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## À la Carte Cable: A Regulatory Solution to the Misinformation Subsidy

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# À LA CARTE CABLE: A REGULATORY SOLUTION TO THE MISINFORMATION SUBSIDY

*Christopher Terry, Eliezer Joseph Silberberg, Stephen Schmitz, John Stack & Eve Sando*

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In a society awash in information streams, our ability to access information is unparalleled. The sheer amount of data and content on the internet, often just a touch away, has revolutionized modern society.<sup>1</sup> Unfortunately, access to limitless information has not always been positive. The traditional value of promoting more speech has reached the point of conflict with a reality that not all information is of equal truthfulness or even of any positive value. To be blunt, our vast sea of information is polluted by swaths of misinformation.<sup>2</sup> Once the tool of the yellow journalists, satirical criticisms, and supermarket tabloids, misinformation in contemporary times has been weaponized as a mechanism for persuading the intentionally misinformed and organizing the ideologically unbendable.<sup>3</sup>

Misinformation is certainly not new, but the scourge of misinformation in our current milieu has been particularly venomous.<sup>4</sup> Misinformation spread on social media and quasi-private chatrooms directly led to the planning and execution of an attempted coup on January 6, 2021.<sup>5</sup> In some cases, the role of 2020 election misinformation has even become a defense argument for those who claim misinformation convinced them to storm the United States Capitol on January

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<sup>1</sup> See KATHLEEN STANSBERRY ET AL., PEW RSCH. CTR., HUMANITY IS AT A PRECIPICE; ITS FUTURE IS AT STAKE 5 (2019), <https://www.pewresearch.org/internet/2019/10/28/3-humanity-is-at-a-precipice-its-future-is-at-stake/>; see also Max Roser et al., *Internet, OUR WORLD IN DATA*, <https://ourworldindata.org/internet> (last visited Nov. 18, 2022).

<sup>2</sup> See Dan Froomkin, *Fox News Isn't News*, NBC NEWS (Apr. 9, 2022), <https://www.nbcnews.com/think/opinion/fox-news-study-comparing-fox-cnn-highlights-cable-tvs-harm-rcna23620>.

<sup>3</sup> See generally Sadiq Muhammad T & Saji K. Mathew, *The Disaster of Misinformation: A Review of Research in Social Media*, 13 INT'L J. DATA SCI. ANALYTICS 271 (2022).

<sup>4</sup> Cf. Froomkin, *supra* note 2.

<sup>5</sup> Craig Silverman et al., *Facebook Hosted Surge of Misinformation and Insurrection Threats in Months Leading Up to Jan. 6 Attack, Records Show*, PROPUBLICA (Jan. 4, 2022), <https://www.propublica.org/article/facebook-hosted-surge-of-misinformation-and-insurrection-threats-in-months-leading-up-to-jan-6-attack-records-show>; Amna Nawaz et al., *How Disinformation Around Jan. 6 Riot Has Downplayed Violence, Divided Americans*, PBS NEWS HOUR (Jan. 5, 2022), <https://www.pbs.org/newshour/show/how-disinformation-around-jan-6-riot-has-downplayed-violence-divided-americans>.

6, 2021.<sup>6</sup> In addition, misinformation about COVID-19 has contributed to scores of preventable deaths.<sup>7</sup> In fact, misinformation about COVID-19 during the pandemic was so rampant that even social media platforms—once staunchly opposed to enforcing almost any kind of posting restriction<sup>8</sup>—reluctantly began to moderate the COVID-19 content posted to their websites.<sup>9</sup> If the past several years have taught us anything it is that misinformation can be deadly—for individuals and for the stability of democracy.<sup>10</sup>

The cruel irony of our current milieu is that many of us have involuntarily subsidized the spread of misinformation.<sup>11</sup> While it is true that the mere use of social media websites and viewing advertisements can subsidize the platforms that facilitate the spread of misinformation,<sup>12</sup> there is an even more direct misinformation subsidy: cable television subscription fees. And there is likely no better story detailing the absurdity of the cable subsidization regime than the story of One America News Network, or OAN.<sup>13</sup>

OAN's story began in 2013, when Robert Herring, Sr. founded OAN as a

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<sup>6</sup> David Klepper, *Defense for Some Capitol Rioters: Election Misinformation*, AP NEWS (May 29, 2021), <https://apnews.com/article/dc-wire-donald-trump-health-coronavirus-pandemic-election-2020-b7e929bb8d49b77d0922eae7ad3794b7>; Alan Feuer, *Blaming Trump, Jan. 6 Suspect Says He Fell Down a 'Rabbit Hole' of Lies*, N.Y. TIMES (Apr. 13, 2022), <https://www.nytimes.com/2022/04/13/us/politics/jan-6-suspect-trump.html>.

<sup>7</sup> See Leonardo Bursztyn et al., *Misinformation During a Pandemic* 31–32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27417, 2020).

<sup>8</sup> See Evelyn Douek, *The Internet's Titans Make a Power Grab*, ATLANTIC (Apr. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/pandemic-facebook-and-twitter-grab-more-power/610213/>.

<sup>9</sup> Marty Swant, *As Facebook Moderates Covid-19 Misinformation with AI, Advertisers Navigate Brand Safety During the Crisis*, FORBES (May 14, 2020), <https://www.forbes.com/sites/martyswant/2020/05/14/as-facebook-moderates-covid-19-misinformation-with-ai-advertisers-navigate-brand-safety-during-the-crisis/?sh=671904875f47>; Marc Faddoul, *COVID-19 Is Triggering a Massive Experiment in Algorithmic Content Moderation*, BROOKINGS TECHSTREAM (Apr. 28, 2020), <https://www.brookings.edu/techstream/covid-19-is-triggering-a-massive-experiment-in-algorithmic-content-moderation/>.

<sup>10</sup> See generally Bursztyn et al., *supra* note 7 (contrasting death rates of viewers of a Fox News show that downplayed the risks of COVID-19 with a Fox News show that did not downplay the risks of COVID-19); Jeffrey Layne Blevins et al., *Shouting into the Wind: Medical Science Versus "B.S." in the Twitter Maelstrom of Politics and Misinformation About Hydroxychloroquine*, SOC. MEDIA & SOC'Y, Apr.–June 2021, at 1.

<sup>11</sup> See generally Verizon & Verizon Wireless, Reply Comment on Framework for Broadband Internet Service Open Internet Rulemaking (Sept. 15, 2014), [https://www.verizon.com/about/sites/default/files/09\\_15\\_14\\_VZ\\_VZW\\_Open\\_Internet\\_Re mand\\_reply\\_comments.pdf](https://www.verizon.com/about/sites/default/files/09_15_14_VZ_VZW_Open_Internet_Re mand_reply_comments.pdf).

<sup>12</sup> See Tom Relihan, *Social Media Advertising Can Boost Fake News – or Beat It*, MIT SLOAN SCH. OF MGMT. (Dec. 19, 2018), <https://mitsloan.mit.edu/ideas-made-to-matter/social-media-advertising-can-boost-fake-news-or-beat-it>.

<sup>13</sup> See generally John Shiffman, *How AT&T Helped Build Far-Right One America News*, REUTERS (Oct. 6, 2021), <https://www.reuters.com/investigates/special-report/usa-oneamerica-att/>.

conservative news provider after AT&T executives pitched the idea of creating another conservative news network to him.<sup>14</sup> AT&T's executives were explicit that they wanted to create a conservative rival to Fox News Network, and they found just that in OAN. Just two short years later, in 2015, OAN began its rise to conservative-news-world prominence supported largely by AT&T's per-subscriber subsidy.<sup>15</sup>

OAN's main draw was its consistent, positive coverage of President Trump's presidential campaign and presidency.<sup>16</sup> The channel's prominence also came on the heels of President Trump's affinity for both OAN's rose-tinted portrayal of his presidency and OAN's broadcasting conspiracy theories in-line with those pushed by President Trump and his political allies.<sup>17</sup> This favorable, intentionally myopic<sup>18</sup> reporting led to reciprocity: OAN would say nice things about President Trump and President Trump would direct his base to consume content from OAN—in fact, President Trump explicitly did so at least 120 times on Twitter in just the last two years of his administration.<sup>19</sup>

This symbiotic, often conspiratorial, relationship grew stronger in the waning days of the Trump Administration.<sup>20</sup> In response, OAN's popularity surged. After President Biden won the 2022 Presidential Election, OAN repeated the assertion that President Biden had not in fact won the election (known colloquially as the “Big Lie”).<sup>21</sup> OAN maintained this posture even after Fox

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<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*; accord Tatyana Hopkins, *Social Media Companies Profiting from Misinformation*, GWToday (June 19, 2020), <https://gwtoday.gwu.edu/social-media-companies-profiting-misinformation>.

