

A Modest Proposal on "Must-Carry," the 1992 Cable Act, and Regulation Generally: Go Back to Basics†

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Introduction

When Congress enacted the Cable Television Consumer Protection and Competition Act¹ (1992 Cable Act or Act) on October 5, 1992, handing President Bush the first and only veto override of his presidency, it was a foregone conclusion that the Act would soon be before the Supreme Court. Less than an hour after enactment, cable giant Turner Broadcasting Systems was in federal court challenging the Act's "must-carry" and retransmission-consent provisions,² with several other plaintiffs following suit over the next month.³

Pursuant to Section 23 of the Act, a three-judge federal district court panel convened to hear challenges to the constitutionality of Sections 4 and 5, the must-carry provisions. On April 8, 1993, the court upheld the provisions in a 2-1 decision, with Judge Stephen F. Williams, sitting from the District of Columbia Circuit, in dissent.⁴ The panel decision was appealed directly to the Supreme Court, again pursuant to the Act. On June 27, 1994, in a 5-4 decision, the United States Supreme Court vacated the judgment below, remanding the case to the district court for further fact-finding.⁵

Those 2-1 and 5-4 rulings suggest what the opinions and dissents make clear, that the judiciary created anything but a clear decision or, more important, a clear body of law.⁶ In fact, but for a value judg-

1. Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at scattered sections of 47 U.S.C.) [hereinafter 1992 Cable Act].

2. *Turner Broadcasting Sys., Inc. v. FCC*, No. 92-2247 (D.D.C. filed Oct. 5, 1992).

3. *Discovery Communications, Inc. v. United States*, No. 92-2558 (D.D.C. Nov. 5, 1992); *National Cable Television Ass'n, Inc. v. United States*, No. 92-2495 (D.D.C. Nov. 5, 1992); *Time Warner Entertainment Co., L.P. v. FCC*, No. 92-2494 (D.D.C. Nov. 5, 1992); *Daniel's Cablevision, Inc. v. United States*, No. 92-2292 (D.D.C. Oct. 13, 1992).

4. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994).

5. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994).

6. In fact, it is worse than that, as the syllabus makes clear:

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Parts II-A and II-B, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined, the opinion of the Court with respect to Parts II-C, II-D, and III-A, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, and SOUTER, JJ., joined, and an opinion with respect to Part III-B, in which REHNQUIST, C.J., and BLACKMUN and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and GINSBURG, JJ., joined, and in Parts I and III of which THOMAS, J., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part.

ment or two by one or more of the justices, the decision could easily have gone in any number of directions—and may well surprise when it comes down again in the near future.⁷ To better appreciate the uncertainty in this area of the law, it will be useful first to outline the questions presented in *Turner Broadcasting* and then to step back from the case—both in time and theory—to better evaluate how complicated, confused, and mistaken that jurisprudence has become.

I

The 1992 Cable Act

A product of more than five years of congressional give-and-take, the 1992 Cable Act has been characterized, neutrally, as a "far-reaching new law [that] completely overhauls the legal rules governing the television marketplace."⁸ Unlike its predecessor, the Cable Communications Policy Act of 1984, "which essentially deregulated the cable television industry on the assumption that cable would face effective competition,"⁹ the 1992 Cable Act "marks the beginning of a new regulatory era."¹⁰ The Act regulates, among other things, access to cable programming for cable competitors, retransmission of commercial and noncommercial broadcast signals, and rates for cable television subscribers. This Article will focus on the retransmission provisions, but the analysis that follows applies, *mutatis mutandis*, to the other parts of the Act as well.

Although the 1992 Cable Act addresses several methods of television transmission, it focuses on cable transmission because of cable's market dominance in recent years and the threat that poses, in the eyes of Congress, to other forms of transmission, especially over-the-air broadcasting by local stations. As the Court in *Turner Broadcasting* put it, "Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance."¹¹ More precisely:

Id. at 2450. But for the concurrence of Justice Stevens, who would otherwise have voted not to vacate but to affirm the judgment below, no disposition of the appeal would have commanded a majority of the Court.

7. See Court Speeds "Must-Carry" Cable Motions, NAT'L L.J., Oct. 17, 1994, at B1.

8. Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM/ENT L.J. 305, 306 (1993). Allard notes also that more cynical commentators, after likening its production to the making of sausage, have dubbed the final product the "Lawyer's Full Employment Act of 1992." *Id.* at 353. Allard's article is a useful review of the 1992 Cable Act.

9. *Id.* at 311.

10. *Id.* at 306.

11. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2454 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994).

According to Congress, [cable's] 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.¹²

Congress concluded, the Court said, that unless it regulated the cable industry, with its increasing vertical integration and horizontal concentration, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."¹³

To remedy this perceived threat to local broadcast television, Sections 4 and 5 of the Act, the must-carry provisions, require most cable operators to set aside up to one-third of their channels for carriage of local commercial and noncommercial signals, at no charge to the broadcasters. Alternatively, Section 6 of the 1992 Cable Act, dealing with retransmission consent, permits local commercial broadcasters to reject the must-carry privilege, to withhold consent to be carried, and to negotiate a price for consent to such carriage with a cable operator.¹⁴

II

Must-Carry and the Court

Because the court below had set aside consideration of the retransmission consent provisions on a jurisdictional ruling,¹⁵ the

12. *Id.* (citations omitted).

13. *Id.* at 2455.

14. The requirements are considerably more detailed than here stated—varying, for example, by the capacity of the cable system or the character of the local broadcaster—but those details are not central to this Article. See Allard, *supra* note 8.

15. The district court stated:

All of the plaintiffs challenge section 6, the retransmission consent provision, on the ground that it is not severable from section 4, and must be struck if section 4 is declared unconstitutional. Because the Court holds that section 4 is constitutional, plaintiffs' challenge to section 6 must fail, and the Court expresses no opinion on the severability issue.

Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 38 n.10 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994). Both sides seem wrong here. Section 6 is severable from § 4. Moreover, that § 6 must be struck if § 4 is declared unconstitutional of course does not imply that if § 4 is upheld, § 6 must be upheld.

