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In *Quincy Cable TV, Inc. v. FCC*,[1] the Court of Appeals for the District of Columbia Circuit found that the FCC's "must carry" rules violated the first amendment rights of cable operators and programmers.[2] The must carry rules require a cable operator to carry in its cable package local broadcast stations "significantly viewed in the community."[3] The court concluded that the rules did not necessarily further a substantial governmental interest and that, even if they did further such an interest, they were not the least restrictive means of achieving that objective.

In ruling that the must carry rules violated the first amendment, the *Quincy* court also raised serious doubts as to the constitutionality of the mandatory access requirements of the Cable Communications Policy Act of 1984 (Cable Act).[4] These mandatory access requirements require cable operators to reserve cable channels for public, educational, and governmental use.[5] Congress passed the Act to ensure that cable systems are responsive to the needs and interests of the local community, and to guarantee that cable communications provide the widest possible diversity of information sources and services to the public.[6]

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1 768 F.2d 1434 (D.C. Cir. 1985).

2 *Id.* at 1459.

3 *See* 47 C.F.R. §§ 76.57-76.61 (1984).

4 47 U.S.C.A. §§ 521-559 (West Supp. 1985).

5 The FCC's must carry rules at issue in *Quincy* required a cable system to carry in its cable package all broadcast stations "significantly viewed" in the community which the system serves. 47 C.F.R. § 76.54(a) (1984). Such stations are determined under a complex formula. *Id.*

In contrast, the mandatory access requirements of the Cable Act permit a local franchising authority to require a cable operator to designate certain channels for public, educational, or governmental use. 47 U.S.C.A. § 531 (West Supp. 1985). The Cable Act also requires a cable operator with 36 or more channels to designate certain channels for leased access by persons unaffiliated with the operator. *Id.* § 532.

The must carry rules and the mandatory access requirements are similar because both allow the government— federal in the case of the must carry rules and § 532, local in the case of § 531—to require a cable operator to carry a channel in his package which he might not otherwise carry.

6 *See* 47 U.S.C.A. §§ 521(2), 521(4) (West Supp. 1985). The Cable Act also seeks to achieve other objectives. These objectives include establishing a national policy concerning cable communications, establishing uniform local franchising procedures, establishing federal, state and local regulatory guidelines, establishing an orderly and fair franchise renewal procedure, and promoting competition within the cable communications industry. *See id.* § 521. *See also* H.R. REP. No. 934, 98th Cong., 2d Sess. 19, 20 (1984).

Quincy suggests that the mandatory access provisions of the Cable Act unconstitutionally dilute cable operators' first amendment rights. Because Congress has not found that broadcasters or cable operators do not already fulfill the objectives outlined by the Cable Act, it is far from clear that the mandatory access provisions are the least restrictive means of achieving a substantial governmental interest, or that they in fact further such an interest.

This note examines the constitutionality of the Cable Act in light of *Quincy*. Part I reviews the facts and holding of *Quincy*. Part II discusses the mandatory access provisions of the Cable Act. Part III analyzes the first amendment standards that apply to the print and broadcast media and describes how the first amendment standard for the Cable Act should differ. Finally, Part IV concludes that the mandatory access provisions, like the must carry rules, violate cable operators' first amendment rights because they are not narrowly tailored to achieve a substantial governmental interest.

I. *Quincy Cable TV, Inc. v. FCC*

In *Quincy Cable TV, Inc. v. FCC*,[7] the court examined the constitutionality of the FCC's must carry rules, under which cable operators were obligated to carry in their cable packages local broadcast stations "significantly viewed in the community."[8] Congress intended the must carry rules to assure that cable TV would not undermine the financial viability of free, community-oriented television.[9] In promulgating the rules, the Commission concluded that the public benefits more by receiving local broadcast service than by receiving cable programming from distant locales.[10]

The petitioner in *Quincy* was a twelve-channel cable system located at a point equidistant from Seattle and Spokane, Washington.[11] Under the must carry rules, Quincy Cable was required to carry all of the broadcast stations significantly viewed in the community, even though the major networks were significantly viewed in both Spokane and Seattle on different affiliate stations. This would have required Quincy Cable to carry two ABC, two NBC, and two CBS stations, occupying a total of six channels.[12] Quincy Cable argued that compliance with the rules would leave an insufficient number of channels for the many cable movie, entertainment,

7 768 F.2d 1434 (D.C. Cir. 1985).

