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Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation

Monroe Price
University of Pennsylvania, monroe.price@gmail.com

Donald W. Hawthorne
Yeshiva University

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Saving Public Television: The Remand of *Turner Broadcasting* and the Future of Cable Regulation†

by
MONROE E. PRICE*
and
DONALD W. HAWTHORNE**

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* Sadie and Joseph Danciger Professor of Law and Director, Squadron Program on Law, Media and Society, Benjamin N. Cardozo School of Law, Yeshiva University.

** Adjunct Associate Professor of Law, Benjamin N. Cardozo School of Law, and Associate, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York.

Introduction

Turner Broadcasting System, Inc. v. FCC,[1] the most important Supreme Court case in a generation concerning the regulation of the electronic media,[2] was revolutionary, but not in the way many observers expected. Those scholars, including the authors of this Article, who thought that the case would provide a re-examination of fundamental First Amendment doctrine were sadly mistaken. The case, deciding the constitutionality of the so-called "must-carry rules,"[3] statutory provisions that require cable operators to carry certain commercial and noncommercial broadcasters, was much heralded for its potential for a breakthrough reconceptualization of First Amendment doctrine. But traditional First Amendment theory emerged from the Court's opinion largely unscathed and unexamined. What was radically reconsidered, recast, and even distorted were historical facts and, with them, the traditional relationship between government and the electronic media. The opportunity to reconsider the relationship between Congress and the organization and distribution of information in American society was lost.

We have argued, prior to the *Turner Broadcasting* decision, what seems to us the simple proposition: Congress ought to have a greater role in regulating broadcast signal carriage where it has defined suitable public goals—such as those relating to education, culture, or public interest responsibilities—than where it has not.[4] Saving "free television," a purpose attractive to the Supreme Court and found to be such an appropriate goal, seems to us a relatively empty category, precisely because it eschews considerations relating to substance (or content, to use the First Amendment doctrinal word). We find a more weighty and constitutionally defensible goal in the preservation of noncommercial broadcasting, a purpose reflected in Congress' enactment of a must-carry statute for noncommercial broadcasters distinct from its provision for carriage of commercial broadcasters.[5]

1. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994).

2. We here refer to *Red Lion Broadcasting* as of antecedent singularity. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

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

4. Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499 (1994).

5. *See* 1992 Cable Act, *supra* note 3, § 4 (dealing with commercial broadcasters), § 5 (dealing with noncommercial broadcasters).

Driven by its fixation on content-neutrality, the *Turner Broadcasting* Court, far from recognizing the importance of the distinction between commercial and noncommercial broadcasters, deemed it immaterial and practically non-existent. In this Article, we wish to revisit our analysis in light of Justice Kennedy's opinion. More important and more therapeutic, we hope to extend our analysis to future circumstances. The world, after *Turner Broadcasting*, is girding for the next stages of the epic and long-enduring struggle surrounding Congress' power to adjust and integrate the vast historic system of "free" over-the-air broadcasting and the new technologies of cable, direct broadcast satellite and the emerging national information highway. We hope to demonstrate how, despite the weaknesses in *Turner Broadcasting* (and perhaps because of them), the constitutionality of Congressional efforts to maintain public broadcasting stands on a different, and stronger footing, than similar efforts to support broadcasters as a whole.

In the first sections of this Article, we explore how Justice Kennedy upheld the must-carry rules while avoiding any searching re-examination of First Amendment doctrine. Despite a promisingly fact-sensitive analysis of the nature of cable speakers, Justice Kennedy's opinion turned in the end on a simple content-based litmus test. We examine that doctrinal commitment and the creative storytelling required to justify mandatory carriage in its terms. Errors and exaggerations in judicial storytelling are significant because they can affect the outcome of cases. In this case, however, their influence may go beyond the bounds of *Turner Broadcasting* to reshape the electronic regulatory regime in their distorted image. Ultimately, the implausibility of the story Justice Kennedy tells reflects on the doctrine underlying it.

We suggest that Justice Kennedy's rigid doctrinal approach can potentially endanger all substantive government regulation of the electronic media, especially measures designed to aid noncommercial programmers. As challenges are inevitably raised to statutes, regulations, and franchise agreements in the wake of *Turner Broadcasting*, courts will again have the opportunity to consider the proper role of content-based decision-making in electronic media regulation. We hope that when those occasions arise, the issues we explore here concerning the proper role of content considerations and the nature of First Amendment speakers will be seriously considered.

In the concluding section of this Article, we discuss the extremely important issues in the Court's instructions for the *Turner Broadcasting* remand. For the purposes of the remand, the "law of the case" is

that Section 5 and Section 4, the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992[6] (1992 Cable Act) mandating carriage of noncommercial and commercial broadcasting respectively, are "content-neutral." Phoenix-like, the possibility of differential treatment of Section 5 and Section 4—governing noncommercial and commercial licensees—arises once again. Under the Court's own test, the predictive and actual danger to noncommercial broadcasting resulting from lack of a mandatory carriage rule is far greater than the danger to the commercial broadcaster system; in addition, the constitutional fit in Section 5 is superior to the Congressional design in Section 4. These distinctions should lead the three-judge court considering the remand of *Turner Broadcasting* and Congress, when it takes up similar questions in the future, to view more favorably regulatory measures grounded in the instructional, educational and public interest concerns reflected in Section 5.

I
Storytelling and *Turner Broadcasting*

Turner Broadcasting, so long awaited as the definitive word on the application of free speech principles to cable television regulation, became instead an intriguing example of the convergence between law and other literary media. Like the messages conveyed by much of the electronic media, *Turner Broadcasting* is about storytelling, not truth; it is about the power of the storyteller, not about objectivity; and it is about the creativity of judges as authors, not as legal scientists. In holding that Sections 4 and 5 were, by and large, content-neutral, the Court necessarily depicted an entire world that the must-carry rules inhabit.[7] In doing so, Justice Kennedy was obliged to misrepresent that world, and, where his world view was in too much tension with a resistant reality, to enlist the power of the Court to change it.

6. *See supra* note 3.

7. The must-carry, or mandatory carriage, provisions, are not actually so prescriptive as the terms suggest. A commercial broadcaster may deny a cable system the right to carry its signal, or it might simply not demand carriage. 47 U.S.C. § 325(b)(1) (Supp. IV 1992). Noncommercial broadcasters may also waive mandatory carriage. *Id.* § 535(b)(1). If we see the 1992 Cable Act as Congress' attempt to strengthen an integrated cable/over-the-air broadcasting system, then these waiver provisions are arguably ill-tailored to accomplish that purpose. On the other hand, as Justice Stevens suggested in his concurrence in *Turner Broadcasting*, the must-carry and retransmission consent provisions may dovetail effectively. 114 S. Ct. at 2474 (Stevens, J., concurring). Only those marginal stations too unpopular or unprofitable to bargain for payment for carriage (and therefore most likely to be dropped by a cable operator) will elect mandatory carriage. In this view, the 1992 Cable Act's regime is narrowly drawn to aid just those stations that require government assistance to be assured carriage.

Our own hopes for a rational rethinking of First Amendment doctrine had been raised by a colloquy during oral argument before the Court. Justice Kennedy asked H. Bartow Farr, counsel for the cable industry, an intriguing question: Whether Section 5,[8] mandating carriage of noncommercial television, was more vulnerable than Section 4,[9] mandating carriage of commercial broadcasters, under previous Court decisions that prohibit content-based regulation of the press. Farr hesitatingly argued that both must-carry provisions were unconstitutional. Justice Kennedy retorted that if public television, which he considered "most justifiable" was also constitutionally "the most vulnerable," that might mean that "there is something wrong with the constitutional doctrine."[10]

We were heartened by the possibility that Justice Kennedy, as exemplified by this colloquy, was preparing to urge the Court to re-examine the inherited categories and mechanical analyses that have become fixtures of First Amendment doctrine, to adopt a more nuanced, fact-specific approach, to consider pragmatic outcomes as well as theoretical categories, and even to reconsider the relationship between Congress and the media.[11]

As it turned out, that reading of Justice Kennedy's intent was dramatically wrong. The *Turner Broadcasting* decision preserved intact the Supreme Court's traditional approach to First Amendment decision-making, with its fixation on content-neutrality and mechanical application of stratified levels of scrutiny. In an ambiguous and ambivalent *Turner Broadcasting* decision, the Court more or less upheld the power of Congress to assert its must-carry rules. More, because the decision affirmed the capacity of Congress, in some circumstances, to pursue regulatory goals protecting broadcasters and imposing carriage requirements on cable more onerous than the burdens government can place on newspapers. Less, because the Court questioned whether Congress had a sufficient basis for what it had done and took the very unusual step of requiring additional proof. In fact, the Court procrastinated, remanding the case to the district court for a determi-

8. 1992 Cable Act, *supra* note 3, § 5 (codified at 47 U.S.C. § 535(a) (Supp. IV 1992)).

