of the *O'Brien* analysis, for unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. *Ward*, 491 U.S., at 799. Finally, the record fails to provide any judicial findings concerning the availability and efficacy of "constitutionally acceptable less restrictive means" of achieving the Government's asserted interests. See *Sable Communications*, 492 U. S., at 129.

In sum, because there are genuine issues of material fact still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250 (1986). Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

The judgment below is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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 BLACKMUN, concurring.

I join JUSTICE KENNEDY's opinion, which aptly identifies and analyzes the First Amendment concerns and principles that should guide consideration of free speech issues in the expanding cable industry. I write to emphasize the paramount importance of according substantial deference to the predictive judgments of Congress, see, *e.g.*, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 103 (1973), particularly where, as here, that legislative body has compiled an extensive record in the course of reaching its judgment. Nonetheless, the standard for summary judgment is high, and no less so when First Amendment values are at stake and the issue is of far-reaching importance. Because in this case there remain a few unresolved issues of material fact, a remand is appropriate. The Government had occasion to submit to the District Court only portions of the record developed by Congress. In light of the Court's opinion today, those portions, which were submitted to defeat a motion for summary judgment, are not adequate to support one. The record before the District Court no doubt will benefit from any additional evidence the Government and the other parties now see fit to present.

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 STEVENS, concurring in part and concurring in the judgment.

As JUSTICE KENNEDY has ably explained, the "overriding congressional purpose" of the challenged must-carry provisions of the 1992 Cable Act is to "guarantee the survival of a medium that has become a vital part of the Nation's communication system," a purpose that is "unrelated to the content of expression." *Ante*, at 22. The public interests in protecting access to television for the millions of homes without cable and in assuring the availability of "a multiplicity of information sources" are unquestionably substantial. *Ante*, at 39–40. The must-carry provisions are amply "justified by special characteristics of the cable medium," namely, "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Ante*, at 37. Cable operators' control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media.

While I agree with most of JUSTICE KENNEDY's reasoning, and join Parts I, II(C), II(D), and III(A) of his opinion, I part ways with him on the appropriate disposition of this case. In my view the District Court's

judgment sustaining the must-carry provisions should be affirmed. The District Court majority evaluated §§4 and 5 as content-neutral regulations of protected speech according to the same standard that JUSTICE KENNEDY's opinion instructs it to apply on remand. In my view, the District Court reached the correct result the first time around. Economic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effect of legal rules in complex conditions. Whether Congress might have accomplished its goals more efficiently through other means; whether it correctly interpreted emerging trends in the protean communications industry; and indeed whether must-carry is actually imprudent as a matter of policy will remain matters of debate long after the 1992 Act has been repealed or replaced by successor legislation. But the question for us is merely whether *Congress* could fairly conclude that cable operators' monopoly position threatens the continued viability of broadcast television and that must-carry is an appropriate means of minimizing that risk.[1]

As JUSTICE KENNEDY recognizes, *ante*, at 41–42, findings by the Congress, particularly those emerging from such sustained deliberations, merit special respect from this Court.[2] Accorded proper deference, the

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[1]I have no quarrel with JUSTICE KENNEDY's general statement that the question for the reviewing court in a case of this kind is merely whether "Congress has drawn reasonable inferences based on substantial evidence," given his caveat that Congress need not compile or restrict itself to a formal record in the manner required of a judicial or administrative factfinder. *Ante*, at 42–43. In my view, however, application of that standard would require affirmance here.

