include the requirement that political candidates be given equal opportunities on broadcast stations. *Id.* The fairness doctrine was thought to have been codified based on such broad language. *Id.* at 1-2.

In 1969, the Supreme Court upheld the constitutionality of the fairness doctrine. *Id.* at 2; see *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 400-01 (1969) (upholding the constitutionality of the fairness doctrine under the scarcity rationale). In 1984, however, the Court indicated that it would review its previous holding from *Red Lion* if prompted by Congress or the FCC. NAB Fairness Doctrine Primer, *supra*, at 2; see *FCC v. League of Women Voters*, 468 U.S. 364, 378 n.12, *appeal dismissed*, 468 U.S. 1205 (1984) (quoting *Red Lion*, 395 U.S. at 393) (noting that the Court would reconsider the constitutional basis of its decision in *Red Lion* if Congress or the FCC were able to show that the fairness doctrine “[has] the net effect of reducing rather than enhancing speech”). However, in a 1985 report, the FCC concluded that the fairness doctrine no longer served the public interest and may be unconstitutional. NAB Fairness Doctrine Primer, *supra*, at 2. Specifically, the FCC found that the scarcity rationale used to justify the doctrine was no longer valid due to the growth in broadcasting and other comparable media. *Id.* Furthermore, the FCC found that the doctrine had the opposite of the intended effect and actually chilled broadcasters speech. *Id.*

In 1986, the U.S. Court of Appeals for the D.C. Circuit ruled that, in fact, Congress had not codified the fairness doctrine in the Communications Act. *Id.*; see *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 517 (D.C. Cir. 1986) (stating that Congress did not codify the fairness doctrine into the Communication Act and therefore the FCC had the authority to repeal the doctrine), *cert. denied*, 482 U.S. 919 (1987). In August of 1987, the FCC repealed the fairness doctrine. NAB Fairness Doctrine Primer, *supra*, at 3. In 1989, a federal appellate court upheld the FCC’s decision, determining that the doctrine no longer served the public interest, without reaching the issue of its constitutionality. *Id.*; see *Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 (D.C. Cir. 1989) (finding that the

The broadcasters in *Red Lion* alleged that the doctrine abridged their First Amendment freedom of speech and press.<sup>82</sup> Although noting that broadcasting clearly implicates a First Amendment interest, the Court upheld the regulations under the scarcity rationale.<sup>83</sup> The Court found that, in contrast to the print media where the editorial rights of the publisher prevail, the right of the broadcast listeners or viewers to receive access to social, political, and other ideas takes precedence over the editorial rights of the broadcaster because of the physical limits of the medium.<sup>84</sup>

Most recently, the Court upheld the scarcity rationale for extensive broadcast regulation in *FCC v. League of Women Voters*.<sup>85</sup> The Court noted, however, that the scarcity rationale has been criticized in recent years due to the emergence of cable and satellite television.<sup>86</sup> Still, the Court refused to reconsider its approach unless recommended to do so by Congress or the FCC.<sup>87</sup>

Extensive content-based broadcast regulations also have been justified by the pervasiveness rationale.<sup>88</sup> Under certain circumstances, the privacy interests of viewers and listeners clash with, and limit, a speaker's First Amendment rights.<sup>89</sup> In public, a speaker's rights typically domi-

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doctrine disserves the public interest because it actually thwarts its intended effect by dissuading broadcasters from presenting controversial viewpoints without reaching the constitutionality of the doctrine), *cert. denied*, 493 U.S. 1019 (1990).

Congress considered codifying the fairness doctrine into the Communications Act. NAB Fairness Doctrine Primer, *supra*, at 3. It decided not to after repeated threats of a Presidential veto. *Id.*; see also CARTER, *supra* note 65, at 200-01 (detailing the history of the fairness doctrine).

82. *Red Lion*, 395 U.S. at 386.

83. *Id.* at 386-88, 400-01. The Court noted the First Amendment concerns here are distinguishable from the speech and press interests when "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388. Therefore, the Court concluded that there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*

84. *Id.* at 390.

85. 468 U.S. 364, 376, *appeal dismissed*, 484 U.S. 1205 (1984). The *League of Women Voters* Court held that, despite Congress' extensive powers to regulate noncommercial educational broadcast stations, the ban on editorializing on certain stations was unconstitutional. *Id.* at 402.

86. *Id.* at 376 n.11 (noting that critics argue that, as a result of cable and television technology which provide communities with a wide range of stations, the scarcity doctrine may be obsolete).

87. *Id.* The Court refused to reconsider its "approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.*

88. See *infra* notes 89-99 (outlining the pervasiveness rationale used to justify extensive content-based broadcast regulations).

89. Note, *supra* note 72, at 1077 n.87 (stating that "[p]rivacy rights in this sense have been seen as a negative implication of the First Amendment and have been referred to as a right not to listen or a right not to know").

nate.<sup>90</sup> However, the government may limit a speaker's rights when viewers or listeners are determined to be "a captive audience."<sup>91</sup> In the home, the speaker must avoid infringing the privacy rights of the listener or viewer.<sup>92</sup> If it is possible for the viewer to control whether the speech is received, however, the government may not interfere with the viewer's choice.<sup>93</sup>

The pervasiveness rationale is exemplified in *FCC v. Pacifica Foundation*,<sup>94</sup> in which the Court upheld an FCC regulation regarding obscene, indecent, or profane broadcasting.<sup>95</sup> The Court first determined that the words of an indecent broadcast constituted "speech" within the meaning of the First Amendment and that the FCC's regulations were content-based.<sup>96</sup> After noting several other instances in which content-based regulations had been upheld,<sup>97</sup> the Court upheld the FCC's regulations.<sup>98</sup> The Court relied on the pervasiveness of radio and television in the home to justify allowing extensive regulations of "indecent" broadcasts.<sup>99</sup>

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90. *Id.* at 1077.

91. *Id.*; see also *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (validating a city ordinance prohibiting political advertisements in a city transit system due to the fact that the commuters are a "captive audience").

92. Note, *supra* note 72, at 1077.

93. *Id.* (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983)).

94. 438 U.S. 726 (1978).

95. *Id.* at 738. At issue in *Pacifica* was an afternoon broadcast of a satiric monologue of "the words you couldn't say on the public . . . airwaves." *Id.* at 729. For a full recitation of the monologue, see Appendix to the Opinion of the Court. *Id.* at 751-55. The FCC asserted its powers to regulate the broadcast after holding that it was indecent and prohibited by 18 U.S.C. § 1464. *Id.* at 732. The FCC noted that its holding rested, in part, on the fact that the monologue was broadcast in the early afternoon "when children were undoubtedly in the audience." *Id.*

96. *Id.* at 744.

97. Most specifically, the Court noted that the government may forbid speech calculated to provoke a fight. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). Furthermore, the government may distinguish between commercial and noncommercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64 (1977). The government may treat libel against private citizens more seriously than libel against public officials. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1973). Finally, the Court has recognized that obscenity may be regulated, *Miller v. California*, 413 U.S. 15, 23 (1973), in part due to the fact that its content is offensive to contemporary moral standards. *Roth v. United States*, 354 U.S. 476, 489 (1957).