9. *Id.* § 4 (codified at 47 U.S.C. § 534 (Supp. IV 1992)).

10. We have tried to reconstruct this exchange from the notes of observers, as there is no official transcript of the oral argument.

11. In fact, Justice Kennedy's opinion in *Turner Broadcasting* is in line with the bright line, intentionalist reading of the content-based distinction he has been fashioning in earlier opinions. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring) (arguing that the "sole question" in determining constitutionality is "whether the restriction is in fact content-based"); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (government's purpose determines whether a statute is content-based or content-neutral).

nation of whether Congress or the government had a purpose sufficient to justify Congress' actions and whether the strategy selected was appropriately tailored.[12] The Court's reasoning was fragmented. Although there was broad consensus on some points, Justice Kennedy had difficulty assembling five votes for any outcome. Finally, Justice Stevens, who favored affirming the decision of the three-judge district court, and therefore upholding the must-carry rules, concurred in the judgment to save a bare majority.[13]

The doctrinal linchpin of the Court's opinion is Justice Kennedy's conclusion that "[t]he design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech."[14] In order to reach this conclusion, Justice Kennedy not only ignored Congress' clearly expressed, content-related purposes for enacting the must-carry provisions; he eviscerated the Federal Communication Commission's authority and Congress' power to regulate broadcast licensees substantially differently from cable programmers.

There were many reasons for Congress to establish a rule protecting the system of broadcasting; the best ones, at least from a citizen's perspective, had to do with the societal functions that broadcasting uniquely performed, especially those mandated by Congress. Congress' elaborate findings in the legislative history of the must-carry provisions were in harmony with this civic perspective: Congress had noted that broadcasters were "an important source of local news[,] public affairs programming and other local broadcast services critical to an informed electorate."[15] Broadcasters grew up in a tradition (now abandoned) in which they had to ascertain what needs the "community" had for a local station outlet.[16] For much of broadcasting's recent history, it had obligations under the Fairness Doctrine affirmatively to cover controversial issues of public importance. Broadcasters have been under special obligations affirmatively to hire minorities and special incentives have been crafted to encourage minority ownership of station licenses. All of these efforts were designed to render the use of the scarce resource of the public airwaves. In short, Congress has sought (ineffectively, to be sure) to shape the content of the broadcasting system in the public interest and, for that very reason,

12. *Turner Broadcasting*, 114 S. Ct. at 2472.

13. *Id.* at 2475.

14. *Id.* at 2461.

15. *Id.* at 2462 (quoting Pub. L. No. 102-385, § 2(a)(11), 106 Stat. 1460 (1992)).

16. *See* Commission En Banc Programming Inquiry, *Report and Statement Policy*, 4 F.C.C. 2303 (1960).

justified, in its findings, the obligation of cable outlets to facilitate their carriage.

None of this could be squared with a pure theory of "content-neutrality." From Justice Kennedy's doctrinal viewpoint, it was necessary to deny that broadcasters possessed a set of law-derived values related to the content of broadcast programming and providing the basis for their congressional protection. To harmonize his needs with history, the Justice was forced to denigrate the historic role of broadcasters. The vice of deregulation became the virtue of neutrality; and the virtue of public interest, the protection of children and other efforts (however faltering) to improve broadcasting was converted into the vice of content-specific intervention. Congressional efforts to make broadcasters responsible were diminished, written out of history, and relegated to obscurity. By demonstrating that the FCC plays an insignificant regulatory role, with little or no effective control over programming content, Justice Kennedy avoided having to justify preferential treatment of broadcasters based on any special, content-related social purpose.

To sustain his point, Justice Kennedy issued a series of intermediate dicta, virtual holdings on issues not argued or directly before the Court. For example, Justice Kennedy concluded "[t]he FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."[17] Given the minimal extent to which the FCC and Congress "actually influence the programming offered by broadcast stations," the Justice wrote, "it would be difficult to conclude that Congress enacted must-carry in an effort to exercise content control over what subscribers view on cable television."[18] These characterizations of the relationship between Congress and broadcasting have little basis in fact or law. True, the FCC has never been a very effective regulator of the medium and has been subject to criticism as much for its perceived sweetheart relationship with the industry as for its intrusive regulatory practices.[19]

In addition, the FCC has been operating under the sway of a deregulatory ideology for much of the last fifteen years. Still, broadcasters have been *licensees*, yoked to the federal government, and have

17. *Turner Broadcasting*, 114 S. Ct. at 2463.

18. *Id.* at 2464.

19. *See generally* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103 (1993). For an older-fashioned view from the broadcast side, see also JON T. POWELL & WALLY GAIR, PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING: THE BROADCAST INDUSTRY LOOKS AT ITSELF (1988).

felt the indirect as well as direct pressure of the government to give meaning to the term "public interest, convenience, and necessity" in the Communications Act of 1934.[20] To say otherwise is to put one's head in the sand; the Supreme Court's gloss on the FCC's regulatory power and its exercise confirms, without a case properly before it, the narrowest tendencies of the FCC, those that totally surrender the regulatory impulse.

The Court's history of the relationship between the FCC and noncommercial television is downright puzzling. Again, to demonstrate the main point that Congress was not protecting broadcasters because of their intrinsic value, the Court goes to pains to suggest that there is little that is institutionally special, or content-related, about noncommercial broadcasters.[21] What is important, at least for this decision, the Court states, "is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational' programs."[22] The very fact that these are noncommercial licensees, that their whole history is tied to instructional, public, and cultural development is overlooked.

Given the travails of public broadcasters begging for congressional appropriations, the lash of congressional interference, and the abuse of funding restrictions to impose a heavier than healthy hand on public broadcasting decisions, it is pollyannish to conclude, from a review of recent history, that "the Government is foreclosed from using its financial support to gain leverage over any programming decisions."[23] For Justice Kennedy, the only relevant fact (and the only fact that could be relied upon by Congress) was that public broadcasting stations augment something called a free broadcasting service. Indeed, if Justice Kennedy sensed that there was another basis for preferring public broadcasting stations (such as their contribution to instruction, to diversity, or to the enhancement of public information), significant problems might have existed with the constitutionality of the statute.

Justice Kennedy's is a world in which there are no content-related nuances because Congress and the FCC have few content-related

20. Pub. L. No. 416, § 1, 48 Stat. 562 (codified as amended at 47 U.S.C. § 151 (1988)).

21. The Court's only concession to the unique, legislated qualities of noncommercial educational stations was to observe that they "may not broadcast promotional announcements or advertisements on behalf of for-profit entities"—a vanishing distinction. *Turner Broadcasting*, 114 S. Ct. at 2463.

22. *Id.*

23. *Id.* This passing comment may well prove, however, to be a boon to constitutional arguments premised on the unconstitutional conditions doctrine.

powers. Broadcast licensees cannot (or do not) have a content-based task, whether they are commercial or noncommercial, that can be the basis of a preference between them and cable programmers. The historic modes of thinking about television—the accepted understanding that noncommercial broadcasters are substantially distinct from other over-the-air licensees—are converted to categories without meaningful distinctions except for peculiarities in the ownership, license, or affiliations of the licensee. To show how indifferent, in his view, Congress was to the content-related consequences of its legislation, Justice Kennedy used approvingly the following example: "if a cable system were required to bump a cable programmer to make room for a broadcast station, nothing would stop a cable operator from displacing a cable station that provides all local- or education-oriented programming with a broadcaster that provides very little."[24] Aside from the absence of logic in using the exceptional case to prove the intent of a general rule, Justice Kennedy shows remarkable enthusiasm for obliterating Congress' capacity and indicated interest in furthering educational and other public interest goals.