8 *See* text accompanying notes 3 and 5 *supra*.

9 *See* Rules re Microwave-Served CATV, First Report and Order in Docket No. 14895, 38 F.C.C. 683, 700 (1965).

10 *Id.*

11 768 F.2d at 1446.

12 *Id.*

and sports services available.[13] Quincy Cable found this particularly unjust because its subscribers could receive the Spokane stations' over-the-air broadcast signals without the benefit of cable.[14] Quincy Cable asked the FCC for a waiver of the rules. The Commission denied the request and fined Quincy Cable $5000 for failing to comply with the must carry rules.[15]

Quincy Cable appealed the FCC's ruling to the Court of Appeals for the District of Columbia Circuit. The court unanimously reversed the Commission's ruling, holding that the must carry rules violated Quincy Cable's first amendment rights.[16]

In determining the proper first amendment standard to apply to the must carry rules, the court concluded that the first amendment standard for cable differed from the standard applicable to the broadcast media.[17] Although the scarcity rationale often justifies government regulation of the broadcast media,[18] the court noted that "differences in the characteristics of news media justify differences in the first amendment standards applied to them."[19] Reasoning that cable does not utilize the public airwaves to transmit its messages to viewers,[20] the court concluded that the scarcity

13 Quincy polled its subscribers and determined that they would prefer to view three specialized cable programs rather than the three Spokane network affiliates. *Id.* at 1447.

14 *Id.* at 1446.

15 *Id.* at 1447 (citing Quincy Cable TV, Inc., 89 F.C.C.2d 1128 (1982)).

16 *Quincy*, 768 F.2d at 1459. In a companion case, Turner Broadcast System, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), the District of Columbia Circuit reached the same result for cable *programmers*. Turner Broadcasting System, Inc. (TBS) filed a petition with the FCC to institute rulemaking procedures to consider deleting the must carry rules. TBS argued that as a cable *programmer*, with its holdings including Cable News Network (CNN), CNN Headline News, and WTBS, it is in the business of selling a programming package to cable *operators*, who actually deliver the cable signal to subscribing households. Where the must carry rules require an operator to allocate a significant portion of its channels to must carry signals, the rules operate to deprive programmers of opportunities to sell their services. *Id.* at 1445. The court recognized that TBS had standing to address this issue because numerous petitions for waiver of the must carry rules from cable operators had stated that the rules precluded them from carrying TBS programming. *Id.* at 1445 n.24.

17 768 F.2d at 1450.

18 The scarcity rationale was first discussed in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Under the scarcity rationale, the government may regulate the broadcast industry to a greater extent than the print media because of physical limitations on the number of broadcasters who may broadcast without interfering with one another. The electromagnetic spectrum is a scarce physical resource which is "simply not large enough to accommodate everybody." National Broadcasting Co. v. United States, 319 U.S. 190, 212-13 (1943). *See* notes 66-87 *infra* and accompanying text.

19 *Quincy*, 768 F.2d at 1448 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969)).

20 In a cable system, television sets receive electrical impulses not through the airwaves, but rather through coaxial cable. *See* M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 630 (2d ed. 1982). In many respects cable systems resemble telephone systems, where miles of cable extend underground or on poles throughout a municipality and where individual homes desiring service are accordingly wired off of the main line. *See* White v. City of

rationale did not apply to the cable industry.[21]

The court next considered whether it could characterize the rules as an incidental burden on speech, thereby justifying analysis under *United States v. O'Brien*.[22] *O'Brien* imposes two requirements on incidental restrictions on speech: first, "the restrictions must further an important or substantial governmental interest,"[23] and second, the restrictions may "be no greater than is essential to the furtherance of that interest."[24] The court doubted that the must carry rules were an incidental burden on speech, since the rules strongly burdened both cable programmers, who were bumped off of cable systems, and cable operators, who were required to carry certain speakers regardless of content or appropriateness for the community.[25] Because it was not convinced that the must carry rules were an incidental burden, the court suggested that *O'Brien* may be too permissive a standard.[26] Nevertheless, the court found that the must carry rules failed to satisfy even the lenient *O'Brien* standard.

Addressing the substantiality of the governmental interest, the

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Ann Arbor, 406 Mich. 554, 281 N.W.2d 283 (1979); Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001, 1003 (1981).