98. *Pacifica*, 438 U.S. at 748-51.

99. *Id.* at 748-49. The Court noted that the unique accessibility of broadcasting to children supported distinguishing between broadcast and print media. *Id.* at 749. The Court previously recognized in *Ginsberg v. New York*, that government regulations of otherwise protected expression were upheld due in part to the government's interest in the "well-being of its youth." 390 U.S. 629, 639-40 (1968).

### 3. *The Applicable First Amendment Standard for Cable Television*

In 1992, Congress passed the 1992 Cable Act, amending the Cable Communications Policy Act of 1984 (the "1984 Cable Act")<sup>100</sup> and the Communications Act of 1934.<sup>101</sup> Prior to the 1984 Cable Act, it was uncertain who had ultimate authority to regulate cable television.<sup>102</sup> The 1984 Cable Act was implemented to establish the legislative basis for developing an unambiguous national communications policy,<sup>103</sup> to assure diversity of information sources and services,<sup>104</sup> and to promote competition in the cable industry,<sup>105</sup> among other goals.<sup>106</sup>

Cable television has experienced substantial growth since its inception in 1950.<sup>107</sup> During the early years, the regulation of the cable television

100. 47 U.S.C. §§ 521-559 (1984) (amended by Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.)).

101. 47 U.S.C. §§ 151-154 (1988); *see also* DANIEL L. BRENNER ET AL., *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO* § 2.01 (1995).

102. *See* 47 U.S.C. §§ 151-155 (1934) (establishing the Federal Communications Commission); *see* 47 U.S.C. § 521(3) (1988) (stating the congressional purposes of defining the appropriate roles of regulatory authority of the FCC, the states, and local communities over cable television); *see also* BRENNER, *supra* note 101, § 2.02[3] (indicating that one purpose of the 1984 Act was "to clarify the appropriate roles of the competitors for regulatory authority of cable television—the FCC, the states, and the local communities").

103. BRENNER, *supra* note 101, § 2.02[1]; *see* 47 U.S.C. § 521(1) (stating a congressional purpose of the 1984 Act was to establish a national communications policy).

104. BRENNER, *supra* note 101, § 2.02[4]; *see* 47 U.S.C. § 521(4) (stating that a major purpose of the 1984 Act was to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public").

105. BRENNER, *supra* note 101, § 2.02[6]; *see* 47 U.S.C. § 521(6) (stating that an overall theme of the 1984 Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems").

106. *See* 47 U.S.C. § 521 (outlining Congress' findings and purposes for the 1984 Act). The other stated goals of the 1984 Cable Act were to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community," 47 U.S.C. § 521(2); and "to establish an orderly process for franchise renewal." 47 U.S.C. § 521(5); *see also* BRENNER, *supra* note 101, § 2.02[1]-[6] (explaining congressional purposes of the 1984 Cable Act).

107. *See* *United States v. Southwestern Cable Co.*, 392 U.S. 157, 162 (1968). Early in their history, cable systems, then called community antenna television or CATV, received the signals of broadcasting stations and transmitted them by wire to subscribers. *Id.* at 161-62; *see also id.* at 161 n.8 (providing the definition of cable television promulgated by the Federal Communications Commission). Originally, cable systems did not produce their own programming. *Id.* at 161-62. Traditionally then, cable systems performed two basic functions. *Id.* at 163. First, they provided for unobstructed reception of broadcast stations and, second, they provided for the importation of distant signals beyond the range of local antennae. *Id.* Cable television has experienced remarkable growth since these early years, and is now a significant source of both broadcast and original programming. *Turner*

industry was left primarily to local authorities.<sup>108</sup> As the cable industry grew, the FCC indirectly exercised jurisdiction over cable systems under its authority to regulate microwave relay systems.<sup>109</sup> It was during this period that the FCC first implemented must-carry regulations.<sup>110</sup> The Court upheld the FCC's jurisdiction over cable television in *United States v. Southwestern Cable Co.*<sup>111</sup> Until 1975, the FCC's primary concern was the relationship between cable and broadcasting.<sup>112</sup> As the industry grew, however, the FCC became more concerned with the emergence of cable as part of the national communications structure and further entered the field of regulation.<sup>113</sup> In *United States v. Midwest Video*

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*Broadcasting Sys., Inc.*, 114 S. Ct. at 2445, 2451. See also CARTER, *supra* note 65, at 335-38 (providing a general description of the growth of the cable industry). Consequently, cable television has created substantial competition for broadcast stations. *Turner Broadcasting*, 114 S. Ct. at 2451.

For a detailed explanation of the basic principles of cable television technology, recent technological developments, and the future of cable television, see GARY L. CHRISTENSEN, *CABLE TELEVISION RETROSPECTIVE AND PROSPECTIVE* 13-35 (1985). Mr. Christensen concludes that cable television uses a flexible technology and is able to deliver a great variety of programming to its customers. *Id.* at 35. He foresees channel capacity continuing to increase to accommodate new services, and that local advertising on cable channels will increase, thereby adding to subscription revenues. *Id.*

108. BRENNER, *supra* note 101, § 2.03[1]. The FCC first considered its jurisdiction over cable regulation in 1958. *Id.* Specifically, in *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), the FCC declined to exercise jurisdiction over cable systems as common carriers under Section 3(h) of the 1934 Communications Act, which is now codified at 47 U.S.C. § 153(h) (1988). Furthermore, the FCC determined that it did not have the statutory authority to regulate cable television pursuant to Titles II and III of the 1934 Communications Act. BRENNER, *supra* note 101, § 2.03[1]; see also *In re CATV & TV Repeater Services*, 26 F.C.C. 403, 427-31 (1959) (detailing the FCC's findings that it did not have the jurisdiction to regulate the cable television industry).

109. See *Southwestern Cable Co.*, 392 U.S. at 165 (recounting the growth and concomitant regulation of the cable television industry); BRENNER, *supra* note 101, § 2.02[2].

110. See *infra* notes 123-30 and accompanying text (providing a detailed explanation of early must-carry regulations).

111. 392 U.S. 157 (1968). In *Southwestern Cable Co.*, the Court held that the agency's statutory power extended to the regulation of cable television. *Id.* at 178; see e.g., BRENNER, *supra* note 101, § 2.03[2]. The Court based the FCC's jurisdiction to regulate cable on its authority to regulate broadcast television, thereby limiting its seemingly broad power to regulate cable systems. *Southwestern Cable Co.*, 392 U.S. at 178 (detailing the FCC's jurisdiction over cable television); see e.g., BRENNER, *supra* note 101, § 2.03[2]. The significant aspect of *Southwestern Cable Co.* was its attempt to define cable television and to determine who exercised jurisdiction over the industry. *Id.*

112. See BRENNER, *supra* note 101, § 2.03[4] (discussing federal interests regarding cable and broadcasting).

113. *Id.* (discussing the FCC's increased regulation regarding cable). The FCC preempted local regulation. *Id.* Under the Preemption Doctrine, once Congress has regulated an area of Federal interest, implicitly or explicitly, state and local governments are prevented from regulating that same area under the Supremacy Clause of the U.S. Constitution. *Id.* § 2.04[2]. U.S. CONST. art. VI, § 2 (providing the authority for the preemption doctrine). The Doctrine of Preemption with regard to cable regulation has now been

