NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY
11 N.C. J.L. & TECH. ON. 195 (2010)

CABLEVISION SYSTEMS CORP. V. FCC: REVISITING THE STANDARD OF REVIEW FOR FIRST AMENDMENT CHALLENGES IN THE CABLE TELEVISION CONTEXT

Isaac S. Lew [*]

Turner Broadcasting System, Inc. v. FCC *(1997) set the standard of review for challenges by cable television operators who claim that federal laws such as the Cable Television Consumer Protection and Competition Act of 1992 violate their First Amendment right to free speech. That standard, intermediate scrutiny, holds that a content-neutral law will be upheld against a First Amendment challenge if the law furthers an important government interest, and if the incidental restriction on First Amendment freedoms is no greater than essential. Nearly thirteen years after being decided, however, the rationale that supported* Turner*'s conclusion that intermediate scrutiny was appropriate has eroded. Specifically, cable companies no longer exercise the type of control over television broadcasting that concerned lawmakers in the 1990s.* Cablevision Systems Corp. v. FCC*, a case currently pending a writ of certiorari in the Supreme Court, is the perfect opportunity for the Court to reconsider the* Turner *decision and establish a new, highly-contextual and fact-specific standard that is more appropriate for First Amendment challenges in the cable television context.*

I. INTRODUCTION

The First Amendment to the United States Constitution[1] is one of the most important parts of the Constitution.[2] Although the

[*] J.D. Candidate, University of North Carolina School of Law, 2011.

[1] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

original reasoning behind its passage is debatable,[3] it was "undoubtedly . . . a reaction against the suppression of speech and of the press that existed in English society."[4] Almost certainly, one specific purpose of the First Amendment was to prohibit prior restraints to publication.[5] That is to say, the founders did not want there to be a requirement to obtain a government license before one could publish speech.[6]

In the 218 years since its ratification, however, the Supreme Court has clarified and extended the meaning of the First Amendment beyond its historical roots.[7] Specifically, the Court has considered the meaning of the Amendment in the context of the media. Federal laws regulating telephone lines,[8] the broadcast airwaves,[9] the Internet,[10] and cable television[11] have all been

---

[2] *See generally* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[3] *See* GEOFFREY STONE ET AL., THE FIRST AMENDMENT 6 (3d ed. 2008) ("Scholars have long puzzled over the actual intention of the framers of the First Amendment.").

[4] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 922 (3d ed. 2006).

[5] *Id.* at 923.

[6] *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("[T]he main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments . . . . ' ") (emphasis in original, internal citations omitted).

[7] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (holding that spending money on elections can be considered political speech); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the First Amendment protected speech advocating illegal activity or use of force except in limited circumstances); United States v. O'Brien, 391 U.S. 367 (1968) (establishing a test that allows certain forms of conduct to fall under the protection of freedom of speech).

[8] *See, e.g.*, Sable Commc'ns of Cal. v. FCC, 492 U.S. 115 (1989) (declaring unconstitutional a federal law that prohibited "indecent" speech in telephone conversations, but upholding the same law as to "obscene" speech).

[9] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding the FCC's ability to ban "indecent material" over the airwaves).

[10] *See, e.g.*, Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004) (holding that enforcement of the Child Online Protection Act should be enjoined

subject to First Amendment challenges. Case after case, the Court has built its First Amendment jurisprudence.[12] Although general principles can be drawn from these varying cases, the Court, by taking specific contexts into account, has developed a set of First Amendment rules and theories unique to each type of media.[13]

This Recent Development focuses on the First Amendment jurisprudence of cable television broadcasting. In particular, it argues that the two controlling cases in this field, *Turner Broadcasting System, Inc. v. FCC* (1994) ("*Turner I*")[14] and *Turner Broadcasting System, Inc. v. FCC* (1997) ("*Turner II*"),[15] which together upheld a federal law forcing cable operators to carry the signals of local channels on their systems, are outdated and should be reconsidered. Fortunately, a perfect opportunity for the Court to

---

because the law likely violates the First Amendment); United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003) (upholding a federal law requiring libraries receiving federal funds to install software filters on library computers in order to block sexually explicit Internet content); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (invalidating certain provisions of the Communications Decency Act of 1996 that prohibited the transmission of obscene or indecent material to a minor via the Internet).