Supreme Court did not consider that section of the 1992 Cable Act. Rather, the Court first summarized the district court's decision granting summary judgment to the government. The lower court had said that Congress had employed "its regulatory powers over the economy to impose order upon a market in **dysfunction**."¹⁶ The 1992 Cable Act was "simply industry-specific antitrust and fair trade practice regulatory **legislation**;" the must-carry provisions were "essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive **practices**."¹⁷ Finding that the regulations were not content-based, the lower court had applied an intermediate standard of scrutiny to conclude "that the preservation of local broadcasting is an important governmental interest, and that the must-carry provisions are sufficiently tailored to serve that **interest**."¹⁸ Thus, the district court had found must-carry to be consistent with the First Amendment.

From the outset of his analysis, Justice **Kennedy**¹⁹ stated clearly that 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**."²⁰ The must-carry rules regulate speech, Kennedy continued, by reducing the editorial discretion of cable operators over their systems and by rendering it more difficult for cable programmers to compete for **carriage**.²¹ Nonetheless, "because not every interference with speech triggers the same degree of scrutiny under the First Amendment," he noted, "we must decide at the outset the level of scrutiny applicable to the must-carry provisions."²²

To summarize the rest of the *Turner Broadcasting* opinion, the "relaxed" scrutiny of *Red Lion Broadcasting Co. v. FCC*²³ was deemed insufficiently rigorous because cable **television** does not suffer from the "inherent limitations" (frequency scarcity) that justify greater regulation of the broadcast media, and because "laws that **single out the press, or certain elements thereof, for special treatment**

16. *Turner Broadcasting*, 114 S. Ct. at 2455.

17. *Id.*

18. *Id.*

19. Hereafter I often refer to "Justice Kennedy" rather than "the Court" because in Part III-B of the opinion, at least, it is problematic to speak of "the Court." See *supra* note 6.

20. *Turner Broadcasting*, 114 S. Ct. at 2456 (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)).

21. *Turner Broadcasting*, 114 S. Ct. at 2456.

22. *Id.*

23. 395 U.S. 367 (1969).

'pose a particular danger of abuse by the State.'"²⁴ But strict scrutiny is too rigorous, for the **must-carry** rules do not **regulate** the content of any speech. That leaves the **intermediate** level of scrutiny, which is appropriate because **must-carry**, although burdening speech incidentally, is justified not with reference to content but "to preserve access to free television programming."²⁵ Thus, like the majority below, Justice Kennedy found the rules constitutional if they further an important governmental interest and are narrowly tailored to serve that interest.²⁶ Unlike the district court, however, he was **unable** to conclude from the record that the harms the **must-carry** rules are meant to alleviate are real or that the rules do not burden substantially more speech than is necessary.²⁷ Consequently, the Court sent the case back for additional fact-finding.

ra

Must-Carry and the Constitution

Laymen know what lawyers seem not to know, namely, that there is a dissonance between the command of the First Amendment—"Congress shall make no law . . . **abridging** the **freedom** of speech, or of the press"—and the analysis just outlined. On its face, the First Amendment seems to prohibit the kinds of abridgments that Congress has **imposed** with its **must-carry** requirements. The question, then, is whether that **dissonance** can be explained, and the **abridgments** justified, or whether instead it is as simple as it seems.

Toward answering that question, I will **take** as my point of departure the issue that Justice Kennedy said must be decided at the outset, namely the level of scrutiny applicable to the **must-carry** provisions.²⁸ Clearly, the Court's entire analysis—and a good deal of modern constitutional jurisprudence generally—turns on that issue. For the chances of a law being found **constitutional** are almost a direct function of the level of judicial scrutiny the law receives—"strict," "intermediate," "relaxed," or "minimal." Lawyers are familiar, of course, with the implications and operational parameters of what, for lack of a better term, we will call "scrutiny theory," but rarely do they ask the deeper question: What has any of that to do with the Constitution?

Plainly, the Constitution says nothing about different laws being subject to different levels of judicial **scrutiny**—**much** less about which

24. *Turner Broadcasting*, 114 S. Ct. at 2458 (citations omitted).

25. *Id.* at 2461.

26. *Id.* at 2469.

27. *Id.* at 2470-72.

28. *Id.* at 2456.

laws are subject to which level. Nor does the idea of differing levels of judicial scrutiny make a great deal of sense intuitively, if one thinks about it, even if it were entailed by the Constitution. What the Constitution does say, by contrast, sheds light on a simpler, more straightforward and satisfying resolution of the must-carry question than anything yet to come from the scrutiny theory of the modern Court. To appreciate those points, however, we need to step back; we need to go back to basics, apply those basics to the must-carry question, and then see how far astray we have been led by modern scrutiny theory,

A. The Original Design

It is useful to think of our constitutional design as composed of two intimately connected parts—substance and structure. On the substantive side, a single word captures it all—freedom. America was founded on the simple but profoundly important idea that every individual has an inherent right to be free, a right to plan and live his own life by his own lights, provided only that in doing so he respect the equal rights of others to do the same. Two conclusions are entailed immediately by the idea of freedom. First, we all have a right to be and do wrong—constrained, again, by the rights of others. Second, as a corollary, the right to be and do wrong, to pursue mistaken or unpopular values, implies a fundamental distinction between rights and values. Indeed, that distinction is at the heart of the classical liberal vision.²⁹

Our founding documents, from the Declaration of Independence through the Constitution and the Bill of Rights to the Civil War Amendments, fairly sing out with those ideas. They speak also, especially through the common law, to another profoundly important aspect of freedom, namely, that all rights can be reduced to a single idea—property. John Locke, whose thinking animated so many of the Founders, put it well: "Lives, Liberties and Estates, which I call by the general Name, *Property*."³⁰ Indeed, through replications of property

29, See Roger Pilon, *Introduction, FLAG-BURNING, DISCRIMINATION, AND THE RIGHT TO DO WRONG: Two DEBATES* (Roger Pilon ed., Cato Institute 1990); reprinted as *Resolved: A Flag-Burning Statute Is Unconstitutional, and a Flag-Burning Amendment Is Un-American*, in *FIRST AMENDMENT LAW HANDBOOK* 233 (James L. Swanson ed., 1991).

