1-1-1995

Turner Broadcasting System, Inc. v. FCC: The Fate of Must-Carry Still Uncertain

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol15/iss2/4
NOTE

TURNER BROADCASTING SYSTEM, INC. V. FCC: THE FATE OF "MUST-CARRY" STILL UNCERTAIN

I. INTRODUCTION

Cable television will play a big role in the development of the "information superhighway." The cable phenomenon, with its great technological possibilities, is continually changing what we watch on television and the way we watch it. With the advent of interactive communication, which will allow access to home banking, shopping and other services, traditional television programming could become a thing of the past. Some cable systems will soon be able to accommodate up to 500 channels, with programming to suit every interest and taste. If effective regulations are to be enacted, the legislature needs to act, before the cable industry expands beyond control.

One controversial means of controlling the cable industry is the "must-carry" regulations. These regulations require cable systems to reserve a certain number of channels for the transmission of local broadcast stations. Because the United States Supreme Court has not issued a clear and comprehensive declaration as to the constitutionality of must-carry regulations, their future existence remains uncertain. The Court needs to strike a balance between the interest in protecting the consumer and local broadcast sources with the interest in promoting new technologies.

Part II of this Note analyzes the ever-changing development of must-carry regulations through a historical account of congressional action and case law. Part III focuses on the much anticipated Turner Broadcasting Sys., Inc. v. FCC decision and how the Supreme Court's ruling will

2. Id. at 1082.
3. See infra note 25.
affect the cable regulation scheme. Finally, Part IV discusses the standard of First Amendment analysis, the economic aspects of Turner, and the aftermath of the Court's decision. As one court watcher put it, "[t]he Supreme Court, an institution that takes pride in doing things the old-fashioned way and prohibits tape recorders and cameras in the courtroom, yesterday met the Information Age."5

II. BACKGROUND

A. Statutory History of Cable Television

1. The 1934 Act

The foundation of broadcast regulation started with the Communications Act of 1934 ("1934 Act").6 The 1934 Act directed the Federal Communications Commission ("FCC") to "regulate broadcasting in a manner that will serve 'the public interest, convenience, or necessity.'"7 Though broad, this pronouncement did not necessarily include cable, as cable television did not appear until the late 1940s.8 Nevertheless, the FCC did not wait for an explicit grant of power over cable by either Congress or the courts. During the early 1960s, the FCC decided to unilaterally assert jurisdiction "when it became more concerned that a rapidly growing cable industry threatened the viability of free television."9 Thus, the cable industry saw the emergence of the controversial must-carry provisions. These provisions continued to exist, albeit with various challenges, throughout the 1970s.

2. The 1984 Act

Starting in the 1980s with the Reagan/Bush era, the idea that government should not interfere with business took center stage in political discourse. Both the Reagan and Bush administrations adopted a laissez-

9. Id. at 369-70.
faire policy — "a political-economic philosophy of the government of allowing the marketplace to operate relatively free of restrictions and intervention." Thus, a deregulatory trend emerged in Congress, leading to the enactment of the Cable Communications Policy Act of 1984 ("1984 Act"). The 1984 Act clearly marked a change in regulation by implementing a localized licensing process which shifted regulatory authority away from the FCC to local agencies. By this time, all the previous measures that had protected broadcasters were "repealed, substantially weakened, or subjected to liberal waivers by the Commission . . . ." The FCC had little recourse as all this was unfolding.

With the change in political administrations in the 1990s, must-carry has once again risen to the forefront. Although the development of new cable technology was avidly encouraged by the government in the previous decade, the current attitude is that cable poses a threat to traditional broadcast media. However, is this congressional attitude at odds with the current hype over the information superhighway? This change can be explained as another phase in the regulation-deregulation cycle of cable life.

3. The 1992 Act

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") was passed "[t]o amend the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets . . . ." Congressional studies have consistently shown that the cable industry today has certainly grown into a giant. Cable experienced exponential growth, especially during the 1980s. By 1991, there were "approximately 10,800 operating cable systems in the United States, serving over 28,000 communities, reaching about 54 million subscribers." Now, more than

10. A French term, literally meaning: "let (people) do (as they please)." WEBSTER'S NEW WORLD DICTIONARY 788 (2d ed. 1978).
13. Swan, supra note 8, at 374.
15. See infra notes 179-80 and accompanying text.
17. Id.
20. Id.
half of the nation's television households are served by cable and that number is continually rising.\textsuperscript{21} The 1992 Act was seen as a way to control the cable industry from running rampant.\textsuperscript{22} However, the Bush Administration argued that "fair access legislation was unnecessary because remedies under existing law provide competitors with sufficient recourse in the courts to address anticompetitive conduct."\textsuperscript{23} Ultimately, Congress' convictions concerning cable industry regulation were strong enough to override President Bush's veto of the 1992 Act.\textsuperscript{24}

Of particular controversy are Sections 4 and 5 of the 1992 Act,\textsuperscript{25}

\begin{quote}
21. Id.
22. The 1992 Act provides the following statement of policy:

It is the policy of the Congress in this Act to —

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


25. Sections 4 and 5 of the 1992 Act, in relevant part, require:

\textbf{SEC. 4. CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS.}

\textbf{(b) SIGNALS REQUIRED. —}

\textbf{(1) IN GENERAL. — (A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.}

\textit{(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system [emphasis added].}

\textbf{SEC. 5. CARRIAGE OF NONCOMMERCIAL STATIONS.}

\textbf{(b) REQUIREMENTS TO CARRY QUALIFIED STATIONS. —}
which require the carriage of local commercial television signals and noncommercial stations. These two provisions were designed to promote the future viability of over-the-air television broadcasting by restoring equity to the relationship between broadcasters and cable operators.  

While cable operators might argue that such requirements are rigid, the language of each section provides some accommodation in terms of cable system capacity. For example, under Section 4, there is a distinction as to the number of local commercial television stations that must be carried depending on whether the cable system offers more or less than twelve channels. The requirements for the carriage of noncommercial educational television stations under Section 5 are determined according to twelve or fewer, thirteen to thirty-six, or more than thirty-six usable activated channels.

