TURNER BROADCASTING V. FCC

By Adam Pliska

In *Turner Broadcasting v. FCC*[1] cable operators challenged the must-carry provisions of the Cable Television Consumer Protection Act of 1992 (the Cable Act)[2] as being unconstitutional on First Amendment grounds. The Cable Act requires cable companies to carry the signals of local broadcast stations on their cable systems.[3] After a second review by the United States Supreme Court,[4] in an opinion by Justice Kennedy, the Court held that the Cable Act had survived the intermediate scrutiny test and therefore was constitutional.[5]

Taken together, the *Turner* decisions are important in two respects. First, they articulate the standard of scrutiny for regulation of cable technology.[6] Secondly and commensurately, the Court addressed the level of deference applied to congressional evidence. The Court's handling of these points should provide clues into what will be considered justifiable First Amendment regulation of media technology in the future.[7] However, it is hardly clear that the standards the Court articulated and the tests that it applied in reaching its conclusion were one in the same. This is particularly important when one considers the growing influence the government will almost certainly have on future communication technologies.[8] As a

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1. 512 U.S. 622 (1994) [hereinafter *Turner I*].
2. 47 U.S.C.A. §§ 534, 553 (West Supp. 1996).
3. *See id.* § 534.
4. *See* Turner Broadcasting v. FCC, __U.S.__, 117 S. Ct. 1174 (1997) [hereinafter *Turner II*].
5. *See id.* at 1183.
6. *See Turner I*, 512 U.S. at 662 ("the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny").
7. These clues might be especially helpful in light of recent cases. *See, e.g.*, Adarand Construction v. Pena, 515 U.S. 200, 227 (1995) (apparently rejecting race-based regulatory remedies by declaring that "[t]o the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled" (construing Metro Broadcasting v. FCC, 497 U.S. 547 (1990))).
8. For example, the scope of the FCC's power has continued to broaden. Originally, the FCC refused to exercise any control over cable companies, arguing that cable companies were not "common carries" or broadcasters. *See* Holli K. Sands, *The Supreme Court Turns its Back on the First Amendment, The 1992 Cable Act and the First Amendment*: Turner Broadcasting System, Inc. v. FCC, 3 VILL. SPORTS & ENT. L.J. 295, 296 (1996). However, today it seems "fairly clear that neither 'broadcaster' nor 'common

result, future application of the scrutiny and deference standards, and even the very existence of such standards, remain in question. Because new technologies like cable possess "undefined potential to affect the way we communicate and develop our intellectual resources,"[9] the understanding of the Court's decision is critical to the communications medium.

This comment first provides a brief description of the regulated technology under the Cable Act. Next it examines the relevant case history for the Court's articulation of a scrutiny standard and discusses how the Court's unclear commitment to congressional, evidentiary deference will affect that level of scrutiny. Finally, it concludes with a discussion of the potential future ramifications of the *Turner* decision.

I. TECHNOLOGY REGULATED UNDER THE MUST-CARRY RULES

The Cable Act specifically affects two technologies: television broadcasting and cable signal distribution. Sections 534 and 535 of the Cable Act require cable companies to carry local broadcast stations on their cable systems.[10] A basic assessment of the regulated technology will be helpful in understanding the Court's justification for applying intermediate scrutiny.

"Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range."[11] This is the basic form of broadcast television. It traditionally has been dominated by the major networks, but also provides consumers with local broadcast stations. Broadcasting has benefits as well as drawbacks for consumers. On the positive side, the programming is a public good and is therefore available to everyone without cost. On the down side, signal quality can be affected by distance and other forms of signal interference.

"Cable systems, by contrast, rely upon a physical, point to point connection between a transmission facility and the television sets of individuals subscribers."[12] The two primary benefits of cable are a lack of signal interference and the ability to provide subscribers with many more sta-

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carrier' has any certain, objective meaning." THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 22 (2d ed. 1998).

9. *Turner I*, 512 U.S. at 627.

