

Reassessing *Turner* and Litigating the Must-Carry Law Beyond a Facial Challenge

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I. INTRODUCTION

In recent decades, the must-carry rules have had a troubled constitutional history. After two sets of rules were struck down by the D.C. Circuit for violating the First Amendment rights of both cable operators and cable programmers, Congress revised the Federal Communications Commission ("FCC") rules in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").¹ In 1997, the Supreme Court determined that the must-carry law was constitutional under an intermediate scrutiny test.² The Court's decision was ultimately based on the determination that Congress relied on substantial evidence when inferring that broadcasters would be hurt without the must-carry rules. However, does the *Turner II*³ decision preclude further First Amendment challenges to the must-carry rules?

This Note argues that the answer is no and that the time is drawing near for new challenges. Because the must-carry rules were facially challenged in the *Turner* decisions, no party is precluded from challenging

1. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-77 (1992).

2. 47 U.S.C. §§ 534-35. This Note's focus is the mandatory carriage of broadcast signals by cable providers. However, many of the arguments are applicable to DBS mandatory carriage, which was legislated in 1999. *See* Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, § 1002(f)(2) (1999) (codified at 47 U.S.C. 338) [hereinafter SHIVA]. The Satellite Home Viewer Improvement Act's must-carry provisions were upheld after a facial challenge. *Satellite Brdcast. & Comm'n Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). *See infra* Part II.D.

3. *Turner Brdcast. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 214 (1997).

the rules as applied. Although subsequent challengers of the must-carry law have the burden of overcoming the deference afforded to Congress's findings, this should be possible. In many markets, the central premise to Congress's findings—cable will abuse its market power by behaving anticompetitively toward broadcasting—is no longer or increasingly less possible. After all, *Turner I*⁴ established that a harm must actually be proven, and *Turner II* merely established that Congress' findings were sufficient to withstand a facial application of First Amendment scrutiny.

This Note has four subsequent Parts. Part II will provide background on the birth of the must-carry rules. Part III will discuss the *Turner* decisions. Part IV will discuss must-carry rules today and the impact of the *Turner* decisions on future litigation. Part V concludes the Note.

II. MUST-CARRY'S PURPOSE

A. *Cable Becomes a Threat to Broadcasting*

The must-carry provisions are as old as the initial attempts to regulate cable, which began when cable was first perceived as a threat to broadcasting. Cable was first used in the 1940s as a means to facilitate broadcasting.⁵ Because broadcast waves reflect off of mountains,⁶ instead of bending around them, individuals living in mountainous areas had a difficult time receiving broadcast signals. In order to solve this problem, large antennae were placed on mountain tops, and cables were run from the head end,⁷ where the broadcast signals from an antenna were "collected," to people's homes in the surrounding communities.⁸ This was the beginning of Community Antenna Television ("CATV").⁹ Because CATV was the only means for these individuals to receive broadcast signals, broadcasters welcomed CATV for the additional viewers it provided.¹⁰

4 *Turner Brdcast. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

5. *See id.* at 627.

6. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE: THE LAW OF MASS MEDIA* 868 (4th ed. 1996). *See also* Jeremy D. Lansman, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Comments in Response to the Sixth Further Notice of Proposed Rule Making*, MM Dkt. 87-268 (1996), http://www.fcc.gov/Bureaus/Engineering_Technology/Filings/FCC96-317/comments/kyestv.txt (last visited March 10, 2008) (noting that television signals reflect off of mountains).

7. *See* CARTER ET AL., *supra* note 6.

8. *Id.*

9. *See id.* This was later simply referred to as cable television when cable systems did more than merely act as a "common carrier" for broadcast stations.

10. *Id.*

Because, on the whole, CATV was not perceived as a direct threat to broadcasting, FCC refused to regulate the cable industry in the late 1950s.¹¹

Broadcasters' and the FCC's perceptions of cable began to change in 1961 when a cable operator began to serve the San Diego area,¹² an area that broadcasters had little trouble servicing.¹³ The San Diego cable antenna picked up signals from as far as one hundred miles away, which meant that Los Angeles's content could be retransmitted to the San Diego community.¹⁴ In addition to retransmitting distant signals otherwise unobtainable by San Diego viewers, cable offered better picture clarity than over-the-air reception.¹⁵ Consequently, the three independent VHF stations in San Diego were no longer competing just against each other for viewers but also against the four Los Angeles stations. Because the increased competition to local broadcasters would fragment the audience—and therefore broadcasters' advertising revenue—cable was now an economic threat to broadcasting.¹⁶

B. FCC Attempts to Protect Local Broadcasting from Cable

*Carter Mountain Transmission Corporation*¹⁷ is often cited as the beginning of must-carry obligations.¹⁸ This was a 1962 case dealing with a CATV provider's attempt to gain permission to carry distant signals.¹⁹ The FCC denied Carter Mountain Transmission Corporation permission to recast broadcast signals until the company could show that the imported signals would not duplicate the programming of the local broadcast station.²⁰

Not long after the D.C. Circuit upheld the FCC's jurisdiction to deny the retransmission of broadcast signals,²¹ the FCC was formally petitioned by broadcasters to implement regulations on cable systems.²² Because the

11. Inquiry into the Impact of Community Antenna Systems, *Report and Order*, 26 F.C.C. 403 (1959). See also CARTER ET AL., *supra* note 6, at 871.

12. See CARTER ET AL., *supra* note 6, at 868.

13. See *id.*

14. *Id.*

15. *Id.*

16. See *id.*

17. Application of Carter Mountain Transmission Corp., *Decision*, 32 F.C.C. 459 (1962) [hereinafter Carter Mtn.], *aff'd* 321 F.2d 359, *cert. denied* 375 U.S. 951.

18. See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1440 n.11 (D.C. Cir. 1985).

19. Carter Mtn., *supra* note 17, at 459.

20. *Id.* at ¶ 17. See generally, *infra* note 22 for an example of broadcaster concerns of the time.

21. Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963).

22. In 1964, the American Broadcast Company ("ABC") formally petitioned the FCC to assert jurisdiction over all CATV stations. See Notice of Inquiry and Proposed Rule

1934 Communications Act gave the FCC the jurisdiction to regulate the air waves,²³ the FCC believed that it could regulate cable since doing so would be sufficiently ancillary to the FCC's broadcasting authority.²⁴ In addition to ensuring the survival of the present broadcast structure and UHF stations, the FCC believed that regulation of cable was important to maintain fairness to broadcasters.²⁵ After all, CATV systems were retransmitting signals that they received for free over the air. Broadcasters, on the other hand, had to pay considerable sums of money to produce and air the content in the first place.²⁶

In 1966, the FCC conducted its *Economic Inquiry Report*,²⁷ which was an analysis of the economic relationship between cable and broadcast. In the *Report*, the FCC admitted that it lacked sufficient data to predict cable's impact on broadcast.²⁸ However, the scenario described by ABC and other broadcasters—that cable may hurt the public interest by leading to the death of many broadcast stations²⁹—seemed like a growing reality.³⁰

Making, 30 Fed. Reg. 6078 (April 29, 1965). The petition requested that the FCC create broadcast zones that specify which stations serve which areas and then limit the use of broadcast programming from leaving that zone. *Id.* at ¶¶ 3, 10. ABC reasoned that if the FCC did not intervene, then some local broadcasters may go out of business or the quality of the programming that they provided to their community would diminish due to lost revenue. *Id.* at ¶ 9. The result would be that, instead of going to local broadcasting, all advertising revenue would go to the stations in large urban markets, which are retransmitted via CATV to the communities, driving the local broadcasters out of business. *Id.* at ¶ 9 n.3. ABC also argued that Ultra High Frequency (“UHF”) stations, which had naturally weaker signal strength than Very High Frequency (“VHF”) stations, covering less geographic area and placing UHF stations at a natural disadvantage in the audience they could reach, would likely go out of business without FCC regulation. The FCC summarized that ABC petition as follows: “Fundamentally at stake, according to ABC, is the question of whether CATV is to be permitted to rework the basic framework of the established broadcasting system from a multiplicity of local stations into a nationwide distribution of signals from major metropolitan centers” *Id.* at ¶ 9. Other formal and informal petitions expressed similar concerns. *Id.* at ¶ 2.

