TURNER BROADCASTING, THE FIRST AMENDMENT, AND THE NEW ELECTRONIC DELIVERY SYSTEMS

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After ducking the issue of the First Amendment status of cable television for years,[1] the United States Supreme Court rendered its most important decision concerning the regulation of the new electronic media in *Turner Broadcasting, Inc. v. FCC*.[2] *Turner* involved the constitutionality of the "must-carry" provisions of the 1992 Cable Act (the "Act" or "Cable Act")[3] which require cable systems to carry specified local broadcast television stations. While cable television began over four decades ago as a community antenna service, it changed drastically after the advent of satellite in the mid-1970's to also provide scores of satellite-delivered programs and to become the most important video delivery system. Cable's First Amendment status, however, remained in doubt. One group of lower court cases analyzed cable's First Amendment status under the print model of *Tornillo*,[4] which provides that content-based regulation of communication media is constitutional only if it is narrowly tailored to a compelling government interest. Another group of cases opted for the more permissive broadcast regulatory scheme of *Red Lion*,[5] under which content-based regulation of communication media is valid if it is reasonably related to a legitimate government interest.

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1. *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), *cert. denied*, 114 S. Ct. 2738 (1994); Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

2. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).

3. 47 U.S.C. §§ 534, 535 (Supp. IV 1992).

4. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *See* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1986); Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, *appeal dismissed*, 484 U.S. 1053 (1988).

5. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982).

The Court in *Turner* has now determined that the *Red Lion* scheme is confined to broadcasting.[6] Cable and other new electronic delivery systems such as telephone companies ("telcos") come under traditional First Amendment jurisprudence. That is, they are to receive strict scrutiny First Amendment protection when the government regulation is content-based and to come under the intermediate *O'Brien*[7] standard when the regulation is content-neutral.

This paper explores the polar opposites of *Red Lion* and *Tornillo*, as well as the intermediate *O'Brien* standard. The paper then analyzes the Supreme Court's selection between these competing doctrines in its decision in *Turner* regarding the constitutionality of the Cable Act's must-carry provisions. The paper then explores the likely effect *Turner* will have on new electronic delivery systems such as the telcos. The paper concludes that *Turner* foretells serious constitutional obstacles to government regulation of the emerging media that will comprise the Information Superhighway. This will enhance the vast potential these media have for widespread dissemination of information throughout the United States and the world.

I. FIRST AMENDMENT CONSTITUTIONAL BACKGROUND TO TURNER

While each medium of expression is to be assessed for First Amendment purposes by standards suited to it,[8] it is often the case that "[l]aw . . . is determined by a choice between competing analogies."[9] In *Turner*, while cable systems and programmers argued that the proper analogy was to *Tornillo*,[10] the United States government and its allies contended for *Red Lion* as the controlling precedent.[11]

A. *Red Lion: The Broadcast Regulatory Scheme and the First Amendment*

The broadcast regulatory scheme in the Communications Act of 1934[12] is based on a public trustee concept. Radio is inherently not open

6. *Turner*, 1114 S. Ct. at 2456–57.

7. United States v. O'Brien, 391 U.S. 367 (1968).

8. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 557 (1975); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

9. Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW AND ECON. 15, 38 (1967).

10. Brief for Appellant National Cable Television Association, Inc., at 18, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994)(No. 93-44).

11. Brief for Federal Appellees at 13, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994)(No. 93-44).

12. 47 U.S.C. § 151 *et seq.* (Supp. IV 1992).

to all. The number of people who want to use the spectrum, and in particular to broadcast, exceeds the number of available frequencies or channels. Consequently, Congress decided that the government should allocate the radio spectrum for specific uses and award permits in order to prevent engineering chaos. As the Court stated in *Red Lion*, the government could have required each frequency to be shared on a daily, weekly, or other basis.[13] Instead, Congress developed a system where short-term broadcast licenses are awarded to private entities who volunteer to serve the public interest as fiduciaries for all those who were kept off the air by the government. These licensees must demonstrate to the Federal Communications Commission (the "FCC") that they have met the public interest standard, thus warranting renewal for another term.[14]

This scheme necessarily involves content regulation. While the FCC is not to censor, a licensee can be called upon to demonstrate to the agency that it has served as a local outlet by presenting community-issue oriented programming.[15] It must afford equal broadcast opportunities to candidates for the same public office at any level and reasonable access to federal candidates for elective office.[16] In addition, television broadcasters are required to serve the educational and informational needs of the child audience, particularly by carrying programming specifically designed to meet the needs of that audience.[17] The scheme thus implicates First Amendment concerns and calls for "a delicate balancing of competing interests."[18]

In the seminal *Red Lion* case, the United States Supreme Court sustained the constitutionality of the public trustee scheme in the context of the "fairness doctrine" and specific rules promulgated to implement that doctrine.[19] The Court based its decision on the physical

13. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390–91 (1969).

14. *See* 47 U.S.C. §§ 307(d), 315(a) (1988).

15. *See* Deregulation of Radio, 84 F.C.C.2d 968, 977–83 (1981)(report and order); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1077, 1091–92 (1984)(report and order).

16. 47 U.S.C. §§ 315(a), 312(a)(7) (1976).

17. 47 U.S.C. § 303b(a)(2) (Supp. IV 1992).

18. Columbia Broadcasting Sys., Inc. v. Democratic National Comm., 412 U.S. 94, 117 (1973). The Court stated that:

> A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a "public trustee." To perform its statutory duties, the Commission must oversee without censoring . . . .

Id. at 117–18.

19. The fairness doctrine required broadcasters to devote a reasonable amount of time to airing controversial issues of public importance, and to do so fairly by affording reasonable

scarcity of frequencies which then existed and persists today in all but the smallest markets. The Court found "no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[20] The goal of the First Amendment, the Court stated, is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee."[21] The Court indicated that "[I]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[22]

The Court considered the claim that the FCC regulations would have a chilling effect on broadcasters and the airing of controversial issues, but found that the possibility was "at best speculative."[23] It determined that the Commission could take remedial steps to require broadcaster treatment of controversial issues and the that Court could revisit the issue if and when such effects might be definitively shown.[24]

As the Court in *Turner* noted, *Red Lion* is still the law.[25] This means that FCC content regulation of broadcasting does not come under strict scrutiny. Rather, if such regulation is reasonably related to a legitimate public interest, it is permissible under the First Amendment.[26] The Court has consistently stressed the uniqueness of the *Red Lion* decision.[27]

B. *Tornillo: The Print Model and the First Amendment*

Five years after deciding *Red Lion*, the Supreme Court in *Tornillo* struck down a Florida statute that gave political candidates who had been editorially attacked in the press a right to reply.[28] The Court found

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opportunity for the discussion of conflicting viewpoints. *Red Lion*, 395 U.S. at 377. The FCC has since eliminated the doctrine but has retained the personal attack and political editorializing regulations involved in *Red Lion*. *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043 (1987), *enforced*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1989).

20. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

21. *Id.* at 390.

22. *Id.*

23. *Id.* at 393.

24. *Id.*

25. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456–57 (1994); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

26. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 226–27 (1943). The FCC, however, cannot censor broadcasters and has soundly "eschewed direct federal control over discrete programming decisions . . ." by broadcasters, a step that would "raise[] 'serious First Amendment issues.' " Metro Broadcasting, Inc. v. FCC, 497 U.S. at 585; *see also* FCC v. League of Women Voters, 468 U.S. 364 (1984).

27. *See, e.g.*, Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam).