Moreover, the 1992 Act "gives each local TV station the choice of giving up its must-carry right in favor of negotiating a separate deal with its local cable operator." However, this option could hurt the viewers. For example, a popular local station could use this alternative option to "extract from a cable system a payment for each viewer" the local station

(2)(A) SYSTEMS WITH 12 OR FEWER CHANNELS. — Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

(3) SYSTEMS WITH 13 TO 36 CHANNELS — (A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels —

(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations . . . .

(D) A cable operator of a system described in this paragraph which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

See generally id. § 2(a), 106 Stat. at 1462 (noting the growing economic disparity between broadcast and cable television).
reaches through cable.\textsuperscript{30} In turn, cable operators may pass along the costs of retransmitting television stations to their customers.\textsuperscript{31}

Clearly, "[g]iven its immense economic, political, and social impact, federal courts will often find themselves interpreting the meaning and the constitutionality of the 1992 Act."\textsuperscript{32} Congress provided an elaborate list of findings to substantiate its policies.\textsuperscript{33} In addition, the strong nexus between Congress’ policies and its assertion of a fundamental government interest can favorably influence the federal courts.\textsuperscript{34} Congress has learned its lesson from attacks made on previous must-carry regulations, which were enacted without such a comprehensive basis of support.\textsuperscript{35} Nevertheless, no matter how much foresight Congress might have to strengthen its policymaking, the ultimate fate of must-carry legislation rests on court adjudication.

\textbf{B. Historical Case Development}

Constitutional litigation in cable television regulation has been evolving since cable’s inception. The fundamental issue considered in all previous cases was whether the FCC had the authority to regulate cable television. To its credit, the Supreme Court has issued clear-cut rulings with regard to this matter.

1. The Supreme Court Establishing FCC Control Over Cable

In \textit{United States v. Southwestern Cable Co.}\textsuperscript{36} the Supreme Court, for the first time, recognized FCC jurisdiction over cable television.\textsuperscript{37} The FCC, acting on Midwest Television’s complaint, restricted Southwestern Cable Co. from expanding cable transmission into areas which adversely affected Midwest Television.\textsuperscript{38} Midwest’s complaint alleged that Southwestern was importing Los Angeles station signals into San Diego, thereby fragmenting Midwest’s viewing audience and reducing advertising revenues to local stations.\textsuperscript{39} The Court held that "[t]he Commission’s

\begin{itemize}
\item 30. Mannes, \textit{supra} note 29, at 47.
\item 31. \textit{Id}.
\item 32. Swan, \textit{supra} note 8, at 385-86 (footnotes omitted).
\item 33. 1992 Act, \textit{supra} note 22, § 2(a), 106 Stat. at 1460-63.
\item 34. Swan, \textit{supra} note 8, at 388 (footnote omitted).
\item 35. \textit{Id}.
\item 36. 392 U.S. 157 (1968).
\item 37. Swan, \textit{supra} note 8, at 370.
\item 38. \textit{Southwestern Cable}, 392 U.S. at 160.
\item 39. \textit{Id} at 160 n.4.
\end{itemize}
authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended." In this case, the FCC had not exceeded or abused its authority. Acting in a new and dynamic field, Congress gave the FCC expansive powers pursuant to the 1934 Act. Thus, the FCC was to act as the "single Government agency" with sole authority to regulate all forms of electronic communication, including cable.

One year later, in Red Lion Broadcasting Co. v. FCC, the Court made its boldest ruling concerning the role of the FCC. The Court upheld the FCC regulations promulgated under the "fairness" doctrine, which required a radio station to provide time for response for a person personally attacked "in the context of controversial public issues . . . ." In the spirit of the First Amendment, the Court believed it was in the FCC's interest to preserve an "uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . ." Furthermore, the Court emphasized that the proper focus should be on the viewers' interests and not on the rights of broadcasters. While the facts of this case did not explicitly deal with cable television, the Court's decision strengthened the FCC's power over broadcasters in general. The FCC has relied on this decision as a basis of its authority to govern all forms of communication, including cable television.

a. "Reasonably Ancillary"

Further development of FCC jurisdiction over cable television was enunciated in United States v. Midwest Video Corp. ("Midwest I"). Midwest I involved a regulation that required cable operators "with 3500 or more subscribers to originate a significant amount of local program-

40. Id. at 167. The 1934 Act required the FCC to attempt to "make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service . . . ." Mark Glenn, Comment, Communications Law — A Must-Carry Rerun: Century Communications Corp. v. FCC, 14 J. CORP. L. 265, 267 n.23 (1988) (quoting 47 U.S.C. § 151 (1982)).
41. Southwestern Cable, 392 U.S. at 181.
42. Id. at 173.
44. Southwestern Cable, 392 U.S. at 167-68.
46. Id. at 369-70.
47. Id. at 390.
48. Id.
Despite the fact that the regulation failed to define what constituted a "significant amount," the Court's standard centered on "whether the Commission's program-origination rule is 'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.'" The Court found that the regulations satisfied this reasonably ancillary standard.

In FCC v. Midwest Video Corp. ("Midwest II"), the Court limited this reasonably ancillary standard. The Court invalidated a more demanding regulation than that in Midwest I because the FCC treated cable as a common carrier — allowing a broad right to public access. The regulation involved in Midwest II mandated that cable systems have a capacity of at least twenty channels and allow public access to four of those channels. Furthermore, the "authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress," not the FCC. The Court limited the Midwest I standard based on the realization that otherwise the FCC jurisdiction would be essentially unbounded.

b. Modern Affirmation

More recently, the Court has maintained the position that the FCC has a justified interest in regulating cable, but has continued to issue vague pronouncements as to the limits of this authority. For example, in Capital Cities Cable, Inc. v. Crisp, the Court, in invalidating a state regulation requiring "cable television operators in that State to delete all advertisements for alcoholic beverages contained in the out-of-state signals that they retransmit by cable to their subscribers," held that "[t]he power delegated to the FCC plainly comprises authority to regulate the signals carried by cable television systems." In essence, federal law preempted

50. Swan, supra note 8, at 371.
51. Midwest I, 406 U.S. at 663 (alteration in original) (quoting Southwestern Cable, 392 U.S. at 178).
52. Id.
54. Id. at 708-09.
55. Id. at 691.
56. Id. at 709.
57. See generally id. at 706, 708 (discussing the scope of the FCC's authority and jurisdiction).
59. Id. at 694.
60. Id. at 699.
state law in this area of regulation. Therefore, the effect of any state cable regulations conflicting with FCC regulations is precluded. While this decision reiterates the Court's position that the FCC possesses broad authority, there is no clear enunciation as to the scope of this authority.

c. Confronting the Underlying First Amendment Issue

A case that dealt more squarely with First Amendment concerns was *Leathers v. Medlock*.