[2]As JUSTICE KENNEDY observes, *ante*, at 42–43, we cannot abdicate our responsibility to decide whether a restriction on speech violates the First Amendment. But the factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than

findings in §2 are sufficient to sustain the must-carry provisions against facial attack. Congress's conclusion, for example, that broadcasters who are denied carriage on cable systems will suffer serious and potentially terminal economic harm, see §2(a)(16), requires no "further demonstration." See *id.*, at 44. Because 60% of American households have cable, and because most cable subscribers rely solely on that medium to receive video signals, it is a practical certainty that a broadcaster dropped from the local cable system would suffer substantial economic harm. It is also clear that cable operators—particularly (but not exclusively) those affiliated with cable programmers—have both the ability and the economic incentive to exploit their gatekeeper status to the detriment of broadcasters. Thus, even if Congress had had before it no historical evidence that terminations or refusals of carriage had already occurred,[3] it could reasonably infer that cable operators' bottleneck control, together with the already high degree of vertical integration in the industry, would motivate such conduct in the near future.[4] Indeed, the

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those supporting content-based restrictions on speech, see *Sable Communications* v. *FCC*, 492 U. S. 115, 129 (1989); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843 (1978) (both cited *ante*, at 42), or restrictions imposed by administrative agencies, see, *e.g.*, *Century Communications Corp.* v. *FCC*, 835 F. 2d 292, 304 (1987) (cited *ante*, at 42–43).

[3]But see H.R. Rep. No. 628, 102 Cong., 2d Sess. 50–57 (1992); Sen. Rep. No. 92, 102d Cong., 1st Sess. 43–44 (1991).

[4]As Judge Jackson put it in his opinion for district court:

"[E]ven if the state of the broadcasting industry is not now as parlous as the defendants contend, the Court finds it indisputable that cable operators have attained a position of dominance in the video signal distribution market, and can henceforth exercise the attendant market power. The Court does not find improbable Congress' conclusion that this market power provides cable operators with both incentive and present ability to block non-cable

main thrust of the most pertinent congressional findings is not that cable carriers have already eliminated broadcast competition on a grand scale, but that given their market power they may soon do so.[5]

An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly. The mandatory access mechanism that Congress fashioned in §§4 and 5 of the 1992 Act is a simple and direct means of dealing with the dangers posed by cable operators' exclusive control of what is fast becoming the preeminent means of transferring video signals to homes. The must-carry mechanism is analogous to the relief that might be appropriate for a threatened violation of the antitrust laws; one need only refer to undisputed facts concerning the structure of the cable and broadcast industries to agree that that threat is at least plausible. Moreover, Congress did not have to find that all broadcasters were at risk before acting to protect vulnerable ones, for the interest in preserving access to free television is valid throughout the Nation. Indeed, the Act is well tailored to assist those broadcasters who are most in jeopardy. Because thriving commercial broadcasters will likely avail themselves of the remunerative "retransmission

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programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy. In light of the considerable body of evidence amassed by Congress, and the deference this Court should accord to the factfinding abilities of the nation's legislature, . . . the Court must conclude that the danger perceived by Congress is real and substantial." *Turner Broadcasting System, Inc.* v. *F. C. C.*, 819 F. Supp. 32, 46 (D.C. 1993) (citations omitted).

[5]See §2(a)(16) ("As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."); see also §2(a)(15), §2(a)(17).

consent" procedure of §6, those broadcasters who gain access via the §4 must-carry route are apt to be the most economically vulnerable ones. Precisely how often broadcasters will secure carriage through §6 rather than §4 will depend upon future developments; the very unpredictability of this and other effects of the new regulatory scheme militates in favor of allowing the scheme to proceed rather than requiring a perfectly documented or entirely complete *ex ante* justification.

