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CONGRESSIONAL CABLE-VISION: *TURNER BROADCASTING v. FEDERAL COMMUNICATIONS COMMISSION*

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Congress has re-entered the cable TV business. In the Cable Television Consumer Protection and Competition Act of 1992,[1] Congress announced its vision of a revised cable television regulatory scheme, a vision that commanded cable operators to carry local broadcast stations and to position these stations in a particular order.[2] But cable programmers and cable operators[3] have not subscribed to this "congressional cable-vision," contending that these "must-carry" requirements burden their First Amendment right to free speech.

Last Term in *Turner Broadcasting v. Federal Communications Commission*,[4] the Supreme Court endorsed this latest congressional entry into the cable television industry by affirming the constitutional validity of must-carry provisions. The Court characterized must-carry as a content-neutral speech restriction that imposed only an incidental burden on speech[5] and applied only intermediate scrutiny to these regulations. Because it neither fully understood current cable technology nor considered other rapidly developing TV capabilities, the Court shortsightedly developed a standard that will soon demand a sequel in order to conform with First Amendment doctrine.

Cable technology was created to link programming stations to subscribers' television sets physically, using cables or optical fibers.[6] Shortly after the birth of cable, the FCC promulgated must-carry rules to ensure that broadcast television would survive alongside the new technology.[7] As cable operators increased channel capacity and expanded

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1. Pub. L. No. 102-385, 106 Stat. 1460 (codified in part at 47 U.S.C. §§ 534-35 (Supp. IV 1993)).

2. *See* 47 U.S.C. § 534(b)(1), (b)(6), (h)(1)(a) (1988 & Supp. IV 1993).

3. "Cable programmers" are those programmers who transmit their speech directly to cable companies for delivery to the viewer. Cable programmers do not transmit their programming through the air, as do broadcast programmers. "Cable operators" are those making the decisions as to which programmers (both broadcast and cable) to carry and on what channels to position the programmers within the system.

4. 114 S. Ct. 2445 (1994).

5. *See id.* at 2461-64.

6. *See id.* at 2451.

7. *See* Century Communications Corp. v. FCC, 835 F.2d 292, 293-94 (D.C. Cir. 1987),

their programming to include specialized non-broadcast stations, courts re-evaluated their willingness to allow relaxed scrutiny of government intrusion into a First Amendment-protected media. Since 1985, no court has upheld a specific FCC must-carry plan nor definitively has selected a First Amendment standard of review.[8]

In 1992, by enacting Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act,[9] Congress attempted to tailor a constitutionally acceptable must-carry provision to diffuse the editorial and economic power of cable operators and to shelter local broadcasters from a competitive advertising market.[10] Congress feared that the substantial percentage of households with cable subscriptions would result in decreased advertising revenue for broadcast stations not carried by cable systems,[11] and theorized that requiring carriage of these broadcast stations would correct the "competitive imbalance."[12] Turner Broadcasting and other cable programmers and operators challenged the constitutionality of these must-carry provisions, claiming that the demands violated the editorial discretion of the cable operators and freedom of expression of the cable programmers.[13]

In a divided opinion, a three-judge panel[14] ruled that the must-carry provisions were constitutionally permissible.[15] In granting summary judgment for the government, the majority characterized the provisions as mere economic regulations, and concluded that the provisions were "in

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cert. denied, 486 U.S. 1032 (1988); *see generally* Alison K. Greene, Quincy Cable TV, Inc. v. Federal Communications Comm'n: *Should The FCC Revive Cable Television's Must Carry Requirement?*, 19 LOY. L.A. L. REV. 1369 (1986).

8. *See, e.g.*, *Century Communications*, 835 F.2d 292.

9. Section 4 demands carriage of local broadcast stations, including all full power television broadcasters that operate in the same television viewing market as the cable system. 47 U.S.C. § 534(b)(1)(B), (h)(1)(A). Section 5 requires carriage of local "noncommercial educational television stations." 47 U.S.C. § 535(a).

10. *See* 106 Stat. 1460, § 2(a), (b) (1992).

11. *See id.* at § 2(a)(1)-(21) (1992).

12. Turner Broadcasting v. FCC, 114 S. Ct. 2445, 2454 (1994).

13. Turner Broadcasting v. United States, 819 F. Supp. 32 (D.D.C. 1993).

14. The Cable Television Consumer Protection and Competition Act provides that all challenges to must-carry should be heard by a three-judge panel of the D.C. District Court, 47 U.S.C. § 555(c)(1), and that constitutional challenges be appealed directly to the Supreme Court, 47 U.S.C. § 555(c)(2).

