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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

STOP CODE 1800D

Re: Limitations on Commercial Time on
Television Broadcast Stations
MM Docket No. 93-254

Gentlemen:

This letter is written on behalf of Silver King Communications, Inc. ["SKC"] to submit the attached decision of the United States Supreme Court (Turner Broadcasting System, Inc. v. FCC, No. 93-44 [June 27, 1994]) for inclusion in the record in the above-captioned proceeding.

In both its Comments and Reply Comments in that proceeding, SKC demonstrated that any general reimposition of television commercial limits or any more specific restrictions on the home shopping program format could not be reconciled with the First Amendment. The attached Turner decision confirms this.

In particular, the Court's opinion concluded that the must-carry rules are subject to the intermediate level of First Amendment scrutiny (see, e.g., United States v. O'Brien, 391 U.S. 367 [1968]) only because they are content-neutral:

The rules...confer must-carry rights on all full power broadcasters, irrespective of the content of their programming. They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming.

Turner, slip opinion at 23.

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Federal Communications Commission
August 4, 1994
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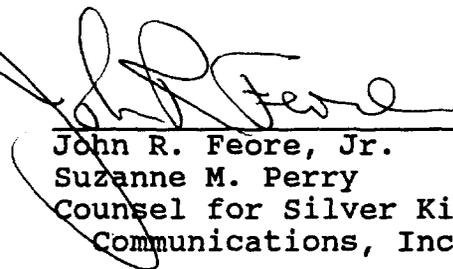
By contrast, restrictions on television commercial matter or the home shopping program format would prohibit (or substantially restrict) the broadcast of particular ideas and points of view and would penalize stations because of the content of their programming. Such restrictions would, in short, be content-based restrictions subject to the strictest level of First Amendment scrutiny. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); R.A.V. v. St. Paul, 505 U.S. (1992); Regan v. Time, Inc., 468 U.S. 641 (1984).

In Turner, the Supreme Court reaffirmed the extraordinary level of scrutiny to which content-based speech restrictions are subject. The content-based restrictions on televised commercial matter in general and the home shopping program format in particular that under consideration in the above-referenced inquiry could not survive such scrutiny and cannot, therefore, be proposed or adopted.

Very truly yours,



Michael Drayer
Executive Vice President
and General Counsel
Silver King Communications, Inc.



John R. Feore, Jr.
Suzanne M. Perry
Counsel for Silver King
Communications, Inc.

SMP:car

Attachment

cc: Paul Gordon, Esquire

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TURNER BROADCASTING SYSTEM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

No. 93-44. Argued January 12, 1994—Decided June 27, 1994

Concerned that a competitive imbalance between cable television and over-the-air broadcasters was endangering the broadcasters' ability to compete for a viewing audience and thus for necessary operating revenues, Congress passed the Cable Television Consumer Protection and Competition Act of 1992. Sections 4 and 5 of the Act require cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations. Soon after the Act became law, appellants, numerous cable programmers and operators, challenged the constitutionality of the must-carry provisions. The District Court granted the United States and intervenor-defendants summary judgment, ruling that the provisions are consistent with the First Amendment. The court rejected appellants' argument that the provisions warrant strict scrutiny as a content-based regulation and sustained them under the intermediate standard of scrutiny set forth in *United States v. O'Brien*, 391 U. S. 367, concluding that they are sufficiently tailored to serve the important governmental interest in the preservation of local broadcasting.

Held: The judgment is vacated, and the case is remanded.

819 F. Supp. 32, vacated and remanded.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II, and III-A, concluding that the appropriate standard by which to evaluate the constitutionality of the must-carry provisions is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. Pp. 11-41.