The strain of forcing the must-carry provisions into the content-neutral mold shows elsewhere in the Court's opinion. To live within his own ideology, Justice Kennedy is obliged to determine that the must-carry rules "do not produce any net decrease in the amount of available speech."[25] If what Justice Kennedy means is that all cable channels will be filled and therefore the "amount" of speech remains the same, he is engaging in perilously flippant manipulation of the concept of a net decrease in the amount of available speech. It could be, of course, that speech markets are not adequately reflecting viewer preferences, and hence that the speech displaced will be less valuable to the audience than the speech substituted for it. But that is a point Justice Kennedy leaves unexplored, and, indeed, must leave unexplored, given his commitment to content-neutrality.

II
Turner Broadcasting, the Public Interest, and New Technology

Logical gaps and revisionist regulatory history are not the worst byproducts of the content-neutral doctrinal straitjacket. The decision in *Turner Broadcasting*, because of the way it erects its doctrinal foundation, presents new perils for educational broadcasters and for the

24. *Id.* at 2462.
25. *Id.*

capacity of Congress to assure that cable television systems continue to carry them. For public broadcasters, there is more at stake than mandatory carriage. A federal district court recently struck down the portion of the 1992 Cable Act that requires operators of direct broadcast satellite cable to set aside a portion of their channel capacity for "noncommercial programming of an educational or informational nature."[26] Other courts have declared unconstitutional cable channel set-asides for public, educational, and government ("PEG") uses that have been mandated by local franchising authorities.[27] *Turner Broadcasting* may provide a fresh impetus for similar attacks on regulations favoring educational broadcasting. Public broadcasters have also proposed reserving a portion of the "information highway" for public purposes.[28] The *Turner Broadcasting* decision's emphasis on content-neutrality could present obstacles for that initiative and generally diminish federal influence over the architecture of the national information infrastructure.

Such calamitous results for public broadcasting arise in the analytic framework employed by the Court: one in which mandatory carriage could be constitutionally permissible for commercial channels but not for educational channels, because the former provision could be construed as content-neutral, while the latter was content-based. The *Turner Broadcasting* Court was spared coming to grips with this implausible result because the Court and the parties before it did not differentiate between the constitutionality of Sections 4 and 5. Their failure to do so was not surprising. The broadcast industry, of course, had no interest in arguing that non-commercial broadcasters had a better claim to mandatory carriage. The cable industry argued that it was a speaker whose rights were equally infringed by both kinds of

26. *See* Daniels Cablevision v. United States, 835 F. Supp. 1, 8-9 (D.D.C. 1993). The Court's decision is being appealed, though the appeal was held in abeyance pending the outcome of *Turner Broadcasting*.

27. *See, e.g.*, Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552 (N.D. Cal. 1987), *appeal dismissed for want of juris.*, 484 U.S. 1053 (1988) (holding PEG access requirements unconstitutional). Set-asides for PEG uses are authorized under 47 U.S.C. § 531 (Supp. IV 1992).

28. Drafters of the ill-fated "information superhighway" legislation in the House and Senate proposed granting educational programming free preferred access to video platforms provided by telephone companies and their video programming affiliates. *See* H.R. 3636, 103d Cong., 2d Sess. § 659 (1994); S. 1822, 103d Cong., 2d Sess. § 103 (1994). Senator Dole cited what he called the "outlandish, if not unconstitutional" provision of S. 1822 requiring new networks to reserve part of their capacity for nonprofit television programmers as one of his reasons for mobilizing the opposition that doomed the legislation. Edmund L. Andrews, *The Phone Law Static*, N.Y. TIMES, Sept. 26, 1994, at C1, C3.

must-carry requirements.[29] Amici saw the issue in black and white, as either well-deserved government regulation or an assault on civil liberties.[30] Even public broadcasters argued in terms that applied equally to Sections 4 and 5.[31] The United States alone constructed an analytic framework that would have supported a distinction between must-carry for commercial and noncommercial broadcasting, but it did not rest its argument on that distinction. Instead, the Solicitor General argued that the must-carry rules were merely economic regulation.[32]

In retrospect, avoiding an argument that would require a distinction between commercial and public broadcasting was a wise strategic choice given the jurisdictional tendencies that emerged. Application of traditional First Amendment analytic categories raised the spectre that mandatory educational carriage involves, oddly, more constitutional questions than mandatory commercial carriage. The Court's solution to this problem was to eliminate the distinction on which the paradox turns: if, for purposes of constitutional determination, there are no significant differences between commercial and noncommercial broadcasting, then the content neutrality doctrine can, and must, embrace both.[33]

As we suggested in our pre-*Turner Broadcasting* tract,[34] there is another solution. In our view, Congress' power to impose any carriage requirement springs from the roles assigned to broadcasters in a democratic society. Because noncommercial educational broadcasters clearly have such responsibilities and because of the social significance

29. Brief of National Cable Television Ass'n, Inc. at 19, *Turner Broadcasting* (No. 93-44).

30. *Compare* Brief of Consumer Federation of America *with* Brief of American Civil Liberties Union, *Turner Broadcasting* (No. 93-44).

31. Brief of Ass'n of America's Public Television Stations at 22, *Turner Broadcasting* (No. 93-44).

32. This was the position adopted by the two-judge majority in the district court. *See* Turner Broadcasting Sys., Inc. v. United States, 819 F. Supp. 32, 40-41 (D.D.C. 1993) (Sporkin, J., concurring), *vacated and remanded*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994).

33. Where the Court detected potentially embarrassing departures from content-neutrality that could not be simply ignored, as in provisions that singled out noncommercial broadcasters for special treatment, it left them to the district court on remand, with a strong signal that they should be read out of the statute. For instance, the Court instructed the district court to consider on remand whether 47 U.S.C. § 534(h)(2)(B) (requiring carriage of low power stations if, among other things, they address local news and informational needs) and § 534(h)(1)(C)(ii) (authorizing the FCC to grant must-carry privileges to ineligible distant broadcasters on the basis, *inter alia*, of their attention to the value of localism and provision of news coverage or sporting events of interest to the community) are content-based regulation. *See Turner Broadcasting*, 114 S. Ct. at 2460 n.6.

34. *See* Hawthorne & Price, *supra* note 4, at 510-13.

of their role, the case for mandatory carriage of their signals is stronger than for commercial broadcasters. It seems intuitively apparent to us that Congress acted because it recognized that in a decent society there should be an organ of cohesiveness called public service broadcasting. Such an entity exists and is favored with federal funds and frequencies precisely because it performs important functions in society: functions of instruction, general cultural education, and furtherance of plural views. Congress had these criteria in mind when it compelled cable systems to carry otherwise marginal, relatively infrequently viewed channels.

In this respect, our view is closer to those of Justice O'Connor. Justice O'Connor recognized the importance of distinguishing between commercial and noncommercial broadcasting, and she distinguished them for the right reasons. In her discussion of content-based speech restrictions, she suggested that public affairs and educational programming "seem somewhat weightier" than the interests in localism and diversity of viewpoints served by mandatory carriage of commercial broadcasters, even though she found it "a difficult question whether they are compelling enough to justify restricting other sorts of speech."[35] Furthermore, even if government could compel a channel set-aside for news or educational programming, Justice O'Connor also questioned whether Section 5 is adequately tailored to meet the appropriate First Amendment tests. In her view, the 1992 Cable Act's mandatory carriage provisions improperly disadvantaged non-broadcast educational programmers in order to assist traditional public stations.[36] Justice O'Connor wrote that "[e]ven if the Government can restrict entertainment in order to benefit supposedly more valuable speech, I do not think the restriction can extend to other speech that is as valuable as the speech being benefitted."[37] These are fair questions, and the ones that should have been met in vigorous debate; they reflect a truer sense of what Congress sought to do, and the environment in which it tried to do it, than the distorted world view that emerged from the majority's opinion.

