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Lisa M. Chandler

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Turner Broadcasting System, Inc. v. Federal Communications Commission,

114 S. Ct. 2445 (1994).

INTRODUCTION

Plaintiffs, cable operators and programmers, initiated this action against defendants, the Federal Communications Commission and the United States (“Government”), challenging the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act of 1992”), commonly referred to as the “must-carry” provisions. The United States District Court for the District of Columbia, finding no genuine issues of material fact, granted summary judgment for the government¹. On direct appeal, the U.S. Supreme Court reversed.

FACTS

After several years of Congressional hearings on the cable television industry, Congress overrode a Presidential veto and enacted the Cable Act of 1992. The Act, *inter alia*, obligates cable operators to carry the signals of broadcast television stations. The specific number of broadcast stations to be carried by a cable operator depends on the capacity of a particular system. The “must-carry” provisions require carriage of commercial² and noncommercial broadcast stations³ alike. Furthermore, the broadcast signal must be carried in its entirety, i.e. on a continuous, uninterrupted basis,⁴ and must be located on the same channel as it appears on the broadcast spectrum.⁵ Moreover, a fee cannot be assessed for carriage of a broadcast station’s signal.⁶

Plaintiffs, Turner Broadcasting System, Inc. et al. (“Turner”), challenged the constitutionality of the must-carry provisions, contending that they violated the First Amendment. Turner argued that as content-based regulations, the must-carry provisions were subject to strict scrutiny analysis.

Concluding that the must-carry provisions were wholly unrelated to the content of the messages conveyed by cable operators and programmers, the District Court sustained the provisions employing intermediate scrutiny.⁷ Under the *O’Brien* test, the District Court held “that the preservation of local broadcasting

1. 819 F. Supp. 32 (D.C. 1993).

2. 47 U.S.C. § 534(b)(1)(B) (1988 ed., Supp. IV).

3. 47 U.S.C. § 535(a) (1988 ed., Supp. IV).

4. 47 U.S.C. §§ 534(b)(3), 535(g)(1) (1988 ed., Supp. IV).

5. 47 U.S.C. §§ 534(b)(6), 535(g)(5) (1988 ed., Supp. IV).

6. 47 U.S.C. § 534(b)(10) (1988 ed., Supp. IV).

7. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2455 (1994) (*citing* *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 40 (D.C. 1993)).

is an important governmental interest, and that the must-carry provisions are sufficiently tailored to serve that interest.”⁸

LEGAL ANALYSIS

The issue before the United States Supreme Court on direct appeal was whether the must-carry provisions of the Cable Act of 1992 infringed cable operators and programmers’ First Amendment rights to freedom of expression. In resolving this issue, the Court engaged in exhaustive First Amendment analysis of these provisions.

The significance of the *Turner* decision is threefold. First, the Court reaffirmed the continued validity of the scarcity rationale expounded in *Red Lion Broadcasting Co. v. FCC*.⁹ Additionally, the Court distinguished cable from broadcast media, concluding that the relaxed standard for broadcast regulation is inapplicable to cable regulation. Finally, the Court found the provisions were not content-based, thus permissible, because they were designed not to promote speech of a particular content, but to prevent cable operators from exploiting their economic powers.

Generally, broadcast regulation is subject to a less rigorous standard of First Amendment scrutiny.¹⁰ This relaxed standard is due to the unique nature of the broadcast medium, specifically the electromagnetic spectrum as a scarce resource,¹¹ and the limited availability of the broadcast medium to speakers.¹² This unique posturing of the broadcast medium affords the Government some leniency in its regulation of the broadcast medium, i.e. limited content restrictions and affirmative obligations.¹³ Recognizing strong opposition to the scarcity rationale as justification for relaxed scrutiny of broadcast regulation, the *Turner* Court specifically “declined to question [the scarcity rationale’s] continuing validity as support for broadcast jurisprudence.”¹⁴

The Court distinguished cable from broadcast because broadcasting’s inherent limitations are not present with cable. Absent such limitations, the Court reasoned that the standard for broadcast regulation is inapplicable to cable regulations.¹⁵ Also, the Government contended that broadcast jurisprudence is premised on the broadcast market’s dysfunction, and thus, because the cable market is similarly affected, *Red Lion* principles should apply to cable as well — a proposition which the Court flatly rejected.

The Court further addressed the Government’s contention that the must-carry provisions were “industry-specific antitrust” regulations, thus like other “legisla-

8. *Id.* at 2455 (citing *Turner Broadcasting System, Inc.*, 819 F. Supp. at 45-47).

9. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

10. *Red Lion*, 395 U.S. at 367; *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

11. *National Broadcasting Company*, 319 U.S. at 212.

12. *Red Lion* at 390.

13. *Id.*

14. *FCC v. League of Women Voters of California*, 468 U.S. 364, 376 (1984).

15. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983).

tive efforts to correct market failure in a market whose commodity is speech,"¹⁶ were subject to rational scrutiny. The Court rebuffed this argument, noting that the risk of abuse posed by laws that single out the press, in whole or in part, for special treatment, necessitate imposition of heightened scrutiny.¹⁷ Acknowledging that cable operators and programmers were subject to special treatment under the must-carry provisions, the Court held that heightened scrutiny was required.

The Court then hypothesized as to what level of heightened scrutiny the must-carry provisions commanded. As a general proposition, regulations that are content-based are subject to the most exacting scrutiny,¹⁸ because they are in contravention of the well-established principle that the First Amendment preserves for the individual the freedom to decide what ideas and beliefs are worthy of attention. The necessary corollary is that regulations which are not related to the content of the message are subject to intermediate scrutiny.¹⁹ The Court then engaged in an exhaustive review of the must-carry provisions and Congressional purposes²⁰ in enacting them, concluding that such regulations were wholly unrelated to the content of the message to be delivered.

The defendants set forth three arguments supporting their contention that strict scrutiny was appropriate, each of which the Court rejected. First, the plaintiffs argued that the must-carry provisions required strict scrutiny because they compelled speech by cable operators, relying primarily on *Miami Herald Publishing Co. v. Tornillo* (right-to-access statute was invalidated because it assessed a penalty based on content and deterred publication of material that would trigger the effects of the statute).²¹ Concluding that unlike the right-to-access statute in *Tornillo*, the must-carry provisions are content-neutral and do not deter cable operators from carrying a particular message, thus, do not constitute an impermissible intrusion on editorial control.

The Court further concluded that strict scrutiny was inapt because must-carry does not favor broadcast programmers over cable programmers. The defendants maintained that regulation which favors one set of speakers over another is presumptively invalid. The defendants mischaracterized the holding in *Buckley v. Valeo*²² as asserting that *all* speaker-based rules are presumptively invalid. The Court rejected this argument, concluding that *Buckley* found that speaker-based regulations command strict scrutiny only when the Government's preference is content-based.

Finally, the Court also rejected the contention that strict scrutiny was appro-

16. *Associated Press v. United States*, 326 U.S. 1 (1945).

17. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986).

18. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509-10 (1991).

19. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

20. The Congressional purpose approved by the *Turner* Court was to ensure access to free television programming to the forty percent of Americans without cable. In the absence of regulations requiring the carriage of broadcast signals, the continued vitality of such programming is threatened.

21. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

22. *Buckley v. Valeo*, 424 U.S. 1 (1976).

priate because cable operators were singled out for disfavored treatment. Where differential treatment is justified by some special characteristic of the regulated medium, heightened scrutiny is not prescribed.²³ Thus, the Court held that because of cable's unique characteristics, i.e. its ability to control most of the programming channeled into a subscriber's home, and the threat to the continued vitality of the broadcast medium such ability poses, strict scrutiny was not warranted.

Dismissing arguments for both strict and rational levels of scrutiny, the Court applied the *O'Brien* standard of intermediate scrutiny²⁴. The Court determined that the Government's interest in ensuring the continued vitality of the broadcast medium was substantial and important, and further that the must-carry provisions are not related to the suppression of expression. Based on the record before it, the Court was not able to conclusively decide the extent to which the must-carry provisions interfere with free speech, and thus, was not able to determine whether they are no more extensive than necessary. The inadequacy of the record compelled the Court to vacate the District Court's holding and remand the case for further proceedings.

CONCLUSION

Finding genuine issues of material fact, the United States Supreme Court vacated and remanded the District Court's grant of summary judgment to the defendants. The Court found that broadcast and cable are distinct media, subject to different standards of scrutiny. Applying the *O'Brien* test, the Court specifically concluded that the record was deficient in its findings concerning the effects of the must-carry provisions on expression, and whether the provisions were no more extensive than necessary.

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23. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

24. Under the *O'Brien* standard, a regulation is constitutional if it advances an important or substantial governmental interest, which is not related to the suppression of speech, and incidental restraints on First Amendment freedoms are no more extensive than necessary. *United States v. O'Brien*, 391 U.S. 367 (1968).