JUSTICE KENNEDY asks the three-judge panel to take additional evidence on such matters as whether the must-carry provisions really respond to threatened harms to broadcasters, whether §§4–5 "will in fact alleviate these harms in a direct and material way," *ante*, at 41, and "the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections," *id*, at 44. While additional evidence might cast further light on the efficacy and wisdom of the must-carry provisions, additional evidence is not necessary to resolve the question of their facial constitutionality.[6]

To predicate the facial validity of the must-carry provisions upon forecasts of the ultimate consequences of their implementation is to ask the District Court to address questions that are not at present susceptible of reliable answers. Some of the matters the lead opinion singles out for further review—for example, "the degree to which cable programmers will be dropped from

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[6]The must-carry obligations may be broader than necessary to protect vulnerable broadcasters, but that would not alone be enough to demonstrate that they violate the First Amendment. Thus, for instance, to the extent that §§4 and 5 obligate cable operators to carry broadcasters they would have carried even in the absence of a statutory obligation, any impairment of operators' freedom of choice, or on cable programmers' ability to secure carriage, would be negligible.

cable systems to make room for local broadcasters," *ante*, at 44—depend upon predictions about the future voluntary actions of entities who are parties to this case. At best, a remand for consideration of such factors will require the District Court to engage in speculation; it may actually invite the parties to adjust their conduct in an effort to affect the result of this litigation (perhaps by opting to drop cable programs rather than seeking to increase total channel capacity). The must-carry provisions may ultimately prove an ineffective or needlessly meddlesome means of achieving Congress' legitimate goals. However, such a conclusion could be confidently drawn, if ever, only after the must-carry scheme has been tested by experience. On its face, that scheme is rationally calculated to redress the dangers that Congress discerned after its lengthy investigation of the relationship between the cable and broadcasting industries.

It is thus my view that we should affirm the judgment of the District Court. Were I to vote to affirm, however, no disposition of this appeal would command the support of a majority of the Court. An accommodation is therefore necessary. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). Accordingly, because I am in substantial agreement with JUSTICE KENNEDY's analysis of the case, I concur in the judgment vacating and remanding for further proceedings.

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 O'CONNOR, with whom JUSTICE SCALIA and JUSTICE GINSBURG join, and with whom JUSTICE THOMAS joins as to Parts I and III, concurring in part and dissenting in part.

There are only so many channels that any cable system can carry. If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped. In the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385, 106 Stat. 1460, Congress made a choice: By reserving a little over one-third of the channels on a cable system for broadcasters, it ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained. The question presented in this case is whether this choice comports with the commands of the First Amendment.

I

A

The 1992 Cable Act implicates the First Amendment rights of two classes of speakers. First, it tells cable operators which programmers they must carry, and

keeps cable operators from carrying others that they might prefer. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. *Ante*, at 11–12. Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place.

Second, the Act deprives a certain class of video programmers—those who operate cable channels rather than broadcast stations—of access to over one-third of an entire medium. Cable programmers may compete only for those channels that are not set aside by the must-carry provisions. A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers. As the Court explains in Parts I, II–A and II–B of its opinion, which I join, cable programmers and operators stand in the same position under the First Amendment as do the more traditional media.

Under the First Amendment, it is normally not within the government's power to decide who may speak and who may not, at least on private property or in traditional public fora. The government does have the power to impose content-neutral time, place, and manner restrictions, but this is in large part precisely because such restrictions apply to all speakers. Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome. Laws that single out particular

speakers are substantially more dangerous, even when they do not draw explicit content distinctions. See, *e.g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 584, 591–592 (1983); see also *Leathers* v. *Medlock*, 499 U. S. 439, 447 (1991).

I agree with the Court that some speaker-based restrictions—those genuinely justified without reference to content—need not be subject to strict scrutiny. But looking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content. The findings, enacted by Congress as §2 of the Act, and which I must assume state the justifications for the law, make this clear. "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." §2(a)(6). "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." §2(a)(8)(A). "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." §2(a)(10). "Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." §2(a)(11).

Similar justifications are reflected in the operative provisions of the Act. In determining whether a broadcast station should be eligible for must-carry in a particular market, the FCC must "afford particular attention to the value of localism by taking into account such factors as . . . whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community." §4, 47 U. S. C.