10. *See* 47 U.S.C.A. §§ 534, 535 (West Supp. 1996).

11. *Turner I*, 512 U.S. at 627.

12. *Id.* at 627-28.

tions.[13] For practical purposes, cable companies are usually given a temporary monopoly in a certain geographic area.[14]

Although cable operators and broadcasters may have started out as complements,[15] they have emerged as competitors. One of the concerns that regulators have with cable is its potential for "bottlenecking" or "gatekeeping."[16] This describes the unequal market power that cable companies have over broadcasters. Most Americans receive cable or broadcast stations through cable television. While most cable systems rely on viewers' monthly payments to cover operating costs, the success of broadcast television is determined by advertising and the number of viewers. Thus, access is crucial for broadcast television. However, if cable companies refuse to carry the signals of broadcasters, rather than altering their television reception equipment, viewers may cease watching broadcast stations altogether. This is supported by empirical data that show the market shift from traditional broadcasting to cable television.[17] Because both broadcast and cable television program the same or virtually the same type of product, these two mediums have become intertwined.

II. THE CABLE ACT AND MUST CARRY RULES

By enacting the Cable Act, Congress set out to "amend the Communications Act of 1934 to provide increased consumer protection and promote competition in the cable television and related markets."[18] The proposed act

> [a]mong other things ... subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators ... and directs the FCC to develop and promul-

13. *See id.* at 629.

14. *See* 47 U.S.C.A. § 521(a)(2); *see also Turner I*, 512 U.S. at 631.

15. Cable companies brought broadcast signals to viewers who would normally not be able to see them and broadcasters brought programming that cable subscribers wanted to watch.

16. *See* Laurence H. Winer, *The Red Lion of Cable, and Beyond?*—Turner Broadcasting v. FCC, 15 CARODZO ARTS & ENT. L.J. 1, 48-50 (1997).

17. *See generally* HUGH MALCOLM BEVILLE, JR., AUDIENCE RATINGS: RADIO, TELEVISON, CABLE (Lawrence Erlbaum Associates eds., 1988); *see also* S. REP. NO. 92, at 1135 (1991).

18. 47 U.S.C.A. § 534 (quoting preamble).

> gate regulations imposing minimum technical standards for cable operators.[19]

In drafting the legislation, Congress was obviously concerned about the growing market power of the cable industry.[20] Providing a guide for courts examining congressional intent, Congress provided a Statement of Policy:

> It is the policy of the Congress in this Act to ... (1) promote the viability to the public of a diversity of views and information through cable television and other video distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and (5) ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers.[21]

With these goals in mind, section 534(a) of the Cable Act provides that "each cable operator shall carry, on the cable system of that operator, the signals of the local commercial television stations and qualified low powered stations."[22] Carriage is at the discretion of cable operators subject to certain limitations.[23] "A cable operator ... with 12 or fewer usable activated channels shall carry ... three local commercial television stations."[24] If three commercial stations are not present, then stations with more than 35 channels must carry two low powered stations.[25] Those cable systems that offer fewer than 35 stations must carry at least one low powered station.[26]

Other requirements compel cable operators to provide undistorted signal quality and to assign broadcast stations a corresponding number on the

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19. *Turner I*, 512 U.S. at 630.
20. *See id.* at 633.
21. 47 U.S.C.A. § 521(b)(1-5).
22. *Id.* § 534(a).
23. *See id.*
24. *Id.* § 534(b)(2).
25. *See id.* § 534(c)(B). Low powered stations usually are defined as local broadcasters with relatively week broadcast signals. *See id.* § 534(h)(2)(A-F).
26. *See id.* § 534(c)(A).

cable system as the broadcast station would use in broadcasting.[27] Other restrictions prevent cable companies from receiving a fee for carriage.[28] However, cable companies with fewer than 300 subscribers are not effected by the must-carry rules.[29]

