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Quincy Cable TV, Inc. v. Federal Communications Commission: Should the FCC Revive Cable Television's Must Carry Requirement

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**QUINCY CABLE TV, INC. v. FEDERAL COMMUNICATIONS
COMMISSION: SHOULD THE FCC REVIVE
CABLE TELEVISION'S MUST CARRY
REQUIREMENT?**

I. INTRODUCTION

In its infancy, cable television service was designed to transmit clear broadcast signals to viewers in rural areas. In the past three decades, cable has evolved into a full scale communications medium, offering viewers a wide variety of information and entertainment services. Throughout most of cable television's history, the Federal Communications Commission (FCC or Commission) has attempted to ensure, through regulation of cable signal carriage, that the growth of cable television does not adversely affect the development of traditional broadcast television service.¹ Prior to the District of Columbia Court of Appeals decision in *Quincy Cable TV, Inc. v. Federal Communications Commission*,² FCC regulations required that cable television systems carry the signals of all the local broadcast stations in the community served by the system as part of its basic service. This "must carry" requirement was designed to guarantee that cable subscribers still had ready access to local broadcast stations, and that no local station would be placed at a competitive disadvantage vis-a-vis other stations or services carried on the community's system.³

After considering challenges to the constitutionality of the generation-old must carry rules, the *Quincy* court determined that the rules impermissibly infringed upon the first amendment freedoms of cable system operators and cable television programmers.⁴ The court found that by imposing mandatory carriage of local broadcast signals on cable systems, the rules abridged cable operators' editorial discretion and restricted cable programmers' opportunities to sell their services.⁵

1. The FCC has the authority to regulate radio and television broadcasting as required by the "public convenience, interest, or necessity." Communications Act of 1934, § 303, 47 U.S.C. § 303 (1982). The Commission also has the authority to regulate cable television as long as the regulation is in the public interest and reasonably ancillary to its regulation of broadcast television. See *infra* notes 40-42 and accompanying text for a discussion of the FCC's jurisdiction over cable television.

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

3. See *infra* notes 33-37 and accompanying text.

4. 768 F.2d at 1438.

5. See *infra* notes 108-13 and accompanying text for a complete discussion of the *Quincy* court's holding.

As background to the *Quincy* decision, this Note provides a brief history of the regulations adopted by the FCC in the early 1960's to ensure the continued financial vitality of conventional broadcast television in the face of competition from cable. Next, this Note presents the *Quincy* case and analyzes the court's reasons for invalidating the "must carry" rules. Following the case analysis, this Note discusses the subsequent actions taken by broadcasters in response to the *Quincy* decision.

This Note assumes that when the *Quincy* court invalidated the must carry rules, it established a minimum standard of constitutionality for regulations that incidentally impinge upon cablecasters' first amendment freedoms. It is not the purpose of this Note to establish the ideal standard of constitutional analysis for cable television regulations. Instead, this Note analyzes the constitutionality and practicality of future mandatory carriage regulations in light of the *Quincy* standard. After discussing several proposals for new must carry rules filed with the FCC by competing broadcast interest groups, this Note recommends that the Commission adopt rules which provide that cable operators be required to carry only the public broadcast stations in their local communities.

II. BACKGROUND

A. *The Must Carry Rules*

Prior to their judicial demise,⁶ the must carry rules required that a cable system carry, upon the stations' request, the signals of all commercial television stations within thirty-five miles of the community served by the system, qualified public or noncommercial educational broadcast stations in the same market, and all other stations "significantly viewed"⁷ in the community.⁸ The applicability of the rules depended upon the size of the television market in which the system was located.⁹ The rules made no exceptions for cable systems with limited channel capacities, a

6. The must carry rules became ineffective September 3, 1985, after the United States Court of Appeals for the District of Columbia Circuit denied the National Association of Broadcasters and other broadcast interest groups' petition for a stay of execution. *NAB, Broadcasters Ask for Stay of Execution of Must Carry*, BROADCASTING, Aug. 26, 1985, at 31.

7. "Significantly viewed" signals were defined in 47 C.F.R. § 76.54(a) (1984) as those listed in Appendix B of the FCC's Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326, 378-463 (1972).

8. See generally 47 C.F.R. §§ 76.57-.61 (1984).

9. The FCC defined the terms "major" and "smaller" television markets for purposes of cable television regulation, then provided separate must carry provisions for those systems operating in communities located outside of all major and smaller television markets, 47 C.F.R. § 76.57 (1984), for those systems operating within smaller television markets, *id.* § 76.59, and for those systems located within major television markets, *id.* § 76.61.

large number of must carry obligations or a great deal of programming duplication. Although the rules contained a waiver provision,¹⁰ the Commission was not generous in granting waivers to system operators who petitioned for relief from their must carry obligations.¹¹

B. Historical Development

The first cable television systems were known as Community Antenna Television (CATV) systems. These systems developed in the late 1940's and early 1950's to amplify and distribute television signals of good quality to areas where reception was difficult or non-existent.¹² Reception is bolstered in weak signal areas by the installation of a common antenna at a prime location near the community such as atop a high tower or mountain. The antenna picks up steady signals from distant television broadcast stations, transmits them to a receiving station by wire or microwave, and ultimately distributes them by cable to the receiving sets of system subscribers.¹³

Initially, CATV systems did not produce any original programming; they merely provided subscribers with clear reception of both local and distant television signals.¹⁴ Although the CATV industry originated to provide clear reception to sparsely settled areas and areas of adverse terrain, in recent years cable systems have become increasingly popular even in areas where broadcast reception is uninterrupted.¹⁵ Today, cable

10. See 47 C.F.R. § 76.7 (1984).

11. Absent a compelling showing, the FCC would not grant must carry waivers even if the mandatory carriage obligations resulted in deletion of discretionary signals. *In re* Amendment of Part 76 of the Commission's Rules and Regulations (Sections 76.59-76.63) with Respect to "Saturated" Cable Television Systems, 66 F.C.C.2d 710, 713 (1977) [hereinafter cited as Saturated Cable Television Systems]. For examples of cases where the Commission denied petitions for waiver, see *In re* MBS Cable TV, Inc., 59 F.C.C.2d 1181 (1976); *In re* Liberty TV Cable, Inc., 53 F.C.C.2d 275 (1975); *In re* Concord TV Cable, 58 F.C.C.2d 1178 (1975); *In re* TelePrompter Cable Communications Corp., 47 F.C.C.2d 1222 (1974). Although the problem was not resolved, the FCC took notice of the plight of saturated cable systems and issued a notice of proposed rulemaking in 1977. Saturated Cable Television Systems, *supra*, at 710.

12. *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 517 n.16 (D.C. Cir. 1955) (holding that FCC erroneously denied protest against grant of permit to operate television station).

13. *Id.*

14. Distant television broadcast signals are those signals coming from more than 35 miles away from a cable system located in a large television market, and more than 55 miles away from a cable system located in a smaller market. D. PEMBER, *MASS MEDIA LAW* 474 (2d ed. 1981).

15. The launching of domestic communications satellites in the mid-1970's gave cable systems the opportunity to import distant television signals to subscribers. This added attraction made cable popular in urban as well as rural areas. For a brief discussion on this point, see Lloyd, *Cable Television's Emerging Two-Way Services: A Dilemma for Federal and State Regulators*, 36 VAND. L. REV. 1045, 1047 (1983).

television delivers not only broadcast signals, but also an entire menu of national program services distributed to cable systems via satellite.¹⁶

In 1958, the FCC expressly disclaimed any jurisdiction over CATV systems, and made no attempt to regulate the industry.¹⁷ In 1962, however, the Commission shifted its position. In *In re Carter Mountain Transmission Corp.*,¹⁸ the Commission asserted indirect jurisdiction over cable by imposing restrictions upon the activities of the common carrier microwave facilities which serve CATV systems.

In *Carter Mountain*, the Commission denied the application of a microwave carrier who sought permission to construct facilities for the transmission of distant television signals to three local CATV systems.¹⁹ The Commission concluded that it would not serve the public interest, convenience or necessity to grant the microwave carrier's application, believing that importation of distant signals on the CATV systems would lead to the "demise" of the local television station and loss of service to

16. Home Box Office, Inc. provided the first cable programming service via satellite in 1975, when it began offering motion pictures for an additional fee. G. SHAPIRO, P. KURLAND & J. MERCURIO, *CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 2* (1983) [hereinafter cited as *CABLESPEECH*]. Today there are approximately 40 video program services and a number of non-video services distributed to cable systems over the facilities of three domestic satellites. The wide variety of programming available includes live and taped sports events, religious programs, motion pictures, music videos, childrens' programs, foreign language programming, national and international news and other cultural, informational and entertainment programs. *Id.*

17. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), *recon. denied*, *In re Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403 (1959) [hereinafter cited as *CATV Report & Order*]. In *Frontier Broadcasting Co.*, the Commission held that it did not have jurisdiction over CATV under the provisions of the Communications Act relating to common carriers. *CATV Report & Order*, *supra*, at 427. It should be noted, however, that while finding "no present basis for asserting jurisdiction or authority over CATV's," *id.* at 431, the FCC recognized that CATV may have an adverse impact upon the development of broadcasting. The FCC concluded its *CATV Report and Order* as follows:

Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. Since both of these steps require changes in the Communications Act, we will shortly recommend to Congress appropriate legislation

Id. at 441.

18. 32 F.C.C. 459 (1962), *aff'd*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

19. *Id.* at 465. In CATV systems, microwave facilities are used to relay the television broadcast signals, normally picked up off the air at a point some distance from the transmitting broadcast antenna, through a series of radio repeaters to a point in or near the community served by the system. The television signals are then distributed by cable to the individual subscribers' sets.

those persons who chose not to pay the cost of subscribing to a CATV system.²⁰ The Commission reasoned that the need for a local television outlet outweighed the benefit of the improved service which CATV systems could promise its subscribers.²¹ The Commission agreed, however, to grant the application if the CATV system operators agreed to carry the signal of the local broadcast station and not to duplicate the programming of the local station on any other channels on their systems.²²

In appealing the FCC's decision to the District of Columbia Circuit Court of Appeals, the microwave carrier contended that by denying the application the Commission had attempted to regulate CATV systems without the legal authority to do so.²³ The court disagreed and held that the Commission had "justifiably concluded that the continuance of the local station served the public interest, and that [the FCC] was fully warranted in imposing conditions, designed to protect that station, for the reconsideration of appellant's application."²⁴

In 1965, the FCC decided that "the likelihood or probability of [CATV's] adverse impact upon potential and existing [broadcast] service [had] become too substantial to be dismissed."²⁵ Thus, the Commission expanded its holding in *Carter Mountain* and imposed general regulation on all microwave-fed cable systems' carriage of broadcast signals.²⁶ The FCC noted that although cable systems and local broadcasters provide the public with the same basic product—programs created or sold for distribution—the local broadcast stations must bargain and bid for their programming in the program distribution market, subject to that market's various restrictions and conditions.²⁷ Unlike broadcasters, cable systems do not come within the scope of section 325 of the Communications Act,²⁸ and could rebroadcast distant broadcast signals without entering the program distribution market and without encountering any

20. *Carter Mountain*, 32 F.C.C. at 464-65.

21. *Id.* at 465.

22. *Id.*

23. *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 363 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

24. *Id.* at 366.

25. Rules re Microwave-Served CATV, First Report & Order, 38 F.C.C. 683, 713-14 (1965) [hereinafter cited as *Microwave-Served CATV Report*].

26. *Id.* at 713-15.

27. *Id.* at 704.

28. Communications Act of 1934, § 325(a), 47 U.S.C. § 325(a) (1982). Section 325(a) of the Communications Act prohibits "any broadcasting station [from] rebroadcast[ing] the program or any part thereof of another broadcasting station without the express authority of the originating station." *Id.* In its *CATV Report & Order*, the FCC determined that CATV retransmission of broadcast signals was not "rebroadcasting" within the scope of § 325. *CATV Report & Order*, *supra* note 17, at 429-30.

regulation or copyright liability.²⁹

The FCC reasoned that the importation of distant signals into the service areas of local stations necessarily created substantial competition for local broadcasting.³⁰ Consequently, the Commission concluded that mandatory carriage and nonduplication rules³¹ were necessary to create "reasonably fair and open conditions for competition between CATV and broadcasting stations,"³² and also to "ameliorate the adverse impact of CATV competition upon local stations, existing and potential."³³

The FCC assumed that CATV service was intended to supplement, not replace, over-the-air broadcast service.³⁴ Therefore, the failure or refusal of a CATV system to carry the signal of a local station was plainly inconsistent with that assumption and was "inherently contrary to the public interest."³⁵ The Commission realized that it was enacting rules to prevent a result that was purely speculative, and went on to state: "If the rules should ultimately prove unnecessary or need modification in light of the passage of time, congressional action or other factors, they can be modified or rescinded. Our best present judgment is that the public interest requires their adoption."³⁶

The following year, 1966, the FCC extended the applicability of the must carry rules to all cable systems, not only those which require micro-

29. Microwave-Served CATV Report, *supra* note 25, at 703-04.

30. *Id.* at 707.