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

that enforcement of such a right would impose additional costs on newspapers, by requiring them to expand in size or omit content, and might deter discussion of issues which would trigger replies.[29] More significantly, the Court held that the statute intruded into the editorial function of the press and, therefore, violated the First Amendment:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.[30]

It is difficult to reconcile *Tornillo* and *Red Lion*.[31] Both involved right of reply regulations. In *Red Lion*, the regulations in question were found to promote the First Amendment values of balanced, vigorous debate.[32] The Court determined that any chilling costs were speculative.[33] In *Tornillo*, however, the costs were found to exist (with no more evidence than in *Red Lion*) and, in any event, the regulation was deemed to violate the First Amendment because of its interference with editorial autonomy.[34] The opposing results seem driven by the greatly differing circumstances and traditions of the two media (in broadcasting, government licensing to select the channel operator and keep out others; in print, no licensing or interference with editorial judgment).

Unlike *Red Lion*, *Tornillo* is not confined to its own medium of print. The decision stands for the proposition that content-based regulation of any medium other than broadcasting comes under exacting strict scrutiny analysis. To be sustained, therefore, such regulation must be narrowly tailored to a compelling state interest. That is, "[t]here must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to

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29. *Id*. at 256–57.

30. *Id*. at 258.

31. For analysis of the differing results, *see* Henry Geller & Donna Lampert, *Cable, Content Regulation, and the First Amendment*, 32 CATH. U. L. REV. 603, 617–18 (1983); *see also* Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

32. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

33. *Id*. at 393.

34. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

serve the goal."[35] It follows that judicial determination that a regulation is content-based is usually, but not always,[36] lethal to the government's case.

In determining whether a regulation is content-based or content-neutral, a critical inquiry in which a court must engage is whether the government adopted the regulation "because of disagreement with the message it conveys."[37] Furthermore, as the Court noted in *Turner*, the government also may not regulate speech based on "favoritism" to the content being conveyed, or "impose differential burdens upon speech because of its content."[38] Thus, "speaker-based laws demand strict scrutiny when they reflect the government's preference for the substance of what the favored speakers have to say . . . ."[39]

C. *The Intermediate Test of O'Brien*

While under *Tornillo*, content-based regulation is constitutionally valid only if it is narrowly tailored to a compelling state interest, under *O'Brien*, content-neutral regulation is valid if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[40] The latter "narrow tailoring" component requires that the means chosen not "burden substantially more speech than is necessary to further the government's legitimate interests."[41]

Thus, there is leeway as to the amount of tailoring required between a content-neutral regulation and the government interest it is intended to promote. Content-neutral regulation need not be the least speech-restrictive means of promoting the applicable governmental interest. It can meet the test so long as the "regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation."[42]

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35. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478 (1974)(O'Connor, J., dissenting).

36. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

37. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Furthermore, the Court has determined that "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." Burson v. Freeman, 112 S. Ct. 1846, 1850 (1992).

38. *Turner*, 114 S. Ct. at 2458–59.

39. *Id.* at 2467.

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

41. *Ward*, 491 U.S. at 799.

42. *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

Furthermore, Congressional findings, and especially Congress' predictive judgment, must be accorded substantial deference under either strict scrutiny or intermediate scrutiny analysis.[43] When reviewing a regulation under either standard, therefore, a court must not substitute its judgment for that of Congress but rather "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[44] While such review can be difficult since the courts are necessarily reviewing the judgments of a co-equal branch, intermediate review under *O'Brien* is certainly not lethal to the government's case. Indeed, it is generally quite favorable in light of the substantial deference to be accorded congressional judgment.

The above discussion of *Red Lion* and the traditional First Amendment jurisprudence, i.e., strict scrutiny under *Tornillo* or intermediate scrutiny under *O'Brien*, sets the framework for the *Turner* case. The government sought to avoid analysis of the must-carry provisions of the Cable Act under traditional First Amendment jurisprudence, and especially strict scrutiny analysis, by arguing for the application of *Red Lion*. It did so on the grounds that television represents a dysfunctional market where the government has given cable a "preferred position" in the market thereby enabling it to monopolize the television medium.[45] The significance of *Turner* is its rejection of that argument: *Red Lion* is not to be extended to new electronic media such as cable or other burgeoning means of delivering video programming such as the telcos.[46] While the First Amendment analysis of both the majority and minority opinions in *Turner* is flawed, the long-run effect of the case will be to make heightened scrutiny analysis generally applicable to the new electronic fields. This is sound, not only under First Amendment law and precedent, but also as a matter of policy in light of the dawning era of enormous electronic abundance.

II. TURNER: RED LION CONFINED

The must-carry provisions of the Cable Act require that cable systems generally set aside somewhat more than one-third of their channel capacity for local television stations. Section 4 of the Act requires cable systems with more than twelve channels to set aside up to one-third of channel capacity for local commercial television broadcast stations

43. *Turner*, 114 S. Ct. at 2471.

44. *Id*.

45. Brief for the Federal Appellees, at 13, 28, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994)(No.93-44).

46. *See Turner*, 114 S. Ct. at 2456–57.

requesting carriage.[47] Section 5 of the Act requires carriage of local noncommercial stations on a basis geared to cable size.[48] The district court in *Turner* upheld the validity of these requirements under *O'Brien* intermediate scrutiny analysis and granted summary judgment in the government's favor.[49]

Upon direct review in the Supreme Court, the government argued that rather than applying the *O'Brien* standard, the district court should have applied the *Red Lion* standard which does not require regulation to be content-neutral but does require it to be viewpoint-neutral.[50] First, the government contended that the *Red Lion* standard is applicable to cases "where Congress acts to correct dysfunction in a market, whose commodity is speech, and requires the government to show that reasonable steps were taken to correct that dysfunction."[51] Second, the government urged that where regulation has given certain speakers "a preferred position" in the speech marketplace which enables their monopolization of an important communications means, the government may act to insure that such speakers allow a diversity of programs to their subscribers.[52] Cable, the government argued, occupies such a position because in order to use public rights-of-way it must obtain a local franchise that is usually exclusive, either de jure or de facto, with government regulation limiting franchise authorities' ability not to renew the franchise.[53]

The Court unanimously rejected the government's argument for application of the *Red Lion* standard to the must-carry provisions. First, it held that *Red Lion* is based on the unique and distinguishing characteristic that broadcast frequencies are a scarce resource that must be allocated among many more applicants than there are available frequencies, and that cable television does not have such inherent limitations.[54]

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47. 47 U.S.C. § 534(b)(1)(B) (Supp. IV 1992).

48. *See* 47 U.S.C. § 535(b)(2)(A), (b)(3)(a), (b)(3)(D)(Supp. IV 1992).

49. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 10 (D.D.C. 1993), *vacated*, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).

50. Brief for Federal Appellees, at 13, 14, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994)(No. 93-44).

51. *Id*.

52. *Id*. at 28–29.

53. *Id*. This argument is similar to the position taken by the 10th Circuit Court of Appeals in Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377–78 (10th Cir. 1981). In *Boulder*, the court noted that when cables are laid "[s]ome form of permission from the government must, by necessity, precede such disruptive use of the public domain" and that there is "a sheer limit physically on the number of cables that can use the existing poles or underground conduits or the streets." *Id*. at 1378; *see also* Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1548–51 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). These courts found that regulation similar to that found in the broadcast area is permissible in cable to ensure diversity of programming and sources.

54. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994).