Section 535 of the Cable Act imposes almost identical standards on cable operators for the carriage of "noncommercial educational television stations."[30] Subject to few exceptions, cable companies are required to carry "any qualified local noncommercial educational television station requesting carriage."[31] In sum, "[t]aken together ... [sections 534 and 535] subject all but the smallest cable systems nationwide to must-carry obligations, and confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system."[32]

The goals and effect of the must-carry rule are both social and economical. For years courts have recognized that "the diversity of views and information on the airwaves serves important First Amendment goals."[33] Here, the goals have social benefits, but are primarily a result of governmental interest in preserving a competitive market. The ultimate effect of the must-carry rules is to impose a duty on cable operators to carry competing signals.

III. CASE HISTORY

The cable industry has argued that the Cable Act represents an infringement of First Amendment rights.[34] Cable operators have viewed cable systems and broadcasters as competing "voices" and therefore believe that any regulation that favors a competitor signals over their own is tantamount to censorship, deserving of the highest degree of scrutiny.[35] The FCC, on the other hand has seen the must-carry regulation as neces-

27. *See id.* § 534(b)(6). For example, a broadcast station that is normally assigned to channel four on the broadcast spectrum must also be assigned to channel four on the cable system.

28. *See id.* § 534(b).

29. *See id.* § 534(b)(1)(A).

30. *Id.* § 535(a).

31. *Id.* § 535(a)(1).

32. *Turner I*, 512 U.S. at 632.

33. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990).

34. *See* Turner Broadcasting v. FCC, 819 F. Supp. 32, 39 (D.D.C. 1993).

35. *See id.*

sary to further the justifiable government's interest in preserving the broadcast medium.[36]

As a result of this conflict, a three-judge panel reviewed the case pursuant to section 555 of the Cable Act.[37] The court dismissed the complaint, citing among other things, the "de minimis" nature of the regulations and the unwillingness of the court to "pass judgment upon the wisdom of the policies the national legislature ha[d] chosen to pursue in such endeavors."[38] The United States Supreme Court immediately granted direct review.[39]

A. *Turner I*

Turner I did not resolve the conflict between the government and the cable operators because the Court determined that issues of material fact still needed to be resolved.[40] Still, *Turner I* is important because it determined the standard upon which First Amendment challenges to cable regulation would be evaluated. At the outset, the Court announced that "[b]ecause the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded."[41] In the remainder of the opinion, the Court determined what the standard should be and how that standard should be applied.

Although the Court was quite clear that it would judge regulation of speech only under the most "rigorous scrutiny,"[42] the Court stated that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[43] *Turner I* clarified the issue when the Court found that the must-carry rules fell under this second category.[44] It was reasoned that the "the privileges conferred by the must-carry rules ... [were] unrelated to content."[45] Therefore, the Court agreed with the district court that intermediate scrutiny was the appropriate standard for the

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36. *See* Turner Broadcasting v. FCC, No. 95-992, 1996 WL 587661, at *22 (U.S. Oral Arg., Oct. 7, 1996).

37. 47 U.S.C.A. § 555(c)(1) (West Supp. 1996) ("Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges.").

38. *Turner Broadcasting*, 819 F. Supp. at 33, 39.

39. *See* Turner Broadcasting v. FCC, 502 U.S. 952 (1995).

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

41. *Id.* at 641.

42. *See id.* at 642.

43. *Id.*

44. *See id.*

45. *Id.* at 645.

regulation of the speech of cable operators. Although the Court noted the technical and market distinctions between cable operators and broadcasters,[46] the Court found a guideline in *United States v. O'Brien*[47] which fashioned this new standard in the broadcast context.[48]

Under *O'Brien,* a content-neutral regulation will be sustained if it advances "important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[49] *O'Brien* provides a four part test to determine if: (1) "the regulation ... is within the constitutional power of the government;" (2) it "furthers an important or substantial governmental interest;" (3) it "is unrelated to the suppression of free speech;" and (4) if the alleged restrictions on speech are "no greater than is essential to the furtherance of that interest."[50]