15. This decision was a marked change from the prior rulings of the D.C. Circuit. *See* Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (holding must-carry provisions are not narrowly tailored and questioning lack of evidence needed to show the necessity of must-carry provisions); Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (striking down regulation for failure to articulate a substantial government interest and to tailor a remedy to that interest), *cert. denied*, 476 U.S. 1169 (1986).

intent as well as form unrelated . . . to the content of any messages that . . . cable operators, broadcasters, and programmers have in contemplation to deliver."[16] Having accepted the provisions as content-neutral, the court adopted a standard of intermediate scrutiny[17] that required the government to demonstrate that: (1) the regulations protect or achieve a significant government interest; and (2) the regulations were tailored to serve that interest.[18] The court recognized the government's interest in preserving free television and sustained the provisions.[19]

Judge Williams dissented, questioning the need for must-carry provisions[20] and concluding that the provisions are content-based and thus warrant strict scrutiny.[21] He assumed that the government had a compelling interest to protect broadcast television, but would have struck down the provisions as insufficiently tailored to serve that purpose.[22]

The Supreme Court vacated and remanded. In a 5-4 decision,[23] the Court accepted the intermediate scrutiny embraced by the district court.[24] Writing for the Court, Justice Kennedy contrasted broadcast and cable television technologies in order to justify a distinct jurisprudence for the latter. Broadcasters are confined by the limits of the electromagnetic spectrum, unlike cable, and must compete for a limited number of available frequencies. This competition for scarce frequencies permitted the Court to approve broadcast regulations that survived its relaxed scrutiny.[25] But the Court refused to extend this scarcity rationale to cable.

According to Justice Kennedy, cable programmers are not encumbered by the same physical restraints as broadcasters; recent advances in technology may ensure that there is "no practical limitation on the number

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16. *Turner*, 819 F. Supp. at 40.

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

18. *Turner*, 819 F. Supp. at 45-47.

19. *Id.* at 47.

20. *Id.* at 63-64 (Williams, J., dissenting).

21. *Id.* at 59-60. Strict scrutiny requires a compelling government purpose and a narrowly tailored solution to serve that purpose.

22. *Id.* at 61.

23. Chief Justice Rehnquist and Justices Blackmun and Souter joined Justice Kennedy's opinion for the Court. Justice Stevens did not agree with the Court's final disposition but joined the opinion almost in its entirety to establish a majority for the Court's analysis. *See* Turner Broadcasting v. FCC, 114 S. Ct. 2445, 2475 (1994). Justices O'Connor, Scalia, Thomas, and Ginsburg dissented.

24. *Id.* at 2469.

25. Rational basis scrutiny requires only a legitimate government interest and a regulation reasonably related to further that interest. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (permitting the government to place limited content restrictions and impose affirmative obligations on broadcasters).

of speakers who may use the cable medium."[26] Also, unlike broadcasters transmitting their programming through the air, cable systems do not suffer electromagnetic interference among signals which permits a nearly unlimited density of signals.[27] As cable is free from the scarcity of the electromagnetic spectrum, so, the Court argued, it should be free from extensive government intrusion.

The Court rejected two alternative arguments for applying a scarcity rationale to cable regulation. The Court dismissed the contention that the relaxed standard of broadcast jurisprudence stemmed from concerns over market dysfunction rather than electromagnetic scarcity.[28] The Court also refused to accept that the regulation warranted only rational-basis scrutiny simply because it may be classified as "industry-specific antitrust legislation."[29] Although the Court acknowledged that the standard rule for economic-based legislation might be a rational-basis test,[30] the Court invoked a well-established exception for laws that single out segments of the media and asserted that cable regulation warranted some degree of heightened protection.[31]

The appellants advanced two independent theories arguing that the Court should apply strict scrutiny. First, the appellants equated a cable operator's speech with the editorial discretion of print media. Like newspapers, cable operators engage in a selection and ordering process[32]—a process which the Supreme Court has held to be protectable speech.[33] Although the Court has allowed strict scrutiny to protect editorial discretion in the print medium, it refused to extend that protection to cable.[34] The Court distinguished print and cable media, asserting that: (1) cable operators feel no need to "respond" to programming with which they disagree because viewers do not associate the view of particular programmers with the cable operators that carry them;[35] and

26. *Turner*, 114 S. Ct. at 2457.

27. *Id.*

28. *Id.* at 2457-58.

29. *Id.* at 2458.

30. *Id.* (citing Lorain Journal Co. v. U.S., 342 U.S. 143 (1951) and Associated Press v. United States, 326 U.S. 1 (1945)).

