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Robert B. Hobbs Jr.

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CABLE TV'S "MUST CARRY" RULES: THE MOST RESTRICTIVE ALTERNATIVE—*Quincy Cable TV, Inc. v. FCC.*

INTRODUCTION

How should the first amendment balance the interests of cable television system operators against the interests of a community's television stations? The Federal Communications Commission (FCC) maintains that it must protect the public interest by ensuring that television audiences have access to free local programming. Cable systems assert that they have the constitutional right to provide whatever cable channels and services their subscribers desire.

In *Quincy Cable TV, Inc. v. FCC*,¹ the District of Columbia Circuit Court of Appeals held that the cable operator's first amendment rights should prevail.² The court held as unconstitutional the FCC's "must carry" rules that required a cable system, on the request of a local television broadcaster and without compensation, to carry all local broadcast television stations.³ Using an "incidental burden on speech" test devised in *United States v. O'Brien*,⁴ the court found that the rules were based solely on the FCC's speculative fear that cable would eradicate local broadcasting and that the rules were overly broad in their application.⁵

This note first argues that the court correctly applied the least scrutinizing first amendment test to the facts of the case and concluded its inquiry after the rules failed that test. Second, this note argues that the FCC, while once on the correct regulatory path regarding cable, erred by not studying the potential impact of cable television on a case by case basis as the FCC had decided to do with competing broadcasters in *Carroll Broadcasting, Inc. v. FCC*.⁶ Third, this note concludes that the *Quincy* case will benefit cable operators financially and will provide proper protection of cable

1. 768 F.2d 1434 (D.C. Cir. 1985), *petition for cert. filed sub nom. Nat'l Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3229 (U.S. Sept. 23, 1985) (No. 85-502).

2. *Id.* at 1452, 1462-63.

3. *Id.*

4. 391 U.S. 367 (1968).

5. 768 F.2d at 1463.

6. 258 F.2d 440 (D.C. Cir. 1958).

operators' right of free speech.

THE CASE

The *Quincy* case involved two separate actions that were filed to challenge the application of the must carry rules. Quincy Cable TV, Inc., the owner of a cable system, challenged an FCC ruling that it comply with the rules despite the limited channel capacity of its cable system. Turner Broadcasting System, Inc., a supplier of programming to cable systems, wanted the FCC to institute rulemaking to essentially delete the must carry rules. The court in *Quincy* combined the two challenges into one case.⁷

A. *Quincy Cable TV, Inc.*

On November 27, 1979, Quincy Cable TV, Inc., a cable system in Grant County, Washington,⁸ filed a request with the FCC for a waiver of the cable television mandatory signal carriage rules.⁹ Quincy Cable argued that the three television broadcast stations that it desired to delete¹⁰ could be received in the town of Quincy without cable, and that alternative programming would better serve its subscribers.¹¹ The Quincy cable system was limited to a twelve channel capacity. In 1979 Quincy Cable conducted a subscriber survey to determine what channels it should carry. Quincy Cable found that subscribers preferred to watch three cable channels¹² instead of the three local channels from Spokane, Washington. Quincy Cable was already carrying three network affiliates from Seattle, Washington (which largely duplicated the three Spokane stations), a Spokane public broadcasting station, and four public affairs and entertainment channels.¹³ Quincy Cable petitioned the FCC in November 1979 for the waiver¹⁴ even though it

7. *Quincy*, 768 F.2d at 1438 n.5, 1445, 1447.

8. *Quincy Cable TV, Inc.*, 89 F.C.C.2d 1128-29 & n.1 (1982).

9. 89 F.C.C.2d at 1128.

10. KREM, KHQ-TV, and KXLY-TV, located in Spokane, Washington. 89 F.C.C.2d at 1128 n.1. Spokane is located about 125 miles from Quincy, Washington. *Quincy*, 768 F.2d at 1446.

11. 89 F.C.C.2d at 1128-29.

12. That is, programming supplied specifically for cable audiences by cable programmers, such as Turner Broadcasting System. 768 F.2d at 1437 n.1.

13. Of the twelve channels, only the four Spokane channels could be received in Quincy without cable, and only then with the aid of a UHF translator station. 768 F.2d at 1446 & n.25.

14. *Quincy Cable TV, Inc. v. FCC*, 730 F.2d 1549, 1550 (1984).

was not yet obliged under the rules¹⁵ to carry the Spokane stations since none had yet requested carriage.¹⁶

In a letter ruling effective May 2, 1980, the Cable Television Bureau Chief denied the petition.¹⁷ Two requests for reconsideration were denied.¹⁸ Nevertheless, Quincy Cable deleted two of the Spokane stations¹⁹ and petitioned the full Commission for review. Quincy Cable argued that the Bureau's order was defective as to procedure and as to constitutional law. Arguing that the must carry rules infringed on its editorial discretion over programming, Quincy Cable contended that the rules were unconstitutional under the first amendment.²⁰ The FCC rejected the argument.²¹

The FCC in *Quincy* reiterated that the must carry rules assured that local broadcast television stations are carried on cable systems, allowing access to the local audience that the stations are licensed to serve. The three Spokane stations were the only ones that were entitled to mandatory carriage, and after Quincy Cable deleted two of the stations, the system "saturated its channels with non-mandatory signals."²² The FCC fined Quincy Cable \$5,000 for violating Section 76.57(a)²³ by deleting the Spokane stations.²⁴ The FCC suggested that Quincy expand its channel capacity to fulfill its signal carriage obligations.²⁵

Quincy Cable appealed to the District of Columbia Circuit Court of Appeals. Quincy Cable's brief emphasized its limited twelve channel capacity, but Quincy Cable had expanded its system capacity to twenty-four channels in June 1982 and to thirty-two channels by January 1983, the latter being one year prior to oral arguments before the court of appeals. The new system used

15. The must carry rules only impose the obligation on the cable operator once the local broadcast station requests carriage. 47 C.F.R. §§ 76.57(a), 76.59(a), 76.61(a) (1980).