(a) Because the must-carry provisions impose special obliga-

Syllabus

tions upon cable operators and special burdens upon cable programmers, heightened First Amendment scrutiny is demanded. The less rigorous standard of scrutiny now reserved for broadcast regulation, see *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, should not be extended to cable regulation, since the rationale for such review—the dual problems of spectrum scarcity and signal interference—does not apply in the context of cable. Nor is the mere assertion of dysfunction or failure in the cable market, without more, sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media. Moreover, while enforcement of a generally applicable law against members of the press may sometimes warrant only rational basis scrutiny, laws that single out the press for special treatment pose a particular danger of abuse by the State and are always subject to some degree of heightened scrutiny. Pp. 11–16.

(b) The must-carry rules are content-neutral, and thus are not subject to strict scrutiny. They are neutral on their face because they distinguish between speakers in the television programming market based only upon the manner in which programmers transmit their messages to viewers, not the messages they carry. The purposes underlying the must-carry rules are also unrelated to content. Congress' overriding objective was not to favor programming of a particular content, but rather to preserve access to free television programming for the 40 percent of Americans without cable. The challenged provisions' design and operation confirm this purpose. Congress' acknowledgement that broadcast television stations make a valuable contribution to the Nation's communications structure does not indicate that Congress regarded broadcast programming to be more valuable than cable programming; rather, it reflects only the recognition that the services provided by broadcast television have some intrinsic value and are worth preserving against the threats posed by cable. It is also incorrect to suggest that Congress enacted must-carry in an effort to exercise content control over what subscribers view on cable television, given the minimal extent to which the Federal Communications Commission and Congress influence the programming offered by broadcast stations. Pp. 16–28.

(c) None of appellants' additional arguments suffices to require strict scrutiny in this case. The provisions do not intrude on the editorial control of cable operators. They are content-neutral in application, and they do not force cable operators to alter their own messages to respond to the broadcast programming they must carry. In addition, the physical connection between the television set and the cable network gives cable operators bottleneck, or

Syllabus

gatekeeper, control over most programming delivered into subscribers' homes. *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, and *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U. S. 1, distinguished. Strict scrutiny is also not triggered by Congress' preference for broadcasters over cable operators, since it is based not on the content of the programming each group offers, but on the belief that broadcast television is in economic peril. Nor is such scrutiny warranted by the fact that the provisions single out certain members of the press—here, cable operators—for disfavored treatment. Such differential treatment is justified by the special characteristics of the cable medium—namely, the cable operators' bottleneck monopoly and the dangers this power poses to the viability of broadcast television—and because the must-carry provisions are not structured in a manner that carries the inherent risk of undermining First Amendment interests. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U. S. 221, and *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U. S. 575, distinguished. Pp. 28–38.

(d) Under *O'Brien*, a content-neutral regulation will be sustained if it furthers an important governmental interest that is unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Viewed in the abstract, each of the governmental interests asserted—preserving the benefits of free, over-the-air local broadcast stations, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming—is important. Pp. 38–41.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE SOUTER, concluded in Part III–B that the fact that the asserted interests are important in the abstract does not mean that the must-carry provisions will in fact advance those interests. 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, the Government must adequately show 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, the Government still bears the burden of showing that the remedy adopted does not burden substantially more speech than is necessary to further such interests. On the state of the record developed, and in the absence of findings of fact from the District Court, it is not possible to conclude that the Government has satisfied either inquiry. Because there are genuine issues of

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material fact still to be resolved on this record, the District Court erred in granting summary judgment for the Government. Pp. 41-45.

JUSTICE STEVENS, though favoring affirmance, concurred in the judgment because otherwise no disposition of the case would be supported by five Justices and because he is in substantial agreement with JUSTICE KENNEDY's analysis of this case. P. 6.

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Parts II-A and II-B, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined, the opinion of the Court with respect to Parts II-C, II-D, and III-A, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, and SOUTER, JJ., joined, and an opinion with respect to Part III-B, in which REHNQUIST, C. J., and BLACKMUN and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and GINSBURG, JJ., joined, and in Parts I and III of which THOMAS, J., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 93-44

TURNER BROADCASTING SYSTEM, INC., ET AL.,
APPELLANTS *v.* FEDERAL COMMUNICATIONS
COMMISSION ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[June 27, 1994]

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court, except as to Part III-B.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. This case presents the question whether these provisions abridge the freedom of speech or of the press, in violation of the First Amendment.