*Corp.*,<sup>114</sup> the Court validated the FCC's additional jurisdiction ancillary to its authority to regulate broadcast stations by granting the FCC the authority to regulate CATV, the predecessor of cable television.<sup>115</sup>

The courts curtailed the FCC's jurisdiction over cable television after 1975.<sup>116</sup> However, the FCC implemented its own policy of cable deregulation to stimulate the growth of the industry.<sup>117</sup> Congress ultimately passed the 1984 Cable Act to create a national policy of deregulation for the cable industry to promote growth and competition within the industry.<sup>118</sup> Eight years later, Congress re-regulated the cable industry with the 1992 Cable Act.<sup>119</sup>

Cable television operators and programmers are engaged in speech within the meaning of the First Amendment and, therefore, are entitled to protection accordingly.<sup>120</sup> The Court, in the past, has failed to definitively establish the level of First Amendment protection available to

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largely replaced with the 1984 and 1992 Cable Acts. See BRENNER, *supra* note 101, § 2.04[2]. For a detailed account of the history of the Doctrine of Preemption and its relation to the regulation of cable television, see BRENNER, *supra* note 101, §§ 2.04-2.05[2][h] (explaining the Doctrine of Preemption and the FCC Preemption Policy, and its relationship to the 1984 Cable Act).

114. 406 U.S. 649 (1972) [hereinafter *Midwest I*].

115. *Id.* at 662-63 (upholding the FCC's jurisdiction to regulate CATV based on its authority to regulate broadcast television). The Court in *Midwest I* upheld the FCC's statutory authority to prescribe program orientation rules for cable television as justified by its authority to regulate broadcast television. *Id.* The dissent complained that this policy stretched the FCC's jurisdiction too far, in effect forcing cable operators to become broadcasters. *Id.* at 681 (Douglas, J., dissenting).

116. BRENNER, *supra* note 101, § 2.03[5] (discussing the deregulation of the federal program relating to Cable regulation); see also *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 49 (D.C. Cir.) (per curiam) (invalidating the FCC's anti-siphoning rules, designed to keep certain programming such as sports events, from migrating to competing services of broadcast television), *cert. denied*, 434 U.S. 829 (1977); *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) [hereinafter *Midwest II*] (overturning common carrier access and channel capacity rules, as beyond the scope of the FCC's jurisdiction under the 1934 Communications Act).

117. BRENNER, *supra* note 101, § 2.03[5]. The FCC reexamined its principal justification for cable regulations, namely that the growth of cable was reasonably related to the decline in broadcasting. *Id.* The FCC shifted the burden from the cable industry to prove that they were not harming local broadcast stations through the importation of distant signals. *Id.* The burden was now on the broadcasters to show harm. *Id.*

118. See *supra* notes 100-06 and accompanying text (discussing in detail the 1984 Cable Act).

119. See *infra* notes 145-64 and accompanying text (discussing the 1992 Cable Act, specifically the must-carry provisions of § 4 and § 5).

120. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. at 2445, 2456 (1994) (stating that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment"); see also *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403 (9th Cir. 1985) (concluding that cable television operators and programmers enjoy some First Amendment protection), *aff'd*, 106 S. Ct. 2034 (1986).

cable television with regard to must-carry requirements until the issue was decided in *Turner Broadcasting System, Inc. v. Federal Communications Commission*.<sup>121</sup> In *Turner Broadcasting*, the Court concluded that must-carry regulations were entitled to the intermediate scrutiny applied to non-content based regulations.<sup>122</sup>

### C. Must-Carry Regulations

The principle behind the must-carry regulations was first articulated in *Carter Mountain Transmission Corp. v. FCC*.<sup>123</sup> In *Carter Mountain*, the United States Court of Appeals for the District of Columbia upheld the FCC's rationale for denying a television microwave-system license to a common carrier.<sup>124</sup> Specifically, the court recognized that the protection of a local broadcast television station constitutes a "public interest, convenience, or necessity."<sup>125</sup> Consequently, the court granted the carrier the option of refile for a license, contingent upon a showing that they would carry the local broadcast station without duplicating its programming.<sup>126</sup>

In 1965, the FCC first codified this principle into must-carry regulations.<sup>127</sup> Originally, these regulations required system operators to carry local broadcast stations in order to receive the microwave license necessary to import distant broadcast signals.<sup>128</sup> After one year, the rules were extended to cover all cable systems and were further expanded in subsequent regulations.<sup>129</sup> The overriding purpose of the rules was to protect

121. *Turner Broadcasting*, 114 S. Ct. at 2456-57; see e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984) (invalidating an Oklahoma statute prohibiting the advertisement of alcoholic beverages on both cable and broadcast television based on federal preemption grounds and, furthermore, not addressing the First Amendment issue presented).

122. *Turner Broadcasting*, 114 S. Ct. at 2469.

123. 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

124. *Id.* at 363-64 (stating that the FCC may deny a station a license based on the "public interest, convenience, or necessity" standard without contradicting the First Amendment). See also Lutzker, *supra* note 17, at 478-79 (explaining the holding and significance of the *Carter Mountain* decision).

125. *Carter Mountain*, 321 F.2d at 364 (stating that it is not a denial of free speech to deny a license to transmit radio or television programs because the public interest standard has not been met).

126. *Id.* at 363-64.

127. Lutzker, *supra* note 17, at 477.

128. *Id.*; *In re Rules Re Microwave-Served CATV*, 38 F.C.C. 683, 713 (1965) (concluding that carriage and nonduplication requirements are appropriate means to create fair competition between CATV and broadcasting stations).

129. Lutzker, *supra* note 17, at 477; see also *In re CATV*, 2 F.C.C.2d 725, 769 (1966) (concluding that public interest supported the application of must-carry regulations to all CATV systems); Cable Television Report and Order, 36 F.C.C.2d 143, 173-76 (1972) (expanding the regulations farther and establishing the signals required to be carried).

local broadcast stations from the threat of possible elimination at the encircling hands of cable television.<sup>130</sup>

The United States Court of Appeals, approximately twenty years later, struck down the FCC's must-carry rules in 1985 as unconstitutional under the First Amendment.<sup>131</sup> The court recognized that the FCC, using the best interests of the public standard, promulgated must-carry rules to protect local television.<sup>132</sup> Originally the FCC could not prove the factual predicates necessary for the enactment of these rules.<sup>133</sup> The court nevertheless noted that the FCC undertook a series of revisions regarding the must-carry requirements without reconsidering the theoretical premises on which the rules were based.<sup>134</sup> The court questioned these regulations on First Amendment grounds.<sup>135</sup> Concluding that the more relaxed standard for broadcast regulations was inappropriate in the cable context,<sup>136</sup> the court determined that the rules clearly failed the *O'Brien* balancing

130. Lutzker, *supra* note 17, at 477.

131. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (holding that the must-carry regulations at issue were insufficiently tailored to justify their interference with First Amendment rights and therefore violative of the Constitution), *cert. denied sub nom.* National Ass'n. of Broadcasters v. *Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986); see 47 C.F.R. §§ 76.57-76.61 (1994) (codifying the must-carry regulations at issue in *Quincy*).

