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Cable Television, New Technologies and the First Amendment After *Turner Broadcasting System, Inc. v. F.C.C.*

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INTRODUCTION

From the moment it emerged as an independently viable communications medium, the cable television industry has been forced to operate within the shadow of regulatory oversight. Cable television systems, which now reach into nearly two-thirds of all television households and serve almost sixty million subscribers,¹ have nearly always been subject to the regulatory whimsy of government. Like many other communications industries—especially radio and television broadcasting—cable television has become trapped in a state-imposed "cycle of repression,"² unable to cut itself loose from government control, despite its continual growth and sophistication. In fact, regulation of this industry has never been more pervasive, nor intrusive, than it is today. With passage of the Cable Television Consumer Protection and Competition Act of 1992,³ and judicial endorsement of much of that legislation in *Turner Broadcasting System, Inc. v. F.C.C.*,⁴ cable's future rests squarely in the hands

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1. BROADCASTING & CABLE YEARBOOK, vol. 2, xi (1995).

2. Robert Corn-Revere, *New Technology and the First Amendment—Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L. J. 247, 264 (1994). See also LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT, Ch. 11 & 12 (U. of Cal. Press 1987).

3. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 106-385, § 2(a)(3), 106 Stat. 1460, 1460-1463 (codified at 47 U.S.C. §§ 521-559 (1988 & Supp. V 1993)) [hereinafter "'92 Act"].

4. 114 S. Ct. 2445 (1994) [hereinafter referred to as "*Turner*"] (*Turner* involves a challenge by several cable system operators and programmers to §§ 4 and 5 of the '92 Act, codified at 47 U.S.C. §§ 534 & 535 (Supp. V 1993), which require cable television systems to carry the video signals of certain local broadcast stations. The

of the federal government. Congress, with some help from the Supreme Court, has made it clear that any blueprints for the future of the nation's communications infrastructure will have to pass through Washington.

Turner is a landmark decision in this area, most importantly because it ends nearly half a century of reticence by the Supreme Court regarding the constitutional status of cable television. Is cable television like broadcasting, which is subject to government regulation because of the scarcity of the broadcast spectrum,⁵ or is it more akin to the newspaper industry, which is nearly immune from government encroachment?⁶ Even this most rudimentary question has remained unanswered, which has helped produce a body of lower court precedents that is unprincipled, inconsistent, and overly deferential. Cable plaintiffs have registered a few victories in the lower courts,⁷ but the majority of government regulations have survived constitutional attack. The expansion of regulation has not been slowed by the Supreme Court, which, by its inaction, has tacitly endorsed the government's regulatory scheme. In *Turner*, the Court finally ended its silence. Unfortunately for those in the cable industry, however, the dominant effect of the decision was to sanction the government's continued superintendence of the industry.

In addition to being a landmark cable television case, *Turner* is also an important First Amendment case. The Court in *Turner* applied several of the most common First Amendment principles and appeared to modify, or at least clarify, some of those principles. In doing so, the Court also revealed continuing divisions among its members over, for example, the precise definition of what is a "content-based" regulation,⁸ subject to strict judicial

plaintiffs argued that these "must-carry rules" interfere with their autonomy and editorial discretion in selecting which stations and programs to carry on their systems and therefore, the regulations violate their First Amendment free expression rights.)

5. See *Red Lion Broadcasting, Co. v. F.C.C.*, 395 U.S. 367 (1969).

6. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

7. See, e.g., *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1477 (N.D. Cal. 1986), *cert. dismissed*, 484 U.S. 1053 (1988) (prohibiting local franchise authority from granting exclusive cable franchise); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 45-46 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (rejecting "spectrum scarcity"—the regulatory rationale for broadcasting—as applied to cable); and *Quincy Cable v. F.C.C.*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) and *Century Communications Corp. v. F.C.C.*, 835 F.2d 292, 293 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (both holding unconstitutional different version of the FCC's must-carry rules).

8. Content-based regulations are those that restrict the expression of particular subjects or viewpoints. These types of regulations violate the First Amendment unless the government can show that they are necessary to serve a compelling governmental interest and that they are no more restrictive than necessary. *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

scrutiny, versus a "content-neutral" regulation, subject to less exacting scrutiny.⁹

While the *Turner* decision leaves much to be desired—especially for cable system operators and programmers—the fact that the Court at least sought to establish some First Amendment standards for this industry makes the case noteworthy. This is just the beginning, however. The impact of the *Turner* decision could be dramatic. As our nation leaps headlong into the "Information Age," *Turner* could become an important precedent for all new communications technologies as they struggle to retain their autonomy from government regulators.

This article is divided into four parts. Part I explains the *Turner* decision and its major holdings. Part I also traces the evolution of the cable television industry and its changing regulatory framework. This may be background for some readers, but it is essential to understanding the full significance of the case. Part II looks at an important macro-level aspect of the decision—the Court's search for a regulatory model for cable television. This part of the paper examines the legitimacy of the Court's choice of models and analyzes the possible effect that its choice will have on the cable industry and the changing communications infrastructure. Parts III and IV focus more on the micro-level consequences of the Court's decision. Part III contains an analysis of the Court's application of constitutional law and how the decision may substantially modify long-standing First Amendment principles, while the final section attempts to explain how *Turner* might be modified by the district court on remand, and how the decision might affect another important cable case—*Daniels Cablevision, Inc. v. United States*¹⁰—that is currently making its way through the federal courts.

I. *TURNER* AND ITS HISTORICAL AND JUDICIAL ANTECEDENTS

The United States Supreme Court's decision in *Turner* is historic if for no other reason than because it is only the sixth case involving cable television

9. Content-neutral regulations are those that—unlike content-based regulations—do not target particular subjects or viewpoints. Instead, the burden on speech caused by these regulations is incidental to some other government objective. Content-neutral regulations are typically subject to an intermediate-level scrutiny whereby the government must show that: (1) the regulation furthers an important or substantial government interest, (2) the burdens on speech caused by the regulation are unrelated to the suppression of speech, and (3) the restriction on speech caused by the regulation is no greater than necessary to advance the government's interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968), as modified by *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989).

10. 835 F. Supp. 1 (D.D.C. 1993).

that has reached the Court.¹¹ More importantly, it is the first case that even begins to answer some of the most basic paradigmatic questions about the constitutional status of this medium. In the three decades that have passed since the Federal Communications Commission [hereinafter FCC] first began regulating cable television, *Turner* is the first case in which the Court grapples with these fundamental issues. To be sure, however, the Court has just begun this process, and indeed the *Turner* decision raised as many questions as it answered. But at least now there are some discernable boundaries to the battlefield.

A. *Turner Broadcasting System, Inc. v. F.C.C.*

On October 5, 1992, after years of intense lobbying and mounting public dissatisfaction with cable rates and services, Congress overrode the veto of President George Bush for the first and only time and passed the Cable Television Consumer Protection and Competition Act of 1992 ("the '92 Act").¹² On its face, the '92 Act would appear to be a boon to those who watch and pay for cable service. It promises improved customer service,¹³ ensured public access,¹⁴ and lower, government-controlled rates.¹⁵ Unfortunately, the '92 Act, like most previous regulatory efforts, is riddled with constitutionally suspect provisions.

11. The others are: *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (challenge to FCC's regulatory authority over cable); *U.S. v. Midwest Video Corp. [Midwest Video I]*, 406 U.S. 649 (1972) (challenge by cable company to program origination requirements); *F.C.C. v. Midwest Video Corp. [Midwest Video II]*, 440 U.S. 689 (1979) (challenge to regulations requiring third-party access to cable systems); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (challenge to city's refusal to grant more than one cable franchise in same market); and *Leathers v. Medlock*, 499 U.S. 439 (1991) (challenge to special cable television sales tax).

12. Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C.A. §§ 521-559 (1988 & Supp. V 1993). The '92 Act was enacted after three years of hearings regarding the structure of the cable television industry. See S. REP. NO. 92, 102nd Cong., 1st Sess. 3-4 (1991) (hearings), and the introduction to the act itself, §§ 2(a)(1)-(21) (conclusions).

13. 47 U.S.C. § 552 (1988 & Supp. V 1993) (giving franchising authorities the power to establish and monitor standards for customer service).

14. 47 U.S.C. § 532 (1988 & Supp. V 1993) (requiring that cable system operators lease a certain portion of their channel capacity for use by programmers not affiliated with the cable system).

15. 47 U.S.C. § 543 (1988 & Supp. V 1993) (establishing authority and criteria for regulation of cable rates by the F.C.C. and local franchising authorities).

Among the most pernicious of these are the so-called "must-carry" rules,¹⁶ which were the subject of *Turner*. The must-carry rules require cable system operators to set aside a certain portion of their channel capacity for retransmission of local commercial and public broadcast signals.¹⁷ While the number of channels each cable system must reserve for local broadcasting depends on the size of the system, cable system operators have no discretion to determine which local broadcast signals must appear on their systems.¹⁸ As soon as the must-carry rules went into effect, Turner Broadcasting System,¹⁹ among other plaintiffs,²⁰ filed suit in federal district court challenging enforcement of the rules. The plaintiffs argued that the must-carry rules interfered with their editorial discretion to control the content of their own systems, violating their First Amendment free expression rights.

Two other lawsuits were filed²¹ challenging several other provisions of the '92 Act, as well as some of the provisions from the Cable Communications and Policy Act of 1984.²² Pursuant to a provision in the '92 Act,²³ a special three-judge panel of the U.S. District Court for the District of Columbia was required to hear the challenge to the must-carry rules, while the claims challenging the other provisions of the act were removed from the jurisdiction of the special panel²⁴ and were heard by Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia. Essentially, then, there were two separate cases—*Turner*, which involved the must-carry rules and was being heard by the special district court panel, and *Daniels Cablevision, Inc. v. F.C.C.*, which involved the challenges to the non-must-carry provisions and was being heard by Judge Jackson sitting

16. 47 U.S.C. §§ 534-535 (1988 & Supp. V 1993).

17. 47 U.S.C. § 532 (1988 & Supp. V 1993).

18. Unless, of course, a cable system operator decides to carry *more* local broadcast signals than is required by the must-carry rules.

19. *Turner Broadcasting System, Inc. v. F.C.C.*, 819 F. Supp. 32 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994).

20. *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993), and *National Cable Television Ass'n v. United States*, 819 F. Supp. 32 (D.D.C. 1993).

21. *Time Warner Entertainment Co. v. F.C.C.*, 810 F. Supp. 1302 (D.D.C. 1992), and *Discovery Communications, Inc. v. United States*, 810 F. Supp. 1302 (D.D.C. 1992).

22. Pub. L. No. 98-549, 98 Stat. 2782, (codified at 47 U.S.C. §§ 521-613 (1988 & Supp. V 1993)) [hereinafter "'84 Act"].

23. 28 U.S.C. § 2284 (1988); 47 U.S.C. § 555(c)(1) (Supp. V 1993); *see also* '92 Act, *supra* note 3.