30, John Locke, *The Second Treatise of Government*, Two TREATISES OF GOVERNMENT § 123 (Peter Laslett ed., 1960). While correctly stating the law, Justice Kennedy's failure to address the connection between property and liberty, including freedom of speech, gets him off on the wrong foot almost from the start. Thus, he writes: "[I]t is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Turner Broadcasting*, 114 S. Ct. at 2457 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)). The right to broadcast, like the right to speak, write, or publish, is a function of an underlying right to the property

and its derivative, contract, the whole of the Bill of Rights can be deduced. What are rights of speech, press, and immunity from unreasonable search and seizure, after all, to say nothing of rights to life and liberty, if not instances of the right to be sovereign over what is one's own?³¹

The structural side of the original design is more complex, but still relatively simple and straightforward if related properly to the substantive side. It is not, however, a blueprint for wide-ranging democracy. The Framers did not come together, create a government, then yield up to it our rights of self-rule, those rights thereafter to be exercised by majorities on behalf of all of us, save for a few pockets in which minorities might be immune from majority rule.³² That post-New Deal view, a product of the Progressive Era mindset, explains much of the modern jurisprudential problem, even as it flies in the face of the original constitutional design. Whatever its explanatory value, however, it offers no answer at all to the problem of connecting substance and structure or to the implicit problem of majoritarian tyranny.

To appreciate the original design and its contrast with the modern view, we need to outline the connections between substance and struc-

that enables that activity. Well before the Communications Act of 1934, when "Congress created a system of free broadcast service," according to Justice Kennedy, *Turner Broadcasting*, 114 S. Ct. at 2469, the distribution of broadcast frequencies was handled, properly, by a rule of first possession, as Judge Williams noted below. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 65-66 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994); see also JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 156-57 (1991); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 147-52, 163 (1990).

31. The **propertarian** foundations of the theory of rights are developed more fully in Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979).

32. For one statement of that view, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990):

The United States was founded as a Madisonian system, which means that it contains two opposing principles that **must** be continually reconciled. The first principle is self-government, which means that in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless *some* things majorities must not do to minorities, *some areas* of life in which the individual must be free of majority rule.

Id. at 139 (emphasis added). With differing emphases, one finds that view today on nearly all parts of the political spectrum. See Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39 (review of CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990) and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)). For more accurate accounts of the Madisonian view, see James A. Dorn, *Public Choice and the Constitution: A Madisonian Perspective*, PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 57 (James D. Gwartney & Richard E. Wagner eds., 1988); Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent"*, 15 HARV. J.L. & PUB. POL'Y 965 (1992).

ture by considering the fundamental problem faced by the Framers—how to create a government at once strong enough to secure our rights, as the Declaration states the basic function of government, yet not so strong as to violate those rights. The bridge between the state of nature and government—and between substance and structure—is the individual right of self-rule—what Locke called the "Executive Power" that each of us has in the state of nature,³³ But the gap between the individual exercise of that right and its collective exercise is yawning; for any vote short of unanimity means that majorities rule minorities, which hardly respects the rights of self-rule of those minorities. Faced with that dilemma, the Framers did not dive headlong into the kind of rationale for government that says "we're all in this together," as was expressed in a recent health-care address.³⁴ Rather, they candidly recognized that government, in essence, is a necessary evil. As George Washington put it: "Government is not reason, it is not eloquence, it is force."³⁵

Given that realization, the Framers sought to limit the use of force and the violation of minority rights as much as possible. Plainly, that meant limiting government as much as possible. Among the ways the Framers chose to do that, three stand out. The first and most important limitation was imposed through the doctrine of enumerated powers, the centerpiece of the Constitution, whereby the institutions of the federal government were "authorized"—the crucial word that connects substance to structure—to pursue only those ends and exercise only those powers expressly enumerated in the document. By implication, which the Tenth Amendment makes explicit, any power not resting with the federal government rests with the states—where the people of a state, through their state constitution, can restrain it—or with the people. As a corollary, and a crucial one it is, most things were left to what today we call the private sector—where affairs are undertaken through voluntary association, with government serving simply to secure our rights as we pursue our essentially private lives.³⁶

33. Locke, *supra* note 30, § 13.

34. President Bill Clinton, U.S. Health Care System: Rampant Medical Inflation, Address Before a Joint Session of Congress (Sept. 22, 1993), in *VITAL SPEECHES OF THE DAY*, Oct. 15, 1993, at 6.

35. FRANK J. WILSTACH, *A DICTIONARY OF SIMILES* 526 (2d ed. 1924).

36. The doctrine of enumerated powers and its demise is discussed in Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 *NOTRE DAME L. REV.* 507 (1993). See also Glenn H. Reynolds, *Guns, Kids, and the Commerce Clause: Is the Court Ready for Constitutional Government?* (Cato Policy Analysis No. 216, Oct. 10, 1994) (urging the Supreme Court to revive the enumerated powers doctrine in *United States V. Lopez*, No. 93-1260 (argued Nov. 8, 1994)).

Second, in addition to limiting the federal government's ends, the Framers sought also to limit its means through the Necessary and Proper Clause, which authorizes Congress "[t]o make all laws which shall be necessary and proper for carrying into execution" any of the other enumerated powers.³⁷ Although some have understood that authorization as expanding the power of Congress,³⁸ the clause does not say that Congress may make "all laws for carrying into execution" but all laws "which shall be necessary and proper," thus limiting the means available to Congress to those that are necessary and proper.³⁹ Finally, a third structural restraint, instituted more as an afterthought, took the form of the Bill of Rights, added to the Constitution in case the other limitations proved insufficient.⁴⁰

Today, the first of those restraints is all but dead, the second is dead, and the third, the Bill of Rights, is in the hands of judges armed with no discernible theory of rights. Before discussing how that has come to be and the implications for must-carry analysis, let us look at how must-carry would fare under the original design. To do that, however, it will be useful first to say a word about the Commerce Clause,⁴¹ through which so much of the modern scenario has come about, and then to sketch the judicial methodology the original design entails.