132. *Quincy*, 768 F.2d at 1442 (concluding that the FCC promulgated must-carry regulations to guard local broadcasters from destruction).

133. *Id.*

134. *Id.* The court noted that this was in marked contrast to general FCC policy and practice. *Id.* For example, the court noted that the FCC's prior regulations requiring distant-signal-carriage and the syndicated-exclusivity rules were later eliminated after exhaustive studies. *Id.* Like the must-carry requirements, these rules originally were promulgated to protect the broadcasting industry from competition by the cable industry. *Id.*

135. *Id.* at 1443-45. The court initially discussed the First Amendment standard for cable television adopted in previous cases. *Id.* The court noted that the most common approach was to treat broadcast and cable television consistently. *Id.* at 1443; see *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968) (applying the more relaxed standard of review used for broadcast regulations in the cable context). The court in *Quincy* compared this approach with one where the regulations were upheld only after surviving an intermediate scrutiny analysis. *Quincy*, 768 F.2d at 1443-44; see *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967) (holding that distant signal rules promulgated by the FCC were not an illegal restraint on First Amendment rights because the restraint was no greater than what was reasonably required to promote the public interest). The initial treatment of the issue in the lower federal courts was to sustain these regulations; however, the trend has been to subject the regulations to more exacting scrutiny. *Quincy*, 768 F.2d at 1443-44; see *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 48-50 (D.C. Cir.) (invalidating cable regulations under an intermediate scrutiny analysis) *cert. denied*, 434 U.S. 829 (1977). The *Quincy* court concluded by noting that the Supreme Court had never addressed the constitutionality of the must-carry rules. *Quincy*, 768 F.2d. at 1445.

136. *Quincy*, 768 F.2d at 1447. In particular, the court concluded that the scarcity rationale as applied to broadcast television does not justify regulation of cable television because cable systems have the technological capacity to carry a large volume of stations. See *id.* at 1448.

approach,<sup>137</sup> and thus it was unnecessary to determine if a more exacting level of scrutiny was warranted.<sup>138</sup> The court noted, however, that the must-carry rules were not unconstitutional *per se* and invited the FCC to redraft the rules consistent with its opinion.<sup>139</sup>

The FCC accepted the court's invitation and redrafted the must-carry regulations, only to have them held unconstitutional again in *Century Communications Corp. v. FCC*.<sup>140</sup> The FCC, in a significant move, changed its rationale and argued that the rules were necessary to guarantee access to broadcast television during the period when customers became familiar with an "input-selector device."<sup>141</sup> The rules, the FCC argued, further decreased the number of channels a cable system must carry, limited the pool of potential commercial and noncommercial channels that were required carriage, and established a provision where cable operators were not required to carry more than one station affiliated with the same network.<sup>142</sup> Ultimately, the court did not determine the appropriate level of scrutiny for must-carry regulations because the FCC regulations failed the intermediate review of *O'Brien*.<sup>143</sup> The attitude of

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137. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The *O'Brien* Court outlined the intermediate level of scrutiny analysis to be used when a governmental regulation imposes an incidental burden on speech. *Id.*; see *supra* note 21 (setting out the specific test to determine whether a governmental regulation is justified).

138. *Quincy*, 768 F.2d at 1148. Most specifically, the *Quincy* court found that, even assuming *arguendo* that the preservation of local broadcasting was an important governmental interest, the FCC failed to carry its substantial burden of justification because it did not reexamine its justifications for the rules' original promulgation for the past twenty years. *Id.* at 1457. The court declined to answer whether, in the abstract, the preservation of free local television is an important and substantial governmental interest. *Id.* at 1459. Furthermore, the court determined that the rules failed the second prong of the test because they were overly broad. *Id.* Specifically, the rules protected all broadcast stations from the alleged threat of cable television regardless of the broadcast station's economic situation. *Id.* at 1461.

139. *Id.* at 1463.

140. 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

141. *Id.* at 296. The "input-selector device," more commonly known as an A/B switch, allows viewers to flick a switch to alternate between cable and broadcast programming. *Id.* The Commission estimated this transition period would last five years. *Id.*

142. *Id.* at 296-97; see 47 C.F.R. §§ 76.55 to 76.56 (1994) (establishing definitions applicable to the must-carry rules and signal carriage obligations).

143. *Century Communications*, 835 F.2d at 298-304. The court held that:

in the absence of record evidence in support of its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the *O'Brien* test for incidental restrictions on speech.

*Id.* at 304.

the court, however, seemed to favor future cable and must-carry regulations.<sup>144</sup>

## II. THE 1992 CABLE ACT: RE-REGULATION OF A BURGEONING INDUSTRY

### A. *The 1992 Cable Act and the Must-Carry Regulations*

The most contentious requirements of the 1992 Cable Act are the must-carry provisions contained in sections four and five.<sup>145</sup> In general, a cable operator with twelve or fewer usable activated channels must carry the signals of at least three local commercial television stations.<sup>146</sup> The operator is exempted from the carriage requirements of section four if the cable system has less than 300 subscribers, and the broadcast signals are not entirely deleted.<sup>147</sup> Section four of the Act requires cable systems with more than twelve channels to broadcast local stations from the same market as the cable system.<sup>148</sup> However, no more than one-third of a cable system's channel capacity must carry such broadcast stations.<sup>149</sup> Cable systems must be devoted to carrying the broadcast programming in its entirety without compensation.<sup>150</sup> Regarding local noncommercial ed-

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144. *See id.* The court specifically noted that the must-carry rules were not *per se* unconstitutional. *Id.* The court clarified its position by stating: "we *reluctantly conclude* that the FCC has not [met its burden in this case] . . . . Accordingly, we have *no choice* but to strike down this latest embodiment of must-carry." *Id.* at 304-05 (emphasis added).

145. *See* 47 U.S.C. § 534(a) (Supp. V 1994). Specifically, the regulations regarding carriage obligations state that:

[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

*Id.* Furthermore, the regulations require that "[i]n addition to the carriage requirements set forth in section 534 of this title, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section." *Id.* § 535(a).

146. *Id.* § 534(b)(1)(A). The regulations specifically state that, as a general rule, "[a] cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations." *Id.*

147. *Id.* The regulations provide an exception to the general rule that a cable system with twelve or fewer channels shall carry at least three broadcast stations, namely, that "if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station." *Id.*

148. *Id.* § 534(b)(1)(B).

149. *Id.* The regulations state that "[a] cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system." *Id.*

150. *Id.* § 534(b)(3)(B). The regulations state that "[t]he cable operator shall carry the entirety of the program schedule of any television station carried on the cable system un-

educational television stations, a cable operator with twelve or fewer channels must carry the signal of one qualified station,<sup>151</sup> while a system with thirteen to thirty-six must carry at least one, but not more than three, qualified stations.<sup>152</sup>

Both systems are subject to subsection (c) of the Act, requiring that cable systems carry all qualified local noncommercial educational television stations that were carried as of March 29, 1990.<sup>153</sup> A cable system with more than thirty-six channels must carry every noncommercial educational television station requesting carriage, except stations that are substantially duplicative.<sup>154</sup> Like section four, section five requires that cable systems carry the programming in its entirety without compensation.<sup>155</sup>

Congress promulgated the 1992 Cable Act after conducting three years of hearings regarding the cable television industry.<sup>156</sup> The bill launched a battle between the cable television industry, which was opposed to the

less carriage of specific programming is prohibited." *Id.* Furthermore, the regulations specify that "[a] cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations . . . or for the channel positioning rights." *Id.* § 534(b)(10).