The "head end" of the cable system is, in simple terms, a "super antenna" capable of receiving broadcast signals of broadcasters out of range of conventional home television antennae. This "super antenna" also receives cable subscription services broadcast via satellite or microwave relays. In addition, cable systems frequently are capable of providing their own programming, and in some cases they are capable of two-way communication. *See* STORER COMMUNICATIONS, BROADCASTING/CABLECASTING YEARBOOK D-1 (1983). *See also* TELEVISION AND CABLE FACTBOOK, CABLE AND SERVICES VOLUME (1984).

Because the costs of establishing a cable system are relatively high, municipalities usually grant a single company exclusive franchise rights to service that municipality for a set time; one commentator concluded that 99.9% of cable operators have exclusive franchise rights. Kreiss, *supra*, at 1005. The cable operators who receive the exclusive franchise thus enjoy monopoly benefits in their respective communities. *Id.*

21 *Quincy*, 768 F.2d at 1449. The *Quincy* court noted that in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's rules regulating indecent, but not obscene, radio broadcasts. The regulation was justified because of the pervasiveness of the broadcast industry and because the broadcast media is uniquely accessible to children. *Id.* at 748-50. The *Quincy* court declined to follow *Pacifica* as an alternate basis for regulating the cable industry because cable subscribers affirmatively invite cable into their homes. In addition, subscribers can purchase lock boxes to regulate children's viewing habits. 768 F.2d at 1448-49 n.31.

22 391 U.S. 367 (1968).

23 *Id.* at 377.

24 *Id.*

25 768 F.2d at 1451-52.

26 *Id.* at 1450-54. The court even suggested that the appropriate standard might be found in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Tornillo*, the Supreme Court held that the government may not force a newspaper editor to print that which he otherwise would not. *Id.* at 258. *See* notes 58-65 *infra* and accompanying text. The *Quincy* court, however, felt it unnecessary to apply *Tornillo* to the cable industry because the restrictions imposed by the must carry rules failed under the more permissive *O'Brien* test. 768 F.2d at 1453-54.

court reasoned that although the FCC's objective—preserving free, local television—may be legitimate, the Commission had produced no evidence to suggest that cable television posed any threat to local broadcasting.[27] The FCC admitted that the perceived threat was based on a "more or less intuitive model."[28] The court noted that the Commission had made no attempt to study "any of the admittedly speculative links in the chain of reasoning advanced in support of the rules."[29] Because the Commission had not "put itself in a position to know"[30] whether the perceived threat was in fact real, it could not know whether it was furthering an "important or substantial governmental interest."[31]

Though this conclusion sufficed to invalidate the must carry rules, the court continued with its analysis. The court found that, even if the FCC could show that the must carry rules furthered an important or substantial governmental interest, those rules failed the second component of the *O'Brien* test.[32] Although seeking to protect local broadcasting,[33] the rules were "grossly overinclusive"[34] because they "indiscriminately protect[ed] each and every local broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator."[35]

The court also observed that the rules did not reflect the way in which cable systems actually affect the economic viability of different types of broadcasters.[36] The FCC was aware, for example, that VHF stations are relatively immune from competition from cable;[37] the must carry rules were pointless as applied to VHF because viewers watched those stations regardless of whether they subscribed to

27 768 F.2d at 1456. Indeed, some FCC studies suggest that cable television poses no threat at all to broadcast television. For example, in Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979) [hereinafter Economic Inquiry Report], the Commission stated that "[u]pon examination of the economic evidence, we conclude that competition from cable television does not pose a significant threat to conventional television or to our overall broadcast policies." *Id.* at 661. In *Quincy*, the FCC contended that its conclusion in the Economic Inquiry Report assumed that the must carry rules would remain intact. 768 F.2d at 1456. Although the court doubted this explanation, it concluded that even if the FCC had not repudiated the underlying assumption of the must carry rules in the Economic Inquiry Report, neither had it proven that cable threatened local broadcast stations. *Id.* at 1457.

28 768 F.2d at 1457 (quoting Inquiry Into Economic Relationship Between Television Broadcasting and Cable Television, 65 F.C.C.2d 914 (1977)).

29 768 F.2d at 1457.

30 *Id.* (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir. 1977)).

31 768 F.2d at 1459.

32 *Id.* at 1460.

33 *Id.* (citing Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir. 1977)).