The Court determined that in light of technological developments, there is no practical limitation on the number of speakers on cable nor is there any danger of interference between two cable speakers.[55]

Second, while agreeing that the cable market reflects dysfunction, the Court rejected the extension of *Red Lion* on that basis, holding again that the physical, rather than the economic, characteristics of the broadcast market underlie the Court's broadcast jurisprudence and that the claim of market dysfunction "is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media."[56] For the same reason, the Court rejected the notion that the must-carry provisions are simply "industry-specific antitrust legislation" that warrant only rational basis scrutiny under "precedents governing legislative efforts to correct market failure in a market whose commodity is speech" such as in the *Associated Press*[57] and *Lorain Journal*[58] cases.[59] The Court noted that both these cases were brought under the Sherman Antitrust Act, a law of general application, and that "while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, . . . laws that single out the press, or certain elements thereof, for special treatment . . . are always subject to at least some degree of heightened First Amendment scrutiny."[60]

These holdings are sound. Indeed, it is surprising that the government urged so sweeping and bold a position that would have made the *Red Lion* standard applicable to all media, including the print press, upon a finding of market dysfunction.[61] *Red Lion* permits content regu-

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55. *Id.*

56. *Id.* at 2457–58.

57. Associated Press v. United States, 326 U.S. 1 (1945).

58. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

59. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994).

60. *Id.* at 2458.

61. The term "market dysfunction" is rather vague and is determined within the context of particular fact situations. The cable television market is clearly dysfunctional because cable is the way into the home for over 60% of the television audience, and as a monopoly gatekeeper cable has the power to disconnect the broadcast station from a large portion of its potential audience. *See Turner*, 114 S. Ct. at 2454.

Newspapers can also enjoy monopoly positions. The government would presumably argue that there is no market dysfunction in print, however, because a monopoly newspaper is not a gatekeeper preventing other print outlets from reaching the public. There is always the possibility of competing newspapers, leaflets, flyers, magazines and other print outlets, as well as the electronic media.

The same thing is true, however, in radio broadcasting. For example, there are over 60 stations in the Chicago area, and in all broadcast markets there is not only the possibility of radio cassettes being distributed, but also the availability of other electronic media and the print media.

lation such as the fairness doctrine, access for candidates, and specifically designed educational programming merely upon the basis that such regulation is reasonably related to a legitimate public interest.[62] If there is a market dysfunction in some speech sector, however, then structural, non-content relief which avoids the First Amendment concerns raised by content regulation is generally preferable. If content regulation is needed, surely it is sound that there be heightened scrutiny for such intrusion into the editorial process, not merely the reasonably related or rational basis approach of *Red Lion*.

The same analysis applies to the argument based on cable's governmentally preferred position and franchising. Even assuming, as some lower courts have,[63] that cable's close involvement with the government and the regulated television industry is a pertinent distinguishing factor from print which bears on the government's ability to regulate cable, it does not follow that the *Red Lion* standard is applicable and that the government, under a rational basis approach, can regulate cable content as to fairness or children's programming. Cable is a multichannel video delivery system, with greatly expanding capacity. Clearly, there can be structural relief, such as access provisions, to deal with cable's monopoly gatekeeper role in today's environment. Here again, governmental regulation should meet some degree of heightened First Amendment scrutiny rather than simply a rational basis standard.

III. TURNER: THE MAJORITY REWRITES THE STATUTE

The critical issue thus became what degree of heightened scrutiny, *Tornillo's* strict scrutiny or *O'Brien's* intermediate scrutiny, the Court would apply when evaluating the must-carry provisions. This depended on whether the Court determined that the regulations were content-based or content-neutral.

It would have been easy for Congress to craft a content-neutral must-carry provision. As the Court found in *Turner*, "[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television program-

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The fact is that Tornillo was attacked in a powerful, monopoly newspaper, and the most effective reply was in that newspaper. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249 (1974). The reason for the different treatment must lie in the government licensing scheme.

62. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967).

63. *See* cases cited *supra* note 5.

ming that is channeled into the subscriber's home."[64] The Court further noted that cable operators have an economic incentive to not carry all local signals and that the financial health of signals not carried can be greatly threatened.[65] Thus, there is a substantial governmental interest in insuring the continued availability of these over-the-air signals, especially for the forty percent of American homes without cable.[66] The must-carry provisions, therefore, are justified without reference to content "by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[67]

While the must-carry provisions in the Cable Act do not suppress or favor any viewpoint, there are statutory findings in the Act which raise a most serious issue—namely, whether the government favored the carriage of local broadcast signals, and the possible dropping of cable networks, because of the *content* of those signals. Statutory findings in the Cable Act are explicit in recognizing the "benefit" in local origination of programming. They state that local broadcasters are "an important source of local news and public affairs programming and other local broadcasting services critical to an informed electorate."[68] The statutory findings further state that "[p]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the government's compelling interest in educating its citizens."[69] Finally, there is an entire section, section 5, which bestows

64. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994).

65. *Id*. at 2461.

66. *Id*.

67. *Id*. at 2468. The author, joined by several other disinterested persons, strongly urged Congress to adopt a content-neutral approach of "may carry, must-carry all." Letter from Henry Geller, Communications Fellow, the Markle Foundation, to John D. Dingell, Then Chairman, House Energy and Commerce Committee and Edward J. Markey, Then Chairman, House Energy and Commerce Telecommunications and Finance Subcommittee, 1–2 (March 17, 1992)(on file with the author). Cable has long urged that in its carriage of local signals it is simply acting as a master antenna for the community. *See Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546, Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 940–42 (1991)(statement of Amos B. Hostetter, Jr., Chairman, Continental Cablevision, Inc.). But a master antenna, with such great penetration (60% of all TV households), acts in an anti-competitive and destructive fashion when it carries most local signals and drops a few weak ultra high frequency (UHF) independents or noncommercial stations. These weak stations are severely threatened because a cable subscriber is unlikely to use either an A/B switch (an input/output switch that permits off-air reception) or maintain an antenna to receive them. The proposal thus gave cable an option: leave over-the-air broadcasting alone so viewers would maintain switches and antennas or carry all such signals. Cable operators would most likely select the latter since over-the-air signals are the most popular. This scheme is truly content-neutral, and would readily pass muster under *O'Brien*.

68. 47 U.S.C. § 521(a)(11) (Supp. IV 1992).

69. 47 U.S.C. § 521(a)(8)(A) (Supp. IV 1992).

special benefits on noncommercial educational television, including the requirement that cable operators import a distant noncommercial educational television station if none is available locally.[70]

That localism is an important and driving force behind the Cable Act is further shown by provisions which permit the FCC to require carriage of a low-power station if it determines that the station's programming would address inadequately served "local news and informational needs."[71] The FCC is also allowed to require carriage of an otherwise ineligible station if the station provides coverage of news or sports or other events of interest to the community.[72]

The minority in *Turner* relied upon these provisions to find that Congress had preferred local broadcasters over cable programmers in significant part because of the educational and local content of the broadcasters' programming.[73] The minority determined that the must-carry provisions come within the strict scrutiny test.[74] The minority then found that the must-carry provisions meet a legitimate, but not a compelling, government interest and, therefore, would not survive strict scrutiny analysis.[75]

The majority opinion sloughed aside the above provisions as being nothing more than a recognition that broadcast signals have "some intrinsic value."[76] The majority found that the "overriding objective" of the must-carry provisions is "not to favor programming of a particular subject matter [read educational] . . . or format [read local], but rather to preserve access to free television programming for the 40 percent of Americans without cable."[77] Consequently, the majority found the must-carry provisions to be content-neutral and that *O'Brien* intermediate scrutiny was the applicable standard of review.[78]

In so finding, the majority simply reads the above provisions out of the Cable Act.[79] It is certainly correct that Congress was concerned with

70. 47 U.S.C. § 535(b)(2)(B)(i) (Supp. IV 1992).