§534(h)(1)(C)(ii) (1988 ed., Supp. IV). In determining whether a low-power station is eligible for must-carry, the FCC must ask whether the station "would address local news and informational needs which are not being adequately served by full power television broadcast stations." §4, 47 U. S. C. §534(h)(2)(B) (1988 ed., Supp. IV). Moreover, the Act distinguishes between commercial television stations and noncommercial educational television stations, giving special benefits to the latter. Compare §4 with §5. These provisions may all be technically severable from the statute, but they are still strong evidence of the statute's justifications.

Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U. S. ___, ___ (1991) (slip op., at 10–11); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 228 (1987). The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable. See, *e.g.*, *id.*, at 231–232; *Regan* v. *Time, Inc.*, 468 U. S. 641, 648–649 (1984); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 514–515 (1981) (plurality); *Carey* v. *Brown*, 447 U. S. 455, 466–468 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972); *Cox* v. *Louisiana*, 379 U. S. 536, 581 (1965) (Black, J., concurring); see also *R. A. V.* v. *St. Paul*, 505 U. S. ___, ___ (1992) (slip op., at 8) ("The government may not regulate [speech] based

on hostility—or favoritism—towards the underlying message expressed").

This is why the Court is mistaken in concluding that the interest in diversity—in "access to a multiplicity" of "diverse and antagonistic sources," *ante*, at 40 (internal quotation marks omitted)—is content neutral. Indeed, the interest is not "related to the *suppression* of free expression," *ante*, at 39 (emphasis added and internal quotation marks omitted), but that is not enough for content neutrality. The interest in giving a tax break to religious, sports, or professional magazines, see *Arkansas Writers' Project*, *supra*, is not related to the suppression of speech; the interest in giving labor picketers an exemption from a general picketing ban, see *Carey* and *Mosley*, *supra*, is not related to the suppression of speech. But they are both related to the *content* of speech—to its communicative impact. The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.

B

The Court dismisses the findings quoted above by speculating that they do not reveal a preference for certain kinds of content; rather, the Court suggests, the findings show "nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable." *Ante*, at 24. I cannot agree. It is rare enough that Congress states, in the body of the statute itself, the findings underlying its decision. When it does, it is fair to assume that those findings reflect the basis for the legislative decision, especially when the thrust of the findings is further reflected in the rest of the statute. See *Church of Lukumi Babalu Aye* v. *Hialeah*, 508 U. S. ___, ___ (1993) (slip op., at

12–13) (relying on recitals in a city council resolution as evidence of the justifications for an ordinance).

Moreover, it does not seem likely that Congress would make extensive findings merely to show that broadcast television is valuable. The controversial judgment at the heart of the statute is not that broadcast television has some value—obviously it does—but that broadcasters should be preferred over cable programmers. The best explanation for the findings, it seems to me, is that they represent Congress' reasons for adopting this preference; and, according to the findings, these reasons rest in part on the content of broadcasters' speech. To say in the face of the findings that the must-carry rules "impose burdens and confer benefits without reference to the content of speech," *ante*, at 19, cannot be correct, especially in light of the care with which we must normally approach speaker-based restrictions. See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983).

It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral. See *Arkansas Writers' Project, Inc.*, *supra* (striking down content-based exemptions in a general revenue measure); *Regan* v. *Time, Inc.*, *supra* (striking down content-based exemptions in a general anticounterfeiting statute); *Metromedia, Inc.* v. *San Diego*, *supra* (plurality) (striking down on content discrimination grounds a general urban beautification ordinance); *Carey* v. *Brown*, *supra*, at 466–468 (striking down on content discrimination grounds an ordinance aimed at preserving residential privacy). Of course, the mere possibility that a statute might be justified with

reference to content is not enough to make the statute content based, and neither is evidence that some legislators voted for the statute for content-based reasons. But when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.

C

Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest. *Boos* v. *Barry*, 485 U. S. 312, 321 (1988). This is an exacting test. It is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.