[11] *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 732 (1996) (upholding a provision of the Cable Television Consumer Protection and Competition Act of 1992 permitting cable operators to prohibit the broadcasting of programming that "depicts sexual or excretory activities or organs in a patently offensive manner" while invalidating two other similar provisions in the Act) (internal citations omitted).

[12] *See* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33, 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2003) ("[T]he story of the development of the American system of freedom of expression is not a story about the text of the First Amendment." Instead, "[t]he central features of First Amendment law were hammered out mostly over the course of the twentieth century, in fits and starts, in a series of judicial decisions and extrajudicial developments. . . . [I]t is a common-law story.").

[13] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (setting forth the First Amendment standard for cable television); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (setting forth the First Amendment standard for newspapers); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (setting forth the First Amendment standard for over-the-air broadcasting).

[14] 512 U.S. 622 (1994).

[15] 520 U.S. 180 (1997).

revisit the outdated *Turner* cases has arisen in *Cablevision Systems Corp. v. FCC*,[16] a case that has worked its way up to the Second Circuit Court of Appeals and is pending a writ of certiorari.

Part II of this Recent Development provides a brief history of First Amendment jurisprudence in the regulation of television broadcasts and an overview of the reasoning behind government regulation of both broadcast television and cable. Part II also explains how the Supreme Court has balanced government interests in television regulation with competing First Amendment principles. Part III analyzes Cablevision's arguments in *Cablevision Systems Corp. v. FCC* and argues that the Court of Appeals for the Second Circuit erred in its conclusion that Cablevision's First Amendment rights, as interpreted by the *Turner* cases, were not violated. Part III also demonstrates how a subsequently decided case in the United States Court of Appeals for the District of Columbia Circuit conflicts with the holding in *Cablevision*, and thus, because there is a circuit split, supports review of the *Turner* framework by the Supreme Court. Finally, Part IV suggests that changes in the cable television industry call for a new, fact-specific approach to First Amendment jurisprudence in the cable television context.

II. BRIEF HISTORY OF FIRST AMENDMENT JURISPRUDENCE IN THE REGULATION OF TELEVISION BROADCASTING

A. *Legislative Background*

Regulation of television broadcasting can trace its roots to the Communications Act of 1934 ("1934 Act").[17] The purpose of the 1934 Act was to regulate "communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ."[18] To accomplish this goal, the

[16] Cablevision Sys. Corp. v. FCC, 570 F.3d 83 (2d Cir. 2009).

[17] Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–614 (2006)).

[18] 47 U.S.C. § 151.

Act authorized the creation of the Federal Communications Commission ("FCC").[19] Among other things, the FCC had the responsibility "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses" that would be granted.[20]

B. *Supreme Court Cases for Broadcast Media*

In 1941, the National Broadcasting Company ("NBC") brought suit seeking enjoinment of certain provisions of the 1934 Act, namely Section 303.[21] Section 303 gave the FCC broad discretion in granting licenses "as public convenience, interest, or necessity [required]."[22] NBC claimed that this section violated its First Amendment free speech rights by vesting too much editorial discretion in the government.[23] In *National Broadcasting Co. v. United States*,[24] the Court ruled that forcing radio stations to obtain a license before being allowed to transmit[25] was not a violation of the First Amendment because "[u]nlike other modes of expression, radio inherently is not available to all."[26] The Court reaffirmed that the FCC had a broad mandate from Congress to regulate the broadcast spectrum.[27] Accordingly, the agency was constitutionally permitted to consider non-technical aspects of regulation because the "facilities of radio are limited, and therefore precious; they cannot be left to wasteful use without detriment to the public interest."[28] In so doing, the Court established the idea