<sup>18</sup> Aaron Rugar, *The Other Conservative News Network Trump Keeps Tweeting About, Explained*, VOX (May 13, 2019), <https://www.vox.com/2019/5/13/18617594/trump-one-america-news-network-explained> (“Robert Herring – owner of Herring Broadcasting – went as far as to ban OANN employees from covering any polls that didn’t show Trump in the lead. In turn, Trump repeatedly promoted OANN’s Trump-favorable polling.”); *see also* Margaret Sullivan, *Trump’s Favorite Channel, One America News, Was Never ‘News’ at All*, WASH. POST (Oct. 10, 2021), [https://www.washingtonpost.com/lifestyle/media/one-america-news-herring-trump-reuters/2021/10/08/b439a2f8-283d-11ec-8d53-67cfb452aa60\\_story.html](https://www.washingtonpost.com/lifestyle/media/one-america-news-herring-trump-reuters/2021/10/08/b439a2f8-283d-11ec-8d53-67cfb452aa60_story.html) (“‘If there was any story involving Trump, we had to only focus on either the positive information or basically create positive information,’ Marissa Gonzales, an former OAN producer who resigned last year, told Reuters. ‘It was never, never the full truth.’”).

<sup>19</sup> *See generally* Shiffman, *supra* note 13 (“The next day, Herring tweeted: ‘If anyone thinks we will throw the best President America has had, in my 79 years, under the bus, you are wrong. We will continue to give him honest coverage.’”).

<sup>20</sup> *See* Rugar, *supra* note 18 (explaining that OAN “amplifie[d] right-wing conspiracy theories” favorable to the Trump administration).

<sup>21</sup> Tom Porter, *Pro-Trump OAN Network Admits There Was No Widespread Fraud in Georgia in the 2020 Election After Extensively Pushing the Claim*, INSIDER (May 10, 2022),

News affirmed that President Biden had won the election.<sup>22</sup> Similarly, OAN reported that “Antifa” members had been behind the January 6<sup>th</sup> insurrection at the United States Capitol Building—not Trump supporters—even after the FBI had debunked this myth.<sup>23</sup> OAN’s popularity among right-wing news consumers jumped specifically because its dissemination of these lies was what its viewers wanted to hear, regardless of the truth behind the on-air statements.<sup>24</sup>

Tragically, OAN’s latest boons came at the cost of the company’s cable viability. While OAN’s carefully curated lies built a multi-million viewership following, those lies led to quiet article retractions<sup>25</sup> and lawsuits.<sup>26</sup> Less than a decade after OAN burst into the cable mainstream, OAN’s lies have proven to likely be its undoing as both DirecTV and Verizon have announced they will be dropping OAN from their cable packages.<sup>27</sup> In that short period, OAN burst into the White House press room and busted back into the fringes of the Internet.<sup>28</sup>

At the core of OAN’s story as a far-right-wing Icarus of sorts is the contractual and regulatory structure that made it all possible. OAN’s reason for existence purportedly came from AT&T executives who explicitly told Herring, Sr. that “they wanted a conservative network” to bolster their cable package’s political spectrum reach.<sup>29</sup> From that point, AT&T, through its then-cable subsidiary,<sup>30</sup>

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<https://www.businessinsider.com/pro-trump-oan-admits-no-election-fraud-georgia-2020-2022-5>.

<sup>22</sup> See generally Shiffman, *supra* note 13.

<sup>23</sup> FBI ‘Can’t Find Proof’ of Antifa Involvement in Jan. 6 Protests Despite Mountains of Video Evidence, OAN, <https://www.oann.com/fbi-cant-find-proof-of-antifa-involvement-in-jan-6-protests-despite-mountains-of-video-evidence/> (Mar. 4, 2021).

<sup>24</sup> See generally Shiffman, *supra* note 13 (noting OAN application downloads increasing in the millions after these stances).

<sup>25</sup> Mikael Thalen, *Pro-Trump Outlet OAN Is Deleting All Its Articles About Dominion*, DAILY DOT (Jan. 21, 2021), <https://www.dailydot.com/debug/pro-trump-outlet-oan-is-deleting-all-its-articles-about-dominion/>.

<sup>26</sup> Sharon Pruitt-Young, *The 2020 Election Is Back in Court, as Dominion Sues Conservative Media Outlets*, NPR (Aug. 10, 2021), <https://www.npr.org/2021/08/10/1026509404/dominion-sues-conservative-media-oan-newsmax-2020-election>.

<sup>27</sup> Caleb Ecarma, *Trump-Loving One America News Is About to See Its Distribution Further Dwindle*, VANITY FAIR (July 27, 2022), <https://www.vanityfair.com/news/2022/07/one-america-news-network-distribution-dwindle>; Jon Brodtkin, *OAN Sues AT&T, Says Being Kicked Off DirecTV May Force It to Shut Down*, ARS TECHNICA (Mar. 15, 2022), <https://arstechnica.com/tech-policy/2022/03/oan-sues-att-says-being-kicked-off-directv-may-force-it-to-shut-down/>.

<sup>28</sup> See generally Jessica Bursztynsky, *YouTube Suspends OANN for a Week After It Posted Fake Covid-19 Cure*, CNBC, <https://www.cnbc.com/2020/11/24/youtube-suspends-oann-for-a-week-after-it-posted-fake-covid-19-cure.html>, (Nov. 24, 2020).

<sup>29</sup> Brodtkin, *supra* note 27.

<sup>30</sup> Catie Keck, *AT&T Has Officially Spun Off DirecTV, Which Is Now Its Own Business*, VERGE (Aug. 3, 2021), <https://www.theverge.com/2021/8/3/22608577/att-directv-tpg-deal-u-verse-att-tv-new-company>.

DirecTV, became the financial backbone of the then-fledgling OAN.<sup>31</sup> Confidential contracts between AT&T and OAN contributed millions to OAN's revenue.<sup>32</sup> In fact, in 2020, OAN's contract with AT&T provided ninety percent of Herring Networks' Income.<sup>33</sup>

Without AT&T's support, OAN could not survive on its own advertising revenue.<sup>34</sup> In fact, OAN's main revenue stream came from fees that DirecTV and Verizon collected from subscribers—even if those subscribers never once watched, much less approved of, OAN's content—simply because those individuals had subscribed to their cable services.<sup>35</sup> Putting this in perspective, AT&T agreed to pay OAN's parent company twelve cents per DirecTV subscriber each month over half a decade, and at that time DirecTV boasted roughly twenty million subscribers.<sup>36</sup> Verizon had a similar deal based on per-subscriber fees that Verizon collects.<sup>37</sup> As one commentator put bluntly, pulling those fees was “the death blow for the network.”<sup>38</sup>

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<sup>31</sup> Shiffman, *supra* note 13 (It is important to note that AT&T has repeatedly denied this assertion, though documentation and reports from reputable news sources have asserted otherwise. “AT&T issued a statement saying it has ‘never had a financial interest in OAN’s success and does not “fund” OAN’. . . According to an AT&T filing citing Herring’s number, those fees would total about \$57 million.”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see also Jared Gans, *OAN Officially Dropped by Verizon, Its Last Major Carrier*, ABC27, <https://www.abc27.com/news/us-world/politics/oan-officially-dropped-by-verizon-its-last-major-carrier-2/> (July 22, 2022) (discussing the significance of OAN being dropped by DirecTV and Verizon); Dominick Mastrangelo, *90 Percent of OAN Revenue in 2020 Came From AT&T Contract: Report*, THE HILL (Oct. 6, 2021), <https://thehill.com/homenews/media/575572-90-percent-of-oan-revenue-in-2020-came-from-att-contract-report/>.

<sup>34</sup> See generally Angelo Carusone (@GoAngelo), TWITTER (Oct. 6, 2021), <https://twitter.com/GoAngelo/status/1445858337673781249?s=20>.

<sup>35</sup> Shiffman, *supra* note 13; Jeremy W. Peters & Benjamin Mullin, *OAN, a Dependable Trump Promotor Faces a ‘Death Blow’*, N.Y. TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/business/oan-troubles.html>.

<sup>36</sup> Carusone, *supra* note 34.

<sup>37</sup> Peters & Mullin, *supra* note 35 (“OAN’s remaining audience will be small. The network will soon be available only to a few hundred thousand people who subscribe to smaller cable providers, such as Frontier and GCI Liberty . . . OAN also sells its programming directly to users through its OAN Live and KloudTV streaming platforms, but those products most likely provide a fraction of the revenue generated by traditional TV providers.”).

