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Articles

The Saga of Cable TV's "Must-Carry" Rules: Will a New Phoenix Rise from the Constitutional Ashes?

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No longer the stepchild of the television industry, cable television has become the media success story of the 1980s. From twenty four hour news to quality entertainment and sports events, cable has been transformed from a money-losing, second-rate, reception-enhancement service into a powerful entertainment and information machine that provides greater diversity and higher quality than could have been imagined just a few years ago. With an increased number of viewers and a vast array of programs to appeal to almost any viewer's palate, cable television has become important, even indispensable, for many Americans.

Over-the-air broadcasters, never happy with the prospect of competition from this newer medium, have for years actively tried to stunt cable's development, with the help of a more than willing Federal Communications Commission (FCC). One of the main weapons used by over-the-air broadcasters to limit the impact of cable was the "must-carry" rules — FCC regulations which mandated the carriage of local over-the-air television stations by a cable operator. The must-carry rules represented a mainstay of cable regulation until they suffered two major constitutional defeats by the District of Columbia Circuit Court of

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Appeals in 1985 and 1987.[1] The refusal of the United States Supreme Court to review these lower court determinations[2] appears to have sealed the defeat of the must-carry rules. This decision has ushered in a new era featuring less regulation of cable television — an era that may be a boon for the cable industry but more problematic for the public it serves.

The courts in *Quincy Cable TV v. FCC*[3] and *Century Communications Corp. v. FCC*[4] did more than just nullify a long-standing rule. They put broadcasters, Congress, the FCC, and the public on notice that carte blanche regulation of cable is not constitutional unless such regulation passes first amendment muster.[5] Although the Court in *Quincy Cable* and *Century Communications* did not articulate the precise standard of review to be applied to cable regulation, dicta in both decisions left open the possibility of even stricter first amendment scrutiny in future cases.[6]

This leads to the ultimate issue: should the FCC or Congress reinstate the must-carry rules? The answer to this question should be a qualified yes. The public interest mandates reimposition of the must-carry rules, but the rules must be more narrowly and intelligently tailored in order to remain within the ambit of first amendment protection.

This Article will trace the history of cable television and the FCC's attempts at regulation, discuss the *Quincy Cable* and *Century Communications* decisions, and propose a new set of must-carry rules that should pass constitutional muster.

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1. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988); Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

2. National Ass'n of Broadcasters v. Century Communications Corp., 108 S. Ct. 2014 (1988), *denying cert. to* 837 F.2d 517 (D.C. Cir. 1988); National Ass'n of Broadcasters v. Quincy Cable TV, 476 U.S. 1169 (1986), *denying cert. to* 768 F.2d 1434 (D.C. Cir. 1985).

3. 768 F.2d 1434.

4. 835 F.2d 292.

5. *Id.* at 295.

6. *Id.* at 298.

I. History of Cable Regulation

A. *Background and Early History*

The must-carry rules go back to the birth of cable television and have taken on a number of incarnations over the years.[7] The rules essentially required cable operators in a given community to transmit to their subscribers over-the-air broadcast signals that could be received by viewers in that particular area. The rules further mandated that should a broadcast television station so request, a cable operator must carry: (1) all commercial television stations within thirty-five miles of the community served by the cable system; (2) all noncommercial educational television stations in the same television market as the cable system community, in a predicted Grade B contour;[8] and (3) all stations whose signals were "significantly viewed" in the community.[9]

Cable television, originally known as community antenna television (CATV), started out as a device enabling outlying communities to pick up television signals which could not be directly received over the air. This was achieved either by connect-

7. *See* Rules re Microwaves-Served CATV, First Report and Order, 38 F.C.C. 683 (1965) [hereinafter First Report and Order of 1965]; CATV, Second Report and Order, 2 F.C.C.2d 725 (1966) [hereinafter Second Report and Order], discussed *infra* notes 26-34 and accompanying text.

8. A predicted Grade B contour is the line representing the service area in which a good picture is available 90% of the time at 50% of receiver locations. This compares with a Grade A contour, where a good picture is available 90% of the time at 70% of receiver locations. Television Assignments, Sixth Report and Order, 41 F.C.C. 148, 177 (1952) [hereinafter Sixth Report and Order].

9. J. GOODALE, ALL ABOUT CABLE § 2.06 [1][b][4] (1989). The Commission defined "significantly viewed" as a minimum of a 3% share of viewing hours and 25% net weekly circulation for network-affiliated stations, and a minimum of 2% share and 5% net weekly circulation for independent stations. *Id.* (An "independent station" was defined as one which did not carry more than 10 hours of network programming per week. 47 C.F.R. § 76.5(n) (1988).). As a specific example, New York City's oldest franchises, Manhattan Cable and Paragon Cable (the two franchises serving Manhattan) would be required to carry all the Very High Frequency (VHF) and Ultra High Frequency (UHF) stations that broadcast in the area, even those licensed in New Jersey (such as WWOR-TV in Secaucus and WNET-TV in Newark) and parts of Long Island (WLIW-TV in Garden City) if those stations met the threshold. However, smaller public television stations in New Jersey would not be mandated carriage since they were not considered within the predicted Grade B Contour and were not significantly viewed by the Manhattan viewing public. *See* PARAGON CABLE TELEVISION, A/B SWITCH NOTICE 209-35/2789 (Oct. 1989).

ing the homes desiring the service to a master antenna (usually erected atop a hill) or by transmitting distant signals to the community via a microwave relay system.[10] Early cable television systems began operations in the early 1950s, prompted by either the lack of quality reception in rural areas or the lack of local television outlets.[11] Another factor promoting cable systems was the freeze on new television licenses imposed by the FCC from 1948 to 1952.[12]

The germination of this upstart medium posed a regulatory problem because the Communications Act of 1934,[13] the guiding statute governing broadcasting, did not address cable transmissions and, consequently, did not explicitly grant the FCC jurisdiction over cable. Due to this void in the Communications Act, the FCC was initially reluctant to get involved with cable as a medium despite the urging of the Commission's senior staff to

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10. *See* L. Powe, American Broadcasting and the First Amendment, 216-17 (1987); *see also* J. Goodale, *supra* note 9, § 1.02 (describing the workings of early cable systems).

> The first cable system was set up by John Walson of Mahonoy City, Pennsylvania. Walson, a line serviceman with the local utility and the owner of an appliance store selling television receivers, erected a large antenna on top of a utility pole at the peak of a local mountain and strung a cable from the antenna to a warehouse at Mahonoy City to provide sufficient reception of television programs. Not only did Mr. Walson obtain subscribers for this system (for a $100 installation fee and a $2.00 per month charge), but this "cable" also helped to sell television receivers.

Id. For a brief history of early cable television, see E. Barnouw, Tube of Plenty, 351-54 (1975).

11. In the early 1950s, many areas of the mountain states did not have local television because of the sparse population and reception problems caused by the terrain. "In a study presented to the FCC in 1965, it was indicated that in 1956 approximately 70% of the population . . . could not receive three network signals [and] [a]bout 20% of the population could not receive any signal without some means of augmenting their reception." J. Goodale, *supra* note 9, § 1.01.

12. For a history of the freeze on new television licenses, see 17 Fed. Reg. 3905-06 (1952). Due to the rapid growth of television and the limited number of VHF channels available for distribution, the Commission held hearings during this three-and-a-half year period and devised a frequency allocation plan created to ensure "a fair and equitable" distribution. In essence, the plan created 70 UHF allocations in addition to the existing VHF channels so that each community in the United States would be able to have television service. Sixth Report and Order, *supra* note 8, at 151-55.

13. 47 U.S.C. § 151 (1982). The Act confers jurisdiction over broadcasters of radio communications and common carriers, such as telephone companies. *Id.* However, because the Act preceded the development of cable systems, there is no mention of any kind of "community antennas" or microwave relays through cable systems. *Id.*

treat cable as a "common carrier."[14] Through the mid-1950s, the Commission did not see the need to assert its jurisdiction since cable was a minor player in the burgeoning broadcast scene and did not economically challenge over-the-air broadcasters.[15] In addition, regulation of cable broadcasting would have created additional work for the Commission and its staff. In 1958, the Commission reaffirmed its earlier rejection of cable regulation,[16] ruling that cable could not be considered a common carrier because the subscriber did not "control" the programming sent over the cable.[17]

By the end of the decade, however, commercial broadcasters began to take a second look at the expansion of cable and saw it as a potential threat to their economic well-being.[18] Shortly after congressional subcommittee hearings on the matter,[19] the FCC launched an inquiry to determine the impact of cable systems on over-the-air broadcasting.[20] At that time, the Commission could not make an explicit determination as to what, if any, economic impact cable had on broadcasters.[21]

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14. Just before the end of the licensing freeze in 1952, the heads of both the Broadcast and Common Carrier bureaus concluded in a memorandum that the Commission must take a position regarding jurisdiction over cable, despite the lack of guidance from the 1934 Act. They advocated classifying cable as a "common carrier" since it seemed to meet the four-part definition stated in the Act: (1) the communications were interstate; (2) the service was a communications service; (3) it is open to the public; and (4) it is for hire. L. POWE, *supra* note 10, at 218 & n.2. For a brief discussion of the FCC's initial review of whether cable television fell within the scope of the Communications Act of 1934, *see* J. GOODALE, *supra* note 9, § 1.05; Federal Communications Commission: CATV and TV Repeater Services, 26 F.C.C. 403, 427-28 (1959); and *Review of Allocations Problems, Special Problems of TV Service to Small Communities: Hearings Before the Senate Interstate and Foreign Commerce Committee*, 85th Cong., 2d Sess. 3490 (1958) (reprint of memo of Mar. 25, 1952).

