## Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969)

Mr. Justice WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of s 315 of the Communications Act1 that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. Red Lion involves the application of the fairness doctrine to a particular broadcast, and RTNDA arises as an action to review the FCC’s 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the Red Lion litigation had begun.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a ‘Christian Crusade’ series. A book by Fred J. Cook entitled ‘Goldwater—Extremist on the Right’ was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a ‘book to smear and destroy Barry Goldwater.’ When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine, to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, the FCC’s position was upheld as constitutional and otherwise proper.

As they now stand amended, the regulations read as follows: ‘Personal attacks; political editorials.

‘(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available ) of the attack, and (3) an offer of a reasonable opportunity to respond over the licensee’s facilities.

‘(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

‘NOTE: The fairness doctrine is applicable to situations coming within ((3)), above, and, in a specific factual situation, may be applicable in the ((2)), above. See, section 315(a) of the Act, 47 U.S.C. s 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 F.R. 10415. The categories listed in ((3)) are the same as those specified in section 315(a) of the Act.

‘(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee’s facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.’ 47 CFR ss 73.123, 73.300, 73.598, 73.679 (all identical).

Believing that the specific application of the fairness doctrine in Red Lion, and the promulgation of the regulations in RTNDA, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in RTNDA and affirming the judgment below in Red Lion.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,16 as the Court has noted at length before. It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same ‘right’ to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the lisensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in s 326, which forbids FCC interference with ‘the right of free speech by means of radio communication.’ Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on ‘their’ frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use. In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of s 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, s 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation.

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. ‘Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.’

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. If experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government’s choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace. Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government’s effort to assure that a broadcaster’s programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional. The judgment of the Court of Appeals in Red Lion is affirmed and that in RTNDA reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

## Turner Broadcasting System Inc. v. F.C.C. (1994)

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

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

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

Cable technology affords two principal benefits over broadcast. First, it eliminates the signal interference sometimes encountered in over-the-air broadcasting and thus gives viewers undistorted reception of broadcast stations. Second, it is capable of transmitting many more channels than are available through broadcasting, giving subscribers access to far greater programming variety.

On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102–385, 106 Stat. 1460 (1992 Cable Act or ActAt issue in this case is the constitutionality of the so-called must-carry provisions, contained in §§ 4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

Section 4 requires carriage of “local commercial television stations,” defined to include all full power television broadcasters, other than those qualifying as “noncommercial educational” stations under § 5, that operate within the same television market as the cable system. Cable systems with more than 12 active channels, and more than 300 subscribers, are required to set aside up to one-third of their channels for commercial broadcast stations that request carriage. Cable systems with more than 300 subscribers, but only 12 or fewer active channels, must carry the signals of three commercial broadcast stations.

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

Section 5 of the Act imposes similar requirements regarding the carriage of local public broadcast television stations, referred to in the Act as local “noncommercial educational television stations.” Taken together, therefore, §§ 4 and 5 subject all but the smallest cable systems nationwide to must-carry obligations, and confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system.

C Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry. In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

In addition, Congress concluded that due to “local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,” the overwhelming majority of cable operators exercise a monopoly over cable service. “The result,” Congress determined, “is undue market power for the cable operator as compared to that of consumers and video programmers.”

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

In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, “the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.”

II There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. Nevertheless, because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions.

A We address first the Government’s contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media. Compare Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (television), with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (print). But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another’s signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.

The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

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

Although the Government acknowledges the substantial technological differences between broadcast and cable, it advances a second argument for application of the Red Lion framework to cable regulation. It asserts that the foundation of our broadcast jurisprudence is not the physical limitations of the electromagnetic spectrum, but rather the “market dysfunction” that characterizes the broadcast market. Because the cable market is beset by a similar dysfunction, the Government maintains, the Red Lion standard of review should also apply to cable. While we agree that the cable market suffers certain structural impediments, the Government’s argument is flawed in two respects. First, as discussed above, the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence. Second, the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.

By a related course of reasoning, the Government and some appellees maintain that the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny under this Court’s “precedents governing legislative efforts to correct market failure in a market whose commodity is speech.” This contention is unavailing. Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded.

B At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions “rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”

For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the “principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” The purpose, or justification, of a regulation will often be evident on its face.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

C Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech.6 Although the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators’ programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.

In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable. Appellants’ ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon the content-neutral character of must-carry. Cf. Arizona v. California, 283 U.S. 423, 455–457, 51 S.Ct. 522, 526–527, 75 L.Ed. 1154 (1931). Indeed, “[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” United States v. O’Brien, 391 U.S., at 383, 88 S.Ct., at 1682 (citing McCray v. United States, 195 U.S. 27, 56, 24 S.Ct. 769, 776–777, 49 L.Ed. 78 (1904)).