<sup>38</sup> *Id.* (This isn’t to say that OAN took the cancellation in stride. Instead, OAN publicly fought for its cable-TV-life. In fact, OAN hosts encouraged viewers to dig up “dirt” on AT&T Chairman William Kennard, who had previously was the chair of the Federal Communications Commission under Barack Obama.); Brodtkin, *supra* note 27 (“You bring me concrete evidence of whatever it may be: cheating on his taxes, cheating on his wife, saying racial slurs against white people . . . Whatever it may be. Find it for me. Bring it, and we will air it.”).

While one can debate the dubious quality of OAN's opinion-based programming, the marketplace reality OAN faced is straightforward. OAN's programming lacked the ability to attract a sufficiently large and diverse audience to stay afloat.<sup>39</sup> In the traditional self-sustaining advertising model employed by broadcasters on non-cable media—such as radio stations or more novel Internet streaming platforms—a channel will fail without a sufficient consumer base because profit is based largely on advertisement sales.<sup>40</sup> OAN's speech was entirely dependent on an external subsidy to exist as a cable channel. This is particularly important because OAN ran far fewer advertisements than its competition. From our understanding, OAN explicitly rejected the familiar advertisement model used by other media forms. In fact, this was likely an intentional choice to ensure that OAN had greater freedom from the kinds of commercial backlash that could come from its viewpoints.<sup>41</sup>

The basis of OAN's support came by including it in a bundle package that users had little choice over. Without the subsidization-state created by regulation and cemented in contracts by cable companies, OAN's rise would likely have never happened.<sup>42</sup> Ironically, without DirecTV's decision to pull the plug on OAN, its fall from power may never have happened.<sup>43</sup> In other words, the subsidization of OAN's lies came from the backs of subscribers who likely suffered from those same lies, all without those subscribers ever knowing that they had been coerced into supporting OAN's ability to remain a cable channel.<sup>44</sup> OAN's quick rise and crashing death are due to the United States' cable regulatory subsidization regime.

But this subsidy scheme goes far beyond OAN. In the United States, cable subscribers are offered a package or bundle of programming.<sup>45</sup> The offerings presented by bundle packages are negotiated with the threat of blackouts and other detrimental negotiation tactics because of the monopoly power of

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<sup>39</sup> See Justin Peters, *Farewell to OAN, the Network for Loons and the President They Loved*, SLATE (July 31, 2022), <https://slate.com/business/2022/07/oan-verizon-fios-directv-cable-trump.html>.

<sup>40</sup> See Robert Morello, *How Do Radio Stations Make a Profit?*, CHRON., <https://smallbusiness.chron.com/radio-stations-make-profit-57480.html> (Jan. 28, 2019).

<sup>41</sup> Shiffman, *supra* note 13 (“The network’s reliance on fees from cable, satellite and streaming providers, instead of commercials, inoculates it from advertiser boycotts faced by counterparts such as Fox News and rightwing online news site Breitbart, in McCabe’s view.”).

<sup>42</sup> *Id.* (“‘If Herring Networks, for instance, was to lose or not be renewed on DirecTV, the company would go out of business tomorrow,’ OAN lawyer Patrick Nellies told the court, a transcript shows.”).

<sup>43</sup> See generally *id.*

<sup>44</sup> See Ecarma, *supra* note 27 (“[OAN] was able to exist all these years in its current form only because it was being subsidized by AT&T/DirecTV and Verizon . . .”).

<sup>45</sup> See, e.g., Rachel Oaks, *Best TV and Internet Bundles and Deals for October 2022*, CABLETV (Sept. 30, 2022), <https://www.cabletv.com/blog/best-tv-internet-deals>.



broadcast companies.<sup>46</sup> These bundles then are offered to the consumer containing many channels the consumers will never touch.

This raises a simple question. Why does the regulatory state continue to compel, or allow private companies to compel, private citizens to support speech they either don't want or don't agree with? As a dedicated batch of First Amendment defenders, we the authors, do not object to conservative cable channels or their liberal-leaning counterparts voicing their preferred viewpoints or content. But we also do not believe that the government should compel consumers to support those viewpoints with an artificial subsidy enforced through state action.

The traditional view is that speech should rise or fall on its own merit in the marketplace of ideas.<sup>47</sup> But this idealized life-cycle is artificially prevented in the media environment created by cable providers.<sup>48</sup> Cable, as an industry relies on the consumer to support programming and content (thus speech) by forcing consumers to pay for content as a package. Citizens who want access to the public sphere must pay for the access they want. But, in the cable industry, consumers also must pay for all other content or speech they don't use or to which they may object.<sup>49</sup>

Importantly though, OAN's story has reignited discussion over this long-simmering regulatory paradox.<sup>50</sup> Consumers who want access to some cable channels are put into a box where they are forced to pay for programming they either do not want or do not use. The franchise arrangements between a municipality and the local cable provider mean that these arrangements and content mandates are being supported by state action.<sup>51</sup> In the case of OAN, or other news channels, this means citizens are being compelled, with the approval and involvement of a state actor, to directly subsidize political speech with which they may disagree. Put in context, roughly ninety million AT&T/DirecTV cable subscribers in the United States are compelled through state action to

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<sup>46</sup> See e.g., Jared Newman, *YouTube TV vs. Disney: 5 Things to Know About the Blackout*, HIVE (Dec. 16, 2021), <https://www.techhive.com/article/579902/youtube-tv-vs-disney-5-things-to-know-about-the-possible-blackout.html>.

<sup>47</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also David Schultz, *Marketplace of Ideas*, MIDDLE TENN. STATE UNIV. (2017), <https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas> (last visited Nov. 29, 2022).

<sup>48</sup> See Gans, *supra* note 33.

<sup>49</sup> See Press Release, FCC, Media Bureau Releases Report on Cable a la Carte Pricing Model (Nov. 19, 2004).

<sup>50</sup> See Ecarma, *supra* note 27.

<sup>51</sup> See Implementation of Section 621(a)(1) of the Cable Communication Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, 34 FCC Rcd. 6844, 6845 (2019).

subsidize the speech and media content used by a mere two million subscribers.<sup>52</sup> And cable providers, as middle men, have little incentive to be selective in the channels they include in the bundles they offer, as the costs for adding channels are passed to the consumer while cable companies are able to advertise “more channels.”

While much of the debate about misinformation in the news concerns objections to ideological viewpoints in news content, advocates for “cleaner” a la carte cable packages have also included groups opposed to indecent sexual or profane content.<sup>53</sup> The uncommon bedfellows represented by the groups advocating for a la carte cable hold a common thread: opposition to promoting speech with which one disagrees.<sup>54</sup>

We propose that the FCC should mandate that cable providers offer an a la carte packaging of cable, where consumers can choose content independently on a network-by-network basis. Our philosophical touchstone is a familiar one: speech should succeed or fail on its own merits, and proponents are the determinative champions of its survival. Broadcaster companies argued the same in *Quincy Cable*, stating that “must-carry” rules infringed on their Free Speech rights.<sup>55</sup> “Must-carry” rules can be defined as requiring some channels to always be included, similar to what broadcast bundles are doing now.<sup>56</sup> It should not be on the consumer’s shoulders’ to keep that speech collectively and involuntarily on metaphorical life-support, despite lacking numerosity of advocates. This rings all the truer when the speech being subsidized is explicitly political in nature, affirming views that are so narrowly held that they cannot survive on their own merit in the media format that spreads them to their consumer base.

In Part I, we explore the cable industry and discuss some of its historical controls. In Part II, we discuss the role of “must-carry”, and “retransmission consent” as well as the critical cable regulation decision in *Turner Broadcasting System, Inc., v. Federal Communications Commission*. In Part III, we contrast cable regulations with those of broadcast and internet, while in Part IV, we discuss the marketplace of ideas concept inside of a subsidized public sphere. In Part V, we propose a la carte cable as a way to reduce the subsidy of a range of cable programming, including cable news, where misinformation is a problem. We conclude by reiterating this simple point—speech that cannot stand on the backs of its proponents should not stand on the backs of those who do not choose

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<sup>52</sup> See Justin Baragona, *MAGA Cable Channel OAN Could Become Impossible to Find on TV*, DAILY BEAST, <https://www.thedailybeast.com/maga-cable-channel-oan-could-become-impossible-to-find-on-tv> (July 21, 2022).

<sup>53</sup> John Eggerton, *PTC Launches Cable a la Carte Calculator*, NEXT TV (Sept. 25, 2007), <https://www.nexttv.com/news/ptc-launches-cable-la-carte-calculator-30743>.

<sup>54</sup> See *id.*

<sup>55</sup> *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1437–38 (D.C. Cir. 1985).

<sup>56</sup> See *id.* at 1441–42.

to support it.