71. 47 U.S.C. § 534(h)(2)(B) (Supp. IV 1992).

72. 47 U.S.C. § 534(h)(1)(C)(ii) (Supp. IV 1992).

73. *See* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478–79 (1994) (O'Connor, J., dissenting).

74. *Id*. at 2478.

75. *Id*. at 2478–79.

76. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2462 (1994). The majority does recognize that the provisions as to low-power and otherwise ineligible stations in 47 U.S.C. § 534(h)(1)(C) do pose a content problem and leaves the determination concerning their validity to the district court upon remand—a rather clear invitation to the district court to invalidate the provisions. *Turner*, 114 S. Ct. at 2460 n.6.

77. *Id.* at 2461.

78. *Id.* at 2469.

79. The majority is unpersuasive in its effort to respond to the argument that "the must-carry rules are content-based because the preference for broadcast stations 'automatically

preserving access for the forty percent of households without cable, but the minority was right when it stated that the Congressional findings and scheme make clear that a substantial purpose of the must-carry provisions was also to preserve the availability of local and noncommercial educational programming. As a consequence, Congress was making a content-driven determination to favor local broadcast signals and noncommercial educational stations over cable programmers, since cable systems with limited capacity will likely have to drop cable programmers in order to meet their must-carry obligations.

The majority probably acted in this fashion for pragmatic reasons. The findings and scheme in section 5, which grant a preference for noncommercial educational stations, are unnecessary. Congress could have simply adopted a content-neutral approach focused on preserving the availability of local signals for the cable and non-cable audiences in order to counterbalance cable's monopoly bottleneck position. It could have adopted the "may carry, must-carry all" approach[80] which would lead to the same results as the must-carry provisions but in a wholly content-neutral fashion. The majority could have noted that these alternatives were open to Congress, and acknowledged that the must-carry provisions are indeed content-based regulations. Instead, it simply chose the pragmatic route of essentially re-writing, or, more aptly, discarding parts of, the Act thereby avoiding a fourth round on the must-carry controversy.[81] In practical effect, the government won under its market dysfunction argument but under *O'Brien* intermediate scrutiny rather than a rational antitrust test or the *Red Lion* standard.

After finding that the must-carry provisions are content-neutral, the majority proceeded to analyze the case under *O'Brien* intermediate scrutiny analysis. The Court found that the must-carry provisions meet important governmental interests of "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread

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entails content requirements.'" *Turner*, 114 S. Ct. at 2462 (quoting Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 58 (1993)). Contrary to the majority's holding, the FCC's oversight authority does grant it the power to require particular types of programming such as children's educational programming, broadcasts by federal candidates for public office, and community-issue oriented programming. *See* 47 U.S.C. § 303 (Supp. IV 1992). Furthermore, it is unrealistic for the majority to hold that licensees operating on special channels reserved for noncommercial educational stations are not required significantly to serve educational needs. *See* Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 77–78, 80 (1994).

80. *See* Geller, *supra* note 67.

81. *See* Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[82] The majority then proceeded to determine whether the must-carry provisions were narrowly tailored to meet these governmental interests. This turned on resolution of two questions: whether the government had demonstrated that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry" and whether the must-carry provisions burden "substantially more speech than is necessary to further the government's legitimate interests."[83]

The majority found that on the record before the Court, even according "substantial deference to the predictive judgments of Congress," there was a need for additional fact finding on these issues and remanded to the district court.[84] The majority indicated that even if it accepted the validity of an FCC study which showed that in 1988, at a time when no must-carry provisions were in effect, about twenty percent of cable systems dropped or refused to carry one or more local broadcast stations on at least one occasion,[85] a factual issue remained because there was an inadequate showing on the record that broadcasters who would be dropped or repositioned in the absence of must-carry "would suffer financial difficulties as a result."[86] Similarly, there was a void in the record "concerning the actual effects of must-carry on the speech of cable operators and cable programmers . . . ."[87]

The minority opinion is somewhat stronger on this score, finding that the must-carry provisions "restrict too much speech" and that the only sound remedy is to "[p]rotect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event."[88]

Both the majority and, ultimately, the minority opinions, however, are mistaken on this score. The concurring opinion of Justice Stevens, which relies on the interplay between the retransmission consent provision of section 6 of the Act[89] and the must-carry provisions of section 4 and section 5, is the sound approach.[90] Without section 6, there is a

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

83. *Id.* at 2470; Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

84. *Turner*, 114 S. Ct. at 2472.

85. *See* POLICY AND RULES DIVISION MASS MEDIA BUREAU, CABLE SYSTEM BROADCAST SIGNAL CARRIAGE SURVEY, S. Rep. No. 92, 102d Cong., 2d Sess. 42–43 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175–76.

86. *Turner*, 114 S. Ct. at 2472.

87. *Id*.

88. *Id*. at 2479–80 (O'Connor, J., dissenting).

89. 47 U.S.C. § 325(b) (Supp. IV 1992).

90. *Turner*, 114 S. Ct. at 2474.

strong argument that the must-carry provisions are overbroad. It is undisputed that, even in the absence of must-carry, cable operators will carry popular over-the-air signals, including strong noncommercial educational signals, precisely because they are the most watched programming.[91] Even if cable operators fail to voluntarily carry popular over-the-air signals, there is a factual question whether these popular stations would be so injured economically as to impair their ability to operate successfully.[92] The problem area concerns the less popular stations such as the UHF independents or noncommercial educational stations. The must-carry provisions do not focus on the need to carry such stations, and indeed, give the cable operator discretion as to what stations to carry on the one-third of its channel capacity which must be devoted to local commercial programming. It follows that absent the retransmission consent provision of section 6, the governmental scheme would not be narrowly tailored to the purpose it is designed to meet.

The retransmission consent measure in section 6 saves the day. Under section 6, a commercial TV station can choose must-carry or instead, can seek compensation for allowing the cable operator to continue carrying cable programming.[93] This scheme has been effective, with a large majority of stations opting for retransmission consent be-

91. While cable's prime time ratings have recently increased, over-the-air signals still garner a majority of the viewing audience. *See Basic Cable Scores Big in Feb. Sweeps*, ADVERTISING AGE, Mar. 6, 1995 at 2. For business reasons, therefore, cable must seek to deliver such signals to its subscribers. This is true even more so today because cable faces the competition of direct broadcast satellite (DBS) and distinguishes itself from DBS on the ground that it does deliver local signals. If cable failed to do so, subscribers would retain antennas and an A/B switch in order to have access to over-the-air programming. Such retention is undesirable from the viewpoint of the cable operator because it facilitates "churn," i.e., subscribers deciding to leave the system.

92. Both the stations and the cable system would be adversely affected. The extent of the impact, however, is unclear and would likely vary from case to case. The dissent is wrong in pegging the inquiry to bankruptcy because broadcasters can suffer substantial adverse affects before going bankrupt. In contrast to the dissent's narrowly focused inquiry, the majority offers a broad-ranging economic inquiry on this issue. *Compare Turner*, 114 S. Ct. at 2472 *with Turner*, 114 S. Ct. at 2480 (O'Connor, J., dissenting).