23. Communications Act of 1934, ch. 652, §§ 1, 301, 48 Stat. 1064 (1934).

24. See Amendment of Subpart L, Part 11, To Adopt Rules and Regulations To Govern the Grant of Authorizations in the Business Radio Service, *Memorandum and Order*, 1 F.C.C.2d 524 (1965) (tentatively concluding that the FCC has jurisdiction over all CATV systems whether they use point-to-point microwave transmission or not) [hereinafter *Authorization Order*]; Amendment of Subpart L, Part 91, To Adopt Rules and Regulations To Govern the Grant of Authorizations in the Business Radio Service, *Second Report and Order*, 2 F.C.C.2d 725, ¶ 19 (1966) [hereinafter *Economic Inquiry Report*]. The Supreme Court found that the regulation of cable was sufficiently ancillary to the FCC's authority in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (allowing FCC jurisdiction over cable).

25. *Economic Inquiry Report*, *supra* note 24, at ¶ 131.

26. *Id.* at ¶¶ 133-34.

27. *Id.*

28. See *id.* at ¶¶ 43-45.

29. See *Authorization Order*, *supra* note 24, at ¶ 3.

30. See *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1440 (D.C. Cir. 1985).

As a consequence, in order to ensure that broadcasters were carried by the CATV without being duplicated, the FCC asserted jurisdiction over CATV to protect broadcasters. Later, the must-carry regulations would make official the safety mechanism that ensured broadcasters would not be shutout by cable companies' bottleneck technology.³¹

C. *Objections to the Must-Carry Provisions*

The FCC's actions received criticism from cable advocates in the following decades. One critic of the FCC's actions toward cable contended that "[t]here is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology."³² In 1980, Turner Broadcasting Systems, a cable programmer that had its programming displaced by the must-carry regulations, petitioned the FCC to eliminate the regulations.³³ The petition alleged that the must-carry rules violated the First Amendment rights of cable programmers, cable operators, and the viewing public.³⁴ Although the FCC denied Turner's appeal, the FCC conceded that the must-carry rules deprived cable programmers access to some audiences and that the compelled carriage of broadcast signals displaces alternate programming for cable's subscribers.³⁵

In *Quincy Cable TV v. FCC*, the D.C. Circuit struck down the FCC's must-carry rules under the *O'Brien* test.³⁶ The rules at issue in *Quincy Cable TV* were very stringent compared to the current rules. Without any regard to a cable system's capacity, they required, *inter alia*, mandatory carriage of both all broadcast signals in the local market and all significantly viewed commercial broadcast stations.³⁷

Under the *O'Brien* test, according to the *Quincy Cable TV* court, regulations are invalid if they do not serve a substantial government interest

31. Economic Inquiry Report, *supra* note 24, at ¶ 66. *See e.g.*, Carter Mtn., *supra* note 17.

32. 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, 40 (1976).

33. *Quincy Cable TV*, 768 F.2d at 1437.

34. *Id.*

35. *Id.* at 1437-38.

36. The *O'Brien* test applies to regulations that only incidentally burden speech. Such regulations are also referred to as "content neutral."

37. *See* 47 C.F.R. §§ 76.57(a)(1), (a)(4) (1984). While the Commission insisted that the rules did not pose a burden to cable operators since cable technology allowed for almost infinite capacity, the court noted that nearly forty percent of cable systems had fewer than twenty channels, meaning that must-carry rules presented a significant burden to many cable providers. *Quincy Cable TV*, 768 F.2d at 1439 n.9.

or are more intrusive than necessary to serve that interest.³⁸ The *Quincy Cable TV* court believed that the must-carry regulations violated both parts of this test. Because the rules could not pass the *O'Brien* test, the court reasoned that there was no need to consider whether a stricter First Amendment test was necessary.³⁹

The court believed that the issue of whether there was a substantial government interest at stake was largely an empirical matter. According to the court, there were three fact-based, empirical grounds upon which the FCC rules violated the First Amendment.⁴⁰ First, because a governmental restriction of speech must be narrowly tailored to achieve its ends, data needs to exist showing that the regulated technology is in fact a threat to what the government seeks to protect.⁴¹ In the present case, the FCC needed data showing conclusive evidence that cable would inevitably pose a threat to local broadcasting, warranting regulation. Instead of this evidence, the FCC's finding that cable was *not* a threat to local broadcasting from its 1966 *Economic Inquiry Report*⁴² and subsequent *Notice of Proposed Rulemaking*⁴³ undercut the FCC's case.⁴⁴

The second empirical deficiency of the FCC's position regarded the A/B switch,⁴⁵ which would appear to be a less intrusive technology to achieve the government's objectives. The court believed that the FCC's earlier admission that the switch required little effort to install and use⁴⁶ weighed against the FCC's argued need for must-carry regulations.⁴⁷

The final empirical deficiency in the FCC's argument for must-carry was the Commission's assertion that the A/B switch was not an acceptable alternative because some consumers may subscribe to cable to eliminate their need for antennae. According to the FCC, many cable subscribers would likely not have the antennae necessary to enable the A/B switch to work properly. The *Quincy Cable TV* court believed that "[t]hat purported

38. *Quincy Cable TV*, 768 F.2d at 1444-45.

39. *Id.* at 1448.

40. *Id.*

41. *Id.*

42. Economic Inquiry Report, *supra* note 22.

43. Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, *Notice of Proposed Rulemaking*, 71 F.C.C.2d 1004, 1006 (1979).

44. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1456 (D.C. Cir. 1985).

45. An A/B switch allows a cable subscriber to use the residence's antenna to pick up the over-the-air broadcast signals. Such technology theoretically moots the need for must-carry regulations because a cable subscriber could access all of the local broadcast signals with an effort that was theoretically little more than that to change channels. *Id.* at 1441.

46. Amendment of Part 76 of the Commission's Rules and Regulations to Require Cable Television Carriage of Certain Subscription Television Signals, *Memorandum Opinion and Order*, 77 F.C.C.2d 523, ¶ 12 (1980).

47. *Quincy Cable TV*, 768 F.2d at 1455.

phenomenon is almost certainly susceptible of empirical proof.”⁴⁸ The court made it clear that the empirical deficiencies of the FCC’s must-carry rules were the basis of the First Amendment violation:

As long as [the Commission] continues to rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done.⁴⁹

The *Quincy Cable TV* court also had a theoretical ground for striking down the must-carry regulations under the *O’Brien* test. If the purpose of the must-carry regulations is to preserve “localism,” then the regulations violate the First Amendment because the regulations were “‘grossly’ overinclusive.”⁵⁰ In reaching its conclusion, the court separated localism from protection of local broadcasters. Localism—protecting the number of local voices and programming available to a community—must and should be the ultimate goal of the FCC’s action. Among other reasons, the court argued that the Commission’s role is to protect the public, not to protect licensees from new technologies and competition.⁵¹ The protection of local broadcasters at the expense of cable operators’ editorial discretion would create a preference for one class of speakers over another, which itself violates the First Amendment.⁵² The court reasoned that the rules were overinclusive because they protected every broadcaster in a certain signal range no matter how duplicative the material and no matter how little of the programming was actually local.⁵³

The significance of the *Quincy Cable TV* decision is that it hinged a substantial amount of the must-carry rules’ constitutionality on empiricism and on the legitimacy of the government interest. Empirical findings regarding the need for and the effectiveness of the must-carry rules either justified or did not justify the need for the rules altogether. In the case of *Quincy Cable TV*, the FCC bore the ultimate burden of proving the need for the rules through known facts. The FCC failed to meet that burden, let alone survive a facial attack.

As important as the legacy of empiricism, however, is *Quincy Cable TV*’s definition of the government objective: saving broadcast localism, not

48. *Id.* at 1457 n.48.

49. *Id.* at 1459.

50. *Id.* at 1460 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977)).

51. *Id.* at 1460.

52. *See id.*

53. *Id.*

local broadcasters. While this distinction seems subtle, these goals are completely different. According to the *Quincy Cable TV* court, the FCC may not legitimately attempt to save local broadcasters' jobs by protecting broadcast from cable competition.⁵⁴ However, the FCC may protect broadcast localism by ensuring that the audience has a sufficient number of voices and adequate programming. The FCC must protect audience access, not broadcasters' stations.

D. Road to the Modern Must-Carry Law: Century Communications and the Cable Television Consumer Protection and Competition Act of 1992

Under pressure from Congress,⁵⁵ the FCC revised the must-carry rules and republished them. The new rules based the number of signals that a cable operator must carry on the number of channels offered by the cable system. The new rules even would have phased out must-carry altogether after five years,⁵⁶ phasing in the A/B switch.⁵⁷

The revised must-carry rules were subsequently challenged in *Century Communications v. FCC*.⁵⁸ Not only were the must-carry rules in *Century Communications* much more lenient than the rules they replaced, but, given that they were only being implemented for five years, they were also less burdensome than the must-carry rules in effect as of this writing. At the time, however, the cable programmers and providers still perceived these rules as unduly restrictive and consequently challenged them.