The logic and realism of Justice O'Connor's opinion suggests continuing room (given the upcoming debates over direct broadcasting, video dialtone, and the information superhighway) for addressing more explicitly the question whether, economic regulation largely

35. *Turner Broadcasting*, 114 S. Ct. at 2478 (O'Connor, J., dissenting).
36. *Id.* at 2479.
37. *Id.*

aside,[38] Congress is warranted, precisely for content-related reasons, in imposing the kind of architectural and structural laws contained in the 1992 Cable Act. In our view, in Section 5 of the 1992 Cable Act, Congress quite properly selected one set of speakers over another. We would argue, in fact, that the Court might have more appropriately concluded that the absence of a content basis for Congress' actions would have precluded, rather than permitted, a preference. The Court's view that broadcasters as a class can be preferred precisely because they have freed themselves of all substantive public interest obligations is troublesome. Our point is not that such obligations as furthering children's programming or accommodating political candidates necessarily merit mandatory carriage, but rather that if broadcasters are free to ignore them then there is no discernible difference between commercial broadcasters and other sources of cable programming, and hence no rational basis for Section 4's preference for commercial broadcasters over their cable programming competitors.

Our reading of regulatory history and the social role of noncommercial broadcasting, and of Congress' purposes in mandating its carriage, also differs from the Court's. Public stations are not unregulated, undirected entities, and they should not become so. They have been licensed and established for important content-related reasons,[39] and those are precisely the reasons that they merit mandatory carriage. Noncommercial broadcasters carry on government's historic responsibility for education of the public and the more recent role it has undertaken in support of the arts.[40] In fact, it is likely because of their distinctive content that noncommercial stations are somewhat favored under the 1992 Cable Act's mandatory carriage regime, with special guarantees (disregarded by the Court) to assure that noncommercial service is strengthened.[41] The *Turner Broadcast-*

38. Economic regulation is relevant, even in our analysis, in determining what kind of entity may be subject to regulation. *See infra* part V.

39. *See* QUALITY TIME? THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON PUBLIC TELEVISION 9 (Twentieth Century Fund Press 1993).

40. As the Court has recognized, "education is perhaps the most important function of state and local governments," as evidenced by "[c]ompulsory school attendance laws and the great expenditures for education." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance").

41. For example, the statute requires a cable system with a capacity of 37 channels to devote up to one-third of its channels to commercial must-carries, but carry *all* nonduplicative noncommercial stations requesting carriage. 47 U.S.C. § 535(e) (Supp. IV 1992). Similarly, § 5 provides a step toward universal access to public television by requiring cable operators to import a public broadcast station to service areas that do not have one. 1992

ing majority opinion's mischaracterizations of commercial and noncommercial broadcasting were not, in our view, mere errors or oversights. They followed, perhaps inevitably, from the effort to comprehend an outcome-conscious, regulatory restructuring of public discourse in the purely formal analytic categories of traditional First Amendment analysis. In opposition to the *Turner Broadcasting* majority's analytic methodology, we advocate here something closer to Justice O'Connor's approach: a jurisprudence of meaning, in which, at least in some forms of congressional action, content considerations are relevant to First Amendment analysis.

III
Content-Based Favoritism

While the Court has struggled to define the attributes of content-based regulation in recent years,[42] the core significance of the distinction between content-based and content-neutral regulation has remained unchanged. Because of the threat to individual liberty and the democratic process in government suppression of "dangerous" ideas, all content-based regulations "presumptively violate the First Amendment."[43] Content-neutral regulations are subject to more relaxed scrutiny and will pass muster if they further "an important or substantial government 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."[44] While this distinction has recently

Cable Act, *supra* note 3, § 5 (codified at 47 U.S.C. § 535 (Supp. IV 1992)). No such requirement exists under § 4. *Id.* § 4 (codified at 47 U.S.C. § 534 (Supp. IV 1992)).

42. The Court has recently wrestled with the definition of content-based regulation in a number of cases. *Compare* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (restrictions on speech are content-neutral if they are "justified without reference to the content of the regulated speech") *with* Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 509 (1991) (rejecting the argument that discriminatory treatment is suspect "only when the legislature intends to suppress certain ideas") *and* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1993) (a regulation is content-based when one must consider the content of an act or utterance to determine whether it falls within the scope of the regulation). Although much of the argument in *Turner Broadcasting* involved the definition of content-based legislation, the Court did not revisit the question. In any case, it is immaterial to our argument here, since we would concede that § 5 is content-based under any definition proposed by the parties in *Turner Broadcasting*.

43. *Renton*, 475 U.S. at 47.

44. *Turner Broadcasting*, 114 S. Ct. at 2469 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

been attacked by some scholars,[45] largely in the context of hate speech and pornography, in the courts the content-based dogma reigns uncompromised and almost uniformly unquestioned.[46]

The *Turner Broadcasting* Court has now held that Section 5, the must-carry provision for noncommercial broadcast stations, is not content-based. This is the law of the case and, fortunately for public television in the short run, not open for reexamination. That ruling may enable Section 5 to survive review by the three-judge court on remand and will give public broadcasting's precious language to invoke when faced with congressional efforts to censor programming content. All this aside, however, in the long run, the conclusion is troubling and, notwithstanding the Court's determination, it appears inescapable to us that Section 5 is content-based on its face; in our view, that is its saving grace.[47]

45. One commentator notes: "Sometimes constitutional doctrine seems to have lost sight of the point of central constitutional commitments. Sometimes the commitment to free speech seems like an abstraction insufficiently . . . connected with democratic goals, or indeed with any clearly describable set of governing aspirations." Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 797 (1993). *See also* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 107 (1993).

46. Although we agree with the criticism that reflexive reliance on doctrine can yield results at odds with underlying First Amendment purposes, the rationale for content-based broadcast regulation is distinct from, and says nothing about, the appropriateness of eliminating the content-based distinction in the contexts of pornography or hate speech. Among other distinctions, the content-based regulations we advocate here are affirmative speech requirements. There are strong arguments for retaining the bright-line rule against content-based prohibitions of speech, which are implicated to a far lesser degree, if at all, when government affirmatively mandates speech concerning a particular subject matter.

47. The definition of a "qualified noncommercial educational television station" includes stations that transmit "predominantly noncommercial programs for educational purposes." 47 U.S.C. § 535(l)(1) (Supp. IV 1992). *See also Turner Broadcasting*, 114 S. Ct. at 2476 (O'Connor, J., dissenting) ("I cannot avoid the conclusion that [the statute's] preference for broadcasters over cable programmers is justified with reference to content"). Even the government recognized that this section "might be characterized as favoring educational speech over entertainment." Brief for Federal Appellees at 38 n.25, *Turner Broadcasting* (No. 93-44). Of course, § 5 does not express a preference for a particular viewpoint, but it is content-based insofar as it favors a particular subject matter. There is language in *Turner Broadcasting* and other cases suggesting that subject-matter distinctions should be accorded a lower level of scrutiny than content-based or viewpoint-based distinctions. *See Turner Broadcasting*, 114 S. Ct. at 2481 (Ginsburg, J., concurring in part and dissenting in part) (the must-carry rules "do not differentiate on the basis of 'viewpoint,' and therefore do not fall in the category of speech regulation that Government must avoid most assiduously"); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (applying content-neutral balancing to subject-matter restriction). In general, however, the Court has not recognized the validity of holding subject-matter distinctions to a lower level of First Amendment scrutiny. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991) (holding subject matter-based speech restriction unconstitutional); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) ("[t]he First Amendment's hostility to content-based regulation extends

According to First Amendment tradition and the *Turner Broadcasting* Court, recognition of such a content-basis leads almost inevitably to a declaration of unconstitutionality. But it need not be so. In cases involving mandated access to broadcast and cable media, content-based distinctions have sometimes been viewed not only as permissible, but as the very basis for a regulation's constitutionality. Of course, as the *Turner Broadcasting* Court recognized, broadcasters have been viewed as uniquely vulnerable to regulation, chiefly because of the scarcity of the broadcast spectrum. But the significant lesson to be drawn from the broadcast mandated access cases is that content-based regulations were not permitted willy-nilly merely because broadcaster speakers are entitled to less First Amendment protection; rather, *particular* content-based regulations were deemed constitutional because of the *particular* content they preferred or prescribed. Such regulations have typically been subject to a positive content-based test: Only if an appropriate content is mandated and an appropriate purpose served has broadcast regulation been upheld.

In *CBS, Inc. v. FCC*,[48] for example, the Court upheld a provision of the Communications Act of 1934[49] that requires broadcast licensees to grant access to qualified candidates for federal elective office. Such a regulation is constitutional, concluded the *CBS* Court, because it makes "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[50] In *Metro Broadcasting, Inc. v. FCC*,[51] the Court upheld the constitutionality of preferential treatment for minorities in the transfer of broadcast licenses, reasoning that a minority owner's status

not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic").