The United States District Court for the District of Columbia granted summary judgment for the United States, holding that the challenged provisions are consistent with the First Amendment. Because issues of material fact remain unresolved in the record as developed thus far, we vacate the District Court's judgment and remand the case for further proceedings.

I
A

The role of cable television in the Nation's communications system has undergone dramatic change over the past 45 years. Given the pace of technological advancement and the increasing convergence between cable and

other electronic media, the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.

The earliest cable systems were built in the late 1940's to bring clear broadcast television signals to remote or mountainous communities. The purpose was not to replace broadcast television but to enhance it. See *United States v. Southwestern Cable Co.*, 392 U. S. 157, 161-164 (1968); D. Brenner, M. Price, & M. Meyerson, *Cable Television and Other Nonbroadcast Video* §1.02 (1992); M. Hamburg, *All About Cable*, ch. 1 (1979). Modern cable systems do much more than enhance the reception of nearby broadcast television stations. With the capacity to carry dozens of channels and import distant programming signals via satellite or microwave relay, today's cable systems are in direct competition with over-the-air broadcasters as an independent source of television programming.

Broadcast and cable television are distinguished by the different technologies through which they reach viewers. Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range. Cable systems, by contrast, rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers. The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend for its very existence upon express permission from local governing

authorities. See generally *Community Communications Co. v. Boulder*, 660 F. 2d 1370, 1377-1378 (CA10 1981).

Cable technology affords two principal benefits over broadcast. First, it eliminates the signal interference sometimes encountered in over-the-air broadcasting and thus gives viewers undistorted reception of broadcast stations. Second, it is capable of transmitting many more channels than are available through broadcasting, giving subscribers access to far greater programming variety. More than half of the cable systems in operation today have a capacity to carry between 30 and 53 channels. 1994 Television and Cable Factbook I-69. And about 40 percent of cable subscribers are served by systems with a capacity of more than 53 channels. *Ibid.* Newer systems can carry hundreds of channels, and many older systems are being upgraded with fiber optic rebuilds and digital compression technology to increase channel capacity. See, e.g., Cablevision Systems Adds to Rapid Fiber Growth in Cable Systems, *Communications Daily*, pp. 6-7 (Feb. 26, 1993).

The cable television industry includes both cable operators (those who own the physical cable network and transmit the cable signal to the viewer) and cable programmers (those who produce television programs and sell or license them to cable operators). In some cases, cable operators have acquired ownership of cable programmers, and vice versa. Although cable operators may create some of their own programming, most of their programming is drawn from outside sources. These outside sources include not only local or distant broadcast stations, but also the many national and regional cable programming networks that have emerged in recent years, such as CNN, MTV, ESPN, TNT, C-Span, The Family Channel, Nickelodeon, Arts and Entertainment, Black Entertainment Television, CourtTV, The Discovery Channel, American Movie Classics, Comedy Central, The Learning Channel, and

The Weather Channel. Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers. See Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L. J. 329, 339 (“For the most part, cable personnel do not review any of the material provided by cable networks. . . . [C]able systems have no conscious control over program services provided by others”).

In contrast to commercial broadcast stations, which transmit signals at no charge to viewers and generate revenues by selling time to advertisers, cable systems charge subscribers a monthly fee for the right to receive cable programming and rely to a lesser extent on advertising. In most instances, cable subscribers choose the stations they will receive by selecting among various plans, or “tiers,” of cable service. In a typical offering, the basic tier consists of local broadcast stations plus a number of cable programming networks selected by the cable operator. For an additional cost, subscribers can obtain channels devoted to particular subjects or interests, such as recent-release feature movies, sports, children’s programming, sexually explicit programming, and the like. Many cable systems also offer pay-per-view service, which allows an individual subscriber to order and pay a one-time fee to see a single movie or program at a set time of the day. See J. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* §5.05[2] (1989); Brenner, *supra*, at 334, n. 22.