#### I. UNDERSTANDING THE CABLE REGIME: CABLE, RETRANSMISSION, AND MUST-CARRY

Cable stands between the broadcast industry and the internet, not just as a content delivery system, but also within the regulatory sphere. Cable, like broadcasting, has substantially consolidated its ownership horizontally and vertically since deregulation, but cable is still subject to a range of content regulations, including some legacy provisions, including must-carry and retransmission consent.<sup>57</sup>

Historically, the United States has many examples of direct government subsidies for the distribution of political speech going as far back as the Postal Act where newspapers—themselves often subsidized by political parties during the printing process—were given a direct government subsidy in the form of the 2<sup>nd</sup> Class postal rate.<sup>58</sup> The government directly subsidized the distribution of political information, a value clearly reflective of the constitutive choices of a communication policy that associated with the free speech provisions of the First Amendment.<sup>59</sup>

Throughout the age of electronic media, government subsidy often took the form of operations utilizing regulated monopolies.<sup>60</sup> Both the telegraph under Western Union and the POTS telephone system of “Ma Bell” were designed and implemented as monopoly wireline services.<sup>61</sup> Almost 100 years after the Radio Act, broadcast stations continue to have a significant subsidy in the form of a local monopoly license to use a specific frequency in a localized market area.<sup>62</sup>

After the FCC’s adoption of a deregulatory approach, marketplace

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<sup>57</sup> David McCabe, *Bill Clinton’s Telecom Law: Twenty Years Later*, THE HILL (Feb. 7, 2016), <https://thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later/>.

<sup>58</sup> See GEOFFREY COWAN & DAVID WESTPHAL, CT<sub>R</sub>. ON COMM’N LEADERSHIP & POL’Y, PUBLIC POL’ICY AND FUNDING THE NEWS 9 (2010).

<sup>59</sup> See PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 45 (2004).

<sup>60</sup> John Leslie King & Joel West, *Ma Bell’s Orphan: US Cellular Telephony, 1947-1996*, 26 TELECOMM. POL’Y, 189, 192 (2002) (discussing the history of government subsidization for telecommunication companies).

<sup>61</sup> See *id.* (“In exchange for AT&T’s commitment to pursue the goal of universal US telephone service, the US government agreed to provide AT&T with immunity from anti-trust prosecution . . .”).

<sup>62</sup> Corinne Schweizer et al., *Blast from the Past? A Comparative Analysis of Broadcast Licensing in the Digital Era*, 4 J. OF INFO. POL’Y, 507, 512 (2014) (stating that the United States government is one of six countries that awards certain frequencies to applicants for licensing).

mechanisms were seen as a more appropriate methodology for dictating the programming of individual broadcast stations.<sup>63</sup> Since the 1980s the government has used indirect subsidies in the form of increased ownership limits or permitting joint operating arrangements to help broadcasters be self-sufficient.<sup>64</sup> The 1996 Telecommunications Act was a culmination of deregulatory philosophy that fundamentally altered the media environment in the United States by taking a laissez-faire marketplace approach by deregulating significant elements of the phone, broadcast, and cable industries.<sup>65</sup>

Despite the fact that post deregulation broadcasters were supported primarily through indirect subsidy, the cable industry was able to both consolidate ownership nationally and keep its locally implemented monopoly protections.<sup>66</sup> Cable providers also benefit from a monopoly arrangement, namely the franchises they have with municipalities, a regulatory construction that dates back to the earliest Community Access Television Systems.<sup>67</sup> Likewise, as broadcaster speech regulations were dialed back or curtailed substantially in line with a deregulatory and even later a competition philosophy of regulation, the cable industry was somehow left with significant content-based regulations in place.<sup>68</sup> Ideas like must-carry, retransmission, and the per-subscriber fees for content, some of which are more than fifty-years-old, continue to this day.

#### A. Cable: A Quick Romp Through Its Regulatory History

Cable is a system of providing television programming and other services to consumers via radio frequency signals transmitted directly to people's televisions through fixed fiber or coaxial cables as opposed to the over-the-air method used in traditional television broadcasting (via radio waves) in which a reception antenna is required.<sup>69</sup> Originally, the primary function of cable

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<sup>63</sup> See generally ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* (Oxford Univ. Press, 1st ed. 1989).

<sup>64</sup> CONG. RSCH. SERV., RS22168, *THE CORPORATION FOR PUBLIC BROADCASTING: FEDERAL FUNDING AND ISSUES 1* (2017) ("The CPB engaged the consulting firm of Booz & Company to explore possible alternatives to the federal appropriation to CPB. Among its findings, the report stated that ending federal funding for public broadcasting would severely diminish, if not destroy, public broadcasting service in the United States.").

<sup>65</sup> McCabe, *supra* note 57.

<sup>66</sup> Cf. Susan P. Crawford, *The Looming Cable Monopoly*, *YALE L. & POL'Y REV. INTER ALIA* (June 1, 2010), [https://ylpr.yale.edu/inter\\_alia/looming-cable-monopoly](https://ylpr.yale.edu/inter_alia/looming-cable-monopoly) (discussing the non-competitive nature within the cable industry and the ease of which they were able to upgrade their components compared to phone lines).

<sup>67</sup> See, e.g., RICHARD A. POSNER, *CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY* 1–2, 4 (1990), [https://www.rand.org/pubs/research\\_memoranda/RM6309.html](https://www.rand.org/pubs/research_memoranda/RM6309.html).

<sup>68</sup> See generally Michael Zarkin, *Cable TV Deregulation Reconsidered: An Exploration of Three Theses*, 17 *COMM. L. & POL'Y* 1 (2012).

<sup>69</sup> *Cable Television*, *ENCYCLOPEDIA BRITANNICA* (Feb. 27, 2019),

television was to facilitate reception of local television stations by persons who could not receive a satisfactory over-the-air signal because of their location.<sup>70</sup> Cable television transmission evolved into providing signals from distant television stations to areas where the signals would not otherwise be available over the air.<sup>71</sup> The majority of cable television programming initially consisted of the retransmission of signals broadcast by others rather than programs originated by cable systems or other non-broadcasters.<sup>72</sup> Today, most cable programming originates from sources other than over-the-air broadcast signals.<sup>73</sup>

Cable is also a highly concentrated industry. 2015 FCC data demonstrated the top 13 cable companies account for 95% of pay-tv subscribers in the United States, making up 94.8 million subscriptions.<sup>74</sup> Cable content, despite its numerical diversity, reflects this concentration as well.<sup>75</sup> The top 50 networks, which are labeled as ‘must have’, account for 81.4% of the total prime time ratings.<sup>76</sup> Ten owners account for 95% of top-50 networks’ ratings.<sup>77</sup> The top six competitors of these ten owners control 75% of total cable and broadcast networks’ prime-time viewership ratings and make up 81% of advertising revenues.<sup>78</sup>

With so much of the viewership contained in the same few cable companies, the only offered way to access the content consumers want is through bundles. Nine studios dominated the U.S. cable programming industry in March 2016. Disney, Fox, NBC Universal, Time Warner Inc., and Viacom account for 68% of the \$54.8 billion industry, while Discovery, CBS, AMC Networks, and Scripps Networks account for another 10% of the industry.<sup>79</sup> Furthermore, in

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<https://www.britannica.com/technology/cable-television>.

<sup>70</sup> Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 L. & CONTEMP. PROBS. 77, 86, 88 (1981).

<sup>71</sup> *See id.* at 89.

<sup>72</sup> *See id.* at 81 (discussing the shift of cable providers in the 1980s from using retransmission of various broadcast signals to providing non-broadcast channels such as movies and sport events).

<sup>73</sup> *See id.*

<sup>74</sup> Bruce Leichtman, *FCC Workshop on the State of the Video Marketplace*, LEICHTMAN RSCH. GRP. 2 (Mar. 21, 2016), <https://slideplayer.com/slide/10530507/>.

<sup>75</sup> *See* Marci L. Ryvicker, *State of the Video Marketplace*, WELLS FARGO 13 (Mar. 18, 2016), <http://slidetodoc.com/state-of-the-video-marketplace-marci-l-ryvicker/>.

<sup>76</sup> Tasneem Chipty, *Challenges Faced by Multichannel Video Programming Distributors*, FCC 7 (Mar. 21, 2016), [https://transition.fcc.gov/bureaus/mb/docs/policy/video\\_marketplace/presentation\\_ChIPTy\\_2016.pdf](https://transition.fcc.gov/bureaus/mb/docs/policy/video_marketplace/presentation_ChIPTy_2016.pdf).

<sup>77</sup> *See id.* at 8.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> Ryvicker, *supra* note 75.