48. 453 U.S. 367 (1981). The Court made clear that the scarcity rationale was insufficient to justify a general right of access to the media. The statute was constitutional because of the specific nature of the content it prescribed: information crucial to the democratic process. *Id.* at 395-96. *See also* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (restrictions on broadcasters upheld only when they are "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues") (citations ommitted); Syracuse Peace Council v. FCC, 867 F.2d 654, 683 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (Starr, J., dissenting) ("Spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory. This point is made clear by the familiar cases in which the Court has upheld broadcast regulation on the ground that the regulation *furthered* substantial First Amendment interests . . . .") (emphasis added).

49. Pub. L. No. 416, § 1, 48 Stat. 562 (codified as amended at 47 U.S.C. § 312(a)(7) (1988)).

50. 453 U.S. at 396.

51. 497 U.S. 547 (1990).

"influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities."[52] The Court has also upheld FCC regulations prohibiting common ownership of a newspaper and a broadcast license serving the same area, on the basis that the prohibition "enhanced the diversity of information" and promoted the "public interest in diversified mass communications."[53] Such cross-ownership restrictions may appear to be content-neutral, and the Court so regarded them. However, the Court's reasoning makes clear that the regulation was permissible because separately held media could reasonably be assumed to have a more diverse content than commonly held media. The regulation, in other words, was permissible because of its content-based effects.[54]

The Court also recognized content-based concerns, such as diversity and localism, as the basis for the FCC's statutory authority to regulate the cable industry under the Communications Act of 1934. The Court found that the FCC had the authority to regulate cable because cable systems could threaten the survival of educational broadcasters and commercial broadcasters that provide outlets for "local self-expression."[55] Similarly, the Court held that local origination requirements imposed on cable operators by the FCC were constitutional because they were reasonably tailored to increase "the number of outlets for community self-expression" and to augment "the public's choice of programs and types of services."[56] Recent lower court decisions have also upheld content-based mandatory carriage cable regu-

52. *Id.* at 581. In other words, minority broadcasters were favored because they could be expected to provide distinctive content.

53. FCC v. National Citizens Comm'n For Broadcasting, 436 U.S. 775, 802 (1978) (citation omitted). Cable has similar cross-ownership restrictions. *See, e.g.*, 47 U.S.C. § 533(a)(1) (Supp. IV 1992) (cable-broadcast licensee); *id.* § 533(a)(2) (cable-MMDS/SMATV); *id.* § 533(b) (cable-telephone); 47 C.F.R. § 76.501(a)(1) (1993) (cable-network). However, restrictions on common ownership of cable and telephone licenses have been declared unconstitutional by several courts. *See* U.S. West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994); Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993).

54. Justice O'Connor's dissent in *Turner Broadcasting* shares this view: "The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information . . . is directly tied to the content of what the speakers will likely say." 114 S. Ct. at 2477 (O'Connor, J. dissenting).

55. United States v. Southwestern Cable Co., 392 U.S. 157, 174-76 (1968).

56. United States v. Midwest Video Corp., 406 U.S. 649, 667-68 (1972). However, the Court later rejected FCC authority to mandate cable access channels absent explicit congressional authorization. FCC v. Midwest Video Corp., 440 U.S. 689, 707-09 (1979) (government interests such as increasing outlets for community self-expression were not sufficiently compelling to overcome the statutory ban on treating broadcasters (and, by analogy, cable operators) as common carriers).

lations, such as franchise agreements requiring carriage of local origination programming,[57] where the content distinction served an appropriate public purpose.[58]

How such content-based regulations will fare after *Turner Broadcasting* is an open question. They are largely enacted pursuant to powers specifically granted by Congress, such as the power to establish requirements in a franchise that channel capacity be set aside for public, educational, or governmental use.[59] Other provisions, such as local origination requirements, may exist only in a particular franchise. But all such regulations must be viewed as suspect after

57. For example, the Seventh Circuit upheld a content-based cable franchise provision that required franchisees to offer a certain amount of programming developed "specifically for the community" served by the franchisee. Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1543 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). The court found that "[p]romotion of community self-expression can increase direct communication between residents by featuring topics of local concern," and held that "[e]ncouragement of 'localism' certainly qualifies as an important or substantial interest." *Id.* at 1549. *See also* Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 6 (D.D.C. 1993) (upholding PEG and leased access requirements on the grounds that "affording speakers with lesser market appeal access to the nation's most pervasive video distribution technology" serves a significant regulatory interest); Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 411-12 (S.D. Fla. 1991) (PEG requirements are permissible content-neutral regulation); Erie Telecommunications v. City of Erie, 659 F. Supp. 580, 599-601 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (upholding leased access and PEG channel requirements of one public, one religious, three educational, one library, one social service, one arts and sports, one hospital, two leased, and two governmental access channels). *But see, e.g.*, Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, *appeal dismissed*, 484 U.S. 1053 (1988) (striking down PEG requirements); Group W Cable v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987) (same); Weinberg, *supra* note 19, at 1104-05 n.6 (collecting cases overturning cable regulations).

58. Where similar content-based cable regulations have been held unconstitutional, as in the *Preferred Communications* litigation, the basis for the court's ruling was not the mere fact that the regulation was content-based but the degree of infringement on the cable operator's rights that the particular regulation threatened. Preferred Communications, Inc. v. City of Los Angeles, 67 Rad. Reg. 2d (P & F) 366, *aff'd in part, vacated in relevant part*, 13 F.3d 1327 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2738 (1994). The *Preferred Communications* district court recognized that localism and access requirements were content-based and served a compelling state interest. The court ruled that the localism provision was acceptable because it was only a "consideration" rather than a formal requirement, *id.* at 374, but struck down the access provisions on the grounds that the city had failed to show with any specificity that the allotment of one-sixth of the operator's channel capacity to access channels was narrowly tailored to further those interests. *Id.* at 374-75. The court's ruling left open the possibility that, if more carefully tailored or supported by a fuller record, the access channels might be upheld. More important, the mere fact that the franchise requirements were clearly content-based did not immediately condemn them.

59. 47 U.S.C. § 531(a) (Supp. IV 1992). The voluntary contractual nature of franchise agreements invites the defense that no franchisee is compelled to accept a city's terms. That argument invites the response that government may not impose unconstitutional conditions on discretionary benefits.

Turner Broadcasting, since their content basis insures that they will be subject to searching scrutiny. On the other hand, the careful analysis of purposes and means undertaken in recent cases like *Preferred Communications*[60] may provide a model for a successful post-*Turner Broadcasting* defense of clearly content-based regulations, particularly if the Court adopts the sensitive, substantive content analysis of O'Connor's *Turner Broadcasting* dissent and advocated here.

IV
Section 5 Distinguished from Section 4

The Supreme Court in *Turner Broadcasting* not only ignored the differences between Section 4 and Section 5 of the 1992 Cable Act, it treated them as if they were indivisible parts of a seamless whole. That treatment represents a profound mischaracterization of the statute. The two sections have different histories, purposes, degrees of tailoring of means to ends, and different roles to play in a democratic society. On remand, these differences may be more important than the similarities between Sections 4 and 5.

We believe that Congress should be able to mandate access for educational broadcasters precisely because of their content and because Section 5 is tailored to meet Congress' objectives. Section 4, on the other hand, is more constitutionally suspect because there is little content-based justification for preferring commercial broadcasters to competing cable programmers, and the means for implementing the asserted government interest is not well-tailored. Those aspects of the mandatory carriage regime that appeared to weigh most heavily in favor of the statute's constitutionality for the *Turner Broadcasting* Court seem weaknesses to us, while the Court's analytic method, which papered over the substantive differences between commercial and non-commercial broadcasters, seems to bypass or ignore distinctions crucial to a new First Amendment approach.

Mandatory carriage of educational programming not only serves a compelling government interest, but it also serves an interest that furthers core First Amendment values. Public education is of course one of the central functions of modern American government, and an educated populace is a cornerstone of democratic self-governance.[61]

60. *See supra* note 58.