B

On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992 Cable Act or Act). Among other things, the

Act subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators. At issue in this case is the constitutionality of the so-called must-carry provisions, contained in §§4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

Section 4 requires carriage of "local commercial television stations," defined to include all full power television broadcasters, other than those qualifying as "noncommercial educational" stations under §5, that operate within the same television market as the cable system. §4, 47 U. S. C. §§534(b)(1)(B), (h)(1)(A) (1988 ed., Supp. IV).¹ Cable systems with more than 12 active channels, and more than 300 subscribers, are required to set aside up to one-third of their channels for commercial broadcast stations that request carriage. §534(b)(1)(B). Cable systems with more than 300 subscribers, but only 12 or fewer active channels, must carry the signals of three commercial broadcast stations. §534(b)(1)(A).²

¹Although a cable system's local television market is defined by regulation, see 47 CFR §73.3555(d)(3)(i) (1993), the FCC is authorized to make special market determinations upon request to better effectuate the purposes of the Act. See 1992 Cable Act §4, 47 U. S. C. §534(h)(1)(C) (1988 ed., Supp. IV).

²If there are not enough local full power commercial broadcast stations to fill the one-third allotment, a cable system with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two of them. See §534(c)(1); see also §534(h)(2) (defining "qualified low power station"). Low power television stations are small broadcast entities that transmit over a

If there are fewer broadcasters requesting carriage than slots made available under the Act, the cable operator is obligated to carry only those broadcasters who make the request. If, however, there are more requesting broadcast stations than slots available, the cable operator is permitted to choose which of these stations it will carry. §534(b)(2).³ The broadcast signals carried under this provision must be transmitted on a continuous, uninterrupted basis, §534(b)(3), and must be placed in the same numerical channel position as when broadcast over the air. §534(b)(6). Further, subject to a few exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of its must-carry obligations. §534(b)(10).

Section 5 of the Act imposes similar requirements regarding the carriage of local public broadcast television stations, referred to in the Act as local “noncommercial educational television stations.” 47 U. S. C. §535(a) (1988 ed., Supp. IV).⁴ A cable system with 12

limited geographic range. They are licensed on a secondary basis and are permitted to operate only if they do not interfere with the signals of full power broadcast stations.

³Cable systems are not required to carry the signal of any local commercial television station that “substantially duplicates” the signal of any other broadcast station carried on the system. §534(b)(5); see also *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992* (Broadcast Signal Carriage Issues), No. 92-259, March 29, 1993, ¶19 (defining “substantial duplication” as a 50% overlap in programming). Nor are they required to carry the signals of more than one station affiliated with each national broadcast network. If the cable operator does choose to carry broadcast stations with duplicative programming, however, the system is credited with those stations for purposes of its must-carry obligations. §534(b)(5).

⁴“Noncommercial educational television station[s]” are defined to include broadcast stations that are either (1) licensed by the FCC as a “noncommercial educational television broadcast station” and have, as licensees, entities which are eligible to receive grants from the

or fewer channels must carry one of these stations; a system of between 13 and 36 channels must carry between one and three; and a system with more than 36 channels must carry each local public broadcast station requesting carriage. §§535(b)(2)(A), (b)(3)(A), (b)(3)(D). The Act requires a cable operator to import distant signals in certain circumstances but provides protection against substantial duplication of local noncommercial educational stations. See §§535(b)(3)(B), (e). As with commercial broadcast stations, §5 requires cable system operators to carry the program schedule of the public broadcast station in its entirety and at its same over-the-air channel position. §§535(g)(1), (g)(5).

Taken together, therefore, §§4 and 5 subject all but the smallest cable systems nationwide to must-carry obligations, and confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system.