16. 768 F.2d at 1446-47.

17. 89 F.C.C.2d at 1129.

18. 730 F.2d at 1550.

19. KHQ-TV and KREM. 89 F.C.C.2d at 1129.

20. Quincy Cable also argued that the rules violated its fifth amendment rights since they constituted a compensable taking. 768 F.2d at 1447 n.27. The Commission rejected the argument without substantive discussion. 89 F.C.C.2d at 1134.

21. 89 F.C.C.2d at 1134-35.

22. *Id.* at 1137.

23. 47 C.F.R. § 76.57(a) (1980).

24. 89 F.C.C.2d at 1138.

25. *Id.* at 1137.

converters and differently priced groups of channels. When these facts came to light, the court remanded the case to the FCC for reconsideration within six months.²⁶

The FCC, on remand, reaffirmed its earlier decision despite Quincy Cable's supplementary filings.²⁷

B. *Turner Broadcasting System, Inc.*

Turner Broadcasting System petitioned the FCC in 1980 to institute rulemaking regarding the must carry rules. Turner contended that the rules should be deleted since the cable industry and FCC regulatory policy had changed significantly since the 1960's, disproving the theoretical economic assumptions on which the rules were based. Turner also argued that the rules were unconstitutional.²⁸

Turner asserted injury since it could not sell its programs to those cable systems that were saturated²⁹ with mandatory local signals.³⁰ Turner also argued that the rules injured systems that were less saturated since such systems were still restricted in the number of nonlocal channels that they could carry.³¹

The FCC delayed action, and Turner petitioned the District of Columbia Circuit Court of Appeals to compel the FCC to act. On March 23, 1984, the court remanded the case to the FCC for action. The FCC then denied the petition for rulemaking, stating that the rules still had a valid purpose and that Turner had failed to show otherwise.³² The FCC acknowledged that the rules were "intended to compel carriage of broadcasting signals in place of alternate programming that subscribers, if given their choice, might otherwise choose."³³ The FCC also conceded that the rules deprived cable operators of a choice in deciding what cable channels to carry.³⁴

26. 730 F.2d at 1549-51.

27. 768 F.2d at 1447.

28. *Id.* at 1445.

29. *I.e.*, a twelve channel system being forced to carry the signals of twelve "local" stations, thus precluding any additional "cable" channels. Notice of Proposed Rulemaking in Docket No. 21472—"Saturated" Cable Television Systems, 66 F.C.C.2d 710 (1977) [hereinafter cited as *Saturated Cable Systems*].

30. 768 F.2d at 1445 & n.24.

31. *Id.* at 1445.

32. *Id.* at 1446, citing the Commission's Opinion and Order.

33. *Id.*

34. *Id.*

Turner petitioned the court of appeals for review of the Commission's denial.³⁵

C. "Must Carry" Rules Held Unconstitutional

On July 19, 1985, a unanimous District of Columbia Circuit Court of Appeals held that the FCC's mandatory carriage rules violated the first amendment to the United States Constitution.³⁶ In an opinion authored by Judge J. Skelly Wright,³⁷ the court first discussed the regulatory background³⁸ and the prior constitutional challenges³⁹ to cable regulation in general. As to the latter, the court found that the Supreme Court had never reviewed a constitutional challenge to the must carry rules, except as to the FCC's proper jurisdiction in promulgating the rules.⁴⁰ The *Quincy* court acknowledged that cable operators who had challenged the regulations had been unsuccessful in the federal circuits.⁴¹

The first amendment standard of review presented some problems for the court in *Quincy*. The court rejected the "scarcity" rationale, which is a justification for a more intrusive restriction on a broadcaster's first amendment rights, since that rationale is limited to regulating broadcast media.⁴²

The court then focused on the test set out in *United States v.*

35. *Id.*

36. *Id.* at 1438.

37. The other circuit judges were Ruth Bader Ginsburg and Robert H. Bork. *Id.* at 1437.

38. 768 F.2d at 1438-43.

39. *Id.* at 1443-45. The court dismissed the FCC's view that the Supreme Court had sustained the validity of the rules in a footnote in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). The Supreme Court in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 n.7 (1979) clearly refuted that footnote as *dicta*. See *Quincy*, 768 F.2d at 1443 n.20.

40. *Id.* at 1443 & n.20.

41. *E.g.*, *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968) (cable operators analogized to broadcasters in justifying a regulation more intrusive on first amendment rights); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967) (regulation was no more restrictive on speech than was necessary to preserve local broadcasting). These two cases were specifically rejected by the D.C. Circuit in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 n.80 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

42. The courts have held that the fact that only a finite number of frequencies can be assigned to broadcasters justifies a regulation more intrusive on first amendment rights than a regulation on other media such as newspapers. *Quincy*, 768 F.2d at 1448-50.