D

Appellants [also] contend that the provisions compel speech by cable operators.

1

Appellants maintain that the must-carry provisions trigger strict scrutiny because they compel cable operators to transmit speech not of their choosing. Relying principally on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), appellants say this intrusion on the editorial control of cable operators amounts to forced speech which, if not per se invalid, can be justified only if narrowly tailored to a compelling government interest.

Tornillo affirmed an essential proposition: The First Amendment protects the editorial independence of the press. The right-of-reply statute at issue in Tornillo required any newspaper that assailed a political candidate’s character to print, upon request by the candidate and without cost, the candidate’s reply in equal space and prominence. Although the statute did not censor speech in the traditional sense—it only required newspapers to grant access to the messages of others—we found that it imposed an impermissible content-based burden on newspaper

Tornillo does not control this case for the following reasons. First, the must-carry rules are content neutral in application. They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty. Likewise, they do not grant access to broadcasters on the ground that the content of broadcast programming will counterbalance the messages of cable operators. Instead, they confer benefits upon all full-power, local broadcasters, whatever the content of their programming.

Second, appellants do not suggest, nor do we think it the case, that must-carry will force cable operators to alter their own messages to respond to the broadcast programming they are required to carry. Given cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator. Indeed, broadcasters are required by federal regulation to identify themselves at least once every hour, and it is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility. Cf. PruneYard Shopping Center v. Robins, 447 U.S. 74, 87, 100 S.Ct. 2035, 2044, 64 L.Ed.2d 741 (1980) (noting that the views expressed by speakers who are granted a right of access to a shopping center would “not likely be identified with those of the owner”). Moreover, in contrast to the statute at issue in Tornillo, no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that “the safe course is to avoid controversy,” Tornillo, 418 U.S., at 257, 94 S.Ct., at 2839, and by so doing diminish the free flow of information and ideas.

Finally, the asserted analogy to Tornillo ignores an important technological difference between newspapers and cable television. Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers’ access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.

The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.

III

A

In sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny. We agree with the District Court that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. See United States v. O’Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Under O’Brien, a content-neutral regulation will be sustained if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” Id., at 377, 88 S.Ct., at 1679. To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government’s interests. “Rather, the requirement of narrow tailoring is satisfied ‘so long as the … regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” Narrow tailoring in this context requires, in other words, that the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.”

Congress declared that the must-carry provisions serve 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 programming. None of these interests is related to the “suppression of free expression or to the content of any speakers’ messages. And viewed in the abstract, we have no difficulty concluding that each of them is an important governmental interest.

B

That the Government’s asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When 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.”

Because there are genuine issues of material fact still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government. Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

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

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

While I agree with most of Justice KENNEDY’s reasoning, and join Parts I, II–C, II–D, and III–A of his opinion, I part ways with him on the appropriate disposition of this case. In my view the District Court’s judgment sustaining the must-carry provisions should be affirmed. The District Court majority evaluated §§ 4 and 5 as content-neutral regulations of protected speech according to the same standard that Justice KENNEDY’s opinion instructs it to apply on remand. In my view, the District Court reached the correct result the first time around.

It is thus my view that we should affirm the judgment of the District Court. Were I to vote to affirm, however, no disposition of this appeal would command the support of a majority of the Court. An accommodation is therefore necessary. Accordingly, because I am in substantial agreement with Justice KENNEDY’s analysis of the case, I concur in the judgment vacating and remanding for further proceedings.

## Miami Herald v. Tornillo (1974)

Mr. Chief Justice BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers’ collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee’s candidacy. In response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization’s accomplishments for the citizens of Dade County. Appellant declined to print the appellee’s replies and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of $5,000. The action was premised on Florida Statute s 104.38 (1973), F.S.A., a ‘right of reply’ statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellant sought a declaration that s 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that s 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print.

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions.

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation.

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public. The contentions of access proponents will be set out in some detail. It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a ‘wired’ nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated ‘interpretive reporting’ as well as syndicated features and commentary, all of which can serve as part of the new school of ‘advocacy journalism.’

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper’s being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be ‘surrogates for the public’ carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the ‘marketplace of ideas’ is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court’s decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation.

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

Appellee’s argument that the Florida statute does not amount to a restriction of appellant’s right to speak because ‘the statute in question here has not prevented the Miami Herald from saying anything it wished’ begs the core question. Compelling editors or publishers to publish that which “reason’ tells them should not be published’ is what is at issue in this case. The Florida statute operates as a command in the same sense as a statue or regulation forbidding appellant to publish specified matter. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.