31. Nonduplication rules, adopted at the same time as the must carry requirement, preclude CATV systems from duplicating the programming of local stations for periods of 15 days before and after a local broadcast. The rules are designed to protect local broadcast stations' exclusivity, including their right to exhibit programs in the competitive program market. See Microwave-Served CATV Report, *supra* note 25, at 743. See also 47 C.F.R. § 76.92 (1985) for the current nonduplication provisions.

32. Microwave-Served CATV Report, *supra* note 25, at 713.

33. *Id.* The FCC stressed that the issue was not whether to bar CATV entry into any particular market. Rather, the issue was whether to permit the use of microwave facilities to serve CATV systems while imposing some restrictions upon the manner in which CATV systems competed with the local television stations. *Id.* at 707. The FCC concluded that there was sufficient evidence showing that CATV had a competitive advantage over, and an adverse impact upon, local television to justify some regulation. *Id.*

The FCC stated that "it is plain that CATV competition can have a substantial negative effect upon station audience and revenues, although we lack the tools with which to measure precisely the degree of such impact." *Id.* at 710-11. The FCC speculated that the competition from cable could destroy or prevent the establishment of stations and could also "impair the ability of stations fully to serve the needs and interests of their communities." *Id.* at 707.

34. *Id.* at 705.

35. *Id.* The FCC also stated that a CATV system's failure to carry a local station placed an unreasonable restriction upon that station's ability to compete in the market, and that it was patently destructive of the goals of the FCC in seeking to allocate television channels to different areas and communities. *Id.*

36. *Id.* at 715.

wave licenses but also those which receive their signals off the air.³⁷ The rules were updated in 1972³⁸ and remained virtually unchanged until they were ruled unconstitutional in *Quincy Cable TV, Inc. v. FCC*.³⁹

C. Judicial Challenges to Cable Regulation

In *United States v. Southwestern Cable Co.*,⁴⁰ the United States Supreme Court upheld the FCC's authority to regulate cable television as long as the regulation was "reasonably ancillary to the effective performance of [its] responsibilities for the regulation of television broadcasting."⁴¹ Since the 1968 *Southwestern Cable* decision, the Court has heard several cases challenging the breadth of the FCC's authority over cable, and has passed judgment on the types of regulations that come within the "reasonably ancillary" limitation.⁴² However, the Supreme Court has yet to determine the constitutional validity of any cable regulation.

Assuming that the regulation was arguably within the FCC's jurisdiction, cable system operators then challenged the constitutionality of cable regulations, including the must carry rules, in the lower courts. In *Black Hills Video Corp. v. FCC*,⁴³ the Eighth Circuit rejected a cable operator's claim that the must carry rules violated his first amendment

37. CATV, Second Report & Order, 2 F.C.C.2d 725, 745 (1966).

38. Cable Television Report & Order, 36 F.C.C.2d 143, *reconsidered*, 36 F.C.C.2d 326 (1972), *aff'd*, *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

39. 768 F.2d 1434 (D.C. Cir. 1985).

40. 392 U.S. 157 (1968).

41. *Id.* at 178. In *Southwestern Cable*, respondent claimed the FCC had no authority to issue a rule banning CATV transmission of distant signals into the 100 largest television markets unless the service existed prior to the time the rule was issued or unless the Commission found the service to be "consistent with the public interest." *Id.* at 180 (quoting *In re Midwest Television, Inc.*, 4 F.C.C.2d 612, 626 (1966)). The Supreme Court did not rule on the validity of the specific rule promulgated. Rather, the Court only determined whether the FCC had the authority under the Federal Communications Act to regulate CATV systems and, if so, whether it had the authority to issue the prohibitory rule being challenged. *Id.* at 167.

The Court held that the Commission had broad authority over "all interstate or foreign communication by wire or radio" under the Act, and that CATV systems were included within this interstate communication. *Id.* at 167-68 (quoting 47 U.S.C. § 152(a) (1968)). The Court also found that the FCC had reasonably determined that the successful performance of its responsibilities for the orderly development of local television broadcasting allowed for some regulation of cable systems, and that the FCC had the authority to issue the prohibitory order. *Id.* at 167-81.

42. See *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984) (Court addressed FCC's authority to preempt state and local cable regulations); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest II*) (rules which required cable operators to make channels available for local access held invalid and beyond scope of FCC jurisdiction); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (plurality) (*Midwest I*) (rule requiring cable operators to originate their own local programming held within FCC's grant of authority).

43. 399 F.2d 65 (8th Cir. 1968).

rights.⁴⁴ After citing the Supreme Court's decision in *National Broadcasting Co. v. United States*,⁴⁵ which determined that the right of free speech does not include the right to use the airwaves without a license,⁴⁶ the *Black Hills Video* court held:

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the airwaves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service.⁴⁷

At the time *Black Hills Video* was decided, cable television service was assumed to be secondary to broadcasting and virtually dependent upon broadcast signals for its programming.⁴⁸ In fact, for nearly a decade following that decision, the courts did not question the propriety of treating cable television regulation as indistinguishable from broadcast regulation for purposes of first amendment analysis.⁴⁹ It was not until the landmark decision in *Home Box Office v. FCC*⁵⁰ that the courts be-

44. *Id.* at 69.

45. 319 U.S. 190 (1943).

46. *Id.* at 227. In *National Broadcasting Co.*, the appellants challenged FCC regulations relating to the licensing of radio broadcast stations. *Id.* at 209. In this landmark decision, the Court held that the regulatory powers of the Commission were not limited to the engineering and technical aspects of radio communications, and that the FCC had the authority to adopt, in the "public interest," regulations that restricted which broadcast stations were granted operating licenses. *Id.* at 216-18.

The Court also rejected the appellants' claim that the licensing restrictions abridged their right to free speech. *Id.* at 227. The Court recognized that due to the physical limitations of the electromagnetic spectrum, radio could not possibly be available to all. *Id.* at 226. For this reason, broadcasting, unlike other forms of expression, was subject to governmental control. *Id.* at 227. The Court stated:

The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Id.

47. *Black Hills Video*, 399 F.2d at 69.

48. See CABLESPEECH, *supra* note 16, at 139-41.

49. See, e.g., *Southwest Pa. Cable TV, Inc. v. FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975) (cable's nonduplication regulations upheld); *Midwest Television, Inc. v. FCC*, 426 F.2d 1222, 1230 (D.C. Cir. 1970) (FCC order restricting expansion of CATV system to promote success of UHF stations in same area upheld).

50. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

gan to reevaluate cable television's role in the telecommunications industry.⁵¹

In *Home Box Office*, the court ruled on the validity of an FCC regulation limiting the number and type of feature films and sports events that cable television systems and pay subscription broadcast stations⁵² could offer their subscribers.⁵³ The cable and pay broadcast system operators claimed that such a regulation exceeded the FCC's authority.⁵⁴ The FCC contended that the rule was necessary to prevent cable and pay television system operators from bidding away or siphoning off the better programs from conventional broadcast television.⁵⁵ By limiting the cable and pay television systems to material which would not otherwise be shown on television, the FCC hoped to avoid such siphoning and to enhance the diversity of program offerings on broadcast television as a whole.⁵⁶ With regard to cable television,⁵⁷ the court held that the FCC did not have jurisdiction to promulgate the challenged regulation, and therefore held the regulation invalid.⁵⁸ In order to avoid multiple remands, the court also determined the proper standard of first amendment analysis for cable television in the event that the FCC was able to satisfy the jurisdictional prerequisites.⁵⁹

The court ruled that the first amendment standard of analysis developed in *National Broadcasting Co.*⁶⁰ and reaffirmed in *Red Lion Broad-*

51. See *supra* note 16 and accompanying text for a discussion of the prominent role Home Box Office, Inc. played in the evolution of the cable television industry.

52. Subscription television stations possess the technical capability to broadcast programs in a "scrambled" manner. Scrambling permits only those members of the public who have paid a fee to receive special equipment to unscramble the signal and receive it in intelligible form. See *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 195 n.1 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). See also 47 C.F.R. § 73.641(b) (1985) for a codified definition of subscription stations.

53. *Home Box Office*, 567 F.2d at 21.

54. *Id.* at 18.

55. *Id.* at 21.

56. *Id.*

57. The court stated that cable regulations must be considered separately from those regulations applicable to subscription broadcast television, and it upheld the regulation insofar as it related to subscription broadcast television. *Id.* at 18.

58. *Id.* The court determined that the proper test for FCC jurisdiction over cable television was whether the ends proposed to be achieved by the regulation were also well understood and consistently held ends for which broadcast television could be regulated. *Id.* at 28. Under this standard, the challenged rule did not pass muster. *Id.* at 34.

59. *Id.*

60. 319 U.S. 190 (1943). The first amendment tolerates a far more intrusive regulation of broadcasting than other forms of expression due to the physical limitations of the airwaves. Only a certain number of voices or images can simultaneously be carried over the electromagnetic spectrum. *Id.* at 226.

casting Co. v. FCC,⁶¹ which allows for some degree of governmental regulation of the broadcast industry, could not be directly applied to cable television. The court reasoned that "since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent,"⁶² cable television was distinguishable from broadcast television. The court made it clear, however, that the absence in cable television of the physical limitations of the electromagnetic spectrum⁶³ did not automatically lead to the conclusion that no regulation of cable would be acceptable vis-a-vis the first amendment.⁶⁴ The *Home Box Office* court emphasized that the right of free speech does not embrace the right to suppress the speech of others, and therefore determined that the "government may adopt reasonable regulations separating broadcasters competing and interfering with each other for the same audience."⁶⁵

The *Home Box Office* court noted the distinction between governmental regulations which are intended to "curtail expression" and those evincing a "'governmental interest . . . unrelated to the suppression of free speech.'"⁶⁶ Regulations that fall into the latter category will be upheld if they pass muster under the criteria set forth in *United States v.*

61. 395 U.S. 367 (1969). In *Red Lion*, a broadcaster contended that certain FCC regulations relating to broadcast presentation of controversial issues of public concern abridged his first amendment freedom. *Id.* at 386. The regulations provided that if statements made over the air amounted to an attack on the integrity of an individual or group, the broadcaster was required to notify the person or group attacked and provide reasonable opportunity for response over the broadcaster's facilities. *Id.* at 373-75. The Court held that the FCC's rules, intended to promote fairness, did not exceed the FCC's authority, and stated that "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations . . . are both authorized by statute and constitutional." *Id.* at 400-01 (footnote omitted).

62. *Home Box Office*, 567 F.2d at 45. In the *National Broadcasting Co. and Red Lion* cases, the Court observed that placing restrictions on broadcasters actually furthered, rather than impeded, first amendment goals. Justice Frankfurter, writing for the majority in *National Broadcasting Co.*, stated, "[w]ith everybody on the air, nobody could be heard." 319 U.S. at 212.

63. For an explanation of the limitations of the electromagnetic spectrum, see *supra* note 46. In contrast to the limited airwaves, improvements in the technology of cable television have increased the channel capacity of cable systems within the last 20 years. CABLESPEECH, *supra* note 16, at 2. By installing dual cables, modern cable systems can be built to accommodate more than 200 channels of programming. *Id.*

64. *Home Box Office*, 567 F.2d at 46. This statement indicates the court's unwillingness to analogize cable television to the conventional press and adopt the standard of first amendment protection set forth in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). See *infra* note 149 and accompanying text for further discussion of this standard.

65. 567 F.2d at 47.