1. The Case that Caused Congressional Intervention: *Century Communications v. FCC*

Regardless of the FCC's vast curtailing and scheduled phase-out of the rules, the post-*Quincy Cable TV* rules were almost immediately challenged on First Amendment grounds⁵⁹ and were deemed unconstitutional on much of the same reasoning.⁶⁰ The D.C. Circuit reapplied the *O'Brien* test, finding that the new must-carry rules equally lacked sufficient reasoning under the first prong⁶¹ and were again overbroad under the second prong.⁶²

54. *Id.* at 1455.

55. CARTER ET AL., *supra* note 6.

56. *See Century Commc'ns Corp. v. FCC*, 835 F.2d 292, 296 (D.C. Cir. 1987).

57. *See id.*

58. *Id.*

59. *Id.* at 297.

60. *See id.* at 297-99.

61. *See id.* at 300-03 (assessing whether the government's interest is substantial).

62. *See id.* at 303-04 (assessing whether the government's means are congruent to its desired ends).

The FCC again did not present sufficient empirical evidence to prove that the must-carry rules were necessary to meet a governmental interest. In claiming that the must-carry rules were necessary for the five-year transition period to the A/B switch, the court believed the FCC based the need for the rules on “highly dubious assertions,” rather than on substantial evidence.⁶³ The FCC offered no evidence that individuals did not understand how to use the A/B switch,⁶⁴ nor did the Commission offer evidence justifying five more years of must-carry.⁶⁵ Instead, the court argued that the best evidence suggested that individuals could figure out how to use an A/B switch with few problems.⁶⁶ The FCC also did not show that cable operators would drop the local signals if the must-carry rules were removed.⁶⁷

Unlike in *Quincy Cable TV*, however, the D.C. Circuit’s analysis in *Century Communications* was completely empirically based, rather than theoretically based. The court argued that the means were not congruent to the desired ends because the FCC presented little empirical data support that a lack of must-carry rules would in fact harm broadcasting.⁶⁸

The irony of *Century Communications* is that the case was a big win for the cable industry but ultimately became the industry’s biggest loss. The mere five-year transition before the must-carry rules were phased out would likely be welcomed by the cable industry if that industry could go back in time and choose that particular law again. However, as a result of *Century Communications*, Congress placed itself in charge of creating must-carry rules. While later challenges to must-carry rules involve overcoming Congress’s fact-finding—a very different legal burden than overcoming fact-finding of the FCC—*Century Communications* can stand for the proposition that absent explicit, empirical justification, even a fairly lenient version of must-carry rules can fail intermediate scrutiny.

2. Congress Writes the Must-Carry Rules: The Cable Television Consumer Protection and Competition Act of 1992

The 1992 Cable Act was the first time that Congress explicitly legislated must-carry obligations.⁶⁹ In order to address the empirical

63. *Id.* at 300.

64. *See generally id.*

65. *Id.* at 304.

66. *See id.* at 302, 304 (arguing that Americans are very tech savvy).

67. *See id.* at 303.

68. *See id.* at 304 (“If any interim period of must-carry rules is, in fact, necessary, the FCC adduces literally no evidence that this period must last for fully five years.”).

69. *See* David Swan, Note, “*Must-Carry*” in the 1992 Cable Bill: Will the Third Time Be a Charm?, 12 J. L. & COM. 367, 375 (1993) (discussing Congress prescribing “the number of cable channels to be set aside for public access”).

deficiencies that concerned the D.C. Circuit,⁷⁰ Congress devoted the vast majority of the bill's findings to the justification of the must-carry rules. The findings included:

- Cable operators possess undue market power over consumers, video programmers—especially over noncable programmers—and broadcasters;⁷¹
- The government has a substantial interest in promoting the diversity of views through multiple media technologies;⁷²
- Local public television services provide
 - Educational and informative programming to citizens;⁷³
 - A local community institution;⁷⁴
- Most consumers do not have A/B switch technology, and A/B switch technology is not a viable alternative to mandatory carriage;⁷⁵ and,
- The regulatory system assumes that a system of must-carry would be in place.⁷⁶

The requirements enacted by Congress were similar to those addressed by *Century Communications* in that they accounted for the capacity of the cable operator's system; however, there was no five-year phase-out to the must-carry law. A cable operator with twelve or fewer channels must carry three local commercial television signals⁷⁷ and one noncommercial station;⁷⁸ a system with more than twelve channels must use up to one-third of its capacity for local commercial television stations' signals;⁷⁹ a system with thirteen to thirty-six channels must carry one to three noncommercial local signals;⁸⁰ and, a cable operation with more than thirty-six usable channels must carry all local noncommercial stations requesting carriage.⁸¹ With this basic formulation came a host of other

70. *Turner I*, 512 U.S. at 646 (noting that Congress' findings were unusually detailed); *See also Turner II*, 520 U.S. at 219 (implying that Congress tailored the 1992 Cable Act to alleviate some of the concerns found in *Quincy Cable TV* and *Century Comm.*).

71. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(a)(2), (5), (13)-(16), 106 Stat. 1460, 1461-62 (codified as amended in scattered sections of 47 U.S.C.).

72. *Id.* at § 2(a)(6).

73. *Id.* at §§ 2(a)(8)(A).

74. *Id.* at § 2(a)(8)(B).

75. *Id.* at §§ 2(a)(17)-(18).

76. *Id.* at §§ 2(a)(18)-(20) (Congress also found that carriage of broadcast stations also benefited cable providers, but this finding suggests that must-carry rules are not necessary).

77. *Id.* at § 4(b)(1)(A) (except when the cable operator has fewer than 300 subscribers).

78. *Id.* at § 5(b)(2)(A).

79. *Id.* at § 4(b)(1)(B).

80. *Id.* at § 5(b)(3)(A)(i).

81. *Id.* at § 5(b)(3)(D).

obligations for the cable provider, such as potential carriage of low-power stations,⁸² signal nondegradation,⁸³ and positioning the channel in accordance with the broadcast signal's channel.⁸⁴ Possibly the most significant aspect of the must-carry law was the ability of a broadcaster to opt out of being carried.⁸⁵ If a broadcaster opted out, then it could demand payment to be carried by the cable operator⁸⁶; a broadcaster would do this if its programming was popular enough to be a "must have" for the cable operator.

III. THE TURNER DECISIONS

A. *Turner I*

In *Turner Broadcasting System v. FCC*,⁸⁷ various petitioners brought a First Amendment facial challenge⁸⁸ to the must-carry law⁸⁹ almost immediately after the law was passed. After a three judge panel split two to one in the district court in favor of the must-carry law's constitutionality,⁹⁰ the appeal went directly to the Supreme Court.⁹¹

Turner I has five important legacies: first, intermediate scrutiny was the appropriate level of scrutiny when determining whether the must-carry rules were constitutional under the First Amendment; second, must-carry rules were an economic regulation; third, governmental interests were at stake; fourth, the actual impact of cable on local broadcasting must be known and supported by evidence; and fifth, the First Amendment interests of cable operators were potentially jeopardized by the must-carry law.⁹²

As for the first legacy, five justices agreed that intermediate scrutiny was the correct standard to apply, whereas four justices believed that strict scrutiny was more appropriate. In his opinion for the Court, Justice Kennedy discussed the intermediate scrutiny test laid out in *O'Brien*.⁹³ The *O'Brien* test requires that a content-neutral regulation be sustained "[when]

82. Cable Television Consumer Protection and Competition Act of 1992, § 4(c).

83. *Id.* at § 4(b)(4)(A).

84. *Id.* at § 4(b)(6).

85. *See generally id.* at § 6(b)(1)(A) (forbidding transmitters, after enactment of the 1992 Cable Act, from retransmitting the signal of a broadcasting station except "with the express authority of the originating station").

86. *Id.* at §§ 6(b)(1)(A), 6(b)(3)(B), 6(b)(4).

87. *Turner Brdcast. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

88. *See id.* at 671 (Stevens, J., concurring) (explicitly acknowledging the facial challenge); *see also infra* Part IV.A (information concerning facial challenges generally).

89. 47 U.S.C. §§ 534-35.

90. *Turner Brdcast. Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993).

91. *See Turner I*, 512 U.S. at 626-27.