Leathers concerned Arkansas' extension of its generally applicable sales tax to cable television services alone, while exempting the print media. The Court held that although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, "the fact that it is taxed differently from other media does not by itself . . . raise First Amendment concerns." This rationale was perhaps an indication by the Court that cable is not accorded as much First Amendment protection as the print media. This would help explain why the Court has given the FCC so much power over cable. Of particular note to the Court was that there was no indication that Arkansas had "targeted cable television in a purposeful attempt to interfere with its First Amendment activities." The Court has recently identified this "targeting" standard in the must-carry provisions.

2. The D.C. Circuit's Ruling — The Fall of "Must-Carry"

While the Supreme Court has provided some enlightenment on the issue of FCC regulatory power over cable, the federal courts of appeals have made the greatest impact. Prior to *Turner*, no Supreme Court case

62. Id. at 442-43.
63. Id. at 444.
64. Id. at 448.
65. See infra note 116 and accompanying text.
66. See, e.g., Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967) (upholding the FCC's distant signal rules and the cease-and-desist order issued under them); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977) (invalidating FCC regulation limiting the number and type of feature films and sports events that cable systems could offer to their subscribers); Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (upholding FCC rule prohibiting duplication of programs on same day they are presented by a local station); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (holding that the cable company had an adequate First Amendment claim against a city policy of auctioning off the right to provide service in particular areas and in limiting each area to a single franchisee).
had even dealt with must-carry provisions. Yet, the District of Columbia Circuit has squarely faced the challenge. In 1985, in *Quincy Cable TV, Inc. v. FCC*,67 the D.C. Circuit reviewed a challenge to an FCC order requiring Quincy Cable to carry the signals of several local broadcast stations or else pay a $5,000 "forfeiture."68

First, the court emphasized what lower federal courts had already held: that conduct engaged in by cable operators is afforded First Amendment protection.69 With this in mind, the *Quincy* court declared the must-carry rules unconstitutional. This decision was based on the finding that "[t]he rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves."70 However, the court conceded that a different standard of First Amendment review should apply to cable71 because, unlike broadcast television, the notion of "physically scarce airwaves is plainly inapplicable."72 Yet, the court did not suggest the actual level of review required. Of particular note is that the court in *Quincy* left open the option that the FCC could revise the must-carry rules to be more sensitive to First Amendment concerns.73

Second, the court found that the FCC rules were premised on economic assumptions, not hard evidence. Thus, there may be times when "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'"74 This proved to be a recurring hurdle in subsequent cases.

It was not long before the D.C. Circuit was once again asked to interpret must-carry rules, this time a revised version, in *Century Communications Corp. v. FCC*.75 The significant changes from the prior *Quincy* regulations included: (1) an effective period of five years; (2) limits on how many channels a cable carrier must devote to must-carry; and (3)

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68. *Id.* at 1438.
69. *Id.* at 1444.
70. *Id.* at 1452.
72. *Quincy*, 768 F.2d at 1450.
73. *Id.* at 1463.
74. *Id.* at 1455 (alteration in original) (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977)).
limits on the pool of potential must-carry channels.\textsuperscript{76} However, the Century court was still unconvinced that the updated rules were necessary to advance any substantial governmental interest and declared the revised regulations unconstitutional.\textsuperscript{77} The court used the same reasoning as it did in Quincy, emphasizing that “when trenching on first amendment [sic] interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures.”\textsuperscript{78} But, as before, the court did not suggest that must-carry rules were \textit{per se} unconstitutional.\textsuperscript{79}

The Supreme Court may have been successful at avoiding the must-carry issue in previous cases like Quincy and Century, but it could not evade the issue forever. The parties involved on both sides of Turner eagerly anticipated the Court’s decision expecting clearer guidance on the issue.\textsuperscript{80} Turner, however, failed to provide such guidance.

\section*{III. \textit{T}urner \textit{B}roadcasting \textit{S}ystem, \textit{I}nc. \textit{v.} \textit{F}CC\textsuperscript{81}}

\subsection*{A. Facts}

Turner Broadcasting System (“TBS”) and numerous other cable programmers and operators (“petitioners”) challenged the constitutionality of the must-carry provisions (Sections 4 and 5) of the 1992 Act which require cable systems to reserve a portion of their channels for the transmission of local television stations.\textsuperscript{82} The petitioners contended that such provisions abridged their First Amendment rights of freedom of speech and/or of the press.\textsuperscript{83} Therefore, they further maintained that the Supreme Court should apply a strict scrutiny analysis of the provisions.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{76} Id. at 296-97.
  \item \textsuperscript{77} Id. at 293.
  \item \textsuperscript{78} Id. at 304.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Dennis Wharton, \textit{Must-Carry Verdict Due}, \textit{Daily Variety}, June 24, 1994, at 1; see generally \textsc{Patrick Parsons, Cable Television and the First Amendment} 4 (1987) (discussing the uncertainty and conflict with past lower court decisions on the issue).
  \item \textsuperscript{81} 114 S. Ct. 2445 (1994).
  \item \textsuperscript{82} Id. at 2451.
  \item \textsuperscript{83} See infra note 100 and accompanying text.
  \item \textsuperscript{84} Turner, 114 S. Ct. at 2464.
\end{itemize}
B. Procedural History

1. The District Court Panel’s Opinion

The case was first filed in the United States District Court for the District of Columbia. The District Court granted summary judgment to the United States and other intervenor-defendants, holding the must-carry provisions to be consistent with the First Amendment. Furthermore, the District Court concluded that the provisions warranted only an intermediate standard of scrutiny, finding that “the preservation of local broadcasting is an important governmental interest, and that the must-carry provisions are sufficiently tailored to serve that interest.”