66. *Id.* at 47-48 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

O'Brien.⁶⁷ On the other hand, rules that fall into the former category will be upheld, if at all, only if the government can meet a significantly heavier burden of proof and show a compelling interest justifying such a law.⁶⁸

Because the challenged FCC regulation was not intended to suppress speech, but instead to protect the quality of free television programming, the court held that the proper standard of analysis for the regulation was the balancing test set out in *O'Brien*.⁶⁹ Under the *O'Brien* test, a government regulation will be upheld if: (1) It is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental burden on first amendment freedom of speech is no greater than is necessary to further the government interest.⁷⁰ In applying the *O'Brien* criteria to the regulation at issue, the *Home Box Office* court found that although it was within the FCC's constitutional power and "speech neutral," the regulation was still impermissible because it could not satisfy the test's remaining two requirements. According to the court, the challenged rule served no substantial government interest and was "grossly overbroad."⁷¹

In addition, the *Home Box Office* court added another dimension to the *O'Brien* standard: it required that the Commission state the harm which its regulation sought to remedy and its reasons for supposing that the potential for harm existed.⁷² The court stated that requiring the regulation to serve a substantial government interest "translates in the

67. 391 U.S. 367 (1968). In *O'Brien*, respondent O'Brien publicly burned his Selective Service registration certificate in order to convince others to adopt his anti-war beliefs. *Id.* at 369. He was convicted of violating a recently amended provision of the Universal Military Training and Service Act, which made it a crime for anyone to knowingly destroy or mutilate draft certificates. *Id.* at 369-70.

O'Brien contended that the amendment was unconstitutional because it was enacted to abridge speech and served no legitimate legislative purpose. *Id.* at 370. He claimed that the first amendment protects all modes of communication of ideas, and his act of burning his draft card, done in demonstration against the war and draft, constituted speech within the context of the first amendment protection. *Id.* at 376. The Court first rejected O'Brien's argument that his act constituted speech protected by the Constitution. The Court then stated that when speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest can justify incidental burdens on first amendment freedoms. *Id.* The Court held that the challenged provision served a substantial government interest—maintenance of an efficient and easily administered system for raising armies—and that it was narrowly and precisely drawn to specifically protect this stated interest. *Id.* at 381-82.

68. *Home Box Office*, 567 F.2d at 47-48.

69. *Id.* at 48.

70. *O'Brien*, 391 U.S. at 377.

71. *Home Box Office*, 567 F.2d at 49-51.

72. *Id.* at 34.

rulemaking context into a record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate of the agency."⁷³ In essence, the court placed the burden on the Commission to show first that the siphoning phenomenon was an actual threat to broadcast television and second that the promulgated regulation was sufficiently tailored to cure the siphoning problem.

The court held that there was no evidence in the FCC's record supporting the need for the regulation and, therefore, even if the FCC had the authority to promulgate the rule, it was invalid.⁷⁴ The court stated that "a regulation perfectly reasonable and appropriate in the face of a given problem is highly capricious if that problem does not exist."⁷⁵ Thus, the *Home Box Office* court, in determining a possible standard by which to analyze the constitutionality of cable television regulations, established guidelines for attacking the validity of the must carry rules.

III. *QUINCY CABLE TV, INC. v. FCC*

A. *The Facts*

In *Quincy Cable TV, Inc. v. FCC*, the Court of Appeals for the District of Columbia consolidated two petitions challenging the Commission's must carry rules, the first by Turner Broadcasting System (TBS) and the second by Quincy Cable TV.⁷⁶ In 1980, TBS filed a petition with the FCC requesting that the Commission institute rulemaking procedures to delete the must carry rules.⁷⁷ TBS contended that the regulatory environment had changed so that rules requiring mandatory carriage of broadcast signals were no longer necessary.⁷⁸ TBS also argued that under the first amendment test set out for cable television regulations in *Home Box Office, Inc. v. FCC*,⁷⁹ the rules could not pass constitutional scrutiny.⁸⁰

TBS, the licensee of "Superstation" WTBS, an Atlanta broadcast station which is distributed throughout the country via satellite retransmission, also originates two nonbroadcast program services which are

73. *Id.* at 50.

74. *Id.*

75. *Id.* at 36 (quoting *City of Chicago v. Federal Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972)).

76. 768 F.2d 1434 (D.C. Cir. 1985). The three judge panel consisted of Circuit Judges Wright (who filed the opinion for the court), Bork and Ginsburg. *Id.* at 1437-38.

77. *Id.* at 1445.

78. *Id.*

79. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977); *see supra* notes 52-75 and accompanying text.

80. *Quincy*, 768 F.2d at 1445.

distributed primarily through cable systems.⁸¹ TBS claimed that when the must carry rules cause a significant amount of a cable system's channel space to be occupied with signals of local broadcast stations, it artificially increases the competition cable programmers⁸² face for the limited amount of channel space left on the systems.⁸³ In some instances, TBS contended, cable systems became so saturated with must carry obligations that the rules operated to preclude the programmers from any opportunity to sell their services to these systems.⁸⁴ Initially, the FCC failed to respond to TBS's petition.⁸⁵ Then, in April 1984, the Commission issued a brief order denying TBS's challenge of the must carry rules.⁸⁶ TBS then sought judicial review of the Commission's denial.⁸⁷

Petitioner Quincy Cable TV operates a cable television system in Quincy, Washington, a small town located approximately halfway between Seattle and Spokane. At the time Quincy petitioned the Commission for a partial waiver of its must carry obligations, it had only a twelve channel capacity.⁸⁸ Quincy contended that its must carry obligations precluded carriage of three other program services which would probably be more popular among the system's subscribers than the Spokane stations it was required to carry.⁸⁹ The FCC denied Quincy's petition, ordered it to carry the signals of the local Spokane stations, and imposed a \$5000 forfeiture for its failure to do so.⁹⁰ Quincy sought judicial review of the Commission's order.⁹¹ After considering the parties' petitions, the three judge panel held that the FCC's must carry rules, as presently written, violated petitioners' first amendment rights and were therefore

81. *Id.* at 1437 n.3.

82. A cable television programmer is an independent service which provides cable system operators with programming to transmit over their systems. *Id.* at 1437 n.1.

83. *Id.* at 1445.

84. *Id.* See *infra* note 160 for a discussion of saturated cable systems.

85. *Id.* at 1446. In March of 1983, TBS filed a second petition, again seeking reevaluation of the must carry rules. When that petition elicited no response from the Commission, TBS sought review in court. The Commission then successfully moved to remand the record so that it could act upon TBS' petition. *Id.*

86. *Id.*

87. *Id.* TBS sought review pursuant to 47 U.S.C. § 402(b) (1982), which grants parties the right to appeal decisions and orders of the FCC exclusively to the United States Court of Appeals for the District of Columbia.

88. *Id.* at 1446; see *infra* note 91.

89. *Id.* at 1446-47.

90. *Id.* at 1447.

91. *Id.* Shortly before the date set for oral argument the court learned that Quincy Cable had substantially increased its channel capacity. *Id.* at 1447 n.28. The court remanded the case to the FCC for reconsideration in light of the changed circumstances. *Id.* at 1447. On remand, the Commission reaffirmed its earlier decision, and Quincy again went forward with a petition for judicial review. *Id.*

unconstitutional.⁹²

B. *The Court's Reasoning*

In determining the validity of the must carry rules, the *Quincy* court closely examined the nature of cable television technology, the origin and purposes of the FCC's regulation of that technology, and the prior judicial assessments of the constitutionality of the FCC's regulation.⁹³ In order to determine the appropriate standard of first amendment review for the must carry rules, Judge Wright posed two "distinct questions": (1) Whether cable television regulation warrants a standard of review different from that of broadcast television; and (2) if so, whether the must carry regulations merit treatment as "incidental" burdens on speech and therefore warrant review under the balancing test developed in *United States v. O'Brien*.⁹⁴

In addressing the first question, the court stated that "sensitivity to the uniqueness of each medium" precluded its "facile adoption" of first amendment jurisprudence that has developed around challenges to FCC regulation of radio and broadcast television.⁹⁵ The *Quincy* court, like others in recent decisions,⁹⁶ recognized the problem inherent in assuming that cable television regulations should be treated the same as broadcast television regulations for purposes of first amendment scrutiny.⁹⁷ According to Judge Wright, the scarcity rationale, which has provided the justification for governmental regulation of broadcasting, "has no place in evaluating government regulation of cable television"⁹⁸ since cable television technology allows for "virtually unlimited channel capacity."⁹⁹

The court also discussed, but disregarded, the other attributes of cable television which could arguably justify application of the first amendment standard reserved for broadcasters: "We cannot agree . . . that the mere fact that cable operators require the use of a public right of way—typically utility poles—somehow justifies lesser First Amendment

92. *Id.* at 1438.

93. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-47 (D.C. Cir. 1985).

94. *Id.* at 1447-48 (citing *United States v. O'Brien*, 319 U.S. 367 (1968)). See *supra* text accompanying note 70 for a discussion of the *O'Brien* test.

95. *Id.* at 1448.

96. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45-46 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977); see also *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir.) (City's process of awarding cable franchises by auction, thus limiting access to one cable company per region, violated first amendment), *cert. granted*, 106 S. Ct. 380 (1985).

97. 768 F.2d at 1448-50.

98. *Id.* at 1449.

99. *Id.* at 1450.

scrutiny.”¹⁰⁰ The court recognized that there must be some governmental regulation regarding the installation and maintenance of cable systems, but it stated that these regulations need not extend so far as to control the nature of programming that is conveyed over the system.¹⁰¹

Additionally, the court refused to accept the argument that the “natural monopoly characteristics” of cable franchising create economic constraints comparable to the physical constraints imposed upon broadcasters.¹⁰² The economic scarcity argument was not analogous, according to Judge Wright, because purely economic restraints upon the number of speakers available on a community cable system do not justify intrusion into first amendment rights.¹⁰³ On this point, the court found no meaningful distinction between the economic monopolistic characteristics of cable television and those of newspapers.¹⁰⁴

After deciding that cable television definitely requires a different standard of first amendment review than that used for broadcasting regulations, the court addressed its second question—the appropriateness of treating the must carry rules as merely incidental burdens on speech.¹⁰⁵ Although the court conceded that the must carry rules may be content neutral,¹⁰⁶ it stated that the assumption that the rules only incidentally burden speech may be erroneous.¹⁰⁷ The court explained that “[a]lthough not intended to suppress or protect any particular viewpoint, the rules are explicitly designed to ‘favor[] certain classes of speakers

100. *Id.* at 1449.

101. *Id.*

102. *Id.* at 1449-50.

103. *Id.* at 1450 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-56 (1974)).

104. *Id.* (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977)). The *Quincy* court disposed of this argument by analogizing to *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *Quincy*, 768 F.2d at 1450. In *Miami Herald*, the Supreme Court held unconstitutional a state statute granting political candidates a right to equal space to reply to criticism or attacks upon their records by the newspaper. 418 U.S. at 258. The Court reasoned that the law failed to clear the first amendment’s barriers because of its intrusion into the newspaper editors’ function of choosing what material to put into their papers. *Id.*

105. 768 F.2d at 1450.

106. *Id.* at 1451. “In one sense . . . the government can frame the interest served by the must-carry rules in essentially speech-neutral terms. So framed, the rules’ object is to assure that the rise of a potentially monolithic national television industry does not undermine the economic vitality of free, locally-controlled broadcasting.” *Id.* (footnote omitted).

107. *Id.* at 1453. “In short, our examination of the purposes that underlie the must-carry rules . . . leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech.” *Id.*

over others.’”¹⁰⁸ The very purpose of the rules, according to the court, was “to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal [was] to create an overwhelming competitive advantage over cable programmers.”¹⁰⁹

The court determined that the rules “coerce[d] speech”¹¹⁰ since they required that the cable operator carry the local broadcast signals “regardless of their content and irrespective of whether the operator considers them appropriate.”¹¹¹ The court decided that the rules put substantial limits on a cable operator’s “otherwise broad discretion to select the programming it offers its subscribers.”¹¹²

In summarizing its opinion on this point, the *Quincy* court stated:

We need not, however, definitely decide whether a more exacting standard than that announced in *O’Brien* and applied in *Home Box Office* is the correct test for evaluating the constitutionality of the must-carry rules. For even if we assume that the regulations burden speech only incidentally and therefore can pass muster under the First Amendment if they “further[] an important or substantial governmental interest” and impose a restriction “no greater than is essential to the furtherance of that interest,” . . . we have concluded that the must-carry regulations, as written, are clearly impermissible.¹¹³

In applying the *O’Brien* standard, the court also focused upon the additional requirement set forth in *Home Box Office, Inc. v. FCC*,¹¹⁴ that “the agency must do something more than merely posit the existence of the disease sought to be cured.”¹¹⁵ The court imposed a heavy burden of justification upon the FCC, requiring that it show that the must carry rules were still necessary to preserve localism in broadcasting and to protect local broadcasters from financial ruin.¹¹⁶

The court reasoned that “an asserted interest in alleviating or forestalling a problem—such as the destruction of free, local television—can hardly be considered ‘important or substantial’ if the government now

108. *Id.* at 1451 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 48 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977)).