O'Brien.⁴³ In deciding to apply the test, the court first discussed the distinction between regulations causing incidental burdens on speech,⁴⁴ and those that are intended to curtail expression.⁴⁵ The former was the type of speech involved in *O'Brien*,⁴⁶ which necessitates a less scrutinizing first amendment standard.⁴⁷ The latter goes more to the heart of the first amendment, so it necessitates a more scrutinizing standard of review.⁴⁸

The court acknowledged the problem of applying the *O'Brien* test to cable carriage regulations since the channel restrictions could be seen as a direct burden on speech. However, the court recognized the fact that the *O'Brien* test was the least scrutinizing test available.

Therefore, the court used the *O'Brien* test to analyze the FCC's must carry rules.⁴⁹ Applying that test, the court held that the must carry rules (1) were within the constitutional power of the FCC,⁵⁰ (2) were unrelated to suppression of free expression,⁵¹ but (3) did not further an important or substantial governmental interest,⁵² and (4) imposed a greater incidental burden on expression than essential to further any alleged governmental interest.⁵³

In applying the "substantial interest" element of the test, the court held that the FCC had not shown by concrete evidence the evil targeted by the rules, which apparently was the potential eradication of local broadcast television due to cable competition.⁵⁴ In applying the "least incidental restriction" element of the test, the court held that the rules were overly broad. For example, the rules failed to distinguish profitable local broadcasters from unprofitable ones, and failed to distinguish small "saturated" cable systems

43. 391 U.S. 367 (1968).

44. Regulations that "evinced a governmental interest unrelated to the suppression or protection of a particular set of ideas . . ." *Quincy*, 768 F.2d at 1450.

45. Either directly by banning speech due to its communicative impact or indirectly by favoring one group of speakers over another group. *Id.* at 1450.

46. See *infra* text accompanying notes 109-117.

47. *Quincy*, 768 F.2d at 1451.

48. *Id.*

49. *Id.* at 1453-54.

50. *Id.* at 1443. This is implied from previous Supreme Court approval of jurisdiction. See *id.*

51. *Id.* at 1454. This was conceded *arguendo*.

52. *Id.* at 1459.

53. *Id.* at 1462.

54. *Id.* at 1458-59.

from ones with larger channel capacities.⁵⁵

It seems unlikely that the *Quincy* case will be reversed or even granted a writ of *certiorari* by the Supreme Court. On August 2, 1985, the FCC withdrew from the appeal of the case.⁵⁶ The full Commission, by a three to two vote, even applauded the *Quincy* decision.⁵⁷ Chief Justice Warren Burger on September 9, 1985 refused to stay the enforcement of the *Quincy* decision.⁵⁸ On September 10, 1985 the FCC declared that the court's decision had become effective as to the FCC.⁵⁹

However, the FCC has not yet given up on some type of signal carriage regulation. While recognizing the validity of the *Quincy* decision, the FCC on November 14, 1985 filed a notice of proposed rulemaking to request suggestions for a revised rule that would be constitutional.⁶⁰

BACKGROUND

To understand the constitutional question that faced the *Quincy* court, it is necessary to first look at the FCC's longstanding policy of "localism"—a policy to promote the public interest in having communities served by free broadcast programming that caters to local interests and needs.⁶¹ The FCC applied its localism policy to television broadcasting in 1952.⁶² Moreover, when cable

55. *Id.* at 1462 & n.55.

56. Calcasieu Cablevision, Inc., No. CAC-8805 (F.C.C. Sept. 10, 1985) (available Jan. 31, 1986, on LEXIS, Fedcom library, FCC file). The FCC by this action dismissed as moot over 230 proceedings that involved the rules. *Id.*

57. Goodale, *Big Media and the Courts*, N.Y. L.J., Aug. 12, 1985, at 3, col. 3 n.5.

58. Raleigh News & Observer, Sept. 11, 1985, at 12B, col. 1.

59. Calcasieu Cablevision, Inc., No. CAC-8805 (F.C.C. Sept. 10, 1985) (available Jan. 31, 1986, on LEXIS, Fedcom library, FCC file).

60. Notice of Inquiry and Notice of Proposed Rulemaking, Docket No. 85-349 (November 18, 1985) [hereinafter cited as Mandatory Carriage Rules Inquiry]. The FCC's position had thus changed since September 1985 when it stated that it would not "... attempt to devise new mandatory cable carriage rules consistent with the court's decision." Calcasieu Cablevision, Inc., No. CAC-8805 (F.C.C. Sept. 10, 1985) (available Jan. 31, 1986, on LEXIS, Fedcom library, FCC file). The original comment period was to end on December 30, 1985 but was extended to January 29, 1986 on the petition of the National Association of Broadcasters. Order Granting Motion for Extension of Time to File Comments, Docket No. 85-349 (December 18, 1985).

61. See generally Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 U. CINN. L. REV. 427, 495 (1975).

62. Pearson, *Cable: The Thread By Which Television Competition Hangs*,

systems began operating, the FCC soon decided that it had to find a way to apply its localism policy to cable services also.

To understand how the *Quincy* court resolved the first amendment question presented, it is necessary to understand the first amendment test the court used. The *O'Brien* test was developed to be used when a regulation or statute only incidentally burdens speech, thus requiring a less scrutinizing standard of review.