15. In 1952, there were 70 cable systems with a total of 14,000 subscribers as opposed to 108 television stations covering 15 million viewers. By 1959, there were 560 cable systems covering 550,000 subscribers, a significant increase, but one that pales in comparison with 510 television stations covering an audience of 43 million viewers. J. GOODALE, *supra* note 9, § 1.02.

16. Frontier Broadcasting v. Collier, 24 F.C.C. 251 (1958).

17. *Id.* at 254.

18. *See* J. GOODALE, *supra* note 9, § 1.04.

19. *Id.*

20. *See* Matter of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403 (1959).

21. The FCC sent the matter back to Congress for additional hearings, which produced a bill that would permit the Commission to regulate cable television. However, the

Cable television systems began to proliferate and revenues surpassed those of broadcasters.[22] Cable operators, who initially formed rather small entities serving rural areas with poor reception, began to look at dense urban environments as offering a greater economic opportunity. Consequently, the FCC abruptly changed its approach to reflect the economic threat to broadcasters. In *Carter Mountain Transmission Corp. v. FCC*,[23] the Commission effectively reversed its prior determinations, ruling that an application by a cable operator to expand its service could not be granted without a hearing on the economic impact of the proposed expansion on a local television station. The Commission denied the application after determining that outside signals from a cable system would have an economic impact on the local television station in question.[24] The District of Columbia Circuit Court affirmed the FCC's determination, casting the economic health of over-the-air broadcasters as a paramount concern in any cable challenge.[25]

By the mid-1960s, as the idea of a new medium with specialized programming began to take shape, the FCC considered the fundamental question of whether it should impose conditions for cable operations and the extent to which cable should be allowed to compete with broadcasting.[26] It answered this

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proposed legislation was never enacted into law. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 164-65 (1968). In 1966, similar legislation was proposed, but failed to reach the House floor for debate. *Id.* at 170 n.30. Interestingly, the Senate Committee on Interstate and Foreign Commerce rendered an almost apocalyptic warning in 1959 when it stated "that the unrestricted growth of CATV would eliminate local broadcasting, and that, in turn, this would have . . . undesirable consequences" for residents of local communities and even states by depriving them of all local television service. *Id.* at 175-76 n.43.

22. From 1961 to 1965 the number of over-the-air television stations increased from 527 (covering 47 million homes) to 569 (covering 52.7 million homes) as revenues grew from $1.5 billion to $2.1 billion. In the same period, cable systems jumped from 700 in 1961 to 1,325 in 1965, increasing the number of subscribers from 700,000 to 1.5 million. Revenues grew from $35 million to $125 million, approximately a 350% increase. *See* J. GOODALE, *supra* note 9, § 1.04.

23. 32 F.C.C.2d 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963).

24. *Id. Carter Mountain* involved the Commission's denial of an application to the cable company to expand its service to a Wyoming cable system. The Commission concluded that the proposed expansion to another town would adversely impact the local television station. *Id.*

25. 321 F.2d 359, *aff'g* 32 F.C.C.2d 459.

26. First Report and Order of 1965, *supra* note 7, at 684.

question affirmatively and, in its *First Report and Order of 1965*,[27] the Commission adopted comprehensive rules governing cable television transmission over microwave relay systems.[28] The rules essentially required microwave cable operators to carry all over-the-air broadcast stations that would otherwise reach subscribers' homes via the airwaves. This was the first manifestation of the must-carry rules.[29] Later that year, the Commission issued a Notice of Inquiry concerning broader regulations of cable television.[30]

One year later, a *Second Report and Order*[31] modified the earlier rules by expanding the application of the must-carry requirements to all cable systems, not just systems using microwave transmissions.[32] It also modified the rules by severely limiting the expansion of cable into the top 100 television markets by prohibiting the importation of distant television signals into those markets.[33] In adopting these rules, the Commission did not hide its basic motive — to try to protect the established broadcast industry from economic dislocation by cable.[34] The

27. First Report and Order of 1965, *supra* note 7.

28. *Id.* At first, the Commission only regulated microwave cable systems on the grounds that microwave transmitters were common carriers of video signals and fell under FCC jurisdiction. Note, *Quincy Cable v. FCC: Judicial Deregulation of Cable Television via the First Amendment*, 20 SUFFOLK U.L. REV. 1179, 1183 (1986) [hereinafter Note, *Quincy Cable*].

29. First Report and Order of 1965, *supra* note 7, at 716-19. The rules also prohibited cable systems from carrying any distant stations that duplicated the programs that were being broadcast within 15 days before or after by any stations within 60 miles of the cable system. Note, *Quincy Cable, supra* note 28, at 1183.

30. *See* Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 495 (1965). The FCC not only expanded the Commission's common carrier jurisdiction, but also noted that unfair competition from cable may require more comprehensive action. It then imposed a freeze on cable system expansion pending the outcome of the investigation. Note, *Quincy Cable, supra* note 28, at 1184 n.28.

31. Second Report and Order, *supra* note 7.

32. *Id.*

33. *Id.* at 782. However, a distant signal could be imported when the importation, demonstrated through an evidentiary hearing, was shown to be consistent with the public interest — particularly the viability of local broadcast service. *Id.* The Second Report and Order also modified the rules by reducing the nonduplication period from 15 days to the same day. *Id.* at 747.

34. *Id.* at 788-89. Indeed, the FCC in its Second Report and Order duly noted that cable would sooner or later threaten broadcasters and reasonable regulation of cable was necessary to prevent the "frustration of the F.C.C.'s overall regulatory scheme." Note, *Quincy Cable, supra* note 28, at 1184 n.30 (citing Second Report and Order, *supra* note 7, at 734). The Commission also noted that many UHF stations were failing and con-

must-carry rules became a centerpiece of this goal.

B. Southwestern Cable *and* Midwest Video I

Once the FCC became actively involved in the regulation of cable, a judicial challenge to its power was inevitable. In 1968, the Supreme Court was called upon to decide the validity of the FCC's regulation of cable in *United States v. Southwestern Cable*,[35] a case which challenged the distant importation requirements of the *Second Report and Order*.[36] In *Southwestern Cable*, the owner of a San Diego television station, KFMB-TV, sought to bar Southwestern Cable, a San Diego cable firm, from importing Los Angeles television stations.[37] Pending consideration of the merits of KFMB's argument of adverse economic impact, the FCC restricted the expansion of cable service in those areas where cable had not been in operation on or before February 15, 1966.[38]

Southwestern Cable appealed the FCC's order to the Ninth Circuit.[39] The Ninth Circuit ruled that the FCC lacked power under the Communications Act to issue such an order,[40] despite a contrary opinion in a similar case by the District of Columbia Circuit.[41] The Supreme Court reversed the Ninth Circuit's ruling and upheld the FCC's broad authority to regulate cable television. Citing Section 153 of the Communications Act, the Court

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cluded that the cable industry was weakening the viability of UHF. Second Report and Order, *supra* note 7, at 781-82.

35. 392 U.S. 157 (1968).

36. *See supra* note 7.

37. KFMB-TV's owners alleged that the importation of Los Angeles signals had fragmented the San Diego audience, that expansion of such signals would reduce advertising revenue of local stations, and that the ultimate consequence would be to terminate or curtail the services provided in the San Diego area by local broadcasting stations. 392 U.S. at 160 n.4.

38. United States v. Southwestern Cable Co., 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).

39. 378 F.2d at 118.

40. *Id.* at 122.