The interest in localism, either in the dissemination of opinions held by the listeners' neighbors or in the reporting of events that have to do with the local community, cannot be described as "compelling" for the purposes of the compelling state interest test. It is a legitimate interest, perhaps even an important one—certainly the government can foster it by, for instance, providing subsidies from the public fisc—but it does not rise to the level necessary to justify content-based speech restrictions. It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one. And the same is true of the interest in diversity of viewpoints: While the government may subsidize speakers that it thinks provide novel points of view, it may not restrict other speakers on the theory that what they say is more conventional. Cf. *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 612–613 (1990) (O'CONNOR, J.,

dissenting); *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n*, 475 U. S. 1, 20 (1986) (plurality).

The interests in public affairs programming and educational programming seem somewhat weightier, though it is a difficult question whether they are compelling enough to justify restricting other sorts of speech. We have never held that the Government could impose educational content requirements on, say, newsstands, bookstores, or movie theaters; and it is not clear that such requirements would in any event appreciably further the goals of public education.

But even assuming arguendo that the Government could set some channels aside for educational or news programming, the Act is insufficiently tailored to this goal. To benefit the educational broadcasters, the Act burdens more than just the cable entertainment programmers. It equally burdens CNN, C–SPAN, the Discovery Channel, the New Inspirational Network, and other channels with as much claim as PBS to being educational or related to public affairs.

Even if the Government can restrict entertainment in order to benefit supposedly more valuable speech, I do not think the restriction can extend to other speech that is as valuable as the speech being benefited. In the rare circumstances where the government may draw content-based distinctions to serve its goals, the restrictions must serve the goals a good deal more precisely than this. See *Arkansas Writers' Project, Inc.*, 481 U. S., at 231–232; *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 214–215 (1975).

Finally, my conclusion that the must-carry rules are content based leads me to conclude that they are an impermissible restraint on the cable operators' editorial discretion as well as on the cable programmers' speech. For reasons related to the content of speech, the rules restrict the ability of cable operators to put on the programming they prefer, and require them to include pro-

gramming they would rather avoid. This, it seems to me, puts this case squarely within the rule of *Pacific Gas & Electric Co.*, 475 U. S., at 14–15 (plurality); *id.*, at 23–24 (Marshall, J., concurring in judgment); see also *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257–258 (1974).

II

Even if I am mistaken about the must-carry provisions being content based, however, in my view they fail content-neutral scrutiny as well. Assuming arguendo that the provisions are justified with reference to the content-neutral interests in fair competition and preservation of free television, they nonetheless restrict too much speech that does not implicate these interests.

Sometimes, a cable system's choice to carry a cable programmer rather than a broadcaster may be motivated by anticompetitive impulses, or might lead to the broadcaster going out of business. See *ante*, at 38–45. That some speech within a broad category causes harm, however, does not justify restricting the whole category. If Congress wants to protect those stations that are in danger of going out of business, or bar cable operators from preferring programmers in which the operators have an ownership stake, it may do that. But it may not, in the course of advancing these interests, restrict cable operators and programmers in circumstances where neither of these interests is threatened.

"A regulation is not 'narrowly tailored'—even under the more lenient [standard applicable to content-neutral restrictions]—where . . . a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Simon & Schuster*, 502 U. S., at ___–___, n. ** (slip op., at 15–16, n. **) (internal quotation marks omitted). If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. *Schneider* v. *State (Town of Irvington)*, 308

U. S. 147 (1939). If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980); see also *Edenfield* v. *Fane*, 507 U. S. ___, ___-___ (1993) (slip op., at 15–16). 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. *Martin* v. *City of Struthers*, 319 U. S. 141 (1943). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) (citations omitted).

The must-carry provisions are fatally overbroad, even under a content-neutral analysis: They disadvantage cable programmers even if the operator has no anticompetitive motives, and even if the broadcaster that would have to be dropped to make room for the cable programmer would survive without cable access. None of the factfinding that the District Court is asked to do on remand will change this. The Court does not suggest that either the antitrust interest or the loss of free television interest are implicated in all, or even most, of the situations in which must-carry makes a difference. Perhaps on remand the District Court will find out just how many broadcasters will be jeopardized, but the remedy for this jeopardy will remain the same: Protect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event.