The Court found that the must-carry provisions met the first two prongs of the *O'Brien* test. The Court cited Congress' assertion that the must-carry regulations served three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television.[51] With these factors in mind, the Court reasoned that "[t]he interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene," and pointed out that "nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming."[52] It next asserted that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order," reasoning that it "promotes values central to the First Amendment."[53] Most importantly, the Court recognized "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."[54]

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46. *See id.* at 627-29.
47. 391 U.S. 367 (1968).
48. *See Turner I,* 512 U.S. at 662-68.
49. *Turner II,* 117 S. Ct. at 1186.
50. *O'Brien,* 391 U.S. at 377; *accord* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).
51. *See Turner I,* 512 U.S. at 662.
52. *Id.* at 663.
53. *Id.*
54. *Id.* at 664.

The Court dismissed the cable operator's arguments that it was unconstitutional for the must-carry provisions to compel them to carry unwanted speech.[55] In reaching its conclusion, the Court rejected arguments based on *Miami Herald Publishing Co. v. Tornillo*[56] and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[57] (cases which found it unconstitutional to compel a broadcaster or publisher to carry unwanted and averse speech based on content).[58] Instead, the Court in *Turner I* found the regulations applicable to the cable industry were distinguishable due to the content-neutral nature of these regulations.[59]

The Court dedicated a great deal of time to addressing the narrow tailoring factor of the test. The Court reasoned that "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[60] Despite the Court's warning, it did not concede that the must-carry rules were tantamount to the regulation of content-regulated speech. In rejecting this proposition, the Court addressed (and ultimately rejected) several arguments raised by the cable industry appellants.[61]

Because, even under intermediate scrutiny the government is prohibited from fashioning a regulation that is overly broad, the Court reiterated the idea that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'"[62] Therefore, the Court concluded that "in applying *O'Brien* scrutiny we must ask first whether the government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry."[63] In addition, the Court stressed the significant technological differences between publishers and cable operators, pointing to the ability of cable operators to block access to broadcast competitors and the potential for abuse.[64]

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55. *See id.* at 653.
56. 418 U.S. 241 (1974).
57. 475 U.S. 1 (1986).
58. *See Turner I*, 512 U.S. at 655.
59. *See id.* at 654.
60. *Id.* at 641.
61. *See id.* at 653-61.
62. *Id. at* 664 (quoting Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985).
63. *Id.* at 664-65.
64. *See id.* at 656-57.

Related to the suppression prong, the Court likewise rejected arguments that the must-carry rules were unconstitutional because they favored one medium over another and that cable operators were getting disfavored treatment. With respect to alleged preferences for broadcasters, the Court asserted that the only significant question was whether "Congress preferred broadcasters over cable programmers based on the content of programming each group offers."[65] The Court flatly stated that the answer to this question was "no."[66] With respect to the "disfavored treatment" of cable operators, the Court asserted that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[67] To the Court, the cable industry met this test. The Court asserted, "[t]he must-carry provisions, as we have explained above, are justified by special characteristics of the cable medium" and again pointed to "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[68]

The Court concluded that it was not in the position to rule on the fourth part of the *O'Brien* test, narrow tailoring, because the record had not provided sufficient information.[69] Based on the record, the Court stated that it was unable to determine if the must-carry rules suppressed more speech than was necessary or how effective the less-restrictive means were.[70] Some of the information that the Court suggested it was looking for included: additional evidence of financial harm to broadcasters;[71] the extent to which cable operators' current system would be effected;[72] and the extent that "cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters."[73] In short, the majority in *Turner I* believed "that [while] the Government's asserted interests are important in the abstract [that] does not mean ... that the must-carry rules will in fact advance those interests."[74]

In the end, the Court remanded the case for additional fact-finding because it felt that "genuine issues of material fact still [needed] to be re-