41. *See* Buckeye Cablevision v. FCC, 387 F.2d 220 (D.C. Cir. 1967). In this case, the D.C. Circuit opinion upheld the constitutionality of the Commission's rules barring distant signals into the top 100 markets, when it ruled that the Commission had the jurisdiction to order an Ohio cable operator to desist from carrying the signal of a Lansing, Michigan television station. The D.C. Circuit concluded that the "implied agency authority" permitted the Commission to promulgate the "distant signal" rules and that such rules were not an unconstitutional restraint of first amendment rights. *Id.* at 225.

ruled that cable was subject to jurisdiction as a "service incidental to the transmission of signals,"[42] and "reasonably ancillary to the effective performance of the Commission's . . . regulation of television broadcasting."[43] Noting the serious financial difficulties of Ultra High Frequency (UHF) stations,[44] the Commission ruled that the threat of unregulated and explosive growth of cable television permitted the Commission to regulate cable under the "reasonably ancillary" standard.[45]

Although *Southwestern Cable* did not specifically decide the validity of any of the 1966 FCC regulations,[46] it did open an era of judicial support of cable regulation. In the same year, two lower courts ruled that the non-duplication rules did not conflict with the first amendment rights of cablecasters.[47]

After these victories, the Commission tried to extend cable access regulations by imposing rules requiring cable operators serving more than 3,500 subscribers to "operate to a significant

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42. 392 U.S. 157, 168 (1968). The Court stated: "Indeed, such communications are defined by the Act so as to encompass 'the transmission of . . . signals, pictures, and sounds of all kinds,' whether by radio or cable, 'including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.' " *Id.* (quoting 47 U.S.C. § 153(a), (b) (1982)).

43. *Id.* at 178.

44. *Id.* at 176 n.44.

45. *Id.* at 178. The Court cited a study finding that "CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such competition, and that in consequence a 'substantial percentage of potential new station entrants, particularly UHF, are likely to be discouraged . . . .' " *Id.* at 176 (citing Fisher & Ferrell, *Community Antenna Television Systems and Local Television Station Audience*, 80 Q.J. ECON. 227, 250 (1966)).

46. *Id.* The opinion stated:

> There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such restrictions and conditions, not inconsistent with the law," as "public convenience, interest, or necessity requires" (citing 47 U.S.C. § 303(r)). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

Id. See also J. GOODALE, *supra* note 9, § 2.02[1].

47. *See* Titusville Cable TV v. United States, 404 F.2d 1187, 1191 (D.C. Cir. 1968); Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968). The court in *Black Hills* also concluded that the non-duplication rules did not violate federal copyright laws. 399 F.2d at 70.

extent as a local outlet by originating programming."[48] The goal of these ambitious access regulations was to ensure that cable would "provide a fair, efficient, and equitable distribution of television service" to the viewing audience.[49] The broadcast industry had shifted from an earlier claim of economic loss to a claim that original cable programming would serve to fractionalize the industry.[50] The Commission explicitly rejected these claims and concluded that such requirements were in the public interest.[51] If the 1966 rules marked cable's youth, these rules marked the new medium's adolescence. The Commission's jurisdiction to impose the local origination rules was upheld in *United States v. Midwest Video Corp.*[52] In a plurality opinion by Justice Brennan,[53] the Court justified the expanded scope of FCC regulations by applying the "reasonably ancillary" standard to include the policy objective of ensuring that a cable system satisfactorily meets community needs.[54] In using Section 153 of the Communications Act to promote the goal of diversified programming, the plurality opinion validated access regulation that went far beyond the limited objectives in *Southwestern Cable*.[55]

48. CATV, First Report and Order, 20 F.C.C.2d 201, 214 (1969) [hereinafter First Report and Order of 1969] (citing Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 422 (1968)). The Commission interpreted "by significant extent" to "mean something more than the origination of automated services (such as time and weather . . .) and aural services (such as music and announcements)." This "necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programming." The order also stated that cablecasting not only includes programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programming." *Id.*

49. *Id.* at 208-09.

50. *See id.* at 202.

51. *Id.* at 203. In rejecting the argument that a prohibition on CATV original programming was "necessary to prevent potential fractionalization of the audience" for over-the-air broadcasts and the diminution of advertising revenues, the Commission stated, in a considerable departure from the past, "a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service." *Id.* at 202-03. The Commission also noted that there was no support on the record for this proposition. *Id.* at 203.

52. 406 U.S. 649, *reh'g denied*, 409 U.S. 898 (1972).

53. *Id.* Justice Brennan was joined in his opinion by three other members of the Court: Justices White, Marshall and Blackmun. Chief Justice Burger concurred in the result, but not in the reasoning. Justice Douglas dissented with Justices Powell, Stewart and Rehnquist.

54. *Id.* at 668.

55. *See* J. BARRON, MASS COMMUNICATIONS LAW 996 (3d ed. 1979).

Justice Burger cast the deciding vote. Though unpersuaded by the plurality's reasoning, he nevertheless concluded that the Commission should be allowed discretion in making such rules.[56] The dissenters claimed that the FCC's action greatly exceeded the *Southwestern Cable* rationale.[57]

C. Midwest Video II *and* Home Box Office — *A Limitation of FCC Power*

The Court's expansive views of FCC jurisdiction was short-lived. The Supreme Court curtailed much of those broad-based powers in 1979 in *FCC v. Midwest Video Corp.* (*Midwest Video II*).[58] *Midwest Video II* involved even more ambitious mandatory-access rules promulgated by the Commission in the wake of its victory in *Midwest Video I*. These rules would have required cable systems with more than 3,500 subscribers to develop a twenty-channel capacity and to make certain channels available for third-party access by 1986.[59]

The Supreme Court, in a 6-3 ruling, struck down the regulations on the grounds that the access rules improperly imposed common-carrier status on cable operators — a status which is prohibited to broadcasters under section 3(h) of the Communications Act.[60] In its often disjointed opinion, the majority noted that cable operators "share with broadcasters a significant amount of editorial discretion regarding what programming will include"[61] and that by imposing common-carrier status on cable operators, the FCC diluted their editorial power.[62]

Largely because broadcasters may not act as common carri-

56. 406 U.S. at 676 (Burger, C.J., concurring).

57. *Id.* at 677 (Douglas, J., dissenting).

58. 440 U.S. 689 (1979).

59. Cable TV Capacity and Access Requirements, Report and Order, 59 F.C.C.2d 294 (1976) [hereinafter Report and Order of 1976]. *See* FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

60. *See* 440 U.S. at 700. Section 3(h) of the Communications Act prohibits broadcasters from acting as common carriers. "Section 3(h) defines 'common carrier' as 'any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . . .' " *Id.* at 701 n.10. The Court also reiterated that common-carrier status was rejected in *Southwestern Cable*. *Id.* at 701 n.11.

61. *Id.* at 707.

62. *Id.* at 708-09.

ers, the Court concluded that the access rules were not reasonably ancillary to broadcasting under *Southwestern Cable*, and were therefore invalid. While the majority opinion did not focus on any first amendment issues, it did state in a footnote that the question was "not frivolous."[63] Interestingly, the first amendment question was more thoroughly discussed by the Eighth Circuit,[64] but the Supreme Court concentrated its opinion on the question of statutory interpretation of the Act.[65]

Two years earlier, the District of Columbia Circuit also discussed in great detail the first amendment rights of cable operators and dramatically shifted judicial philosophy toward increased protection. The decision, *Home Box Office, Inc. v. FCC*,[66] paved the way for increased judicial scrutiny of cable regulations and enunciated a standard of review that would be crucial in both *Quincy Cable* and *Century Communications.*

Home Box Office involved a challenge to FCC regulations that limited the types of films, sports events, entertainment programs, and commercials that could be aired on cable and subscription channels.[67] The Commission's justifications for such restrictive, even draconian, limitations were similar to its reasons for earlier regulations: to prevent unregulated cable television, through revenue raised by subscribers, from siphoning off programs currently shown on free television and thereby denying

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63. *Id.* at 709 n.19. Since the Supreme Court opinion rested on statutory grounds, it did not express a view on that question, except to "acknowledge that it is not frivolous and to make clear that the asserted constitutional issues did not determine or sharply influence our construction of the statute." *Id.*

64. *See* Midwest Video Corp. v. FCC, 571 F.2d 1025, 1048 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). When the Eighth Circuit considered the case, it suggested that the access rules might violate the first amendment rights of cable operators. *Id.*

65. *See* 440 U.S. 689.

66. 567 F.2d 9 (D.C. Cir. 1977).

67. *Id.* Essentially these rules prohibit pay exhibition of:

> (1) feature films more than three, but less than 10, years old; (2) specific sports events . . . shown on broadcast television within the previous five years; (3) more than the minimum number of non-specific (i.e., regular season) sports events which had not been broadcast in any of the five preceding years . . .; (4) all series programs . . . [; and (5)] commercial advertising in conjunction with pay exhibition of programming and [the FCC] limited the overall number of hours of pay operation which could be devoted to sports and feature films to 90 percent of total pay operations.

Id. at 13. For a delineation of the regulations in question, see *id.* at 18-20.

such programs to those without cable access.[68] Cable television was to be shackled in order to preserve the economic might of free television.