A. *Economic Competition and Local Stations*

Before the birth of cable television, the FCC had decided cases involving a broadcast license applicant's potential economic competition to an established licensee and any resulting threat to local service. In those cases, the FCC determined that the public interest required at least one licensee to provide adequate local service. In *FCC v. Sanders Brothers Radio Station*,⁶³ the Supreme Court held that the economic competition from the applicant was not a factor to be considered by the FCC in deciding whether to grant a radio license to the applicant.⁶⁴ In deciding that such potential competition would only cause mere economic loss to the existing station, the Court reasoned that a power to deny a license simply due to increased competition to an existing licensee would allow the FCC to grant broadcast monopolies, a power not given to the FCC under the Communications Act.⁶⁵ The Court stated that economic loss could be considered by the FCC when the competition from the applicant would cause both stations either to go out of business for lack of adequate financial support or to fail to render adequate local service.⁶⁶

In *Carroll Broadcasting Co. v. FCC*,⁶⁷ the District of Columbia Circuit Court of Appeals restated the *Sanders Brothers* distinction between economic injury to a licensee and economic injury to the public interest.⁶⁸ The court held that the local public interest is harmed only when local service is affected.⁶⁹ The public interest is unaffected if Station A is replaced by Station B, as long as Station

27 RUTGERS L. REV. 800, 801 (1974).

63. 309 U.S. 470 (1940).

64. *Id.* at 473.

65. *Id.* at 476.

66. *Id.* at 475-76.

67. 258 F.2d 440 (D.C. Cir. 1958).

68. *Id.* at 442.

69. No matter who provides the required service. *Id.* at 444.

B provides the required local service.⁷⁰ Thus the question of whether Station A makes \$5000 or \$50,000 is irrelevant to the public interest if local service is not adversely affected.⁷¹

The local programming policy was adopted for broadcast television service in 1952. Since most television markets only had three or less allocated channels, the number of national networks became fixed at three.⁷² However, the FCC's policy of localism and its attempt to apportion local television service on a nationwide basis left twenty percent of the American population without any television service in 1956. This helped to bring about cable television as a substitute in those isolated areas.⁷³

B. Localism Policy and Cable Television Regulation

A great deal of existing literature has traced the history of FCC cable regulation.⁷⁴ This note will briefly highlight that era with respect to localism and the mandatory signal carriage rules.

As early as May 1958 the FCC was considering the economic impact on local television service from "auxiliary services."⁷⁵ Broadcasters challenged cable as a threat to their economic security in the market place, claiming that cable would split television audiences and cut the broadcasters' revenues.⁷⁶ However, the FCC refused to act due to an inability to determine whether advertisers would withdraw advertising based on lower ratings, and an inability to predict the amount of financial loss that would cause a broadcaster to go out of business.⁷⁷ The FCC would involve itself only when the sole local broadcast service was threatened.⁷⁸

The must carry rules were promulgated along with other cable

70. *Id.*

71. *Id.* at 443.

72. Pearson, *supra* note 62, at 801-02.

73. Hagelin, *supra* note 61, at 495.

74. See an excellent bibliography found in G. SHAPIRO, P. KURLAND & J. MERCURIO, 'CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 250 (1983) [hereinafter cited as CABLESPEECH].

75. CATV & TV Repeater Services, Docket No. 12443, 26 F.C.C. 403, 412 (1959).

76. Smith, *Primer on the Regulatory Development of CATV (1950-72)*, 18 How. L.J. 729, 731, 733 (1975).

77. CATV & TV Repeater Services, 26 F.C.C. at 422.

78. *Id.* at 438. In *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963), the FCC found evidence that a microwave-fed cable system would bring about the demise of a local television station.

regulation in 1965.⁷⁹ Since 1959 the number of cable systems had tripled.⁸⁰ The 1965 regulations were limited in coverage to microwave fed cable systems.⁸¹ The FCC believed that cable systems owed their primary duty to those stations that placed the best signals in the community.⁸² The FCC reasoned that a cable system's failure to carry local stations would be contrary to the public interest.⁸³ The FCC stated that if cable replaced local broadcast service, the public would lose free service, service to outlying areas, and service with local control and program selection.⁸⁴

The FCC chose to cast cable's role as a supplemental broadcast service and not as an alternative service.⁸⁵ The FCC argued that giving the cable operator the ability to choose to carry a local station would be inconsistent with that role.⁸⁶

One consideration for the FCC was the use by a cable subscriber of a switching device which would allow the user to switch between cable reception and over-the-air antenna reception.⁸⁷ The FCC all but ruled out such devices as an alternative cable regulation since cable operators might not provide them to subscribers, and since switching was an "obvious" deterrent to their use by subscribers.⁸⁸ The FCC relied on an assertion that switching devices were "frequently defective."⁸⁹

In 1966, the FCC modified the rules and extended them from microwave fed cable systems to all cable systems.⁹⁰ Again the FCC reasoned that cable systems that failed to carry local stations effectively cut off such stations from the cable system's subscribers.⁹¹

The must carry rules specified four priority types of local stations that the cable operator had to carry on the request of a local

79. First Report & Order in Docket Nos. 14895 & 15233, 38 F.C.C. 683 (1965) [hereinafter cited as *First Report & Order*].

80. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 79 (1967).

81. *First Report & Order*, *supra* note 79, at 683-84.

82. *Id.* at 717.

83. *Id.* at 705-06.

84. *Id.* at 699-700.

85. *Id.* at 700.

86. *Id.* at 705.

87. See *CABLESPEECH*, *supra* note 74, at 144.

88. *First Report & Order*, *supra* note 79, at 702-04.

89. *Id.* at 688.

90. Second Report & Order in Docket Nos. 14895, 15233 & 15971, 2 F.C.C.2d 725, 746 (1966) [hereinafter cited as *Second Report & Order*].