B. The Commerce Clause Under the Original Design

Under the original design, the Commerce Clause would not have afforded Congress the power to regulate the cable industry. In fact, that clause was meant by the Framers to serve a function quite opposite the function it serves today. It arose because under the Articles of Confederation, state legislatures had become dens of special-interest legislation aimed at protecting local manufacturers and merchants

37. U.S. CONST. art. I, § 8, cl. 18.

38. See, e.g., WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 380-81 (1953).

39. For a discussion of the loss of the Necessary and Proper Clause in *McCulloch v. Maryland*, see Roger Pilon, *On the Folly and Illegitimacy of Industrial Policy*, 5 STAN. L. & POL'Y REV. 103 (1993).

40. Indeed, so central was the doctrine of enumerated powers in the original design that Publius (here, Alexander Hamilton) argued that a bill of rights would be superfluous: "[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" THE FEDERALIST No. 84 (Alexander Hamilton).

41. U.S. CONST. art. I, § 8, cl. 3: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

from out-of-state competitors.⁴² The resulting tangle of state-by-state tariffs and regulations served only to impede the free flow of goods and services among the states to the detriment of all. Only a national government could break the logjam—In fact, the need to do so was a driving force behind the call for a new constitution.

The purpose of the Commerce Clause, then, was to enable Congress not so much "to regulate," in any affirmative sense, but to "regularize" or "make regular" commerce among the states. In fact, the first great Commerce Clause case, *Gibbons v. Ogden*,⁴³ did just that when it overturned a New York State statute that impeded the free flow of interstate commerce. To be sure, Justice Marshall's opinion there dwelled perhaps too much on the jurisdictional question concerning the distribution of regulatory power between federal and state governments and not enough on the substantive question—the point of regulation in the first place—and thus led to later cases that transformed the Commerce Clause almost entirely into a federal-state battleground.⁴⁴ Nonetheless, the essential point of the commerce power still emerged from the case. Indeed, were the power not so restrained, were Congress able to use the power to regulate virtually any activity it wished, as is the case today, there would have been no point in enumerating its other powers—much less in defending the doctrine of enumeration throughout the pages of the *Federalist Papers*. Today's ample, affirmative reading of the commerce power, in short, cannot be right, for it eviscerates utterly the doctrine of enumerated powers—the centerpiece of the Constitution.⁴⁵

C. Judicial Methodology Under the Original Design

Turning then to the Constitution as originally understood, there are at most three basic questions that a court has to ask when considering the constitutionality of an act of Congress, such as the 1992 Cable Act. First, is Congress acting pursuant to some enumerated end or power, such as the power to coin money or to establish post offices? If not, that ends the matter.⁴⁶ Indeed, it would be sheer "judicial ac-

42. See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 109 (4th ed. 1970); FREDERICK D. SMITH, *THE CONSTITUTION: ITS STORY AND BATTLES* 184-89 (1926). The discussion that follows draws from *Pilon*, *supra* note 36,

43. 22 U.S. (9 Wheat.) 1 (1824). See Reynolds, *supra* note 36, at 6-9; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

44. See Epstein, *supra* note 43.

45. For fuller discussions of these points, see *Pilon*, *supra* note 36; Reynolds, *supra* note 36; Epstein, *supra* note 43.

46. Those moderns who find the initial question too stark or otherwise odd would benefit, perhaps, from a brief historical note suggesting that for much of our history that question was asked not so much by the judiciary as by the political branches—all but un-

tivism" to read a power into the Constitution that is not there in the first place—especially since the very point of having a written constitution to begin with is to limit governmental power.⁴⁷

Second, if the end pursued or power exercised is in fact enumerated in the document, are the means chosen both necessary and proper? If not, that ends the matter. Here, there is no warrant for anything *but* "strict scrutiny"—not if the word "necessary" is to mean what it actually means, rather than "appropriate," as Justice Marshall used it to mean when he gutted the Necessary and Proper Clause in *McCulloch v. Maryland*.⁴⁸ Thus, while Congress may have power, say, to establish post offices, not only does it lack authority to confer monopoly privileges on those institutions, but such a grant invokes means that are neither necessary nor proper to their establishment: not necessary because there could be government post offices without prohibiting the private delivery of mail; not proper because a monopoly grant takes the liberty of individuals and firms to engage in the otherwise rightful activity of providing mail service.

Finally, if the first two questions are answered in the affirmative, does the governmental action that follows violate either enumerated

thinkable today: Thus, in 1794, James Madison, who was not unfamiliar with the Constitution, rose on the floor of the House to challenge a bill that would have appropriated \$15,000 for relief for refugees who had fled to Baltimore and Philadelphia. He stated that he could not "undertake to lay his finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents." 4 ANNALS OF CONG. 179 (1794). Two years later, Virginia's William B. Giles, facing a similar bill, observed, "[The House] should not attend to what . . . generosity and humanity required, but what the Constitution and their duty required." 6 ANNALS OF CONG. 1727 (1796). Throughout the nineteenth century we find presidents vetoing measures deemed unauthorized by the Constitution. As late as 1887, for example, President Cleveland vetoed an appropriation to buy seeds for drought-stricken farmers on just that ground. H.R. 10203, 49th Cong., 2d Sess. (1887). In 1907 we find the Supreme Court itself writing:

The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in [sic] the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. . . .

This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment.

Kansas v. Colorado, 206 U.S. 46, 89-90 (1907). Notwithstanding all the water that has spilled over the New Deal dam in the interim, the view just stated was recently echoed by the Fifth Circuit in *United States v. Lopez*, a case that is now before the Supreme Court, 2 F.3d 1342 (1993), cert. granted, 114 S. Ct. 1536 (1994). See Reynolds, *supra* note 36.