61. As the Court has observed, education is crucial to the "preparation of individuals for participation as citizens" and invests "fundamental values necessary to the maintenance of a democratic political system." Ambach v. Norwick, 441 U.S. 68, 76-77 (1979). Education of all citizens is "required in the performance of our most basic public responsibilities" and "the very foundation of good citizenship." Brown v. Board of Educ., 347 U.S. 483, 493

But it is significant that education also serves the same purposes commonly ascribed to the First Amendment itself: facilitating democratic discourse and the search for "political truth," as well as encouraging individuals to "develop their faculties."[62] Hence, mandating carriage of educational programming may further First Amendment values, even if it comes at the expense of the "speech" of cable operators and their preferred programming sources.

Moreover, mandatory carriage of noncommercial broadcasters is well-tailored to effect the goal of furthering public education. Noncommercial must-carry is less burdensome than commercial must-carry, involves fewer channels, and is therefore less subject to characterization as significantly foreclosing the cable operator's right to choose program providers or bundle programming to maximize consumer welfare. While the evidence of the plight of commercial broadcasting is at best equivocal, educational broadcasters were genuinely imperiled in the days before mandatory carriage.[63] In sum, mandatory carriage rules for public broadcasting serve a significant purpose and impose only modest burdens, while no less burdensome alternative appears likely to ensure that the institution of noncommercial broadcasting survives unimpaired.

In our view, if the regulatory regime were more demanding, the argument for carriage of commercial stations would have been stronger, not weaker as the Court suggests. Historically, in the United States, commercial broadcasters have been viewed as holders of a public trust, encapsulating a bundle of obligations that were properly thought to be necessary for the public interest. These obligations included providing service to the local community, coverage of controversial issues of public importance in a way that exhibited fairness, preferred access to candidates as advertisers, programming for children, and other aspects of a well-rehearsed litany. In recent years,

(1954). *See generally* Lawrence A. Cremin, AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE, 1876-1980 (1988) (discussing the relationship of education and democracy). Congress explicitly recognized the connection between education, public television, and the democratic process, in its funding of "instructional, educational, and cultural" programming through the Corporation for Public Broadcasting. 47 U.S.C. § 396(a)(1) (Supp. IV 1992). As Congress has found, public stations constitute "valuable local community resources for . . . address[ing] national concerns and solv[ing] local problems." *Id.* § 396(a)(8).

62. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

63. According to the FCC, between 1985 and 1988, 153 public television stations (nearly half of all such stations) were dropped or denied carriage 463 times by 347 cable systems. FCC MASS MEDIA BUREAU CABLE SYSTEM BROADCAST SIGNAL CARRIAGE SURVEY, STAFF REPORT BY THE POLICY AND RULES DIVISION 10 (Sept. 1, 1988). During that time, 182 public television stations were involuntarily repositioned on 541 occasions. *Id.* at 19.

however, broadcasters have been able to convince the FCC and Congress that they should not be bound by these public interest obligations.

The success of their lobbying efforts is highlighted by the recent FCC determination that home shopping channels are eligible for mandatory carriage because they meet the public interest standard.[64] We believe that the FCC's embrace of home shopping stations should have undermined any claim that commercial stations are eligible for the privilege of mandatory carriage—not because of something innately flawed about home shopping, but because, given the inclusion of home shopping within the scope of "the public interest," there are no relevant criteria by which to distinguish "local commercial stations" from other program providers, such as cable networks.[65] Therefore, Congress should not be able to extend preferential treatment for one over the other. Given the analytic framework adopted by the *Turner Broadcasting* Court, however, the FCC's holding that home shopping channels serve the public interest probably strengthened the case for Section 4, by weakening further the content requirements applicable to commercial broadcasting.

V
Regulating "Speakers" Under the First Amendment

Constitutional objections to mandatory carriage spring from two basic presumptions of First Amendment doctrine. We have already discussed the first: that content-based regulation is subject to a heightened scrutiny that is all but insurmountable. The second presumption might be called "speaker absolutism," the principle that a speaker's rights are independent of the speaker's physical properties, institutional status, social role, and history, and can derive from nothing more than an entity's self-designation as a speaker. This second principle creates an additional hurdle for cable regulation, since any distinction between Section 4 and Section 5 may be constitutionally meaningless if both are seen as infringing the rights of a core First Amendment speaker. The examples of constitutionally permissible content-based favoritism discussed so far have this in common: They do not impose restrictions on anything resembling the legendary Hyde Park corner orator.

64. *See In re* Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 8 FCC Rcd. 5321 (1993).

65. This argument does not address antitrust violations or other discriminatory actions by vertically integrated cable operators.

Cable operators, then, must be distinguishable from the general run of First Amendment speakers to warrant more intrusive government regulation. In its arguments in *Turner Broadcasting*, the government found the distinguishing feature in the concept of "market dysfunction," which it defined as the power of a private entity to silence others' speech, whether because of physical limitations in the medium, economic monopoly, or government-conferred advantages.[66] The government's position is accurate as a matter of description. Cable operators do in fact operate under conditions of scarcity, do generally enjoy an economic monopoly (whether natural or conferred by a franchise), and are the beneficiaries of government advantages, from initial selection to government-sponsored monopoly.

The Court, however, was unconvinced. Justice Kennedy rejected the government's argument as a mischaracterization of *Red Lion Broadcasting Co. v. FCC*,[67] which the Court interpreted narrowly as deriving its mandate to regulate broadcasting solely from spectrum scarcity and signal interference. Interpreting market dysfunction in purely economic terms, the Court also had little difficulty in establishing that its prior holdings do not support the proposition that market failure alone is sufficient grounds to lower the applicable standard of review.[68] The Court declined to apply broadcast regulation's relaxed First Amendment scrutiny to cable on the basis that cable does not suffer from the technological limitations of the broadcast medium.[69]

There are elements of speaker absolutism in the Court's analysis. For example, the Court invokes the principle that "each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence," as if mandating broadcast carriage on a cable network was equivalent to compelling an individual to renounce her faith or denounce his family.[70]

However, for an example of the extreme consequences of speaker absolutism, one must look to Justice O'Connor's dissent. Justice O'Connor insists that it should be the cable operator, not government, that has "control over who gets to speak over cable."[71] Once again, Justice O'Connor is strong on the facts. Because many cable operators are monopolists, she observes, viewers' preferences will not necessarily prevail. But, rather than seeing in this monopoly position

66. Brief for Federal Appellees at 35-36, *Turner Broadcasting* (No. 93-44).
67. 395 U.S. 367 (1969).
68. *Turner Broadcasting*, 114 S. Ct. at 2457-58.
69. *Id.* at 2457.
70. *Id.* at 2458.
71. *Id.* at 2480.

a rationale for regulation, the Justice regards the First Amendment as compelling the conclusion that "a single cable operator," as a speaker with editorial discretion, should be able to "decide what millions of subscribers can or cannot watch."[72] Only a fetishistic concept of First Amendment speakers and a Manichean view of government regulation could lead one to conclude that the First Amendment forbids Congress from denying one-third of its channel capacity to a corporate entity created primarily to make profits, not express opinions, at the expense of the information needs and preferences of millions of flesh and blood human beings.[73]

The majority opinion stops well short of Justice O'Connor's speaker fetishism. In fact, in an exercise of careful, fact-sensitive adjudication, the majority justifies significant limitations on the rights of cable speakers, based on two peculiarities of the medium. Justice Kennedy recognizes that once a "cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers."[74] Quoting a commentator, the Court observes that "[f]or the most part, cable personnel do not review any of the material provided by cable networks . . . [C]able systems have no conscious control over program services provided by others."[75]

This relaxed level of supervision over content, which distinguishes cable from the typical, or idealized, newspaper,[76] is significant because the recognition of cable operators' First Amendment rights depends in large part on the editorial functions they perform. However, the majority does not suggest that cable operators are generally entitled to reduced protection because of their limited editorial role. Rather, the Court relies on the conduit function to blunt the argument that mandatory carriage is coerced speech. One of the dangers of coerced carriage of the speech of others is that the speaker will become

72. *Id.*

73. Justice O'Connor suggests that Congress could deal with the dangers posed by the immense power of cable operators by encouraging competition, subsidizing broadcasters, or, perhaps, obligating cable operators to act as common carriers for part of their channels. *Id.* If, as the Justice says, Congress could achieve the purposes of the must-carry statute by providing content-based subsidies to broadcasters, then, in Justice O'Connor's view, the only objectionable aspect of the must-carry rules must be that they require cable speakers to say certain things of the government's choosing.