109. *Id.*

110. *Id.* at 1452.

111. *Id.*

112. *Id.* (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which recognized first amendment protection of editorial discretion).

113. *Id.* at 1454 (citations omitted).

114. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

115. *Quincy*, 768 F.2d at 1455.

116. *Id.*

denies that the alleged problem is a problem at all."¹¹⁷ The court found that there may be no "problem" because in recent years the Commission has eliminated other cable regulations which, like the must carry rules, were premised on the desire to protect local broadcasters from competitive injury by cable television.¹¹⁸ The court relied upon the FCC's conclusion in its 1979 Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television (Economic Inquiry Report)¹¹⁹ that distant signal regulations¹²⁰ were no longer necessary because "competition from cable television does not pose a significant threat to conventional television or to our overall broadcasting policies."¹²¹

According to the court, the FCC's conclusions, "if given the broad applicability their sweeping tone suggests, would fatally undercut the Commission's argument that the must-carry rules serve the important end of preventing the destruction of free, local broadcasting."¹²² The court concluded that the rules did not serve a substantial government interest because the FCC had failed to sustain its "heavy burden of justification" and show that the rules were necessary to prevent serious injury to local broadcasting.¹²³

Finally, the court found that the rules clearly failed to pass muster under the last requirement of the *O'Brien* test because the rules were "grossly" overinclusive with respect to their purpose.¹²⁴ The court noted that the "rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable

117. *Id.* at 1455-56.

118. *Id.* at 1456.

119. 71 F.C.C.2d 632 (1979) [hereinafter cited as Economic Inquiry Report].

120. Distant signal regulations, also dependent upon the size of the television market in which the cable system is located, placed restrictions upon the number of distant signals cable systems could offer subscribers. *Id.* at 648-49. As a result of its Economic Inquiry Report, *supra* note 119, the Commission determined that these regulations could be removed without incurring a significant risk of loss of broadcast service to television viewers. *Id.* at 713-15. In a later proceeding, which expressly excluded a review of the must carry requirements, the FCC affirmed its earlier conclusions and eliminated both the distant signal rules and the syndicated exclusivity rules. The syndicated exclusivity rules required deletion of individual programs from distant stations that were otherwise available for carriage. CATV Syndicated Program Exclusivity Rules Report & Order, 79 F.C.C.2d 663 (1980), *aff'd*, *Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

121. *Quincy*, 768 F.2d at 1456 (quoting Economic Inquiry Report, *supra* note 119, at 688).

122. *Id.* at 1456.

123. *Id.* at 1459.

124. *Id.* at 1460 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977)).

operator."¹²⁵ Even local stations that carry little or no actual local programming were entitled to carriage under the rules.¹²⁶ Moreover, the rules protected *every* local broadcaster, "regardless of whether or to what degree the affected cable system poses a threat to its economic well-being."¹²⁷

The court observed that the FCC's failure to identify which broadcasters warranted must carry protection made it impossible to conclude that the rules were effectively tailored to suit their purpose.¹²⁸ Although the court found the must carry rules unconstitutional, it suggested that the FCC might develop new rules which are "more sensitive to the First Amendment concerns" that had been discussed in the opinion.¹²⁹

IV. ANALYSIS

In holding that the must carry rules violated the first amendment, the court in *Quincy Cable TV, Inc. v. FCC*¹³⁰ reached three fundamental conclusions: (1) Cable television regulation deserves a standard of first amendment review distinct from that applied to broadcast regulation;¹³¹ (2) the first amendment analysis for cable regulations discussed in *Home Box Office, Inc. v. FCC*¹³² is an acceptable, but certainly not the best, method for analyzing the must carry rules;¹³³ and, (3) the must carry rules clearly fail to pass muster under the *Home Box Office* standard.¹³⁴ In determining whether the must carry rules violated first amendment rights, the *Quincy* court simply assumed, without discussing, that cable operators and programmers engage in speech which is worth protecting.¹³⁵ The *Quincy* court began its discussion of the constitutionality of the must carry rules by stating: "The Supreme Court has repeatedly stressed that '[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.'"¹³⁶ This statement indicates that the court accepted the fact that cable television is actually a medium of expression, and not

125. *Id.*

126. *Id.*

127. *Id.* at 1461.

128. *Id.* at 1462.

129. *Id.* at 1463.

130. 768 F.2d 1434 (D.C. Cir. 1985).

131. *Id.* at 1450.

132. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

133. *Quincy*, 768 F.2d at 1453-54.

134. *Id.* at 1454-62.

135. *Id.* at 1452 n.39.

136. *Id.* at 1438 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).

merely a conduit through which the broadcast signals pass.¹³⁷

Although cable systems were originally designed only to distribute clear television signals to areas where broadcast reception was weak, their function has rapidly grown and developed over the past thirty years. Today's cable systems carry not only local broadcast signals but also distant broadcast signals and national program services transmitted to cable via satellite.¹³⁸ Since cable television offers such a wide variety of services, many scholars argue that cable is actually more analagous to the press than broadcast television for purposes of the first amendment.¹³⁹ Cable programmers, similar to wire news services or syndicated newspaper columnists, clearly engage in speech since their programs provide the public with information and entertainment.¹⁴⁰ Cable operators, similar in this respect to newspaper publishers and editors, express themselves through the exercise of editorial discretion by selecting which signals, services and programs to distribute over their systems.¹⁴¹ Although the *Quincy* court made reference to this comparison, it stopped short of adopting the analogy.

The *Quincy* court easily, albeit implicitly, concluded that modern cable operators and programmers engage in speech and deserve some protection under the first amendment. The difficult task facing the court was not only to determine the validity of the must carry rules but, in so

137. In its petition for certiorari, the National Association of Broadcasters (NAB) challenged this assumption. Joint Petition for Writ of Certiorari at 11, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) [hereinafter cited as NAB Petition for Certiorari]. See *National Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3336 (Nov. 12, 1985) for a synopsis of the NAB's arguments. The NAB argued that with respect to its retransmission of broadcast signals, cable television is more akin to a conduit than a speaker. NAB Petition for Certiorari, *supra*, at 11. The NAB pointed to the copyright law, which grants cable systems a compulsory license to retransmit local broadcast signals for minimum copyright royalties, but forbids cable operators from delaying, deleting or substituting any of the stations' commercial or program material as it is being distributed to the systems' subscribers. *Id.* See 17 U.S.C. § 111(c) (1982) for the provisions of cable television's compulsory copyright license. With respect to retransmitting broadcast signals, the NAB argued that cable operators may function only as carriers of expression. What the NAB's argument seems to ignore is the big picture—that retransmission of local broadcast signals is only one of many services a cable system performs. Cable operators have full discretion to select which services the system will carry; by imposing mandatory carriage requirements, the government has abridged the operators' discretion to select these other services to a certain degree.

138. See *supra* notes 14-16 and accompanying text.

139. See, e.g., Goldberg, Ross & Spector, *Cable Television, Government Regulation and the First Amendment*, 4 COMM/ENT L.J. 578 (1981).

140. As discussed *supra* note 16, there are dozens of cable program services appealing to a wide variety of audiences.

141. See *supra* note 112 and accompanying text. The United States Supreme Court has recognized that editorial discretion is deserving of first amendment protection. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

doing, to clearly define the scope of cable television's first amendment protection. The *Quincy* court, however, invalidated the must carry rules without actually fulfilling this second task. The court did not develop a workable, exacting standard for future constitutional analysis of government regulation of cable television.

A. *Selecting a Standard of First Amendment Review*

The *Quincy* court's first finding, that cable should be distinguished from broadcast television regulations for purposes of first amendment analysis, was settled eight years earlier in *Home Box Office Inc. v. FCC*.¹⁴² In *Quincy*, Judge Wright merely reviewed and reaffirmed all the reasons set forth in *Home Box Office* distinguishing the two media.¹⁴³ In both cases the court recognized that the rationale for allowing a certain degree of intrusion into a broadcaster's right of free speech is premised upon the limitations and scarcity of the broadcast medium.¹⁴⁴ Since cable does not possess similar physical limitations, the scarcity argument is inappropriate.¹⁴⁵ The *Quincy* court also followed *Home Box Office* in rejecting the claim that economic restraints can bring the cable medium within the scarcity rationale.¹⁴⁶ Although the *Quincy* court discussed this issue in great detail, it did nothing more than reaffirm the *Home Box Office* holding on this point.

Once the court dismissed the applicability of broadcast television's first amendment analysis, it had to adopt or develop another standard by which to measure the must carry rules.¹⁴⁷ Had the *Quincy* court determined that the holding of *Miami Herald Publishing Co. v. Tornillo*,¹⁴⁸ which established the first amendment standard for the traditional press,

142. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

143. Judge Wright, who wrote the *Quincy* opinion, was also a member of the panel that issued the per curiam opinion in *Home Box Office*.

144. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1448-49 (D.C. Cir. 1985); *Home Box Office*, 567 F.2d at 43-45.

145. *See supra* text accompanying note 99.

146. 768 F.2d at 1448-50; *see supra* text accompanying notes 100-03.

147. In *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985), the court suggested a different approach to the first amendment rights of cable operators:

Undeniably, cable operators do transmit programs produced by others. To the extent an operator does so, however, we believe it would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promoters [sic]. Their First Amendment protection is not diminished because they distribute or present works created by others.

Id. at 1410 n.10.

148. 418 U.S. 241 (1974).

also supplied the appropriate standard of analysis for cable television,¹⁴⁹ there would have been no need for the court to test the must carry rules under the *United States v. O'Brien*¹⁵⁰ standard or to invite the Commission to adopt new must carry rules.¹⁵¹ Under the rule of *Miami Herald*, the government would not be able to constitutionally impose any mandatory requirements upon cable system operators.¹⁵² However, like the *Home Box Office* court which preceded it, the *Quincy* court was unwilling to accept the idea that no regulation of cable television would be valid.¹⁵³ Instead, the court opted to use the *O'Brien* interest balancing test, as applied to cable television in *Home Box Office*, as the minimum standard of first amendment scrutiny.

In adopting the *O'Brien/Home Box Office* balancing test, the *Quincy* court required that, as a minimum, the must carry rules clear three hurdles in order to be constitutionally permissible. The rules were to be content neutral and only burden speech "incidentally," serve an important or substantial government interest, and be narrowly drafted to impose a restriction "no greater than is essential to the furtherance of that interest."¹⁵⁴ Under the court's analysis, if the must carry rules failed to clear any one of the three threshold *O'Brien* requirements, they could not stand. With this in mind, the *Quincy* court suggested that the must carry rules may impose a more than incidental burden upon speech,¹⁵⁵ probably are unnecessary and therefore do not serve a substantial government interest,¹⁵⁶ and definitely are not narrowly drafted to sufficiently serve their intended purpose.¹⁵⁷ Because the rules obviously failed to clear the last hurdle and could be held unconstitutional on that ground alone, there was no need for the court to make any absolute findings about the *O'Brien* test's first two requirements. By finding the rules overbroad, the court avoided the possibility of developing a more precise test.

Although the court determined that the old must carry rules were unconstitutional under the *O'Brien/Home Box Office* analysis, it was careful to point out that it was not deciding whether any version of

149. Under the *Miami Herald* standard, a government imposed right of access to the traditional press violates the first amendment. *Id.* at 258.

150. 391 U.S. 367 (1968); see *supra* text accompanying notes 69-70.

151. *Quincy*, 768 F.2d at 1463.

152. *Miami Herald*, 418 U.S. at 258; see *supra* note 149.

153. *Quincy*, 768 F.2d at 1450. "That cable television shares attributes of the more traditional press does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation." *Id.*

154. 768 F.2d at 1451.

155. *Id.* at 1451-54.

156. *Id.* at 1457; see *supra* text accompanying note 117.