---

[19] *Id.*
[20] 47 U.S.C. § 301 (2006).
[21] *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 193 (1943).
[22] 47 U.S.C. § 303 (2006).
[23] *See Nat'l Broad. Co.*, 319 U.S. at 214–16 (explaining NBC's argument that the FCC should function as a traffic control officer, rather than make decisions based on the content of the material being transmitted).
[24] 319 U.S. 190 (1943).
[25] *Id.* at 227.
[26] *Id.* at 226.
[27] *Id.* at 215–16. Indeed, the FCC was "not limited to the engineering and technical aspects of regulation." *Id.* at 215.
[28] *Id.* at 216.

that technical, physical limitations—such as a limited number of radio frequencies—constituted sufficient reasons to override any First Amendment concerns.[29]

Red Lion Broadcasting Co. v. FCC[30] further developed the idea that technological scarcity in the broadcast media influences First Amendment analysis. In that case, the Court considered the constitutionality of three FCC rules with First Amendment implications.[31] The first rule, known as the "fairness doctrine," required radio and television broadcasters to present discussion of "public issues . . . and that each side of those issues must be given fair coverage."[32] The second rule forced broadcasters to give advanced warning to any person or group whose character would be attacked on an upcoming broadcast.[33] Moreover, the broadcast station had to provide the attacked person or group notification of the date and time of the broadcast, a copy of the broadcast or transcript, and an opportunity to respond on the station.[34] Finally, the political editorializing rule required a broadcaster who, in an editorial, endorsed or opposed a political candidate to notify the opponents of the endorsed candidate or the opposed candidate, and give them a chance to respond on the broadcaster's station.[35] The Supreme Court upheld all three rules, grounding its decision in

[29] This view is not without controversy. For example, Ronald Coase criticizes this method of broadcast spectrum licensing, explaining that even though "frequencies are limited in number and people want to use more of them than are available[,] . . . it is a commonplace of economics that almost *all* resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists." Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) (emphasis added). Coase's suggestion is to use pricing mechanisms in allocating frequencies. *Id.*

[30] 395 U.S. 367 (1969).

[31] *Id.* at 370–71.

[32] *Id.*

[33] *Id.* at 373–74.

[34] *Id*.

[35] *Id.* at 374–75.

light of the finite number of available broadcast frequencies.[36] Despite conceding that "broadcasting is clearly a medium affected by a First Amendment interest,"[37] the Court nonetheless held that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[38]

Red Lion was an important step in the Court's First Amendment jurisprudence because it stood for the proposition that technological context mattered when it came to First Amendment analysis in mass media. The Court admitted the government was placing "restraints on [broadcasters] in favor of others whose views should be expressed on this unique medium."[39] But it justified those restraints by noting that even though broadcasters' speech was being abridged, "the people as a whole retain[ed] their interest in free speech by [public broadcasting] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."[40] Thus, the Court valued the rights of the viewers and listeners over those of the broadcasters.[41]

C. *Cable Television Legislation*

Cable television, in contrast to over-the-air broadcast television, works by transmitting video via coaxial cable or fiber optics.[42] It is a direct wire service and involves no antennas at the receiving end. In the late-1980s, cable television experienced tremendous growth, with cable operators being able to deliver more channels than ever before.[43] However, given the lack of

---

[36] *Id.* at 400. The Court rejected Red Lion's claim that it, as a broadcaster, had First Amendment protections that the FCC violated by forcing it to broadcast the views of speakers it might not agree with. *Id.* at 386.

[37] *Id.* at 387.

[38] *Id.* at 387 (internal citations and footnote omitted).

[39] *Id.* at 390.