The court’s decision, however, was divided. Judge Stephen F. Williams, the lone dissenter, chose to side with the cable operator’s position that must-carry rules should be subject to strict scrutiny review. Based on this standard, Judge Williams said the provisions were unconstitutional because “Congress was favoring one set of speakers over another.”

85. The proceedings were held before a special three-judge panel which Congress provided for in anticipation that cable companies would challenge the provisions of the 1992 Act. Claudia MacLachlan, High Court Holds TV’s Future, NAT’L LJ., Jan. 10, 1994, at 1. From here, an appeal was routed directly to the Supreme Court, bypassing the Circuit Court of Appeals. Id. This sped up the process tremendously.

86. Turner, 114 S. Ct. at 2451.

87. Intermediate scrutiny is explained as follows: “[W]hen judging content-neutral laws governing speech (such as time, place, or manner regulations), the Court generally employs some variation of ‘intermediate scrutiny,’ a standard that does impose meaningful limits on government, and under which challengers have at least a fair fighting chance of getting the law struck down.” SMOLLA, supra note 7, § 3.02[1][b], at 3-11 to 3-12. “The Supreme Court applies this intermediate level of review to content-neutral laws because such laws, although ‘innocent’ in the sense that they are not the product of any governmental impulse to censor speech, still have the effect of reducing the total quantity of speech circulating in society.” Id. at § 3.02[1][b], at 3-12 (citing Martin Redish, The Content Distinction in First Amendment Analysis, 34 STAN. L. REV. 113, 128 (1981)) (emphasis in original).

88. Turner, 114 S. Ct. at 2455.

89. MacLachlan, supra note 85, at 29. “The ‘strict scrutiny’ test is the ‘default standard’ for measuring the content-based regulation of speech.” SMOLLA, supra note 7, § 3.03[1][a], at 3-82. “Under the strict scrutiny test, laws regulating the content of speech will be upheld only when they are justified by ‘compelling’ governmental interests and are ‘narrowly tailored’ (or employ the ‘least restrictive means’) to effectuate those interests.” Id.

90. MacLachlan, supra note 85, at 29.
2. Injunction Sought by TBS

With a huge stake in the battle against must-carry, TBS and its supporters vigorously litigated the issue on appeal. Threatened by the lower court's decision, they sought to enjoin enforcement of the 1992 Act while this case was pending on direct appeal to the United States Supreme Court. 91 Chief Justice Rehnquist, acting as Circuit Justice for the District of Columbia Circuit, denied the application for an injunction. 92 First, Rehnquist reasoned that "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." 93 Therefore, given this benefit of the doubt, the 1992 Act "should remain in effect pending a final decision on [its] merits . . . ." 94

Second, the Chief Justice had reservations about issuing such extraordinary relief because "[u]nlike a stay, which temporarily suspends 'judicial alteration of the status quo,' an injunction 'grants judicial intervention that has been withheld by the lower courts.'" 95 Thus, the power to grant injunctions should be used sparingly. 96 Furthermore, Justice Rehnquist reiterated the following criteria for adjudicating whether an injunction should issue: "(1) it is 'necessary or appropriate in aid of [our] jurisdiction,' and (2) the legal rights at issue are 'indisputably clear.'" 97 At this stage of the litigation, he reasoned, the First Amendment issues were not yet fully developed as to make it "indisputably clear" that applicants had a right to be free of the must-carry provisions. 98 For instance, the pivotal question of "whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters" 99 had yet to be addressed. Although TBS was not granted the benefit of an injunction, Chief Justice Rehnquist's brief statements concerning the case were a preview of what was to come upon review by the United States Supreme Court.

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92. Id.
93. Id. at 1807.
94. Id.
95. Id. (quoting Ohio Citizens For Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986)).
96. FCC, 113 S. Ct. at 1807.
97. Id. (citations omitted).
98. Id. at 1808.
99. Id.
The case was then directly appealed from the District Court to the United States Supreme Court. The issue presented to the Court was whether must-carry provisions abridged the rights of freedom of speech or of the press, in violation of the First Amendment. The District Court's judgment was vacated and the case was remanded for further proceedings. The Court stated that, "issues of material fact remain unresolved in the record as developed thus far . . . ."

C. Court's Reasoning

1. Interpreting Congressional Intent

In its opinion, the Supreme Court majority began by providing some background into cable technology and contrasting it to other communication mediums. The main point was that cable television, as compared to the broadcast medium, experiences fewer inherent limitations. Especially with the technological advances made each day, cable expands its ability to accommodate more and more channels. In addition, the Court reiterated Congress' finding that the cable industry is increasingly being characterized by vertical integration and horizontal concentration. This unique phenomenon creates "barriers to entry" for broadcasters.

The Court then highlighted the legislative history and intent of the 1992 Act. "Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air

100. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2451 (1994). The text of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

101. Turner, 114 S. Ct. at 2451.

102. Id.

103. See generally id. at 2451-52 (discussing the origin and development of broadcast and cable television).

104. Turner, 114 S. Ct. at 2457.

105. Id. at 2454. "[O]wnership of both production and distribution facilities is sometimes referred to as 'vertical integration' . . . ." GEORGE H. SHAPIRO ET AL., CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 126 (1983). Vertical integration makes it "harder for broadcasters to secure carriage on cable systems, because cable operators have a financial incentive to favor their affiliated programmers." Turner, 114 S. Ct. at 2454. Horizontal integration is characterized when there are "many cable operators sharing common ownership." Id.

broadcast television stations to compete for a viewing audience and thus for necessary operating revenues." The Court's interpretation was that Congress intended to guarantee the survival of free broadcast television, not to disenfranchise cable systems.

2. Determining Content-Neutrality

Next, the Court scrutinized the regulations to decide whether they were content-based or content-neutral. In dealing with this issue, the Court's main focus is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." Using this approach, the Court concluded that since the rules apply to all cable operators, the interference was not based upon the content of the programming. Also, the benefits and privileges of must-carry provisions are conferred upon all broadcasters who request carriage.