34 768 F.2d at 1460.

35 *Id.* (footnote omitted).

36 *Id.* at 1462 (citing Economic Inquiry Report, *supra* note 27, at 639).

37 768 F.2d at 1462.

cable. Furthermore, the rules did not distinguish between 100-channel systems and twelve-channel systems,[38] or between those cable systems saturated with must carry signals and those not saturated.[39] Because the rules were fatally overbroad, they failed the second component of the *O'Brien* analysis and were therefore unconstitutional under the first amendment.[40]

II. The Cable Communications Policy Act of 1984

Congress enacted the Communications Act of 1934,[41] which provides the overall framework for regulation of the communications industry, long before the birth of cable television. As a result, no national policy existed to guide the early development of the cable industry. Congress enacted the Cable Communications Policy Act of 1984 to provide national guidance in the area of cable regulation.[42] The two specific objectives of the Cable Act are to ensure that cable systems are responsive to the needs and interests of local communities,[43] and to make certain that cable communications provide the widest possible diversity of information sources and services to the public.[44] To achieve these objectives, Congress enacted sections 531[45] and 532.[46] Section 531 permits local franchising authorities to require franchisees to designate certain channels for public, educational, or governmental uses. Section 532 requires a cable operator to designate certain channels for use by persons unaffiliated with the cable operator.[47] Like the FCC's must carry rules, the mandatory access provisions force a cable operator to carry a channel in his package which he might not other-

38 *Id.* at 1462 n.55. Presumably a twelve-channel system operator would have his freedom of expression impinged upon more than would a 100-channel system operator, because a greater percentage of his channels would be affected.

39 *Id.* For example, Quincy Cable was required to carry at least six channels; another system may have as few as two required channels.

40 *Id.* at 1462.

41 47 U.S.C.A. §§ 151-609 (West Supp. 1985).

42 *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 19 (1984).

43 47 U.S.C.A. § 521(2) (West Supp. 1985).

44 *Id.* § 521(4). *See also* note 6 *supra*.

45 47 U.S.C.A. § 531 (West Supp. 1985).

46 *Id.* § 532.

47 The idea of public access to cable television apparently developed as part of a battle for cable franchise rights in the Borough of Manhattan in New York City in the mid-1960s. Potential franchisees offered a "soap box" channel on which anyone could appear to present their ideas. The concept caught on; local and federal policy makers, concerned over the monopolization of the television industry by a select few, saw in cable a vehicle with which to counteract the monopolies. *See* 2 C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW ¶ 15.01 (1985). Section 531 is Congress' codification of this public access objective.

Section 532 complements § 531 by providing access for commercial stations to cable television systems. Unlike § 531, § 532 is an affirmative duty imposed on cable operators; Congress, perhaps bowing to a powerful lobbying effort, cut out all local control over leased access channels.

wise carry.[48] In *FCC v. Midwest Video Corp.*[49] (*Midwest Video II*), the United States Supreme Court, affirming the Court of Appeals for the Eighth Circuit, invalidated similar mandatory access rules. At issue were the FCC's Cable Access Rules,[50] which required cable systems with a minimum number of subscribers to dedicate a certain number of channels for public, educational, local governmental, and leased access.[51] The Court based its holding solely on the FCC's lack of authority to promulgate such rules.[52] Now that Congress has passed the Cable Act, the FCC's jurisdiction is not an issue. The constitutionality of the access rules, however, remains very much in doubt.

The Eighth Circuit's opinion in *Midwest Video II* suggested that the FCC's access requirements violated cable operators' first amendment rights.[53] This opinion sparked an intense debate over the constitutionality of the Cable Act. Some argue that mandatory access rules impermissibly infringe upon the first amendment rights of cable operators by depriving operators of editorial control over a certain number of their channels.[54] Others conclude that the right of the public to receive diverse viewpoints ranks ahead of the cable operators' first amendment right to control content.[55] Whether the Cable Act survives constitutional scrutiny depends to a great extent on the first amendment standard which courts will apply to the access rules. Although the *Quincy* court applied the *O'Brien* test to the

48 *See* note 5 *supra*.

49 440 U.S. 689 (1979).

50 47 C.F.R. § 76.254(b) (1977).

51 *Id. See* Cable TV Capacity and Access Requirements, 59 F.C.C.2d 294 (1976).