[40] *Id.*

[41] *Id.* ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

[42] Federal Communications Commission, Cable Television Information Bulletin (June 2000) http://www.fcc.gov/mb/facts/csgen.html (on file with the North Carolina Journal of Law & Technology).

[43] *Id.*

alternative choices for receiving television signals, competition among cable operators did not increase, resulting in a drastic increase in the rates charged for cable service.[44]

Consequently, Congress passed the Cable Television Consumer Protection and Competition Act of 1992[45] ("1992 Cable Act") amending the original 1934 Act. Among many other things, section 4 and section 5 of the 1992 Cable Act required cable operators to transmit the signals of local television stations.[46] Concerned with the monopoly power that cable operators had, Congress enacted these must-carry provisions. In particular, Congress noted that "[a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."[47] Congress especially feared that in "the absence of a requirement that [cable] systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming [would] be seriously jeopardized."[48]

D. *The Turner Cases*

The constitutionality of the must-carry provisions of the 1992 Cable Act was challenged in *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*").[49] Cable companies argued that must-carry provisions violated their First Amendment free speech rights by forcing them to transmit channels which they might not ordinarily want to transmit.[50] By a slim margin, the Court held that the

---

[44] *Id.* ("[I]n many communities, the rates for cable services far outpaced inflation.").

[45] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at various sections of 47 U.S.C. (2006)).

[46] *Id.* §§ 4–5, 106 Stat. at 1471–81.

[47] *Id.* § 2(a)(10).

[48] *Id.* § 2(a)(16).

[49] 512 U.S. 622 (1994).

[50] CHEMERINSKY, *supra* note 4, at 1174 (explaining that the basic argument was that cable companies had a "First Amendment right to decide what to include on their channels" and that "forcing the inclusion of some stations will keep it from including other programming that it and its viewers would prefer").

standards used in *Red Lion* did not apply in this case.[51] In fact, the Court said that the "rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation."[52] Reaffirming that context matters, the Court explained that the cable television medium lacked the physical limitations that plagued the broadcast medium.[53] For that reason, a different standard should be used to analyze any First Amendment challenges to the must-carry laws.[54] That standard, the Court held, was intermediate scrutiny, which upholds content-neutral laws[55] against First Amendment challenges where the laws further an important or substantial government interest, and where the incidental restriction on First Amendment freedoms is no greater than essential.[56]

After establishing this standard, however, a plurality of the Court remanded the case for further development on the facts.[57] Justice Kennedy, writing for the plurality, held that while the government claimed important interests, there was insufficient evidence on the record to determine whether the harms stated were "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[58]

After remand, the Court finally upheld the must-carry provisions of the 1992 Cable Act by a 5-4 decision in *Turner*

---

[51] *Turner I*, 512 U.S. at 637.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 639.
[55] This is in contrast to a content-based law, a law which targets a specific category of protected speech under the First Amendment. Such a law, attempting to restrict a whole category of speech such as "politics," would have to meet the strict scrutiny standard in order to be upheld. While the Court was unanimous as to what standard governs the cable context, the Court was divided 5-4 that the must-carry laws were content-neutral and thus even deserving of analysis under that standard. The four dissenters would have struck the law down as impermissible content-based laws. *Id.* at 676 (O'Connor, J., dissenting).
[56] *See Turner I*, 512 U.S. at 661–62.
[57] *Id.* at 668.
[58] *Id.* at 664.

Broadcasting System, Inc. v. FCC ("*Turner II*").[59] Deferring to Congress, the Court was satisfied that there was now sufficient evidence on the record to substantiate Congress'ss findings, as articulated in the 1992 Cable Act.[60] *Turner II* held that the government indeed had an important interest in protecting local broadcast television stations and the must-carry provisions were substantially related to that goal without burdening the cable operators' First Amendment rights any more than necessary.[61]

III. *CABLEVISION*'S FIRST AMENDMENT CHALLENGES TO MUST-CARRY

A. *Cablevision Systems Corp. v. FCC*

Cablevision Systems Corp. v. FCC[62] was an as-applied challenge to the FCC's must-carry regulations. While the Court of Appeals for the Second Circuit correctly noted that the *Turner* cases did not rule out the possibility of an as-applied challenge to the 1992 Cable Act,[63] the court erred in its conclusion[64] that no such First Amendment violation occurred.