47. The term "judicial activism" is ordinarily used by political conservatives to criticize judges whom they believe create "rights" that are nowhere to be found in the Constitution. Given the Ninth Amendment's reminder that not every right we have is enumerated—indeed, most are not—and given the doctrine of enumerated powers, the "activist" label is doubtless far better applied to judges, whatever their political stripe, who create or recognize powers that have no basis in the Constitution.

48. 17 U.S. (4 Wheat.) 316, 410 (1819). See *supra* note 39.

or **unenumerated** rights by taking the lives, liberties, or property of individuals or institutions? To answer that question, it is not enough to **consult** an enumeration of rights, not least because, as the **Framers** saw, there are an infinite number of unenumerated rights that must be considered as **well**.⁴⁹ In fact, if the judicial job is to be done correctly, there is no substitute for a **well-worked-out** theory of rights. In a nutshell, such a theory would ground rights in **property—lives, liberties, and estates—and** would explain how rights and correlative obligations are variously alienated and created through tortious and promissory (including constitutional) **behavior**.⁵⁰ Armed with such a theory, and the political theory outlined above, the Bill of Rights makes systematic **sense**. Absent those theories, it is an odd and incomplete collection of values, aspirations, and what **not**.

This third question—whether an otherwise constitutional government action violates a **right—is** in principle redundant and hence unnecessary, as the Federalists recognized in the great debate about whether to add a bill of rights to the **Constitution**.⁵¹ For if the logic of rights is a zero-sum game, as it is,⁵² then a government action, if otherwise constitutional, will by definition not violate rights. To see why, consider the following steps.

To determine whether a government action, if otherwise constitutional, violates rights, we might ask first if there is such a **right, enumerated or unenumerated, as is claimed by some plaintiff**.⁵³ If not,

49. See Randy E. Barnett, *Introduction: James Madison's Ninth Amendment, THE RIGHTS RETAINED BY THE PEOPLE 1* (Randy E. Barnett ed., 1989).

50. These issues are discussed in Roger Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished Ph.D. dissertation, University of Chicago), drawing in part upon ALAN GEWIRTH, *REASON AND MORALITY* (1978). On the **correlativity** of rights and obligations, see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

51. The Federalists thought a bill of **rights unnecessary** and potentially dangerous. See *supra* note 40 and accompanying text. Since it was **impossible** to enumerate all rights, the enumeration of only some rights might be construed to deny or disparage others. They were right, for the Ninth-Amendment "solution" has not worked. (See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127 (1987), for an account of how the judiciary, for the first 30 years, repaired to the higher **law—the** theory of rights that stands behind the Ninth Amendment.) The Antifederalists, by contrast, thought the enumeration of powers would prove an insufficient protection against expanding government and so insisted on a bill of rights. They, too, were right. In the end, it is the **judiciary** that has failed to enforce either the **powers'** or the **rights'** boundaries.

52. See Hohfeld, *supra* note 50.

53. I am assuming here that the judge can answer that question, as so many common-law judges of old did, by repair to the theory of rights. If the judge's only aid in answering the question, however, is positive law, then the Bill of Rights will prove a weak restraint on expansive readings of enumerated powers. Here, the only remedy is judicial training in the theory of rights.

that ends the matter, this time in favor of the government. If, on the other hand, there is such a right, we must ask whether it might have been alienated by either the direct or the political behavior of the plaintiff. Rights, for example, to life, liberty, property, due process, and much else can be voluntarily alienated by individuals acting directly in their individual capacities.⁵⁴ Similarly, the right not to have property taken for public use, even with just compensation,⁵⁵ and the right not to have income taxed,⁵⁶ to take just two examples, have been alienated through political behavior, namely the constitutional ratification process. Thus, through the very process of creating a constitution and amending it over time, certain rights have been alienated by the institution of enumerated powers.⁵⁷ If the right claimed by the plaintiff has in fact been alienated, either directly or through the political process, that too ends the matter, again in favor of the government. But if the right does exist and has not been alienated, either directly or politically, then that means, by definition, that the government has no authority to act—that the action is *not* "otherwise constitutional." Thus, again, the rights analysis is redundant in a zero sum game. Nevertheless, it is doubtless a useful check on analysis from the powers perspective alone, especially since the language the Framers used in drafting enumerated powers does not always serve well either the function of those powers or the larger constitutional design—a point well demonstrated in the case of the Commerce Clause.

It should be noted, finally, that applying the methodology just outlined involves relatively few value judgments on the part of the judiciary. A judge does not have to ask whether a government end is "compelling" or "substantial" or "important," only whether it is enu-

54. After all, every time a contract is formed it both extinguishes and creates rights and obligations. So, too, when individuals commit torts and crimes.

55. U.S. CONST. amend. V.

56. U.S. CONST. amend. XVI.

57. But if we can alienate rights through the constitutional process, it may be asked, why can we not do the same through the ordinary majoritarian legislative process? We can. But we can do so only if the power under which the legislative majority acts is in fact an enumerated power—thus, the importance of being clear about the precise source of authority. Note, however, that even if we are able to locate that source in the Constitution, the "air of illegitimacy" that surrounds government remains, compelling us to speak of the institution as a "necessary evil" and a "forced association." See *supra* text accompanying notes 33-35. For the unanimous consent that alone would yield legitimacy (at a point in time) is absent in both the constitutional context and the ordinary legislative context. Constitutional consent (ratification) is merely supermajoritarian; legislative consent is not even that, only majoritarian. What is worse, neither is direct (save for the initiative process), and both are usually ancestral. Government "by the consent of the governed" is thus more an ideal than a fact. Hence, the need, given that fact, to limit government as much as possible, the better to minimize forced association.

merated in the Constitution.⁵⁸ Likewise, the question of whether the means Congress selects are “necessary”—unlike Marshall’s “appropriate”—can usually be reduced to a question of fact, not a question of value. As for “proper,” questions involving that value-laden word, as discussed above, can usually be reduced to questions about rights: Does the means selected violate some enumerated or unenumerated right?⁵⁹ And rights questions, again, are for the most part not values questions. Rights are rooted in reason, in first principles, from which they are derived, not in value-laden assumptions.⁶⁰ Thus, neither does the third question involve many value judgments. To be sure, there are applications of constitutional law that do require value judgments; the Fourth Amendment’s prohibition of *unreasonable* searches and seizures and the Eighth Amendment’s prohibition of *excessive* bail or fines and *cruel* and unusual punishments are examples. But those are the exceptions, not the rule. Indeed, if the rule of law is to reign, judges must make value judgments only where necessary.⁶¹ The original design, not least by virtue of its attempt to limit government as much as possible, leaving most value judgments to be made by private individuals in the private sector, is aimed at just that.