24. *Turner Broadcasting System, Inc. v. F.C.C.*, 810 F. Supp. 1308, 1314 (D.D.C. 1992).

alone.²⁵ The three-judge district court panel in *Turner* granted, 2-1, the government's motion for summary judgment.²⁶ The plaintiffs appealed the decision directly to the U.S. Supreme Court, which noted probable jurisdiction.²⁷

The plaintiffs in *Turner* made four basic arguments relating to the constitutionality of the must-carry rules. First, they argued that the must-carry rules are unconstitutional on their face and as applied, because they distinguish between different types of speakers based on the content of their speech.²⁸ Like all content-based regulations, therefore, the must-carry rules should be subject to strict judicial scrutiny.²⁹ Second, they argued, these regulations should be strictly scrutinized because they impose special burdens on cable system operators not required of other media.³⁰ Third, the cable plaintiffs argued that the must-carry rules should be subject to strict scrutiny because they favor one medium (broadcast) over another (cable).³¹ Finally, the plaintiffs argued that these regulations should be subject to strict scrutiny because of the extent to which they intrude on the editorial functions of cable system operators. Specifically, they force cable system operators to turn over a portion of their channel capacity for use by others, which compels them to promote speech they might disagree with or would otherwise decide not to carry.³²

The Supreme Court rejected each of these arguments and held, 5-4, that the must-carry regulations are neutral on their face and as applied, because the distinctions they make between speakers are not based on content, but on the manner in which programmers transmit their messages.³³ The Court also held that the differential treatment applied to the different media was not

25. Judge Jackson eventually ruled against most of the challenges to the non-must-carry provisions. *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993). This decision was appealed by several parties, including the federal government. These appeals have been consolidated and are now before the U.S. Court of Appeals for the District of Columbia. This case is discussed in more detail in part IV of this article.

26. *Turner Broadcasting System, Inc. v. F.C.C.*, 819 F. Supp. 32 (D.D.C. 1993).

27. *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 38 (1993).

28. *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445, 2458-64 (1994). See also brief for appellant *Turner Broadcasting Systems, Inc.*, 1993 WL 638226.

29. See *Boos v. Barry*, 485 U.S. 312, 324-29 (1988).

30. *Turner*, 114 S. Ct. at 2456-58. See also brief for appellant *Time-Warner Entertainment Co.*, 1993 WL 639374, *27-*31.

31. *Turner*, 114 S. Ct. at 2456-58; See also brief for appellant *Turner Broadcasting System, Inc.*, 1993 WL 638226, *23-*31.

32. *Turner*, 114 S. Ct. at 2464-69. See also brief for appellant *Time Warner Entertainment Co.*, 1993 WL 638232, *4-*6.

33. *Turner*, 114 S. Ct. at 2460-61.

motivated by an interest in the content of particular messages, but by the fact that the broadcasting industry was in economic peril and needed special assistance.³⁴ Finally, the Court held that any special burdens imposed on the cable industry were justified by the "special characteristics" of cable, namely, its supposed ability to exercise "bottleneck, or gatekeeper, control" over television programming.³⁵

The Supreme Court concluded that because the must-carry rules were content-neutral, the regulations were not subject to strict scrutiny and should instead be analyzed under the test articulated in *United States v. O'Brien*.³⁶ The *O'Brien* test—as modified by *Ward v. Rock Against Racism*³⁷—applies to government actions that restrict speech but do not target speech. In other words, the burden on speech posed by such regulations must be merely "incidental" to some other government objective.³⁸ To sustain these types of regulations under *O'Brien*, the government must show: (1) that the regulation furthers an important or substantial government interest, (2) that the government interest is unrelated to the suppression of speech, and (3) that any incidental restriction of speech is no more burdensome than necessary to advance the government's interest.³⁹

Having concluded that the must-carry rules are not aimed directly at speech, the Court then analyzed the substantiality of the government's interest in regulation. It recited the interests advanced by Congress in the introduction to the '92 Act: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."⁴⁰ Essentially, the Court concluded that the restrictions imposed by the must-carry rules were incidental to the government's substantial interest in preventing the demise of broadcast television.⁴¹ With respect to the third prong of the *O'Brien* test, however,

34. *Id.* at 2467.

35. *Id.* at 2466.

36. 391 U.S. 367, 377 (1968).

37. 491 U.S. 781, 799 (1989).

38. For example, in *O'Brien*, the plaintiff burned his draft card, which violated federal law. The plaintiff argued that the law was unconstitutional because it restricted his freedom to speak. The Court held, however, that the restriction of speech was not one of the objectives of the law; rather, the burden on speech that the law produced was incidental to the government's substantial interest in maintaining the integrity of the draft system. *O'Brien*, 391 U.S. at 381-82.

39. *Id.* at 377.

40. *Turner*, 114 S. Ct. at 2469.

41. *Turner*, 114 S. Ct. at 2461 ("The 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.").

the Court remanded the case back to the district court panel to determine whether the must-carry rules actually advance the government's asserted interests and whether or not they are more restrictive than necessary to serve those interests.⁴²

The fact that the Court remanded the case was an immediately small but potentially significant victory for the cable plaintiffs. It is possible that on remand, the district court will determine that the broadcast industry is not really in economic peril and, therefore, the must-carry rules do not directly advance the government's asserted interests. This seems unlikely, however, given the tone of the district court's earlier decision in *Turner* and the magnitude of Congress' investment in this legislation. Furthermore, even if the plaintiffs win on remand, it will be overshadowed by the Court's damaging assessment of cable's status under the Constitution and in the marketplace of ideas.

The validity of the arguments presented by both sides in *Turner* are analyzed much more precisely in subsequent sections of this article. In addition, the likely impact of the case is given substantial consideration, including the possible modification of *Turner* on remand and the likely effect of *Turner* on the *Daniels* case. At this point, however, it is important to try to provide some context for this analysis.

B. The Origins and Evolution of Cable Television Regulation

The history of cable television regulation actually begins in 1934, 15 years before the first cable television system was operational. In that year, Congress passed the Communications Act of 1934 ('34 Act),⁴³ which, among other things, established the FCC and gave it authority to regulate the services and rates of broadcast licensees⁴⁴ and common carriers.⁴⁵ Obviously, the '34 Act did not address the FCC's authority over the still unborn cable industry. And despite the constant pleadings of disgruntled broadcasters, the FCC consistently refused to assert jurisdiction over the cable industry during the first decade of its existence.⁴⁶

Things began to change in the 1960s, however. In 1962, the FCC refused to grant a license to a cable system operator unless it agreed to carry

42. *Id.* at 2470-72 (In September 1994, the parties were ordered by the district court panel to submit cross-motions for summary judgment by March 1, 1995. The district court is expected to hand down its decision in late 1995 or early 1996).

43. 47 U.S.C. § 151 (1988 & Supp. V 1993).

44. 47 U.S.C. § 201 (1988 & Supp. V 1993).

45. 47 U.S.C. § 301 (1988 & Supp. V 1993).

46. See *Frontier Broadcasting v. Collier*, 24 F.C.C. 251, 253 (1958); and Report and Order in Docket 12443, 26 F.C.C. 403, 431 (1959).

local broadcast signals (must-carry rule) and to not import distant signals that duplicated local programming (non-duplication rule).⁴⁷ Then, in 1966, it explicitly asserted jurisdiction over all cable systems.⁴⁸ Without any clear statutory authority, and with scant acknowledgment of the rights of cable system operators, the federal government had asserted substantial control over the cable industry.

Cable system operators challenged these regulations in *United States v. Southwestern Cable Co.*,⁴⁹ the first Supreme Court decision involving cable television. The Court upheld both the FCC's rules and its assertion of jurisdiction, but limited the FCC's authority to that which is "reasonably ancillary" to the FCC's responsibilities for the regulation of broadcasting.⁵⁰ Despite this apparent limitation, the FCC continued to expand its regulatory control after *Southwestern*. In 1969, it ordered all cable operators to honor the "fairness doctrine,"⁵¹ to provide equal time for political candidates, and to create original programming.⁵² And in 1970, it barred all cross-ownership of broadcast and cable systems located in the same market.⁵³

Again, cable system operators sought relief in the courts but without success. In *United States v. Midwest Video*,⁵⁴ another U.S. Supreme Court case, the plaintiff cable system operator challenged the program origination rules. Once again the Court had an opportunity to define the scope of the FCC's authority and to articulate a regulatory model for cable television regulation. Instead, it simply affirmed the FCC's jurisdiction over things "reasonably ancillary" to broadcasting.⁵⁵ The Court's approach to cable

47. See *Carter Mountain Broadcasting Corp. v. F.C.C.*, 32 F.C.C. 459, 465 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir 1963), *cert denied*, 375 U.S. 951 (1963). While still dismissing any jurisdictional authority over cable television, the FCC's imposition of these conditions indicated a growing sympathy with the interests of broadcasters and a willingness to intervene, at least indirectly.

48. Second Report and Order in Dockets 14895, 15233 and 15971, 2 F.C.C.2d 725, 729-44 (1966).

49. 392 U.S. 157 (1968).

50. *Id.* at 178.

51. The "fairness doctrine" required that broadcasters (or in this case cable system operators) air contrasting views on controversial issues. It was first applied to broadcasters in 1949. Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1258 (1949). It was rescinded by the FCC in 1987 by *Syracuse Peace Council*, 2 F.C.C. 5042 (1987).

52. First Report and Order in Docket 18397, 20 F.C.C.2d 201 (1969).

53. Second Report and Order in Docket 18397, 19 R.R.2d 1775 (1970). This order also prohibited the three major networks from owning cable systems anywhere.

54. *Midwest Video I*, 406 U.S. 649 (1972).

55. *Id.* at 668.

regulation was, to this point, one of nonintervention.⁵⁶ One reason for this was that the scope of the FCC's authority to regulate cable had been considered solely a matter of statutory interpretation. The notion of a constitutional limit on FCC jurisdiction had not been given serious consideration.⁵⁷ In the absence of any prophylactic constitutional barrier, the government had an open door to regulate, which it did.⁵⁸

Over the next several years the cable industry gradually managed to chip away at the existing regulatory barriers. It received some help from the FCC⁵⁹ as well as the U.S. Court of Appeals for the District of Columbia. In *Home Box Office, Inc. v. F.C.C.*,⁶⁰ that court explicitly rejected "spectrum scarcity" as a rationale for cable regulation.⁶¹ It also rejected the suggestion that cable systems are natural monopolies and should therefore be regulated on that basis.⁶² Not only did the court find the regulations in *Home Box Office* to be beyond the statutory authority of the FCC under the '34 Act, but

56. *Id.* at 673, 674 n.31. (citing *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 863-864 (5th Cir. 1971)) ("The Commission, thus, must be afforded some leeway in developing policies and rules to fit the exigencies of the burgeoning CATV industry. Where the on-rushing course of events [has] out paced the regulatory process, the Commission should be enabled to remedy the [problem] . . . by retroactive adjustments. . .").

57. In some earlier cases, the idea that cable regulations infringed on speech was raised but dismissed with little elaboration. *See, e.g., Black Hills Video Corp. v. F.C.C.*, 399 F.2d 65, 69 (8th Cir. 1968); *Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220, 225 (D.C. Cir. 1967); *Idaho Microwave, Inc. v. F.C.C.*, 352 F.2d 729, 733 (D.C. Cir. 1965); and *Carter Mountain Broadcasting Corp. v. F.C.C.*, 32 F.C.C. 459, 465 (1962), 321 F.2d 359, 364 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

58. In 1971, another set of comprehensive regulations was imposed on the cable industry. Among other things, these rules: 1) allowed signal importation by cable operators, but placed severe restrictions on the number and types of signals that could be imported; 2) prohibited importation of programs that local stations had purchased the rights to (non-duplication); 3) required cable operators to provide free access channels for use by public, educational and government programmers (PEG channels); and 4) promulgated a number of technical standards for the industry. These requirements were later incorporated into the FCC's Cable Television Rules, issued in February 1972. *Cable Television Report and Order in Dockets 18397, 18397(a), 18373, 18416, 18892 and 18894*, 36 F.C.C.2d 143 (1972).