Specifically, this case involved the market modification provision of the must-carry rules.[65] Typically, under must-carry rules, a cable operator must dedicate up to one third of its stations[66] to transmit the signals of every local television station in its Designated Market Area ("DMA").[67] However, pursuant to the

---

[59] 520 U.S. 180 (1997).

[60] *Id.* at 195 ("On our earlier review, we were constrained by the state of the record to assessing the importance of the Government's asserted interests when 'viewed in the abstract.' The expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way.") (internal citations omitted).

[61] *See Turner II*, 520 U.S. at 180.

[62] 570 F.3d 83 (2d Cir. 2009).

[63] *Id.* at 95.

[64] *Id.* at 97–98.

[65] 47 U.S.C. § 534(h)(1)(C)(i) (2006).

[66] *Id.* § 534(b)(1)(B).

[67] *Id.* § 534(h)(1)(A).

market modification provision, the FCC has the authority on written request to add or subtract communities from the DMA, thereby effectively adding or subtracting stations that the cable operator is required to carry.[68] The First Amendment problem in the market modification provision, however, is that the statute instructs the FCC to consider "the value of localism" in granting a market modification request.[69]

In *Cablevision Systems Corp. v. FCC*, Cablevision, a cable operator, challenged a recent FCC market modification order that forced it to carry a television station on its Long Island DMA.[70] Among other arguments Cablevision put forth,[71] it claimed that the market modification provisions of the must-carry law violated the First Amendment on an as-applied basis.[72] The Court of Appeals for the Second Circuit rejected this claim, basing its reasoning on *Turner II*'s holding that a content-neutral restriction on free speech in the cable context was permissible as long as the restriction did not burden more speech than necessary to further an important government goal.[73] Concluding that the market modification provisions were content-neutral, the Second Circuit upheld them against Cablevision's as-applied First Amendment challenge.[74] The court, however, made two mistakes in its analysis: first, it failed to fully consider the constitutionality of the market modification provisions and, secondly, in upholding the FCC's order, it did not place sufficient weight on the reasoning that underpinned *Turner II*.

---

[68] *Id.* § 534(h)(1)(C)(i) ("[F]ollowing a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market . . . .").

[69] *Id.* § 534(h)(1)(C)(ii).

[70] Cablevision Sys. Corp. v. FCC, 570 F.3d 83, 87 (2d Cir. 2009).

[71] Cablevision also argues that forcing it to carry WRNN is a *per se* taking in violation of the Fifth Amendment. *See id.* at 98.

[72] Brief for Petitioner at 51, Cablevision Sys. Corp. v. FCC, 570 F.3d 83 (2d Cir. 2009) (No. 07-5553).

[73] *Cablevision*, 570 F.3d at 97.

[74] *Id.*

The constitutionality of the market modification statute was noted only briefly in a footnote in *Turner I*.[75] In that passing reference the Court suggested that such a provision might "single out certain . . . broadcasters for special benefits on the basis of content."[76] Unfortunately, the Court did not take up the issue again in *Turner II*. As a result of the lack of attention the Court previously paid to the issue, the Second Circuit should have considered the issue as one of first impression. Instead, the Second Circuit merely recited the FCC's reasoning behind the order and hastily concluded that the order was content-neutral and passed intermediate scrutiny.[77]

However, as Cablevision correctly noted in its brief, unlike the *Turner* cases that upheld the must-carry provisions because they made no reference to content,[78] the market modification order focused directly on the programming *content* of a television station.[79] The FCC did not necessarily do anything wrong here: the market-modification statute mandates that the value of localism be evaluated when granting or denying an order.[80] However, once the content of speech is being judged—as is the case when it is being evaluated on the basis of "value"—strict scrutiny is triggered.[81] Assuming that were the case, there is no evidence of a compelling state interest that could have saved the order from

---

[75] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 642 n.6 (1994) (explaining that "the District Court did not address this provision, but may do so on remand").