151. *Id.* § 535(b)(2)(A). The must-carry regulations provide that "a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station." *Id.*

152. *Id.* § 535(b)(3)(A)(i). The regulations state specifically that "system[s] with 13 to 36 usable activated channels . . . shall carry the signal of at least one qualified local non-commercial educational television station but shall not be required to carry the signals of more than three such stations." *Id.*

153. *Id.* § 535(c). The regulations provide, however, that "[t]he requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station." *Id.*

154. *Id.* § 535(e). The must-carry regulations provide that:

a cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local non-commercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage.

*Id.*

155. *Id.* § 535(g)(1)-(2). The regulations provide that:

a cable operator shall retransmit in its entirety . . . [and a] cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage . . . [with the exception that a] cable operator shall not be required to add the signals of a qualified local noncommercial educational television station not already carried . . . where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any increased copyright costs resulting from carriage of such signal.

*Id.*

156. See *supra* notes 3 and 4, and accompanying text (citing congressional hearings and congressional findings stated in the Act).

legislation, and the broadcasting industry and consumer protection organizations, which strongly supported the bill.<sup>157</sup> The bill caused a political battle as well, ultimately handing President Bush the first and only override of his presidential veto.<sup>158</sup>

The Act lists Congress' conclusions regarding its investigation of the cable industry and the reasons for the promulgation of the Act.<sup>159</sup> Significantly, Congress found that monthly rates for cable television had increased steadily since rate deregulation began in 1984.<sup>160</sup> Congress found sufficient competition lacking between local cable systems.<sup>161</sup> Congress determined that cable had become vertically and horizontally integrated.<sup>162</sup> Furthermore, Congress characterized broadcast stations as an important source of local news and programming, critical for an informed electorate, and noted that there is a substantial governmental interest in promoting the continued availability of this free television program-

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157. See Kirk Victor, *Cable Stakes Were as High as They Come*, NATIONAL JOURNAL, Oct. 10, 1992, at 2313-15 (describing the key players in support of the Act as the broadcasting industry, represented primarily by the National Association of Broadcasters and CBS, Inc., the consumer protection organizations, represented primarily by the Consumer Federation of America, and the independent television stations, while opposition to the legislation primarily came from the cable industry and Hollywood, via the Motion Picture Association of America). See also Kirk Victor, *Down to the Wire*, NATIONAL JOURNAL, May 16, 1992, at 1175-80 (describing the lobbying war between the supporters and opponents of the 1992 Cable Act).

158. See *supra* note 2 (listing the margin of victory for the supporters of the 1992 Cable Act). The 1992 Cable Bill was a fierce political battle between President Bush and congressional Democrats. As for President Bush's reasons for vetoing the Cable Bill, he stated in his veto message to the United States Senate on October 3, 1992, "I am returning herewith without my approval S. 12, the Cable Television Consumer Protection and Competition Act of 1992. This bill illustrates good intentions gone wrong, fallen prey to special interests." Mike Mills, *Bush Asks for a Sign of Loyalty; Congress Changes the Channel*, CONGRESSIONAL QUARTERLY, Oct. 10, 1992, at 3149; see also Victor, *supra* note 157, at 2313 (describing President Bush's strong opposition to the 1992 Cable Bill and the eventual override sustained with substantial Republican support).

159. See *supra* note 3 (citing congressional findings within the Act).

160. 47 U.S.C. § 521(a)(1) (Supp. V 1993). Specifically, Congress concluded that the average monthly cable rate had increased almost three times as much as the Consumer Price Index since deregulation in 1984. *Id.*

161. *Id.* § 521(a)(2).

162. *Id.* § 521(a)(4)-(5). Specifically, "[t]he cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." *Id.* § 521(a)(4). Furthermore, Congress specifically found that "[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the [economic] incentive . . . to favor their affiliated programmers." *Id.* § 521(a)(5); see also Lutzker, *supra* note 17, at 487 (detailing Congressional findings that the cable industry has become horizontally and vertically integrated thereby decreasing competition).

ming.<sup>163</sup> Finally, Congress found economic incentives for cable television to refuse to carry broadcast signals, and concluded that carriage requirements were necessary for the economic survival of broadcast television.<sup>164</sup>

### B. Court Challenges to the 1992 Must-Carry Provisions

Immediately after the 1992 Cable Act became law, several suits were filed challenging *inter alia* the constitutionality of the must-carry regulations.<sup>165</sup> In *Turner Broadcasting System, Inc. v. FCC*,<sup>166</sup> the United States District Court for the District of Columbia upheld the must-carry provisions of the 1992 Cable Act as consistent with the First Amendment.<sup>167</sup>

Initially, the court outlined several economic reasons why Congress promulgated the Act, and, more particularly, the must-carry rules.<sup>168</sup> Defering to these findings, the court concluded that the must-carry rules were content-neutral (as opposed to content-specific), imposed an "incidental burden" on speech, and were, therefore, subject to an intermediate level of First Amendment scrutiny.<sup>169</sup> In applying the intermediate scrutiny standard,<sup>170</sup> the court recognized the importance of local broadcast-

163. 47 U.S.C. § 521(a)(11)-(12). Congress concluded that: "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate . . . . There is a substantial governmental interest in promoting the continued availability of such free television programming." *Id.*

164. *Id.* § 521(a)(15)-(16). Specifically, Congress concluded that because broadcast and cable television compete for advertising revenues, by carrying the broadcast signal, the cable system theoretically is taking advertising revenues from the broadcasters. *Id.* § 521(a)(14).

165. See *supra* note 18 (listing the suits filed challenging the 1992 Cable Act).

166. 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445, *vacated remanded, sub nom.* National Interfaith Cable Coalition v. FCC, 114 S. Ct. 2730 (1994).

167. *Turner Broadcasting*, 819 F. Supp. at 36 (holding that the must-carry provisions of § 4 and § 5 of the 1992 Act do not violate plaintiffs' First Amendment rights).

168. *Id.* at 39-41.

169. *Id.* at 40-41. The court found that the must-carry provisions are not viewpoint based, do not compel the carriage of any particular message, and do not propose burdens because of the messages carried. *Id.* at 40. The court did recognize that the must-carry provisions may be "marginally" content-related. *Id.* at 44. The court stressed the economic motives of Congress in enacting the legislation, however, and refused to second-guess congressional findings. *Id.* at 40-41.