31. *Id. See* Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986).

32. The ordering and selecting process involves the cable operator's selection of programmers to fill the cable system and assignment of those programmers to particular channels. This is similar to a newspaper editor's selection of editorials and articles and the subsequent placement of those selections within the newspaper.

33. *Turner*, 114 S. Ct. at 2464. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

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

35. *Id.* at 2465-66. The Court also points to a regulation requiring station identification

(2) cable operators have "bottleneck" control over cable subscribers' access to programming.[36] According to the Court, the cable operator's decision not to carry a broadcaster virtually silences the broadcast to the 60 percent of homes subscribing to cable.[37] The Court concluded that this great potential for abuse required some government intervention to insure against privately imposed limits on the viewers' choices.[38]

Second, the appellants contended that the unequal treatment of similar video programming media warrants strict scrutiny.[39] Video delivery systems such as multichannel multipoint distribution or satellite master antennae television are not subject to similar must-carry provisions. The court rejected strict scrutiny on this ground because the "special characteristic" of cable—the bottleneck monopoly of cable operators—justified the "differential treatment."[40]

Having rejected strict scrutiny on these grounds, Justice Kennedy considered whether the challenged regulations were content-based or content-neutral. As a general guideline, a regulation is content-based if (1) the regulation, on its face, distinguishes speech "on the basis of the ideas or views expressed;"[41] or (2) the regulation intends to favor or disfavor a particular message.[42] The Court found that the terms of the regulation did not restrict programming based on its content.[43] Even though the regulations favored a class of speakers, they did so based on the choice of transmission media—cable or electromagnetic spectrum.[44] Speaker preference, the Court argued, is not content preference—only when the two converge will the speaker-based law require strict scrutiny.[45]

The Court then examined the intent of the legislation, finding that Congress's "overriding objective" was the preservation of free broadcast

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once per hour to demonstrate that programmers' speech is distinct from system operators' speech in the minds of the consumer. *Id.*

36. *Id.* at 2466. The Court also noted that cases requiring strict scrutiny for editorial discretion involved content-based regulations, which the Court found absent in this case. *See infra* text accompanying notes 41-49.

37. *Turner*, 114 S. Ct. at 2469-70.

38. *Id.*

39. *Id.* at 2466.

40. *Id.* at 2468 (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

41. *Id.* at 2459.

42. *Id. See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

43. *Turner*, 114 S. Ct. at 2459. As the Court states, whether "commercial or noncommercial, independent or network-affiliated, English or Spanish language, religious or secular," the same must-carry provisions apply. *Id.* at 2460.

44. *Id.*

45. *Id.* at 2461.

television.[46] While Congress noted at least three content-based purposes within the enacted statute,[47] the Court held that these accolades of local broadcast television merely illustrated that the "services provided by broadcast television have some intrinsic value, and thus, are worth preserving against the threats posed by cable."[48] The Court supported its reading by observing that all broadcasters—regardless of their programming—qualify for must-carry applications, even if their application and subsequent carriage displaces a cable station which carries exclusively educational or local programming.

Finding the regulation content-neutral, the Court definitively adopted an intermediate scrutiny standard.[49] The Court found the regulation satisfied the first prong of the intermediate scrutiny standard by serving an important government interest.[50] But, even according deference to the "predictive judgments of Congress,"[51] the Court did not find enough evidence on the record to approve summarily the regulation as sufficiently tailored to satisfy that government interest.[52] It thus remanded to the district court for further factual findings.

Justice Stevens, concurring in part and concurring in the judgment, believed that the Court should have affirmed the decision of the district court. Finding the bottleneck argument compelling,[53] Justice Stevens would have deferred to the speculative harms feared by Congress and the manner that Congress chose to remedy them.[54]

Justice O'Connor, concurring in part and dissenting in part, disagreed with the Court's conclusion that intermediate scrutiny should be applied to the regulation. Equating content of speech with communicative impact,[55] Justice O'Connor found four content-based purposes in Section 2 of the Cable Television Consumer Protection and Competition Act[56]

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46. *Id.*

47. *See* 106 Stat. 1460, §§ 2(a)(10) (preferring local origination of programming), 2(a)(11) (positing that broadcast is an important source of local news and public affairs programming), and 2(a)(8) (finding local broadcasters provide educational and informational programming).

48. *Turner*, 114 S. Ct. at 2462.

49. *Id.* at 2469.

50. *Id.*

51. *Id.* at 2471.

52. *Id.* at 2472.

53. *Id.* at 2473 (Stevens, J., concurring).