52 440 U.S. at 696, 708-09. The Court did not address the first amendment issue, except to note that it was not frivolous. *Id.* at 709 n.19.

53 571 F.2d 1025, 1056-57 (1978). The court stated that it had "seen and heard nothing [in the case] to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access." *Id.* Thus, the court applied Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), to conclude that the FCC may not, consistently with the first amendment, control cable operators' editorial discretion.

54 *See* Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979). *See generally* Kreiss, *supra* note 20, at 1010 n. 60; *Home Box Office*, 567 F.2d at 46. These commentators rely on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which a newspaper right-of-reply statute was held unconstitutional. Because government may not require newspapers to publish something they otherwise would not publish, *see* notes 58-65 *infra* and accompanying text, it is argued that government may not require cable operators to carry something they otherwise would not carry. Whether the branch of government imposing the requirement is local (§ 531) or national (§ 532) is immaterial. *See* Wellington, *supra*, at 1109-11; Kreiss, *supra* note 20, at 1010 n.60; *Home Box Office*, 567 F.2d at 46.

55 *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981); Berkshire Cablevision, Inc. v. Burke, 571 F. Supp. 976, 985 (D.R.I. 1983); H.R. REP. No. 934, 98th Cong., 2d Sess. 30-36 (1984). *See generally* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); *Red Lion*, 395 U.S. at 390; Associated Press v. United States, 326 U.S. 1, 20 (1945).

FCC's must carry rules,[56] it also suggested that *O'Brien* may be too lenient.[57] In light of the uncertainty surrounding the appropriate standard for cable, a discussion concerning the standards courts have applied to the print and broadcast media is necessary to determine their applicability to the Cable Act.

III. Finding an Appropriate First Amendment Standard for Cable Television

A. *Access to Print Media*

In *Miami Herald Publishing Co. v. Tornillo*,[58] the Supreme Court examined a Florida right-of-reply statute which applied to newspapers.[59] The respondent, a candidate for political office, demanded that the petitioner publish respondent's response to two critical editorials, as the statute required.[60] The petitioner refused this demand, claiming that the statute violated its first amendment rights.[61] The Supreme Court agreed with the petitioner, holding that the government may not compel a newspaper to publish that which "reason" tells it not to publish.[62]

Writing for the Court, Chief Justice Burger noted a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[63] The Chief Justice expressed concern over the effects of newspaper monopolization in a particular market.[64] He nevertheless refused to sanction a government-induced right of access to the print media. He concluded that although a responsible press is a desirable goal, "press responsibility is not mandated by the constitution, and like many other virtues it cannot be legislated."[65]

B. *Access to Broadcast Media*

Broadcasters traditionally have received special treatment under the first amendment. In 1934, Congress enacted the Communications Act, establishing the Federal Communications Com-

56 *Quincy*, 768 F.2d at 1450-54. *See* notes 22-26 *supra* and accompanying text. *Quincy* is not the only court to apply the *O'Brien* test to cable television. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (invalidating FCC regulations limiting the program fare cablecasters and subscription broadcast television stations may sell to the public).

57 *Quincy*, 768 F.2d at 1453-54. *See* notes 25-26 *supra* and accompanying text.

58 418 U.S. 241 (1974).

59 *Id.* at 258.

60 *Id.* at 243-44.

61 *Id.* at 245.

62 *Id.* at 256, 258.

63 *Id.* at 252 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

64 418 U.S. at 241-42.

65 *Id.* at 256.

mission (FCC).[66] Congress authorized the FCC to regulate broadcasting by issuing licenses to broadcasters serving the "public convenience, interest, or necessity."[67] In 1943, the Supreme Court upheld the FCC's licensing authority in *National Broadcasting Co. v. United States*.[68] The Court held that the scarcity of radio frequencies necessitated government regulation.[69] The majority opinion explained that the electromagnetic spectrum was simply too small to accommodate all potential users, and so the number of users who could operate without interfering with one another was limited.[70] The licensing scheme was therefore necessary to avoid confusion on the airwaves.[71]

The Supreme Court further limited broadcasters' first amendment rights in *Red Lion Broadcasting Co. v. FCC*[72] by upholding the "fairness doctrine" against constitutional attack.[73] Under the fairness doctrine, broadcasters are required to present fair coverage of both sides of important public issues. Although the Court recognized that broadcasters have a first amendment interest in retaining editorial control over the programs they broadcast,[74] it held that the unique characteristics of the broadcast industry justify limiting that interest.[75] Specifically, the Court observed that the scarcity of public airwaves[76] prohibits all who wish to broadcast from doing so.[77] The Court concluded that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[78] The fairness doctrine properly compensated for the lack of public access to the airwaves by requiring broadcasters to make airtime available to members of the public.[79]