[76] *Id.*

[77] *Cablevision*, 570 F.3d at 97.

[78] Brief for Petitioner at 52, Cablevision Systems Corp. v. FCC, 570 F.3d 83 (2d Cir. 2009) (No. 07-5553) (footnote omitted).

[79] *Id.* (The order was "quite explicit in saying that WRNN [was] granted carriage rights because of the supposedly Long Island-targeted nature of its programming.").

[80] 47 U.S.C. § 534(h)(1)(C)(ii) (2006).

[81] *See Turner I*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). To survive strict scrutiny, a law must be narrowly tailored to a compelling state interest. *See* CHEMERINSKY, *supra* note 4, at 671–72 ("Under strict scrutiny, a law is upheld if it is proved necessary to achieve a compelling government purpose.").

failing such an exacting standard.[82] Therefore, as a result of the Second Circuit's failure to consider the issue of the market modification provision as one of first impression, the court applied intermediate scrutiny when it should have applied strict scrutiny. In applying the wrong standard, the court incorrectly concluded that no First Amendment violation occurred.

However, even if the Second Circuit was correct in using intermediate scrutiny, the court should have struck down the law because the factual basis behind the *Turner* framework had changed. The decision in the *Turner* cases was based on concern over the cable industry's monopolistic power.[83] The fear was that since the physical connection between a subscriber and the cable network was controlled by the cable operator, this gave the "cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[84] By simply refusing to carry a channel, a cable operator could prevent subscribers from accessing particular programming.[85] Unlike over-the-air broadcast television, which is free to all, a cable operator could thus "silence the voice of competing speakers with a mere flick of the switch."[86]

Fortunately, the monopolistic power that cable companies enjoyed in the early 1990s has now largely disappeared. Cablevision makes a compelling argument that "[r]eal-world market conditions . . . today could not be more different" since there are now a number of satellite television providers (known as Direct Broadcast Service providers, or "DBSs").[87] DBSs' market share growth, along with telephone companies getting into the

---

[82] Brief for Petitioner at 53, *Cablevision*, 570 F.3d 83 (No. 07-5553).

[83] *Turner I*, 512 U.S. at 656 ("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 . . . . The potential for abuse of this private power over a central avenue of communication cannot be overlooked.").

[84] *See id.*

[85] *Id.*

[86] *Id.*

[87] Brief for Petitioner at 56, *Cablevision*, 570 F.3d 83 (No. 07-5553).

business of providing video service, creates a very different landscape than the one the *Turner* court considered more than a decade ago.[88] By failing to take these changes into consideration, the Second Circuit failed to follow the Supreme Court's determination that the courts should not displace Congress's judgment regarding content-neutral regulations, "*so long as* its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination."[89] The Second Circuit should have reconsidered Congress'ss *Turner* findings in light of more than a decade's worth of development in the cable television industry. Consumers now have a multitude of ways other than cable to receive television signals. Accordingly, the bottleneck power that cable operators could have exercised in the past is no longer a viable concern. Had the court considered this, the proper decision would have been to strike the legislation down as lacking "reasonable factual findings supported by evidence."[90]

B. *Comcast Corp. v. FCC*

A little more than two months after the Second Circuit issued its ruling in *Cablevision Systems Corp. v. FCC*, the Court of Appeals for the District of Columbia Circuit handed down its decision in *Comcast Corp. v. FCC*.[91] In that case, Comcast, a cable operator, challenged the FCC's rule capping the number of subscribers a single cable television operator could serve at thirty percent of the national market.[92] In a victory for the cable service provider, the D.C. Circuit ruled that the thirty percent cap was "arbitrary and capricious."[93] More important than the final ruling, however, was the court's declaration that "many significant

---

[88] *Id.* at 57.