59. For example, the FCC rescinded the program origination rules. *Report and Order in Docket 19988*, 49 F.C.C.2d 1090 (1974).

60. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

61. *Id.* at 45. The "spectrum scarcity" or "scarce resource" rationale discussed in detail *infra* notes 100-104 is the traditional justification for government regulation of broadcasting. This rationale posits that because broadcast spectrum space is a finite resource, the government is obligated to ensure its proper use.

62. *Id.* at 46.

it also held that the regulations were unconstitutional.⁶³ In *Home Box Office*, for the first time, a federal appellate court had upheld the First Amendment rights of cable operators and had begun to establish unique standards for the industry.⁶⁴

Two years later in *F.C.C. v. Midwest Video Corp.*,⁶⁵ the Supreme Court had a chance to pick up where the D.C. Circuit left off in *Home Box Office*. In *Midwest Video II*, a cable system operator challenged the constitutionality of the FCC's mandatory public access channel requirements of 1972 and 1975. The Court held that the rules exceeded the FCC's authority⁶⁶ but did not comment on the constitutionality of the access rules or of cable regulation generally, except to note that those issues were "not frivolous."⁶⁷ Cable's constitutional status remained uncertain.

By the mid-1980s all the pieces were in place for sweeping deregulation of the cable television industry—a Republican president, a relatively compliant Congress, and a laissez-faire capitalist at the helm of the FCC.⁶⁸ These players combined to produce the Cable Communications and Policy Act of 1984 ('84 Act).⁶⁹ For years leading up to passage of the '84 Act, regulatory authority over cable had been split between federal (FCC), state, and municipal governments.⁷⁰ However, none of these bodies had explicit congressional authority to regulate. The primary objective of the '84 Act, then, was to establish a coherent regulatory framework in which the jurisdictions of these different governments were more clearly defined.⁷¹

63. *Id.* at 49.

64. *Id.* at 46. The court recognized that cable system operators exercise many of the same editorial functions as newspaper editors, and, therefore, many of the traditional standards applicable to regulation of the print media might apply to cable. It did not adopt the "print model," discussed *infra* notes 127-147, but it went a long way toward distinguishing cable from broadcasting.

65. *Midwest Video II*, 440 U.S. 689 (1979).

66. The Court applied its test from *Southwestern*, finding that the FCC's rules were "reasonably ancillary" to its effective regulation of broadcasting. *Id.* at 708.

67. *Id.* at 710 n.19.

68. Mark Fowler, who argued for reliance on market forces rather than regulation, was the head of the FCC. See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209 (1982).

69. 47 U.S.C. §§ 521-613 (1988 & Supp. V 1993).

70. State and local governments have regulated cable services by requiring cable system operators to obtain a franchise in order to access public rights of way such as streets and telephone poles. Because installation of cable systems requires the use of public rights of way, state and municipal governments can condition receipt of a franchise on an applicant's first submitting to certain regulations.

71. 47 U.S.C. §521 (1988 & Supp. V 1993).

Consistent with the "New Federalism" of the Reagan era, the '84 Act ceded much of the regulatory authority over cable to state and local governments. Prospective cable system operators using public rights of way are required under the '84 Act to receive a franchise grant from the local franchising authorities.⁷² These authorities can grant "one or more" franchise.⁷³ As it turns out, however, many only granted one franchise, giving a state-sanctioned monopoly to the sole provider.⁷⁴ In addition, under the '84 Act, a franchiser may require provision of channel capacity for public, educational, and governmental ("PEG") access,⁷⁵ and franchisers *must* require that franchisees make lock boxes available to their customers to block out certain channels⁷⁶ and provide leased access channels for commercial use by programmers unaffiliated with the cable system operator.⁷⁷

In the wake of the '84 Act, the U.S. Court of Appeals for the District of Columbia handed down two important cases—*Quincy Cable v. F.C.C.*⁷⁸ and *Century Communications Corp. v. F.C.C.*⁷⁹—each of which struck down a different version of the FCC's must-carry rules as violative of the First Amendment. Rejecting the scarcity rationale yet again, the court in *Quincy* held that a different First Amendment standard must be applied to cable.⁸⁰ The court applied the test from *United States v. O'Brien*⁸¹ for content-neutral government restrictions of speech, and on that basis struck down the must-carry provisions.⁸² The court added that a more exacting First Amendment standard might be warranted, but because the must-carry rules failed the intermediate standard of *O'Brien*, it was not necessary for the court to go any further in its analysis.⁸³ In *Century Communications*, decided two years later, the same court reviewed the constitutionality of a scaled-down version

72. 47 U.S.C. § 541(b)(1) (1988 & Supp. V 1993). A franchising authority is the state or local regulatory body that determines which cable system operators will receive local franchises to provide cable services.

73. 47 U.S.C. § 541(a)(1) (1988 & Supp. V 1993).

74. JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 259 (1993).

75. 47 U.S.C. § 531(a) & (b) (1988).

76. 47 U.S.C. § 544(d)(2)(A) (1988).

77. 47 U.S.C. § 532 (1988 & Supp. V 1993). Systems with channel capacity of 36 to 54 must set aside 10 percent of their channels for leased access, and systems with 54 or more channels must set aside 15 percent.

78. 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

79. 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

80. *Quincy Cable*, 768 F.2d at 1450.

81. 391 U.S. 367 (1968). *See supra* notes 36-39.

82. *Quincy Cable*, 768 F.2d at 1454-1462.

83. *Id.* at 1454.

of the must-carry rules. Once again the court held the rules were not narrowly tailored to serve a substantial government interest and were therefore invalid under *O'Brien*.⁸⁴

The U.S. Supreme Court had another chance to advance a definitive First Amendment model for cable in *Los Angeles v. Preferred Communications, Inc.*,⁸⁵ in which it addressed the constitutionality of exclusive franchise grants. But once again the Court refused, despite the urgings of three justices.⁸⁶ Significantly, however, the Court acknowledged that cable system operators are "speakers" for First Amendment purposes and that application of a broadcasting model to cable might not be appropriate.⁸⁷ No new model was advanced, however, and cable's vulnerability to regulation persisted.

The primary flaw of the '84 Act was that it deregulated the cable industry while at the same time giving state and local governments the power to grant exclusive franchises. Under the '84 Act, many exclusive franchisees discovered that there was little to prevent them from increasing rates.⁸⁸ Eventually, consumer complaints reached a critical mass, inspiring Congress to pass the '92 Act, the primary objective of which was to simultaneously promote competition and protect consumers.⁸⁹

The '92 Act affirms the jurisdiction of state and local franchising authorities to regulate cable rates, although cable systems subject to "effective competition," as defined in the Act,⁹⁰ are exempt from rate regulation.⁹¹ It

84. *Century Communications*, 835 F.2d at 304.

85. 476 U.S. 488 (1986) (In this case the plaintiff cable franchise applicant brought suit alleging a violation of its First Amendment rights after being denied a local cable franchise, even though there was "sufficient excess physical capacity" to accommodate more than one franchise).

86. *Id.* at 496-497 (Blackmun, J., Marshall, J., and O'Connor, J., concurring).

87. *Id.* at 494-495.

88. Cable rates increased nearly 30 percent from 1986 to 1988, and in 1991, cable rates were increasing by 14 percent annually, nearly twice the rate of inflation. S. REP. NO. 92, 102nd Cong., 1st Sess. 4-5 (1991). It is important to note, however, that rates have not gone up uniformly and in addition, the type and volume of services has increased. A cable system today offers much more than cable systems did just a few years ago, and the number of channels on systems increases every year.

89. *Id.* at 1.

90. See 47 U.S.C. §543 (l)(1) (Supp. V 1993) (stating that "effective competition means that-

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system;

(B) the franchise area is-

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video

is important to note that none of the other regulations contained in the '92 Act—including the must-carry rules—are triggered by the presence or absence of competition. Thus, the must-carry rules apply to all cable systems—including those subject to same-market competition—even though the absence of competition is the key regulatory rationale for the '92 Act. Aside from rate regulation, the '92 Act also contains several provisions designed to foster competition in the cable industry.⁹²

Two of the most constitutionally suspect portions of the '92 Act are those dealing with mandatory leased access⁹³ and mandatory carriage of local broadcast signals (the must-carry rules).⁹⁴ Indeed, the District of Columbia Circuit struck down two previous versions of the must-carry rules in *Quincy Cable* and *Century Communications*.⁹⁵ The latest round of must-carry rules—challenged in *Turner*—give local broadcasters a choice between either mandatory carriage of their signals by the cable system operator or payment by the cable system operator to the broadcaster for the right to retransmit their signals.⁹⁶ What is so troublesome about the must-carry and leased access provisions is that, like the public, educational, and government ("PEG") access

programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video program distributors other than the largest multichannel video program distributor exceeds 15 percent of the households in the franchise area; or

(C) a multichannel video program distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.").

91. However, "effective competition" is defined so narrowly in the Act that only one percent of all cable systems are exempt from rate regulation. Wesley R. Heppler, *The 1992 Cable Act: Rate Regulation, Must Carry, and Retransmission Consent*, CABLE TELEVISION LAW 1994: BEYOND THE CABLE ACT 278 (Practicing Law Institute 1994).

92. Under the new law, franchising authorities are prohibited from granting exclusive franchises and from unreasonably refusing to award an additional franchise. 47 U.S.C. § 541(a)(1) (1988 & Supp. V 1993). In addition, franchise authorities are permitted to refuse to grant franchises to cable system operators who already operate a franchise in the same area. *Id.* Finally, municipalities are permitted to own cable television systems and those that do are exempt from any rate regulation. *Id.*

93. 47 U.S.C. § 532 (1988 & Supp. V 1993). The leased access provisions require cable system operators to set aside a certain portion of their channel capacity for use by unaffiliated commercial programmers.

94. 47 U.S.C. §§ 534-35 (Supp. V 1993).

95. *See supra* notes 78-79 and accompanying text.

96. 47 U.S.C. §§ 534-35 (Supp. V 1993); 47 U.S.C. § 325(b) (1988 & Supp. V 1993).

provisions in the '84 Act, they permit direct government interference with the editorial functions of cable system operators, which the Supreme Court has acknowledged are protected First Amendment activities.⁹⁷ All three of these regulations—must-carry, leased access, and PEG access—are now being challenged in the courts. While the must-carry rules are challenged in *Turner*, the constitutionality of the other two provisions is the subject of the *Daniels* case.⁹⁸

II. *TURNER* AND THE SEARCH FOR A REGULATORY MODEL

Leading up to *Turner*, the world of cable television regulation was replete with uncertainty. The lower courts were forced to hear challenges to cable regulations with little guidance from the Supreme Court. The result of this was a disjointed body of lower court precedents.⁹⁹ Lower courts not only produced different outcomes in similar cases, but the constitutional models they applied (in those cases where they recognized the existence of constitutional issues) were markedly divergent.

Some courts struck down certain regulations, holding that because cable systems do not have to compete for spectrum space—the traditional justification for regulation of the broadcast media¹⁰⁰—they should be free from most regulation.¹⁰¹ Others, however, held that the cable media should be regulated similarly to the broadcast media because, while they may not compete for spectrum space, they do compete for access to public rights of way.¹⁰² Still other courts have upheld regulations based on the alleged

97. *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

98. *Daniels Cablevision v. F.C.C.*, 835 F. Supp. 1 (D.D.C. 1993). See discussion *infra* text accompanying notes 216-19.