In a long per curiam opinion, the court concluded not only that the Commission had exceeded its jurisdiction in promulgating these rules — because it had not demonstrated that limiting exhibition of films and sporting events on cable was necessary to prevent siphoning of such programming away from the over-the-air broadcasters[69] — but more significantly, that the cable rules violated the first amendment.[70] In this vein, the court stated that the scarcity doctrine, which justified extensive regulations of broadcast television, was not applicable to cable television because of cable's greater number of potential channels.[71] The court therefore reasoned that the traditional first amendment standards that have been applied to the print media must also be applied to cable operators.[72]

The court then enunciated a two-level standard of first amendment review. If a regulation is intended to curtail expression then there must be a compelling state interest or "clear and

68. *Id.* at 25.

69. *Id.* at 28-34. Applying the "reasonable ancillary" standard of *Southwestern Cable*, the court held that the Commission's restrictions did not satisfy the objectives of regulating cable only to achieve ends for which it could also regulate broadcast television. *Id.* at 36-43. It noted that sufficient facts were not produced to demonstrate that the public interest justified the preservation of "free" television as the primary viewing service. *Id.* Also, the opinion rejected the Commission's claim that Section 1 of the Communication Act required the Commission to formulate anti-siphoning rules. *Id.* at 31. Section 1 of the Act states:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-Wide and World-Wide wire and radio communication service with adequate facilities at reasonable charges . . . there is created a commission to be known as the "Federal Communications Commission."

47 U.S.C. § 151 (1982).

70. 567 F.2d at 43-51. Broadcast media are governed by more restrictive first amendment principles than print media because there are not enough channels for all who want to broadcast. If scarcity is not an issue in cable, then the more restrictive regulation applied to broadcasting should not be applied to cable.

71. *Id.* at 44 (citing National Broadcasting Co. v. United States, 319 U.S. 190 (1943)). For a further discussion of the scarcity doctrine see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394, 396-401 (1969).

72. 567 F.2d at 46 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973) (rejecting a Florida access statute as an unconstitutional intrusion on a newspaper's first amendment rights)).

present danger."[73] If a regulation is not intended to curtail expression it must " '(1) further an important or substantial governmental interest; . . . and (2) the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.' "[74] Ultimately, the decision concluded that although the nonsubscription cable television regulations were not intended to suppress free expression, the incidental burden they placed on first amendment freedoms exceeded any governmental interest.[75] The court, however, determined that the subscription television rules were justified.[76]

D. *Recent Cases*

During the early 1980s, the courts continued to search for a unified constitutional standard for cable regulation. While no single trend-setting decision was rendered, several lower court cases discussed the first amendment implications of cable regulation. Some courts upheld regulation while others rejected regulation.

Two decisions, *Community Communications Co. v. City of Boulder*[77] and *Berkshire Cablevision of R. I., Inc. v. Burke*,[78] essentially upheld cable access regulations based on the economic argument that cable television was a natural monopoly and subject to some mandatory access rules.[79] While some circuits have

73. *Id.* at 47-48. *See also* Cohen v. California, 403 U.S. 15 (1971).

74. 567 F.2d at 48 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968) (involving draft card burning which formulated the incidental burden test)).

75. *Id.* at 49-50.

76. *Id.* at 59-60. The court upheld the rules by reasoning that National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 922 (1969), foreclosed any first amendment issues regarding subscription television regulations. 567 F.2d. at 59.

77. 660 F.2d 1370 (10th Cir. 1981). The case involved an attempt by the city to restrict a local cable company's operations to one defined area even though the franchise agreement allowed the company to operate anywhere within the city limits. The Tenth Circuit ruled that the physical limitations on the rights of way that cables could be attached (either underground or through telephone poles) could justify restricting cable systems. *Id.* at 1377-78. After so deciding, the court remanded the case back to the lower court. *Id.* at 1380.

78. 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

79. A natural monopoly exists in a market if there is a natural tendency for one competitor to emerge with control of the market. *See generally* Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969). The court in *Berkshire Cablevision* specifically differentiated between natural monopoly in cable and the natural monopoly

relied on this economic argument,[80] others rejected it and ruled that such a scarcity which is based solely on economic conditions does not justify speech limitations.[81] These latter courts concluded that, for constitutional purposes, cable should be treated more like a newspaper than an over-the-air broadcaster. The most significant case espousing this view is *Preferred Communications, Inc. v. City of Los Angeles*,[82] the first ruling to limit a municipality's right to deny a cable television company access to a local market when public utility facilities in that region were physically capable of accommodating more than one system.[83] After noting that cable television channels were not scarce, as

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of newspapers in many cities. 571 F. Supp. at 982-88. Factors leading to a natural monopoly in the cable market include: Lower cost for one company to deliver cable service than for two or more to deliver it, less disruption of the public streets and byways; and inability of utilities to physically accommodate more than one system. *See* Note, *Access to Cable, Natural Monopoly and the First Amendment*, 86 COLUM. L. REV. 1663 (1986). This was important because the Supreme Court in Miami Publishing Co. v. Tornillo, 418 U.S. 241 (1974), specifically rejected a monopoly argument when it ruled that a right of access law for newspapers was unconstitutional. 418 U.S. at 253, 259. The court in *Berkshire Cablevision* distinguished the two media by stating that while the "lack of any access requirement for newspapers simply does not prevent a member of the general public from expressing his opinions *in that same medium*, . . . [by] distribut[ing] a written message in the form of a leaflet, pamphlet, or other relatively inexpensive form of 'publication,' " a resident who cannot spend a considerable sum of money to develop a cable system is "shut out of that medium with no way to express his ideas with the widely acknowledged power of the small screen." 571 F. Supp. at 986.

80. *See also* Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) (no first amendment violations in the process of cable franchising).

81. *See* Home Box Office Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977). The court stated: "[S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the first amendment rights of the conventional press, and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point." *Id.* (citations omitted).

82. 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

83. *Id. Preferred Communications* involved an application by a cable television company for a license to operate in a given area of Los Angeles. Because the firm did not participate in an auction for the franchise, as required by CAL. GOV'T CODE § 53-066 (West Supp. 1984), its application was denied. Preferred Communications sued, claiming that the city's regulation of cable television violated the operator's first amendment rights. The Ninth Circuit, reversing the lower court, concluded that the city of Los Angeles could not grant an exclusive franchise to a single cable television operator when the public utilities in that region are physically capable of accommodating more than one system. Although the court ruled that the city could not, consistent with the first amendment, "limit access by means of an auction process to a given region of the city to a single cablevision company," it did not exclude the possibility that a city-operated franchise system could respect first amendment rights. 754 F.2d at 1410-11.

broadcast channels were,[84] the court applied the *O'Brien*[85] test and ruled that the city's franchising scheme was unconstitutionally overbroad.[86] The Supreme Court affirmed the Ninth Circuit ruling on narrower grounds.[87]

During this time, not only were many courts leaning towards increased constitutional protection, but the Reagan administration also began to view the electronic mass media as similar to the print media for first amendment purposes. Through its FCC chairman, who became the administration's point man in an effort to significantly deregulate the communications industry, the Commission scrapped programming requirements for radio and television[88] and nullified the "fairness doctrine,"[89] citing in part first amendment considerations for the decision.[90] The Commission's actions were criticized by many

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84. *Id.* at 1403-05.

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

86. 754 F.2d. at 1406-07. For a more detailed analysis of *Preferred Communications*, see Note, *Aid or Obstruction? Government Regulation of Cable Television Meets the First Amendment*, 61 WASH. L. REV. 665 (1986). *See also* Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985), which ruled that a cable company adequately alleged a first amendment cause of action when an Air Force base limited its cable franchise to a single firm. *Id.* at 1338. The decision relied on the fact that the cable rights of way were a "public forum" entitled to significant first amendment protection. *Id.*

87. City of Los Angeles v. Preferred Communication, Inc., 476 U.S. 488 (1986). The majority opinion by Justice Rehnquist held that the first amendment claims could not be addressed without a more developed record of the proceedings. Therefore, it remanded the case without enunciating a first amendment standard. *Id.*

88. *See* In the Matter of Deregulation of Radio, 84 F.C.C.2d 968 (1981), which deregulated radio by abolishing advertising limitations, program log requirements and news and public affairs standards. For television deregulation, see Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984), which similarly eliminated news public affairs guidelines and advertising limitations. However, the FCC's elimination of advertising limitations on children's programming was overturned by the D.C. Circuit in Action for Children's Television v. FCC, 821 F.2d 741, 745-47 (D.C. Cir. 1987).