157. 768 F.2d at 1459; see *supra* text accompanying notes 124-27.

mandatory carriage rules would violate the first amendment.¹⁵⁸ Therefore, there exists a possibility that cable carriage rules narrowly tailored and necessary to serve a substantial government interest may be upheld as constitutionally valid even if they do abridge speech to a certain extent.

B. Applying the O'Brien/Home Box Office Analysis

1. Assessing the degree of burden the must carry rules imposed

In addressing the first element of the *O'Brien/Home Box Office* analysis, the *Quincy* court was reluctant to treat the must carry rules as only an incidental burden upon speech. The rules operated to restrict the editorial discretion of cable operators and the availability of channels for programmers' services, while enhancing the expression of local broadcasters.¹⁵⁹ Because the burden on speech was dependent upon two variable factors, the number of local and significantly viewed signals in the community and the channel capacity of the cable system, the court had difficulty identifying the degree of burden the rules actually imposed. In some instances—saturated cable systems providing the classic illustration—the must carry rules imposed a substantial burden upon both operators and programmers.¹⁶⁰

Had the court been so inclined, it simply could have declared that since the rules clearly favored the speech of local broadcasters over that of cable operators, programmers and distant broadcasters, they fell outside the realm of "incidental burden" and therefore required the existence of a compelling governmental interest to be constitutionally valid.¹⁶¹ The *Quincy* court avoided resolving this issue, however. Instead, the court stated: "That the intrusion into cable operators' editorial autonomy is deep does not require the conclusion that the rules are inappropriate for analysis under the *O'Brien* test."¹⁶² By taking this approach, the *Quincy* court left to a later court the task of determining whether a new

158. 768 F.2d at 1463.

159. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451 (D.C. Cir. 1985). Stated Judge Wright: "[T]he Commission's objective is a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech." *Id.*

160. The case of *In re Quaker CATV, Inc.*, 59 F.C.C.2d 1216 (1976), provides a graphic illustration of the saturation problem. Quaker's system had a 12 channel capacity and the potential obligation to carry 17 stations pursuant to the must carry rules. For a discussion of this case, see *Saturated Cable Television Systems*, *supra* note 11, at 713. *Quaker* provided a rare instance where the cable system made a compelling showing and the FCC granted a waiver of the must carry rules so as to allow the retention of a distant signal on the system despite the demand for carriage by a local station. *Id.*

161. See *supra* text accompanying note 66.

162. *Quincy*, 768 F.2d at 1453.

version of the must carry rules, which do serve a legitimate governmental interest, are constitutional because they meet the *O'Brien* criteria or are still unconstitutional because they are purposely designed to favor certain broadcasters over other broadcasters and all cablecasters.

2. Weighing the necessity of the must carry rules

In addressing the second element of the *O'Brien/Home Box Office* test, that the rules serve an important or substantial government interest, the *Quincy* court suggested that the Commission's stated interest in preserving free, locally oriented television may not be sufficiently weighty to warrant the rules' interference with first amendment rights.¹⁶³ However, in *Capital Cities Cable, Inc. v. Crisp*,¹⁶⁴ the United States Supreme Court recently stated: "There can be little doubt that the comprehensive regulations developed over the past twenty years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."¹⁶⁵ The Supreme Court then pointed out that "the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers."¹⁶⁶

Thus, the Supreme Court recognized the existence of a legitimate governmental interest in the area of cable television regulation. The *Quincy* court, however, questioned the premise that cable actually poses a threat to local broadcast television.¹⁶⁷ In effect, it held that there is no need to strike a balance between cable and non-cable households if cable poses no real threat. If there is no threat, there is no need for remedial regulation.

The *Quincy* court used two approaches to dismiss the necessity of the must carry rules, although neither of the approaches completely precludes the Commission from subsequently justifying the adoption of narrower rules. The court first suggested that in the course of eliminating other cable regulations, the Commission practically undermined the very foundation of the must carry rules.¹⁶⁸ Second, the court stated that even if that was not the case, the Commission did not meet its burden of justi-

163. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985).

164. 104 S. Ct. 2694 (1984).

165. *Id.* at 2708.

166. *Id.*

167. 768 F.2d at 1455-56.

168. *Id.* at 1456.

fication under *Home Box Office, Inc. v. FCC*¹⁶⁹ since it was unable to affirmatively show that local broadcasters actually needed the protection afforded by the rules.¹⁷⁰

By broadly construing statements made by the FCC in its 1979 Economic Inquiry Report,¹⁷¹ such as "cable does not appear to be a major negative force on the financial situations of television broadcasters,"¹⁷² the *Quincy* court found support for its assertion that the must carry rules may no longer be necessary because local broadcasters no longer appear to be in jeopardy. The FCC contended that underlying its conclusions in the Economic Inquiry Report was the assumption that the must carry rules would continue to operate.¹⁷³ The court discounted the FCC's explanation by pointing out that the Commission had failed to expressly state in its report that it was premising its conclusions on such an assumption.¹⁷⁴ The court also noted that the FCC's conclusions "appeared to rest largely on factors wholly unrelated to mandatory carriage."¹⁷⁵

Although the FCC made no express statements regarding the must carry rules in its report, the *Quincy* court failed to consider other comments by the Commission which indicate that the study did assume the continued existence of mandatory carriage, at least in respect to UHF band stations.¹⁷⁶ For example, in summarizing its findings in the Economic Inquiry Report, the Commission reported, "[t]he available information . . . indicates that presently UHF affiliates and independents in intermixed markets, historically the least successful stations financially, are often benefited by cable because the positive effect of signal parity on cable more than offsets the negative effect of increased competition."¹⁷⁷ Although the FCC's assumption is not clearly expressed, the only way it could be assured of UHF signal carriage, and hence signal parity on

169. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

170. *Quincy*, 768 F.2d at 1457.

171. *See supra* note 119.

172. Economic Inquiry Report, *supra* note 119, at 688.

173. *Quincy*, 768 F.2d at 1456.

174. *Id.*

175. *Id.*

176. All broadcasting stations operate along an electromagnetic frequency established by the FCC, on either very high frequency (VHF) or ultra high frequency (UHF). The VHF range produces a higher quality signal than UHF, and therefore UHF reception is often inferior to VHF reception. Cable television mitigates some of UHF's disadvantages because over cable the reception quality of UHF signals is indistinguishable from VHF signals. *See Malrite T.V. v. FCC*, 652 F.2d 1140, 1143 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

177. Economic Inquiry Report, *supra* note 119, at 661. The Commission also found that "[t]he ability of stations to maintain existing levels of service to their communities is likely to be unimpaired in the absence of our distant signal rules." *Id.* Had the Commission also found the same to be true in the absence of its must carry rules, it would have expressly so indicated.

cable, would be through the guarantee of mandatory carriage regulations. The *Quincy* court seemed to ignore the subtleties of the Commission's analysis in order to read into the Commission's findings the fact that the must carry rules were no longer necessary.¹⁷⁸

In an alternate approach, the *Quincy* court suggested that the must carry rules did not effectively serve or further any governmental interest, even if the interest they were designed to protect was still valid.¹⁷⁹ The court reasoned that if the rules unnecessarily protected broadcasters from unseen and unproven evils, they did not serve their articulated purpose. The FCC had assumed that unless local stations were carried over cable, cable television subscribers would cease watching local broadcast television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them. The Commission also believed that the potential loss of a portion of local television stations' audiences would adversely affect the stations' economic vitality.¹⁸⁰ The court criticized the FCC for neglecting to gather support for the "assumptions that [were] the linchpins of its analysis."¹⁸¹ The problem with the court's criticism is that prior to *Quincy*, mandatory carriage requirements were always imposed upon cable television operators. Therefore, there was never any opportunity for the Commission to gather any empirical evidence as to what would result if there were no such requirements. With the protection afforded by the must carry rules local broadcasters were successfully coexisting with cable television services and imported distant signals. Thus, the Commission had no reason to believe the rules needed further verification or justification.

In balancing the government's interest against the petitioner's first amendment rights, the *Quincy* court presented a detailed history of cable regulation before it subjected the must carry rules to any constitutional review. However, in its discussion of the origins and purposes of the must carry rules, the court brought up two factors which it seemed to ignore in its later analysis of whether the rules served their stated purpose. Early in the opinion, the court pointed out that although broadcast

178. The *Quincy* court suggested only that VHF stations do not need the protection afforded by the must carry rules. It ignored the issue of the rules' necessity with regard to UHF signals. The Commission, on the other hand, has expressly recognized that cable carriage improves the financial situation of UHF signals. See, e.g., Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 891 (1980) (separate statement of Chairman Ferris). At the very least, the rules may still be needed to protect UHF stations. See *infra* text accompanying notes 185-87.

179. *Quincy*, 768 F.2d at 1457.

180. *Id.*

181. *Id.*

signals are still available off the air to cable subscribers if they purchase an inexpensive A/B switch,¹⁸² the switch is only useful if the subscribers keep their antennas connected.¹⁸³ The court noted that since cable can deliver clear signals without the use of expensive or unsightly antennas, subscribers often choose to disconnect their antennas.¹⁸⁴ The court did not, however, emphasize the fact that when cable subscribers disconnect their antennas the switching device becomes, in effect, useless.

Second, the court pointed out that even if the antenna remains in place, cable retransmission of UHF signals is far clearer than if the same signals were received by antenna.¹⁸⁵ Thus, without the benefit of mandatory carriage, all UHF stations face a significant competitive disadvantage compared not only to VHF stations but also to all cable services.¹⁸⁶ The must carry rules were adopted to balance the inequalities and insure parity between the two modes of television communication.¹⁸⁷ Although it may not have made any difference in the final analysis,¹⁸⁸ the court neglected to weigh the inherent advantages cable enjoys over broadcasting when it applied the *O'Brien/Home Box Office* standard to balance the government's interest against the petitioners' first amendment rights.

3. Determining the scope of the must carry rules

The last requirement the *Quincy* court imposed upon the rules was that they be narrowly drafted to protect only those stations which need protection.¹⁸⁹ This hurdle proved to be insurmountable. The court stated that "[u]ntil [the FCC] establishes a baseline for its general objective of preserving free, community-oriented television . . . we simply cannot know whether the rules are adequately tailored to pass constitutional muster."¹⁹⁰ The court then described the rules as a "'fatally overbroad response' to the perceived fear that cable will displace free, local television."¹⁹¹ The court correctly pointed out that although the rules were

182. This switch enables cable subscribers to alternate between cable and off-the-air VHF signals, and is available for about five dollars. *Id.* at 1441 & n.16.

183. *Id.* at 1441.

184. *Id.*

185. *Id.* See *supra* note 176 for a discussion of UHF broadcast signals.

186. *Quincy*, 768 F.2d at 1441.

187. See *supra* notes 32-36 and accompanying text.

188. These two factors, standing alone, would probably be insufficient to justify the degree of imposition the rules placed upon cable operators.

189. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1459 (D.C. Cir. 1985).

190. *Id.* at 1461.

191. *Id.* at 1459 (quoting *FEC v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1470 (1985)).

adopted to preserve an optimal amount of local programming in every community and to protect the economic well being of local broadcast stations, they operated to require carriage of all local and significantly viewed stations regardless of the stations' program format and financial health.¹⁹²

The court appropriately focused on an apparent inconsistency in the rules' application. In theory, the rules were designed to guard against the demise of diverse, local broadcasting. Yet, in practice, they often operated to require carriage of signals which, while of local origin, transmitted little or no local programming.¹⁹³ Moreover, the overinclusiveness of the rules also contributed to the saturation phenomenon, causing certain cable systems to face more must carry obligations than channels available.¹⁹⁴ The Commission knew of the saturation problem prior to Quincy Cable TV's and TBS's challenges of the must carry rules; in fact, in 1977, the Commission even requested proposals and comments about how the problem should be remedied.¹⁹⁵ However, each of the proposed remedies considered by the FCC overlooked the most obvious solution—narrowing the applicability of the rules to only those broadcast signals which could show that they truly needed the protection. The FCC had not taken further action on the saturation problem prior to the *Quincy* decision. The *Quincy* court recognized that by offering blanket protection to all local broadcasters without considering the individual stations' needs, the must carry rules were impermissibly overinclusive and placed undue and unjustified burdens upon cable operators and programmers.