99. Compare *Century Federal Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1472 (N.C. Cal. 1986) (prohibiting local franchise authority from granting exclusive cable franchises) with *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 712 (8th Cir. 1986) (permitting exclusive franchise grants as a means of fostering competition).

100. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

101. See, e.g., *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1471 (N.D. Cal. 1986), *cert. denied*, 484 U.S. 1053 (1988) ("The characteristic in broadcasting that justifies increased governmental intrusion in that medium is absent in [the cable context]").

102. See, e.g., *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982) (equating cable with broadcasting because while the latter may be regulated because of its use of the public airwaves, the former can be regulated because of its use of other public rights-of-way, such as telephone poles and underground ducts).

natural monopoly status of cable¹⁰³ or on more amorphous notions of listeners' rights and the public good.¹⁰⁴

In order to resolve these inconsistencies, the Court, as it had acknowledged years earlier,¹⁰⁵ needed to adopt a single model for regulation of cable television. In doing so, it had several prototypes from which to choose—the broadcast model,¹⁰⁶ the print model,¹⁰⁷ the common carrier model,¹⁰⁸ the public function model,¹⁰⁹ the public forum model,¹¹⁰ and

103. See, e.g., *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 600 (W.D. Pa. 1987) ("Cable television's physical intrusion into the public rights of way and the ease with which operators are able to create a natural monopoly in a local market have provided justification for governmental regulation").

104. See, e.g., *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976, 987 (D.R.I. 1983) ("It has been noted that if cable is to become a constructive force in our national life, it must be open to all Americans. There must be relatively easy access—for those who wish to promote their ideas, state their views, or sell their goods or services").

105. See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis").

106. See *infra* notes 115-126 and accompanying text.

107. See *infra* notes 127-147 and accompanying text.

108. The common carrier or public utility model is based on the notion that the owner of the communications medium in question is not really a "speaker" but is more of a conduit (carrier) for the speech of others. The owners of such systems merely amplify the speech of others. Telephone systems are regulated primarily under a common carrier model. In *Turner*, the Supreme Court explicitly reaffirmed its prior holdings in both *Preferred* and *Leathers*, that cable system operators do exercise editorial functions that merit First Amendment protection. See *Turner*, 114 S. Ct. at 2456 and, *supra* note 97, and accompanying text. By acknowledging that cable system operators are legitimate First Amendment speakers, the Court indirectly rejected the applicability of a common carrier regulatory model.

109. Proponents of this approach seek, in no uncertain terms, the socialization of information. They are primarily "marketplace" critics who argue that in modern society access to the information marketplace is not possible for most Americans and that the preservation of democracy requires access for groups whose ideas are unrepresented. Access theorists contend that the mass media, though privately owned, serve a crucial public function and therefore should be subject to rigid governmental oversight. See generally Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Even assuming all of the access theorists' factual presumptions are correct, this approach is glaringly unconstitutional. Not only would it authorize content-based and viewpoint-based restrictions, both of which are subject to strict scrutiny, it would permit the government to make these decisions.

others. In *Turner*, the Court finally took a stand and adopted what could be called the "bottleneck" (or monopoly) model of regulation. Under this approach, government authority to regulate is justified by the absence of competition and the supposed ability of cable systems to work as "bottlenecks" to diverse sources of video programming.¹¹¹ The government argued in *Turner*, and the Court agreed, that because most television households now subscribe to cable, the only practical way for broadcasters to reach viewers is via a cable system.¹¹² Cable system operators, therefore, have a competitive advantage over broadcasters.¹¹³ Furthermore, they have both the ability and the financial incentive to exploit this advantage.¹¹⁴

Why did the Court choose this model? Why was a distinct model for cable necessary? What is it about the cable medium that distinguishes it from the others, and are these differences relevant for First Amendment purposes? This section attempts to answer these questions. It also seeks to make clear

This kind of government control over the dissemination of information and ideas is at the apex of the First Amendment's prohibitions. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The Court in *Turner* did not adopt this as a regulatory model, but it was sympathetic to the notion that there is dysfunction in the marketplace that requires government action. *Turner*, 114 S. Ct. at 2454-2455.

110. Proponents of the public forum rationale argue that by granting cable system operators franchises to use public property, cable systems are in fact public forums, or, alternatively, that because they use public rights of way, they should be subject to regulation. First, cable systems are not public forums, as that phrase is used in constitutional law; rather, cable systems merely *use* public forums. Second, although cable systems use public rights of way, this alone should not subject them to anything but the most structural regulation.

This model serves as the basis for most existing state and local regulation of cable franchises. That is, the grant of a franchise, and access to public rights of way, is conditioned on the franchisee first submitting to regulation. However, while the government has the right to control the use of public property, this does not sanction content-based regulations. See *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750 (1988). The public forum model in its purest form was not considered by the Court in *Turner*. Nevertheless, the Court's analysis does seem to treat cable systems as quasi-public in the sense that it permits the government to force cable systems to provide access to others.

111. See *infra* note 148-150 and accompanying text.

112. *Turner*, 114 S. Ct. at 2466.

113. *Id.* at 2454.

114. *Id.* at 2454 (referring to the findings of Congress, the Court notes, "The power derives from the cable operator's ability, as owner of the transmission facility, to 'terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous position.' The incentive derives from the economic reality that [c]able television systems and broadcast television stations increasingly compete for television advertising revenues.")

that setting aside the more precise holdings of the *Turner* case, its greatest and most troublesome legacy could be its adoption of the bottleneck model for cable television and, similarly, its rejection of the print model.

A. *Turner's Three Models*

In *Turner*, the Court explicitly rejected one regulatory model (scarcity/broadcast), embraced another (bottleneck/monopoly), and indirectly shunned the model it should have adopted, or at least taken more seriously (print).

1. The Scarcity/Broadcast Model

The scarcity of broadcast spectrum space has been the fundamental justification for federal broadcast regulation since Congress passed the Radio Act of 1927. This regulatory rationale is based on the premise that because spectrum space is limited, the government has to intervene and direct the traffic. If it did not, "the [airwaves] would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."¹¹⁵ In 1962 when the FCC asserted jurisdiction over cable, it assumed that because it had authority to regulate broadcasting, it had implicit authority to regulate cable. This view was upheld by the U.S. Supreme Court in *Southwestern*.¹¹⁶ What the FCC and the Court did not understand, however, was that the cable industry was not "ancillary" to broadcasting; it was a technically distinct industry with none of broadcasting's scarcity problems. Nevertheless, even if cable could have been characterized as ancillary to broadcasting in 1962, or even in 1968, this justification has grown less tenable as the cable industry has expanded its use of non-broadcast programming.¹¹⁷ By continuing to regulate cable television now that it is an independently viable industry, the government has expanded the scope of

115. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 376 (1969).

116. *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

117. Indeed, today it is more accurate to say that broadcasting is ancillary to cable than vice versa. Congress acknowledges this by its insistence that broadcasters are in need of special assistance from cable system operators. See 47 U.S.C. § 521(a)(4) (Supp. V 1993), stating that the cable industry is becoming increasingly concentrated, 47 U.S.C. § 521(a)(13) (Supp. V 1993), stating that there has been a shift in the video programming industry from broadcasting to cable, and 47 U.S.C. § 521(a)(18) (Supp. V. 1993), stating that cable systems have an economic incentive to "delete, reposition or not carry local broadcast signals," which "seriously jeopardiz[es]" the continuing viability of free broadcast television.

its regulatory authority without a corresponding expansion or clarification of its regulatory rationale.¹¹⁸

Modern proponents of the scarcity rationale argue that while cable is no longer ancillary to broadcasting, and while there is no spectrum scarcity in the cable industry, there is physical scarcity. That is, because there are a finite number of cable lines that public rights of way can accommodate, government should be allowed to regulate the industry.¹¹⁹ But this view simply overstates the extent of the physical limitations. While there is obviously some conceivable limit to the number of cable lines a city can accommodate, that number is certainly more than one, or two, or even three. And if three or more cable systems were operational in any one market, one would have to say there is effective competition. Indeed, the notion of three, or even two, competing daily newspapers in the same market is now almost fanciful, yet the newspaper industry is justifiably beyond the reach of most regulation.¹²⁰ Also, any fear that, left unregulated, public rights of way would be clogged with hundreds of cable lines is misplaced. Market forces will ensure the survival of, at most, a handful of cable systems. So, even these more contemporary incarnations of the scarcity rationale are insufficient to support regulation of cable.

The Court's opinion in *Turner* apparently put the final nail in the scarcity model's coffin. The legitimacy of this model as applied to cable had already been rejected by lower courts,¹²¹ but the Supreme Court had never addressed the issue. In *Turner*, however, the Court was clear: "The rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."¹²²

The practical consequence of the Court's rejection of the scarcity rationale is that virtually all regulations aimed at the cable industry will now warrant at least some level of heightened First Amendment scrutiny. Unlike in the broadcasting context, where government regulations are given substantial judicial deference,¹²³ in the cable context, the government will

118. Although clearly Congress did attempt to defend its continued regulation of cable through its passage of the '92 Act.

119. See discussion of the public forum model, *supra* note 110.

120. Except for truly content-neutral, generally applicable regulations, such as those dealing with taxation or the environment. See *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987).

121. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Quincy Cable v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

122. *Turner*, 114 S. Ct. at 2456.

123. The federal government has substantial authority to regulate the broadcasting

now need to demonstrate that the regulation serves at least a substantial government interest. So, for most regulations targeting cable, the *O'Brien/Ward* test will apply.¹²⁴ It is likely, however, that rational basis scrutiny will still be applied to purely structural laws, such as generally applicable tax and environmental statutes.¹²⁵ It is also clear from the Court's analysis that a regulation that clearly targets particular content or viewpoints will be subject to strict scrutiny as in any other context.¹²⁶ However, as the analysis in Section III explains, the Court's definition of what is content-based has grown precariously narrow.

2. The Print Model¹²⁷

The print model begins with the presumption that regulations that interfere with either the content or the autonomy of the press are unconstitutional, or at least subject to heightened scrutiny.¹²⁸ Proponents of regulation have rejected application of the print model to cable, emphasizing the characteristic differences between the two industries. Clearly, some differences exist, but the ones frequently cited to distinguish the two industries are either factually inaccurate,¹²⁹ or are of no constitutional significance.¹³⁰

industry. The '34 Act authorizes the federal government to regulate the airwaves for the public "interest, convenience and necessity." See 47 U.S.C. § 303 (1988 & Supp. V 1993) and the Supreme Court's holding in *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380 (1969) ("This mandate to the FCC to assure broadcasters operate in the public interest is a broad one"). While regulation of the broadcast industry technically receives something more than rational basis First Amendment scrutiny, most regulations are upheld. Because Congress has already spelled out the interests that justify its supervision of the broadcasting industry, and because the Supreme Court has already upheld the constitutionality of that system, individual regulations are, in effect, presumptively constitutional.

124. See *supra* text accompanying notes 36-39.

125. See *Leathers v. Medlock*, 499 U.S. 439 (1991) and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

126. *Turner*, 114 S. Ct. at 2458-59.