89. Syracuse Peace Council v. WTVH, 2 F.C.C. Rec. 5043 (1987). The "fairness doctrine," 47 U.S.C. § 315 (1982), requires radio and television stations to air balanced programming on issues of public importance. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

90. 2 F.C.C. Rec. at 5057. The Commission concluded that the first amendment standard should be the same for the print and broadcast media, citing in part the explosive growth of broadcast outlets since *Red Lion Broadcasting Co.* 2 F.C.C. Rec. at 5054, 5057. *Red Lion* essentially upheld the Fairness Doctrine on the grounds that broadcasters were subject to more regulation than the print media, since the broadcast spectrum

members of Congress, possibly the strongest proponents of regulation in the broadcast industry today.[91]

Ironically, Congress potentially hurt future prospects of a unified cable policy by enacting the Cable Communications Act of 1984,[92] a complicated law that defers a great deal of jurisdiction over cable television to localities, especially in the area of franchising.[93] The Cable Communications Act of 1984 replaced rules enacted by the Commission in 1972 regarding franchising standards and signal carriage.[94] However, under the Act, the Commission retains much of the power to mandate coverage it had acquired through the must-carry rules.[95]

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was a "scarce" resource. 395 U.S. at 390. The Commission's ruling abolishing the doctrine was upheld by the D.C. Circuit, which did not decide on the constitutional issue. *See* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

91. *See Cable on the Defensive on Capitol Hill*, BROADCASTING, Apr. 4, 1988, at 38. *See also* Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979). In this report, the Commission advocated the elimination of such regulations as the syndicated exclusivity rules, which may require cable systems to delete programs that are exclusively broadcast on a television station in a given market. The FCC attacked the rule because there was no support for the proposition that broadcast television was adversely affected by cable television. *Id.* at 680-82. However, the last decade has shown cable to be a more competitive player in the communications market, and the Commission may again rethink its prior rationale. One recent example is the reimposition of the syndicated exclusivity rules. *See Syndex Redux: F.C.C. Levels the Playing Field*, BROADCASTING, May 23, 1988, at 31-33.

92. 47 U.S.C. §§ 521-559 (1984).

93. The law essentially redefines a cable system by eliminating the earlier FCC requirement of 50 or more subscribers to a system with multiple subscribers. *See* Ross & Brick, *The Cable Act of 1984 — How Did We Get There and Where Are We Going?*, 39 FED. COM. L.J. 27, 37 (1986); *see also* 47 U.S.C. § 522(6). The Act deregulates pricing for "basic cable systems" (any system which includes the retransmission of local television signals) unless no "effective competition" is present in the given area, 47 U.S.C § 522(2); reintroduces public access channels in all cable systems for the first time since *Midwest Video II* and retains prior FCC rules regarding the Fairness Doctrine, 47 C.F.R. § 76.209 (1988). Probably the most significant aspect of the Act is that it gives the states and cities major control over the franchise process and franchise fees. For a detailed description of the contents of the Act, see Meyerson, *The Cable Communications Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543 (1985).

94. 36 F.C.C.2d 143 (1972).

95. *See* Ross & Brick, *supra* note 93, at 46. While the 1984 Act is more comprehensive and deals with changes in the industry, the goal of dualism between the federal government and the states is preserved as both entities have a great say in cable television today.

II. *Quincy Cable v. FCC*

The rapidly expanding cable market and increased aggressiveness of cable operators in challenging FCC regulations made the must-carry rules ripe for a judicial challenge. The possible constitutional problems arising when the FCC compelled a private cable owner to transmit designated stations and programs seemed to be a legitimate claim for a cable operator, particularly after victories in *FCC v. Midwest Video Corp.*[96] and *Home Box Office, Inc. v. FCC*[97] and in the anti-regulatory climate that was so widespread through the 1980s.

The first challenge to the must-carry rules came in 1984.[98] Quincy Cable TV, the operator of a cable system in Quincy, Washington, and Turner Broadcasting System claimed that these rules violated their first amendment rights to carry whatever signals cable operators deemed fit to best serve their audience.[99] Specifically, Quincy Cable sought permission from the Commission to delete three local network affiliated stations.[100] Even though the petition was denied by the Commission's Cable Television Bureau, Quincy Cable nevertheless deleted two of the stations and appealed the Cable Television Bureau's determination, claiming that the must-carry rules violated the first amendment.[101]

Turner Broadcasting System (TBS), the operator of an independent broadcast station from Atlanta and a twenty-four hour news and information service, both of which are carried on cable systems across the country, argued that these rules poten-

96. 440 U.S. 689 (1979); *see supra* notes 52-65 and accompanying text.

97. 567 F.2d 9 (D.C. Cir. 1977); *see supra* notes 66-76 and accompanying text.

98. Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

99. *Id.* at 1452.

100. *Id.* at 1447. The company served a small town, located between Seattle and Spokane, and only had a 12-channel capacity. In 1980, it sought to delete three network affiliate broadcast stations from Spokane (it decided to keep the affiliates broadcasting out of Seattle) and substitute other programming, specifically from WOR-TV in New York (a "superstation" transmitted on cable systems throughout the country); ESPN (Entertainment and Sport Programming Network); Nickelodeon (a cable network geared to children); and Cable News Network (a 24-hour news and information service operated by Turner Broadcasting System). Note, *The Must Carry Rules After Quincy Cable, Inc. v. Federal Communication Commission: The Attempt to Harmonize Mandatory Carriage with Freedom of Speech*, 38 SYRACUSE L. REV. 745 (1987).

101. 768 F.2d at 1447.

tially deprived it of access to cable systems saturated with must-carry signals, and thereby violated its right to broadcast.[102] As with Quincy Cable, the Commission denied TBS's petition. TBS appealed to the District of Columbia Circuit asking the court either to find the rules unconstitutional or to compel the Commission to institute proceedings to reconsider them.[103]

The court concluded that the must-carry rules, as then codified, violated the first amendment rights of cable operators. Yet, by its language and scope, Judge Skelly Wright's opinion[104] served as more than just a resounding defeat for the FCC and over-the-air broadcasters: it delved into the first amendment rights of cable operators in a manner unseen by this court since *Home Box Office*.

While *Home Box Office* and other decisions applied the "incidental burden" test of *O'Brien*,[105] the court in *Quincy Cable* applied a higher degree of first amendment protection. Stating at the outset that cable television "warrants a standard of review distinct from that applied to broadcasters," the court noted that a higher standard of first amendment scrutiny must be applied in evaluating regulations governing cable television as compared with regulations governing over-the-air broadcasters.[106] Since cable technology permits a system to carry up to 200 signals, the scarcity rationale that has justified government regulation over

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102. *Id.* at 1446. Turner Broadcasting Service (TBS) operates WTBS, a UHF independent broadcast station in Atlanta which is carried on cable systems throughout the United States. It was the first of a genre of local stations to become "superstations." Additionally, TBS also operates a 24-hour news and information service called Cable News Network (CNN), and a companion service, called CNN Headline News. Note, *supra* note 100, at 761 nn.122-23. Since the case was decided, TBS started another cable channel called Turner Network Television (TNT).

103. 768 F.2d at 1446. TBS had petitioned the Commission in 1980 to rule on the constitutionality of the must-carry rules. It took the Commission over three years to act on the petition, despite the considerable interest generated among other broadcasters and cable operators. Extensive comments were filed on behalf of TBS's claim. Two weeks after TBS motioned the D.C. Circuit to force the FCC to act on its petition, the Commission denied it. *Id.* at 1445-46.

104. Judge Skelly Wright's opinion was joined by Judges Ginsberg and Bork. The fact that these three jurists, of very differing judicial philosophy, joined in this opinion demonstrates that this increased first amendment protection is shared by those of differing legal beliefs.

105. 567 F.2d at 48-51; *see also* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1406 n.9 (9th Cir. 1984), *aff'd*, 476 U.S. 488 (1986).

106. 768 F.2d at 1448.

the airwaves does not apply to cable. In this respect, cable is more akin to newspapers than over-the-air broadcasters.[107]

The court was equally unsympathetic to the argument that the natural monopoly status of cable justifies content regulation. Noting its prior rejection of this argument,[108] the court stated that any economic constraints imposed by any alleged monopoly had no relevance to this case.[109]

The court then considered the question of what standard to apply to justify limitations on a cable operator's first amendment rights.[110] Citing *Home Box Office*, the court reduced the question to the following: whether the must-carry rules merely serve as an "incidental burden" on speech under the *O'Brien* test or whether the rules are a direct restriction of expression because of their "pervasive effect on [the] audience," mandating an even more stringent first amendment test.[111]

Under *Home Box Office*, if the must-carry rules fall within the first category, they would be sustained if they "further[ ] an important or substantial government interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,"[112] a standard which, although stringent, could theoretically be met. However, if the rules were deemed to directly restrict expression, the government's burden of proof would be heavier still and a compelling interest would have to be shown.[113]

The court never reached the question of which standard to apply because it found that the must-carry rules utterly lacked justification, even under the incidental standard.[114] The court

107. *Id.* The scarcity rationale justifies broadcast regulation because the potential number of over-the-air radio and television stations is limited by a finite number of channels in the available spectrum. This creates a limitation of access for all those who would want their ideas and programs heard. Therefore, government regulations that provide for broadcasting of many viewpoints are justified by the scarcity of signals. Red Lion Broadcasting v. FCC, 395 U.S. 367, 396-401 (1969). Government regulation of the print media was expressly rejected since no corresponding scarcity exists. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

108. 768 F.2d at 1449-50.