54. *Id.* at 2475.

55. *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part).

56. In addition to the three cited by the majority, Justice O'Connor included assuring access to multiple sources of programming, as a content-based regulation, since it has a communicative impact. *Id.* (citing 106 Stat. 1460, § 2(a)(6)).

notwithstanding the Court's claim that Congress' extensive findings were compiled merely to show that the broadcast medium is valuable. She refused to ignore the combination of speaker-specific regulation and content-based purpose simply because one content-neutral purpose may also have existed.[57] Concluding that strict scrutiny was the appropriate First Amendment standard, Justice O'Connor found that preservation of local television is neither a compelling state interest[58] nor are the must-carry provisions sufficiently tailored to meet the goal of preserving local television.[59] Even assuming *arguendo* that the regulations were content-neutral, Justice O'Connor would have held that the regulations were overbroad and recounted a number of ways Congress can protect broadcast television without infringing upon the First Amendment rights of cable operators.[60]

Although *Turner*'s acceptance of an intermediate standard offers the government new hope that a must-carry provision may survive court review,[61] this hope, and the *Turner* standard, will prove short-lived. Rapidly developing TV technologies will further undermine critical assumptions of a rationale that was flawed when written.

The initial error of the Court was to presume that cable programmers and cable operators are similarly affected by must-carry provisions. The First Amendment rights of cable programmers differ from those of cable operators.[62] A cable programmer's speech is in its choice of shows to program; a cable operator's speech is in its choice of programmers to show. Although cable programmers have no constitutional right to air their views over a cable network, neither may Congress burden the transmission of these programs by requiring that cable operators carry a particular programmer because of that programmer's typical content.[63]

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57. *Id.* at 2478.

58. *Id.* Justice O'Connor does recognize that public affairs programming or educational programming may be a weightier state interest, but she is not willing to advance it to a compelling interest. *Id.*

59. *Id.* at 2479.

60. *Id.* at 2479-80. For example, Justice O'Connor suggests that Congress can subsidize broadcasters that provide programming it prefers or encourage the creation of alternative technologies such as satellite or fiber-optic networks. *Id.*

61. Prior to this case, the courts have rebuked the government in several attempts to create must-carry provisions. *See, e.g.*, Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Quincy Cable Television, Inc. v. FCC, 768 F.2d 1424 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

62. Similarly, the rights of newsstand owners are not the same as the rights of newspapers. A newsstand owner "speaks" by selecting and displaying magazines and newspapers, whereas a newspaper speaks by ordering and selecting articles within the paper.

63. This analysis parallels that of the newsstand. The newsstand owner chooses whether

Congress may not favor some First Amendment protected speech over other First Amendment protected speech based on the content of that speech. The must-carry provisions, on their face, explicitly make at least four content-based distinctions preferring local broadcast stations to other types of stations. But when Congress requires cable operators to prefer local broadcasters because of content, this burdens the rights of cable programmers to compete for a channel on which to express their views.

Cable operators' only significant speech interest is in protecting editorial discretion—maintaining control to select and order the channels carried by their cable systems.[64] Editorial discretion is a traditional part of First Amendment expression, explicitly included in the constitutional vanguard in *Miami Herald Publishing Co. v. Tornillo*.[65] In *Tornillo*, the Court accepted that a newspaper has a First Amendment right in deciding what to print and where, within the newspaper, to display it. Similarly, cable operators should have a First Amendment right to place CNN at channel 22 and the Home Shopping Network at channel 74 or to exclude the Home Shopping Network completely. Cable operators engage in little, if any, First Amendment protected conduct outside of this selection and ordering of programming. Yet, though the Court repeatedly acknowledged cable operators deserved First Amendment protection, it refused to protect the most fundamental and crucial aspect of an operator's expression.

By instituting must-carry, Congress also overrode the operator's speech, forcing the operator to carry congressionally preferred programming. Private companies, even those regulated by the government, have a First Amendment right to reject displaying speech which is not their own.[66] The Court recognized this as a long-standing First Amendment principle, yet dismissed its application to cable operators, asserting that subscribers do not associate views expressed on a particular channel with those of the cable operator.[67] As evidence, the Court recalled a regulation that requires station identification once an hour.[68] In *Miami Herald v.*

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or not to carry a particular publication and where to place that publication within the stand. Certainly, the government could not require a newsstand to carry a particular publication.

64. Similarly, copyright law protects the ordering and selection of materials in edited works, and the only protected aspects for the editors are those of selection and ordering. *See, e.g.*, Roth Greeting Cards v. United Card Co., 429 F.2d. 1106 (9th Cir. 1970).