74. *Id.* at 2452 (citing Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 339).

75. *Id.*

76. *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Newspapers, unlike cable operators, exercise active control over the writing, viewpoint, and selection of their material. *Id.* at 247.

identified with the compelled speech. If the speaker does not agree, or wants to make clear it does not endorse the compelled statements, it may be forced to make further declarations of its own to clarify its position. These liabilities proved fatal to right-of-reply statutes guaranteeing access to newspapers.[77] But the *Turner Broadcasting* Court drew a distinction in the case of cable: "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator," and hence little pressure on the cable operator to alter its own messages in response.[78]

More important, the Court focussed on a technological feature of cable that distinguishes it even from monopoly newspapers:

> Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper . . . does not possess the power to obstruct readers' access to other competing publications . . . . The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[79]

This insight, strongly reminiscent of the government's spurned market dysfunction theory, allowed the Court to distinguish two important arguments against mandatory carriage.[80] First, cable's bottleneck function distinguished *Miami Herald Publishing Co. v. Tornillo*,[81] which struck down a right-of-reply statute applying to newspapers. Instead of relying mechanically on cable's designation as a speaker, the Court, in the above-quoted passage, sensitively weighed the potential for harm to the public's speech interests posed by the peculiari-

77. *Id.*; *see also* Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1 (1986) (plurality opinion) (private utility could not be compelled to provide space in billing envelopes for newsletter from critical consumer group).

78. *Turner Broadcasting*, 114 S. Ct. at 2465.

79. *Id.* at 2466.

80. The bottleneck rationale for regulation is also akin to Justice Stevens' argument that cable may be subject to "intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media" because cable operators control an "essential facility." *Id.* at 2473 (Stevens, J., concurring). For Justice Stevens, that characteristic was sufficient to establish the validity of mandatory carriage without requiring a remand or further fact-finding. *Id.*

81. 418 U.S. 241 (1974).

ties of this particular speaker. If cable speakers' rights are less inviolate than newspapers' rights, that is because of technological peculiarities that make cable, with its near-total control over the distribution of video information, a more potent threat to speech.

The Court also relied on the bottleneck function to distinguish the line of cases holding that strict scrutiny should be applied when government regulation singles out certain members of the press for disfavored treatment.[82] Unlike cable, other multichannel video distributors such as multichannel multipoint distribution systems (MMDS) and satellite master antenna television (SMATV) are not required to carry broadcast networks. But the Court concluded that the differential treatment is justified since these media are not subject to monopoly bottleneck control as in cable.[83]

The Court concluded its consideration of cable speakers with a far-reaching observation: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[84] In that statement, the Court rejected speaker absolutism and declared a fundamental split in First Amendment policy that may shape the Court's jurisprudence for years to come. In response to the view expressed by Justice O'Connor and her three concurring Justices, "that it is government power, rather than private power, that is the main threat to free expression,"[85] the majority found that "[t]he potential for abuse of [cable operators'] private power over a central avenue of communication cannot be overlooked."[86] How that philosophical debate is resolved will determine Congress' power to continue to play a role in structuring the private speech marketplace.

The Court's recognition of cable's "physical control of a critical pathway of communication"[87] also comes close to announcing the long-anticipated standard for cable regulation: that as long as the local cable monopoly continues, and as long as government operates in a content-neutral manner, it may be permitted to regulate cable more intrusively than newspapers, if not with the free hand given to broad-

82. *Turner Broadcasting*, 114 S. Ct. at 2468; *see also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

83. *Turner Broadcasting*, 114 S. Ct. at 2468.

84. *Id.* at 2466.

85. *Id.* at 2480.

86. *Id.* at 2466.

87. *Id.*

cast regulation. At least for the present, the Court appears to have situated cable at an intermediate position in the First Amendment hierarchy, between newspaper publishers and broadcasters.

The *Turner Broadcasting* Court thus managed to loose itself, perhaps only temporarily, from the straitjacket of speaker absolutism. But it drew back from addressing the ultimate question about First Amendment speakers: How institutional speakers are created and recognized in our society and how their natural history, the process by which they are formed and endowed with the capacity to speak, reflects on their First Amendment rights.

The First Amendment tradition is grounded on the image of natural, self-created speakers, existing independent of and prior to government intervention. That image does not fit the reality of the new communications technologies and the institutional speakers based on them. These new, technology-dependent speakers rely for their existence on government protection, regulation, and subsidy. But when it is in their interest to assert a claim to First Amendment speakerhood, the same institutions proclaim their independence and immunity from the state that fostered them.[88]

The cable industry is a central example. In its early years, the government guaranteed cable operators access to existing transmission poles, easements, and compulsory licenses,[89] and restricted the power of local governments to regulate cable rates and charge franchise fees.[90] Having grown successful in large part through government intervention and assistance, the cable industry now suddenly declares its independence, arguing, as it did in *Turner Broadcasting*, that it is a speaker entitled to First Amendment protection from government regulation.[91]

88. Sunstein argues that government's role in establishing and making viable new technology industries must condition and limit their claims to First Amendment rights and immunity from state regulation. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 278-91 (1992); *see generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

89. *See, e.g.*, Thomas A. Hart, Jr., *The Evolution of Telco-Constructed Broadband Services for CATV Operators*, 34 CATH. U. L. REV. 697 (1985); R. Clark Wadlow & Linda M. Wellstein, *The Changing Regulatory Terrain of Cable Television*, 35 CATH. U. L. REV. 705 (1986).

90. *See* Henry Geller et al., *The Cable Franchise Fee and the First Amendment*, 39 FED. COMM. L.J. 1 (1987); Peter Krug, *Cable Television Franchise Fees for General Revenue: The 1984 Cable Television Act, Wisconsin Law, and the First Amendment*, 1985 WIS. L. REV. 1273 (1985).

91. *See* Glenn B. Manishin, *An Antitrust Paradox for the 1990's: Revisiting the Role of the First Amendment in Cable Television*, 9 CARDOZO ARTS & ENT. L.J. 1 (1990); Weinberg, *supra* note 19.

It is a promising indication that the *Turner Broadcasting* Court premised its analysis on a close study of the particular capabilities and functions of the cable medium. As new technologies blur the boundaries between traditional media, this type of context-sensitive analysis will be ever more important. Preserving high levels of protection for core First Amendment speakers like newspapers will require careful attention to new media that are performing traditional functions in different forms. The continued evolution of media technologies, combining hitherto distinct functions and relying, in many cases, on government-private partnerships, requires a new jurisprudence of speakerhood.

VI
The Unseen Alternative: Public Television and the *Turner Broadcasting* Remand

In the long term, the questions we raise in this Article relate to future Congressional and agency decisions concerning new media technologies. But in the short term, the treatment of *Turner Broadcasting* on remand and the possible revisiting of the future decision of the three-judge tribunal by the Supreme Court provides an opportunity to think more creatively about public television and the must-carry rules. We do not renounce our view about the appropriateness of content-based regulation in this context; indeed, content considerations should necessarily play a role in the remand court's determination.[92] However, as citizen-advocates for a strengthened public television system, we here embrace the law of the case: namely that Section 5, like Section 4, is content-neutral. That holding—against which we have heretofore argued—forecloses a debate, at the hearing on remand, about whether Sections 4 and 5 should be subject to strict

92. The *Turner Broadcasting* Court phrased the *O'Brien* inquiry as addressing whether "the economic health of local broadcasting is in genuine jeopardy." 114 S. Ct. at 2450. Except in the most formal and artificial sense, it is impossible to speak about preserving the health of broadcasting without invoking some substantive vision of what broadcasting is or ought to be. Assurance of the existence of broadcast television necessarily implies some assumptions about what functions that entity will perform and the type of programming it will provide. Prime-time type programming, for example, is expensive to produce. If that is the type of programming we expect from broadcasters, they must have a sufficiently robust financial profile to bankroll such ventures. Perhaps the Court is saying that Congress can try to ensure that a broadcast system exists at only a minimal level but that if Congress seeks to assure some level of performance—more than old cartoons, or a time and weather scroll—constitutional questions arise. But that interpretation of the health of broadcasting, as mere economic viability, defeats the purpose of the legislation. If broadcasting is only to be propped up on the threshold of economic oblivion, it cannot be expected to deliver programming of sufficient value to justify its existence.

scrutiny.[93] But careful analysis of the circumstances of noncommercial broadcasting—a necessary aspect of the remand hearing—will demonstrate the differences, in application, between Sections 5 and Section 4. The three-judge court should pay close attention to these differences and, in considering them, entertain the possibility that Section 5 may be constitutional while Section 4 is not.