91. *Id.* at 774.

station.⁹² An exception existed when limited channel capacity allowed a cable operator to choose between signals with substantial duplication.⁹³ Another exception to mandatory carriage allowed a cable system to show that a local signal was not in fact present in the community, or that a good signal was technically unobtainable.⁹⁴

When a system's channel capacity was too limited to allow carriage of all must carry signals of the community, the cable system was required to offer and maintain for each subscriber an adequate switching device.⁹⁵ This provision was deleted by the 1972 rules.⁹⁶

When it promulgated the 1972 rules, the FCC conceded that it lacked detailed data on cable viewing patterns, but once obtained, such data would serve as a measure of cable's "possible" impact on local broadcast service.⁹⁷ The must carry rules were revised to utilize a new thirty-five mile zone in which "local" stations were deemed located ("market signals"), and to require carriage of stations "significantly viewed" in the cable community.⁹⁸

92. The 1966 rules required a cable system, on request of the relevant station, to carry the signals of all commercial and educational television stations within whose grade B contour the cable system is located, giving priority to the following: (1) all stations within whose principal community contours the system operates; (2) all stations within whose grade A contours the system operates; (3) all stations within whose grade B contours the system operates; and (4) all television translator stations operating in the community of the system with 100 watts or higher power. 2 F.C.C.2d at 752, 802. "Contours" are geographical lines wherein a signal acceptable to the viewer is expected to be available at the outer limits of service for at least 90 percent of the time at the best 70 percent of receiver locations for the Grade A contour, and at the best 50 percent of receiver locations for the Grade B contour. Sixth Report and Order in Docket Nos. 8736, 8975, & 9175—Television Assignments, 41 F.C.C. 148, 176 (1952). A "television translator" is a broadcaster that retransmits programs of television broadcasters without alteration of the original signal. 47 C.F.R. § 74.701(a) (1982).

93. 47 C.F.R. § 74.1103(b) (1966).

94. *Second Report & Order, supra* note 90, at 753 n.40.

95. *Id.* at 802; 47 C.F.R. § 74.1103(c) (1966).

96. Cable Television Report & Order, 36 F.C.C.2d 143, 212 (1972). No explanation was given as to why this provision was deleted.

97. *Id.* at 169.

98. *Id.* at 170-71, 230-33. The 1972 rules for cable systems operating in those communities located outside of all major and smaller television markets (e.g. Quincy, Washington) essentially added to the 1966 rules (see *supra* note 92) the following priority categories: (5) noncommercial educational television broadcast stations within whose "specified zone" the community of the cable system is located and (6) commercial television broadcast stations that are "significantly

C. Partial FCC Deregulation of Cable

As cable grew due to its increased profitability, the FCC began to reevaluate its position on cable regulation. In 1979, the FCC took advantage of substantial cable television broadcast research available⁹⁹ to review the continued validity of two cable regulations.¹⁰⁰ The distant signal rules limited the number of distant television signals that could be carried by the cable system. A "distant" signal was defined as one originating from any station outside of a community's thirty-five mile zone.¹⁰¹ The syndicated program exclusivity rules required, on the request of a local broadcaster, the deletion of a particular network or syndicated programs from distant signals.¹⁰² The FCC admitted that the distant signal and the syndicated exclusivity rules had been based on mere speculation.¹⁰³

In its 1979 report, the FCC found that cable competition did not "pose a significant threat to conventional television or to overall broadcasting policies."¹⁰⁴ Broadcast television stations earned "substantially" more return on their investment than the average business, so some audience loss to distant stations was acceptable. The FCC found that audience loss was offset by increases in population, economic activity, and advertising demand.¹⁰⁵

In a sharp separate statement, FCC Commissioner Fogarty argued that the public interest was better served by deferring to the

viewed" in the community of the cable system. 47 C.F.R. § 76.57(a)(3)-(4) (1980). The rules also made similar provisions for major television markets (§ 76.61) and smaller television markets (§ 76.59). A "specified zone" is that area extending 35 air miles from the reference point in the community, the location of such point being defined in 47 C.F.R. § 76.53. 47 C.F.R. § 76.5(f) (1982). A "significantly viewed" station is one with a certain share of viewing hours in the surveyed viewing households. 47 C.F.R. § 76.5(k) (1982). This section provides different weekly share requirements for network and independent stations.

99. The research included case studies of 160 broadcast stations. Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 715 (1979) [hereinafter cited as *Economic Relationship Inquiry*].

100. *Id.* at 634, 660.

101. Report & Order in Docket Nos. 20988 & 21284—Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 667-68 (1980) [hereinafter cited as *Syndicated Exclusivity Rules*].

102. *Id.* at 668-69.

103. *Economic Relationship Inquiry*, *supra* note 99, at 634.

104. *Id.* at 661.

105. *Id.*

marketplace until experience, rather than speculation, indicated the need for regulation. The burden of proof should be on those seeking protection against competition (the television broadcasters), not on the innovators (cable operators).¹⁰⁶

The FCC, as a result of the inquiry, deleted the distant signal and syndicated exclusivity rules in 1980.¹⁰⁷ The FCC commented that cable competition had improved television service to the public, and would continue to do so in the future, despite the relaxed distant signal rules.¹⁰⁸

D. *The O'Brien Test*

The *Quincy* court applied the *O'Brien* test to invalidate the must carry rules. In *O'Brien*, the defendant was prosecuted for the willful burning of his Selective Service registration certificate.¹⁰⁹ He did so in public to protest the draft.¹¹⁰ In upholding his conviction and the statute, the United States Supreme Court¹¹¹ found that the restricted conduct contained both speech and nonspeech elements, and that the statute did not prohibit free speech on its face.¹¹² The Court then set forth what has generally been relied on as the test for determining the first amendment validity of regulations which only incidentally burden speech:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government 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.¹¹³

Applying that test to the statute in question, the Court first found that the Government had the constitutional power to classify and conscript manpower for military service.¹¹⁴ Second, the

106. *Id.* at 949 (separate statement of Comm'r Fogarty).