92. *Id.*

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

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.”⁹⁴ Clarifying this last condition, Justice Kennedy reiterated the interpretation of *Ward v. Rock Against Racism*, where the Court argued that the least restrictive means is not necessary; rather, the regulation need only promote the substantial government interest more with the regulation than without.⁹⁵ In other words, “the means chosen do not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”⁹⁶

The Court stated that intermediate scrutiny was warranted because, ultimately, the must-carry rules are not rules that are based on favoring one type of content over another type.⁹⁷ The First Amendment’s greatest scrutiny should be reserved for government action that hinders speech based on the particular message that it conveys.⁹⁸ While the must-carry rules do infringe on cable operators’ editorial discretion,⁹⁹ the infringement does not relate to what type of content the cable operators must provide,¹⁰⁰ and the class-based distinctions of favoring one type of speaker (broadcasters) over another (cable operators) is based on a technology, not any particular content of speech.¹⁰¹

Instead, the Court based its justification for intermediate scrutiny on the argument that the must-carry law is ultimately an economic regulation: *Turner I*’s second legacy.¹⁰² The result of the technological differences between broadcast and cable gives cable an advantage in the market: cable

94. *Turner I*, 512 U.S. at 662 (quoting *O’Brien*, 391 U.S. at 377).

95. *Turner I*, 512 U.S. at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

96. *Id.*

97. *Turner I*, 512 U.S. at 645-46.

98. *See id.* at 641.

99. *Id.* at 645.

100. *Id.*

101. *Id.*

102. Agreement on this point in *Turner II* is somewhat debatable. Justice Breyer did not join with the economic rationale in Part II.A.1 of *Turner II*; however, he joined in other parts of the opinion that discussed Congress’s economic rationale. Mostly, his opinion discusses ensuring that broadcasters remain financially stable to maximize viewpoints in an area. If read a certain way, his concurrence in part seems to argue that cable operators must carry broadcasters because broadcasters’ views are important: a position that leans toward some of the criticisms made by the dissent in *Turner I*. But, Justice Breyer agrees in his concurrence in part that cable is in a position to behave anticompetitively, justifying government intervention under *O’Brien*. Consequently, his concurrence in part may be best read as him not agreeing with some of the extensive arguments made in Part II.A.1, but agreeing with the Court as to the most basic economic problem posed by cable. As more evidence that the Court was ultimately committed to the anticompetitive rationale, the rationale was a holding in *Turner I* and was not overturned on this point in *Turner II*.

acts as a bottleneck through which broadcast signals must pass if they are to be seen. This technological reality not only places cable operators at great advantage by “silenc[ing] the voice of competing speakers with a mere flick of the switch,”¹⁰³ but by its nature, places broadcasts’ viability in great danger.¹⁰⁴ The ultimate premise of the regulation is that cable will use its technological advantage to behave anticompetitively. In the words of Justice Kennedy, speaking for the Court: “[T]he must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be *unfair competition* by cable systems.”¹⁰⁵

Third, the Court determined that the must-carry rules ultimately sought to further three substantial government interests, based on the findings put forth in the 1992 Cable Act. The interests were: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”¹⁰⁶ The Court concluded that these were all legitimate government interests.¹⁰⁷ Preserving broadcast was important because forty percent of American households relied on broadcast stations as a sole source of television programming.¹⁰⁸ Promoting a diversity of viewpoints is important for the general welfare of the public. Eliminating restraints on competition is always an important governmental activity, even if the regulated activity involves expression.¹⁰⁹

Fourth, while the Court supported the theoretical substantial interests involved, the Court was split on the empirical support used to justify the must-carry legislation. Justice Kennedy, writing for the four justices of the plurality opinion, framed the issue:

[The Government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. . . .

Thus, in applying O’Brien scrutiny we must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not burden substantially more

103. *Turner I*, 512 U.S. at 656.

104. *Id.* at 661.

105. *Id.* at 652 (emphasis added).

106. *Id.* at 662.

107. *Id.* at 663.

108. *Id.* at 623.

109. *Id.*

speech than is necessary to further the government's legitimate interests.¹¹⁰

Justice Kennedy makes the issue of must-carry heavily dependent upon facts and the assessment of consequent harms posed by the status quo, both of which can change through the passage of time. Ultimately, despite Congress explicitly finding that “absent carriage requirements there is a substantial likelihood that citizens . . . will be deprived of [local public television services],”¹¹¹ the four justices of the plurality believed that Congress's findings were not sufficient empirical support to constitutionally justify must-carry. While Justice Stevens concurred in the judgment because he believed that Congress should receive enough deference to render the must-carry law facially valid based on the evidence,¹¹² a fifth justice—Justice Ginsburg—wrote a separate dissent to also state that Congress's evidence was insufficient.¹¹³ Consequently, five justices believed that evidentiary proof of the harms was so sufficiently lacking that the must-carry law could not be affirmed (at that moment).¹¹⁴

The fifth legacy was that the case articulated the First Amendment rights of cable operators at stake: editorial control and potential displacement of cable programming.¹¹⁵ While the law reduced the amount of unfettered control cable operators had over their own channels of speech, the plurality reasoned that the interference with speech did not warrant more than intermediate scrutiny since the must-carry law did not stifle speech based on the content of the message.¹¹⁶ *Turner II* later upholds this position.¹¹⁷

The Supreme Court in *Turner I* reversed the district court's finding of summary judgment for the government and remanded to the district court

110. *Id.* at 664-65 (citations and quotations omitted).

111. Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(8)(D).

112. *Turner I*, 512 U.S. at 669-74. Though Justice Stevens's concurrence in part and concurrence in the judgment makes clear that he would prefer to affirm the district court, he agreed to vacate the district court's decision and remand since such a move was demanded by the situation. The four justices that comprised the dissent did not want to remand but, rather, wanted to strike down the must-carry legislation as unconstitutional, even if intermediate scrutiny were to be applied. However, the four other justices that believed intermediate scrutiny should be applied voted to remand. If Justice Stevens did not vote to remand, then the decision may have stalemated or been very confusing since five justices would not want remand—but only four of those on the ground that additional fact finding would be irrelevant since must-carry was unconstitutional.

113. *Id.* at 685.

114. *Id.* at 669. Justice Blackmun concurred to clarify his stance on the need for greater factual determination. He wrote that, while Congress's findings are subjected to great deference, remand was necessary since summary judgment requires greater factual support.

115. *Id.* at 637.

116. *Id.* at 641.

117. *Turner Brdcast. v. FCC (Turner II)*, 520 U.S. 180, 214 (1997).

in order to develop the record regarding the remaining unresolved factual matters.¹¹⁸ Justice Kennedy, writing for the four justices of the plurality opinion, believed that there was insufficient evidence for the district court to have ruled for the government on summary judgment. Because the government's argument depended on two propositions—(1) a substantial number of broadcast stations will be refused carriage without mandatory carriage obligations for cable providers and (2) broadcast stations denied carriage would be significantly financially harmed¹¹⁹—more than one FCC study was needed to support the government position.¹²⁰ According to Justice Kennedy, the record was deficient in demonstrating that:

- Dropped broadcasters would suffer financial harm;¹²¹
- Local broadcast stations have been bankrupted, have had to curtail their operations, or have had to discontinue their broadcast licenses because of the actions of cable systems;¹²²
- Cable operators' speech would be curtailed by mandatory carriage requirements;¹²³ and, *inter alia*,
- Less restrictive means would not be more efficacious.¹²⁴

B. *Turner I on Remand to the District Court*

Upon remand, the district court compiled tens of thousands of pages for the factual development of the case.¹²⁵ While the issue as framed by the district court was whether Congress had substantial evidence before it to draw reasonable inferences that the rules were necessary,¹²⁶ the record on remand was not limited to evidence that was before Congress in making that determination.¹²⁷

Because of the district court's emphasis that Congress's findings were subject to deference and were not to be replaced by the district court,¹²⁸ this

118. *Turner I*, 512 U.S. at 668. Justice Stevens concurred in the judgment on the ground that he believed further factual development was not necessary since the Court should defer to Congress. However, he ultimately agrees to remand in order for the Court to reach a decision. *See id.* at 669. *See also supra* note 114, regarding Justice Blackmun's position.

119. *Id.* at 666.

120. *Id.* at 666-67. Justice Kennedy noted that the government was relying on one 1988 FCC study, which found that "at a time when no must-carry rules were in effect . . . approximately 20 percent of cable systems reported dropping or refusing carriage to one or more local broadcast stations on at least one occasion." *Id.*

121. *Id.* at 667.

122. *Id.*

123. *Id.* at 668.

124. *Id.*

125. *Turner Brdcast. v. FCC*, 910 F. Supp. 734, 755 (D.D.C. 1995).

126. *Id.* at 739.

127. *Id.* at 738.