[89] Turner Broadcasting System, Inc. v. FCC (*Turner II*), 520 U.S. 180, 224 (1997) (emphasis added).

[90] *Id.*

[91] Comcast Corp. v. FCC, 579 F.3d 1 (2009).

[92] The FCC was acting under authority of 47 U.S.C. § 533(f)(1) (2006), which was originally part of the 1992 Cable Act.

[93] *Comcast*, 579 F.3d at 8.

changes . . . have occurred since 1992."[94] Specifically, the court pointed to the growth of satellite television providers, the increased number of cable networks, and the diversity of programming choices that are now commonplace.[95] As a result of these changes in the cable television context, "cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992."[96] The D.C. Circuit, therefore, reached a conclusion in conflict with the Second Circuit's opinion in *Cablevision.* Because of this circuit split, the Supreme Court should grant certiorari[97] to Cablevision's upcoming appeal of the Second Circuit's ruling.[98] In doing so, the Court will have the opportunity to settle the split in reasoning between the two courts of appeals and can clarify the meaning of must-carry in today's landscape, which has changed significantly since the Court last took up the issue in *Turner II*.

IV. TIME FOR A NEW STANDARD OF REVIEW IN CABLE TELEVISION REGULATION

An appeal of *Cablevision Systems Corp. v. FCC* combined with the reasoning in *Comcast Corp. v. FCC* provides the best opportunity yet to overrule the *Turner* framework. As Professor Erwin Chemerinsky noted, "*Turner Broadcasting* is likely just the beginning of the Court's considering the application of the First Amendment to new technologies."[99] However, despite changes in

---

[94] *Id.*

[95] *See id.*

[96] *See id.*

[97] "A split in federal appeals court decisions is one of the tests for the Supreme Court's decision to hear an appeal . . . " John Eggerton, *Cablevision's New Year Resolution: Take on Must-Carry in the Supreme Court*, MULTICHANNEL NEWS, Dec. 23, 2009, http://www.multichannel.com/article/441586-Cablevision_s_New_Year_s_Resolution_Take_On_Must_Carry_In_The_Supreme_Court.php (on file with the North Carolina Journal of Law & Technology).

[98] *Id.* (stating that a Cablevision spokeswoman confirmed the company's plan to petition the Supreme Court in early 2010).

[99] CHEMERINSKY, *supra* note 4, at 1175.

the cable television industry over the past twelve years,[100] *Turner* is still good law. Technological change in a field requires reevaluation of the jurisprudence of that field, especially when such change involves the First Amendment. Indeed, the "First Amendment's application to 21st Century speech technologies is a question of central importance for our democracy."[101]

A. *The Appropriate New Standard Should Be Highly-Contextual and Fact-Specific*

It is difficult to determine the proper standard for First Amendment review of laws regulating cable television transmissions. However, what is abundantly clear is that the "comically outdated 1992 Cable Act" [102] and the *Turner* framework upholding that law need to be revisited because the rationale supporting the legislation and subsequent Supreme Court cases no longer applies. The difficulty arises from the fact that "the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[103]

As a result of the fluidity and changes that are particularly relevant in the cable television context, the best standard in this field is one that is highly-contextual and fact-specific. Although the need to have clearly defined standards is important,[104] rigid

---

[100] *See supra* Part III.B.

[101] Marvin Ammori, *Challenging the Constitutional Framework for Media Regulations,* Dec. 23, 2009, http://ammori.org/2009/12/23/threatening-the-constitutional-framework-for-media-regulation (on file with the North Carolina Journal of Law & Technology).

[102] *Another Video Smackdown*, WALL ST. J., Sept. 9, 2009, http://online.wsj.com/article/SB10001424052970204731804574387120029467020.html (on file with the North Carolina Journal of Law & Technology).