March 2018, about 56% of U.S. cable consumers cite cable, telephone, and internet bundle deals as among the top three reasons to keep cable.<sup>80</sup> New competition from other content providers, including streaming services led to predictions stating that overall pay-tv subscriptions will steadily decline until it drops below 97 million subscribers during 2022.<sup>81</sup> While many subscribers/customers may object to the programming they are getting, program producers maintain that they can only continue to produce the programming if their service is included in a bundle to ensure a steady annual revenue stream.<sup>82</sup>

### 1. *The Prime-Time Access Rule*

However, this kind of off-on faucet-style controls have historical analogues. Historically, the cable industry has had some significant controls placed on its content; however, the FCC's deregulatory efforts have repealed some of these provisions.<sup>83</sup> One example of this deregulatory streak is the Prime-Time Access Rule's (PTAR) demise. The PTAR was designed to promote independent sources of television programming and prevented the networks from dictating affiliate programming choices during the whole of prime time.<sup>84</sup> The PTAR provided independent stations at the local level an opportunity to acquire off network entertainment programs, and to run those programs counter to network affiliate stations, providing local independents a key opportunity daily to generate revenue.<sup>85</sup> When cable providers began to import network affiliates from outside of local television markets, they often found themselves in conflict with the PTAR.<sup>86</sup> In response, network affiliate stations often turned to local newscasts for a programming option.<sup>87</sup>

The PTAR supported the growth of independent local television stations by providing them greater access to popular off-network programming. With access to better quality programming in place, independent stations also became more

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<sup>80</sup> Rani Molla, *Americans Are Still Paying for Cable Because It's Bundled with Their Internet*, VOX (Mar. 20, 2018), <https://www.vox.com/2018/3/20/17139756/reasons-americans-us-pay-cord-cable-tv>.

<sup>81</sup> See generally Alec Tefertiller, *Media Substitution in Cable Cord-Cutting: The Adoption of Web-Streaming Television*, 62 J. OF BROAD. & ELEC. MEDIA 390 (2018).

<sup>82</sup> See generally William James Adams & Janet L. Yellen, *Commodity Building and the Burden of Monopoly*, 90 Q. J. OF ECON. 475 (1976).

<sup>83</sup> Robert G. Finney, *Prime Time Access Rule*, in 3 ENCYCLOPEDIA OF TELEVISION 1818 (2005).

<sup>84</sup> See *id.*; *Prime Time Access Rule Debate*, C-SPAN (June 5, 1991), <https://www.c-span.org/video/?18351-1/prime-time-access-rule-debate>.

<sup>85</sup> Finney, *supra* note 83; C-SPAN, *supra* note 84.

<sup>86</sup> See Finney, *supra* note 83.

<sup>87</sup> See *id.*

marketable to cable providers.<sup>88</sup> For example, WTBS-Atlanta was a local independent station owned by Ted Turner that used its catalog of old movies and sports programming.<sup>89</sup> Turner then offered the local broadcast affiliate to local cable providers all over the United States as a “superstation.”<sup>90</sup> Following the success of WTBS, WGN-Chicago, WTVT-Milwaukee, and WOR-New York followed the “superstation” model, turning their small independent local television stations into national scale cable provider ready programming hubs.<sup>91</sup>

Importantly, while the PTAR protected local broadcast stations, that protection was not enough to keep the rule alive. During the FCC’s shift to a deregulatory stance, the agency concluded that the PTAR was not necessary.<sup>92</sup> Specifically, the FCC concluded that the rule imposed costs by “placing artificial restraints on what programming network affiliates in the top 50 prime time markets could show during the access period.”<sup>93</sup> Ironically, the growth of cable programming, which included the superstations, also expanded the competition against local independent stations and was cited by the agency as a justification for repeal of the PTAR.<sup>94</sup>

## 2. *The Syndicated Exclusivity Rules*

During the same time period, cable’s retransmission of distant broadcast signals led to the adoption of the Syndicated Exclusivity Rules (Synd-Ex Rules).<sup>95</sup> The first syndicated exclusivity rule was promulgated by the FCC in 1972 and adopted as a result of a “Consensus Agreement” that was negotiated among the cable, broadcast, and program production industries in order to facilitate the passage of copyright legislation.<sup>96</sup> Shortly after Congress established a compulsory license system in 1976, the FCC began an inquiry to review the “purpose, effect, and desirability of” the syndicated exclusivity rules.<sup>97</sup> In 1979, the FCC adopted the Report on Cable Television Syndicated

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<sup>88</sup> Chad Whittle, *Ted Turner’s SuperStation WTBS: An Examination of Local News Coverage of America’s First SuperStation in the Atlanta Journal-Constitution; 1970–1989*, 21 AM. COMM’N J. 1, 2 (2019).

<sup>89</sup> *See id.* at 1.

<sup>90</sup> *See id.* at 4.

<sup>91</sup> *See id.* at 1.

<sup>92</sup> FCC, REP. NO. DC-95-104, FCC REPEALS PTAR RULE 2 (1995).

<sup>93</sup> *See id.* at 1.

<sup>94</sup> *See id.* (discussing the growth in independent stations since the rule was adopted).

<sup>95</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-441, BROADCAST EXCLUSIVITY RULES: EFFECTS OF ELIMINATION WOULD DEPEND ON OTHER FEDERAL ACTIONS AND INDUSTRY RESPONSE 7–8 (2015).

<sup>96</sup> *See* Cable Television Report and Order, 36 F.C.C.2d 143, 166–67 ¶ 65 (1972).

<sup>97</sup> Cable Television Syndicated Program Exclusivity Rules, 61 F.C.C.2d 746, 746 ¶ 1 (1976).

### Exclusivity Rules.<sup>98</sup>

Under the syndicated exclusivity rule, a broadcaster could carry network and syndicated programming on its local television station(s) only with the permission of the networks or syndicators that owned or held the rights to that programming.<sup>99</sup> The ability of broadcasters to grant retransmission consent for cable carriage was governed by the terms of the network/affiliate agreement or by the syndication contract.<sup>100</sup> Because local broadcast stations pay for the right to air syndicated programming on their stations, cable systems sometimes offer channels that have also purchased that programming from a syndicator.<sup>101</sup> The rights to syndicated exclusivity go to the local broadcast station, and the station can request that repeated syndicated programming be blacked out when a competing channel offers it.<sup>102</sup> Typically, this costs a station extra when they are signing a syndication agreement.<sup>103</sup>

The FCC concluded that the network non-duplication and syndicated exclusivity rules should serve primarily as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.<sup>104</sup> The rule could be invoked by stations that elect must-carry as well as by those that elect retransmission consent in their local markets, even if they are not actually carried by the cable operator.<sup>105</sup> Thus, the network non-duplication and syndicated exclusivity rules required that the broadcaster possess a legitimate exclusivity contract prior to requesting a blackout.

The Syndicated Exclusivity Rules were similar in operation to the network non-duplication rules, which prevented duplication for network programming. The syndicated Exclusivity Rules applied only to commercial stations.<sup>106</sup> They allowed a local commercial broadcast television station or a distributor of syndicated programming to protect its exclusive distribution rights within a 35-mile geographic zone surrounding a television station's city of license, although the zone may not be greater than that provided for in the exclusivity contract

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<sup>98</sup> See generally Cable Television Syndicated Program Exclusivity Rules, 71 F.C.C.2d 951 (1979).

<sup>99</sup> See *id.* at 959 ¶ 26.

<sup>100</sup> See *id.* at 960 ¶ 27.

<sup>101</sup> See *id.* at 951–52 ¶¶ 2–3.

<sup>102</sup> See *id.* at 971 ¶ 58.

<sup>103</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-441, BROADCAST EXCLUSIVITY RULES: EFFECTS OF ELIMINATION WOULD DEPEND ON OTHER FEDERAL ACTIONS AND INDUSTRY RESPONSE 23 (2015).