The Court conceded that the must-carry provisions distinguish between speakers (cable versus broadcast) in the television programming market, "[b]ut they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry . . . ." Cable operators are still free to choose any programming on all channels not subject to the requirements. As for the channels they are required to carry, cable operators are not being forced to affirm ideas through such carriage. The Court's understanding of the 1992 Act was premised on the belief that "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the forty percent of Americans without cable."

107. Id. at 2454.
108. Id. at 2461.
109. Id. at 2459. In general, content-based regulations trigger heightened scrutiny, making it more than likely that such regulations will be struck down. SMOLLA, supra note 7, § 3.02[1][a], at 3-10 to 3-11. On the other hand, regulations which are content-neutral usually trigger a less rigorous standard of scrutiny, thereby allowing the regulation to stand. Id. at 3-11.
111. Id. at 2460.
112. Id.
113. Id.
114. Id. at 2462.
115. Turner, 114 S. Ct. at 2462.
116. Id. at 2461.
3. Miami Herald Publishing Co. v. Tornillo\textsuperscript{117} Is Not Applicable

The Court rejected appellants' reliance on Miami Herald Publishing Co. v. Tornillo in arguing that the Court should apply a strict level of scrutiny.\textsuperscript{118} In that case, the newspaper refused to print Tornillo's response to previously printed editorials critical of Tornillo's candidacy for office.\textsuperscript{119} The Tornillo Court held that the press possesses editorial discretion and independence, protected by the First Amendment.\textsuperscript{120} However, the Turner Court found that the must-carry rules, unlike the access rules struck down in Tornillo, "are not activated by any particular message spoken by cable operators and thus exact no content-based penalty."\textsuperscript{121} Therefore, the Court determined that the appellants' reliance on Tornillo was incorrect, and a strict level of scrutiny should not be applied. Whether or not cable is ordered to carry local stations, it is not conduct that either makes a statement or is symbolic of one.

4. Cable's Special Characteristic

The Court then stated that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."\textsuperscript{122} In this case, the special characteristics are the "bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."\textsuperscript{123} Given this inherent advantage over broadcast television, the Court had reason to believe that the must-carry rules are not so "evil" as to pose a significant danger to free expression.\textsuperscript{124} Therefore, the application of the most exacting level of First Amendment scrutiny — strict scrutiny — was not justified in this situation.\textsuperscript{125}

\textsuperscript{117} 418 U.S. 241 (1974).
\textsuperscript{118} Turner, 114 S. Ct. at 2464.
\textsuperscript{119} Tornillo, 418 U.S. at 243-44.
\textsuperscript{120} Turner, 114 S. Ct. at 2464; see also Tornillo, 418 U.S. at 258 (discussing the distinctive function of newspaper editors and the level of First Amendment protection accorded to them).
\textsuperscript{121} Turner, 114 S. Ct. at 2465.
\textsuperscript{122} Id. at 2468 (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983)).
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 2469.
\textsuperscript{125} Id.
5. Applying the \textit{O'Brien} Test

The Court's reasoning rested on the application of the well-established \textit{O'Brien} test.\footnote{United States v. O'Brien, 391 U.S. 367 (1968).} According to the test, a regulation will be sustained if: \"[1] it is within the constitutional power of the government; [2] it furthers an important or substantial governmental interest; [3] the governmental interest is unrelated to the suppression of free expression; and [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\"\footnote{The Court decided in \textit{O'Brien} that a sufficient governmental interest was shown to justify defendant's conviction for burning his selective service registration certificate. \textit{Id.} at 367, 368. This decision has become the standard for deciding whether a government content-neutral regulation will be sustained, in light of its burden on speech.} In the eventual circumstance when \"speech\" and \"nonspeech\" elements are combined in the same course of conduct, the Court has held that \"a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.\"\footnote{\textit{Id.} at 377.}

The first prong of the \textit{O'Brien} test requires that the regulation be within the powers of the government.\footnote{\textit{Id.} at 377.} This prong has been treated as superfluous.\footnote{\textit{Id.} at 376.} Today, there are practically no meaningful restraints on the range of subject areas in which Congress may act.\footnote{\textit{Id.} at 377.} In any event, the federal government has a history of regulation in this area.

According to prong two, the regulation must further a substantial governmental interest.\footnote{\textit{Id.}} Here, the First Amendment notion of \"the marketplace of ideas\" is certainly promoted by assuring public access

to a multitude of information sources, which includes local broadcasting. The Court has held that "'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."\(^{136}\)

Prong three requires that the governmental interest be unrelated to the suppression of free expression.\(^{137}\) Since the Court has established that the must-carry rules are not content-based regulations \textit{per se}, the third prong is easily satisfied.\(^{138}\) However, the fact "[t]hat the government's asserted interests are important \textit{in the abstract} does not mean, however, that the must-carry rules will \textit{in fact} advance those interests."\(^{139}\)

The problematic question arises with prong four, which requires that the incidental restrictions on alleged First Amendment freedoms be no greater than necessary to further the governmental interest.\(^{140}\) In other words, "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry."\(^{141}\) Here, even if Congress is accorded substantial deference to its judgments, the hurdle presented by the fourth prong cannot easily be overcome on inconclusive evidence.\(^{142}\) The majority believed that "the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result."\(^{143}\) In this regard, the Court felt there was an incomplete record concerning the actual effects of must-carry on the speech of cable operators and cable programmers.\(^{144}\) Furthermore, there was inadequate consideration and discovery into the possibility that there might be a "'constitutionally acceptable less restrictive means' of achieving the Government's" ends, which would be equally effective.\(^{145}\) The government would have to entertain every reasonable option before coming to the conclusion that the present regulations were the least restrictive available. The record failed

\(^{135}\) Turner, 114 S. Ct. at 2470.
\(^{136}\) Id. (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).
\(^{137}\) O'Brien, 391 U.S. at 377.
\(^{138}\) See \textit{ supra} note 111 and accompanying text.
\(^{139}\) Turner, 114 S. Ct. at 2470 (emphasis added).
\(^{140}\) O'Brien, 391 U.S. at 377.
\(^{141}\) Turner, 114 S. Ct. at 2470.
\(^{142}\) Id. at 2471.
\(^{143}\) Id. at 2472.
\(^{144}\) Id.
\(^{145}\) Id. (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)).
\(^{146}\) Turner, 114 S. Ct. at 2472.
to provide any such finding. 147 These were the unresolved factual questions which forced the Court to remand the case for further proceedings.