109. *Id.* at 1450.

110. *Id.* at 1454.

111. *Id.* at 1450.

112. *Id.* at 1451 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

113. *Id.*

114. *Id.* at 1462-63.

stated, "[O]ur analysis leaves us with no doubt that the must-carry rules, as currently drafted, represent a fatally overbroad response to the perceived fear that cable will displace free, local television."[115]

The court carefully dissected the FCC's principal reasons for creating the must-carry rules. The FCC asserted that without the regulation, cable subscribers would disconnect their antennas and cease to view locally available over-the-air television stations and that even if only a small number of cable subscribers abandoned local television, this would "affect the economic vitality of local broadcasting."[116] Because there was no substantial evidence to bolster these claims, the court found it impossible to defer to the Commission. Noting that over twenty years had passed since the Commission first asserted jurisdiction over cable television, the court stated that the Commission was now "capable of the most sophisticated analysis of the effects of cable" but that it continued to rely on mere "speculative allegations" to justify the must-carry rules.[117] "[T]he Commission has failed to adequately demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate this threat."[118] As an additional attack on the Commission's unsupported allegations, the court noted that a simple and inexpensive device (known as an A/B switch) permits subscribers to use their antennas to receive over-the-air signals.[119] In other words, if the FCC felt the need to protect over-the-air broadcasters, an all-encompassing set of must-carry rules was not the constitutional way to do it. According to the court:

> The rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator. The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable

115. *Id.* at 1459.
116. *Id.* at 1457.
117. *Id.* at 1458.
118. *Id.* at 1459.
119. *Id.* at 1457 n.48.

system.[120]

This blanket protection went way beyond the objective of the regulation, because *every* broadcaster "from the struggling UHF educational station to the most profitable VHF network affiliate" had the right to expect mandatory carriage.[121]

Although the court never reached the question of which standard of first amendment scrutiny would control, it came fairly close to stating that the must-carry rules would be evaluated under the stringent standard applied to regulations that directly curtail freedom of expression, as compared with the "incidental burden" standard ultimately applied by the court. In analyzing the Commission's economic reasons for imposing the must-carry rules, the court determined that the objectives of the rules are a "far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech. . . . Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers."[122] It added:

> In the case of systems saturated with mandatory signals, cable programmers are shut out entirely from the only forum capable of conveying their programming. Because "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment," . . . the conclusion that the must-carry rules burden First Amendment rights only incidentally is far from inevitable.[123]

The court noted that cable operators are not mere "passive conduits of broadcast signals,"[124] but indeed carry an important editorial function, which is compromised by the imposition of the must-carry rules. It stated that the rules effectively "transfer [editorial] control to local broadcasters who already have a de-

120. *Id.* at 1460.
121. *Id.* at 1462.
122. *Id.* at 1451.
123. *Id.* at 1451-52. The court noted that in the print media, it would be "highly unlikely" that a law requiring newspaper vendors to carry local publications would be treated as an incidental burden on speech. *Id.* at 1452 n.37.
124. *Id.* at 1452.

livery mechanism granted by the government without cost and capable of bypassing the cable system altogether."[125] The court continued:

> In short, our examination of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech. . . . [T]he rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly, if a system's channel capacity is substantially or completely occupied by mandatory signals, the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers.[126]

Even though the court did not directly address this issue, this dictum may be important for future cases involving FCC regulation of cable. The court in *Quincy Cable* ruled the must-carry rules unconstitutional in their then-current form, but noted that the Commission could theoretically redraft them so as to pass constitutional muster.[127]

III. The New Must-Carry Rules and *Century Communications*

The Commission did not appeal *Quincy Cable*[128] and only began to consider rewriting the rules after considerable pressure from broadcasters.[129] When the Commission announced that it was considering the introduction of revised must-carry rules, many in the broadcast industry submitted proposals.[130] After

125. *Id.* at 1453.

126. *Id.*

127. *Id.* at 1463.

128. Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

129. Note, *supra* note 100, at 765-66. Broadcast trade associations, most notably the National Association of Broadcasters (NAB) and the Association of Independent Network Television Stations, urged Chairman Mark Fowler to take some action to restore the rules. *Id.* at 766 n.160.

130. *Id.* at 767. For example, the Association of Independent Network Television Stations proposed a set of must-carry rules under the compulsory license provision of the Copyright Act, 17 U.S.C. § 111 (1982). *Id.* at 767 n.166.

months of negotiations with broadcast trade associations, the FCC promulgated a scaled-down version of the must-carry rules. In November 1986, sixteen months after *Quincy Cable* was handed down, the FCC released its revised set of must-carry rules in an attempt to accommodate the court.

The revised must-carry rules[131] were of an interim nature, lasting for a period of five years. During that time, cable operators would be required to install an input selector switch (an A/B switch) to permit subscribers to keep their television antennas and receive broadcast signals over the air. The Commission reasoned that during the five-year period the public would become familiar with the A/B switch, and any past dependence on the must-carry rules would be eliminated. Cable operators were required to issue the A/B switch to the customer, to offer installation at a reasonable fee,[132] and to inform the customer of the phase-out of the must-carry rules.[133]

Compared with the original must-carry rules, the interim rules substantially reduced the number of channels a cable operator had to carry. Cable systems with twenty channels or fewer were not required to carry any commercial stations; systems with between twenty-one and twenty-nine stations were required to carry up to seven broadcast stations; and systems with 125 or more channels were required to devote up to twenty-five percent of their system to must-carry signals.[134] These rules also required cable systems to carry only those over-the-air television stations which were viewed in at least five percent of noncable households in the county in which the cable system was located.[135] They further reduced the number of noncommercial over-the-air television stations a cable system had to carry by requiring systems with fewer than fifty-four channels to carry at least one noncommercial station and systems with fifty-four

131. Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Report and Order, 1 F.C.C. Rec. 864 (1986) [hereinafter Report and Order of 1986].

132. *Id.* at 866.

133. *Id.* at 867.

134. 47 C.F.R. § 76.56 (1986); *see also* J. GOODALE, *supra* note 9, § 2.06[3][a]; Note, *supra* note 100, at 771.

135. Report and Order of 1986, *supra* note 131, at 887.

channels or more to carry at least two noncommercial stations.[136]

Not only did the Commission limit the scope of the new rules as compared with the old, but it changed the rationale behind them. The FCC now reasoned that the new rules were needed so that viewers could become accustomed to the A/B switch.[137] Cable's economic impact on broadcasters, however, was still a consideration in these scaled-down must-carry rules. Recall that the Commission only enacted these rules after extensive pressure from the broadcasting industry. The new rules were still designed to keep some sort of mandatory carriage requirement until the A/B switch would become an accepted part of a cable user's equipment.

Constitutional challenges were soon brought against the interim version of the must-carry rules by Century Communications Corporation and thirteen other cable operators who claimed that the rules violated their first amendment rights.[138] The District of Columbia Circuit, in *Century Communications Corp. v. FCC*,[139] reached the same result as it did in *Quincy Cable*.[140]

Chief Judge Wald, writing for the court, struck down these scaled-down rules as overbroad and lacking in justification.[141] As in *Quincy Cable* the court did not decide which standard to apply to the rules because the *new* must-carry rules failed to satisfy even the "incidental burden" test under *United States v. O'Brien*.[142]

The court noted that the FCC's justification for these rules was markedly different from its justification for the original

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136. *See* J. GOODALE, *supra* note 9, § 2.06 [3][a](1).

137. Report and Order of 1986, *supra* note 131, at 882, 885-86; 47 C.F.R. § 76.64 (1987).

138. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987). The other petitioners besides Century included: Hubbard Broadcasting, Association of Independent Television Stations, Spanish International Communications Corp., Univision, Inc., National Association of Broadcasters, Lincoln Broadcasting Co., National Cable Television Association, Office of Communication of the United Church of Christ, Corporation for Public Broadcasting, National Association of Public Television, Public Broadcasting Service, and National Broadcasting Co. *Id.*

139. *Id.*

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

141. 835 F.2d at 304.