93. See S. Rep. No. 92, 102d Cong., 2nd Sess., 35–36 (1992) *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168–69. Retransmission consent is not available, however, to noncommercial stations. 47 U.S.C. § 325(b)(2)(A)(Supp. IV 1992). These stations operate outside of market forces and there is a compelling interest in having their educational, cultural, and informational programming widely available through must-carry.

cause of their popularity.[94] Weaker UHF independent stations, on the other hand, generally utilize must-carry.[95]

It might still be argued that there is a need for a remand to determine to what extent these weaker stations are adversely affected if not carried by cable. But it seems not only rational but indeed common sense that a weak UHF station, such as Channel 50 in Washington, D.C., if cut off from over half of its audience, would suffer grievous harm. Even if it were not driven off the air, it would operate under a crippling handicap. If the above analysis is correct, the Supreme Court is calling upon the district court to review Congressional findings that are, as a practical matter, sound. If ever there were a case for substantial deference to the predictive economic judgments of Congress, this is it. In short, other than the opinion of Justice Stevens, the treatment of this issue by the Court simply ignores reality.[96]

IV. MUST-CARRY UNDER STRICT SCRUTINY

Analysis of *Turner* should not end with the above *O'Brien* discussion, but should also consider the must-carry provisions under strict scrutiny analysis. It is important to focus on the issue because there are a number of pending cases where the regulation in question is clearly not content-neutral and, therefore, will be subject to strict scrutiny analysis. Is the strict scrutiny test so lethal to the government's position that it nearly automatically results in a finding of unconstitutionality?[97]

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94. A survey conducted by the National Association of Broadcasters found that more than 80% of all commercial stations seek retransmission consent. *See* Brief for Intervenor-Appellees, Consumer Federation of America et. al., at 33 n.31, Turner Broadcasting Sys., Inc. v. FCC 114 S. Ct. 2445 (1994)(No. 93-44)(citations omitted).

95. The above National Association of Broadcasters survey found that 90% of network affiliates used retransmission consent while only 20% of independent stations took the consent route. *Id.* at 33 n.32 (citations omitted). It is puzzling that only Justice Stevens took this important pragmatic pattern into account. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2474 (1994)(Stevens J., concurring). It may stem from the government's failure to advance the point.

96. It is puzzling why the Court requires the district court on remand to ascertain the number of cable programmers that will be dropped in the event of must-carry. *Turner*, 114 S. Ct. at 2472. If the must-carry provisions are narrowly tailored to meet a substantial government interest, that should be the end of the matter under *O'Brien* intermediate-scrutiny analysis. This is so even if the provisions have the incidental effect of causing some number of cable programmers to be dropped.

97. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (holding that content-based regulations "presumptively violate the First Amendment"). This is certainly sound as to regulation that differentiates on the basis of viewpoint and, therefore, falls "in the category of speech regulation that government must avoid most assiduously." *Turner*, 114 S. Ct. at 2481 (Ginsburg, J., dissenting)(quoting R.A.V. v. St. Paul, 112 S. Ct. 2538,

The *Turner* majority certainly acted as if that were the case, since it strained so hard to find that Congressional findings, clearly directed to content (localism and educational fare), were irrelevant to the determination of whether the must-carry provisions are content-based or content-neutral. But what if the majority had found that the must-carry provisions did involve content and, therefore, came under strict scrutiny analysis? Are the provisions narrowly tailored to a compelling government interest?

It seems likely that Section 4, must-carry for local commercial television, would be unconstitutional. As indicated above, this provision is essentially directed to carriage of weaker independent stations. These stations produce little news and information regarding public affairs. Most operate in a similar fashion to the UHF stations which carry home shopping[98] as they primarily carry entertainment or infomercials, with short segments of public service information.[99] It cannot be seriously argued that there is a compelling state interest in ensuring the carriage of such stations, rather than cable programmers.[100]

The provisions of section 5, which require the carriage of noncommercial educational stations, however, stand on an entirely different footing. These provisions are directed at the most compelling interest of the government—the education of its citizens. Children watch an inordinate amount of television. There should be programming that not only entertains but educates and informs this critical audience. By far the major source of such programming is the noncommercial educational station. Congress has long supported educational television for this purpose.[101] Congress has determined that "[p]ublic television provides educational and informational programming to the Nation's citizens,

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2568 (1992)). But, as indicated below, such a mechanistic approach should not be applied in determining the constitutionality of regulation like section 5 of the Cable Act.

98. *See* Home Shopping Station Issues, 8 F.C.C.R. 5321 (1993) (report and order).

99. In my view, the public trustee regulatory scheme has been a complete failure, and does not at all insure adequate public service. *See* Henry Geller, *Broadcasting*, *in* NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY 125 (Paula R. Newberg ed., 1989).

100. It may be argued that there is no compelling state interest even if access were provided on a content-neutral basis which did not discriminate based on localism. But the major difference is that content-neutral regulation is directed to competitive or antitrust considerations. Such regulation may reflect poor policy judgement, but those judgements are for Congress, not the courts, to make. The "may carry, must-carry all" approach is a reasonable means to promote pro-competitive policy and would spur cable systems that seek to be master antennas (as they must do as a practical matter) to expand channel capacity so that they do not act in an anti-competitive fashion.

101. For a full discussion of the compelling state interest served by the noncommercial educational system, *see* Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 76, 84–85 (1994).

thereby advancing the government's *compelling* interest in educating its citizens" (emphasis supplied).[102] While the Court cannot abdicate its responsibility to review the matter, surely a Congressional judgment of compelling state interest in insuring that over half of the TV households throughout the United States are not cut off from reception of this vital educational material is entitled to some reasonable degree of deference.[103]

Because the majority sloughed aside the content nature of the section 5 regulations, it did not confront the issue of whether these regulations meet a compelling state interest. The minority did discuss the issue, however, but its reasoning is flawed. The minority opinion does note that the government's interest in promoting educational programming seems "somewhat weightier" than its interest in promoting localism, but then finds it a "difficult question" whether that interest can justify restricting other speech.[104] The minority opinion points out that the Court has never held that the government could impose educational content requirements on newsstands, bookstores, or movie theaters.[105] That statement, however, simply ignores the crucial consideration that cable is a monopoly gatekeeper with the ability to cut off access to vital educational programming in sixty percent of TV households.[106]

The minority also asserted that the must-carry provisions are not narrowly tailored because in order to benefit educational broadcasters, the provisions burden educational cable channels "with as much claim as PBS to being educational . . . ."[107] The government's compelling interest, however, is that educational programming of noncommercial stations gain access to the large cable audience. To go beyond that and decree what cable programming can or cannot be dropped in order to accommodate that purpose would truly interfere with cable operators'

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102. *See* Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 10 (D.D.C. 1993), *vacated*, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).

103. *Cf.* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–60 (1990)(because "state-conferred corporate structure . . . facilitates the amassing of large treasuries," the state has a *compelling* interest in ensuring that corporations do not use their resources to obtain "an unfair advantage in the political marketplace")(emphasis added). *Austin* illustrates that content-based regulation is not necessarily invalid where a compelling state interest can be shown.

104. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478 (1994) (O'Connor J., dissenting).

105. *Id.*

106. A 1988 FCC survey found that in the period between 1985–1988, 153 noncommercial TV stations were dropped or denied carriage 463 times by 347 cable systems. *See* POLICY AND RULES DIVISION MASS MEDIA BUREAU, CABLE SYSTEM BROADCAST SIGNAL CARRIAGE SURVEY, S. Rep. No. 92, 102d Cong., 2d Sess. 42–43(1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175–76.