128. *Id.* at 739.

evidence was considered to determine whether Congress's judgments had any predictive validity. Accordingly, the district court, again granting summary judgment for the government, spent much of its efforts discussing the predictive validity of Congress's judgments.¹²⁹

While the three judge panel ultimately found for the government on summary judgment,¹³⁰ only Judge Sporkin, writing the opinion for the court, truly supported this view.¹³¹ Judge Jackson believed that there was too much evidentiary dispute to side with Congress's findings on summary judgment, yet he ultimately sided with Judge Sporkin in order to avoid any stalemating.¹³² Judge Williams provided a lengthy dissent, claiming that the facts did not support Congress's findings since, based on the evidence, Congress's findings were not narrowly tailored.¹³³

C. *Turner II*

Turner II was essentially decided based on deference to Congress.¹³⁴ While Justice Stevens believed that this should have been the basis of the decision in *Turner I*,¹³⁵ *Turner II*, after further development of the record, delivered much of what Justice Stevens advocated. Because five justices believed that there was enough evidence to support Congress' inferences that broadcasting would be harmed without the must-carry obligations,¹³⁶ the must-carry law was upheld as constitutional under the First Amendment.¹³⁷

IV. TURNER REASSESSED: FIRST AMENDMENT LITIGATION OF THE MUST-CARRY RULES

While *Turner II* holds that Congress' findings are sufficiently justified, thus making the must-carry law facially valid¹³⁸ under intermediate scrutiny, this does not mean that the must-carry rules are constitutional as applied to particular situations. What is true nationwide may not be true in some markets; technology will inevitably undermine the

129. *Id.* at 742 (discussing evidence about harms to broadcasters after the must-carry rules were struck down after *Century Communications*).

130. *Id.* at 752.

131. *See id.* (J. Jackson, concurring).

132. *See id.* (J. Jackson, concurring).

133. *See id.* at 754-90 (J. Williams, dissenting).

134. *See Turner Brdcast. v. FCC (Turner II)*, 520 U.S. 180, 208 (1997) ("The issue before us is whether, given conflicting views of the probable development of the television industry, Congress had substantial evidence for making the judgment that it did.").

135. *See Turner I*, 512 U.S. at 669-74.

136. *See Turner II*, 520 U.S. at 224.

137. *Id.*

138. *See Turner I*, 512 U.S. at 671 (Stevens, J., concurring).

premise of Congress's conclusions. Moreover, *res judicata* does not preclude the cable industry from initiating another lawsuit on First Amendment grounds when challenging the must-carry law as applied.

A. *Turner was a Facial Challenge*

Among the four *Turner* decisions—the district court, *Turner I*, the district court upon remand, and *Turner II*—the case was only explicitly mentioned once as a facial challenge. The reference was made by Justice Stevens in his concurrence in part in *Turner I*: “As Justice Kennedy recognizes . . . findings by the Congress, particularly those emerging from such sustained deliberations, merit special respect from this Court. Accorded proper deference, the findings in § 2 [of the 1992 Cable Act] are sufficient to sustain the must-carry provisions against facial attack.”¹³⁹ While this is the only reference, and it is fleeting, it implies what a reader of these decisions should suspect—that the challenge was so inherently and obviously facial that the Court did not explicitly discuss the challenge as a facial challenge.

The briefs filed with the Court support this inference. Public Broadcasting Service's (“PBS”) brief claimed that “cable programmers ‘lack standing to bring this facial constitutional challenge’”¹⁴⁰ In response, the Discovery Channel does not deny that the challenge is facial; rather, it merely argued that it did have standing to bring and to contribute in the facial challenge to the must-carry law.¹⁴¹ Moreover, the Association of Independent Television Stations argued that appellants should not prevail precisely because a facial challenge is the hardest constitutional challenge to win, and appellants did not overcome their burden of how the law is unconstitutional in every application.¹⁴²

The Supreme Court's test to determine whether an attack is facial is based on a litigant's ability to claim *jus tertii* standing.¹⁴³ In *City of Chicago v. Morales*, Justice Stevens, the same justice who explicitly referred to the *Turner* case as a facial challenge in *Turner I*,¹⁴⁴ offered a threshold to determine whether a challenge is facial:

139. *Id.*

140. Reply Brief for Appellants Discovery Communications and the Learning Channel, at 23, *Turner Brdcast. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (No. 93-44), 1993 U.S. Briefs 44.

141. *See id.*

142. Brief of Appellee Association of Independent Television Stations, at 27, *Turner Brdcast. Sys. v. FCC*, 512 U.S. 622 (1994) (No. 93-44), 1993 U.S. Briefs 44 (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

143. *See generally* *City of Chicago v. Morales*, 527 U.S. 41 (1999). *Jus tertii* allows standing for a party to bring a law suit when a third party's rights are at stake.

144. *See Turner I*, 512 U.S. at 671 (Stevens, J., concurring).

When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution.¹⁴⁵

If the government had not prevailed in the *Turner* decisions, then the must-carry legislation would have been stricken for being overbroad or lacking evidentiary support. Such a holding would have benefited not only the petitioners but also all those affected by the must-carry law, such as small town cable operators who were not technically involved in the *Turner* litigation. Moreover, the findings used to justify the statute were based on an assessment of findings that were applied nationwide. Facial challenges to laws through the *jus tertii* threshold have been especially applicable to First Amendment challenges of statutes.¹⁴⁶

B. Facial Challenge Jurisprudence: Res Judicata from the Turner II Decision Will Not Preclude As Applied Challenges to the Must-Carry Law

A “facial” challenge is different from an “as applied” challenge. In a facial challenge, the challenging parties must establish that no factual circumstances exist in which the statute could be constitutional.¹⁴⁷ This does not mean that the statute is constitutional in all of its applications. On the contrary, the Supreme Court has explicitly stated that statutes that have survived facial challenges are not protected from as applied challenges.¹⁴⁸ The Supreme Court has also stated that a statute may be facially constitutional, but, when applied to a particular set of facts, it may be unconstitutional.¹⁴⁹ Accordingly, a law that is constitutional as applied in one matter may be unconstitutional as applied to another matter.¹⁵⁰

145. *Morales*, 527 U.S. at 55. n.22.

146. See Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

147. *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also *City Council of L.A. v. Taxpayers*, 466 U.S. 789, 796 (1984) (“There are two quite different ways in which a statute or ordinance may be considered invalid ‘on its face’—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally ‘overbroad.’”).

148. *Wisc. Right to Life v. FEC*, 546 U.S. 410, 411-12 (2006) (finding that a district court misinterpreted the Supreme Court’s upholding of a statute on a facial challenge as reason to deny an as applied challenge).

149. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935).

150. *Id.* See generally *Ala. State Fed. of Labor v. McAdory*, 325 U.S. 450 (1945); *Watson v. Buck*, 313 U.S. 387 (1941).

Because the *Turner* decisions assessed the constitutional validity of the must-carry law on its face,¹⁵¹ new petitioners may challenge the constitutional validity of the law as applied to their facts or situations. If successful, the offending parts of the statute may be severed as inapplicable to the constitutionally offensive situations.¹⁵² The Court, however, attempts to avoid severability where the line drawing is inherently complex.¹⁵³

While as applied challenges under the First Amendment have often considered a statute's appropriateness when applied to different technological platforms,¹⁵⁴ the Supreme Court has stricken statutes for being unconstitutional based on factual circumstances. In *FEC v. Colorado Republican Federal Campaign Committee*, the Supreme Court held that a campaign finance statute, as applied to a particular expenditure, was unconstitutional for violating the free speech clause, and, later in the proceeding, the Court held that the statute on the whole was facially valid.¹⁵⁵ In *Cutter v. Wilkinson*, the Supreme Court determined that a statute regarding religious free practice in prisons was facially valid under the First Amendment but recommended to the inmates that they raise an as applied challenge once certain conditions were met.¹⁵⁶ Both of these Supreme Court cases struck down or suggested that it would strike down a facially constitutional statute for violating the First Amendment, as applied to a particular set of conditions. A challenge to the must-carry law as applied to particular conditions could also be successful, especially in light of the express preference the Court has for as applied challenges over facial challenges.¹⁵⁷

C. How Advancing Technology is Undermining Turner's Premise: Must-Carry Applied to Markets with Multiple Cable Equivalent Services is Constitutionally Inappropriate

For those communities in which cable operators experience healthy competition, must-carry rules would not achieve Congress's objectives and, thus, as applied in those particular areas, the must-carry law should be considered unconstitutional.

151. See, e.g., *Turner Brcdst. Sys. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993).

152. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327-28 (2006).

153. *Id.* at 330.