Red Lion did not sanction a general right of access to the nation's airwaves, however. In *Columbia Broadcast System v. Democratic*

66 Communications Act of 1934, 47 U.S.C.A. §§ 151-609 (West Supp. 1985).
67 *Id.* § 307(a).
68 319 U.S. 190 (1943).
69 *Id.* at 227.
70 *Id.* at 213.
71 *Id.* at 226.
72 395 U.S. 367 (1969).
73 At the time the fairness doctrine consisted of two parts: 47 U.S.C. § 315(a) required a broadcast station which had made air time available to any legally qualified candidate for political office—a defined term—to provide equal opportunities to all other legally qualified candidates seeking the same office; 47 C.F.R. § 73.1920 (1969) provided that where a broadcaster assaulted the integrity, character, or honesty of any person during the presentation of a controversial issue, the broadcaster had to offer that person a reasonable opportunity to reply.
74 *Id.* at 386.
75 *Id.* at 390-92.
76 *Id.* at 390; *see* note 18 *supra*.
77 395 U.S. at 388.
78 *Id.* at 390.
79 *Id.* at 391-92.

National Committee,[80] the Supreme Court held that Congress did not impose a "common carrier" right of access for all persons wishing to speak out on public issues.[81] Although the fairness doctrine[82] required that broadcasters provide a balanced presentation of information on issues of public importance,[83] the Court concluded that the broadcaster must retain editorial control over the allocation of time for differing viewpoints.[84] A government-required right of access could undermine the very goals sought by the fairness doctrine by permitting the wealthy to monopolize the airwaves.[85] The Court also feared that an absolute right of access would inevitably implicate the FCC in a case-by-case determination of who should be heard and when. This would result in even greater government involvement in broadcast operations.[86] Accordingly, the Court found no general right of access to the airwaves emanating from the first amendment.[87]

C. *Cable Regulation*

Because cable television has certain characteristics which resemble both the print and broadcast media, courts and commentators have not reached a consensus on the appropriate first amendment standard for cable. Some cases suggest that cable television more closely resembles the broadcast industry.[88] These courts point to heavy government regulation of cable operation and in programming content,[89] as well as the cable industry's use of

80 412 U.S. 94 (1973).

81 *Id.* at 110.

82 *See* notes 73-74 *supra* and accompanying text.

83 412 U.S. at 110-11.

84 *Id.*

85 *Id.* at 121-25.

86 *Id.* at 128-30.

87 *Id.* at 131.

88 *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983).

89 Government regulation of cable has followed several distinct phases. At first, the FCC determined that the Communications Act of 1934 limited its jurisdiction to "common carriers," *see* Industrial Radiolocation Service, 5 F.C.C.2d 197, 202 (1966), and broadcasters. Because cable systems fall into neither category, the FCC determined that it had no regulatory authority over cable. *See* CATV and TV Repeater Service, 26 F.C.C. 403, 427-28 (1959).

Soon, however, the Commission began to assert jurisdiction over cable, reasoning that regulation was justified because cable systems compete with broadcasters for audiences. In United States v. Southwestern Cable, 392 U.S. 157 (1968), the Supreme Court agreed that the FCC could regulate the cable industry concerning the retransmission of distant broadcast signals through cable systems, because such regulations were "reasonably ancillary" to the Commission's broadcast regulatory duties. *Id.* at 178. And in United States v. Midwest Video Corp., 406 U.S. 649 (1972) (*Midwest Video I*), a plurality ruled that the FCC could

public facilities such as public streets or utility poles.[90] Other courts, citing the inapplicability of the scarcity rationale, have ruled that cable more closely resembles the print media.[91]

Although it is clear that cable is a distinct medium, cable systems more closely resemble the print than the broadcast media. The scarcity rationale, although justifying government regulation of the broadcast industry, is wholly inapplicable to cable.[92] Similar to newspapers placing their vending boxes on public streets, cable operators string cables on public utility poles. The government may designate where a newspaper may place its box; it may not, however, regulate the content of the newspaper. The other argument commonly advanced to link cable with the broadcast media—that cable has traditionally been regulated—is circular; cable is very young, and the Supreme Court has yet to rule on the issue.