65. 418 U.S. 241 (1974).

66. *See generally* Pacific Gas & Electric v. Public Utils., 475 U.S. 1 (1986). This case involves public utilities, which resemble the cable industry, in that both are regulated by the government and often function as local monopolies.

67. *See supra* note 35.

68. *See* Turner Broadcasting v. FCC, 114 S. Ct. 2445, 2465-66 (1994) (citing 47 C.F.R.

Tornillo, the Supreme Court invalidated a statute that would have forced newspapers to publish unsolicited editorial replies that contained ideas and views contrary to those of the paper. Using the *Turner* reasoning, *Tornillo* should have validated the statute so long as it required a signature identifying the speaker. Yet the Court did not explain how station identification should any more allow the government to force speech than the signature on a letter to the editor.

Nor can cable operators easily express disagreement with the forced speech. Unlike a newspaper, the cable operator cannot juxtapose a disclaimer with speech with which it does not agree. In practice, a cable operator may have to demand that every congressionally mandated programmer regularly transmit not only a station identification as required by the FCC, but also a disclaimer, distancing the programmer from the operator. Again the Court did not suggest why a video disclaimer is superior to the common disclaimer that appears on a newspaper editorial page—the presence of which did not save the right-to-reply statute in *Tornillo*.

Perhaps recognizing the inconsistencies in its jurisprudence, the Court also distinguished cable from print media on another ground, positing a "bottleneck" that results from technological and economic realities.[69] This "bottleneck" rationale assumed that the broadcaster's only access to cable subscribers is through carriage on the cable system. If a cable operator decided not to carry a particular programmer, the bottleneck would prevent the programmer from accessing that operator's subscribers. The presence of alternative means to receive broadcast stations removes the bottleneck.

Given the current cable viewer technology, however, the Court's bottleneck rationale is imaginary. With the flick of an inexpensive input selector switch, more commonly termed an A/B switch, nearly all cable subscribers can alternate between broadcast and cable services.[70] This switch allows viewers to capture any broadcast programming not covered by their cable systems.[71] Most televisions have a built-in A/B switch, toggling between broadcast and cable stations by pressing a button on the TV console or remote control. Many televisions automatically program

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§ 73.1201 (1993)).

69. *Id.* at 2466.

70. *See* Century Communications Corp. v. FCC, 835 F.2d 292, 296-300 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

71. Of course, this remedy offers no solution for the viewers unable to receive broadcast signals, but this concern was hardly the sole focus of the legislation or of the Court.

stations, both cable and broadcast, expressly to allow easy access to local stations not carried by cable programmers.[72] The ease with which viewers can independently receive broadcast stations defeats the Court's argument that cable operators may solely control viewers' receipt of these stations.[73]

In light of recent commercial advances in TV technology, the Court's bottleneck rationale becomes even more questionable. The Court recognized that video programming media exist independent of cable and that these media do not create a bottleneck for broadcasters.[74] Yet the Court fails to take the next logical step—that the mere existence of affordable alternatives eliminates the possibility of bottleneck control in cable. As new technologies come on-line, only economics and government regulation will limit the choices available to an interested viewer.

For purposes of First Amendment review, cable television is a hybrid media—resembling broadcast to viewers, sharing editorial discretion with newspapers, and dispensing compilations of associated expressions like newsstands. In arriving at intermediate scrutiny, the Court attempted to average the applicable levels of scrutiny for each type of media, which produced a standard that cannot withstand rapidly occurring technological advances. In *Turner*, the Court overlooked the differences in the interests of cable programmers and cable operators and the flaws inherent in their bottleneck rationale. These missteps caused the Court to trip over its own doctrine. As new technologies draw subscribers away from cable, local cable monopolies begin to compete for cable services within a given region, and First Amendment law continues to protect the rights of the more traditional media to select and display their speech, the Supreme Court should in turn prepare for a *Turner* sequel—"Must-Carry II: Surviving Strict Scrutiny?"

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72. *See, e.g.*, RCA, COLOR TELEVISION OWNERS MANUAL 2 (1990).

73. *See* Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434, 1441 (D.C. Cir. 1985) (suggesting that the existence of the A/B switch preserves broadcaster's access to cable subscribers), *cert denied*, 486 U.S. 1032 (1988); *Century Communications*, 835 F.2d at 302 (confirming FCC report finding the A/B switch convenient for consumers and holding that the existence of the A/B switch eliminates the bottleneck concern).

74. Turner Broadcasting v. FCC, 114 S.Ct. 2445, 2466-68 (1994).