65. *Id.* at 658-59.
66. *Id.* at 659.
67. *Turner I*, 512 U.S. at 660.
68. *Id.* at 661.
69. *See id.*
70. *See id.* at 668.
71. *See id.* at 667.
72. *See id.* at 668.
73. *Id.*
74. *Id.* at 664.

solved on the record."[75] For Congress to regulate speech, it would have to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[76] Although the Court acknowledged "substantial deference to the predictive judgments of Congress,"[77] it asserted that "while [such] predictive judgments are entitled to substantial deference [it] does not mean, however, that they are insulated from meaningful judicial review altogether."[78] Furthermore, it articulated that the purpose of this review is to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[79]

In Justice O'Conner's dissent, she claimed that "[t]he question is not whether there will be control over who gets to speak over cable ... [but] who will have this control."[80] The dissent even acknowledged the legitimacy of some First Amendment regulation of truly content-neutral regulation.[81] However, to the dissent, the must-carry rules do not earn the content-neutral classification.[82] Justice O'Connor believed that "preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content."[83] The dissent also took issue with the congressional evidence. The fact that Congress did not reveal a preference for a certain content was inapposite to the dissent, which stated, "when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present."[84]

The dissent concluded that even if the must-carry rules were judged by the content-neutral standard, it still would have failed. It stated that "[t]he must-carry provisions are fatally overbroad, even under a content-neutral analysis."[85] The dissent illustrated the point by demonstrating that cable companies that do not engage in non-competitive actions would be subject

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75. *Id.* at 668.

76. *Turner I*, 512 U.S. at 664 (citing Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

77. *Turner I*, 512 U.S. at 665.

78. *Id.* at 666.

79. *Id.*

80. *Id.* at 683 (O'Connor, J., dissenting).

81. *See id.*

82. *See Turner I*, 512 U.S. at 674 ("I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content.").

83. *Id.* at 676.

84. *Id.* at 679.

85. *Id.* at 683.

to regulation.[86] In this sense, the dissent seems to suggest that individualized antitrust litigation would be the better tool in remedying market failures.

Therefore, with the majority concluding that intermediate scrutiny should apply to the First Amendment regulation of cable, and the asserted state interest accepted, the case was remanded for further fact-finding regarding content-neutrality and narrow tailoring.[87]

B. *Turner II*

On remand, the district court concluded that the must-carry provisions withstood constitutional scrutiny.[88] Likewise, when the case returned to the Supreme Court, the Court found that the record supported Congress' predictive remedies and did not burden more speech than was necessary. Therefore, the Court concluded that the must-carry provisions were constitutional.[89] The Court began by reaffirming its commitment to the *O'Brien* test,[90] but this time it had the benefit of even more extensive fact-finding.[91] Similarly, the Court reaffirmed its decision that "preserving the benefits of free, over-the-air local broadcast television, ... promoting the widespread dissemination of information from a multiplicity of sources, and ... promoting fair competition" represented a compelling government interest.[92] Moreover, the Court cited Congress' conclusion that there had been a market shift from broadcast to cable television.[93]

In light of the extensive record, the Court seemed more comfortable in dismissing the arguments of the cable industry. This time, the Court did not hesitate when forming its position on the question of narrow tailoring. Although the Court agreed with the cable operators that at least some evidence suggested that the broadcast industry continued to grow, the Court was nevertheless content that "a reasonable interpretation is that expansion in the cable industry was causing harm to broadcasting."[94] The Court was

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86. *See id.* at 681.
87. *See id.* at 668.
88. *See* Turner Broadcasting v. FCC, 910 F. Supp. 734, 751 (D.D.C 1995).
89. *See Turner I*, 117 S. Ct. at 1183.
90. *See id.* at 1186.
91. *See generally Turner Broadcasting*, 910 F. Supp. at 734. For example, the district court used "the more than 18,000 page record which Congress compiled over 3 years of hearings" in concluding that Congress could have drawn the reasonable inference that the must-carry rule was necessary. *Id.* at 751.
92. *Turner II*, 117 S. Ct. at 1186.
93. *See id.* at 1199-1203.
94. *Id.* at 1197.

likewise unimpressed by arguments that alternatives to the must-carry rule might have existed.