154. See, e.g., Richard B. Gallagher, Annotation: First Amendment Guaranty of Free Speech and Press Applied to Licensing and Regulation of Broadcast Media—Supreme Court Cases, 69 L.Ed.2d 1110.

155. See *FEC v. Col. Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001).

156. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

157. See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 580 (2005).

Congress's extensive findings supporting the need for national must-carry rules had a central premise: cable is a bottleneck technology that will ultimately use its power to deny broadcast stations carriage, leading to decreased viewership of many broadcast stations and ultimately causing some broadcasters to go out of business.¹⁵⁸ This, in turn, decreases the number of voices available to a particular community.¹⁵⁹

While this may have been true in some contexts,¹⁶⁰ it may not have been or will be true in markets where cable lacks the economic power to silence broadcasters.¹⁶¹ Two years after the *Turner* litigation reached the Supreme Court the first time, federal law was changed to allow more competition in a given area for video services.¹⁶² While competition with cable did not blossom immediately, many other avenues of video services are now emerging: direct broadcast satellite ("DBS") has gained popularity,¹⁶³ Verizon's FiOS currently delivers television via the same fiber that delivers Internet to the customer's home,¹⁶⁴ other telephone companies are also beginning to use their services to offer video,¹⁶⁵ wireless cable is a nascent technology,¹⁶⁶ Broadband-in-Gas ("BIG") pipes

158. See *Turner Brdcast. v. FCC (Turner II)*, 520 U.S. 180, 191 (1997); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), (5), (13)–(16), 106 Stat. 1460. See also Ronald W. Adelman, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Operators Gatekeepers of Speech?*, 49 SMU L. REV. 1549 (1996).

159. See Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(6); *Turner I*, 512 U.S. at 646-47, 649.

160. *Turner II*, 520 U.S. at 197 (The Court cited evidence suggesting that cable's power is large and growing.).

161. See Thomas W. Hazlett, *Digitizing "Must-Carry" Under Turner Broadcasting v. FCC* (1997), 8 S. CT. ECON. REV. 141 (2000).

162. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in various sections of 47 U.S.C.).

163. The top two DBS providers, DirectTV and DISH Network, saw their subscribership go from the thousands to the tens of millions since 1992, making a dramatically different market than the one assessed by Congress originally. See DirectTV, Wikipedia, <http://en.wikipedia.org/wiki/DirecTV> (last visited Feb. 16, 2008); DISH Network, Wikipedia, http://en.wikipedia.org/wiki/DISH_Network (last visited Feb. 16, 2008). Congress seemed to acknowledge this by telling the FCC to make regulation imposing must-carry obligations on DBS providers. See SHIVA, *supra* note 2, at § 1002(f)(2).

164. See Verizon, About FiOS TV, <http://www22.verizon.com/content/fiostv/about+fios+tv/> (last visited Feb. 16, 2008).

165. See, e.g., *Maryland Briefing*, WASH. POST, July 1, 2006, at B04; see also Stephen Labaton, *House Backs Telecom Bill Favoring Phone Companies*, N.Y. TIMES, June 9, 2006, at C3; Ben Charny & Marguerite Reardon, *Phone companies hear call of the TV*, CNET NEWS.COM, June 6, 2005, http://news.com.com/Phone+companies+hear+call+of+the+TV/2100-1037_3-5734429.html.

166. This is multichannel distribution service ("MMDS") that offers television programming and Internet access via microwave transmission. See Wireless Communications Association, *Advancing the Growth of Wireless Worldwide*, http://www.wcai.com/the_industry.php?panel=6 (last visited Mar. 11, 2008).

could potentially offer high definition television,¹⁶⁷ and the Internet generally is beginning to offer cable equivalent services.¹⁶⁸ These are all competitors with the cable bottleneck either now or in the future. Moreover, not only do cable companies have other technologies to compete with, but in some instances, cable companies compete with each other. One example of this is when Private Communications Operators (“PCOs”) compete against Multiple Systems Operators (“MSOs”) in the same market. As a result, the problem that Congress foresaw in 1992—where a sole cable operator is the *de facto* gatekeeper of speech for a community—is no longer a problem for communities that have multiple Multichannel Video Program Distributors (“MVPDs”).

Because technology has altered or will alter the dynamic of several markets since 1992, the must-carry law may not be necessary to achieve its economic ends in those technologically restructured areas. For instance, the end of “promoting the widespread dissemination of information from a multiplicity of sources” may not have been true in several markets even at the time *Turner II* was decided: this was conceded by the Court.¹⁶⁹ However, this may be even less the case in markets where consumers may choose their MVPD provider (DBS, cable, etc.) based on the quality of programming offered.

In addition to multiple MVPDs rendering the must-carry laws constitutionally troublesome, multiple cable equivalent platforms in a market also may be subjected to different law. If conventional Internet technology reaches a stage where it could be substituted for cable, then there would seem to be less justification to impinge on cable operators’ editorial discretion when the Internet, by its nature, would allow carriage of the broadcast station’s programming. A different problem could be experienced in markets where prototype technologies are offered. BIG pipes, for example, can function equivalently to wireline cable, but if it is

167. See Patrick Nunally, *The Ultimate Data Pipeline Connecting the Home to the World . . . Really is a Pipeline*, at 9, http://www.narucmeetings.org/Presentations/tc_nunally_s06.pdf (last visited Feb. 16, 2008).

168. See, e.g., TV Worldwide, <http://www.tvworldwide.com/> (last visited Feb. 16, 2008); Saul Hansell, *Coming Soon Via Your TiVo: Internet Video on Television*, N.Y. TIMES, Nov. 14, 2006, at C3, available at <http://www.nytimes.com/2006/11/14/technology/14tivo.html>; Joshua Chaffin & Aline Van Duyn, *Brightcove Targets Market for Online TV Media*, FIN. TIMES, Oct. 30, 2006, at 23 (mentioning that NBC and cable operators plan on placing programming on the Internet); Dawn C. Chmielewski, *Apple Takes Aim at the TV Market; Jobs Unveils Movie Downloads, Internet-TV Links and New iPods to Press His Advantage*, L.A. TIMES, Sept. 13, 2006, at C1 (discussing how Apple is making a device to allow the watching of Internet programming on televisions).

169. *Turner Brdcast. v. FCC (Turner II)*, 520 U.S. 180, 226 (1997). “Evidence introduced on remand indicated that only 31 broadcast stations actually went dark during the period without must-carry (one of which failed after a tornado destroyed its transmitter), and during the same period some 263 new stations signed on the air.” *Id.* at 210.

not considered cable service under federal law, it could potentially compete with cable without cable's must-carry obligations.¹⁷⁰

Although the facts are particularized in an as applied challenge,¹⁷¹ the legal standard for constitutional scrutiny is the same in all such cases. Since the level of scrutiny has been settled on the issue of must-carry—intermediate scrutiny—the must-carry rules as applied to a particular plaintiff's facts ultimately require a showing that the government interests are not advanced more with the legislation than without it.¹⁷² As used in *Turner II*, intermediate scrutiny has three steps:¹⁷³

- 1) It furthers an important or substantial governmental interest;¹⁷⁴
- 2) The interest is advanced more with the law than without;¹⁷⁵ and,
- 3) The regulation does not substantially burden more speech than necessary.¹⁷⁶

The *Turner* decisions also established the substantial government interests that deserved protection:

- 1) Preserving the benefits of free, over-the-air local broadcast television;
- 2) Promoting the widespread dissemination of information from a multiplicity of sources; and
- 3) Promoting fair competition in the market for television programming.¹⁷⁷

If all three of these established goals in some manner violate a step of the intermediate scrutiny analysis based on the facts of a particular plaintiff, then that plaintiff may be able to have the Court sever the must-carry obligations,¹⁷⁸ as applied to the plaintiff's circumstances.

Because the underlying premise of the must-carry law is that cable could use its technological advantage as a bottleneck to act

170. Randolph May has written generally about this concern and has cited other scholars with a similar concern. See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 103 n.2 (2006).

171. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 414 (1935).

172. *Turner II*, 520 U.S. at 213-14.

173. This test is often stated with some variation in the conditions. Compare *Turner II*, 520 U.S. at 213-14 with *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) with *Turner II*, 520 U.S. at 235 (O'Connor, J., dissenting) and with *Turner I*, 512 U.S. at 662.

174. *Turner II*, 520 U.S. at 213-14.

175. *Id.*

176. *Id.* at 214, 217.

177. *Id.* at 189.