127. Also called the newspaper model.

128. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

129. For example, proponents of cable regulation insist that such regulation is necessary because cable systems are natural monopolies. But this is not accurate, especially in light of the recent entry of direct broadcast satellite systems into this market, as well as telephone company provision of video dialtone service. See *infra* notes 140 and 144. Nevertheless, even if cable systems are indeed natural monopolies, they are no more so than newspapers. There is no reason, therefore, that these industries should be treated differently for First Amendment purposes. See also *Tornillo*, 418 U.S. at 247-256 (holding that monopoly status alone is an insufficient

The print model of regulation is best capsulized in the Supreme Court's opinion in *Miami Herald Publishing Co. v. Tornillo*.¹³¹ In that case, the Court struck down a Florida statute that required newspapers that assail the personal or professional character of a political candidate to give that candidate an opportunity to reply in the paper free of charge. The Court struck down the law as a violation of the First Amendment, and in doing so it rejected many of the arguments relied upon by proponents of the must-carry rules. For instance, the Court rejected Tornillo's claim that Florida's right-of-reply statute was constitutional because it fostered speech rather than restricted it. The Court held that telling a paper what to print is no different than telling it what not to print, and therefore the statute was unconstitutional even though the government intended to increase speech.¹³² The *Tornillo* court also rejected monopoly-based arguments for regulation, holding that monopoly status alone is an insufficient justification for "compelling editors and publishers to publish that which 'reason' tells them should not be published" ¹³³ Finally, any notion that newspapers could be made to serve as public forums was rejected by this same reasoning. Forced public access imposes a penalty based on the content of a newspaper, the Court held, by forcing the paper to either eliminate stories to make room for those of the "public," or to spend more money to provide additional space for those stories.¹³⁴ Such a regulation is an unconstitutional "intrusion into the functions of editors."¹³⁵ This is precisely what the must-carry rules, as well as the leased access and public access rules, require cable system operators to do. These regulations would clearly be unconstitutional under a print model approach, where there is a strong presumption of autonomy.

In *Turner*, the Court rejected the applicability of the print model to cable, although its reasons were neither persuasive nor unanimous. First, the Court drew attention to the evidence collected by Congress in enacting the '92 Act.

justification for government interference).

130. For instance, the fact that cable systems need to use public rights of way is not a sufficient justification for imposition of a franchising process that allows authorities to directly regulate the services of its franchisees. Newspapers, through placement of newsracks, for example, use public rights of way as well. The same standard that applies to newspaper access to public rights of way is easily and logically transferable to cable. *See Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988) (holding that licensing schemes for newspaper access to public rights of way must be content- and viewpoint-neutral, and must not give too much discretion to individual administrators).

131. 418 U.S. 241 (1974).

132. *Id.* at 256.

133. *Id.*

134. *Id.* at 256-58.

135. *Id.* at 258.

It held that economic power in the cable industry is becoming increasingly concentrated and that regulation is necessary to correct this "competitive imbalance."¹³⁶ But again, levels of competition in the cable television industry are no more severe than those in the newspaper industry.¹³⁷ And even if some corrective regulation is necessary, the Court does not explain why the problem could not be addressed by passage of laws that are truly structural in nature and that do not intrude on the autonomy and editorial functions of cable system operators.¹³⁸

Second, while it is true that ownership of the traditional mass media is generally concentrating in fewer hands,¹³⁹ the number and types of media outlets continue to expand. This is especially true with respect to the new video communications technologies. Among the current competitors are direct broadcast satellite systems,¹⁴⁰ which just recently began operating in dozens of markets across the country;¹⁴¹ satellite master antenna systems (SMATV);¹⁴² multichannel multipoint distribution service (MMDS);¹⁴³ and most importantly, telephone company (telco) provision of video programming.¹⁴⁴ In short, competition levels are increasing in this industry,

136. *Turner*, 114 S. Ct. at 2454.

137. *See infra* text accompanying note 152.

138. In fact, the '92 Act contains a number of provisions aimed at increasing competition. Why was it not sufficient for Congress to pass these structural provisions? The Court in *Turner* does not address this issue, although it is possible that it will resurface on remand when the district court addresses the question of whether the must-carry rules burden more speech than necessary.

139. *See generally* BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (4th ed., Beacon Press 1992).

140. DBS systems allow studios to transmit signals directly to viewers. The studio sends its signals to a satellite that is able to re-transmit the signal to a large area of the country. Viewers within the satellite's "footprint" then can retrieve the signal through a receiving dish, which costs about \$700. The customer also pays a monthly service fee for a package of video channels.

141. Noel Holston, *Hot Dish for '90s and Beyond: Cable-Competing Satellite's Picture, Sound Are Superior*, MINNEAPOLIS STAR TRIBUNE, August 4, 1994 at 1B.

142. SMATV systems are cable systems that are generally used to serve large apartment complexes, hotels, etc. SMATV systems are comprised of a satellite receive station located on the premises, which sends signals to the individual rooms or apartments through coaxial cable.

143. This system is identical to SMATV except that the signal is sent from the receive station to the individual viewer via microwave radio links rather than coaxial cable.

144. Until recently, there were two regulatory obstacles that prevented telcos from entering the video services marketplace. One of them has been rescinded and the other is dying a slow but inevitable death. The first of these is the "information services"

not the other way around. And with every increase in the level of competition, the rationales for rejecting the print model of regulation are further eroded. Not all of these rationales are premised on an absence of competition, but each is undercut by the *existence* of competition.

In addition to the lack of competition argument, the Court in *Turner* recites the contention of Congress that cable systems have the ability and the incentive to harm broadcasters.¹⁴⁵ Congress and the Court presume that all video programming must come to the viewer via cable, and if a local broadcast station does not get its signal on that cable system, it will not survive. This line of reasoning is also flawed for some, first because it is obviously not true that all video programming must come through cable. Local broadcast signals can be received via traditional satellite dishes as well as new direct broadcast satellite systems, via telephone lines, and, where these options are not actually or practically available, most viewers can always receive broadcast signals via an antenna. In fact, cable customers can purchase an inexpensive switch that allows them to turn back and forth from cable programming to over-the-air broadcast programming by simply flipping

ban that was part of the Modified Final Judgment (MFJ) that broke up AT&T into a constellation of smaller, regional bell operating companies (RBOCs), *i.e.*, the "baby bells." *United States v. American Telephone & Telephone*, 552 F. Supp. 131, 189-90 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983). The MFJ prohibited any of the RBOCs from providing information services because it was believed that they could use their capital resources from their phone business to cross-subsidize their video enterprises, which would give them an unfair competitive advantage over existing cable systems. Judge Harold Green of the U.S. District Court for the District of Columbia rescinded the information services ban. *United States v. Western Elec. Co.*, 767 F. Supp. 308, 328 and 332 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, *Consumer Federation of America v. United States*, 114 S. Ct. 487 (1993). In 1992, the FCC specifically authorized all telcos to provide video dialtone services to their customers. *In re Telephone Company-Cable Television Cross-Ownership Rules*, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781, 5783 (1992).

The second major obstacle to telco entry into the cable business is the cable/telco cross-ownership ban contained in the '84 Cable Act. 47 U.S.C. § 533(b) (1988 & Supp. V 1993). This is an explicit prohibition of telco provision of video services. However, several federal courts have recently found this provision to violate the First Amendment rights of telcos, and the proposed telecommunications bill would repeal this provision entirely. *See infra* text accompanying note 214.

145. *Turner*, 114 S. Ct. at 2454.

a switch.¹⁴⁶ In short, the barrier or bottleneck that Congress decries is simply illusory.

Simply put, the rationales proffered by Congress and the Court in *Turner* for rejecting the applicability of the print model are fatally flawed. Unfortunately, the Court was unwilling to give proper scrutiny to the factual presumptions upon which these regulations are founded. It is possible that on remand the district court will return to some of these questions. But whether it does or not, any hope of the print model being applied to the cable industry was dashed by the Court in *Turner*. Just as troubling is that even if the district court strikes down the must-carry rules on remand, the Supreme Court's *Turner* opinion could take on a life of its own and survive as precedent, even after its factual foundations are subsequently exposed.¹⁴⁷

3. The Bottleneck/Monopoly Model

One of the most common arguments in favor of cable regulation is that because of the lack of competition in the cable industry (economic scarcity), the government has a responsibility to ensure that existing cable systems adequately serve the public. Economic scarcity is the driving principle of the '92 Act¹⁴⁸ and was endorsed to some extent by the Court in *Turner*.¹⁴⁹ Unfortunately, this rationale is flawed in several respects. First, it is based on an unduly narrow definition of competition. Under this theory, competition levels are assessed within the cable industry, rather than in the information and entertainment industry as a whole. In other words, monopoly theorists erroneously presume that the information provided via cable is unavailable

146. The appellees in *Turner* pointed out that less than one percent of cable households have a switching device (called an "A/B switch"). See brief for appellee National Association of Broadcasters, 1993 WL 638229, *8-*9. But as the District of Columbia Circuit has recognized in the past, surveys on the use of A/B switches are "unpersuasive, for [they] almost certainly reflect merely the present consumer unfamiliarity with the switch and antenna mechanism," and "to the extent it does not, it may also reflect consumer disinterest in having access to off-the-air signals." *Century Communications Corp. v. F.C.C.*, 835 F.2d 292, 302 (D.C. Cir. 1987). Another explanation for this is that most cable systems carry the popular broadcast stations already, so consumers often have no need for an A/B switch (or, indeed, for the must-carry rules). Congress seems to concede as much in the '92 Act itself. See 47 U.S.C. § 521(a)(17) and (19) (Supp. V 1993).

147. See *infra* notes 205-215 for more discussion about how the Supreme Court's *Turner* decision could be modified on remand.

148. See 47 U.S.C. § 521(a) (Supp. V 1993) (stating purposes of the Act); 47 U.S.C. § 548 (Supp. V 1993) (containing a variety of other measures designed to foster competition in the video programming industry).

149. *Turner*, 114 S. Ct. at 2454.

through other means. To the contrary, as media scholar Jonathan Emord explains:

“[In 1987] ‘the average media market . . . had access to 36 cable channels, . . . 10 over-the-air television stations, 20.4 AM and 19.5 FM radio signals, 15.9 newspapers, 11.8 magazines each with subscription rate figures of at least 5 percent, and a VCR penetration rate of 48.7 percent.’ From the largest to the smallest markets, there is simply no single predominant voice.”¹⁵⁰

As Emord makes clear, the average media consumer has a plethora of additional information and entertainment sources available to her. Also, these figures do not even take into account the recent increases in competition levels provided by direct broadcast satellite and video dialtone systems.¹⁵¹

Nevertheless, the monopoly rationale is flawed in yet another way: It supposes that the existence of only one cable system in a given market is a condition that necessarily justifies government intervention. But daily newspapers enjoy a similar absence of same-medium competition, and they are not subject to government regulation. While it may be preferable to have competing cable systems (or daily newspapers) in every city, our constitutional history clearly rejects any attempt to achieve "effective competition" through government fiat.¹⁵² Even if the absence of same-medium competition justifies application of some form of structural regulation (i.e., antitrust laws), it certainly does not sanction interference with the editorial functions of cable system operators.

Another flaw with this rationale is its presumption that the existence of only one cable system in most cities is the result of the high cost of entry into

150. EMORD, *supra* note 74, at 287 (citing, P. VESTAL, AN ANALYSIS OF MEDIA OUTLETS BY MARKET, App. II (1987), which was prepared for the Research and Planning Department, National Association of Broadcasters).