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> DANA A. SCHERER, CONG. RSCH. SERV., R44473, WHAT'S ON TELEVISION? THE INTERSECTION OF COMMUNICATIONS AND COPYRIGHT POLICIES 1, 12–13 (2016).



between the station and syndicator.<sup>107</sup> Unlike the network non-duplication rule, however, the zone of protection was the same for smaller markets as it is for the top-100 markets.<sup>108</sup> With only a few exceptions,<sup>109</sup> a station that has obtained syndicated exclusivity rights in a program may request a cable operator to black out that program as broadcast by any other television station, and may request a satellite operator to provide such protection against any nationally distributed superstation.<sup>110</sup> Of course, cable or satellite systems were required to comply if properly notified in accordance with the rules.<sup>111</sup>

By requiring cable providers to black out duplicative programming carried on any distant signals they imported into a local market, the FCC network non-duplication and syndicated exclusivity rules provided a regulatory means for broadcasters to prevent cable providers from undermining contractually negotiated exclusivity rights.<sup>112</sup> Likewise, the FCC's sports blackout rule protected a sports team's or sports league's distribution rights to a live sporting event taking place in a local market.<sup>113</sup> As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applied only to the extent the rights holder has contractual rights to limit viewing of sports events.<sup>114</sup>

As part of its deregulatory stance, the FCC performed a cost-benefit analysis to determine whether retaining the Syndicated Exclusivity Rules would be in the public interest.<sup>115</sup> The FCC determined that eliminating the rules would have negligible effects on the size of local station audiences and consequently would not significantly harm any broadcaster.<sup>116</sup> The agency then concluded that, "when weighed against the minimal negative impact on broadcasters and program supply, the increase in diversity and number of new cable systems that the rules' elimination would allow supported their repeal."<sup>117</sup> Following this

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<sup>107</sup> See 47 C.F.R. §§ 76.101 note, 76.103, 76.123(b); 47 C.F.R. §§ 73.658(m), 76.53, 76.101 note (noting the Commission's rules provide such protection within a station's 35-mile geographic zone, which extends from the reference point of the community of license of the television station).

<sup>108</sup> See 47 C.F.R. § 76.101 note.

<sup>109</sup> See 47 C.F.R. § 76.123(a).

<sup>110</sup> See 47 C.F.R. § 76.123.

<sup>111</sup> See 47 C.F.R. § 76.123(a).

<sup>112</sup> See 47 C.F.R. § 76.123; Network Non-Duplication and Syndicated Exclusivity Rules, 79 Fed. Reg. 19849, 19850 (proposed Apr. 10, 2014) (to be codified 47 C.F.R. pt. 76).

<sup>113</sup> *Sports Blackouts*, FCC, <https://www.fcc.gov/consumers/guides/sports-blackouts> (Dec. 10, 2019).

<sup>114</sup> *Id.*

<sup>115</sup> Network Non-Duplication and Syndicated Exclusivity Rules, 79 Fed. Reg. 19849, 19850–51 (proposed Apr. 10, 2014) (to be codified 47 C.F.R. pt. 76).

<sup>116</sup> Network Non-Duplication and Syndicated Exclusivity Rules, 79 Fed. Reg. 19849, 19851 (proposed Apr. 10, 2014) (to be codified 47 C.F.R. pt. 76).

<sup>117</sup> See *id.*

logic, the FCC repealed the Syndicated Exclusivity Rules in 1981.<sup>118</sup> Though the FCC would later reissue the rule in a different form in 1988, this effectively deregulated what had been seen as a significant protection for local broadcasters in favor of cable providers.<sup>119</sup>

Although these rules were repealed, both were significant in establishing how cable providers chose programming options for a community.<sup>120</sup> In each case, however, the competition cable programming provided to local television stations, which made the rules necessary and viable in the first place, was later cited as rationale for the repeal of these rules as part of a larger deregulatory agenda by the agency.<sup>121</sup> Critically, however, this movement toward deregulation of cable programming did not extend to must-carry or retransmission consent.<sup>122</sup>

## II. MUST-CARRY, RETRANSMISSION, AND *TURNER*

The most significant content control imposed on cable providers was the “must-carry” provision.<sup>123</sup> After must-carry, its corollary rule, the retransmission consent rule, is another critical content control on cable content.<sup>124</sup> Understanding must-carry and retransmission consent requires an understanding of *Turner*, the landmark case that upheld the rules.<sup>125</sup> Both rules play an important role in cementing the cable channel “bundling” status quo.

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<sup>118</sup> See Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 FCC Rcd. 21688, 21711 (2000).

<sup>119</sup> See Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299, 5320 (July 15, 1988) (Synd-Ex rules were later reinstated in similar form in 1988); 47 C.F.R. § 76.101 (2022); *FCC Adopts Network Nonduplication, Syndicated Exclusivity and Sports Blackout Rules for Satellite Carriers*, DAVIS WRIGHT TREMAINE LLP (Nov. 9, 2000), <https://www.dwt.com/insights/2000/11/fcc-adopts-network-nonduplication-syndicated-exclu>; see also Tom Wheeler, *Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace*, FCC (Aug. 12, 2005), <https://www.fcc.gov/news-events/blog/2015/08/12/upgrading-media-rules-better-serve-consumers-todays-video-marketplace>.

<sup>120</sup> See generally *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd. 5177 (2005).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See generally Adam Pliska, *Turner Broadcasting v. FCC*, 13 BERKELEY TECH. L.J. 447 (1998) (discussing the Supreme Court’s analysis of the content control regulation).

<sup>124</sup> See CHARLES B. GOLDFARB, CONG. RSCH. SERV., RL 34079, A CONDENSED REVIEW OF RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS 2–3 (2007).

<sup>125</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

## A. Must-Carry

The FCC first instituted must-carry rules in 1965.<sup>126</sup> The FCC was concerned with the lack of access to local community means of self-expression.<sup>127</sup> As cable grew, people would no longer choose local channels, decreasing their revenue, and in extreme cases to the point that the local channels collapse.<sup>128</sup> This would be especially devastating to local channels in rural communities with otherwise limited television access.<sup>129</sup> Cable had the obvious upsides, such as providing a valuable, growing variety of television channels that were not otherwise accessible.<sup>130</sup> The FCC correctly identified the issue that cable growth was not only inevitable, but also incredibly beneficial to everyone.<sup>131</sup> However, local access would struggle to compete with the growing number of new national stations.<sup>132</sup>

The rules were designed to ensure that the local stations would still reach the cable users, hopefully ensuring an opportunity for local stations to compete with national stations.<sup>133</sup> Within a local area, cable companies were required to provide local commercial, noncommercial educational, and “significantly viewed” channels to local cable users.<sup>134</sup> The goal was explicitly to limit the expansion of broadcast, as demonstrated by other regulations denying cable access to the top-100 television markets.<sup>135</sup> Another related regulation required that original programming with advertisements only run them during “natural breaks” of the show, and banned advertisements on pay channels.<sup>136</sup>

*Quincy Cable Television, Inc., v. Federal Communications Commission* marked the reduction of the ability to strictly regulate must-carry laws. Quincy was a cable company that wanted to delete three local network channels in favor of other coverage.<sup>137</sup> Quincy argued it was a violation of their First Amendment rights to force them to carry channels where they wanted to carry channels to best suit their audience.<sup>138</sup>

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<sup>126</sup> See generally Thomas W. Hazlett, *Digitizing “Must-Carry” Under Turner Broadcasting v. FCC (1997)*, 8 SUP. CT. ECON. REV. 141 (2000).

<sup>127</sup> Besen & Crandall, *supra* note 70, at 82 (citing Auxiliary Services Inquiry n.13).

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See id.* at 78.

<sup>131</sup> *See id.* at 118.

<sup>132</sup> *See id.* at 82.

<sup>133</sup> Mark A. Conrad, *The Saga of Cable TV’s “Must-Carry” Rules: Will a New Phoenix Rise from the Constitutional Ashes?*, 10 PACE L. REV. 9, 9 (1990).

<sup>134</sup> *See id.* at 11.

<sup>135</sup> *See id.* at 15.

<sup>136</sup> Besen & Crandall, *supra* note 70, at 93.

<sup>137</sup> *Quincy Cable Television, Inc., v. FCC*, 768 F.2d 1434, 1446–47 (D.C. Cir. 1985).

<sup>138</sup> *Id.* at 1447.

[In short, our examination] of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech. . . . [T]he rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly, if a system's channel capacity is substantially or completely occupied by mandatory signals, the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers.<sup>139</sup>

The 1992 Cable Act updated the must-carry provisions.<sup>140</sup> Provisions accounting for market size and the availability of local broadcast channels were included.<sup>141</sup> Section 614 included must-carry rules for commercial television stations which stated that a provider with less than 300 subscribers are exempt from must-carry.<sup>142</sup> Section 615 covered must-carry provisions for non-commercial stations, which included a requirement for a cable provider to import a non-commercial educational station (typically a PBS station) if one was not available locally.<sup>143</sup> In both cases, the must-carry provisions were seen as being in the public interest, by protecting local network affiliate stations from competition from an imported out of market affiliate, and mandating that a non-commercial station be imported to areas where the local television market did not include a one.<sup>144</sup>

#### B. *Turner Broadcasting System, Inc. v. Federal Communications Commission*

The 1992 act permitted local television stations to waive the must-carry right in return for a right to require the consent of the station to be carried by the cable provider, which lead to the dispute in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, as well as the continued issues regarding

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<sup>139</sup> *Id.* at 1453.