178. While Supreme Court cases exist which have discovered a constitutionally permissible purpose for the statute based on previously unconsidered purposes, these cases involve rational basis review. See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (explaining that rational basis review legislation is presumed valid if rationally related to some legitimate government interest).

anticompetitively toward broadcasters, future plaintiffs could argue that the must-carry law should be found unconstitutional in circumstances where plaintiffs can prove that their cable operation could not act anticompetitively. The remainder of this Part assesses the applicability of *Turner II* to cable operators that cannot act anticompetitively because multiple cable equivalent services exist in the operators' markets.

1. A Competitive Market Can Achieve the Governmental Ends Without the Must-Carry Law

According to the United States Code, a purpose of the cable laws is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."¹⁷⁹ To that end, points "a" and "b," *infra*, evaluate the must-carry laws when a cable operator's market offers equivalent cable services.

A Court-recognized goal of the must-carry law was that Congress sought to protect the percentage of Americans whose main source of television was from broadcast signals. This is a noble goal, but in situations where a cable operator could not have anticompetitive leverage because it lacks market power because of a substantial DBS presence, phone company video services, wireless cable, equivalent services offered via the Internet, other cable providers, or some combination, then the need to impinge upon a cable operator's editorial discretion could be unconstitutional.

While Justice O'Connor's dissent in *Turner I* was one vote shy of being the law for the facial challenge, her arguments could win an as applied challenge. She argued that the must-carry law was overbroad because, for being an anticompetitive piece of legislation, it restricted more than anticompetitive behavior.¹⁸⁰ In terms of constitutionally protected speech, Justice O'Connor made several analogies from precedent:

If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. If the government wants to protect householders from unwanted solicitors, it may enforce "No Soliciting" signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say.¹⁸¹

Justice O'Connor's analysis did not persuade the five justices of the Court who were attempting to determine whether the must-carry law was constitutional in some context; however, this analysis may be enough

179. 47 U.S.C. § 521(6).

180. See *Turner Brdcast. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 682 (1994) (O'Connor, J., dissenting).

181. *Id.* at 682-83 (O'Connor, J., dissenting) (citations omitted).

where the must-carry law is actually applied. Applying Justice O'Connor's analogies, such a circumstance would be similar to Congress banning a type of leafleting that could not possibly produce litter in order to control litter. While the must-carry law may result in better broadcasting in those situations where a cable operator can act anticompetitively, this is unlikely in situations where a broadcaster has a variety of "bottleneck technologies" to turn to in a market. In such a situation, the must-carry law, like the ban on all leafleting, denies speech without ultimately serving the governmental purpose.

Future challengers of the must-carry law should be allowed to show how the must-carry law does not further the government interest and unnecessarily impinges on cable operators' First Amendment rights. In terms of intermediate scrutiny, if a challenger to the must-carry law can show that broadcasting¹⁸² in an area could stay alive and even thrive because of the competitive options in the market, then the law as applied to that scenario would not be (1) furthering this substantial government interest, nor (3) doing this in a way that does not burden more speech than necessary.¹⁸³ Theoretically, this would be enough to render the legislation unconstitutional as applied.

As for (2) under intermediate scrutiny,¹⁸⁴ some challengers may be able to show that the must-carry law is actually counterproductive in some markets. The Court acknowledged in *Turner II* that during the period of no must-carry—the time between *Century Communications* and the 1992 Cable Act—broadcasting actually increased on the whole.¹⁸⁵ If the must-carry law merely provides a weak broadcasting station with enough revenue to stay afloat when it would otherwise be replaced by a stronger broadcaster with better programming, then the must-carry law is counterproductive. The dissent in *Turner II* suggested that this is exactly what happens:

The *only* analysis in the record of the relationship between carriage and noncable viewership favors the appellants. A 1991 study by Federal Trade Commission staff concluded that most cable systems voluntarily carried broadcast stations with any reportable ratings in noncable households and that most instances of noncarriage involved "relatively remote (and duplicated) network stations, or local stations that few viewers watch."¹⁸⁶

182. See *Turner Brdcast. v. FCC (Turner II)*, 520 U.S. 180, 219 (this is opposed to individual broadcasters, based on the analysis of the *Quincy Cable TV* decision from the D.C. Circuit. The Court observed that Congress legislated the must-carry law well aware of the concerns raised in *Quincy Cable TV* and *Century Communications*).

183. See *supra* text accompanying notes 174-76 for the intermediate scrutiny steps.

184. See *supra* text accompanying note 175

185. *Turner II*, 520 U.S. at 210-11.

186. See *id.* at 242.

The Court acknowledged this reality but deemed it irrelevant to the Court's inquiry about whether there was enough contrary evidence to support the issue that the Court sought to address: Did Congress have substantial evidence in reaching its conclusions?¹⁸⁷ In answer to this question, the Court deemed Congress to have enough evidentiary support to uphold the statute on facial grounds,¹⁸⁸ despite the significant contrary evidence in the record. However, because an as applied challenge considers the constitutionality of a statute as applied to particular facts, evidence showing that broadcasting in a particular area can thrive without a must-carry law could prove that the law unconstitutional for violating intermediate scrutiny as applied to a plaintiff's circumstances.

The second interest¹⁸⁹ is very similar to the first interest,¹⁹⁰ and the third interest¹⁹¹ is similar in rationale to the second interest.¹⁹² Competition of cable equivalent services in a market would undermine must-carry's purpose of promoting the dissemination of information from a multiplicity of sources and preventing anticompetitive behavior.

Like the first interest, the second interest would not be advanced more with the must-carry law than without, because with the must-carry law, the broadcaster need not have adequate programming, as defined by public viewership, to be carried. If there is competition in a market, and all or most of the equivalent cable services carry broadcast stations because it is in the MVPDs' economic best interests, then the competing MVPDs would be foolish not to carry the station, lest a competitor pick up the station and gain customers. The stronger the broadcaster, the more voices that broadcaster may be able to hire; whereas, fledging broadcasters that owe their continued survival to must-carry carriage may be decreasing the number of voices by airing duplicative and unresponsive programming, as argued by Justice O'Connor.¹⁹³

187. *Id.* at 208 ("The issue before us is whether, given conflicting views of the probable development of the television industry, Congress had substantial evidence for making the judgment that it did. We need not put our imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment.").

188. *See supra* Part IV.A.

189. *See supra* text accompanying note 177 (the second interest is promoting widespread dissemination of information from a multiplicity of sources).

190. *See supra* text accompanying note 177 (the first interest is preserving the benefits of free, over-the-air local broadcast television).

191. *See supra* text accompanying note 177 (the third interest is promoting fair competition in the market for television programming).

192. *See supra* text accompanying note 177 for governmental interests.

193. *See Turner Brdcast. v. FCC (Turner II)*, 520 U.S. 180, 242 (1997) (O'Connor, J., dissenting) ("A 1991 study by Federal Trade Commission staff concluded that most cable systems voluntarily carried broadcast stations with any reportable ratings in noncable households and that most instances of noncarriage involved 'relatively remote (and duplicated) network stations, or local stations that few viewers watch.'").

Moreover, the competition to broadcast in some markets may be such that broadcasting in a local area may not be in jeopardy at all. During the period between 1987 and 1992 when no must-carry rules existed, the number of broadcasters and the amount of broadcast revenues went up. The Court acknowledged this evidence:

To be sure, the record also contains evidence to support a contrary conclusion. Appellants (and the dissent in the District Court) make much of the fact that the number of broadcast stations and their advertising revenue continued to grow during the period without must-carry, albeit at a diminished rate. Evidence introduced on remand indicated that only 31 broadcast stations actually went dark during the period without must-carry (one of which failed after a tornado destroyed its transmitter), and during the same period some 263 new stations signed on the air.¹⁹⁴

Much of the evidence used to disprove the first governmental interest can be used on this point. A challenger to the must-carry law who can prove that the must-carry law does not advance the first substantial government interest—preservation of local broadcasting—should also be able to prove that the must-carry law does not advance the second interest. The challenger to the must-carry law could do this because the challenger would be showing that the rules prevent the market from theoretically allowing the weak broadcasters to die and be replaced by stronger broadcasters, decreasing the quality and quantity of voices.

As for the third interest, in a competitive market the cable industry would not have enough market power to engage in the anticompetitive practices at issue in the *Turner* decisions.¹⁹⁵ As emphasized by the arguments regarding empiricism in the *Turner* cases,¹⁹⁶ this would require data proving that cable lacked the market power to leverage its bottleneck technology against broadcasters. If a challenger could show that the area it services is truly competitive, then the must-carry law should violate all three prongs of intermediate scrutiny.