One of the differences between *Turner I* and *Turner II* was the extent of deference to Congress. The Court in *Turner I* believed that there was compelling interest, but expressed doubts about the necessity of a remedy.[95] In contrast, the Court in *Turner II* flatly asserted that "[j]udgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make."[96] Therefore, although a significant portion of the opinion is spent debunking the alternates to the must-carry rule,[97] it does not appear that the effectiveness of any of the alternatives would have mattered anyway.[98]

Justice Breyer's concurrence went even further in deferring to congressional findings. He did not deny that "the compulsory carriage that creates the 'guarantee' extracts a serious First Amendment price," adding that "[i]t interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs."[99] Still, Justice Breyer was satisfied that the governmental interest in preserving a diverse information forum is sufficient to justify the must-carry rules.[100]

IV. DISCUSSION

At the heart of the intermediate scrutiny test lies the idea that the degree of permissible governmental regulation should not exceed the boundaries of the evil it seeks to remedy.[101] Because courts must determine the degree of fit between the regulation and the evil sought to be remedied, the amount of deference given to congressional findings will undoubtedly have a significant impact on the ultimate effect of intermediate scrutiny. Certainly, intermediate scrutiny appears to accept some degree of evidentiary deference in favor of Congress.[102] Likewise, the Supreme Court has stated that "[a] court reviewing an agency's adjudicative action should accept the agency's factual findings if those findings are

95. *See Turner I*, 512 U.S. at 668.
96. *Turner II*, 117 S. Ct. at 1203.
97. *See id.* at 1200-03.
98. *See generally id.* at 1203.
99. *Id.* at 1204 (Breyer, J., concurring).
100. *See id.* at 1203-04.
101. *See id.* at 1196.
102. *See Turner II*, 117 S. Ct. at 1203.

supported by substantial evidence on the record as a whole."[103] On the other hand, "[t]he obvious danger [in too much congressional deference] is that congressional findings might be passed as boilerplate, with 'substantial evidence' cobbled together by proponents of the legislation."[104] If this happens, the heightened intermediate scrutiny standard required for First Amendment media regulation becomes quite analogous to minimal scrutiny. Minimal scrutiny:

> Grants a great deal of deference to actions of the other branches of government and requires only that they justify their actions by a valid or legitimate state interest achieved through reasonable means. In practice, minimal scrutiny usually operates as no scrutiny at all and defers totally to the other branches of government.[105]

In many ways, *Turner I* represents a more traditionally conservative approach for evaluating evidence for its First Amendment regulatory weight. This standard has permitted Congress to regulate broadcast television, but has at the same time tried to provide objective prerequisites. It "teaches that the First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems."[106]

The Court explained that the independent judgment of the facts was meant to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[107] This was not the standard the Court appeared to adopt in *Turner II*. At first, the standards articulated might seem to correspond, but a closer inspection shows that they do not. *Turner II* marks a shift from the reliance of objective standards for evidence toward a standard based on the more subjective conclusions of Congress. The Court in *Turner II* was far more willing to accept the record as truth, thereby concentrating less on the quality of the evidence itself.[108] The Court asserted that "the question is whether the legis-

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103. Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992).

104. J.I.B., *Constitutional Substantial-Evidence Review? Lessons From the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162, 1179 (1997).

105. Jeffrey M. Sharman, *The Theory of Low-Valued Speech*, 48 SMU L. REV. 297, 330 (1995).

106. Denver Area Education Consortium v. FCC, __U.S __, 116 S. Ct. 2374, 2385 (1996).

107. *Turner I*, 512 U.S. at 666.