How could that be the case? How can the remand tribunal build on a distinction between categories that was disregarded by the Supreme Court? Despite holding that the must-carry rules were content-neutral, the *Turner Broadcasting* Court, applying the two-part *O'Brien* test,[94] concluded that it lacked sufficient evidence to rule on the statute's constitutionality. The Court consequently remanded to determine if "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," and that the statute does not "burden substantially more speech than is necessary to further the government's legitimate interests."[95] As to both these tests, there are important differences between the two broadcasting systems. In performing the task delegated to the remand court, the danger is that the two systems of broadcasting will be lumped together and the analytic rigor so highly prized in the First Amendment context will be lost. In undertaking the requisite analysis, the three-judge tribunal should look separately at the two Sections and two types of broadcasters in determining whether the relevant class of broadcasters is in danger of extinction if the must-carry rule is dissolved and whether the rule is sufficiently finely-tailored to withstand constitutional attack.

In order to establish the first prong of the analysis prescribed by the Court, the government is obliged to demonstrate both that significant numbers of local broadcasters would be dropped from cable systems absent mandatory carriage and that "the broadcast stations

93. One might argue that the Court's reasoning sometimes appears to rely for its finding of content-neutrality on the fact that § 5 and § 4 were enacted together. *See id.* at 2462. "The operation of the Act further undermines the suggestion that Congress' purpose in enacting must-carry was to force programming of a 'local' or 'educational' content on cable subscribers. The provisions, as we have stated, benefit all full power broadcasters irrespective of the nature of their programming." *Id.* However, the Court squarely stated, without relying on this finding, that both sections were content-neutral and that the allusions to content in the legislative history only show that "the services provided by broadcast television have some intrinsic value." *Id.* at 2477. At least from the standpoint of proceedings in the *Turner Broadcasting* case, the issue of § 5's content neutrality seems conclusively determined.

94. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

95. *Turner Broadcasting*, 114 S. Ct. at 2470 (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

denied carriage will either deteriorate to a substantial degree or fail altogether."[96] While the Court grudgingly assumed for the sake of argument that the government could have satisfied the burden of showing that significant numbers of broadcasters would be dropped,[97] there is substantial evidence that public broadcasters would be dropped or repositioned much more frequently than their commercial counterparts.[98] Public broadcasters are also endemically in a marginal financial position. Reductions in viewership, and hence in the pool of contributors, will have a dramatic effect on the viability of stations already teetering on the financial brink.[99] Moreover, unlike commercial broadcasters, a local noncommercial broadcaster denied carriage has few options for switching to programming that may be more likely to be voluntarily carried by a cable operator. A local commercial station can always seek to affiliate itself with a network that is attractive to a cable operator. The programming sources for educational television, and hence the options for commercial broadcasters, are much more limited.

As the remand court should recognize in its analysis of commercial broadcasting as well, the economic health of local broadcasters is often dependent on the economic health of broadcasting generally.[100] For public television, this interdependence exists with a vengeance. Crippled from the outset by a system of inadequate national coverage and the disadvantage of reliance on many weak UHF outlets, the capacity of public broadcasting to develop an effective and efficient means of scheduling and acquiring programming has always been weak. Under current public broadcasting service rules, the local outlet requires independently raised funds to acquire programming through the PBS cooperative and its capacity to do so declines if its audience is diminished. The inability of a group of noncommercial outlets to bid for national programming would weaken the capacity of

96. *Id.* at 2471.

97. *Id.*

98. *See supra* note 63 and accompanying text.

99. It could be argued that if public broadcasting only became generally viable through mandated carriage, the baseline for measuring the harm from non-carriage should be the condition of public broadcasting before cable carriage was mandated. But that is not the question the Court asks. It merely asks about the effect on broadcasters if they are denied mandated carriage. That must-carry may have facilitated the growth of noncommercial broadcasters far more than commercial broadcasters is irrelevant to the Court's remand analysis.

100. The economic health of local broadcasters cannot be decided on a station by station basis. Because the capacity of the wholesaler (the network) to bid for programming for the station (the local broadcaster) is dependent on the cumulative audience of stations, a network like CBS is weakened when any of its major affiliates disappear, lose audience, or are otherwise financially weakened. All CBS affiliates suffer if the network suffers.

PBS to bid for high quality educational programming. Dwindling local viewership could well translate not only into a drop in local contributions but also into dwindling support from Congress.

But mere economic peril does not adequately convey the risk to public broadcasting from termination of mandatory carriage. Prior to the growth of cable, the public broadcasting system was extraordinarily weak. Most stations were broadcast on the anemic UHF frequency and commanded paltry audiences. Cable carriage dramatically expanded public broadcasters' penetration of households and, therefore, their capacity to attract personal and corporate contributions and government support. Casting public broadcasters back to their UHF origins can therefore be expected to constrict their audiences and funding sources significantly. Their unique history also shows why alternative measures are likely to be less successful for noncommercial than commercial broadcasters; even if it proved a viable alternative to mandatory carriage in some instances, the A/B antenna switch would not correct the poor signal quality of the UHF band, and hence the structural obstacles to noncommercial broadcasting in the days before cable.

Indeed, the "serious risk of financial difficulty" test is better adapted to measuring the state of commercial than noncommercial broadcasters.[101] It seems appropriate to evaluate the health of for-profit commercial broadcasters in terms of their ability to continue to turn a profit. That is not the mission of public broadcasters. Their goal is simply to introduce quality educational programming to an ever wider audience. A commercial station might thrive economically despite a shrunken audience; but for noncommercial stations, economic survival is pointless if their programming fails to find an audience. A substantial reduction in the size of the audience for noncommercial broadcasting is the effective equivalent of bankruptcy for a commercial station. A more appropriate measure of the health of noncommercial broadcasters should take into account effects on viewership, apart from any economic consequences. By that standard, noncommercial broadcasters again seem uniquely vulnerable to injury from cessation of mandated carriage.

The second *O'Brien* prong also appears to make a stronger case for Section 5 than Section 4. The penultimate paragraph of the *Turner Broadcasting* opinion calls for additional findings concerning the effects of must-carry "on the speech of cable operators and cable programmers."[102] On remand, the court is to inquire into the

101. *Turner Broadcasting*, 114 S. Ct. at 2472.
102. *Id.*

> extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters.[103]

Mandatory carriage of noncommercial broadcasters poses only a limited burden on cable operators in any case: a cable system with twelve channels or fewer need carry only one noncommercial broadcaster, and a system with up to thirty-six channels is required to carry no more than three. Cable operators are also not required to carry substantially duplicative noncommercial stations in many cases.[104] In a provision with no counterpart in Section 4, Section 5 requires cable operators to import noncommercial television signals where no local noncommercial broadcasters exist.[105] This provision again evinces narrow tailoring. In precisely those situations where no carriage now exists through local broadcasting, cable systems are charged with carrying noncommercial broadcasters, thereby enhancing the viability of the noncommercial broadcasting system and furthering the ends of public broadcasting, by bringing educational programming to previously unserved audiences.

In the long run, we adhere to the view that cautious, content-based regulation should sometimes prevail over reflexive application of formalistic doctrines in the cable arena. The alternative, too often, is regulatory nonsense. But at this phase of the *Turner Broadcasting* litigation, with the content-based status of Section 5 already resolved, however errantly, the case for carriage can still be made in the Court's own *O'Brien*-derived terms. Regulatory nonsense may still be transmuted, this one time, to adjudicative serendipity.

103. *Id.*

104. *See* 47 U.S.C. § 535(b)(3), 535(e) (Supp. IV 1992).

105. This provision also is narrowly tailored, not requiring such importation for a system with fewer than 12 stations if it would displace stations already carried. 47 U.S.C. § 535(b)(2)(B).