D. Must-Carry Under the Original Design

Earlier I noted that unlike modern constitutional law, with its reliance on scrutiny theory, the Constitution itself is simple, straightfor-

58. But see *Turner Broadcasting*, wherein Justice Kennedy stated that: “Indeed, our precedents have held that ‘protecting noncable households from loss of regular television broadcasting service due to competition from cable systems,’ is not only a permissible governmental justification, but an ‘important and substantial federal interest.’”

Turner Broadcasting, 114 S. Ct. at 2461 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

59. Still, to repair to the earlier example, positivist judges who have difficulty discerning a right to provide mail service—that right is nowhere enumerated, after all—will have difficulty applying the word “proper”—even as they often have no difficulty discerning powers that by constitutional design *must* be enumerated, such as a power to grant monopoly privileges.

60. See *supra* note 50. See also Roger Pilon, *On Moral and Legal Justification*, 11 Sw. U. L. REV. 1327 (1979). Eventually, however, the casuistry of rights theory requires value judgments if the theory is to be completed. From principles of reason, for example, the theory of rights can usually determine whether *A* is liable to *B* in tort, but not whether remedy *x* or remedy *y* will make *B* whole again if *B* has suffered, say, loss of life or limb. To answer the latter question, value judgments are necessary, about which reasonable people can have reasonable differences.

61. Thus, in the law of torts, a strict liability standard rooted in causation is far preferable to a negligence standard, whether rooted in a reasonable-person or an economic-efficiency criterion, because the causation criterion is not only, right from the perspective of rights but more easily objectified and hence less dependent on value judgments.

ward, and intuitively satisfying. **Through** it, the members of the founding generation created the national government, delegating to it a few enumerated powers while leaving the rest to themselves. They undertook their project, as the Preamble makes clear, for a few simple reasons: "to form a more perfect Union, establish Justice, insure domestic **Tranquility**, provide for the common defense, promote the general Welfare, and secure the Blessings of **Liberty**."⁶² Nothing there warrants anything like the expansive government we have today, not even the General Welfare Clause, which was limited, after all, by the word "**general**."⁶³

What emerges is a picture of a free people living under a limited government dedicated to preserving that freedom. When we ask, therefore, how something like must-carry or the 1992 Cable Act generally would fare under such an arrangement, we must remember first that a Congress inspired by such a vision would not likely presume to produce such an act; and if it did, a president so inspired would not likely let the act get past his veto pen; and if he did, the act would not likely survive the Court's first question—**where** does Congress find its authority to enact such a statute? As both a political and a legal matter, in short, vision is important.

That question of vision deserves attention because both the district court and the Supreme Court in *Turner Broadcasting* make much of Congress' stated purposes for enacting the 1992 Cable Act. Plainly, as observed earlier, today's Congress has no reservation whatever about engaging in what has come to be called "mere" economic regulation. Thus, its rationale for the 1992 Cable Act was well stated by the court below:

Congress' principal finding was that, for a variety of reasons, concentration of economic power in the cable industry was preventing non-cable programmers from effectively competing for the attention of a television audience.⁶⁴

62. U.S. CONST. pmbl.

63. The early debate over the Article I, § 8 version of the clause pitted Madison, Jefferson, and others, who argued that the clause, far from being an independent source of power, was an additional *shield*, aimed at ensuring that Congress' enumerated powers be exercised for the general and not for any particular welfare, against Hamilton, who argued the independent power side, but still thought the power limited to the *general* welfare. Compare James Madison, *Report on Resolutions*, in 6 THE WRITINGS OF JAMES MADISON 357 (Gaillard Hunt ed., 1906) and Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 10 WRITINGS OF THOMAS JEFFERSON at 90, 91 (Paul L. Ford ed., 1899) with Alexander Hamilton, *Report on Manufacturers* (1791), in INDUSTRIAL AND COMMERCIAL CORRESPONDENCE OF ALEXANDER HAMILTON 293 (Arthur H. Cole ed., 1968).

64. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 39 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994).

Contrast that with the rationale for the Commerce Clause. In 1787, in the name of helping unsuccessful businesses, state governments were restricting successful (out-of-state) competitors, for which the remedy was federal intervention to override those restrictions. Today, in the name of helping (allegedly) unsuccessful businesses, the federal government restricts successful competitors—precisely what state governments were doing in 1787, requiring federal intervention to free up the market. The irony should not be lost on the Court. The Commerce Clause has been converted from a shield, guarding against government intervention in the market, to a sword, enabling government intervention in the market.

But suppose, contrary to nineteenth century experience,⁶⁵ yet consistent with most of the twentieth century, that members of the political branches have abandoned their responsibilities to uphold the Constitution and enacted something like the 1992 Cable Act, and that the Act has come before the Court to be adjudicated under the Constitution as originally understood. In response to plaintiff-competitors' complaint that Congress had acted without constitutional authority, the government and protected-business defendants might answer that the Act was perfectly consistent with the larger purpose of the Commerce Clause, namely, to free up a market burdened by a "concentration of economic power."⁶⁶

After a century and more of antitrust theory, with its ever-changing contours,⁶⁷ that answer is more than familiar. But it is quite irrelevant to the Commerce Clause, which served for the most part to frustrate, for a century before the advent of antitrust, *real* monopolies, namely, those brought about through the exercise of *government power*.⁶⁸ There is all the difference in the world between public and private power. The former is, by definition, coercive: it has behind it legal force, which in our system needs to be justified. Private power, by contrast, can resort to force only through public processes and instrumentalities and *only*—prior to antitrust and its progeny⁶⁹—to protect property and enforce contracts voluntarily entered into. Mere

65. See *supra* note 46.

66. *Turner Broadcasting*, 819 F. Supp. at 39.