Cable, however, is not identical to the print media. In many geographic areas, cable is the only meaningful way in which viewers can receive television programming; numerous newspapers, by contrast, are generally available in every community. In addition, access to cable television is impossible for those whom the cable

require cable systems to have facilities available for local production and presentation of programs. *Id.* at 664.

In Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (*Midwest Video II*), an appellate court expressly ruled on the first amendment rights of cable operators for the first time. At issue were the FCC Cable Access Rules, 47 C.F.R. § 76.254(b) (1977), which required cable systems with a minimum number of subscribers to dedicate at least four channels for public, educational, local governmental, and leased access. *Id. See* Cable TV Capacity and Access Requirements, 59 F.C.C.2d 294 (1976). Because the rules were not "reasonably ancillary" to the FCC's jurisdiction over broadcasting, the Eighth Circuit held that the FCC lacked authority to promulgate the access rules. 571 F.2d at 1050-52. The court also addressed the "first amendment implications of a Commission effort to enforce unlimited public access requirements." *See* note 53 *supra* and accompanying text.

Midwest Video II was affirmed solely on the grounds that the rules were beyond the authority of the FCC. 440 U.S. 689 (1979). The Court invited Congress to remedy this problem with appropriate legislation. *Id.* at 709. The Court did not address the first amendment issue, except to note that "it is not frivolous." *Id. See* notes 49-52 *supra* and accompanying text.

90 *See* Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("Cable television involves . . . interference with other users of telephone poles and underground ducts."); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983).

91 *See Midwest Video II*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977); *Quincy*, 768 F.2d at 1450.

92 Another argument is that natural monopoly characteristics of cable create economic constraints on competition comparable to the physical constraints imposed by the limited size of the electromagnetic spectrum. *See* Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); *Berkshire*, 571 F. Supp. at 985-88. This economic scarcity argument assumes that cable operators can charge monopolistic rates, which is unproven. Indeed, most franchising authorities prescribe the rates operators may charge. Moreover, the economic scarcity argument should apply with equal vigor to the print media; yet, no court has ever attempted to do so.

operator chooses to ignore;[93] with newspapers, a person may distribute leaflets or even purchase advertising space in a newspaper. The *Quincy* court elected to apply the *O'Brien* test, which allows minimal government regulation of speech if the restraint is merely incidental. *O'Brien*, as an intermediate standard, furnishes a fitting first amendment framework which recognizes the unique nature of cable.

IV. *Quincy's* Impact on the Cable Act

O'Brien permits regulation of speech only if the regulation in question is "incidental" in nature. However, the court in *Home Box Office, Inc. v. FCC*[94] noted that:

> regulations intended to curtail expression—either directly by banning speech because of a harm thought to stem from its communicative or persuasive effect on its intended audience . . . *or indirectly by favoring certain classes of speakers over others* . . . can be justified (if at all) only under categorization doctrines such as obscenity, "fighting words," or "clear and present danger."[95]

Similarly, the Supreme Court has stated 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."[96]

It appears that the access rules favor one class of speakers—local public, governmental, and educational entities—over other speakers—cable programmers who are crowded off of a cable system. Arguably, the access provisions further the first amendment rights of the public, which are "paramount" in the first amendment pecking order.[97] Because cable operators retain control over the majority of cable channels, the restraint on speech is arguably incidental to the goal of providing the public with diversity of information and opportunities for access.[98]

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93 *See Berkshire*, 571 F. Supp at 986. *See also* note 20 *supra*.

94 567 F.2d 9 (D.C. Cir. 1977).

95 *Id.* at 47-48 (emphasis added).

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

97 *See Red Lion*, 395 U.S. at 390.

98 The degree to which this is true depends upon the channel capacity of individual cable systems. In *Quincy*, the District of Columbia Circuit noted that 38.7% of all cable systems have fewer than 20 channels, and that 12.4% of all cable subscribers receive 12 or fewer channels. *Quincy*, 768 F.2d at 1434 (citing TELEVISION AND CABLE FACTBOOK, CABLE & SERVICES VOLUME 1726 (1984)). The potential for more than an "incidental" restriction increases as the number of unrestricted channels decreases. The *Quincy* court suggested that this created a problem with the must carry rules: "Especially troubling is that the rules . . . [do not] distinguish between systems that are saturated with must-carry signals and those that are not." 768 F.2d at 1462 n.55. The *Quincy* court, however, did suggest that the mandatory access rules are incidental because, unlike the must carry rules, they carry the public's first amendment right to receive diverse viewpoints. *Id.* at 1452-53.