107. *Turner*, 114 S. Ct. at 2479.

editorial autonomy, and might well pull the government into a First Amendment quagmire of defining what constitutes worthy cable educational programming.

Finally, the minority opinion holds that since the must-carry rules are content-based, they are "an impermissible restraint on the cable operators' editorial discretion . . . ."[108] Of course the rules interfere with cable's editorial autonomy. The issue is whether there is a compelling state interest that warrants such interference. The minority opinion here simply abandons the First Amendment analysis in which it purports to engage.[109]

It may be that the minority's mishandling of the strict scrutiny issue in the noncommercial educational field is due to the government's failure to argue the point.[110] If that is the case, it is unfortunate. For it leaves four Justices holding that since content regulation is involved, strict scrutiny will be applicable with lethal results in even the strongest governmental area of interest, a powerful education interest seriously threatened if cable undermines its access to audiences, and five other Justices straining very hard to avoid strict scrutiny probably because of the resulting need to invalidate the must-carry regulations. This does not augur well for other content regulations in the cable arena.

Cases in which the constitutionality of such regulations is challenged are sure to come before the Court in the near future. For example, review is currently being sought to challenge the trial court's determination in the *Daniels Cablevision*[111] case that the public access, educational, and governmental channels ("PEG") and the commercial leased channel requirements of the Act[112] are constitutional on the grounds that "affording speakers with lesser market access to the nation's most pervasive video distribution technology" serves a substantial governmental interest and thus meets the intermediate test of *O'Brien*.[113] The commercial leased channel requirements are clearly content-neutral

108. *Turner*, 114 S. Ct. at 2479 (O'Connor, J., dissenting).

109. *Id.* at 2478.

110. The government may have determined that it was very difficult to argue that the must-carry provisions in the commercial arena met a compelling state interest and, therefore, decided that it did not want to defend only part of the must-carry scheme under strict scrutiny analysis.

111. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), *vacated*, Turner Broadcasting Sys., Inc. v. FCC 114 S. Ct. 2445 (1994).

112. *See* 47 U.S.C. §§ 531, 532 (Supp. IV 1992).

113. Daniels Cablevision, 835 F. Supp. at 6. For other cases upholding the PEG requirements under *O'Brien*, *see* Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 411–12 (S.D. Fla. 1991); Erie Telecommunications v. City of Erie, 659 F. Supp. 580, 599–601 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988); *but see* Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, *appeal dismissed*, 484 U.S. 1053 (1988); Group W Cable v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987).

and thus would be sustained under *O'Brien*. Public access channels are really noncommercial, open channels, and regulation of them would also likely fit comfortably under *O'Brien*. The educational access channel and the government access channel (a local C-SPAN) requirements, however, implicate content regulation. If the government set aside a reasonable number of such channels, and adequately funded them,[114] it could cogently argue that these regulations meet a compelling state interest in both the educational and local public affairs area.[115] Whether the government would succeed in the face of *Turner*, however, is uncertain.[116]

This issue will keep arising until there is a definitive ruling by the Court. Thus, on December 27, 1994, Children's Television Workshop (CTW) filed a petition with the FCC, requesting that it amend its so-called "going forward" rules[117] to allow cable operators to increase an agency-prescribed cap by twenty cents per month per subscriber for operators that add a channel programmed by "quality educational or minority programming sources."[118] CTW is exploring the possibility of launching an all-day, advertiser-supported cable channel dedicated to children's educational programming, and believes that without the rule change, its effort will not be feasible.[119] Clearly, we are again in the content area and under strict scrutiny to determine whether there is a compelling governmental interest. The FCC should be allowed to act affirmatively, in light of the strong educational interest, the absence of any adverse effect on other cable programmers, and the voluntary nature of the regulation which precludes interference with cable's editorial autonomy.

In sum, the problem with *Turner* is the majority's strained effort to avoid the strict scrutiny test by jamming the must-carry provisions of sections 4 and 5 of the Cable Act into the content-neutral category even

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114. *See* 47 U.S.C. § 544(b)(1)(Supp. IV 1992).

115. *See* Preferred Communications, Inc. v. City of Los Angeles, 476 U.S. 488 (1986), *cert. denied*, 114 S. Ct. 2738 (1994).

116. The same strict scrutiny issue would arise in the case of a franchise provision requiring a cable operator to offer a specified amount of programming developed "specifically for the [franchise] community." *See* Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1543 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). Section 624(b)(2)(B)of the Cable Act, which permits franchising authorities to enforce franchise requirements "for broad categories of video programming or other services," would also appear to be unconstitutional under strict scrutiny analysis. *See* 47 U.S.C. § 544(b)(2)(B) (Supp. IV 1992). In a universe of multichannel delivery systems and expanding cable programming, there is no compelling need for this interference with editorial autonomy.

117. 47 C.F.R. § 76.922(e) (1994).

118. Petition of Children's Television Workshop at 5, Commission's Sixth Order on Reconsideration and Fifth Report and Order, 59 Fed. Reg. 62614.

119. *Id*. at 11–12.

though, particularly in regard to section 5's provisions relating to carriage of noncommercial educational stations, there is clearly no fit. The opinion is further plagued by the minority's slipshod and flawed analysis of the strict scrutiny test as applied to the educational area. While this does not bode well for sound constitutional application to future cable regulation, there is still hope that a new majority on the Court will arise to save the day.

Such action would not require any new test or major revision of First Amendment jurisprudence. The present formulation is sound: The government must show that a content-based regulation is narrowly tailored to meet a compelling state interest, and the Court will apply strict scrutiny to that showing. Where the regulation differentiates on the basis of viewpoint, strict scrutiny will almost always result in a finding of unconstitutionality. But where the government is seeking to promote content in an area like education, and has a very strong reason for doing so (as in cable where the audience can be cut off from receipt of the educational fare because of a monopoly gatekeeper), the Court must not repeat the mechanistic approach that it employed in *Turner*. Rather, the Court should afford its co-equal branch, Congress, a reasonable amount of deference when Congress finds that a compelling interest is at stake. The Court should not assume the role of a super-legislature as it did in *Turner*.

V. IMPLICATIONS OF TURNER FOR THE INFORMATION SUPERHIGHWAY

While *Turner* raises potentially serious short-term problems, as noted above, in the long run its governing constitutional standards for the so-called Information Superhighway,[120] or National Information Infrastructure (NII), appear to be sound.

Before developing this proposition, some brief comment on the continuing constitutional viability of *Red Lion* for the broadcast public

120. The term "Information Superhighway" is misleading. In reality, the "Superhighway" is a network of networks, with very powerful processing capabilities. In the field of video technology, for example, there are VCRs and discs, over-the-air TV, cable television, telcos, Direct Broadcast Satellite (DBS), wireless cable, and computer delivery systems. As Moore's Law continues to operate (the number of transistors on a chip doubling every 18 months), the computer will become a dominant means of receiving all information, including video. NICHOLOAS NEGROPONTE, BEING DIGITAL, 37–57 (1995). Television, which is now multichannel, will become interactive and customized. *See* Robert Pepper, *Broadcasting Policies in a Multichannel Marketplace*, *in* TELEVISION FOR THE 21ST CENTURY: THE NEXT WAVE 120 (Charles M. Firestone ed., 1993). It seems clear that previously separate industries are converging, creating an abundance of delivery systems and associated equipment with very large digital capacity. *See* INSTITUTE FOR INFORMATION STUDIES, CROSSROADS ON THE INFORMATION HIGHWAY (1995).

trustee scheme in the light of *Turner* is in order. *Turner* is unanimous in leaving *Red Lion* isolated and standing alone.[121] It is unlikely that *Red Lion* will be overturned in this decade.