67. See Viveca Novae, *Happy Warriors: Nasdaq Probe Reflects New Moxie Of Bingham's Justice Department Antitrust Team*, WALL ST. J., Oct. 20, 1994, at A1.

68. That was the underlying issue in *Gibbons v. Ogden*, where Ogden brought suit to challenge a monopoly New York State had granted that bestowed an exclusive right to navigate by steam the waters between New Jersey and the city of New York. *Gibbons* was operating under the protection of that monopoly. 22 U.S. (9 Wheat) 1 (1824). See Reynolds, *supra* note 36.

69. Especially but by no means only the Robinson-Patman Act, 15 U.S.C. §§ 13-13(b), 21(a) (1988).

refusal to deal, to say nothing of countless other antitrust "wrongs," is no invocation of force and, absent any agreement to the contrary, no violation of rights. Accordingly, under the original design, the Commerce Clause, aimed at frustrating *public* restraints on commerce, which use force, is not available to frustrate *private restraints*,⁷⁰ which not only do not use force but are often economically rational.⁷¹

Before leaving this point, a word more is in order about the "bottleneck" argument, the idea that the cable operator acts as a "gatekeeper," exerting "control over most (if **not** all) of the television programming that is channeled into the subscriber's **home**."⁷² As Justice Kennedy put it:

The must-carry provisions . . . are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.⁷³

Even if we accept private-monopoly legal theory, by no means does it follow that cable operators have the control their competitors allege. After all, in **most** situations, broadcast television was there first. When viewers switched from over-the-air receipt of signals to cable receipt, they hardly foreclosed **over-the-air receipt**. And even if they did start with cable, nothing **forecloses** their converting to over-the-air. What is striking in the court opinions, in fact, is the short shrift that is **given** to the simple and inexpensive expedient of an "A/B" input-selector switch. The Supreme Court took at face value the congressional finding that:

most subscribers to cable television **systems** do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television **services**.⁷⁴

70. Cf. *infra* note 87.

71. The history of government attempts to police "fairness," "level playing fields," and the like **does** not inspire confidence. For an excellent account of the sham historical record on which antitrust has been built, a record virtually every lawyer today takes as given when entering the world of antitrust, see DOMINICK T. ARMENTANO, *ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE* (1982). Cf. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). The repetition of history in the present case is instructive. After all, the **parade** of horrors on which Congress has constructed the 1992 Cable Act (*see supra* text accompanying note 12) is just what the court below, on remand, must now look more **closely** at, to determine whether those horrors are real or imagined. **Note**, however, that even if the "Robber **Baron**" and related stories did hold up, the constitutional argument would not change, for truly private "monopolies" give rise neither to actionable wrongs nor to constitutional powers.

72. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2466 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994).

73. *Id.* at 2468.

74. *Id.* at 2454 (citing 1992 Cable Act, *supra* note 1, § 2(a)(17)).

The court below, if anything, upped the argument, saying that; Congress actually found that input-selector switches were ineffective simply because viewers tended not to use them (a function, perhaps, of viewer inertia as much as viewer preference).⁷⁵

Yet in the name of those viewers—too inert to attend to their options—cable operators are required to reduce their offerings in favor of even unpopular local broadcasters. Not only does that take from cable operators and give to broadcasters—raising important Fifth Amendment "takings" questions⁷⁶—but viewers, as a result, have fewer options, as friends of C-SPAN have lately discovered.

To return, however, to the adjudication of must-carry under the original design, assume that the 1992 Cable Act were somehow to have overcome the first constitutional hurdle, that some enumerated power were to have been found by the Court to authorize such a statute. The next question is whether the means selected—here, must-carry—are necessary and proper. To answer that question, of course, there must be some end for which the must-carry means are alleged to be necessary and proper. Let us take Congress and the courts at face value and grant that "Congress' overriding objective" was "to preserve access to free television programming for the 40 percent of Americans without cable."⁷⁷ Granted, it is some stretch to find that as one of the ends enumerated in the Constitution, even by implication, but again, this is merely an assumption,

Now, are the must-carry means necessary if that end is to be realized? Judge Williams, in dissent below, thought not. In fact, he offered as an alternative the leased-access provisions of the 1984 Cable Act,⁷⁸ which had the advantage, he notes, of being content-neutral—an issue that does not even arise under the original design. Leased access also avoids the taking issue noted above—assuming the prescribed compensation is just—even if it does stretch the meaning of the Fifth Amendment's "public use" requirement.⁷⁹ But leased access is not the only less intrusive alternative to must-carry. As discussed

75. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 47 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1994).

76. See *infra* note 79.

77. *Turner Broadcasting*, 114 S. Ct. at 2461.

78. 47 U.S.C. § 532 (1988).

79. Under must-carry, by contrast, we have in essence a publicly sanctioned private condemnation, with local broadcasters "taking" the channels that belong to cable operators. And as is the case with so many modern regulatory takings, the cable operators are made to serve the public—and made to serve their broadcast competitors, in particular—while bearing the whole cost themselves. That, precisely, is what the Fifth Amendment's Takings Clause was meant to prohibit. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

above, the technology for providing more rather than fewer programming options is hardly novel or expensive. Thus, if the aim is to preserve free broadcast television, the must-carry means are far from necessary—and deeply disturbing, since the "public good" they provide is paid for not by the public but by private cable operators.