6. Concurring Justices

Justice Blackmun concurred separately only to "emphasize the paramount importance of according substantial deference to the predictive judgments of Congress . . ." 148 While he believed that Congress had compiled an extensive record, he conceded that the standard for summary judgment was nonetheless high because of the issue and values at stake. 149 Furthermore, Justice Blackmun felt that any additional evidence would be beneficial to the federal government's case. 150

Justice Stevens, concurring separately, would have preferred to affirm the lower court's decision, but he chose to accommodate the majority. 151 Justice Stevens' main disagreement concerned the amount of evidence required by the majority. "Congress did not have to find that all broadcasters were at risk before acting to protect vulnerable ones, for the interest in preserving access to free television is valid throughout the Nation." 152

7. The Dissent

The dissent, led by Justice O'Connor, was vehemently at odds with the majority opinion. First, the dissenters disagreed with the Court's conclusion that the interest in diversity of views and information is content-neutral. 153 They believed that "[t]he interest in 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." 154

Second, "[t]he interest in localism . . . cannot be described as 'compelling' for the purposes of the compelling state interest test." 155

147. Id.
148. Id.
149. Id.
150. Id. at 2473.
151. Turner, 114 S. Ct. at 2475.
152. Id. at 2474.
153. Id. at 2477.
154. Id.
155. Id. at 2478 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612-13 (1990) (O'Connor, J., dissenting)).
The dissent felt that it was the role of the actual viewers and subscribers, not the government, to dictate what fraction of their cable entertainment should be of a local nature, based on demand. 156 This reasoning appears to be based on laissez-faire ideology.

Lastly, the dissenters asserted that the must-carry provisions are overbroad even under a content-neutral analysis. 157 Therefore, under such circumstances, "'[b]road prophylactic rules in the area of free expression are suspect.'" 158 In essence, the dissenting opinion clearly considered the must-carry provisions to be unconstitutional. It is interesting to note that the dissenters were so strongly confident in their position that nothing, not even additional fact finding on remand, would change their minds. 159 If this is any indication, cable opponents have an arduous task ahead in winning support from this group of remaining justices.

IV. ANALYSIS

A. Triggering the First Amendment

In any First Amendment case, the starting point is to determine how the First Amendment is involved in the case at bar. Here, TBS and other cable systems contend that their decision to choose which programming, local or non-local, to carry on their channels is a form of speech or expression protected by the First Amendment. 160 Furthermore, they asserted that "this intrusion on the editorial control of cable operators amounts to forced speech . . . ." 161 Unless cable operators can show that all the channels they are carrying convey a common message, there is still an opposing argument. The discretion involved in either adding or deleting certain programming is usually a function of economic variables (e.g., viewer demand and advertising revenue) not speech concerns. 162 The

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156. Turner, 114 S. Ct. at 2478.
157. Id. at 2480.
158. Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
159. Id.
160. See generally id. at 2464-65 (discussing the editorial independence afforded to the press by the First Amendment).
161. Turner, 114 S. Ct. at 2464.
Court, however, agreed that cable's editorial control over channel carriage does trigger speech, unique from other media.\textsuperscript{163}

The Court struck down TBS's second contention (\textit{i.e.}, forced speech), stating that it is difficult to argue that a First Amendment violation is triggered when cable operators merely carry broadcast programming and are not conveying any message.\textsuperscript{164} Cable has been viewed as a conduit of broadcasting signals and not as a conveyor of messages endorsed by the cable operator.\textsuperscript{165} When the regulation refers to all broadcast stations, the application is clearly content-neutral. Cable's only argument is to assert that broadcasting in general is an idea in itself. The Court had no trouble disposing of such an argument. It reasoned that even though Congress noted the value of broadcast programming throughout the 1992 Act, such references do not automatically cast the must-carry scheme as content-based.\textsuperscript{166}

The dispute on both sides may be far from resolved, but the Court seems to have reached an effective compromise — a cable operator's conduct is symbolic speech which is not necessarily violated by the must-carry rules. This was but one step in determining the constitutionality of must-carry. Only after moving past this initial threshold was the Court able to proceed to the heart of the case.

\textbf{B. Standard of First Amendment Review}

The D.C. Circuit tactfully ducked the standard of review question concerning the constitutionality of the must-carry provisions.\textsuperscript{167} This issue, which created great uncertainty in the courts below, was finally decided by the Supreme Court in \textit{Turner}: intermediate scrutiny will govern cable television's must-carry provisions.\textsuperscript{168} The Court rejected a strict scrutiny test because there are special situations, such as the regulation of broadcasting, which require that First Amendment standards be less protective of free speech.\textsuperscript{169} The Court recognized that interference with

\begin{itemize}
\item \textsuperscript{163} See infra notes 171-72 and accompanying text; see also \textit{Turner}, 114 S. Ct. at 2456 (discussing how cable television operators and programmers transmit speech).
\item \textsuperscript{164} \textit{Turner}, 114 S. Ct. at 2465.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 2462.
\item \textsuperscript{168} \textit{Turner}, 114 S. Ct. at 2469 (concurring with this part of the District Court decision).
\item \textsuperscript{169} SMOLLA, \textit{supra} note 7, § 3.03[1][c], at 3-83.
\end{itemize}
speech may trigger varying degrees of First Amendment scrutiny.\textsuperscript{170} Having to decide between giving cable the greatest constitutional protection, analogous to the print media, or the least protection, like broadcasters, the majority chose to accord cable "the middle of a First Amendment continuum."\textsuperscript{171} This decision was based on the acknowledgment that the programming cable delivers "provides an editorial point of view to subscribers,"\textsuperscript{172} thereby triggering a higher standard of review.\textsuperscript{173} Furthermore, the Court felt that since the must-carry rules can prove burdensome for cable operators and programmers, a greater degree of scrutiny than "rational basis" is warranted.\textsuperscript{174} While cable came short of obtaining strict scrutiny protection afforded the print media, it at least got more protection than traditional broadcasting.\textsuperscript{175}