Assuming that the access provisions are merely incidental restrictions, the *O'Brien* test can be applied. Under this test, the restrictions must further an important or substantial governmental interest, and the restrictions cannot be greater than is essential to further that interest.

Congress set two goals for the Cable Act: assuring that cable systems are responsive to the communities they serve, and assuring an adequate diversity of information sources and services.[99] Unlike the must carry rules,[100] the access provisions are intended to serve a countervailing first amendment interest by providing a forum for public, educational, or government entities.[101] The objective is to serve other first amendment values, arguably an "important or substantial" governmental interest.[102]

Although the goals of the Cable Act are important or substantial governmental interests, the access provisions do not necessarily further these interests. The Supreme Court has stated that a court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."[103] In other words, courts will need to see some evidence which shows that the statutes actually further an important governmental interest. Congress has made no finding that existing cable or broadcast outlets do not already meet the objectives of the Cable Act. Because Congress has not shown that regulation of cable is necessary to protect the public's first amendment rights, it cannot show that the access provisions further the objective of eliminating this fanciful threat.

A similar argument applies to the second *O'Brien* requirement that the restrictions achieve the governmental objective in the least restrictive manner. Sections 531 and 532 apply to cable operators regardless of whether the Cable Act objectives are already met. Further, Congress discounted the diversity and access opportunities available through local broadcast stations, apparently because it assumed that cable displaces these stations. The FCC, however, proved this assumption false.[104] Because Congress has not shown that all cable markets suffer from insufficient diversity and access, the access provisions are not the least restrictive means available to achieve the governmental interest. They thus fail the second prong of *O'Brien*.

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99 *See* notes 5-6 *supra* and accompanying text.

100 *See* note 5 *supra* and accompanying text.

101 768 F.2d at 1452-53.

102 *Id.*

103 Members of City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2128 n.22 (1984).

104 *See* notes 36-39 *supra* and accompanying text.

As the foregoing discussion suggests, Congress has not "put itself in a position to know" whether the access rules further an important governmental interest and are no more restrictive than essential to achieve that interest. The access provisions do not meet either prong of the *O'Brien* test.

V. Conclusion

In *Quincy*, the Court of Appeals for the District of Columbia Circuit ruled that the FCC's must carry rules violated the first amendment rights of cable operators and programmers. The court applied the test applied in *United States v. O'Brien* to conclude that the must carry rules were not the least restrictive means available to further an important governmental interest. The objectives of the Cable Communications Policy Act of 1984 are similar to those of the must carry rules. Because *Quincy* invalidated the must carry rules, the Cable Act may likewise be unconstitutional. It thus becomes critical to find an applicable first amendment standard for cable.

The print and broadcast media have traditionally received different levels of first amendment protection. The print media enjoys greater first amendment protection than does the broadcast media. Because cable more closely resembles the print media, it should not be regulated as heavily as the broadcast media. Cable is sufficiently distinct from print, however, that it cannot be as free from government regulation. *O'Brien* furnishes a fitting first amendment framework for cable. Using this standard, the Cable Act does not satisfy either prong of the *O'Brien* test.[105]

Congress, in enacting the Cable Act, acted before it had adequately studied the local effects of cable television. It has thus "failed to put itself in a position to know" whether there are any existing problems needing redress. Until it does so, the Cable Act appears to violate the first amendment rights of cable operators and programmers.

Mark J. Bernet

105 Congress could more narrowly tailor the access provisions by requiring the FCC to monitor local broadcast stations for both diversity and access opportunities. Where the level of such broadcasting falls below a defined amount, the access provisions would require local cable operators to devote enough channel space to achieve that amount. Where, however, the diversity and access opportunities meet the defined goal, there would be no need for the access provisions. 768 F.2d at 1456-58. *See also* Inquiry into the General Fairness Doctrine Obligation of Broadcast Licensees, 49 Fed. Reg. 20,317, 20,323-25 (May 14, 1984) (to be codified at 47 C.F.R. § 73.1910).