142. 391 U.S. 367, 303-04 (1968).

must-carry rules in *Quincy Cable.*[143] The Commission argued that the interim rules were necessary to "tide the broadcast industry and viewers through the period" during which A/B switches were introduced to the public.[144] The court concluded that the FCC's judgment was "predicated not upon substantial evidence but rather upon several highly dubious assertions" from which the court concluded "that the need for a new saga of must-carry rules is more speculative than real."[145]

The court rejected each of the Commission's premises. First, it stated that the FCC presented little objective evidence — such as surveys or polls — to support its contention that cable subscribers were unfamiliar with A/B switches and that a five-year interim period of must-carry rules were needed to educate the public.[146] Next, the court stated that evidence presented by the Commission did not justify a finding that the must-carry rules were needed for five years.[147] This evidence indicated that only one percent of cable households had an A/B switch, and that half of all cable viewers surveyed by the National Association of Broadcasters stated that they would buy an A/B switch if local broadcast stations were dropped by their local cable system.[148] The court specifically noted that the reason so few viewers had A/B switches was that the switches were not necessary because of the must-carry rules.[149]

The court also rejected the claim that cable subscribers, especially those with videocassette recorders, need the five-year time to learn how to cope with the complicated problems of installing the A/B switch.[150] The court dismissed this argument by saying:

> In a culture in which even costly items like the video-cassette recorder, the cordless telephone, the compact disc-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within

143. 835 F.2d at 299.
144. *Id.* at 299 n.4 (citing Report and Order of 1986, *supra* note 131).
145. *Id.* at 300.
146. *Id.* at 300-01.
147. *Id.*
148. *Id.* at 301.
149. *Id.*
150. *Id.* at 302.

the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.[151]

After concluding that the Commission had failed to demonstrate that the new must-carry rules furthered a substantial governmental interest which outweighed the incidental burden on first amendment interests, the court stated that the five-year interim period was too long, because no evidence had been presented to justify such a lengthy period of time.[152] "Opting for a five-year interim period," the court wrote, "merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase, and install the requisite equipment."[153] "It is wholly unclear to us why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels. The FCC report does nothing to shed light on this matter."[154]

As in *Quincy Cable*, the court in *Century Communications* did not find the must-carry rules per se unconstitutional, but held that the regulations neither furthered a substantial governmental interest nor qualified as brief enough in duration to be considered narrowly tailored to satisfy the "incidental burden" test.[155] Yet, the court added, in a final jab at the Commission, "[w]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."[156]

IV. Salvaging a Limited Must-Carry Requirement for the Public Interest

A. *Analysis*

Notably, the FCC's justification for the original must-carry rules seemed more persuasive than the almost arbitrary set of revised rules that were struck down in *Century Communications*

151. *Id.*
152. *Id.* at 300-03.
153. *Id.* at 304.
154. *Id.*
155. *Id.*
156. *Id.*

Corp. v. FCC. At the time the must-carry rules were promulgated, the Commission's priority of economic protectionism for over-the-air broadcasters, particularly UHF stations, seemed rational enough. An unregulated, unlicensed cable industry would threaten the economic viability of broadcast television. The Commission would then be powerless to put into effect its goal of giving "all communities of appreciable size at least one television [station] as an outlet for local self-expression."[157] Cable penetration has increased to over fifty percent of the United States today.[158] Coupling this increase with an increase in cable profitability[159] and a decrease in the number of "free" television viewers,[160] it could be contended that the economic protectionist argument is even more compelling today than it was in 1965.

In fact, broadcast groups have continued to make rational economic arguments for the reimposition of the rules.[161] One study concluded that without the must-carry rules, cable operators might drop broadcast stations if they believe it would increase spot advertising, or pay subscriptions, or make room for more lucrative cable-only program services.[162] Broadcasters view with particular alarm the prospects of weak UHF stations whose syndicated programming is hardly distinguishable from many cable "superstations," and who are generally less profitable than VHF stations.[163]

In fact, deletions of local stations have occurred in Massachusetts[164] and Utah.[165] Stations in Alabama and Texas were af-

157. *See* United States v. Southwestern Cable, Inc., 392 U.S. 157, 174 (1968) (quoting H.R. REP. No. 1559, 87th Cong., 2d Sess. 3 (1962)).

158. *See By the Numbers*, BROADCASTING, July 4, 1988, at 12.

159. Zoglin, *The Big Boys' Blues*, TIME, Oct. 17, 1988, at 56-61.

160. Landrove & Lipman, *Cable Television Ad Revenues Poised for Growth in 1988*, Wall St. J., Jan. 22, 1988, at 32, col. 2.

161. *See Comments of the National Association of Broadcasters* (July 8, 1988) (responding to the Commission's Inquiry into the Availability of Broadcast Television Signals on Cable Television Systems, No. 88-138 (1988)) [hereinafter NAB Comments].

162. *Id.* at 10 (citing a study by Dr. Michael O. Wirth, Chairperson of the Department of Mass Communications, University of Denver, contained in the Appendix D-1 at 7-16).

163. *Id.* (See study by Dr. Michael O. Wirth in the Appendix D-1 at 7-8.)

164. *Id.* at 13-14. Appendix D-3 contains affidavits of Donald Moore, owner of WCVX-TV, Vineyard Haven, Mass.; Mr. Moore's station was ultimately forced into bankruptcy, primarily, according to the affidavit, because it was unable to obtain carriage on the largest local cable system.

fected when their local cable operators changed their cable positions to make room for more lucrative cable networks.[166] There have also been instances where cable systems operators have demanded additional compensation for keeping a station on its systems nationwide.[167]

The Commission's economic assumptions regarding the original must-carry rules were not persuasive enough to prevent the court in *Quincy Cable* from concluding that the rules were overbroad and constitutionally suspect under the less stringent, but nevertheless rigorous *United States v. O'Brien* standard.[168] Its claims in *Century Cable* justifying the revised must-carry rules show little rhyme or reason. Instead of basing its justification for the revised rules on general economic arguments, the Commission changed course and relied on an arbitrary stop-gap period during which consumers were to get acquainted with A/B switches.[169] In a first amendment matter, such rulemaking is especially irresponsible and serves to embarrass the agency involved, especially after losing in the courts below.[170]

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165. *Id.* at 14-15 Appendix D-4 contains the affidavit of Mark Goldstein, President of KOOG-TV, Ogden, Utah, which was refused carriage on most cable systems in the station's service area. This "severely hampered [the station's] efforts to attract local and national advertisers." The owner of the station was subsequently forced to sell its interest in the station because it "lost significant sums of money as a result of the inability to attract advertiser support" due to its carriage problems.

166. *Id.* at 15. This channel repositioning can injure a station because its cable channel assignment is different from its over-the-air channel. This can cause viewer confusion as to the proper channel.

167. *Id.* at 22-23. For example, WSYM-TV in Lansing, Michigan was told by a local cable company after *Quincy Cable TV, Inc.* that it would be charged for carriage; the owner of a cable system in Jefferson County, Missouri sent a letter to 12 former must-carry stations threatening to drop them unless they each paid $8,000 in equipment costs. Some of the monies paid were considerable. For example, WAYK in Melbourne, Florida had to pay local cable systems an average of $35,000 each, and KUTP, a UHF station in Phoenix had to pay Times Mirror cable systems $150,000 annually for carriage.

168. Neither the five year time period, nor the distinctions among cable systems of the numbers of over-the-air stations they had to carry was rationally justified in the decision. United States v. O'Brien, 391 United States 367 (1968).

169. Indeed, the Solicitor General, in his recommendation not to appeal *Century Communications*, noted that the new, narrowly-tailored rules did not present a suitable issue for appeal. He stated, however, that the original rules would have presented a better case for review because of the direct first amendment considerations. *See Government Won't Appeal Must Carry*, BROADCASTING, Mar. 28, 1988, at 37.

170. *See* Action for Children's Television v. FCC, 821 F.2d 741, 745-46 (D.C. Cir. 1987).

The FCC has not yet announced any new revision of the must-carry rules, although one member of the Commission has stated his advocacy for reimposition of the rules,[171] and a compromise between broadcasting and cable interests has been discussed.[172] However, under pressure from Congress, the FCC decided to survey broadcasters to determine what impact the loss of the must-carry rules has had on broadcasting.[173] Thirty-one percent of the television stations that responded reported that after *Quincy Cable* they had been dropped from cable systems or that they had been denied coverages. Thirty-four percent reported that their signal had been repositioned from one cable channel to another.[174] Twenty percent of the cable systems responding reported that they had dropped broadcast signals or were denying carriage. Twenty-three percent reported that they were repositioning stations.[175] This survey apparently added weight to the broadcast industry's own evidence that a cable industry unfettered by must-carry rules frequently adversely affected the carriage of broadcast stations; however, the cable industry vigorously objected to the methodology of the survey, and the FCC refused to draw any conclusions from it.[176]

Both *Quincy Cable* and *Century Communications* mark the

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171. *See, Must Carry From a Commissioner's Point of View*, BROADCASTING, Mar. 28, 1988, at 28 (remarks of Commissioner James H. Quello to Alabama Broadcasters Association).

172. A proposed compromise between the National Association of Broadcasters and the National Cable Television Association that would have guaranteed broadcasters free carriage of their signals fell apart because of opposition by the Association of Independent Television Stations. The latter group objected to the plan, which was similar to the 1986 version of the must-carry rules nullified by the court in *Century Communications*, because it would have given cable operators the right to reposition independent and UHF channels from their current channel positions to less desirable slots on the UHF band. *See The Must-Carry Deal that Almost Was*, BROADCASTING, July 17, 1989, at 27-28.