C

Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry. See S. Rep. No. 102-92, pp. 3-4 (1991) (describing hearings); H. R. Rep. No. 102-628, p. 74 (1992) (same). The conclusions Congress drew from its factfinding process are recited in the text of the Act itself. See §§2(a)(1)-(21). In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that

Corporation for Public Broadcasting; or (2) owned and operated by a municipality and transmit "predominantly noncommercial programs for educational purposes." §§535(l)(1)(A)-(B).

regulation of the market for video programming was necessary to correct this competitive imbalance.

In particular, Congress found that over 60 percent of the households with television sets subscribe to cable, §2(a)(3), and for these households cable has replaced over-the-air broadcast television as the primary provider of video programming. §2(a)(17). This is so, Congress found, because “[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.” *Ibid.* In addition, Congress concluded that due to “local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,” the overwhelming majority of cable operators exercise a monopoly over cable service. §2(a)(2). “The result,” Congress determined, “is undue market power for the cable operator as compared to that of consumers and video programmers.” *Ibid.*

According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator’s ability, as owner of the transmission facility, to “terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.” §2(a)(15). The incentive derives from the economic reality that “[c]able television systems and broadcast television stations increasingly compete for television advertising revenues.” §2(a)(14). By refusing carriage of broadcasters’ signals, cable operators, as a practical matter, can reduce the number of households that have access to the broadcasters’ programming, and thereby capture advertising dollars that would otherwise go to broadcast stations. §2(a)(15).

Congress found, in addition, that increased vertical integration in the cable industry is making it even harder for broadcasters to secure carriage on cable systems, because cable operators have a financial incentive to favor their affiliated programmers. §2(a)(5). Congress also determined that the cable industry is characterized by horizontal concentration, with many cable operators sharing common ownership. This has resulted in greater “barriers to entry for new programmers and a reduction in the number of media voices available to consumers.” §2(a)(4).

In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, “[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried,” §2(a)(15); the “marked shift in market share” from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, §§2(a)(13)–(14); and that, as a consequence, “the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.” §2(a)(16).

D

Soon after the Act became law, appellants filed these five consolidated actions in the United States District Court for the District of Columbia against the United States and the Federal Communications Commission (hereinafter referred to collectively as the Government), challenging the constitutionality of the must-carry provisions. Appellants, plaintiffs below, are numerous cable programmers and cable operators. After additional parties intervened, a three-judge District Court convened under 28 U. S. C. §2284 to hear the actions. 1992 Cable Act §23, 47 U. S. C. §555(c)(1) (1988 ed., Supp. IV). Each of the plaintiffs filed a motion for summary

judgment; several intervenor-defendants filed cross-motions for summary judgment; and the Government filed a cross-motion to dismiss. Although the Government had not asked for summary judgment, the District Court, in a divided opinion, granted summary judgment in favor of the Government and the other intervenor-defendants, ruling that the must-carry provisions are consistent with the First Amendment. 819 F. Supp. 32 (DC 1993).

The court found that in enacting the must-carry provisions, Congress employed "its regulatory powers over the economy to impose order upon a market in dysfunction." *Id.*, at 40. The court characterized the 1992 Cable Act as "simply industry-specific antitrust and fair trade practice regulatory legislation," *ibid.*, and said that the must-carry requirements "are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Ibid.* The court rejected appellants' contention that the must-carry requirements warrant strict scrutiny as a content-based regulation, concluding that both the commercial and public broadcast provisions "are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that [the] cable operators, broadcasters, and programmers have in contemplation to deliver." *Ibid.* The court proceeded to sustain the must-carry provisions under the intermediate standard of scrutiny set forth in *United States v. O'Brien*, 391 U. S. 367 (1968), concluding that the preservation of local broadcasting is an important governmental interest, and that the must-carry provisions are sufficiently tailored to serve that interest. 819 F. Supp., at 45-47.