<sup>140</sup> *See generally* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>141</sup> *See* 47 U.S.C.A. § 534(h)(1)(C)(i) (2014); *see generally* Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, 12 FCC Rcd. 17987 (1997).

<sup>142</sup> *See generally* Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, 12 FCC Rcd. 17987 (1997).

<sup>143</sup> *See generally id.*

<sup>144</sup> *See* Goldfarb, *supra* note 124, at 1-3.

retransmission consent.<sup>145</sup>

1. *Turner Upholds the New Status Quo*

These provisions were quickly challenged but were upheld in *Turner*.<sup>146</sup> In *Turner*, Turner Broadcasting Systems brought suit against the FCC based on the allegation that the must-carry provisions under the Cable TC Consumer Protection and Competition Act were unconstitutional under the First Amendment.<sup>147</sup> The specific must-carry provisions that Turner Broadcasting disliked required cable TV systems to dedicate a few of their channels to local stations.<sup>148</sup> Under the Turner Broadcasting argument, the idea of requiring cable providers to maintain certain channels—regardless of whether doing might be beneficial to their respective local markets—was compelled speech.<sup>149</sup>

The Court disagreed, explaining the compelled speech at issue and the must-carry provisions generally further governmental interests.<sup>150</sup> Justice Kennedy, writing for the majority, acknowledged that must-carry provisions could be somewhat burdensome on cable providers and held that the provisions must not be more burdensome than they are helpful in furthering governmental interests.<sup>151</sup> However, the majority identified three important governmental interests that the must-carry provisions furthered.<sup>152</sup> These included: “preserving the benefits of free, over-the air local broadcast television”; “promoting the widespread dissemination of information from a multiplicity of sources”; and “promoting fair competition in the market for television programming.”<sup>153</sup>

Furthermore, the Court acknowledged that Congress had expressed concern that if there were any changes to the must-carry provision that there would be a lack of diversity in channels in the consumer marketplace.<sup>154</sup> Still, Congress had neglected to mention in their support of the must-carry provision that the consumer subsidization contained within was to keep “diversity” of channels afloat.<sup>155</sup> Additionally, the Court argued that the must-carry provision is the

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<sup>145</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 185–86.

<sup>148</sup> *Id.* at 185.

<sup>149</sup> *See id.*

<sup>150</sup> *Id.* at 186.

<sup>151</sup> *Id.* at 213–14.

<sup>152</sup> *Id.* at 189–90.

<sup>153</sup> *Id.* at 189.

<sup>154</sup> *See id.* at 191.

<sup>155</sup> *See id.* at 229–30 (O’Connor, J., dissenting) (arguing the lack of neutrality that rests within the must-carry provision is not considered neutral nor is it subject to the scrutiny that it should be and, if the scrutiny that was necessary for a governmental regulation such as

simpler option to administer and has less government involvement in programming determinations based on content.<sup>156</sup>

Notably, Justice Breyer's concurrence recognized that there is a kind of cost-benefit analysis in weighing reduced First Amendment protections in view of the benefit that the must-carry provision has with local broadcast stations.<sup>157</sup> While Justice Breyer lamented that the must-carry provision "interferes with the protected interests of the cable operators to choose their own programming[.]" Justice Breyer clarified that there are equally important First Amendment issues concerning the provision.<sup>158</sup>

## 2. Retransmission

In the 1992 Act, Congress also established the requirement that broadcasters need to acquire the original broadcaster's consent before retransmitting a prior broadcast, known as 'retransmission consent rights'.<sup>159</sup> Prior to the 1992 Act, cable operators were not required to seek the permission of a broadcaster before carrying its signal, nor were they required to compensate the broadcaster for the value of its signal. Congress found that this created a "distortion in the video marketplace which threatens the future of over-the-air broadcasting."<sup>160</sup> Congress acted to remedy the situation by giving broadcasters control over the use of their signals and permitting broadcasters to seek compensation from cable operators for carriage of their signals.<sup>161</sup>

Retransmission consent provided a revenue stream to local broadcasters by including local broadcast stations as part of the per subscriber fee regime.<sup>162</sup> Local cable providers, as a result of must-carry provisions, have to pay local stations to include them—a cost that gets passed onto local consumers.<sup>163</sup> In 1999, Congress adopted a good faith requirement for broadcasters during their negotiation with cable companies.<sup>164</sup> Broadcasting companies that withdraw consent cause blackouts for cable companies that relied on those channels,

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must-carry was implemented in this case, then the provision would surely fail on its own merits).

<sup>156</sup> *Id.* at 222.

<sup>157</sup> *See id.* at 226–27 (Breyer, J., concurring).

<sup>158</sup> *See id.* at 226.

<sup>159</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482–43 (1992).

<sup>160</sup> S. REP. NO. 102-92, at 26 (1991).

<sup>161</sup> *Id.* at 26–27.

<sup>162</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2, 106 Stat. 1460, 1482–43 (1992).

<sup>163</sup> *Id.*

<sup>164</sup> 47 U.S.C. § 325(b)(3)(C).

creating a differential of power that Congress attempted to fix.<sup>165</sup> The National Association of Broadcasters argued that the FCC correctly concluded it had no right to “override the clear congressional intent to establish a free marketplace in which broadcasters could negotiate compensation.”<sup>166</sup>

Disputes over retransmission fees have become more public, as broadcasters and cable providers unable to agree on compensation leads to “blackouts” of channels, sometimes for months at a time.<sup>167</sup> The consumers were left quite literally in the dark during negotiations.<sup>168</sup> Blackouts would cause loss of access to subscribers in the area subject to those negotiations.<sup>169</sup> One 2011 study by Kagan estimated that retransmission fees would increase from \$1.14 billion to \$3.61 billion from 2010 to 2017.<sup>170</sup> Later studies by Kagan showed fees over \$9 billion in 2017.<sup>171</sup>

### C. Must-Carry + Retransmission + Turner = The Status Quo

Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator.<sup>172</sup> Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming.<sup>173</sup> Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.<sup>174</sup> Because of the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.<sup>175</sup>

As disputes over retransmission agreements have become more common, cable companies have advocated substantial modification of the regulations

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<sup>165</sup> Meg Burton, *Reforming Retransmission Consent*, 64 FED. COMM’NS L. J. 617, 618–19 (2012).

<sup>166</sup> *Id.* at 627–28.

<sup>167</sup> *See id.* at 618, 624–25.

<sup>168</sup> *See generally id.*

<sup>169</sup> *See generally id.*

<sup>170</sup> Justin Nielson, *Retrans Projections Update: Sub Rates Continue to Rise*, S&P GLOB. MKT. INTELL., (Jul. 25, 2019), <https://www.spglobal.com/marketintelligence/en/news-insights/research/retrans-projections-update-sub-rates-continue-to-rise>.

<sup>171</sup> *See id.*

<sup>172</sup> *See generally supra* Part II.C.

<sup>173</sup> *See generally supra* Part II.A.

<sup>174</sup> *See generally supra* Part II.B.

<sup>175</sup> *See generally supra* Part II.A.–B.

governing retransmission consent, as well as significant reduction or even elimination of network non-duplication, syndicated exclusivity, and sports blackout rules.<sup>176</sup> For the most part, the objections to the current rules have focused on how they increase relative market power of broadcasters, giving them the upper hand when negotiating retransmission consent, and the prices (monetary and in-kind) cable providers must pay for retransmission consent.<sup>177</sup>

#### D. The FCC and a La Carte, a Short Flirtation with Freedom

Opposition to the idea of a la carte cable regulation has relied on the idea that the approach would not increase customer satisfaction, because the disruptions to the current industry structure would increase the per channel prices for the most watched channels, since co-owned channels would not be subsidized.<sup>178</sup>

The FCC proposed the implementation of an a la carte cable system in a proceeding that ended in 2006.<sup>179</sup> In November of 2004, the FCC released a report arguing for a la carte as one tier of cable offerings.<sup>180</sup> The response to this report was hostile, not only in comments filed by cable providers, but also content producers who sell programming content to cable channels.<sup>181</sup> The primary argument was that a la carte would be disruptive to the industry and lead to increased costs to consumers.<sup>182</sup>

The FCC continued to work on a la carte, and in 2006 released a second report on the issue.<sup>183</sup> The “Further Report” suggested that a la carte could actually reduce consumer costs to 40% of cable subscribers (and 100% of satellite customers).<sup>184</sup> Both the 2004 and 2006 reports on a la carte were not accepted or adopted by the Full Commission and exist now as unofficial agency reports.<sup>185</sup>

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<sup>176</sup> Burton, *supra* note 165, at 623–26.