C. Impact of the Court's Holding

Interested parties may disagree with the *Quincy* court as to the degree of burden the rules placed upon cable operators, the substantiality or import of the government's interest in local broadcasting, and whether the rules effectively served their purpose. It is evident, however, that the must carry rules failed to pass constitutional muster on the basis of their

192. *Id.* at 1461.

193. *Id.*

194. See *supra* note 160 for an illustration of the saturation problem.

195. Saturated Cable Television Systems, *supra* note 11, at 710. The Commission presented several proposals in the Saturated Cable Television Notice, each focusing upon different considerations. The Commission first suggested a plan which offered lesser carriage rights to new stations which come on the air after the cable system became operational. *Id.* Ironically, if one steps back and digests this alternative, it seems to undermine the very purpose of the must carry rules—protecting local broadcasting. New, unestablished local broadcast stations probably need cable carriage more than established stations. The Commission alternatively suggested that carriage priority depend upon station location, program format or technical considerations. *Id.* at 717-18.

overbreadth alone, and thus were properly invalidated by the court. Taken literally, the *Quincy* decision places first amendment protection of cable television operators somewhere in between the protection afforded television broadcasters¹⁹⁶ and that afforded newspaper publishers and editors.¹⁹⁷ The court refrained from imposing upon cable television all of the access and fairness requirements to which broadcasters are subject,¹⁹⁸ yet it refused to guarantee to cable the complete freedom that newspaper editors and publishers enjoy.

In essence, the *Quincy* court turned the tables on the FCC and those broadcasters who relied upon the must carry rules. Prior to the court's decision, the burden fell upon the individual cable system to make a compelling showing, with specific factual evidence, that a waiver of its must carry obligations furthered the public interest.¹⁹⁹ As a result of the *Quincy* decision, the burden has shifted to the Commission to make an affirmative finding, with specific factual evidence, that a mandatory carriage rule is necessary to further an important or substantial, perhaps even compelling,²⁰⁰ government interest. Then, and only then, will the courts uphold such a rule.

V. AFTERMATH OF THE *QUINCY* DECISION

Describing the probable effects of the *Quincy* decision, two commentators stated: "The ruling will have a major impact on cable system owners, broadcast stations and competing services, and the ricocheting steps the participants will take to adjust their behavior will have substantial implications for the structure of the industry."²⁰¹ This statement highlights the fact that the *Quincy* decision cannot be analyzed in a vacuum. The court's action, invalidating the must carry rules, was almost immediately followed by the broadcast groups' reaction: appealing the deci-

196. See *supra* notes 61-62 and accompanying text.

197. See *supra* note 152 and accompanying text.

198. The Supreme Court has supported regulations which clearly abridge broadcasters' speech. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the court upheld the FCC's fairness doctrine, which requires broadcasters to provide adequate coverage of public issues and ensures that the coverage accurately reflects the opposing views. See *supra* note 61. See also 47 U.S.C. § 315 (1982), which provides that if a broadcaster grants one legally qualified candidate for public office access to the airwaves, it is obligated to grant all opposing candidates the same right of access.

199. See, e.g., *In re Quincy Cable TV, Inc.*, 89 F.C.C.2d 1128, 1136 (1982).

200. As discussed *supra* in the text accompanying note 161, a later court may determine that the *O'Brien/Home Box Office* analysis is insufficient, and require the government to meet a substantially heavier burden of justification.

201. Price & Nader, *'Must Carry': The End—Ways to Cope With Change*, Nat'l L.J., Sept. 30, 1985, at 15, col. 1.

sion,²⁰² petitioning the FCC for new must carry rules²⁰³ and lobbying Congress to change the related law which grants cable a compulsory copyright license limiting the royalties cable pays for retransmitting local broadcast programming.²⁰⁴

It is not disputed that the must carry rules gave local broadcast stations an advantage over cable programmers. However, by invalidating the rules the *Quincy* decision left the relationship between the cable and broadcast industries in a state of complete disarray. Unless new mandatory carriage rules are adopted or the copyright law is revised, cable television now has a clear advantage over broadcast television. If cable systems are no longer obligated to carry local stations at no charge, they can charge for carriage and pick and choose among the local stations.²⁰⁵ Broadcasters recognize this fact and argue that it would be inequitable for cable systems to charge local broadcast stations for carriage when the local broadcasters cannot directly charge the cable for copyright royalties.²⁰⁶ Additionally, although some broadcast stations may be in a financial position to bargain for carriage with cable operators, other stations may not.²⁰⁷

202. The FCC, the losing party in the *Quincy* decision, decided not to appeal the case, believing the court's ruling legally sound. It was the broadcasters, intervenors in *Quincy* and the real "losers" in the case, who appealed the decision and petitioned the Supreme Court for certiorari. NAB Petition for Certiorari, *supra* note 137.

203. See *infra* notes 210-11 and accompanying text.

204. See 17 U.S.C. § 111(c) (1982). While the *Quincy* court found no interrelation between the must carry rules and the compulsory copyright license, broadcasters argue that such a relationship exists. The NAB points out that when the court reached its conclusion that the must carry rules favor broadcasters over cable programmers, it neglected to mention that the copyright law does the same thing, only in reverse, because it confers a benefit upon cable operators. NAB Petition for Certiorari, *supra* note 137, at 25.

Broadcasters must devote a substantial portion of their revenues to pay copyright royalties on their programming. In the absence of any mandatory carriage requirement, cable operators have the benefit of no copyright liability on the local signals they choose to carry, without the burden of being required to carry every local station. According to the Association of Independent Television Stations President Preston Padden, the compulsory license then becomes "a device for cable operators to interject themselves into the competition among local broadcast stations by carrying some and excluding others" and would not be serving the purpose Congress intended the license to serve. *INTV Joins NAB in Compulsory License Fight*, BROADCASTING, July 29, 1985, at 26.

205. Soon after the must carry rules became ineffective, several local television stations were notified that they would be dropped from carriage unless they agreed to pay the cable system for carriage. See, e.g., *Must-Carry Damage Case Study*, BROADCASTING, Sept. 16, 1985, at 35.

206. See *supra* note 204.

207. Relying upon demographic trends and the high rate of return broadcasters earn on their investments, the Commission reported in its Economic Inquiry Report that VHF licenses do not suffer from competition by cable and, in fact, could anticipate a steady growth in future station revenues. Economic Inquiry Report, *supra* note 119, at 661. Such a statement suggests that VHF broadcasters, network, affiliate and independent stations, will be able to

Shortly after the *Quincy* decision took effect and the rules were rescinded, the Association of Independent Television Stations (INTV), the National Association of Broadcasters (NAB) and public broadcasting interest groups, such as the Corporation for Public Broadcasting (CPB),²⁰⁸ the National Association of Public Television Stations and the Public Broadcasting Service (PBS),²⁰⁹ each filed petitions for new must carry rulemaking with the Commission. The FCC took note of these petitions and released an official *Notice of Inquiry and Proposed Rulemaking*²¹⁰ soon thereafter. In its notice, the FCC sought comments on the proposals it had received and requested submission of additional specific must carry proposals to fill the void left by the *Quincy* decision.²¹¹

After weeks of negotiation, and just prior to the FCC's deadline for submitting comments on the must carry issue, the commercial broadcasting groups, NAB, INTV and the Television Operators Caucus (TOC), reached a compromise on the must carry issue with the cable television industry.²¹² The two industries joined forces and on March 21, 1986 submitted the agreed-upon rules to the FCC for final approval. The agreement addresses the main concerns of both industries, promoting the carriage of local broadcast signals and minimizing the impingement upon cablecasters' constitutional rights. Although cable had won in court and was not required to accept any must carry plan, cable industry officials were willing to compromise with broadcasters to avoid further attacks on the compulsory copyright license or an all out war over the must carry rules.²¹³

VI. THE NEW MUST CARRY PROPOSALS

A. INTV's Original Proposal

Seeing a close tie between mandatory carriage requirements and

bargain at arms length with cable for carriage. On the other hand, noncommercial stations, which do not have sufficient revenue, will be unable to afford paying for carriage on cable. See *infra* notes 227-28 and accompanying text.

208. CPB is a nonprofit, nongovernmental corporation created by Congress in 1967 to provide federal assistance to public radio and television. See *infra* note 227.

209. PBS is a private nonprofit membership corporation consisting of the licensees of non-commercial, educational television stations throughout the country, which acquires and distributes national programming to its member stations. See *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3112 n.5 (1984).

210. 50 Fed. Reg. 48,232 (Nov. 22, 1985) [hereinafter cited as *Notice of Proposed Rulemaking*].

211. *Id.*

212. See *infra* note 247 and accompanying text.

213. *Cable Goes Behind Closed Doors on Must Carry*, BROADCASTING, Feb. 17, 1986, at 22-23.

cable television's compulsory copyright license for broadcast signals,²¹⁴ INTV originally requested that the FCC adopt rules that would preclude the benefit of a compulsory license to cable system operators unless the cable system carried the entire signals of all local television stations on its basic tier of service.²¹⁵ INTV argued that since the proposed rules neither require nor prohibit carriage of any television station on cable systems, they raise no first amendment issue.²¹⁶ Under this proposal, a cable operator could either choose to take advantage of the compulsory license and carry all the local signals or to negotiate separately with selected stations for use of their copyrighted material.²¹⁷

While the rules INTV originally proposed may not impose any mandatory requirements upon cable operators, their constitutionality may still be suspect. Although not wholeheartedly accepted by the courts, the doctrine of "unconstitutional conditions" may present a challenge. This doctrine bars the government from conditioning the receipt of benefits upon waiver of constitutional rights, even if the receipt of the benefits is only a privilege and not a constitutional right.²¹⁸ Applying the doctrine to INTV's proposal, it may not be permissible for the Commission to condition the benefit of the compulsory copyright license, which substantially reduces the amount of cable operators' copyright liability, upon the cable operators' waiver of first amendment freedoms.

Even if imposing such a choice is constitutionally valid, these proposed rules still do not remedy the overbreadth problem of the old must carry rules. Unless the definition of "local station" is revised to narrow the applicability of the rule, the proposed rules would still encourage carriage of all of the local broadcast stations which were carried under the old rules.²¹⁹ A cable system would be coerced into carrying all local broadcast stations regardless of the station's character or financial status and the amount of programming duplicated by other stations. Thus,

214. *See supra* note 204.

215. Notice of Proposed Rulemaking, *supra* note 210, at 48,233.

216. *Id.*

217. *Id.*

218. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 510 (1978). For an application of the unconstitutional conditions doctrine, see *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the state of South Carolina denied unemployment benefits to appellant because she refused to accept work on Saturdays for religious reasons. The Supreme Court found that appellant's disqualification for benefits imposed a burden upon her right to practice the religion of her choice. The Court held that a ruling which required her to either comply with her religious practice and forfeit her unemployment benefits or abandon a precept of her religion in order to accept work was not constitutionally permissible. *Id.*

219. INTV's proposal requires carriage of all local stations that were entitled to insist upon mandatory carriage under the must carry rules as they were in effect on April 15, 1976; see 47 C.F.R. § 76.57-.61 (1976). *See also* Notice of Proposed Rulemaking, *supra* note 210, at 48,233.

INTV's original proposal merely rearranges communications and copyright laws to offer some benefit to local broadcasting, without identifying which broadcasters are sufficiently at risk to warrant such a benefit.

B. *The Public Broadcasters' Proposal*

The public broadcasters, protecting their own interests apart from the commercial broadcasters, requested that the Commission consider rules which would require that cable systems carry, without charge and on their basic tier of channels, all public stations that provide Grade B²²⁰ service to the system's community.²²¹ Public stations can distinguish themselves from commercial stations because public television does not operate for profit. Since public broadcasters can point to FCC and congressional policies supporting the availability of diverse, quality public television programming,²²² and the fact that rules requiring carriage of only public stations are much narrower than the old must carry rules, public television broadcasters argue that their proposed rules pass constitutional muster under the *Quincy* standard.²²³

The *Quincy* court held that the FCC could not convincingly show that the must carry rules were needed to protect local broadcasters from financial ruin.²²⁴ However, public broadcasters, in their Joint Petition for Rule Making,²²⁵ present a convincing case that mandatory carriage *is* necessary to keep local public television stations in operation. The public broadcasters argue that the lack of a mandatory carriage requirement will result in a loss of cable carriage of local public stations, and that such a loss of carriage will undermine the financial health of the local stations and adversely affect the overall quality and diversity of all public television programming.²²⁶

The financial realities of noncommercial television lend support to the public broadcasters' claim that local stations will not be carried over cable in the absence of must carry regulations.²²⁷ Because cable televi-

220. The grade B contour is defined as an imaginary line along which a good quality broadcast picture may be expected 90% of the time at the best 50% locations. *See* *Midwest Television, Inc. v. FCC*, 426 F.2d 1222, 1224 n.3 (D.C. Cir. 1970).