170. The appropriate test for content-neutral based regulations that impose an incidental burden on speech originated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). *Turner Broadcasting*, 819 F. Supp. at 39, 41. Specifically, the regulations must: (1) "further a significant government interest"; and (2) be "narrowly tailored to serve that interest." *Id.* at 45. This second requirement is satisfied if "the government's regulation will effectively remedy the condition that the government has identified as in need of correction, and if it does not burden substantially more speech than necessary in doing so." *Id.* Furthermore, the means cho-

ing<sup>171</sup> and recognized that Congress had compiled an extensive record which demonstrated that local broadcasting was in serious jeopardy.<sup>172</sup> Furthermore, the court found that even if the broadcasting industry was not currently in serious peril, the economic conditions of the industry made the demise of local broadcasting a very legitimate concern.<sup>173</sup> The court found that the regulations passed the second prong of the First Amendment test;<sup>174</sup> specifically, the court determined that the must-carry regulations were sufficiently tailored to achieve Congress' goals without over-burdening speech, even though the regulations might not necessarily be the least restrictive means available for Congress to achieve its objectives.<sup>175</sup>

Turner Broadcasting appealed, and the Supreme Court granted certiorari to determine whether the must-carry provisions violated the First Amendment.<sup>176</sup> Initially, the Court recognized that cable programmers and cable operators transmit speech, and are protected under the First Amendment.<sup>177</sup> The Court then established that the must-carry rules regulate speech by reducing the number of channels over which cable operators exercise control, and by making it more difficult for cable programmers to compete for the limited number of channels remaining.<sup>178</sup> Recognizing that not every interference with speech is subjected to the same level of First Amendment scrutiny, the Court first directed its attention to the appropriate level of scrutiny for the must-carry regulations.<sup>179</sup>

Initially, the Court reviewed the state of current First Amendment standards applicable to the media.<sup>180</sup> The print media, such as newspapers, enjoy the highest level of protection under the First Amendment.<sup>181</sup>

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sen by the government need not be the least restrictive means available. *Rock Against Racism*, 491 U.S. at 798 (noting that "the importance of broadcasting generally, and in particular local broadcasting, to the American public is now beyond dispute").

171. *Turner Broadcasting*, 819 F.Supp. at 45; *see also* National Ass'n. of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (recognizing the important governmental interest in local broadcasting designed to serve the public).

172. *See Turner Broadcasting*, 819 F. Supp. at 46.

173. *See id.* (noting the position of power that cable operators wield over the market).

174. *Id.* at 47.

175. *See id.* Once again, the court refused to second-guess "Congress' determination that the must-carry provisions are necessary to accomplish its objective." *Id.*

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

177. *Id.* at 2456.

178. *Id.*

179. *Id.*

180. *See id.*; *see also supra* notes 66-99 and accompanying text (detailing the different standards of First Amendment protection afforded to the print and broadcast media, and the justifications for each standard).

181. *Near v. Minnesota*, 283 U.S. 697, 716-19 (1931) (noting that freedom of the press is an especially cherished constitutional right, and, therefore, prior restraint of this freedom

In contrast, broadcast television, due to its unique characteristics, receives the least amount of First Amendment protection.<sup>182</sup> The exact level of protection afforded to cable television regarding must-carry regulations was not definitively determined until *Turner Broadcasting*.<sup>183</sup>

Rejecting *Turner Broadcasting's* arguments that the must-carry rules were content-based and thus required the application of the strict scrutiny standard, the Court determined that the regulations were content-neutral and imposed an incidental burden on speech. Therefore, the must-carry regulations were subject to the intermediate level of scrutiny set forth in *O'Brien* and *Ward*.<sup>184</sup> The Court also rejected several other arguments for applying the strict scrutiny standard to the must-carry regulations.<sup>185</sup> Applying the intermediate scrutiny standard, the Court re-

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will be allowed only in rare instances); see also *FRIENDLY*, *supra* note 72, at 197 (stating that "[t]he Court has consistently reserved for the printed press First Amendment protections which it is not prepared to extend to other, more recently developed channels of communication").

182. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (declaring that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"); see also *supra* notes 72-99 and accompanying text (explaining the scarcity and pervasiveness rationales that are used to justify extensive content-based broadcast regulations).

183. See *Lutzker*, *supra* note 17, at 481-82. The courts have not determined where cable television belongs between the print and broadcast media. *Id.* This is due to the "hybrid" nature of cable television, which is part "common carrier," part "newspaper," and part "broadcaster." *Id.* at 482.

184. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994). The Court began its analysis by rejecting the government's argument that the least restrictive test applied to broadcast regulations should be imposed on cable, stating that the scarcity rationale that justifies extensive broadcast regulations does not apply in the context of cable regulation. *Id.* at 2456-57. However, the Court also concluded that the strict scrutiny available for content regulations was also inappropriate. *Id.* at 2469. The Court determined that non-content based regulations are subject to intermediate scrutiny because these regulations pose a less substantial risk of removing specifically targeted views from the public. *Id.* at 2468-69. To determine whether a regulation is content-neutral or content-specific, the threshold inquiry is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* at 2459. Generally, laws that distinguish speech based on the ideas expressed are content-based, while those that do not reference the particular viewpoint are content-neutral. *Id.* The Court then determined that the must-carry regulations are neutral on their face because they impose burdens and confer benefits without regard to content. *Id.* at 2460. Furthermore, the Court found that the regulations distinguish between the particular manners of communication and not between the messages themselves. *Id.* The Court also found that Congress' principal objective in enacting the must-carry legislation was not to favor speech of a particular content, but to preserve public access to free television programming. *Id.* at 2461.

185. Specifically, the Court rejected appellants' arguments that the must-carry regulations "(1) compel speech by cable operators, (2) favor broadcast programmers over cable programmers, and (3) single out certain members of the press for disfavored treatment." *Id.* at 2464. In dismissing the argument that the must-carry regulations "compel speech,"

jected the district court's determination of constitutionality for the must-carry regulations and the subsequent granting of summary judgment for the government on the record before the Court.<sup>186</sup> While recognizing that courts must give substantial deference to congressional findings in such instances, the Court nevertheless declared that some meaningful judicial review was necessary.<sup>187</sup> The Court examined the evidence and determined that it was insufficient to establish that the broadcast industry actually was in serious peril; furthermore, the Court remained unconvinced that the must-carry regulations actually would remedy the stated ills of the broadcasting industry.<sup>188</sup> Finally, the Court noted the absence of any judicial findings of less restrictive means for achieving the government's objectives.<sup>189</sup> Therefore, recognizing that questions of material fact still remained, the Court remanded the case to the district court for further proceedings.<sup>190</sup>

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the Court distinguished the must-carry regulations from the right of reply statute struck down in *Miami v. Tornillo*, 418 U.S. 241 (1974), the case most heavily relied upon by appellants. *Id.* at 2464-65. The Court first noted that the regulations are not content-based and that they would not require cable operators to alter their speech because of the broadcast messages that were required to be carried. *Id.* Furthermore, the Court observed that cable operators have a greater control over their medium than do newspaper publishers. *Id.* at 2466.

Rejecting the argument of appellants that the must-carry regulations favor broadcast programmers over cable programmers, the Court distinguished these regulations from the ones struck down in *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976), in which the Court stated that the government cannot restrict the speech of some in society to enhance the voice of others. *Id.* at 2466-67. The Court in *Turner Broadcasting* stated that *Buckley* stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a *content* preference. *Id.* at 2467.