III

Having said all this, it is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable—the question

is who will have this control. Under the FCC's view, the answer is Congress, acting within relatively broad limits. Under my view, the answer is the cable operator. Most of the time, the cable operator's decision will be largely dictated by the preferences of the viewers; but because many cable operators are indeed monopolists, the viewers' preferences will not always prevail. Our recognition that cable operators are speakers is bottomed in large part on the very fact that the cable operator has editorial discretion. *Ante*, at 11–12.

I have no doubt that there is danger in having a single cable operator decide what millions of subscribers can or cannot watch. And I have no doubt that Congress can act to relieve this danger. In other provisions of the Act, Congress has already taken steps to foster competition among cable systems. §3(a), 47 U. S. C. §543(a)(2) (1988 ed., Supp. IV). Congress can encourage the creation of new media, such as inexpensive satellite broadcasting, or fiber-optic networks with virtually unlimited channels, or even simple devices that would let people easily switch from cable to over-the-air broadcasting. And of course Congress can subsidize broadcasters that it thinks provide especially valuable programming.

Congress may also be able to act in more mandatory ways. If Congress finds that cable operators are leaving some channels empty—perhaps for ease of future expansion—it can compel the operators to make the free channels available to programmers who otherwise would not get carriage. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 88 (1980) (upholding a compelled access scheme because it did not burden others' speech). Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or timesharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone com-

panies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.

But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals. Perhaps Congress can to some extent restrict, even in a content-based manner, the speech of cable operators and cable programmers. But it must do so in compliance with the constitutional requirements, requirements that were not complied with here. Accordingly, I would reverse the judgment below.

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 GINSBURG, concurring in part and dissenting in part.

Substantially for the reasons stated by Circuit Judge Williams in his opinion dissenting from the three-judge District Court's judgment, 819 F. Supp. 32, 57 (DC 1993), I conclude that Congress' "must-carry" regime, which requires cable operators to set aside just over one-third of their channels for local broadcast stations, reflects an unwarranted content-based preference and hypothesizes a risk to local stations that remains imaginary. I therefore concur in Parts I, II–A, and II–B of the Court's opinion, and join JUSTICE O'CONNOR's opinion concurring in part and dissenting in part.

The "must-carry" rules Congress has ordered do not differentiate on the basis of "viewpoint," and therefore do not fall in the category of speech regulation that Government must avoid most assiduously. See *R. A. V.* v. *St. Paul*, 505 U. S. ___, ___ (1992) (STEVENS, J., concurring in judgment) (slip op., at 15) ("[W]e have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious."). The rules, however, do reflect a content preference, and on that account demand close scrutiny.

The Court has identified as Congress' "overriding objective in enacting must-carry," the preservation of over-the-air television service for those unwilling or unable to subscribe to cable, and has remanded the case for further airing centered on that allegedly overriding, content-neutral purpose. *Ante*, at 21–24, 43–45. But an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress' evident plan to advance local programming. See *ante*, at 3–4, 6–7 (O'CONNOR, J., dissenting).

As Circuit Judge Williams stated:

> "Congress rested its decision to promote [local broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.'" 819 F. Supp., at 58, quoting 1992 Cable Act, §2(a)(11).

Moreover, as Judge Williams persuasively explained, "[the] facts do not support an inference that over-the-air TV is at risk," 819 F. Supp., at 63, see *id.*, at 62–65; "[w]hatever risk there may be in the abstract has completely failed to materialize." *Id.*, at 63. "The paucity of evidence indicating that broadcast television is in jeopardy," see *ante*, at 44, if it persists on remand, should impel an ultimate judgment for the petitioners.