First, the argument has been made that there is no longer any scarcity and, therefore, the foundation of the *Red Lion* rationale has been undercut.[122] But the broadcast scheme is based on allocational scarcity, which is defined, not by the number of outlets or comparisons with other media, but by comparing the number of requests for broadcast frequencies with the number of frequencies available. Indisputably, the same scarcity exists today as existed when the scheme was first developed.[123] *Red Lion* was decided at a time when there were roughly 7000 radio stations;[124] today there are about 11,500.[125] One cannot seriously argue that the public trustee scheme is constitutional at 7000 but not at 11,500.

Second, it is difficult to see how the constitutional issue would be presented to the courts. The broadcasters have no interest in doing so; they like being called public trustees because it enables them to fend off efforts to impose a spectrum usage fee and to operate under little regulatory burden.[126] Furthermore, the Court in this decade has continued to rely heavily on the public trustee concept in determining the constitutionality of broadcast regulation.[127] It may be that the Court, recognizing that sweeping change is coming in light of technological and market developments,[128] is simply waiting for Congress to do what it must do eventually—end the isolated content treatment of broadcasting.

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121. The majority opinion contains no ringing endorsement of the soundness of *Red Lion* and notes that the scarcity rationale has been criticized "since its inception." Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456–57 (1994).

122. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 376–77 n.11 (1984).

123. In large markets, where most people live, no frequencies are open. An open frequency or channel in such a market would attract a multitude of applicants. *See* S. Rep. No. 34, 100th Cong., 1st Sess., 21–23 (1987).

124. *See* S. Rep. No. 34 100th Cong., 1st Sess., 23 (1994).

125. *See* Revision of Radio Rules and Policies, 7 F.C.C.R. 6387 (1992)(memorandum opinion and order and further notice of proposed rule making).

126. *See* HENRY GELLER, THE ANNENBERG WASHINGTON PROGRAM, 1995–2005: REGULATORY REFORM FOR THE PRINCIPLE ELECTRONIC MEDIA, 12–17 (1994); Kim McAvoy, *Dingell May Be Out to Derail Onerous Spectrum Tax,* BROADCASTING AND CABLE MAGAZINE, June 13, 1994, at 42–43.

127. *See* Metro Broadcasting Inc. v. FCC 497 U.S. 547, 566 (1990)(upholding minority ownership preference provisions adopted by the FCC).

128. These changes will also occur in the broadcast television industry, as it moves to digital transmission (called Advanced Television Service). This technology enables TV sets to receive either high definitional TV, or six or seven channels, on a single TV (6 Mhz) allocation. *See* Ken Auletta, *Selling the Air,* THE NEW YORKER MAGAZINE, Feb. 13, 1995, at 36. In the digital era, since "bits are bits," eventually it will not be possible to distinguish between broadcasting and other forms of electronic publishing.

In sum, *Red Lion* should have continued impact only in the broadcast area. That impact is bound to diminish and eventually end as broadcasting enters the digital era and becomes indistinguishable from other forms of electronic publishing.[129] At that point, broadcasting will come fully under traditional First Amendment jurisprudence.

So far as Direct Broadcast Satellite ("DBS") and other microwave video distribution services[130] are concerned, they do not come within broadcast regulation under the FCC's current regulatory regime if they are carried out, as they invariably are, on a subscription video basis.[131] When the services are carried out on such a basis, they are conducted on a contractual, pay relationship, with the subscriber needing a special encoder to receive the encrypted transmission.[132]

Even as a non-broadcast entity, however, DBS and the other microwave carriers can nevertheless be required to present public service material. Section 25 of the Cable Act[133] provides that as a condition to authorization or renewal of any DBS license, the DBS provider must allocate four to seven percent of its channel capacity to "noncommercial programming of an educational nature."[134] The district court in *Daniels Cablevision* found this provision unconstitutional because there was no evidence in the record to show that it is needed to serve a "significant regulatory or market-balancing test."[135] The district court's decision was sound since section 25 is a content-based regulation and, therefore, in order to be constitutional it must serve a compelling state interest. Other than some vague purpose such as reserving capacity for possible future educational growth on a possibly important transmission means, there appears to be no practical reason for the regulation. The real problem is

129. *Id.*

130. In addition to cable, DBS, and the telco video delivery system, such services include multichannel multipoint distribution service (MMDS), operational fixed service (OFS), instructional fixed television (IFTV), and local multichannel distribution service (LMDS).

131. *See* Subscription Video, 2 F.C.C.R. 1001 (1987)(report and order), *aff'd*, Nat'l Ass'n For Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

132. The DBS or other microwave entities can elect to operate as broadcasters (if they intend to serve the public generally), common carriers (if they intend to serve all applicants indifferently and on a non-content-oriented basis), or as private radio non-broadcasters. *Id*. They generally opt for the last.

133. 47 U.S.C. § 335 (1992).

134. *Id.* at § 335(b)(1).

135. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 8 (D.D.C. 1993), *vacated*, Turner Broadcasting Sys., Inc. v. FCC 114 S. Ct. 2445 (1994). DBS operators did not challenge the provision. Cable programmers, who also sell to DBS, did challenge the provisions and were found to have standing. *Id*. There is no evidence that the provision will have any impact on the ability of DBS to carry any programmer. The provision is a speculative future reservation.

not access for distribution of educational programming on DBS, but rather the production of such educational material.[136]

In the 103d Congress, the Senate telecommunications reform bill, S.1822,[137] contained a section which required telecommunications networks to reserve, for public uses, up to five percent of their capacity for the delivery of information services.[138] These services were to be provided at incremental cost to schools, libraries, public broadcasting entities, and non-profit organizations that provide public access to non-commercial educational, informational, cultural, civic or charitable services.[139] This reservation was required "in exchange for use of public rights-of-way," which included the radio spectrum.[140] The Senate Report stated that the reservation was a content-neutral regulation permissible under *Turner* and that "the First Amendment does not bar the Federal government from imposing enforceable public obligations in exchange for 'use of a limited and valuable part of the public domain.' "[141]

In fact, the regulation was not content-neutral. It explicitly sought to promote specified "categories of speech"—namely, "educational, informational, cultural, civic or charitable . . ." categories of speech.[142] In order for the regulation to be sustainable, therefore, the government would have had to have established that the regulation met a compelling state interest. The Senate Report did not identify such an interest, but merely stated that the provision "furthers a number of substantial government interests . . . ."[143] The Report's reliance on use of the public rights-of-way is similarly unpersuasive. This justification for regulation was rejected in *Turner* in regard to cable and its need to use local streets

136. Section 25 of the Cable Act also requires the FCC to impose on providers of DBS service programming the political broadcast obligations of § 312(a)(7)(reasonable access for Federal candidates) and § 315(equal opportunities and lowest unit rate for candidates). *See* Direct Broadcast Satellite Public Service Organizations, 8 F.C.C.R. 1589 (1993)(notice of proposed rulemaking). No issue was raised as to these requirements in the *Daniels Cablevision* case. Section 25 does raise serious constitutional and policy concern, however, in the application of these provisions to multichannel delivery services that can be non-broadcast in nature—for example, to a common carrier DBS service. *Id*. at ¶¶ 8–20. The FCC has not taken final action in this rule-making proceeding.