151. See definitions, *supra* notes 140 and 144. Direct Broadcast Satellite (DBS) services are currently being provided by DirecTV and Primestar, and several other similar video-via-satellite services. YEARBOOK, *supra* note 1, at xi. As of January 1995, 39 phone companies, representing about nine million customers, had filed applications to provide video dialtone service. KATHLEEN M.H. WALLMAN, CABLE TELEVISION LAW 1995, at 389 (P.L.I., 1995).

152. See *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-256 (1974)) (holding that "scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the press [and] there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point").

the cable market.¹⁵³ In fact, while these market entry costs are certainly substantial, many existing cable systems are free of same-medium competition *solely* because the local franchising authority has granted them an exclusive cable franchise *prohibiting* entry of competing systems.¹⁵⁴ In addition to the competitive barriers imposed by many franchising authorities, there is corresponding evidence that in many of those cities where there are no exclusive franchises, there *are* competing cable systems.¹⁵⁵ Indeed, Emord cites one report indicating that more cities have competing cable systems than have competing daily newspapers.¹⁵⁶ In addition, even if one concedes that the high cost of entry into the market repels competition, this is not unique to the cable industry. The newspaper industry faces the same situation, with established newspapers facing little direct competition.¹⁵⁷ The monopoly rationale, therefore, is an insufficient justification for treating the cable industry any differently than the properly unregulated newspaper industry.

Finally, it is important to note that the '92 Act contains a number of provisions aimed at increasing competition in the cable industry, including the prohibition of all exclusive franchise grants.¹⁵⁸ But at the same time Congress seeks to foster competition through regulation, it justifies its other

153. Congress made reference to this in the "purposes" section of the '92 Act. 47 U.S.C. § 521(a) (Supp. V 1993). The Court in *Turner* also relies, in part, on this notion in reaching its conclusion. *Turner*, 114 S. Ct. at 2454.

154. GEORGE H. SHAPIRO, PHILIP B. KURLAND AND JAMES P. MERCURIO, *CABLESPEECH* 11 (Harcourt Brace Jovanovich, Inc. 1983). States and municipalities often grant exclusive franchises because it limits the number of systems using its public rights of way, and, most importantly, it allows the franchising authority to attach conditions to its award of the exclusive franchise. Franchising authorities often require as a condition of their grant of an exclusive franchise that the cable system operator: "install their systems city-wide, include a greater number of channels than needed, to construct special institutional networks and expensive studios to serve perceived public purposes, and to pay franchise fees that exceed the government's cost for permitting cable's use of public rights of way. . . ." These conditions are also often attached to regular franchises, not just to exclusive franchises, which further limits competition.

155. EMORD, *supra* note 74, at 288.

156. EMORD, *supra* note 74, at 288 (citing Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy*, 7 *YALE J. ON REG.* 65, 67 (1990)).

157. One author noted a couple of years ago that only 24 cities in the United States had competing daily newspapers, and in half of those cities, the two papers were commonly owned as part of a Joint Operating Agreement (JOA), which allows two papers to merge their physical and business operations while maintaining separate editorial offices. BAGDIKIAN, *supra* note 139, at 124.

158. 47 U.S.C. § 541(a)(1) (1988 & Supp. V 1993).

regulations on the absence of competition.¹⁵⁹ Congress is attempting to eliminate the conditions that are the very foundation of its claimed authority. Does this mean Congress will rescind its authority, and the '92 Act itself, if and when the cable industry becomes sufficiently competitive?¹⁶⁰ Why was it not enough for Congress to simply pass structural regulations aimed at increasing competition? By adding the must-carry and other regulations aimed at the internal policies of cable systems, Congress seems to have exceeded the boundaries of its own mandate.

Despite these contrary arguments, the Court in *Turner* accepted Congress' factual assertions about the nature of the cable industry, levels of competition, and the ability and desire of cable systems to frustrate the success of local broadcast programmers (although it did remand the case to determine whether the must-carry rules actually remedy these supposed evils).¹⁶¹ In doing so, the Court implicitly adopted a bottleneck/monopoly model in which the substantiality of the government's interest in regulation will now be presumed and the only remaining question will be whether a given regulation actually serves whatever interest the government asserts.

B. Summary and Significance of the Court's Choice of Models

The significance of the Supreme Court's adoption of the bottleneck/monopoly model for scrutinizing the constitutionality of cable regulations should not be underestimated. By advancing this framework, the Court has given the government substantial discretion to regulate this industry and possibly other emerging communications industries as well. Most regulations that substantially affect speech or that target the press for special treatment are subject to heightened judicial scrutiny.¹⁶² And in such cases, the government bears the burden of establishing their constitutionality. But by adopting this bottleneck/monopoly model for cable, the Court has effectively shifted this burden. From now on, regulations aimed at the cable industry may be given the same type of deference that courts typically give to broadcast regulations.¹⁶³ Technically, the government will still bear the

159. S. REP. NO. 92, 102nd Cong., 1st Sess. 51 (1991).

160. To its credit, Congress exempts from regulation any cable system that is subject to effective competition, as defined in § 3 of the '92 Act. This exemption, however, only applies to regulation of cable rates. It does not exempt a system from the must-carry provisions or any other provision in the act.

161. *Turner*, 114 S. Ct. at 2471-72.

162. *Id.* at 2458.

163. Note that the applicable standards are actually not the same. In the broadcast context, the government need only demonstrate something akin to a "rational basis" for the regulation. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). In the

burden of establishing the constitutionality of any regulations that restrict the speech of cable system operators, but the reality is that new regulations will come to the courts bearing a *Turner* stamp of approval that cable plaintiffs will be forced to overcome. In other words, the substantiality of the government's interest in regulation has now been established. And with the onus effectively on the cable industry rather than government, further regulations may simply go unchallenged. Moreover, the *O'Brien* standard—which is interpreted to be a tougher standard than the "rational basis" scrutiny applied in other contexts¹⁶⁴—has proven to be a flimsy barrier to regulation. In fact, some have argued that, as applied, *O'Brien* provides little more than rational basis protection.¹⁶⁵

Another particularly daunting consequence of *Turner* is that it could be used to guide the government's approach to all new communications technologies and delivery systems. In *Turner*, the Court relied on two principles: (1) that cable systems operate as *de facto* monopolies, and (2) that cable systems can and do work as bottlenecks because they are an "essential facility" that all programming must pass through.¹⁶⁶ It is possible that these rationales for government regulation of the cable industry could be applied to other communications industries that share these characteristics. Any new

cable context, the government will have to show a substantial interest. See *O'Brien/Ward* test, *supra* notes 36-39. Nevertheless, having already applied the substantial interest test to the very intrusive must-carry rules, and having effectively sustained their constitutionality, the Court has essentially sustained the constitutionality of other, slightly less intrusive, regulations. And it has also affirmed the government's substantial interest in regulation, so that in most cases, the only question will be whether the regulation is more restrictive than necessary. This is analogous to the situation in the broadcast industry where even though the government is supposed to bear the burden of showing a rational basis for its regulations, the reality is that most regulation of broadcasting bears a presumption of constitutionality.

164. Rational basis scrutiny applies to most economic regulations. Under this test, a regulation will be found constitutional provided there is a rational relationship between the regulation and the harm sought to be remedied. *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993). The burden of proof under rational basis scrutiny is on the party challenging the government action. *Id.* at 2643. Economic regulations are subject to heightened scrutiny if they impose differential treatment to similar media, *Arkansas Writers' Project, Inc. v. Rageland*, 481 U.S. 221, 228 (1987), if they target particular ideas or content, *Simon & Schuster, Inc. v. New York State Crime Victims Bd.* 502 U.S. 105, 115 (1991), or if the restriction of speech is substantial enough to trigger the intermediate scrutiny of *O'Brien/Ward*. See *supra* notes 36-39.

165. See Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); and Keith Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635 (1987).

166. *Turner*, 114 S. Ct. at 2473 (Stevens, J., concurring). Justice Kennedy's majority opinion refers to the same concept but does not use the same language.

communications system that serves as a conduit for the speech of people other than the owner or the owner's agents could be susceptible to regulation. Also, any communications system that operates without *direct* competition from an *identical* system could also be vulnerable. The justifications for regulation relied upon by the Court in *Turner* could be cited by Congress, the FCC, and the courts to sanction a substantial government role in the development of the nation's communications infrastructure. In fact, applying the rationales proffered by the Court in *Turner*, the newspaper industry could even be at risk. If there is market dysfunction in the newspaper industry, as some believe,¹⁶⁷ there may be little standing in the way of more exacting regulation of the traditional press.

III. *TURNER* AND FIRST AMENDMENT DOCTRINE

The *Turner* Court's choice of regulatory models was significant and could have a lasting impact, not only on the cable industry but on the entire system of communications that is emerging. But aside from its general assessment of the constitutional status of cable television, an equally important and troubling aspect of the Court's decision was its interpretation and application of First Amendment principles.

A. *Turner and the Permissible Scope of Content Regulation*

One of the primary arguments made by the cable plaintiffs in *Turner* was that the must-carry rules are content-based regulations that should be strictly scrutinized.¹⁶⁸ It is a fundamental First Amendment principle that government restrictions of expression that are aimed at the content of that expression are subject to the most exacting level of judicial scrutiny.¹⁶⁹ Such regulations will only be upheld where they are narrowly tailored to serve a compelling government interest.¹⁷⁰ As a practical matter, such laws are rarely upheld upon review by a court.¹⁷¹

167. See BAGDIKIAN, *supra* note 139; and Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647-1648 (1967).

168. See *supra* note 29 and accompanying text.

169. *Boos v. Barry*, 485 U.S. 312 (1988).

170. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content").

171. There are exceptions, but usually only where some other fundamental right is involved. See *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a law that prohibited the solicitation of votes and the dissemination of campaign materials within 100 feet of a polling place).

Content-based laws come in one of two forms. They can either be viewpoint-based¹⁷² or subject-matter-based.¹⁷³ Some have argued that only viewpoint-based laws should be subject to strict scrutiny,¹⁷⁴ while at the other extreme, some contend that the distinction between content-based and content-neutral laws should be eliminated altogether.¹⁷⁵ The current approach of the Court, however, provides that both types of content-based regulations (viewpoint and subject matter) are subject to strict scrutiny.¹⁷⁶ Regulations can be classified as content-based in one of two ways, according to Professor Laurence Tribe: (1) if, on their face, they target particular ideas or information, or (2) they are neutral on their face, but are adopted for a content-based purpose.¹⁷⁷

The Court in *Turner* held that the must-carry provisions of the '92 Act are content-neutral, both on their face and as to purpose, and should not be subject to strict judicial scrutiny. They are content-neutral on their face, the Court held, because the distinctions they make between speakers are based solely on the means by which they transmit messages, not on the content of those messages.¹⁷⁸ Furthermore, they are neutral as to purpose because they were not adopted in order to advance speech of a favored content. Instead, Congress' primary purpose in passing the rules was to ensure the economic survival of broadcasters.¹⁷⁹

These conclusions are flawed in several respects. First, the must-carry rules benefit broadcasters at the expense of cable systems, which, as Judge Williams of the district court wrote in dissent, "automatically entails content requirements."¹⁸⁰ The must-carry provisions are direct, government-imposed restrictions of the right of cable system operators to control the tenor of their

172. *E.g.*, *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972) (law prohibited picketing in certain areas, but exempted labor picketing).

173. *E.g.*, *Simon & Schuster, Inc. v. New York Crime Victims*, 502 U.S. 105, 116 (1991) (law requiring the seizure of profits of certain categories of books—those written by those seeking to profit from their crimes).