Ultimately, while the dissent in the *Turner* decisions believed that the instances where cable operators would not have requisite market power made the must-carry law overbroad,¹⁹⁷ because the law was a facial challenge, the Court was able to retort that anticompetitive motives were prevalent enough nationwide that the law was not overbroad.¹⁹⁸ However, in situations where a cable operator could prove that anticompetitive

194. *Turner II*, 520 U.S. at 210.

195. *See id.* at 191-92.

196. *See supra* text accompanying notes 115-19, 132, 142 (assessing whether the requisite amount of empirical evidence was met by Congress).

197. *Turner Brdcast. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 683 (1994); *Turner II*, 520 U.S. at 230.

198. *Turner II*, 520 U.S. at 216.

motives would be economically foolish in the market it serves¹⁹⁹ or that the broadcasting in an area would survive and thrive even without cable access, then the must-carry law may be unconstitutional for not achieving its governmental purposes and infringing on the cable operators' and programmers' First Amendment rights. This "proof of competitive MVPD services" standard makes for a potentially easy bright line, which would allow for comparably easy severability of must-carry's constitutional and unconstitutional aspects by a court.²⁰⁰

2. Addressing the Opposition

All litigation has arguments from the opposing counsel. This Part anticipates and addresses three of their potential arguments. First, broadcasters could argue that the must-carry laws are sufficiently tailored for competition. Section 6 of the 1992 Cable Act allows broadcasters in competitive markets to opt out of must-carry and demand payments from cable operators.²⁰¹ This means that the broadcasters who are so weak that they do not opt for payment are the only broadcasters who are protected by the law—which means that the law protects only the broadcasters who need protecting. Consequently, markets where must-carry is used are the only markets where it is legitimately needed.

However, as argued in *Quincy Cable TV*, it is illegitimate for a law to economically protect individual broadcasters; rather, the must-carry law must instead protect local broadcasting.²⁰² The viability of continued broadcasting in an area and the viewpoints available to a community as a whole may be relatively unaltered or even improved in some markets if cable operators were allowed to drop some broadcast stations, especially if weak broadcast stations that survive because of the must-carry rules could be replaced by a broadcast station with stronger programming. This point was accepted by the Court, but the Court responded that there was enough evidence on both sides for Congress to be able to reach the opposite conclusion for the purposes of making a nationwide law.²⁰³

Because the end is to protect local broadcasting, not broadcasters, those wanting to strike down the law should present evidence that broadcasting would not be hurt in a particular market. Broadcasters in a

199. *Turner I*, 512 U.S. at 683; *Turner II*, 520 U.S. at 230.

200. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006).

201. Cable Television Consumer Protection and Competition Act of 1992, § 6; *see also Turner II*, 520 U.S. at 216.

202. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985).

203. *Turner II*, 520 U.S. at 211 ("Although evidence of continuing growth in broadcast could have supported the opposite conclusion, a reasonable interpretation is that expansion in the cable industry was causing harm to broadcasting.").

market with equivalent services may have other platforms that they could use to deliver their programming and to retain significant viewership, or the ratings may be so low on a commercial station that allowing that station to fail is likely to lead to replacement by a more competent broadcaster. Such a showing by a party would demonstrate that elimination of the must-carry law would better achieve the governmental ends and be more constitutionally sensitive to cable operators' editorial discretion. Ultimately, this clause—certain broadcasters can opt out—does nothing to narrowly tailor the law for constitutional purposes since those broadcasters would be carried by cable operators anyway based on their popularity, which is precisely why those broadcasters can opt out and demand payment from the cable provider.

Second, the burden on cable providers is likely to be less today than it was in 1992. With improvements in cable technology, there has been a corresponding increase in channel capacity.²⁰⁴ This ever improving channel capacity was cited as the reason that the must-carry law was narrowly tailored: evidence suggested that Congress could infer that the burden on cable providers would be increasingly slight.²⁰⁵

This is a point already considered by Congress and approved by the Court in determining whether the law was facially valid.²⁰⁶ This point is no more appropriate to advance in later as applied constitutional challenges than it would be for future as applied challenges to discuss the five less restrictive alternatives available at the time the law was initially challenged.²⁰⁷ None of these arguments are appropriate in future challenges because they were all assumed with the must-carry law's current constitutionality.

However, in some markets, cable providers must displace cable programming in order to meet the must-carry obligated channels.²⁰⁸ This may be all the more true when the headend is forced to deal with already highly compressed, yet bandwidth intensive, high-definition signals.²⁰⁹ While on the whole cable providers' channel capacity may be such that no cable programming is displaced—leading the Court to conclude that on the whole, the burdens of must-carry are congruent to the benefits—this may

204. *Id.* at 214 (arguing that most cable providers have no difficulty accommodating the broadcast channels).

205. *Id.*

206. *Id.*

207. *Id.* at 218-25.

208. *Id.* at 214.

209. See Angela J. Campbell, *A Public Interest Perspective on the Impact of the Broadcasting Provisions of the 1996 Act*, 58 FED. COMM. L.J. 455, 457 (2006) (stating that a high definition signal takes nearly as much bandwidth as an analog signal).

not be the case when applied specifically to those cable operators that do displace programming.

Finally, the opposition could argue that because Congress imposed must-carry obligations on DBS providers in 1999,²¹⁰ the plaintiff would have to show that Congress is not working from a new premise in maintaining the must-carry law for cable.

In the 1992 Cable Act, Congress explicitly mentions the possibility of multiple cable operators in a particular market;²¹¹ Congress has not only amended the Act and not revoked it since 1992²¹² but has even subsequently extended obligations to DBS providers.²¹³ However, these are national assessments, and nationally, as the Supreme Court stated, Congress may conclude that there exist scenarios where the must-carry law is warranted to protect broadcasters from anticompetitive practices. Even though Congress acknowledged that more than one cable service may operate in a market in the 1992 Cable Act, this does not mean that the statute implicitly claims two operators cannot amount to sufficient competition. On the contrary, the Court, which stated that the 1992 Cable Act seeks to prevent anticompetitive practices,²¹⁴ discussed the evidence of multiple cable services in a market: “[C]able operators possess a local monopoly over cable households. Only one percent of communities are served by more than one cable system”²¹⁵ Consequently, while Congress acknowledged that multiple cable competitors may serve an area, Congress, as indicated by the Supreme Court, did not believe that this practice was prevalent enough to conclude that competition existed among cable equivalent services.

When Congress extended the must-carry law to DBS in 1999, it was forced to do so based on legislative symmetry and DBS’s ability to also act as a bottleneck in some markets.²¹⁶ Such an extension of must-carry obligations does not overturn the Court’s conclusion that the must-carry law has an anticompetitive premise, nor does it deny a challenger the opportunity to prove that the law is unconstitutional where a cable provider lacks market power to act anticompetitively.

210. See SHIVA, *supra* note 2, at § 1002(f)(2).

211. See Cable Television Consumer Protection and Competition Act of 1992, § 6(b)(3)(b).

212. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(d)(1), 110 Stat. 56, 116 (1996).

213. SHIVA, *supra* note 2, at § 1002(f)(2).

214. See *supra* text accompanying notes 105-09.

215. *Turner II*, 520 U.S. at 197.

216. See *Satellite Brdcst. & Commc’n Ass’n v. FCC*, 275 F.3d 337, 358 (4th Cir. 2001).

V. CONCLUSION

The FCC's must-carry rules were stricken twice before Congress intervened as unconstitutional for their overbroad implementation to hypothesized harms. In 1997, five justices agreed that deference to Congress's findings was sufficient to find the statutory must-carry law facially constitutional. This conclusion rested on the narrowest grounds. At every phase of the litigation—the initial district court decision, *Turner I*, the district court upon remand, and *Turner II*—the must-carry law was always one vote shy of being deemed unconstitutional, either for lacking empirical justification or for being overbroad. These dissents argued that the law unconstitutionally restricted the speech of cable providers when those providers lacked market power to behave anticompetitively or where broadcasting would not be harmed if the must-carry law did not exist. The holding that the must-carry law was constitutional occurred in the context of a facial challenge, which merely requires that the law be constitutional under some scenario. However, while the must-carry law may facially pass intermediate scrutiny because anticompetitive behavior can exist in some markets, this does not mean that the law can withstand intermediate scrutiny when applied to specific markets with sufficient MVPD competition.

The as applied challenge to the must-carry law may become all the more relevant as technology improves. Cable equivalent services may not only come from other cable providers and DBS services in the future but also from phone companies, wireless cable, and the Internet. While cable may be a bottleneck, technologically, it may have little power to thwart broadcasters' ability to reach consumers in a market where these technologies offer real competition. As a result, sacrificing cable's First Amendment editorial rights may be for little gain.