137. S. 1822, 103d Cong., 2nd Sess. (1994).

138. S. REP. NO. 367, 103d Cong., 2d Sess. 125–26 (1994).

139. *Id.* at 126–27. Cable systems were exempted from this provision because of their present access requirements. *Id.* at 127. Telcos were also exempt because they operate as common carriers and afford nondiscriminatory access. Telcos were obligated, however, to make reserve capacity available at incremental cost based rates. *Id.* at 39, 126.

140. *Id.* at 125–27.

141. S. Rep. No. 367, 103d Cong., 2d Sess., 41–42 (1994)(citing CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)).

142. *Id*. at 42.

143. *Id*.

or ducts.[144] Even as to spectrum, the public trustee notion which drove the *Red Lion* and *CBS* decisions is limited to the broadcast medium. As noted above, the operations here—DBS, MMDS, IFTV, OFS, and LMDS—are, under FCC policy and rules, non-broadcast in nature. It would appear that the thrust of *Turner* is not fully appreciated by some members of Congress.

In the new (104th) Congress, the above issue will likely not arise because of Republican opposition. Commerce Committee Chairman Larry Pressler's Discussion Draft[145] of the Telecommunications Competition and Deregulation Act of 1995[146] omits the five percent set aside of the prior Senate proposal. Senator Ernest F. Hollings, in issuing the Democratic response, has acquiesced in that omission.[147] The Chairman's Draft raises no new First Amendment issues and alleviates two issues now pending in the courts since it permits the telcos to deliver video programming and significantly diminishes rate regulation of cable.[148] It affords the telcos the option of delivering video either as common carriers or as cable operators. If a telco opts for the latter, it will be required to obtain a cable franchise and will be regulated as a cable operator.[149] This is unfortunate, because it would be better policy to require common carriage operation thereby insuring open access to all comers.

The Hollings Draft, in contrast, has strong First Amendment goals.[150] It calls for universal service at incremental cost to schools, libraries, local public broadcast stations, and similar entities.[151] However, the draft does raise a First Amendment issue in one respect. Section 208(D) provides that local broadcast stations are to have access to the telco's video platform at incremental-cost rates and are entitled to access on the platform's first tier of programming.[152] Once again, this provision reflects mere favoritism for the broadcasters because of their

144. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456–58 (1994).

145. Senator Larry Pressler, *Discussion Draft*, WASHINGTON TELECOM WEEK, March 24, 1995 (special report)(discussion draft of Senate Bill 652).

146. S. 652, 104th Cong., 1st Sess. (1995).

147. Senator Ernest F. Hollings, Staff Working Draft, (February 14, 1995)(unpublished manuscript, on file with the *Michigan Telecommunications and Technology Law Review*)(staff working draft of Senate Bill 652).

148. Pressler, *supra* note 145, at S-23, S-24.

149. *See* Pressler, *supra* note 145, at S-23. The Hollings Draft affords a similar choice. *See* Hollings, *supra* note 147, § 208(a).

150. *See* Hollings, *supra* note 147, § 101(b)(3)("to ensure that consumers have access to diverse sources of information"); *Id*. at § 101(b)(6)("to allow each individual the opportunity to contribute to the free flow of ideas . . ."); *Id*. at § 101(b)(10)(to originate and receive voice, data, video and graphics).

151. *See* Hollings, *supra* note 147, § 201(A)(j).

152. *See* Hollings, *supra* note 147, § 208(D).

strong lobbying clout. The provision survived the negotiation process between Republican and Democratic Committee leaders and is contained in the bill currently introduced in the Senate.[153] The bill contains no Congressional findings as to why broadcast stations, including the home shopping stations, merit such preference over educational cable programming such as CNN and C-SPAN. Congress is favoring one group because of the content of its programming, more accurately its lobbying abilities, and must advance a compelling reason for doing so—a difficult hurdle in this case.

VI. CONCLUSION

In sum, I believe that *Turner* augurs well for the application of the First Amendment to the NII. First, the opinion was sound in not extending *Red Lion* to the emerging, remarkably expansive digital telecom environment. There will be an abundance of broadband delivery systems, with great and ever increasing capacity. Transmission will become a cheaper and cheaper commodity. With the inevitable digital revolution and its convergence of media ("bits are bits"), there will be no way to distinguish between the media.[154] All media will just be forms of electronic publishing.

That means that all media will come under traditional First Amendment jurisprudence, and in particular the print model of First Amendment jurisprudence. That model has traditionally served the interests of the First Amendment by promoting the widest possible dissemination of information from diverse sources. In the future it should serve to promote vast dissemination of information by means of the emerging telecommunications media. Just think today of all the magazines, news letters, pamphlets, circulars, etc. that are sent by mail or fax over electronic means. The Internet exemplifies the great potential for such electronic publishing from a huge number of sources. There will be content problems, but they will be the usual ones such as obscenity, libel, and false and misleading advertising.[155]

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153. S. 652, 104th Cong., 1st Sess. § 203 (1994). This provision would amend § 613(b) of the current Cable Act to add a new sub-section (b)(4) which provides that television broadcast stations can gain access to the video dialtone platform at "incremental-cost-based rates" and that local broadcast stations are entitled to access "on the first tier of programming on the video platform." *Id*.

154. *See* NEGROPONTE, *supra* note 120, at 54–58.

155. Senate Bill 652 also includes a provision aimed at eliminating the transmission of indecent material over telecommunications facilities. S. 652, 104th Cong., 1st Sess. § 401 (1995). This provision raises serious free speech issues and should be subjected to hearings

Second, in light of these developments, the bottleneck aspect of cable television, which understandably drove the decisional process in *Turner*, will disappear. There will in all likelihood be a pervasive bedrock common carrier operation (the telcos).[156] Cable itself may become a much more open, nondiscriminatory medium in the new mileau, particularly as it enters into large scale telecom operations with fiber optic and digital compression techniques making available hundreds of channels of programming. Indeed, with the emergence of large video servers (huge computer complexes) and video switching ability, the very notion of channels of programming may disappear; this technology makes available any amount of video programming at the choice of the subscriber. In this future of abundance, there will simply be no need for the messy and awkward *O'Brien*-type review now being conducted at the district court level.

Third, while *Turner* does indicate a flawed approach to applying the traditional First Amendment jurisprudence, namely a mechanistic rejection of finding that regulation is content-based even where it is not viewpoint directed and may well serve a compelling state interest, this may not be of great importance in the future. The problem will not be access. Rather it will be ensuring that vital governmental undertakings that involve the NII in fields like education, libraries, and health care are adequately funded. For example, in education, the issue will not be any reservation of capacity for educational programming or materials. Rather, the issues will be, for example, preparation of educational materials, testing such materials, training teachers to use the applications, and the purchase, maintenance, and upgrading of necessary equipment. All this must be done by the education sector. Telecom can help, with expertise and possibly preferential or incremental cost pricing (though even this can be poor policy if carried to an inordinate extent), but it cannot be called upon to do the job.[157] In short, policymakers must face up to the real problems in these fields of vital governmental interest, and not try to slough their responsibilities through regulatory approaches that look good but really do very little for the public interest.

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and further study in light of technological solutions that are feasible in the digital environment.

156. Telephone Co.-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5781, 5783 (1992)(second report and order, recommendation to Congress, and second further notice of proposed rulemaking), *appeal pending*, No. 92-1404, (D.C. Cir. Sept. 21, 1992).

157. *See* GELLER, *supra* note 126, at 35–36.