Finally, the Court rejected appellants' argument that the must-carry laws signal out certain members of the press, in this case cable operators, for disfavored treatment. *See id.* at 2467-68. Recognizing that regulations that discriminate among the media "often present serious First Amendment concerns," the Court explained that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated," rather than by the *content* of the message. *Id.* at 2468. The Court found that the must-carry provisions were justified due to the special characteristics of the cable medium itself: "[T]he bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* Furthermore, the regulations were broad-based and applied to almost all cable systems across the country. *Id.*

186. *Id.* at 2469-72 (finding that the record was insufficient to determine whether the government had satisfied an intermediate level of scrutiny, and therefore the grant of summary judgment for the government was erroneous).

187. *Id.* at 2471.

188. *Id.* at 2472. The Court noted a complete lack of any findings on the actual extent to which must-carry regulations interfere with protected speech; without such findings, the Court cannot say whether the must-carry provisions "suppress 'substantially more speech than . . . necessary' to ensure the viability of broadcast television." *Id.*

189. *See id.*

190. *Id.*

The dissent argued that the must-carry requirements were content-based regulations and, therefore, should be subject to a strict scrutiny analysis.<sup>191</sup> Applying this analysis, the dissent found the governmental interests important, but not necessarily compelling.<sup>192</sup> Moreover, even assuming that the regulations were content-neutral as the majority determined, the dissent nevertheless found that the must-carry regulations still failed the application of the intermediate scrutiny analysis.<sup>193</sup>

### III. MUST-CARRY REGULATIONS: AN UNNECESSARY SOLUTION

#### A. *Must-Carry Regulations: Content-Neutral or Content-Specific?*

The most significant determination made by the Supreme Court in *Turner Broadcasting* was that the must-carry regulations were content-neu-

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191. *Id.* at 2476 (O'Connor, J., concurring in part and dissenting in part). The O'Connor dissent points to the findings of Congress that are detailed in the Act itself to support the determination that the regulations are based on content. *Id.* Specifically, Justice O'Connor notes certain congressional findings:

There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media . . . [P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens . . . . A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation . . . . Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

*Id.* (citations omitted). Justice O'Connor argues that these "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content." *Id.* at 2477. Justice O'Connor concluded that, no matter how praiseworthy the regulations were, they were content-based and therefore must be narrowly tailored to serve a compelling governmental interest. *See id.*

192. *Id.* at 2478. The only interest that the dissent found that even possibly approached the standard of a compelling government interest was that of promoting educational or news programming. *Id.* However, the dissent concluded that the means chosen to serve this interest were overly broad. *Id.* at 2479. For example, the regulations, while burdening cable entertainment programs, also burdened cable educational and news networks such as CNN, C-SPAN, and the Discovery Channel. *Id.*

193. *Id.* The dissent specifically argued that the regulations were overly broad, that is they restricted too much speech that did not implicate the governmental interests of diversity, localism, educational or public affairs programming. *See id.* at 2478-79. Furthermore, the dissent concluded that the regulations did not advance the interests of protecting local stations economically without burdening a substantial amount of unrelated speech. *Id.* In conclusion, Justice Ginsberg adopted the position of D.C. Circuit Judge Williams. *Id.* at 2481 (Ginsberg, J., concurring in part and dissenting in part) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58, 63 (D.D.C. 1993) (Williams, J. dissenting) (arguing that the regulations are content-based restrictions and "[the] facts do not support an inference that over-the-air TV is at risk"))).

tral and thus subject only to intermediate scrutiny.<sup>194</sup> This issue was crucial, for the must-carry rules would have been declared unconstitutional under a strict scrutiny standard.

In determining that the must-carry regulations were content-based, the dissent failed to recognize the overwhelming evidence indicating that Congress promulgated the must-carry rules to correct economic imbalances within the video industry and to promote competition.<sup>195</sup> The rules themselves provide for carriage of broadcast stations no matter what the broadcast station is carrying, or what it is replacing on cable.<sup>196</sup> For instance, carriage could be required in place of a cable channel that provides educational or even local news programming.<sup>197</sup> This is possible, in light of the existence of educational channels on cable systems such as the Discovery Channel and the Learning Channel, as well as local news programming channels, such as NewsChannel 8 in the Washington, D.C. area. If Congress had intended to promote content-based programming, it surely would have safeguarded these stations from elimination as a result of the must-carry regulations. It stands to logic, therefore, that as promulgated, the regulations are content-neutral and were designed as a tool to correct market imbalances.

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194. See *supra* notes 184-85 and accompanying text (outlining the arguments advanced by the appellants for the application of the strict scrutiny standard). The main argument proposed by appellants was that the regulations were content-based and therefore must pass the strict scrutiny test before being upheld. *Id.* However, the appellants' other secondary arguments also rested on a determination of whether the regulations were content based. *Id.*

195. See The 1992 Cable Act § 2(a)-(b). Congress stated explicitly the policy of the Act:

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

*Id.* § 2(b)(1)-(5).

196. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2453-54, 2476-77 (1994) (O'Connor, J., concurring in part and dissenting in part).

197. See *id.*

*B. Broadcast and Cable Television and an Evolving  
Single Standard of Regulation*

The broadcast and cable television industries are distinguishable primarily by the respective technologies they employ to reach viewers.<sup>198</sup> But the two industries are very different in other ways as well.<sup>199</sup> Broadcast television is the most heavily regulated communications medium.<sup>200</sup> The extent of allowable regulations of cable television, which is part common carrier, part newspaper, and part broadcaster, was not definitively determined until *Turner Broadcasting*.<sup>201</sup>

198. *Id.* at 2451.

Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured . . . by any television set within the antenna's range. Cable systems . . . rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection . . . using cable or optical fibers.

*Id.* Cable technology affords a benefit over broadcast television: it eliminates the interference that is sometimes seen in broadcast television programming, and cable systems are capable of transmitting many more channels than are available through broadcast television. *Id.* at 2452. This second reason, enormous channel capacity, is the principle reason why cable television cannot be regulated as heavily as broadcast television. *See id.*; *supra* notes 72-87 and accompanying text (explaining the scarcity rationale justifying extensive broadcast regulations).

199. One major difference is that the cable industry encompasses both cable programmers, who produce and sell programs, and cable operators, who actually transmit the programs. *Turner Broadcasting*, 114 S. Ct. at 2452. Most of the cable operator's programs are drawn from outside sources, which include broadcast stations and cable networks such as CNN, C-SPAN, MTV, ESPN, and TNT. *Id.* Cable systems, therefore, function primarily to transmit the speech of others. *Id.*; *see also* Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L. J. 329, 339 (noting that cable systems do not conduct substantive review of material provided by cable networks).

Another major distinction is that while, broadcasters generate revenue through advertising, cable systems charge viewers a monthly subscriber's fee, and rely less on advertising revenues. *Turner Broadcasting*, 114 S. Ct. at 2452.