173. The survey was mailed out to every broadcast station and cable system in the United States in May and June, 1988. It dealt with the effect of the nullification of the must-carry rules after *Quincy Cable*. *See Real-World Data on A Post-Must-Carry World*, BROADCASTING, Sept. 5, 1988, at 30-31.

174. *Id.*

175. *Id.*

176. *Id.* Representatives from the cable and broadcasting industries noted that the questionnaire was "confusing" and likely to produce unclear results. It should be noted that only 67% of the television stations and 51% of the cable systems responded to the survey.

ending of a regulation that many cable operators considered an albatross around their economic and programming necks. The court, the Commission, and the broadcast trade associations did not adequately consider the important issue of whether the public interest was served in removing the must-carry rules.

Because both cable television and broadcasters are subject to the "public interest" standard,[177] the effect of the nullification of the must-carry rules should be discussed in relation to its effect on the public — an effect that may be more bad than good in certain areas of the country.

Although the courts applied legitimate constitutional arguments to void the must-carry rules as they existed, they did not preclude the possibility of future must-carry rules that may be constitutionally sound.[178] The FCC should prepare a narrowly-tailored set of revised must-carry rules that may be not only permissible, but a valuable protection for certain segments of the viewing public.

B. *The Proposed Rule*

A proposal to link the must-carry rules to the compulsory license provision in the 1976 Copyright Act[179] has been advocated by broadcast groups.[180] This provision enables a cable operator to avoid copyright liability for retransmitting distant-sig-

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177. Carter Mountain Transmission Corp. v. FCC, 32 F.C.C.2d 459, 461 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963).

178. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987); *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985).

179. Copyright Act, 17 U.S.C. § 111 (1982).

180. *Id.* This section was passed in response to a Supreme Court decision in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), which ruled that cable retransmission of over-the-air programs did not constitute a "performance" under the 1909 Copyright Act. The 1976 Act was a compromise between the interests of copyright holders and those of cable operators. It essentially requires a cable system to pay a fixed percentage of its gross revenue for the right to carry a distant signal. The funds are received by the Register of Copyrights and then distributed to copyright owners whose works are carried by the cable system.

The actual royalty amounts are based on a rather complex formula. A system with semi-annual gross receipts of less than $75,000 pays a flat rate of $28 regardless of the number of broadcast signals carried. A system grossing between $75,000 and $292,000 semi-annually pays 0.5% of the first $146,000 and 1% on revenue in excess of that amount. Larger systems pay royalties based on the actual quantity and type of distant signals carried. For a more detailed discussion, see J. GOODALE, *supra* note 9, § 6.03 [4].

nal non-network programs if it pays a modest statutory fee,[181] an amount much less than normal copyright royalties. Advocates of this plan would require a cable system to supply some sort of carriage of over-the-air television stations in return for the compulsory license. Yet, in light of the constitutional constraints of *Quincy Cable* and *Century Communications*, even this idea may not be narrowly tailored enough to pass constitutional muster. To link the must-carry rules to what is, effectively, a discount on the payment of copyright royalties is to offer cable operators a quid pro quo that may be politically expedient but not necessarily constitutional.

The most direct and constitutionally valid proposal would impose a must-carry requirement on cable systems in areas in which there are demonstrated reception deficiencies. Although there are more broadcast television stations today than when the must-carry rules were first promulgated,[182] there are still areas in which viewers cannot receive an adequate television picture due to distance, geographic factors, or architectural impediments.[183] For viewers in these areas[184] to receive an adequate signal, they must subscribe to a cable television system. Ironically, despite the evolution of cable from a passive medium into a programming medium, these viewers are likely to subscribe to cable for the very reason it was first created — to improve reception. The very reason Manhattan was the first urban area to be wired for cable in the mid-1960s was because television reception was so poor.[185] A recent nationwide survey indicates that this reasoning is prevalent among cable subscribers all over the country, not just where reception is poor.[186]

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181. 17 U.S.C. § 111 (1982).

182. As of June, 1988, there were a total of 1631 commercial and educational television stations on the air. *By the Numbers*, BROADCASTING, June 6, 1988, at 14. In the late 1960's there were about 840. BROADCASTING Y.B. 1969 at 11.

183. NAB Comments, *supra* note 161, at 28 n.37.

184. *Id.* Affidavit from stations located in major cities including Los Angeles and Pittsburgh and affidavits from Appalachian counties in Kentucky and western Pennsylvania state that "terrain features" inhibit or preclude local reception of stations.

185. *See 3 Given Franchises to Provide Cable for Better City TV*, N.Y. Times, Dec. 3, 1965, at 1, col. 3 (describing New York City's decision to award cable franchises in Manhattan with the specific purpose of improving television reception).

186. NAB Comments, *supra* note 161. In a survey done for the National Association of Broadcasters, nearly two-thirds of the respondents stated that better reception was their principal reason for subscribing to cable, and that 98% of the cable homes surveyed

For subscribers in these areas, there really is no alternative to cable. An A/B switch to pick up over-the-air television stations would not help many subscribers in Manhattan or West Virginia because of the poor over-the-air reception. Therefore, the FCC should propose new must-carry rules specifically targeted for areas with over-the-air reception problems.

The rules would work like this: if a cable operator sought to drop a broadcast station or stations from its cable system, it would have the right to do so. However, after the station was dropped, the cable operator would be required to take a random sample of customers, conducted by an outside polling or market research organization, to determine if customers were able to get the dropped stations adequately with an A/B switch. If a significant number of viewers would not receive an adequate picture, the cable company would be required to carry the station. The rules would permit the cable franchisee to drop the station before polling or viewer surveys are conducted, to avoid any constitutional challenges claiming that the must-carry actions were without evidentiary basis.

Since the Cable Communications Policy Act of 1984[187] continues to grant federal preemption in the area of signal carriage,[188] no change in statutory law would be necessary to implement these rules. Therefore, under federal law, the polling requirement could be imposed on local cable franchisees without any violation of the Cable Act's franchising sections.[189] The proposed rules would also rely on a relatively inexpensive polling system. Rather than actually testing reception throughout its service area, a procedure that would be prohibitively expensive, they would permit the cable company to delete broadcast stations before requiring any activities to justify that action.

Despite the prior constitutional rejections of the must-carry rules, these revised rules may pass muster under the "incidental burden" test. First, ensuring proper television reception to all in

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did not have rooftop antennas. NAB Comments, supra note 161, at exhibit 1.

187. 47 U.S.C. § 521-559 (1984).

188. *Id. See also* Ross & Brick, *The Cable Act of 1984 — How Did We Get There and Where Are We Going?*, 39 FED. COM. L.J. 27, 47 (1987).

189. 47 U.S.C.S. § 556 (Law. Co-op. Supp. 1989). For a thorough discussion of local franchising, see Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 551-84 (1985).

a given area is a substantial governmental interest, deriving from one of the major goals of the Communications Act.[190] Furthermore, it is important for the future of over-the-air broadcasters that viewers be able to receive signals, even where reception is difficult. Secondly, applying the rules only to situations in which a significant number of viewers cannot adequately receive the dropped station is narrowly enough tailored so as to not be constitutionally overbroad. These proposed must-carry rules would only apply to areas with demonstrated reception problems; areas with strong over-the-air reception would be exempt. Also, the rules would especially protect UHF stations — many of which are Public Broadcast Service affiliates — which are most vulnerable to over-the-air reception problems. If VHF stations are well received in an area, but one or more UHF stations are not, the cable operators would only be required to carry the UHF stations.

In devising these standards, it is assumed that the "incidental burden" test is applicable. However, neither *Quincy Cable* nor *Century Communications* definitely stated whether this test or the more rigorous "compelling state interest" test should apply. It is far from certain that these new rules would be upheld under the more difficult test. If these rules were declared unconstitutional, the victory would be sweet for a few first amendment aficionados and the cable interests, but certainly not for those viewers who are unable to receive their favorite television programs due to the poor reception. This is not what the public interest is about.

V. Conclusion

The decisions in *Quincy Cable* and *Century Communications* put the FCC on notice that the courts will not hesitate to review and strike down cable regulations that are deemed unconstitutional and that the courts will continue to apply rigorous standards in reviewing cable regulations. The FCC will have to take this into consideration if it decides to resurrect the must-carry rules in yet another incarnation. The public, however,

190. Section 1 of the Communications Act, 47 U.S.C. § 151 (1982), explicitly states that nationwide access by all Americans to broadcast outlets is a major goal of the Act. *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 24 (D.C. Cir. 1977).

needs some guarantee of adequate television reception, and the public interest should compel the Commission to draft a new set of must-carry rules for viewers in reception-deficient areas of the country. A new, leaner, and specifically-tailored set of must-carry rules should, like the legendary phoenix, rise from the constitutional ashes of *Quincy Cable* and *Century Communications.*