Judge Williams dissented. He acknowledged the "very real problem" that "cable systems control access 'bottle-necks' to an important communications medium," *id.*, at 57, but concluded that Congress may not address that

problem by extending access rights only to broadcast television stations. In his view, the must-carry rules are content based, and thus subject to strict scrutiny, because they require cable operators to carry speech they might otherwise choose to exclude, and because Congress' decision to grant favorable access to broadcast programmers rested "in part, but quite explicitly, on a finding about their content." *Id.*, at 58. Applying strict scrutiny, Judge Williams determined that the interests advanced in support of the law are inadequate to justify it. While assuming "as an abstract matter" that the interest in preserving access to free television is compelling, he found "no evidence that this access is in jeopardy." *Id.*, at 62. Likewise, he concluded that the rules are insufficiently tailored to the asserted interest in programming diversity because cable operators "now carry the vast majority of local stations," and thus to the extent the rules have any effect at all, "it will be only to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." *Id.*, at 61.

This direct appeal followed, see §23, 47 U. S. C. §555(c)(1) (1988 ed., Supp. IV), and we noted probable jurisdiction. 509 U. S. ____ (1993).

II

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. *Leathers v. Medlock*, 499 U. S. 439, 444 (1991). Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." *Los Angeles*

v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986). By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. Nevertheless, because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions.

A

We address first the Government's contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1969) (television), and *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943) (radio), with *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974) (print), and *Riley v. National Federation of Blind of N.C., Inc.*, 487 U. S. 781 (1988) (personal solicitation). But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. See *FCC v. League of Women Voters of Cal.*, 468 U. S. 364, 377 (1984); *Red Lion*, *supra*, at 388-389, 396-399; *National Broadcasting Co.*, 319 U. S., at 226. As a general matter, there are more would-be broadcasters than frequencies available in the

electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. *Id.*, at 212. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. See *FCC v. League of Women Voters, supra*, at 377. ("The fundamental distinguishing characteristic of the new medium of broadcasting . . . is that [b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants") (internal quotation marks omitted); *FCC v. National Citizens Comm. for Broadcasting*, 436 U. S. 775, 799 (1978). In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. *Red Lion*, 395 U. S., at 390. As we said in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an un-bridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, at 388; see also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 101 (1973).

Although courts and commentators have criticized the scarcity rationale since its inception,⁵ we have declined

⁵ See, e.g., *Telecommunications Research and Action Center v. FCC*, 801 F. 2d 501, 508-509 (CA DC 1986), cert. denied, 482 U. S. 919 (1987); L. Bollinger, *Images of a Free Press* 87-90 (1991); L. Powe, *American Broadcasting and the First Amendment* 197-209 (1987); M. Spitzer, *Seven Dirty Words and Six Other Stories* 7-18 (1986); Note, *The Mes-*

[to question its continuing validity as support for our broadcast jurisprudence, see *FCC v. League of Women Voters, supra*, at 376, n. 11, and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation. See *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 74 (1983) (“Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication”) (footnote omitted).

This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not. See *infra*, at 32–33. But whatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.

sage in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062, 1072–1074 (1994); Winer, The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?, 46 Md. L. Rev. 212, 218–240 (1987); Coase, The Federal Communications Commission, 2 J. Law & Econ. 1, 12–27 (1959).

Although the Government acknowledges the substantial technological differences between broadcast and cable, see Brief for Federal Appellees 22, it advances a second argument for application of the *Red Lion* framework to cable regulation. It asserts that the foundation of our broadcast jurisprudence is not the physical limitations of the electromagnetic spectrum, but rather the “market dysfunction” that characterizes the broadcast market. Because the cable market is beset by a similar dysfunction, the Government maintains, the *Red Lion* standard of review should also apply to cable. While we agree that the cable market suffers certain structural impediments, the Government’s argument is flawed in two respects. First, as discussed above, the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence. See *League of Women Voters, supra*, at 377; *National Citizens Comm. for Broadcasting, supra*, at 799; *Red Lion, supra*, at 390. Second, the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652, 657–658 (1990); *Federal Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 256–259 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S., at 248–258.