107. *Syndicated Exclusivity Rules*, *supra* note 101, at 665.

108. *Id.* at 746.

109. 391 U.S. at 369.

110. *Id.* at 369-70.

111. Chief Justice Warren authored the opinion. Justice Harlan concurred, and Justice Douglas dissented. *Id.* at 369, 388-89.

112. *Id.* at 375-76.

113. *Id.* at 377.

114. *Id.*

Government had an important interest in assuring the continued availability of issued Selective Service certificates.¹¹⁵ Third, the governmental interest was unrelated to the suppression of free expression.¹¹⁶ Fourth, since the statute only condemned independent, noncommunicative actions, it was no more burdensome than essential to further the governmental interest.¹¹⁷

The *O'Brien* test found subsequent use in many first amendment cases and has been used in the context of cable television several times.¹¹⁸

No court before *Quincy* had analyzed the must carry rules using the *O'Brien* test. Although the FCC still supported its localism policy established decades before, the FCC was now deregulating cable television. One of the last major components of cable regulation left standing was the must carry rules.

ANALYSIS

The *Quincy* court took a step by step approach in analyzing the must carry rules under the *O'Brien* four-part test. First, the court decided that the *O'Brien* test was appropriate in this case even though the must carry rules appeared to burden the speech of cable operators more than incidentally. Second, assuming that the use of the *O'Brien* test was appropriate, the court had trouble finding a substantial governmental interest. Third, assuming such an interest existed, the court found that the must carry rules were fatally overbroad and thus violative of the first amendment. This note, after analyzing each of these three components, will address the possible impact of the *Quincy* decision.

115. *Id.* at 382.

116. *Id.*

117. *Id.*

118. *E.g.*, Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1406-07 & n.9 (9th Cir. 1985) (*O'Brien* used to invalidate a city's policy of auctioning off the right to provide cable service to certain areas and limiting each area to one cable operator; procedure was not the least restrictive alternative); *Home Box Office*, 567 F.2d at 48-51 (*O'Brien* used to invalidate the pay cable television rules of the FCC; rules did not serve a substantial governmental interest and were grossly overbroad); *Carlson v. Village of Union City*, 601 F. Supp. 801, 810-12 (W.D. Mich. 1985) (*O'Brien* used to uphold a city's revocation of a cable television franchise); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976, 987-88 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (*O'Brien* used to uphold a state's mandatory access regulations placed on cable systems).

A. *Unrelated to Suppression of Free Expression*

Is the FCC's interest in preserving free local television broadcasting related to communicative impact or to the suppression of free expression? If a regulation does not meet this element, it is not unconstitutional, but merely requires a much more demanding first amendment test.¹¹⁹ A regulation regulates content if "its applicability depends on the message, symbols or images used by the communicator."¹²⁰ The must carry rules were designed to ensure that the public interest was served through guaranteed local broadcast outlets of expression and opinion; the rules did not guarantee that certain messages were said or not said. From the public's viewpoint, this was neither an expansion nor suppression, but a preservation of the *status quo* existing before cable made a significant impact on the television industry. From the cable operator's viewpoint, the rules restricted the choice of channels that it could carry.

Regardless of what method of enforcement the FCC chose, its underlying purpose was not the restriction of cable operators, but the maintenance of local broadcasting. The *O'Brien* test specifies that it is the governmental interest, not the regulation itself, which must be unrelated to the suppression of free speech. The *O'Brien* court meant to analyze an interest that reasonably supported the regulation, not an interest that "really" influenced the legislature or agency.¹²¹

Even if the FCC applied its localism policy to cable television in direct response to "harmful" communicative conduct, the *Quincy* court correctly began (and ended) its analysis with the *O'Brien* test. Professor Redish advocates an approach to judicial first amendment analysis that abandons the content distinction.¹²² First the court applies the *O'Brien* test. If in the "rare" case the regulation fails the test, it is unconstitutional. In the usual case, after the regulation passes the test, the court applies a more scrutinizing balancing test.¹²³ This is basically the procedure that the

119. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975).

120. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 745 (1980).

121. Ely, *supra* note 119, at 1496 n.57.

122. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142-43 (1981).

123. *Id.* The next test is (1) whether the regulation accomplishes the asserted goal, (2) whether "feasible" less restrictive alternatives are inadequate to accom-

court in *Quincy* utilized, but the court simply stopped after applying the *O'Brien* test.