While this part of the decision can be viewed as a victory for broadcasters, the Court seemed to apply a strict standard of review to the facts of Turner. Justice Kennedy concluded his opinion by saying that "for must-carry to survive, the FCC had to demonstrate not only that 'a large number of broadcast stations would be dropped or repositioned in the absence of must-carry,' but also show that without it, they would be harmed financially."\textsuperscript{176} Is there a double standard in place here? It appears that the Court is requiring the factual scenario that concurring Justice Stevens feared — that broadcasting be at its "death throes."\textsuperscript{177} When considering the economic aspects involved in justifying a particular regulation, questions of proof become problematic. After all, economic studies and theories are only predictions based on continuing trends. The Court has great discretion as to whether to accept these conclusions or to require more substantial evidence. In this case, it chose the latter.

\textsuperscript{170} Turner, 114 S. Ct. at 2456.
\textsuperscript{171} Ted Hearn, Court Orders New Must-Carry Review, MULTICHANNEL NEWS, July 4, 1994, at 1.
\textsuperscript{172} Michael Burgi, Must-Carry's Murky Future, MEDIAWEEK, July 4, 1994, at 9.
\textsuperscript{173} Mark Glenn, Comment, Communications Law — A Must-Carry Rerun: Century Communications Corp. v. FCC, 14 J. CORP. L. 265, 279 (1988).
\textsuperscript{174} Turner, 114 S. Ct. at 2458.
\textsuperscript{175} Aaron Epstein, Cable TV Wins Greater Freedom, SACRAMENTO BEE, June 28, 1994, at A1.
\textsuperscript{176} Hearn, supra note 171, at 38 (quoting Turner, 114 S. Ct. at 2471-72).
\textsuperscript{177} Turner, 114 S. Ct. at 2474.
C. Economic Aspects

1. The Effect of a Cable Monopoly on Broadcasting and Advertising

There are certainly critics on both sides of the question of whether cable television is a monopoly. On the one hand, some people on the government's side contend that must-carry is not an effort to favor broadcasting over cable, but just a way of leveling the field and "prevent[ing] anti-competitive practices . . . in the market for the delivery of television programming."\(^{178}\) Congress views cable as exercising monopoly power to drive its competitors — broadcasters — out of the market.\(^{179}\) This view is clearly consistent throughout the 1992 Act.\(^{180}\) One critic, however, pointed out that "[f]ederal law prohibits both exclusive cable franchises and unreasonable refusals to award competitive franchise licenses."\(^{181}\) Therefore, a logical conclusion would be that cable operators are not granted legally protected monopoly status by the government or otherwise.\(^{182}\)

Despite the fact that a cable monopoly cannot exist in the "legal" sense, the practical reality may be very different. As cable industry analyst G. Kent Webb concluded, cable television systems are a natural geographic monopoly because "'[c]able systems appear to exhibit declining average total costs in terms of the number of channels provided, the size of the geographic area covered, and the number of subscribers served.'"\(^{183}\) In

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180. See, e.g., "Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers." § 2(a)(2), 106 Stat. at 1460. "As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services." § 2(a)(13), 106 Stat. at 1462.

181. Fein, supra note 178, at 46.

182. Id.

other words, the greater the number of subscribers and channels offered within a large service area, the greater the reduction in operation costs per subscriber.

When analyzing cable's monopoly power, the principal concern is whether cable is exercising monopoly power in local advertising markets.\textsuperscript{184} Local broadcasting stations depend on advertising revenues for their existence. Therefore, if cable were to drop local stations, these stations would be denied the opportunity to compete for funding sources and cable systems would be endowed with this market power.\textsuperscript{185}

This situation can also be viewed from the perspective of advertisers. If cable systems are not required to compete with local stations for advertisers, they might have the incentive to unilaterally raise the price of advertising time.\textsuperscript{186} With local stations out of the picture, advertisers would have virtually no say in the matter because they would have no alternative means to reach the viewing public.\textsuperscript{187} Such a scenario could result in the eventual downfall of not only the broadcasting industry, but also the advertising business.

The majority opinion in \textit{Turner} seemed to reflect the Webb notion.\textsuperscript{188} The Court noted a critical distinction between cable and other media, like a daily newspaper. "[While] both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium."\textsuperscript{189} In other words, a newspaper subscriber can buy a different paper without much trouble, while a cable subscriber is forced to watch what he or she can pick up from the cable box. Clearly, cable occupies a unique market position. Furthermore, the Court noted that "[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."\textsuperscript{190} Therefore, the majority made its pro-broadcasting judgment based on economic concerns.\textsuperscript{191}

\textsuperscript{184} Vita \& Wiegand, \textit{supra} note 162, at 2.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 7.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{See supra} note 183 and accompanying text.
\textsuperscript{189} \textit{Turner}, 114 S. Ct. at 2466.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Wrong Road on Must-Carry, ELECTRONIC MEDIA}, July 4, 1994, at 14.
2. The Potential Costs of Must-Carry

While there are harmful costs inflicted on broadcasting and advertising from not having must-carry rules in place, there are also potential costs to cable systems if must-carry rules stand. For example, cable might have to eliminate some currently carried non-local programming if it has no available channels.192 Even assuming that cable systems can increase their channel capacities with new technology, they would most likely pass on the costs of expansion to their subscribers.193 While having the best of both worlds will not be cheap at first, viewers should have the opportunity to make that choice and not be forced into subscribing to cable exclusively.

Another argument is that a must-carry rule would provide less incentive for cable to create new programming.194 Initially, it is likely that cable would be more preoccupied with trying to accommodate local stations before even thinking about adding some programming variety. While this might be true in the beginning, with the everchanging nature of cable technology, it will not be long before the issue becomes moot. When the information superhighway is expanded, cable systems will be more concerned about filling all the unused channels with new programming. Besides expanding cable technology, the FCC can also encourage the industry to offer more program choices. For example, the FCC has already adopted rules that took effect January 1, 1995, allowing cable operators to raise their rates when they add channels.195 The FCC appears to be easing the restrictions imposed by the 1992 Act, to the dismay of consumer groups.