174. *See generally* JEROME A. BARRON AND C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 34-35 (West Publishing 1993).

175. Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 *STAN. L. REV.* 113, 142-151 (1981).

176. *See* *Boos v. Barry*, 485 U.S. 312, 319 & 334 (1988), *Simon & Schuster, Inc. v. New York Crime Victims*, 502 U.S. 105, 116 (1991), and *Burson v. Freeman*, 504 U.S. 191, 197 (1992), where laws at issue in all three cases were struck down as content-based, even though they were not based on viewpoint.

177. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 794 (Foundation Press, 2d.ed. 1988).

178. *Turner*, 114 S. Ct. at 2460.

179. *Id.* at 2461.

180. *Turner*, 819 F. Supp. 32, 58 (D.D.C. 1993).

own expression. These provisions force cable systems to carry — and thus promote — the messages of others, and at the same time, by appropriating much of their channel capacity, they limit the means by which cable system operators can communicate their own messages. Such restrictions cannot fairly be labeled content-neutral. As the Court pointed out in *Buckley v. Valeo*, "the concept that the government can 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."¹⁸¹

Furthermore, even if these distinctions between different media are not facially content-based, the allocation of benefits and burdens evinces a clear intent by Congress to promote the speech of broadcasters over that of cable system operators. Indeed, Congress argues in the Act itself that broadcast television is "an important source of local news, public affairs programming and other local broadcast services critical to an informed electorate."¹⁸² Would Congress have passed the must-carry rules had it not determined that there was something wrong with the content of cable television programming, or at least that something could be gained in the overall quality of television programming by edifying one source at the expense of another?

Congress argues, and the majority in *Turner* agrees, that the must-carry rules are not content-based but are merely designed to ensure the survival of the broadcast industry.¹⁸³ But why? Because of the *content* of the messages provided by local broadcast stations. The value that Congress ascribes to local broadcast stations must be based on content because content is the only thing by which one can assess the value of those stations. As Justice O'Connor wrote in dissent: "The interests of ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say."¹⁸⁴ While there may be nothing wrong with a law that promotes the interests of local broadcast stations, when it does so for a content-based reason and at the expense of another communications medium, then a clear First Amendment boundary has been breached.

The Court's application of the content-based/content-neutral framework is one of the most significant aspects of its analysis in *Turner*. Although the Court missed an opportunity to establish some definitive boundaries to this paradigm, *Turner* is an important case in its evolution. There has been a split developing on the Court for a few years over the definition of "content-based." On one side are those who define content-based broadly to include not only

181. 424 U.S. 1, 48-49 (1976).

182. Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, § 2(a)(11), 106 Stat. 1460, 1460-1463.

183. *Turner*, 114 S. Ct. at 2461.

184. *Turner*, 114 S. Ct. at 2477 (O'Connor, J., dissenting).

viewpoint-based regulations, but also subject-matter and speaker-based regulations.¹⁸⁵ In *Turner*, four justices, O'Connor, Ginsburg, Thomas and Scalia, believed that the must-carry rules, even though not viewpoint-based, were substantial enough intrusions on the editorial functions of cable system operators to warrant strict scrutiny. They argued in dissent that by making reference to the benefits of broadcast programming, Congress clearly had taken content into account.¹⁸⁶ The majority in *Turner*, however, determined that the must-carry regulations were not content-based. Justices Kennedy, Rehnquist, Blackmun, Stevens, and Souter held that these regulations were content-neutral, despite the fact that they interfered to some extent with cable operators' editorial discretion.¹⁸⁷

In *Turner*, the majority seems to have contracted the Court's definition of what is "content-based." It now appears that in order to get strict scrutiny, it is not enough that certain subjects, topics, or speakers are singled out by the government; instead, the Court seems to suggest that plaintiffs must show evidence of a preference for particular *ideas* or *viewpoints*. Several recent Supreme Court decisions suggest a similar condensation of this paradigm.¹⁸⁸ *Turner* seems to have helped solidify that pattern, although only five justices endorsed it. Before these changes began to occur, the Court's First Amendment analysis was beginning to resemble its approach to Title VII employment discrimination claims. Under Title VII, plaintiffs can sue under either a "disparate treatment" theory¹⁸⁹ or a "disparate impact theory."¹⁹⁰ In disparate treatment cases, plaintiffs can succeed by showing that a particular employment decision was motivated by hostility or animus toward a particular individual or group.¹⁹¹ This is similar to the treatment given to viewpoint-

185. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991). In both cases, there were substantial divisions among the justices regarding what is content-based and what is not, and also in what types of situations this paradigm should be applied.

186. *Id.*

187. *Id.* at 2460.

188. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); and *Leathers v. Medlock*, 499 U.S. 439 (1991).

189. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

190. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

191. Under the test set out in *McDonnell Douglas*, a plaintiff can establish a prima facie case of discrimination by showing that they: (1) are a member of a racial minority, (2) that they applied for a position that was open and for which they were qualified, (3) they were not hired, and (4) after they were rejected, the employer continued to seek applicants. *McDonnell Douglas*, 411 U.S. at 802.

based regulations of speech.¹⁹² Title VII plaintiffs can also succeed by showing that an employment criterion or decision has a disparate *impact* on protected groups, regardless of the employer's motivation.¹⁹³ Previous Supreme Court decisions took a similar approach in First Amendment cases; specifically, statutes that singled out particular organizations or mediums for special treatment or to bear special burdens, *i.e.*, "speaker-based" regulations, were subject to strict scrutiny, regardless of the underlying motive.¹⁹⁴ After *Turner*, it is no longer certain that regulations targeting particular media or organizations will be found unconstitutional. Plaintiffs demonstrating something like a disparate impact may not succeed after *Turner* unless they are able to demonstrate some particularized evidence of a bias or animus.¹⁹⁵

B. *Turner and the Compelled Speech Doctrine*

Another argument made by the plaintiffs in *Turner* was that the must-carry rules compel speech by cable system operators, which violates their First Amendment rights. It is settled First Amendment law that a person's right to free expression is violated where they are compelled to speak as a result of

192. Specifically, in both situations, the focus of the court is on the intent of the defendant. Regulations targeting particular ideas or viewpoints, or employment practices targeting particular employees because of their race, gender, national origin, etc., are both almost always impermissible.

193. Under the standard set out in *Wards Cove*, a Title VII plaintiff will not succeed unless they can demonstrate that they have suffered some actual harm and that it was the result of specific employment practices. *Wards Cove*, 490 U.S. at 656. In both disparate impact cases under Title VII and First Amendment challenges to content-neutral regulations, it does not matter that the defendant had an innocent motive; the focus is on the harm caused.

194. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); and *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

195. In *Turner*, the Court argued that the cases prohibiting "speaker-based" regulations, *see supra* note 29, only prohibit regulations that "carry the inherent risk of undermining First Amendment interests." *Turner*, 114 S. Ct. at 2468. As a result, this line of cases involving "speaker-based" regulations appears to have been limited by the Court in *Turner* to only prohibit regulations that target speakers for the stated or implied purpose of restricting expression of certain ideas, viewpoints or subjects. It appears that motive will now be an important element in these cases, which means there is no longer any First Amendment parallel to "disparate impact" claims under Title VII. The clear command of the Court is that singling out particular media or organizations for special treatment or to bear special burdens will no longer be considered inherently inconsistent with the First Amendment. Instead, it only begins the analysis. In short, disparate treatment, *i.e.*, discrimination regarding ideas, subjects or viewpoints, will have be demonstrated; disparate impact will not be enough.

direct or indirect government pressure.¹⁹⁶ In *Abood v. Detroit Board of Education*, for example, the Supreme Court invalidated a state rule that permitted unions of state employees to collect dues, portions of which were to be used for political purposes.¹⁹⁷ Similarly, in *Wooley v. Maynard*, the Court held that the State of New Hampshire could not punish citizens who covered up the state motto "live free or die" on their license plate where that motto conflicted with their religious beliefs.¹⁹⁸ The Court wrote that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'¹⁹⁹ The clear weight of the Court's precedents, then, suggests that not only does the First Amendment protect citizens from being prevented from speaking, it also shields them in most circumstances from being forced to speak.²⁰⁰

The Court's rejection of the plaintiff's arguments on this point is disingenuous at best. The Court cites the *Tornillo*²⁰¹ and *Pacific Gas & Electric Co. v. Public Utility Commission*²⁰² decisions as the two most relevant compelled speech cases, but it argues that neither is controlling, for two reasons: First, the must-carry rules are content-neutral in application because they "are not activated by any particular message spoken by cable operators and thus exact no content-based penalty."²⁰³ The Court fails to reveal, however, that the same was true in *Pacific Gas*. In *Pacific Gas*, the compelled speech was not triggered by any particular message. Instead, just like under the must-carry rules, it was triggered by the government's grant of access to an organization unaffiliated with the plaintiff organization.

196. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (prohibiting mandatory saluting of the flag).

197. 431 U.S. 209 (1977).

198. 430 U.S. 705 (1977).

199. *Id.* at 714.

200. There are exceptions to this rule, such as mandatory reporting of income taxes, etc., but these requirements are usually tied to some other content-neutral and generally applicable state or federal law. See David W. Ogden, *Is There A First Amendment 'Right to Remain Silent'? The Supreme Court's 'Compelled Speech Doctrine'*, 40 FED. B. NEWS & J. 368 (1993).

201. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). See *supra* text accompanying notes 128-133 for more discussion.

202. *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (plurality opinion). This case struck down a rule that required a privately owned utility company to include an editorial newsletter with its billing statements that was critical of the company. The Court held that the utility company would reasonably feel compelled to speak in order to protect its reputation. Therefore, the speech was *effectively* compelled.

203. *Turner*, 114 S. Ct. at 2465.

Second, the Court argues that the must-carry rules will not force cable operators to alter their own messages in order to respond to or counter-balance the broadcast programming they are required to carry.²⁰⁴ It is presumptuous, however, to assume that no cable system operator will ever reasonably feel compelled to respond to the messages it is forced to carry under the must-carry rules. In fact, many local broadcast stations are being purchased by religious organizations throughout the country, many of whom are doing so in hopes of taking advantage of the must-carry rules and being assured substantial access to cable systems. What recourse does a cable system operator have who is opposed to this kind of programming because it conflicts with her own religious beliefs? Is this not compelling some kind of response from that person in precisely the same way that the plaintiff in *Pacific Gas* was compelled to respond?

The crux of the compelled speech doctrine would seem to be that the government cannot force people to advance a particular idea any more than it can prevent them from advancing an idea. Similarly, the government cannot force people to share affiliations with others any more than the government can prevent people from affiliating with others. But this is precisely what the must-carry rules do. At least potentially, they force cable system operators to share an affiliation with broadcasters with whose messages they may disagree. More fundamentally, the must-carry rules interfere with the editorial functions of cable system operators in a way that is not tolerated with other media. At the same time the Court acknowledges that cable system operators exercise editorial functions and that they are protected by the First Amendment, it permits direct government encroachment on those functions. And when a media organization of any kind is forced to support the transmission of messages with which it disagrees, its autonomy is lost, as is its ability to function independently in the marketplace of ideas.

IV. PUTTING *TURNER* IN ITS PLACE: AN ANALYSIS OF THE CASE ON REMAND AND A LOOK AT *DANIELS CABLEVISION*

Having outlined some of the most salient consequences of the Court's decision in *Turner*, it is important to look at how some of the principles adopted by the Court might be applied in the future and also how the disposition of the *Turner* case itself might be altered when the district court panel hears the case on remand.