B. Important or Substantial Governmental Interest

Regarding this element of the *O'Brien* test, the issue in *Quincy* was whether the must carry rules furthered the "important or substantial" governmental interest in preserving free local television broadcasting. A "substantial" interest might be more correctly termed a "non-negligible" interest.¹²⁴ This element can be compared to the "minimum rationality" standard applied to economic regulations challenged on equal protection grounds.¹²⁵ Professor Ely states that this element as used in *O'Brien* will rarely invalidate a regulation if the test is honestly applied, since all regulations to some extent serve the government's goals.¹²⁶ Thus, the "limited nature of judicial inquiry" has been noted regarding this element of the test.¹²⁷

The *Quincy* court had serious doubts about the governmental interest underlying the must carry rules. The court stated that the FCC had to make more than an unsubstantiated assertion of the importance of the governmental interest.¹²⁸ However, the court never criticized the FCC's assertion that in order to protect the public interest the FCC had to ensure that each community had free local programming. The court only attacked the *method* used by the FCC regarding the "threat" of cable to that public interest. The court even suggested that the must carry rules might be revised by the FCC to enable the rules to pass constitutional muster,¹²⁹ which indicated that the court had no real problem with the underlying governmental interest. What the court was essentially attacking was the FCC's lack of justification for the *method* that the FCC chose to protect the public interest.

Assuming that the governmental interest is valid, the court in *Quincy* had to analyze the rest of this element of the *O'Brien* test—whether the must carry rules *furthered* the FCC's interest in

plish that end, and (3) whether the speaker will have available adequate means to express the same views to roughly the same audience. *Id.* at 143.

124. Redish, *supra* note 122, at 143.

125. Ely, *supra* note 119, at 1486 & n.18.

126. *Id.*

127. Redish, *supra* note 122, at 148 n.205.

128. 768 F.2d at 1455 n.44.

129. *Id.* at 1463. See *supra* note 60 and accompanying text.

free local broadcasting. The rules were designed to ensure a guaranteed audience for local broadcast stations, including cable subscribers. The court spent much time explaining why the FCC's position must fail since the FCC had not in twenty years proved the "substantiality" of the interest served by the must carry rules. Clearly the rules *furthered* that interest, but the real question was whether the rules were just too broad.

C. *Least Restrictive Alternative*

The *Quincy* court held that the must carry rules were not the least restrictive alternative available to the FCC for furthering the FCC's substantial interest.¹³⁰ This holding is basically the major objection to the must carry rules, even assuming *arguendo* that all of the other *O'Brien* elements are met.

The *Quincy* court objected primarily to the lack of FCC inquiry into the *actual* impact of cable on local broadcasting. One less restrictive alternative to the rules would be to put the burden on the individual broadcasters to show specific future harm. The FCC, in its First Report and Order, distinguished *Carroll Broadcasting Co. v. FCC*,¹³¹ which allowed the FCC to consider a broadcast license applicant's potential economic harm to existing local service, as only applying to economic competition between broadcast stations. A cable system replacing local broadcast service would not "render the required service."¹³²

However, if the *Carroll* rationale is applied indirectly to the competition from cable systems, the individual local station ought to have the burden to show that (1) the competition from the cable system will force it to cease local programming, and (2) no other broadcast television station exists that renders the required local service. Certainly the cable system might provide local cablecasting and access channels, and to force the only "localcaster" off the air would probably require a large percentage of the viewing audience to be cable subscribers. However, the FCC would still have an interest in ensuring that the remaining nonsubscribers are served. Possibly in this case the FCC would then have the power to compel the cable system to carry the fledgling station if no other local broadcasters were present to provide the "required service." This alternative seems sufficiently narrow to meet the *O'Brien* standard.

130. 768 F.2d at 1462.

131. 258 F.2d 440 (D.C. Cir. 1958).

132. 38 F.C.C. at 701.

Clearly it is more sensible to put the burden to show harm on one of a few speakers that will be hurt rather than to unduly burden all speakers in another class based on a largely unproved and extremely speculative harm.

A test utilized by Judge Skelly Wright in applying the *Carroll* rationale in a case involving broadcasters could be adapted to this area of cable regulation.¹³³ The broadcaster must present specific factual data sufficient to support a *prima facie* case of derogation of public service. The evidence must raise issues of (1) whether market revenue potential will cause the broadcaster to suffer significant income loss, (2) whether such loss would compel the broadcaster to eliminate some or all public service programs, and (3) whether such loss of programs would not be offset by alternative programs of another broadcaster.¹³⁴

One less restrictive alternative to the present must carry rules is the adoption of more narrow must carry rules. However, any *per se* requirement that a cable system carry a certain number of local channels might be unconstitutional absent a showing that the local television service would be threatened without the carriage.

Another less restrictive alternative would be to require the cable system¹³⁵ to supply switching devices to all subscribers who request them, or for the FCC to require all television receivers to carry such devices. However, such a requirement may be unnecessary since viewers who want to see the deleted local station will spend the small amount for a switch, or simply disconnect the cable and hook up an antenna. Switching devices would be unnecessary for reception of stations on the UHF band since the coaxial cable attaches to the separate VHF antenna outlet.¹³⁶

The FCC has previously refused to rely on switching devices as an alternative method of ensuring the continued viability of local broadcasting.¹³⁷ Ironically, the FCC has more recently suggested the use of a switching device by cable subscribers as an alternative to expanding the must carry rules. The FCC in that decision refused to require cable systems to carry local subscrip-

133. *WLVA, Inc. v. FCC*, 459 F.2d 1286, 1297 (D.C. Cir. 1972).

134. *Id.* at 1297. The House of Representatives had a bill pending in 1982 which would have modified the carriage rules to have them apply only when a local station had a certain audience share. The bill, H.R. 5949, did not pass. *CABLESPEECH*, *supra* note 74, at 148 n.44.

135. By the FCC or by the franchising authority.

136. *CABLESPEECH*, *supra* note 74, at 144.