108. *See Turner II*, 117 S. Ct. at 1196.

lative conclusion was reasonable and supported by substantial evidence in the record before Congress."[109] Although the textual difference between the cases was slight, the result is very different. Whereas the Court in *Turner I* wanted proof that "the threat to broadcast television is real,"[110] the Court in *Turner II* merely wanted to know if the legislative conclusions were reasonable. Suddenly, Congress is in the position of both creator of the record and judge.

Because narrow tailoring determinations are largely based on the degree of deference, greater deference gives Congress greater latitude in passing legislation. In *Turner I*, the evidence was "critical to the narrow tailoring step of the *O'Brien* analysis" and was thereby essential in fashioning the proper remedy.[111] The Court in *Turner II* indeed examined the evidence it sought in the earlier case. However, this greater deference made it much easier for the Court to accept the assertion that broadcast stations were likely to be dropped without must-carry protection,[112] or that the burden on cable operators was slight.[113] The Court seemed willing to act as little more than a rubber stamp, catching only the most egregious abuses of regulation. The Court's attitude can best be summed up in its declaration that it was "not at liberty to substitute ... [its] judgment for the reasonable conclusion of a legislative body."[114]

These cases will most likely be cited as benchmarks of government regulation of developing media technologies. But taken together, they create conflicting signals. On one hand, the Court is willing to rest the entire outcome of a case on the presentation of facts that are not much different than those with which it started. On the other hand, it appears these facts have relatively little significance it making its ultimate conclusion. Perhaps the Court is suggesting that certain prerequisite evidence does have to exist in order for regulation to be constitutional. If that is the case, these requirements seem to be mere formalities. Or perhaps the Court has simply articulated two standards—the objective standard of *Turner I* and the subjective standard of *Turner II*.

109. *Id.*
110. *Turner I*, 512 U.S. at 665.
111. *Id.* at 668.
112. *See Turner I*, 117 S. Ct. at 1197.
113. *See id.* at 1198.
114. *Id.* at 1197.

V. CONCLUSION

The need for regulation of media technology has long been recognized.[115] To be sure, "[a]mong the most important functions of the Supreme Court are to craft and apply constitutional doctrine."[116] The need for clarity of standards is obvious. After *Turner I & II*, however, any hope for a definite standard is smashed. On one hand, intermediate scrutiny is said to apply to cable regulation. On the other hand, a confusing and seemingly high degree of deference transforms that standard into something analogous to minimal scrutiny. Because the right of speech is at stake, the Court's willingness to defer to congressional evidence and thus affect the efficacy of intermediate review must not be overlooked.

In fairness to the Court, the problematic nature of these decisions probably stems from an earnest attempt to regulate an alternative medium with traditional, broadcast regulation. Perhaps unique aspects of the cable industry and its importance in American society make it difficult to judge on any objective scale. On the other hand, the same argument could be made for radio or television broadcasting. Regardless, it is clear that while applying an old standard to a new medium may vary in efficacy, articulating two standards (or none at all) is certain to be problematic.

The *Turner* cases left unanswered a major question they set out to define: what is the standard for evaluating congressional evidence in First Amendment media regulation. As media technology continues to develop, the Court will certainly have to readdress that question. Looking ahead, it has been suggested that "[r]ather than trying to treat cyberspace under a single doctrine, courts, litigants, and legislators should be sensitive to a variety of legal doctrines and carefully apply those doctrines in light of the distinct characteristics of the implicated cyber forum."[117] Perhaps this augurs the fate of the cable industry as well. Regardless of which method is best, hopefully on the next consideration of this issue, a clear standard will be fashioned. If that is the case, the media industry will gain the consistency it requires and the boundaries of government regulation into commercial speech rights will be, at least for a time, clear. Without any

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115. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 388-90 (1969) ("[B]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on the licensees in favor of others whose views should be expressed on this unique medium."); National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943); FCC v. League of Women Voters of California, 468 U.S. 364, 377 (1984).

116. Richard A. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 56 (1997).

117. David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public v. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 4 (1998).

true clue as to the reasonableness of evidence, any evidence standard articulated in these cases is meaningless. The future of communications technology demands clarification.

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