Finally, there is the concern that if cable systems cannot differentiate their services (i.e., offering a different variety of channels), "consumers would buy from the firm with the lowest price (because output is homogeneous across firms) . . ."196 However, it must be remembered that the whole purpose of must-carry legislation is to promote competition, and to allow the consumer to shop around for the best deal in town. Eventually, competing cable systems will acquire the same cable techno-

192. Vita & Wiegand, supra note 162, at 15.
193. Id.
194. Id. at 16.
196. Vita & Wiegand, supra note 162, at 17.
logy and provide the same services, so price should be the competing factor. This is the essence of a free market society.

On its face, the Court in *Turner* seems to explicitly agree that broadcasters do have valid economic concerns; but in the end, it raises doubts as to the sufficiency of evidence. Yet the Court does not address any of the economic effects of must-carry toward cable. There needs to be a careful weighing of economic effects on both sides. The Court is certainly steering broadcasters as well as cable operators in a misleading direction. Where does the must-carry issue now stand? What happens next? These are just some of the daunting questions that demand contemplation.

D. Aftermath of the Turner Decision

1. The Battle Continues

From the prior analysis, there appears to be no clear victory for either side. The Court left both sides with no clear pronouncement on the constitutionality of the must-carry provisions. One thing is certain however — that the case will wind its way up to the Supreme Court a second time. Will the Court then finally resolve the constitutionality issue? It is uncertain whether the government will present enough “hard evidence” to convince the Court that the harm to broadcasters is “real.”

2. All Eyes on Justice Breyer

Another point of uncertainty after this ruling concerns the replacement of Justice Blackmun by recently confirmed Justice Steven G. Breyer. Prior to his appointment to the United States Supreme Court, Judge Breyer participated in a “moot court” session in which students argued the cable-broadcast case. This event, taped on C-SPAN, provided perhaps a glimpse of his position. Judge Breyer only went so far as mentioning that he was concerned that the 1992 Act gave broadcasters special treatment.

Some consider Justice Breyer a deregulator; hence, he could give

198. *Id*.
cable the vote it needs to overrule the must-carry provisions. Furthermore, Justice Breyer is unlikely to give as much deference to the findings of Congress in the 1992 Act as Justice Blackmun did in *Turner*. Justice Blackmun appeared to be the tie breaker in this first round. However, now that he is retired, the result would be a four to four tie. Justice Breyer may be taking Justice Blackmun's seat, but with a different thinking cap. The other Justices on either side will probably not change their positions in the next round. With such a split, anything can happen. It will be interesting to see how Justice Breyer will cast the deciding vote.

3. The Policymaking Spirit Lives On

Finally, one should consider the possible scenario of the Court declaring must-carry unconstitutional. How will Congress react? Will Congress go back to the drawing board and attempt to draft an alternative approach? One would think that Congress would give up on its futile quest. Yet, if Congress is willing to stand up for its convictions, the future of must-carry might linger on. While the Clinton administration may still retain control over the FCC, the past November midterm election results could put a twist on things. The major Republican overhaul in both Houses of Congress could result in amendments to the 1992 Act, particularly the must-carry provisions. It is uncertain whether defense of the regulations will continue, absent Democratic majorities in Congress.

A good characterization of the must-carry controversy is the "endless policy loop." Another more vivid characterization is "an unsatisfying roller coaster ride, a continually changing pattern of regulation and rationalization that has left many of the participants unhappy, most of them confused, and nearly all of them nervous, awaiting the next rise or dip in

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200. McAvoy, supra note 199, at 11.

201. In a law review article, Breyer presented this view of legislative history: "The 'problem' of legislative history is its 'abuse,' not its 'use.'" Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 874 (1991), quoted in Reske, supra note 199, at 22.


203. It is important to note that this case was decided by a 5 to 4 decision. Doug Halonen, Cable, Broadcast Weigh Must-Carry Ruling, ELECTRONIC MEDIA, July 4, 1994, at 3, 3. This lends credit to the notion that the must-carry issue is far from being clearly settled.

the political landscape." It has been suggested that parties on both sides should put their differences aside and instead engage in negotiated rulemaking. This may entail forming a committee with cable and broadcast representatives that would meet and, with the help of a mediator, propose new solutions that would later be adopted by the FCC.

V. CONCLUSION

The Supreme Court's decision in Turner seems to be a good compromise, but unless a clearer position is enunciated, there is still the danger of inconsistent rulings in the future. This author agrees most with Justice Stevens' concurring opinion. It would be foolish for the FCC to wait until local broadcasters are eliminated before acting on a rising threat. The must-carry provisions are fair and should remain intact. It is true that new technologies should be encouraged and favored, but not to the extent of driving other sources out of the market. Local broadcast stations can and do provide a valuable service to the community. Even cable operators acknowledge the fact that the must-carry issue will be irrelevant in a few years, when the channel capacity is expanded. Considering this, why is cable so adamant in fighting the must-carry provisions? Only cable operators hold the key to their own future development. Congress' role is to protect the public interest at the present time. It cannot rely on speculation that cable systems will eventually be able to accommodate local broadcasters.

No matter which side ultimately prevails in the second appeal of Turner, as one commentator put it, "[t]he decision seems destined to become a landmark First Amendment opinion that will determine the free speech rights not only of cable operators but also telephone companies and

206. Brotman, supra note 204, at 405.
207. See generally id. at 405-06 (discussing a proposal to break the chain of vexatious litigation).
208. Burgi, supra note 172.
other wannabe information highway delivery technologies."

Perhaps when the Court ends the conflict between both sides once and for all, cable and broadcast television can effectively work together toward more progressive solutions.

_LamDien Le*

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209. Wharton, _supra_ note 80, at 1, 39.

* This Note is dedicated to my parents in appreciation for all their moral, spiritual and financial support through the years. I also wish to thank the staff writers and editors of the Loyola of Los Angeles Entertainment Law Journal for their invaluable assistance with this Note.