221. Notice of Proposed Rulemaking, *supra* note 210, at 48,233.

222. For a codification of congressional policy, see 47 U.S.C. § 396 (1982).

223. Notice of Proposed Rulemaking, *supra* note 210, at 48,233.

224. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985).

225. Joint Petition for Rule Making of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service (1985) (on file in the *Loyola of Los Angeles Law Review* office) [hereinafter cited as Public Broadcasters' Petition].

226. *Id.* at 8.

227. A brief history of public television is in order here. In its Sixth Report and Order on

sion is a commercial enterprise, system operators, when given the opportunity, will charge local stations for carriage on the system. Only those broadcasters which meet the operator's price will be guaranteed a channel on the community system. Public television stations are simply not structured to afford any carriage fees.²²⁸ Unlike their commercial counterparts, public stations are financed through federal funding, grants and viewer contributions, not advertising revenues.²²⁹ According to one public broadcaster, public television is "the only system of broadcasting in the world established with no visible means of support. . . . [I]t has known almost continual poverty"²³⁰ As the law stands today, public broadcasters are prohibited from selling advertising time or actively promoting any product or service of any company or organization.²³¹ All of a public station's revenue is used to help produce or acquire programming or to operate the station.²³² Therefore, unless the law and

Television Assignments, 41 F.C.C. 148 (1952), the FCC reserved approximately 12% of the initial television allocations, or 242 channels, for a separate class of license: noncommercial educational stations. In 1962, Congress passed the Educational Television Facilities Act, Pub. L. No. 87-447, 76 Stat. 64 (1962), which provided funds to assist local communities in constructing new public television stations. After a comprehensive study of the nation's system of educational broadcasting, the Carnegie Commission on Educational Television reported on what the goals of the system should be, how many stations were needed to service the nation, what the cost would be and how the system should be funded. PUBLIC TELEVISION, A PROGRAM FOR ACTION: THE REPORT OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION (1967) [hereinafter cited as CARNEGIE COMM'N REPORT]. Shortly after the Commission's report, the word "educational" was replaced with "public," and Congress passed the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified as amended at 47 U.S.C. § 396 (1982)). The Act authorized additional funding and established the nonprofit Corporation for Public Broadcasting (CPB) to facilitate the development of public broadcasting, assist in the establishment and development of a national interconnecting system and administer the funds Congress had dedicated to public broadcasting. C. BROWN, T. BROWN & W. RIVERS, *THE MEDIA AND THE PEOPLE* 128-29 (1978).

228. Public Broadcasters' Petition, *supra* note 225, at 11.

229. For example, KCET, a Los Angeles area public station and member of PBS, received, for the 1985 fiscal year, 68% of its total revenue from individual subscriptions, corporation and foundation grants and donated goods and services. An additional 24% came from program production and broadcasting grants and a CPB community service grant. DIAL, Jan. 1986, at 11 (KCET's monthly program guide).

230. Breitenfield, *Heart of the System: The Stations*, in *THE FUTURE OF PUBLIC BROADCASTING* 39 (Cater & Nyhan eds. 1976).

231. 47 U.S.C. § 399B(b)(2) (1982) clearly prohibits public stations from "mak[ing] its facilities available . . . for the broadcasting of any advertisement" in exchange for any remuneration. In order to generate private support for public broadcasting, public stations are authorized to acknowledge donors and program underwriters. The rules concerning commercial credit are very explicit and restrictive, however. A public station may identify but must avoid promoting its sponsors. See Educational Broadcasting Stations, 97 F.C.C.2d 255, 265 (1984). See also generally 47 U.S.C.A. §§ 399A-399B (West Supp. 1985).

232. For the fiscal year 1985, Los Angeles station KCET spent 63% of its revenue on production, programming and broadcasting, 18% on fundraising and the remaining 19% on pub-

financial structure of public television are revised, local public stations will not be carried over cable unless the system operators are obligated to carry the stations for little or no charge.²³³ In any event, it seems almost contradictory to require that public stations—generally owned and operated by local groups, government organizations or educational institutions to serve community needs²³⁴—pay private cable operators in order to be readily accessible to the public.

In the Commission's view, "the widest possible dissemination of educational and public television programming is clearly of public benefit and should not be restricted."²³⁵ If it takes no action to adopt new must carry rules which protect public television, the Commission would be indirectly precluding public television from cable carriage and therefore acting in a manner inconsistent with its stated policy. Because almost all public stations depend upon viewer contributions, any audience loss that a station suffers due to lack of cable carriage will result in a reduction in contributions and, in turn, federal funding.²³⁶ Moreover, loss of cable carriage of individual stations will also adversely affect the quality of public television programming in general.²³⁷ Public broadcasters conclude that a regulation requiring carriage of local public stations on the community cable system would eliminate the risks to individual stations and overall programming quality that complete cable carriage deregula-

lic information and administration expenses. *DIAL*, Jan. 1986, at 11 (KCET's monthly program guide).

233. Public Broadcasters' Petition, *supra* note 225, at 11.

234. The Carnegie Commission named four distinct categories of noncommercial broadcast stations: School stations, licensed to school systems or districts; state stations, licensed to state boards of education or similar state agencies; university stations, licensed to public colleges and universities; and community stations, licensed to nonprofit groups or corporations. *CARNEGIE COMM'N REPORT*, *supra* note 227, at 21-22. The public stations most likely to need mandatory carriage by cable systems in order to reach their maximum audience are the community stations since they generally carry programming for the benefit of the community at large.

235. Cable Television Report & Order, 36 F.C.C.2d 143, 180 (1972). Since the Commission adopted its Sixth Report and Order on Television Assignments, 41 F.C.C. 148 (1952), both Congress and the FCC have promoted the growth of a public television system in which autonomous local stations provide diverse, quality programming to their respective communities. According to Congress, "it furthers the general welfare to encourage public telecommunications services . . . responsive to the interests of people both in particular localities and throughout the United States." 47 U.S.C. § 396(a)(5) (1982).

236. A decline in viewer contributions will affect the amount of funding a station receives from CPB. 47 U.S.C. § 396(k)(6)(B) (1982).

237. Public Broadcasters' Petition, *supra* note 225, at 10. Due to the interrelationship between public stations and public program producers, both station operations and programming will be affected. Public television producers rely upon financial support from the individual stations to fund their production expenses. Therefore, a reduction in station income translates into less money for quality program production. *Id.*

tion would encourage.²³⁸

The rules proposed by the public broadcasters are narrowly drawn and impose less of a burden on speech than the invalidated version of the must carry rules. In some respects, the rules may even be underinclusive, since they only protect noncommercial stations.²³⁹ The proposed rules obligate cable operators to carry only the community's noncommercial stations which request carriage.²⁴⁰ Since many communities have only one public station in operation, the rules would impose only a minimal burden.²⁴¹ In the larger television markets where there is more than one public station, the stations are generally licensed to different entities which provide different types of programming and serve different audiences.²⁴² Even in the rare situation where stations in the same community duplicate some programming, the programs generally air at different times.²⁴³ Moreover, the public broadcasters' rule would not require a cable system to carry any public station which simultaneously broadcasts all of the same programming as another public station already carried by the system.²⁴⁴

Since most modern cable systems can or will have the capacity to carry upwards of fifty channels on a single cable,²⁴⁵ imposing mandatory carriage of one, two or three signals hardly seems to place "substantial limitations . . . on the cable operator's otherwise broad discretion."²⁴⁶ If anything, the public broadcasters' proposal poses an incidental burden, not a substantial one. Because the federal government has clearly ex-

238. *Id.*

239. Since the public broadcasters' proposed rules offer protection only to noncommercial stations, any commercial station which is adversely affected by loss of cable carriage would not benefit from such a law.

240. Public Broadcasters' Petition, *supra* note 225, at 1.

241. *Id.* at 13.

242. *Id.* at 14.

243. *Id.* Arguably, giving the public the opportunity to view some of the same programs at different times also has its benefits. See CARNEGIE COMM'N REPORT, *supra* note 227, at 51-52; see also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, the Court held that taping broadcast programs off-the-air with a video cassette recorder for time shifting purposes, so that viewers could watch the programs at a time more convenient than the program's actual air time, did not infringe upon the copyrights of the broadcast programs. *Id.* Obviously, it expands the public's access to freely broadcast television if selected quality programs are aired at different times on different channels.

244. Public Broadcasters' Petition, *supra* note 225, at 14.

245. Improvements in cable technology have increased the channel capacity of single cable systems from 12 channels in the 1960's to 54 channels today, and even more tomorrow. It is likely that fiber optic technology will offer even more dramatic expansion in channel capacity in the near future. CABLESPEECH, *supra* note 16, at 1, 3.

246. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1452 (D.C. Cir. 1985). The *Quincy* court suggested that the old must carry rules may have imposed a substantial burden. *Id.*

pressed its policy of encouraging the growth and development of public broadcasting, public broadcasters have no trouble establishing that regulations protecting local public stations serve an important and substantial government interest. Finally, the proposed rules are narrowly tailored to require carriage of those stations which need the protection.

C. *The Cable-Broadcast Compromise*²⁴⁷

The compromise reached between the NAB, INTV, TOC and the cable industry associations provides that cable systems with more than twenty-seven activated channels will be required to devote twenty-five percent of their channel space to qualified local stations, while cable systems with twenty or fewer activated channels will be exempt from any must carry obligations.²⁴⁸ The joint agreement further provides that cable systems with twenty-one to twenty-six channels in use will be required to carry no more than seven local broadcast stations.²⁴⁹ If more than seven stations are available to a cable system in this category, the system's operator may choose which seven stations to carry.²⁵⁰ As with the old rules, cable system operators will still be required to carry all qualified stations in their entirety on the system's basic tier of service, although not necessarily on their channel positions.²⁵¹

To qualify for must carry eligibility under the agreement's proposed rules, broadcast stations must be within fifty miles of the cable system's principal receiving station and must receive a minimum established viewing share.²⁵² New stations must demonstrate that they meet the estab-

247. Submission of Joint Industry Agreement to the FCC, *In re* Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems (Mar. 1986) [hereinafter cited as Joint Industry Agreement]. The specifics of the rules proposed by the joint industry compromise were also reported in the following articles: *The Deal is Done on Must Carry*, BROADCASTING, Mar. 3, 1986 at 31-34; *Cable Firms OK Pact on Local Broadcasts*, L.A. Times, Feb. 28, 1986, pt. IV, at 1, col. 1; *Must Carry: Cable, Broadcasting Reach Tentative Pact*, Hollywood Rptr., Feb. 28, 1986, at 1, col. 1. The rules proposed by this agreement are a diluted version of the rule proposed earlier by the NAB and INTV. NAB originally requested that cable systems be required to devote 40% of their channels to local broadcasting, and carry all new local stations regardless of viewership shares for the first two years of continuous on-air operation. For a detailed discussion of the proposals submitted prior to the cable-broadcast agreement, see *Countdown on Must Carry*, BROADCASTING, Feb. 3, 1986, at 19-24.

248. Joint Industry Agreement, *supra* note 247, at 26. Nearly one third of all operating cable systems carry 20 or fewer channels and will therefore be exempt from the proposed regulation. *The Deal is Done on Must Carry*, *supra* note 247, at 31.

249. Joint Industry Agreement, *supra* note 247, at 6-7.

250. *Id.* at 7.

251. *Id.* at 10.