[103] Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973).

[104] This is the argument made by Justice Anthony Kennedy. "When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles." Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 781 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

rules that leave no room for expansion are, again, particularly problematic in an area as ever-changing and complex as technology. The narrow, fact-specific approach is best articulated by Justice Breyer in his plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[105] There, Justice Breyer notes that "changes taking place in the law, the technology, and the industrial structure related to telecommunications . . . [make] it unwise and unnecessary definitively to pick one analogy or one specific set of words now."[106] Instead, a law that seems to restrict the speech of cable operators should be "closely scrutiniz[ed] . . . to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."[107]

Justice Breyer's approach involves balancing competing principles within existing First Amendment jurisprudence in other contexts, but avoids a specific hard-and-fast rule in the cable media context. Although such "ad hoc review"[108] does make it difficult to determine the outcomes of future cases, the purpose of a judicial standard is not necessarily to facilitate making predictions about the results in future cases. Moreover, this approach is sensible because it allows for flexibility in the emergence of new areas of television broadcasting. Given the rapid change in technology, a flexible standard is one that should be encouraged.

B. *A Changing Court*

While it is urged that the Supreme Court should overrule *Turner* and establish a fact-specific approach such as the one suggested by Justice Breyer, Justice Breyer was one of the five justices who voted to uphold the 1992 Cable Act's provisions.[109] Nonetheless, *Turner* and the 1992 Act should be revisited because the justifications (the specific facts) have changed dramatically

---

[105] 518 U.S. 727 (1996).
[106] *Id.* at 742.
[107] *Id.* at 741.
[108] CHEMERINSKY, *supra* note 4, at 1039.
[109] *See* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

since 1997. The problem with *Turner* is thus not necessarily the ruling itself, but rather the *standard of review* it advocates—intermediate scrutiny. This standard does not sufficiently fit the necessities of a complex and changing context such as cable television transmission precisely because it is too rigid to take into account the industry's dynamics.

Additionally, it must be noted that three members of the *Turner II* court—O'Connor, Rehnquist, and Souter—have been replaced with Alito, Roberts, and Sotomayor. Given this significant change in composition, the role these new justices will play in a decision in this case will be interesting to watch and could be cause for a reversal of *Turner*.

V. CONCLUSION

The First Amendment jurisprudence of cable television broadcasting is at an interesting point in its history. Following the Second Circuit's decision in *Cablevision Systems Corp. v. FCC*, Cablevision was granted a stay of the court's ruling forcing it to carry WRNN, pending the filing and disposition of a writ of certiorari.[110] Should the Supreme Court agree to hear the case, its decision would have "potentially wide scope, covering hugely important media regulations" including the hotly debated topic of network neutrality.[111]

In addition to being an interesting case to follow, *Cablevision Systems Corp. v. FCC* provides the Supreme Court with the chance to further develop its First Amendment jurisprudence in the cable television context. In the years since the *Turner* cases, a lot has changed. The Court has the opportunity to clarify how much these

---

[110] FCC List of Pending Appellate Cases, (Feb. 16, 2010), http://www.fcc.gov/ogc/documents/pending-appellate-cases.pdf (on file with the North Carolina Journal of Law & Technology).

[111] Ammori, *supra* note 101. Network neutrality refers to "the concept that companies which operate a telecommunications network, like the telephone and cable companies, shouldn't be able to play favorites with the content that goes over the network." Public Knowledge, Network Neutrality, http://www.publicknowledge.org/issues/network-neutrality (last visited Mar. 23, 2010) (on file with the North Carolina Journal of Law & Technology).

changes should affect First Amendment analysis in this area of regulation. A question of concern, of course, will not only be whether *Turner* is overruled, but also what standard the Court will use for its analysis. The answer to that question will be critically important in future litigation—both in cable television and other video transmission contexts.