204. *Id.*

A. Turner on Remand: The Case for the Plaintiffs

Despite the largely negative consequences of the *Turner* decision for members of the cable industry, the cable plaintiffs did win a couple of small victories. First, the Court held that the low level scrutiny applied to broadcast regulations is inapplicable to cable in most circumstances.²⁰⁵ Although this holding by the Court was not surprising, it was nevertheless a success for the cable plaintiffs. Another victory for the plaintiffs was that the Court remanded the case back to the district court to determine whether the must-carry requirements are necessary to prevent the demise of local broadcasting.²⁰⁶ Given the district court panel's earlier decision in this case and the tenor of the Supreme Court's opinion, it may at first seem unlikely that the plaintiffs will succeed on remand. But there is actually a substantial amount of support for their side.

The plaintiffs might be able to demonstrate that local broadcasters are not in fact in economic peril and in need of assistance. There are thousands of local commercial broadcasters in this country,²⁰⁷ and just as an intuitive matter it seems likely that if the broadcast industry was spiraling toward extinction, there would be fewer of them around.²⁰⁸ Still, resolution of this question will require an examination of the record compiled by Congress, among other sources. It will also depend on how the district court approaches this factual question and how much deference it is willing to give to Congressional findings.

Nevertheless, even if the district court agrees with Congress that broadcast television's survival is threatened by uncooperative cable systems, the cable plaintiffs might be able to show that the must-carry rules do not actually advance the government's asserted interests. One of the primary interests of the government in passing the must-carry laws was to ensure that viewers had access to local programming.²⁰⁹ It is not at all clear, however, that the must-carry rules advance that interest. On most cable systems, mainstream local broadcast signals are already carried.²¹⁰ So, the primary beneficiaries of the must-carry rules are the less popular and more obscure broadcasters—home shopping channels, religious broadcasters, and the like.

205. *Id.* at 2456.

206. *Id.* at 2472.

207. At the end of 1994, there were more than 1,500 television stations according to U.S. BROADCASTING AND CABLE YEARBOOK. See YEARBOOK, *supra* note 1, at xi.

208. YEARBOOK, *supra* note 1, at xi.

209. 47 U.S.C. § 521 (a)(8)(A)-(D) (Supp. V 1993).

210. Congress seems to acknowledge this in the "purposes" section of the '92 Act. See 47 U.S.C. § 521(a)(17) and (19) (Supp. V 1993).

Not only do the must-carry rules fail to benefit many of the local broadcast stations, in many cases the broadcasters that gain access as a result of the must-carry rules do so at the expense of a cable programmer. C-Span, for example, has been taken off many cable systems to make room for "must carry" broadcasters.²¹¹ So, in the name of public service, the government is often guaranteeing access for home shopping channels while bumping other cable channels whose content may be in much higher demand. And even where a cable channel does not get bumped as a result of the must-carry requirements, many get moved on the system. In Washington, D.C., for example, a city whose population is seventy percent African-American, one local cable system was forced to move the Black Entertainment Television (BET) channel from channel 6 to channel 35 on its system—all to make room for an obscure local broadcaster.²¹²

Another argument that could be successful on remand is that while levels of competition in the cable industry were low when Congress was conducting its investigations on this issue, the industry has grown substantially more competitive in the past couple of years. First, Congress itself took steps in the '92 Act to foster competition, eliminating the granting of exclusive franchises,²¹³ for example. Second, two important new players have entered the video services marketplace—telephone companies (telcos) and direct broadcast satellite system operators. DBS systems are currently competing directly with local cable systems in a number of cities and telcos are providing video dialtone service. In addition, the major telecommunications bill currently being debated in Congress contains provisions that would allow telcos to provide video services on a non-common-carrier basis and to compete directly with existing cable systems.²¹⁴ Again, to the extent that an

211. See Paul Farhi, *Dimming Cable's Eye on Congress: Fewer People Are Getting C-Span Because of New Law's Break for Broadcasters*, WASHINGTON POST, September 7, 1993, at E1.

212. Comments by BET's Vice President for Legal Affairs Maurita K. Coley at the 1994 Communications Law Conference of the Practising Law Institute, New York City, Nov. 10-11.

213. 47 U.S.C. § 541(a)(1) (1988 & Supp. V 1993) (prohibiting franchising authorities from granting exclusive franchises or from unreasonably refusing to grant an additional competitive franchise).

214. Both the House bill (H.R. 1555) and the Senate bill (S. 652) include provisions that would eliminate the cable/telco cross-ownership ban, see 47 U.S.C. § 553(b) (1988 & Supp. V 1993), and allow telcos to provide video services. Furthermore, even if a telecommunications bill is not passed, the cross-ownership ban may be struck down as a violation of the telcos' First Amendment rights. Several federal courts have already reached that conclusion. *Chesapeake & Potomac Telephone Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), cert. granted 115 S. Ct. 2608 (1995); *U.S. West, Inc. v. United States*, 48 F.3d 1092 (9th cir. 1994); *Ameritech*

absence of competition is the rationale for regulation, these developments would seem to undermine the government's asserted interests.

Also, even if the must-carry rules do advance the government's asserted interests in some cities, the district court might be willing to limit their application to those cities where there is no competition. The plaintiffs might ask why other provisions in the Act—namely, the provisions regarding rate regulation—are triggered only by the absence of competition while the must-carry rules apply to cable systems in every market, regardless of how competitive it is.

Finally, if the district court does eventually rule that the must-carry rules are unconstitutional because they fail the second and third prongs of the *O'Brien/Ward* test²¹⁵, then it is essential that the court specify what aspects of the Supreme Court's *Turner* decision survive as precedent. Because the Supreme Court's opinion is so dependent on the factual presumption that cable systems are bottlenecks to diverse programming and that they threaten the survival of broadcasters,²¹⁶ to the extent that this notion is disproved on remand, the entire Supreme Court decision is undermined. If the district court or other courts do not recognize this and put *Turner* in its proper place, it could take on a life of its own. To all communicators affected by this decision, that is something that should be vigilantly guarded against.

B. *Daniels Cablevision, Inc. v. United States*²¹⁷

The *Daniels* case, currently before the U.S. Court of Appeals for the District of Columbia, involves a First Amendment challenge to several provisions of the '92 Act. The most important of these, and the most constitutionally suspect (at least prior to *Turner*) are the provisions requiring cable system operators to carry public, educational, and governmental (PEG) programming,²¹⁸ and the provisions requiring them to provide leased access

Corp. v. United States, 867 F. Supp. 721 (N.D. Ill 1994). The U.S. Supreme Court has agreed to hear *Chesapeake*, so a final determination of the constitutionality of the cross-ownership ban will not come until later in 1996. Of course, the case would become moot with the passage of the telecommunications bill.

215. See *supra* text accompanying notes 36-39.

216. *Turner*, 114 S. Ct. at 2454 & 2468.

217. 835 F. Supp. 1 (D.D.C. 1993) [hereinafter "*Daniels*"].

218. Under the '84 Act, local franchising authorities are permitted to require cable systems to set aside channels for public, educational and governmental (PEG) use. 47 U.S.C. § 531(c) (1988). Under the '92 Act, 47 U.S.C. § 535 (Supp. V 1993), cable systems are *required* to carry all qualified noncommercial educational channels that request access, regardless of the desires of either the cable system operator or the franchising authority. The total number of noncommercial educational channels that must be given access depends on the channel capacity of the system. Also, the cable

to programmers not affiliated with the system operator.²¹⁹ The district court upheld the constitutionality of both of these provisions.²²⁰ An extensive analysis of *Daniels* is not necessary here, but it is important to briefly discuss two of its possible consequences.

First, while it is likely that, in light of *Turner*, the *Daniels* court will uphold the constitutionality of the leased access provisions, the same is not true with the PEG requirements. The appellate court needs to recognize that even if the must-carry rules could be classified as content-neutral, the PEG requirements go one step further. The PEG requirements are content-based on their face because they force cable system operators to carry certain *types* of programming—programs dealing with public, governmental or educational issues. The focus is clearly on the subject matter of the speech and not merely the means of its transmission. In addition, the PEG requirements are unconstitutional as applied because they were clearly passed to remedy some perceived deficiency in the content of programming on existing cable systems. If members of Congress had not determined that something was wrong with existing cable programming, the PEG requirements would not have been necessary. Recognizing this—and distinguishing the PEG rules from the must-carry rules—would be an important development, if for no other reason than because it would establish some clear limit to the scope of government intrusion into the editorial functions of cable system operators.

Second, the *Daniels* case is important more generally because all of the premises relied upon by the Supreme Court in *Turner* will be put to the test once again. It is possible that, unlike the Supreme Court in *Turner*, the *Daniels* court will recognize the dramatic changes taking place in the structure of the communications industry. The court could properly apply the *Turner* precedent while at the same time reaching different results, provided it opens its eyes to the changing levels of competition in the industry and how the regulatory rationales relied upon by Congress and the Supreme Court are already outdated. It is even possible that things will have changed so dramatically by the time the *Daniels* case is decided that the Supreme Court

system operator is prohibited from interfering with the content of the PEG programming once those channels have been allocated. 47 U.S.C. § 531(e) (1988).

219. Under the 1984 Act, cable system operators are required to set aside a certain number of channels for commercial use (leased access) by people unaffiliated with the cable system operator. 47 U.S.C. § 532(b)(1) (1988). The '92 Act does not change this requirement, but it does add two key provisions. The first allows cable systems to prohibit the use of their leased access channels for programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 47 U.S.C. § 532(h) (1988 & Supp. V 1993). The other gives the F.C.C. the authority to determine "maximum reasonable rates" that a cable operator may charge for use of its leased access channels. *Id.*

220. *Daniels*, 835 F. Supp. at 6-7.

will review it. Whatever the decision, those concerned about the future of the cable industry will be anxiously awaiting the D.C. Circuit's resolution of *Daniels*.

CONCLUSION

When confronted with a new technology or a nascent industry, the government almost instinctively latches on with all its regulatory might. The presumption of Congress, the FCC, and some local governments seems to be that an unregulated industry is a dangerous industry. This is especially the case with communications technologies. Today, after three decades of regulation, the cable industry has never been more squarely under the thumb of government. Unfortunately, with the Court's decision in *Turner*, government encroachments on the rights of cable system operators and programmers will continue to expand. Especially in this period of dramatic infrastructural transformation, Congress and the FCC will find it hard to resist the temptation to intervene. In the post-*Turner*, post-Cable Act world, there is little standing in their way—certainly not the First Amendment.

The long-term consequences of the *Turner* decision are difficult to predict. It could be that the decision will be modified on remand, or the case could be altered by the resolution of the *Daniels* case. More likely, however, the *Turner* decision will substantially dampen the cable industry's hopes of acquiring the same level of autonomy as the print media. Instead, cable operators will have to do their best in a world in which the government is in substantial control of their fortunes.

On the macro-level, the Court in *Turner* has created a broad presumption in favor of the constitutionality of regulation. New regulations will come to the Court with a presumption that they serve a "substantial government interest," and that they are somehow justified by the special economic circumstances of the cable television marketplace. On the micro-level, the Court has made clear that many of the most important barriers to government encroachments on First Amendment rights will be of marginal consequence. In doing so, it may have altered those principles in a way that could invite greater restrictions on all speech regardless of the vehicle through which it is expressed.