252. *Id.* at 2-5. Stations must receive a two percent viewing share and a five percent net weekly circulation in non-cable homes by county to be eligible under the proposed rules. *Id.* at

lished viewing standard before they seek must carry eligibility.²⁵³ The proposed rules provide that cable systems will not be required to carry more than one qualified local network affiliate station of the same commercial or public network if more than one qualifies.²⁵⁴ However, contrary to the FCC's current nonduplication rules,²⁵⁵ under the joint agreement a cable system that does choose to carry more than one station affiliated with the same network will not be required to afford nonduplication protection.²⁵⁶

The agreement also provides that cable operators cannot charge broadcasters for carriage of a non-distant signal covered by the compulsory license.²⁵⁷ A station that qualified or would have qualified for carriage under the old must carry rules, but will not qualify under the proposed plan will be afforded "may carry" status.²⁵⁸ If a cable system operator chooses to carry a may carry station's signal it must do so at no charge to the station.²⁵⁹ Finally, the compromise includes a promise from broadcasters that they will not ask Congress to repeal cable's compulsory license.²⁶⁰

In reaching the agreement, both sides had to make concessions and neither was completely satisfied; however, the broadcast groups felt it was the best that could be accomplished considering the constraints of the *Quincy* decision.²⁶¹ Although the commercial broadcasters and cablecasters have reached an accord that addresses all of the private interests—the political and practical concerns of the must carry rules—it will be up to the Commission, or perhaps ultimately the court, to determine whether the proposed rules are constitutional and best serve the needs of the public.

4-5. These eligibility requirements are different from the old rules, which based must carry eligibility upon proximity—35 miles or the Grade B contour, or by being significantly viewed. See *supra* notes 7-9 and accompanying text.

253. Joint Industry Agreement, *supra* note 247, at 5-6.

254. *Id.* at 6-7. The proposed rules also provide that cable systems are not required to carry teletext, multichannel sound or any signals carried in the vertical blanking interval. *Id.* at 10.

255. See *supra* note 31 for a discussion of the nonduplication rules.

256. Joint Industry Agreement, *supra* note 247, at 8.

257. *Id.* at 9. Broadcast signals which are covered under cable's compulsory license are those that were considered must carry signals under the FCC regulations in effect on April 15, 1976. See 17 U.S.C. § 111(e) (1982).

258. Joint Industry Agreement, *supra* note 247, at 9.

259. *Id.* at 10.

260. *The Deal is Done on Must Carry*, *supra* note 247, at 31, 32.

261. Under the *Quincy* standard, any new must carry rules must further a substantial government interest and be narrowly tailored so as to impose only a minimal burden upon cable operators' editorial discretion. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985). See *supra* text accompanying note 114.

Although the rules proposed by the joint agreement are narrower in scope and applicability than the old rules, they still suffer from many of the same shortcomings when analyzed under *Quincy's* standard of constitutionality. First, cable operators have agreed to give up some editorial freedom and devote twenty-five percent of their operational channels to local broadcast stations, but that is no guarantee that such a requirement is a permissible impingement upon the operators' first amendment rights. It will be up to the court to determine whether such an imposition is merely incidental or unconstitutionally substantial. Granted, these proposed rules give cable operators the opportunity to choose among must carry signals in situations where there exists an overabundance of stations which qualify for carriage. From the perspective of cable operators and programmers, however, the rules still operate to preclude carriage of any other signals or services on the seven or more channels reserved for local broadcasting and, therefore, do intrude upon the operators' editorial autonomy.

Second, to come within the *Quincy* standard of constitutionality, the broadcast groups supporting this proposal must not only show that the government's interest in preserving local broadcasting justifies an interference with first amendment freedoms, but also that the proposed rules are necessary to further that goal. The *Quincy* court noted that in analogous contexts the FCC generally demands hard evidence before it will "impose regulatory constraints and burdens on one industry or technology in favor of another."²⁶² Since the court will also demand a showing that the must carry rules effectively serve their stated purpose in order to uphold their constitutionality, the burden of justifying the necessity of rules which protect certain eligible local broadcast signals now rests with the broadcast groups. They will need to show that the absence of must carry protection is causing substantial financial injury to local broadcasters, and that the injury is frustrating the public's interest in free, community oriented television.²⁶³ Given the *Quincy* court's adversity to the suggestion that the must carry rules were necessary to protect VHF licensees against competition from cable,²⁶⁴ this is perhaps the most diffi-

262. 768 F.2d at 1458 (quoting Economic Inquiry Report, *supra* note 119, at 949 (concurring statement of Commissioner Fogarty)). FCC Chairman Mark Fowler has indicated since the *Quincy* decision that he disfavors must carry regulation. *Fowler Takes First Amendment Hard Line on Must Carry*, BROADCASTING, Mar. 3, 1986, at 32. Therefore, it seems reasonable to assume that the Commission will require that the broadcasters present hard evidence justifying the necessity of any new must carry rules before adopting any proposal.

263. The public broadcasters can make a much more compelling argument on this point than the commercial broadcasters. See *supra* notes 226-38 and accompanying text.

264. 768 F.2d at 1456; see also *supra* note 207.

cult challenge facing the commercial broadcasters who desire the adoption of new must carry rules.

Although it may be administratively impossible to develop or apply such a rule, the *Quincy* court indicated that in order to further their goal the ideal must carry rules should identify and protect only those stations which are significantly at risk.²⁶⁵ The stations most needy of must carry protection are new stations, small independent stations, religious, and public stations. Clearly, the cable and broadcast groups' proposed rules do not make such an identification nor do they protect only those stations at risk. In fact, the commercial broadcasters' proposed rules may end up favoring the wealthier stations at the expense of poorer or less stable stations. For this reason the public broadcasters are far from satisfied with this proposal.²⁶⁶ Under the old rules, cable systems were expressly obligated to carry noncommercial stations along with all the local commercial and significantly viewed signals.²⁶⁷ Since the new rules would, in some instances, give the system operators a choice among the must carry stations, public broadcasters fear that cable operators will opt to carry the more popular commercial stations over the less widely viewed public stations.²⁶⁸ This proposal would further frustrate the interests of public broadcasting, contrary to stated governmental policy.²⁶⁹

The *Quincy* court distinguished between rules which favor local broadcasters and those which favor local broadcasting.²⁷⁰ While the latter would be constitutional if justified by the governmental interest of preserving localism, the former would be impermissible for any reason.²⁷¹ The rules proposed by the joint agreement, which exclude from mandatory carriage eligibility new and unestablished local stations and give cable operators the opportunity to choose among eligible signals, may unconstitutionally favor certain local broadcasters, without protecting local broadcasting.²⁷²

265. 768 F.2d at 1463.

266. *The Deal is Done on Must Carry*, *supra* note 247, at 31, 33.

267. *See supra* notes 7-9 and accompanying text.

268. Some small market independent stations share this same fear, and along with public and religious broadcasters have submitted comments to the FCC expressing discontent with the proposed accord. *See Must Carry: Island of Dissidence in a Sea of Assent*, BROADCASTING, Mar. 10, 1986, at 37-39.

269. *See supra* note 235 and accompanying text.

270. 768 F.2d at 1460.

271. *Id.* "[W]ere the individual broadcasters themselves the object of the Commission's favors, the objective itself would be fundamentally illegitimate." *Id.*

272. Critics of the Joint Industry Agreement have noted this problem. Grace Cathedral, Inc., currently in the process of buying a newly constructed UHF signal in Akron, Ohio, asserts that "[t]he compromise represents an insidious and cynical attempt by entrenched economic interests to preserve their market power by conspiring to erect significant barriers to

Lastly, under the *O'Brien/Home Box Office/Quincy* line of reasoning, the proposed must carry rules must be narrowly tailored to the evil sought to be corrected.²⁷³ Unlike the old rules, the proposed rules do eliminate the possibility that a cable system will be saturated with must carry obligations (since they limit the imposition to twenty-five percent of channels in use), and do take into account the degree of program duplication on the system. However, like the old rules, there is still some question as to whether the means of the proposed rules adequately coincide with their supposed objective. Assuming the evil sought to be corrected is the demise of free, community oriented television, it is the new, unestablished broadcast stations which are probably the most needy of cable carriage since they need the exposure to establish a viewing audience. Yet, under the proposed rules these stations will not be eligible for must carry status until they meet the required viewer share without the benefit of mandatory cable carriage.

In contrast, stations that do have an established audience and easily qualify for must carry status may not even need the free, guaranteed carriage to remain in business. The proposed rules continue to violate the *Quincy* court's guidelines because once a station has met the proximity and viewership requirements, it will be eligible for carriage "regardless of whether or to what degree the affected cable system poses a threat to its economic well-being."²⁷⁴ The proposed rules are overprotective with regard to established stations and underinclusive with regard to new, small market and public stations. These rules are therefore insufficiently tailored to meet the end of protecting local broadcasting.

D. A Summary of the Must Carry Proposals

INTV's original proposal, practically superseded by the joint industry agreement, merely placed a band-aid over the must carry issue; it did not address the concerns identified by the *Quincy* court. The *Quincy* court stated: "At some point the goal of preserving localism becomes undifferentiated protectionism."²⁷⁵ INTV's proposed rules appear to pass that point and therefore fail under the court's set standard.

Similarly, the rules proposed by the joint industry compromise do

entry to new broadcast competition, and to deprive viewers, especially those who are not cable television subscribers, of additional diversity.'" *FCC Sets April 25 Deadline for Must-Carry Comments*, BROADCASTING, Mar. 31, 1986, at 73 (quoting comment of Grace Cathedral, Inc.).

273. 758 F.2d at 1459.

274. *Id.* at 1461. The *Quincy* court stated that the old must carry rules were overinclusive for this very reason.

275. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1468 (D.C. Cir. 1985).

not meet the constitutional standard imposed by *Quincy*. These rules impose a recognizable burden upon cable operators' editorial autonomy without establishing a sufficient countervailing governmental interest or public policy rationale to justify the intrusion. Moreover, the rules are not designed to protect those stations which need protection in order to successfully compete with cable, and therefore do not further their asserted goal. The stations that would most likely be excluded from carriage under the joint agreement are those most likely to need the guaranteed carriage.

Although it offers no protection to small commercial broadcasters, the public broadcasters' proposal meets the constitutional minimum imposed by the *Quincy* court. These rules impose only a slight burden, serve a substantial government interest—protecting public television stations and programming—and are narrowly drawn to serve that end. The United States Supreme Court recently stated that “regulations that burden speech incidentally . . . must be evaluated in terms of their general effect.”²⁷⁶ The rules proposed by the public broadcasters will have the effect of preserving our country's system of public broadcasting and encouraging a strong network of local stations responsive to the needs of their local audiences. Conversely, the rules proposed by the joint industry agreement, which tend to favor commercial stations, would have an adverse effect upon public broadcast programming and service.

The INTV and joint industry proposals address the concerns of commercial television broadcasters; however, it is whether the proposed rules serve the public interest that is of greatest concern to the Commission, and whether the rules are constitutional that is of greatest concern to the court. It must be remembered that the must carry rules were designed to benefit the public interest, not private industry. Of the three proposals discussed above, only the public broadcasters' proposal clearly comes within the *Quincy* court's constitutional model and adequately serves the specific governmental interest of preserving diverse, local broadcasting.

VII. CONCLUSION

In *Quincy Cable TV, Inc. v. FCC*,²⁷⁷ the court determined that the must carry rules, which required cable operators to carry all local television signals as part of their basic service, were grossly overbroad and failed to pass constitutional scrutiny under the test developed eight years

276. *United States v. Albertini*, 105 S. Ct. 2897, 2907 (1985).

277. 768 F.2d 1434 (D.C. Cir. 1985).

earlier in *Home Box Office, Inc. v. FCC*.²⁷⁸ The *Quincy* court also found that the Commission was unable to justify the necessity of rules which protected all local broadcasters. In applying the *Home Box Office* interest balancing standard, the court avoided the difficult, yet potentially necessary task of developing a more precise test for analyzing the constitutionality of FCC regulations which impinge upon the editorial discretion of cable system operators.

By invalidating the rules, the court expressly stated that it was not suggesting that *any* version of must carry rules would violate the first amendment; it only held that the version under analysis had failed the test. Accordingly, in the wake of the old must carry rules' death, broadcast interest groups almost immediately petitioned the FCC to adopt an alternate mandatory carriage plan. Should the Commission choose to promulgate new, narrower must carry rules, it must carefully balance the public's interest in local television service against the first amendment rights of the cablecasters. If the Commission accepts the *Quincy* court's holding that an important or substantial government interest justifies an incidental intrusion into cable operators' editorial autonomy, then it should adopt the rules proposed by the public broadcasters which serve the interest of preserving community-oriented public television.²⁷⁹

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278. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

279. If the FCC does adopt the public broadcasters' proposal, in fairness to the commercial broadcasters, it should also urge Congress to revise the compulsory copyright license provisions to account for the broadcasters' loss of guaranteed carriage. See *supra* notes 204-06 and accompanying text for a discussion of the compulsory license.