But assume, to continue, that the must-carry means were necessary. Is must-carry proper? Here, recall "proper" is treated as a function of rights theory. But that raises a problem. For if we assume that the end of preserving free broadcast television is enumerated and that the must-carry means are necessary, then any rights that anyone, including cable operators, might have that are inconsistent with those assumptions must have been alienated at some point in time, either individually or politically, as discussed earlier. Obviously, cable operators have not alienated any such rights in their individual capacities or they would not be claiming those rights as plaintiffs. The problem then with any claim to the effect that cable operators or "we" may have alienated such rights in our political capacities is the plain and unequivocal language of the First Amendment, which flat-out contradicts such a claim—and in addition is later in time than any political (constitutional) alienation that might otherwise have overridden the language.

Nor would the result be any different—just faster—had the analysis started not from the powers but from the rights end of things. Under the original design, in short, this case is, as they say, open and shut, with summary judgment for the plaintiffs. That the Court took so many pages to reach a result so different and uncertain—at least for now—is a sign of the confusion that marks so much of modern First-Amendment jurisprudence. It is a jurisprudence of nuanced distinction upon nuanced distinction, needed to enable government to pursue all manner of "public goods"—such as the preservation of free broadcast TV—while paying lip service, at least, to the plain language of the First Amendment. To see why this has come about, and why things are no longer as simple and straightforward as they were meant to be, it will be useful to sketch a few of the larger issues and a few of their more troubling implications.

IV

Must-Carry and Modern "Scrutiny Theory"

The demise of the original design resulted from a number of factors.⁸⁰ Chief among them, however, was a gradual change in the cli-

80. The discussion that follows draws from *Pilon*, *supra* note 36.

mate of ideas, which in time took its toll on the political and legal culture, sapping the confidence of the judiciary in particular. The nineteenth century witnessed, among other things, the decline of the theory of natural rights on which the Constitution rested, the rise of utilitarianism in ethics and behaviorism in the social sciences, and the gradual spread of democratic theory and a will-based theory of positive law. Thus, by century's end one could find the editors of the (then liberal) *Nation* lamenting the "eclipse of liberalism" in a piece observing that "[t]he Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away."⁸¹

The political implications of this change in ideas were profound and far-reaching, for we stopped thinking of government as a "necessary evil," to be restrained at every turn, and started thinking of it as an engine of good, an instrument for change, an institution for solving social problems. Thus was the Progressive Era informed, thus did the political branches take their cue, devising ever larger plans for the public good, ever grander schemes in the public interest. "What shall we do?" was the question of the day, for which a ready political answer was invariably at hand. "We're all in this together" was the inevitable result.⁸²

The Constitution, unfortunately, stood athwart the juggernaut of social progress, and so the judiciary took on the mantle of a reactionary bastion. Things came to a head during the New Deal, of course, when the planners of the day ran up against the wall of the original design—or such part of it as remained, for in truth it was beginning to fray. At a point, however, President Franklin D. Roosevelt grew weary of the obstructionist Court and threatened to pack its ranks with six additional members. The scheme failed on the surface, but the Court got the message, and the rest is history.⁸³

The demise was not at once, but it was fast, and culminated in the now famous footnote four of *United States v. Carolene Products*,⁸⁴ where a distinction was drawn between two kinds of rights, fundamental and nonfundamental, and two levels of judicial review, strict and minimal. Dovetailing nicely with the political imperatives of the day, strict scrutiny was recommended for laws implicating political rights,

81. *Eclipse of Liberalism*, 71 NATION 105 (1900).

82. See *supra* note 34.

83. See ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 494-500 (1983); MERLO J. PUSSEY, THE SUPREME COURT CRISIS (1937),

84. 304 U.S. 144 (1938). See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

such as voting and speech rights, the better to ensure public pursuits through the political process; minimal scrutiny was recommended for laws regulating "ordinary commercial relations,"⁸⁵ involving rights of property and contract, the political ordering of which was the chief object of the new public policy. Thus was "scrutiny theory" born, to make way for the new political agenda. That it was crafted from whole cloth, and contrary to the original design, was noticed even by the agenda's authors.⁸⁶ It was a case of politics over law, nothing less, nothing more. Today, the theory continues as the ever-shifting "bed-rock" of our basic law.

It should not surprise, however, that the protected preserve of this baseless law, the cherished rights of the First Amendment, should now be subject to its vagaries. As is said, what goes around comes around.⁸⁷ The idea that there are fundamental and nonfundamental rights is nothing less than the reduction of rights to values—the reconceptualization of rights, making them a function of values. Change the values—easily done—and you change the rights. But if rights are mere values, and if the ends of government are no longer enumerated but essentially boundless, then "important" ends—to say nothing of "compelling" ends—can easily trump less important rights. Law and the Constitution are no longer a matter of reason and deduction but a matter of values. And since one man's values are as good as another's, little stands still under this ever-shifting "rule of law."

The 1992 Cable Act is no exception. Winners under the Act cast it as mere economic regulation, the better to render it immune from "strict scrutiny." Losers cast it as the regulation of speech, the better to invoke the scrutiny that might render it void. The truth, of course,

85. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

86. The point was made, for example, by no less than Rexford G. Tugwell, one of the principal architects of the New Deal: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." Rexford G. Tugwell, *Rewriting the Constitution: A Center Report*, CENTER MAG., Mar. 1968, at 20.

87. Under the modern view, in essence, if Congress has a good enough policy reason, however unrelated to the classic rights reasons (defamation and endangerment), it can restrict speech, notwithstanding the plain and unequivocal language of the First Amendment. Thus, Justice Kennedy, taking government's expanded responsibilities as a given, instructs us: "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." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2466 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994) (emphasis added) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). Thus does the antitrust rationale reach now well beyond the regulation of "mere" commercial relations. *Cf. supra* text accompanying notes 67-71.

is that the Act regulates both property and speech, for to regulate property *is* to regulate speech, The Founders understood that, which is why they protected both, equally, To watch the modern Court try to determine which is dominant, whether the regulation of property or the regulation of speech, is to watch a morality play without direction because without foundation. And that will not change until we get back to basics.