137. *See supra* text accompanying notes 87-89.

tion television broadcast stations.¹³⁸

The *Quincy* court correctly applied the least scrutinizing test to the must carry rules as its first inquiry. Since the must carry rules failed the test, the court did not need to apply a more scrutinizing first amendment test, under which the rules certainly would have failed.

D. Impact on Cable Systems

The elimination of the mandatory signals carriage rules will have the largest impact on "saturated" systems with small channel capacities.¹³⁹ Currently, 12.4 percent of cable subscribers are served by systems with twelve or fewer channels.¹⁴⁰ Such cable systems will not have to drop a popular nonmandatory station just to squeeze in a mandatory local station. Some markets have many more than twelve local signals that must be carried on a twelve channel cable system.¹⁴¹ The FCC will no longer need to require such "saturated" systems to spend huge amounts of money to rebuild their systems in order to increase channel capacity to the point that they can carry all mandatory signals.¹⁴²

The impact on larger, multitiered systems will be less, but not insignificant. The FCC has required that a cable system that desires to move a mandatory signal from the first tier to a second or third tier¹⁴³ must provide free converters to subscribers to allow viewing of the mandatory channel, at a great cost to the cable system.¹⁴⁴ Such a high cost seems unnecessary when a simple switching service would suffice.

However, technological advances could assist a saturated cable system in carrying more stations without expanding capacity. New

138. The FCC exempted cable systems from mandatory carriage of subscription television stations, which transmit scrambled signals. Signal Carriage Rules—STV, 77 F.C.C.2d 523, 528-29 (1980).

139. *I.e.*, those with twelve channels or slightly more.

140. *Quincy*, 768 F.2d at 1439 n.9. 38.7 percent of all cable systems have fewer than twenty channels. *Id.*

141. *Saturated Cable Systems*, *supra* note 29, at 711.

142. *See id.* at 710-11.

143. The first tier is a basic service, usually having all must carry stations, for which the subscriber may not need a converter box. The secondary tiers often require a converter box. Cable systems often lease these converters to their subscribers. *See, e.g.*, *Com-West, Inc.*, 95 F.C.C.2d 1219 (1984).

144. The cost to the Com-West cable system of providing the free converters would have been \$200,000. *Id.* at 1220.

bandwidth compression systems such as Comband allow the carriage of two video signals over one 6 MHz cable channel without material degradation. The FCC has approved such systems for use with must carry signals.¹⁴⁵ Comband could be used to effectively double a cable system's channel capacity, thus preventing the need for many saturated systems to rebuild their systems to expand capacity.

The end of the must carry rules will create the need for cable operators and local franchising authorities to make some choices. The cable system must decide whether to drop any or all of its must carry signals. Cable systems do not have to pay local stations in order to carry their signals.¹⁴⁶ However, the higher cost of other channels may be offset by the attraction of new subscribers. Another question for the cable system that wants to delete some local channels is whether to breach a franchise contract that requires the system to carry all local stations.¹⁴⁷

One impact of *Quincy* will certainly be the increase of revenues for cable operators. The losers may be the less popular stations. Such stations include those on the UHF band which due to their frequency allocations suffer from a picture quality that is equal to that of stations on VHF only when the UHF signal is on cable.¹⁴⁸

CONCLUSION

One of the last major FCC programming regulations of cable television was the must carry rules. The FCC adopted its regulatory policy regarding cable in order to preserve local broadcast programming by way of protecting local broadcasters. When cable developed as a viable medium, the FCC found that it no longer needed to regulate the number of distant signals that a cable system carried. Studies concluded that the original premises concerning the impact of cable on local programming were groundless. Somehow, in the wake of deregulation, the FCC forgot about the

145. General Electric Co. Commercial Electronics Products Dept., No. CSR-2826 (F.C.C. May 31, 1985) (available on Jan. 31, 1986, on LEXIS, Fedcom library, FCC file).

146. Cable systems must pay for importing distant stations. Price & Nadel, "Must Carry:" *The End: Ways to Cope With Change*, *The Nat'l L.J.*, Sept. 30, 1985, at 15, col. 2.

147. See, e.g., *Cox Cable New Orleans, Inc. v. City of New Orleans*, 594 F. Supp. 1452, 1461 n.4 (E.D. La. 1984).

148. Price & Nadel, *supra* note 146, at 50, col. 1.

application of its studies to the must carry rules.

Even though supported by a valid governmental interest of ensuring free local broadcast programming, the must carry rules were fatally overbroad from the start. The FCC started out on the right foot in 1958 by not promulgating broad cable regulations and by deciding to review the "threat" of cable on a case by case basis.

The *Quincy* court did not suggest any alternatives to the must carry rules. In 1965, the FCC dismissed applying the *Carroll* rationale directly to the substitution of a cable service for local broadcast service. However, the FCC could have applied the *Carroll* rationale indirectly to petitions by broadcasters who could show that a cable system's presence would *actually* eradicate all free local programming in the community. Whether the cable system could provide the local service itself would be irrelevant to the inquiry. However, the chance of total displacement of all free local service in a community by a cable system seems to be slim at best.

The most apparent effect of *Quincy* is the potential financial gain to both cable operators and cable programmers. The rules were costly to cable systems, especially "saturated" ones. Cable programmers will be able to sell more of their services to more cable systems.

Have the "listeners" really been harmed by guaranteeing that the "speakers" have first amendment rights to carry the programs of their choice? Since television viewers can with relative ease make their own choice whether to watch either cable or broadcast television, the *Quincy* decision greatly broadens cable operators' constitutional rights while not substantially affecting those of the viewing public.

Robert B. Hobbs, Jr.