By a related course of reasoning, the Government and some appellees maintain that the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational basis scrutiny under this Court’s “precedents governing legislative efforts to correct market failure in a market whose commodity is speech,” such as *Associated Press v. United States*, 326 U. S. 1 (1945), and *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951). See Brief for Federal Appellees

17. This contention is unavailing. *Associated Press* and *Lorain Journal* both involved actions against members of the press brought under the Sherman Antitrust Act, a law of general application. But while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, compare *Cohen v. Cowles Media Co.*, 501 U. S. 663, 670 (1991), with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566–567 (1991), laws that single out the press, or certain elements thereof, for special treatment “pose a particular danger of abuse by the State,” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 228 (1987), and so are always subject to at least some degree of heightened First Amendment scrutiny. See *Preferred Communications, supra*, at 496 (“Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force”). Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded. See *Minneapolis Star & Tribune, supra*, at 583.

B

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. See *Leathers v. Medlock*, 499 U. S., at 449 (citing *Cohen v. California*, 403 U. S. 15, 24 (1971)); *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638, 640–642 (1943). Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of

this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions “rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U. S. ___, ___ (1991) (slip op., at 9).

For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. *R. A. V. v. St. Paul*, 505 U. S. ___, ___ (1992) (slip op., at 4); *Texas v. Johnson*, 491 U. S. 397, 414 (1989). Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. See *Simon & Schuster*, 502 U. S., at ___ (slip op., at 11); *id.*, at ___ (KENNEDY, J., concurring in judgment) (slip op., at 2-3); *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U. S. 37, 45 (1983). Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. See *Riley v. National Federation for Blind of N.C., Inc.*, 487 U. S., at 798; *West Virginia Bd. of Ed. v. Barnette*, *supra*. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, see *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984), because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Deciding whether a particular regulation is content-based or content-neutral is not always a simple task. We have said that the “principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or]

disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). See *R. A. V.*, 505 U. S., at ___ (slip op., at 8) (“The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed”). The purpose, or justification, of a regulation will often be evident on its face. See *Frisby v. Schultz*, 487 U. S. 474, 481 (1988). But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Cf. *Simon & Schuster*, *supra*, at ___ (slip op., at 10) (“‘illicit legislative intent is not the *sine qua non* of a violation of the First Amendment’”) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U. S. 575, 592 (1983)). Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content. *Arkansas Writers’ Project*, *supra*, at 231–232; *Carey v. Brown*, 447 U. S. 455, 464–469 (1980).

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. See, e.g., *Burson v. Freeman*, 504 U. S. ___, ___ (1992) (slip op., at 5) (“Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign”); *Boos v. Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (whether municipal ordinance permits individuals to “picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not”). By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral. See, e.g., *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) (ordinance prohibiting the posting of signs on

public property “is neutral—indeed it is silent—concerning any speaker’s point of view”); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations “applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds”).

C

Insofar as they pertain to the carriage of full power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech.⁶ Although the provisions interfere

⁶ The must-carry rules also require carriage, under certain limited circumstances, of low power broadcast stations. 47 U.S.C. §534(c); see n. 2, *supra*. Under the Act, a low power station may become eligible for carriage only if, among other things, the FCC determines that the station’s programming “would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station’s community of license.” §534(h)(2)(B). We recognize that this aspect of §4 appears to single out certain low-power broadcasters for special benefits on the basis of content. Because the District Court did not address whether these particular provisions are content-based, and because the parties make only the most glancing reference to the operation of, and justifications for, the low-power broadcast provisions, we think it prudent to allow the District Court to consider the content-neutral or content-based character of this provision in the first instance on remand.

In a similar vein, although a broadcast station’s eligibility for must-carry is based upon its geographic proximity to a qualifying cable system, §534(h)(1)(C)(i), the Act permits the FCC to grant must-carry privileges upon request to otherwise ineligible broadcast stations. In acting upon these requests, the FCC is directed to give “attention to the value of localism” and, in particular, to whether the requesting station “provides news coverage of issues of concern to such community . . . or coverage of sporting and other events of interest to the community.” §534(h)(1)(C)(ii). Again, the District Court did not address this provision, but may do so on remand.

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