In addition, cable subscribers choose from "tiers" of services. *Id.* The basic tier usually consists of several broadcast stations and certain cable networks. *Id.* For additional fees, cable operators will provide specialty channels such as HBO, pay-per-view sports and movies programming. *Id.*; *see also* JAMES C. GOODALE, *ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION* §§ 5.05-06, at 5-37 to 5-45 (1993) (discussing "tiers" and "buy-through" requirements, as well as, the future for video services); Brenner, *supra* at 334 n. 22 (discussing pay-per-view services).

200. *See generally* *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (stating that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"); *see also supra* notes 72-99 and accompanying text (explaining the rationales for extensive broadcast regulations); *cf.* *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984) (noting that the scarcity rationale has come under criticism in recent years due to the emergence of cable and satellite television, but refusing to reconsider the approach until Congress or the FCC indicates that "technological developments have advanced so far that some revision of the system of broadcast regulation may be required").

201. *See* Lutzker, *supra* note 17, at 482.

Since deregulation of the cable industry in 1984, cable television has grown immensely.<sup>202</sup> Congressional findings concluded that this enormous growth has occurred at the expense of broadcast television.<sup>203</sup> Through this legislation generally, and the must-carry requirements and retransmission consent provisions specifically, Congress was seeking to level the playing field between two competing industries, one of which has an inherent advantage over the other.<sup>204</sup> Congressional intent, therefore, was to rescue the broadcast industry itself, and not to promote specific types of programming it believed to be inherently valuable.

### C. *Insufficient Justification for the Must-Carry Regulations*

Currently, there is a trend toward greater regulation in the cable television industry.<sup>205</sup> Congress' initial purpose for instituting the must-carry provisions was to save the broadcast industry.<sup>206</sup> The 1992 Cable Act was passed in the midst of an economic recession that impacted the broadcast industry particularly hard.<sup>207</sup> Any prediction of the death of the networks,<sup>208</sup> however, was premature, as just two years later broadcast television is "in the midst of a revival."<sup>209</sup> Consequently, the underlying

202. 47 U.S.C. § 521(a)(3) (Supp. V 1994). As a result of deregulation in 1984, Congress found that "over 60% of the households with televisions subscribe to cable television, and this percentage is almost certain to increase." *Id.*

203. *Id.* §§ 521(a)(13), (14) and (16). Congress' findings included:

As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services . . . . Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems . . . . As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

*Id.*

204. See *supra* note 4 (detailing the legislative debate surrounding the 1992 Cable Act).

205. Compare *supra* notes 103-06 and accompanying text (discussing the 1984 Cable Act which deregulated the cable industry) with *supra* notes 145-64 (discussing the 1992 Cable Act which re-regulated the industry).

206. See *supra* notes 123-44 and accompanying text (detailing the history and the purposes of the must-carry regulations).

207. See Paul Farhi, *Advertisers, Suitors Zoom in On TV Networks*, WASH. POST, Oct. 31, 1994, at A1.

208. See *id.* Robert Iglar, President of ABC, predicted that the "future would hold 'fewer networks.'" *Id.*

209. *Id.* The resurgence of the broadcasting industry can be partly attributed to an improving economy. *Id.* at A10. The improving economy has increased the demand for network advertising; therefore, the networks have been able to increase what they charge

premise for the must-carry regulations is no longer valid. Without the economic justification for the regulations, their effect is simply to favor television broadcasters over cable operators based on the content of the programming. Therefore, an analysis of these regulations under a strict scrutiny standard is wholly justified.<sup>210</sup> Under this analysis, the must-carry regulations would be presumptively unconstitutional unless they serve a "compelling" governmental interest and are "narrowly tailored" to serve that interest.<sup>211</sup> The regulations were designed to provide economic protection to the broadcast industry, an end which the Court characterized as "important" but not "compelling."<sup>212</sup> Furthermore, the regulations are not narrowly tailored to protect exclusively broadcast stations that are in economic peril, but in fact have an impact on all stations equally regardless of their economic situation.<sup>213</sup> Therefore, under the appropriate First Amendment analysis, the must-carry regulations contained in the 1992 Cable Act are unconstitutional.

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advertisers. *Id.* Furthermore, due to the recession, network executives have trimmed costs and have learned how to operate their networks on a smaller budget. *Id.*

This recovery may also be attributed to the unique, dominant position of network television. *Id.* "No other medium can reach virtually every household every night of the week . . . . No other media can spend as much as the networks on programming because no other media reaches so many people. . . . In short, the networks' dominant position has an almost self-perpetuating quality." *Id.* Cable television and home video took viewers away from the networks in the 1980s and early 1990s, however, the migration away from network television has stabilized. *Id.* Therefore, due to the preferred position of the broadcasting industry in particular, and the stabilizing of the communications market in general, broadcast television is not in serious economic peril as was originally believed. *See id.* Other evidence also points to the continued survival of network broadcast television. *Id.* For example, broadcast television is, and is likely to remain, the only free, mass market communications medium. *Id.* Also, cable companies are starting their own networks as well, such as Paramount Communications and Time Warner. *Id.* at A11.

210. For the view that they are content-based regulations that favor a preferred group, see Lutzker, *supra* note 17, at 496-97 (arguing that "[m]ust-carry regulations create a favored class of speakers based on the local content of their speech," and, therefore, should be subject to a strict scrutiny analysis).

211. *See supra* notes 21-22 (outlining the strict scrutiny analysis used by the courts and comparing it to a lesser, intermediate level of scrutiny standard).

212. *National Ass'n. of Broadcasters v. FCC*, 740 F.2d 1190, 1198-99 (D.C. Cir. 1984). The Court recognized the "importance of local programming to a national broadcasting system that is designed to serve the public interest." *Id.* at 1198.

213. *See generally* *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. at 2445, 2479-80 (1994) (O'Connor, J., concurring in part and dissenting in part) (arguing from the dissent's point of view that the must-carry regulations are overly broad under both the strict scrutiny analysis and the intermediate scrutiny analysis).

## IV. CONCLUSION

Presented with a case of first impression, the Supreme Court determined in *Turner Broadcasting Sys., Inc. v. FCC*<sup>214</sup> that cable access requirements in the 1992 Cable Act were entitled to an intermediate level of First Amendment scrutiny.<sup>215</sup> The Court concluded that these regulations were economic provisions designed to promote competition within the video industry and to protect a broadcast industry that appeared to be in peril.<sup>216</sup> If Congress discerns a need to promote competition and to correct market imbalances within the video industry by implementing interventionist legislation, the future will see additional cable regulations designed to constrain the ever-expanding cable television industry.<sup>217</sup> This would be unfortunate, however, as the market has demonstrated its own ability to correct economic imbalances without congressional assistance.<sup>218</sup>

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214. 114 S. Ct. 2445 (1994).

215. *See id.* at 2469.

216. *Id.* at 2469-70.

217. Congress has promulgated legislation deregulating and regulating cable television largely in reaction to market conditions. *Compare supra* notes 103-06 and accompanying text (discussing the deregulation the cable television industry, pursuant to the 1984 Cable Act, to promote the growth of the industry) *with supra* notes 145-64 (discussing the re-regulation of the expanding cable television industry, pursuant to the 1992 Cable Act, in part to promote competition in the communications industry as a whole and to protect the broadcast industry).

218. *See supra* notes 207-09 and accompanying text (detailing the resurgence of the broadcast industry).