<sup>177</sup> *See id.*

<sup>178</sup> *See id.* at 636.

<sup>179</sup> CHARLES B. GOLDFARB, CONG. RSCH. SERV. RL33338, THE FCC’S “A LA CARTE” REPORTS 1–3 (2006).

<sup>180</sup> Press Release, Federal Communications Commission, Media Bureau Releases Report on Cable a la Carte Pricing Model (Nov. 19, 2004) (on file with author).

<sup>181</sup> Holly Phillips, Note, *I Want My MTV, But Not Your VHI: A La Carte Cable, Bundling and the Potential Great Cable Compromise*, 28 J. NAT’L ASS’N ADMIN. L. 321, 331 (2008) (finding industry concerns with a la carte cable regulation after the First Report).

<sup>182</sup> Amy Schatz & Joe Flint, *FCC May Endorse Cable à la Carte, In a Policy Shift*, WALL ST. J. (Nov. 29, 2005) <https://www.wsj.com/articles/SB113323293561108783>.

<sup>183</sup> GOLDFARB, *supra* note 179, at 2–3.

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.* at 2 (“Neither of these reports was supported by the full Commission and each was released as an unofficial report.”).



## III. MEDIA, THE FIRST AMENDMENT AND SCRUTINY

Having discussed the regulatory history of cable, it is important to explain the legal standards that police the contours of this history. This legal backdrop demonstrates two immediate, simple takeaways. First, direct regulation of speech content is complex, as well as medium and context specific.<sup>186</sup> Second, we likely cannot construe the federal administrative state to act as a panacea to our current issue.

While the differences between media forms is clear to telecommunications focused scholars and practitioners, the reality for most observers often lacks clear boundaries and understanding. Yet, the legal standards, including the level of constitutional scrutiny applied to different media forms means that the distinctions are important to this discussion. This section discusses these distinctions.

## A. Scrutiny, Generally

Notably the electronic media environment is one where the application of the First Amendment principle is far more operationalist than absolutist. Generally, content regulation of electronic media comes in two general forms: (1) those that are restrictive of certain content, and (2) those that compel certain content.<sup>187</sup> The first are series of regulations which compel media outlets to carry certain content or provide disclosures.<sup>188</sup> These forms of compelled speech are enforced by state actors, including the FCC, FTC, or FEC among others. The regulations are subject to varying levels of scrutiny, depending on the content.<sup>189</sup> Disclosures for advertising, sponsored programming blocks, and identification in political advertising are the most common examples, but the FCC continues to enforce time mandates for educational and information programming on local television broadcast stations.<sup>190</sup>

Alternatively, certain types of content regulation prohibit the transmission of certain content.<sup>191</sup> Like the compelled speech regulations, the regulations prohibiting certain types of speech cover a wide range of content including deceptive advertising and commercial speech.<sup>192</sup> Furthermore, the application of

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<sup>186</sup> See *infra* Part III.A.

<sup>187</sup> See generally *infra* Part III.A. and accompanying notes 188–95.

<sup>188</sup> *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 641, 647, 667 (1994); Clay Calvert, *The First Amendment, Compelled Speech & Minors: Jettisoning the FCC Mandate for Children's Television Programming*, 107 Ky. L.J. 35, 37–38 (2018).

<sup>189</sup> Calvert, *supra* note 188.

<sup>190</sup> *Id.* at 39.

<sup>191</sup> See *United States v. Playboy Ent. Grp.* 529 U.S. 803, 894 (2000).

<sup>192</sup> 15 U.S.C. § 1331 (2022).

these regulations varies by media forms and in today's convergent media environment, these different media types are often confused for one another.<sup>193</sup> It does not help that terms used to describe both media outlets and produced content are often used interchangeably across different media types.<sup>194</sup> To oversimplify this discussion, the key idea is that in a First Amendment analysis, cable sits between the rigid speech protections offered to newspapers and the internet, and the more flexible restrictions applied to the regulation of broadcast speech.<sup>195</sup>

#### B. Broadcasters and Content Controls

Broadcasters, which include local television stations, as well as over the air AM/FM radio signals, are the most heavily regulated.<sup>196</sup> Each station is licensed by the FCC to operate at a certain frequency, at a certain power, in a defined location.<sup>197</sup> The acceptance of the government license by a station owner comes with controls mandating a range of content and disclosures as well as prohibitions and limitations on obscene and indecent programming content.<sup>198</sup>

Ironically, the inception of content controls can also be traced to the decision to license broadcasters.<sup>199</sup> In broadcasting's early days, the lack of regulation led to a chaotic marketplace in which the radio waves were clogged with interference by broadcasters who were operating without oversight or allocation of frequency.<sup>200</sup> As a result of public outcry and the need to control spectrum usage, the Federal Radio Commission adopted the use of licenses, which allocated frequency and transmission power to broadcasters.<sup>201</sup> Rather than award ownership of a spectrum allocation to licensees, the government, on behalf of citizens, retained ownership of the spectrum.<sup>202</sup> Spectrum was considered a "scarce" resource, and the Commission was forced to make comparative decisions regarding who would be given a broadcast license.<sup>203</sup> As

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<sup>193</sup> John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 368–70 (2012).

<sup>194</sup> See *infra* Part III.B.–C.

<sup>195</sup> *Playboy*, 529 U.S. at 815; see *infra* Part III.B.–C.

<sup>196</sup> Blevins, *supra* note 193, at 369.

<sup>197</sup> See F.C.C., THE PUBLIC AND BROADCASTING 15 (Sept. 2021) <https://www.fcc.gov/media/radio/public-and-broadcasting#LICENSING>.

<sup>198</sup> *Id.* at 13.

<sup>199</sup> *Who Regulates the Spectrum*, NAT'L. TELECOMMS. & INFO ADMIN. (last visited Oct. 20, 2022), <https://www.ntia.doc.gov/bookpage/who-regulates-spectrum>.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Regulating the Use of the Spectrum*, NAT'L. TELECOMMS. AND INFO ADMIN. (last visited Sept. 26, 2022), <https://www.ntia.doc.gov/book-page/regulating-use-spectrum>.

a result, the licenses issued by the FCC require that broadcasters operate in, and by extension produce, content that served the public interest, convenience, and necessity.<sup>204</sup>

Functionally, the regulation of broadcaster content has been consistently reviewed under a rational basis level of scrutiny since 1943.<sup>205</sup> During NBC's challenge to the FCC's regulations dealing with network radio programming, the Supreme Court stated that not only did the FCC retain the authority to regulate broadcast content, a regulatory burden existed that essentially required the FCC to do so.<sup>206</sup> The Court stated that, "we are asked to regard the Commission as a kind of traffic officer . . . . But the act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."<sup>207</sup> For nearly fifty years, broadcasting was regulated using a public trustee model.<sup>208</sup> Relying on the idea that licensees were trustees of a limited public resource, the FCC used behavioral content methodologies to regulate broadcasters.<sup>209</sup> Under this regime, the FCC implemented controls on broadcast content, including regulations dealing with editorial content.<sup>210</sup> Both regulatory positions were supported by the FCC on the basis of spectrum scarcity, saying that the inherent problems with scarcity meant that broadcasting required special regulations.<sup>211</sup>

The regulations that restrict or control the airing of certain types of content rely heavily on the idea that broadcasting is intrusive, pervasive and may have secondary effects that the Government has an interest to control.<sup>212</sup> While such restrictions continue to be contentious and challenged in court,<sup>213</sup> regulatory action has also been applied to the second branch of content regulations, those which compel certain types of speech.<sup>214</sup> These regulations are founded on the

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<sup>204</sup> *National Spectrum Goals*, NAT'L. TELECOMMS. AND INFO. ADMIN. (last visited Oct. 20, 2022), <https://www.ntia.doc.gov/book-page/national-spectrum-goals>.

<sup>205</sup> See *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

<sup>206</sup> *Id.* at 215–16.

<sup>207</sup> *Id.*

<sup>208</sup> Priscilla M. Regan, *Reviving the Public Trustee Concept and Applying It to Information Privacy Policy*, 76 MD. L. REV. 1025, 1030–31 (2017).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Blevins, *supra* note 193, at 369.

<sup>212</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376, 400 (1969) (Early enforcement actions based on content focused the behavior of broadcasters. The FCC attempting to regulate in the public interest, revoked licenses for objectionable broadcast content and refused to grant additional time and power for other broadcasters, citing the need to use the limited number stations to serve the widest possible audiences.).

<sup>213</sup> *FCC v. Fox Television Stations*, 567 U.S. 239, 259 (2012).

<sup>214</sup> *Children's Educational Television*, FCC CONSUMER GUIDES, <https://www.fcc.gov/consumers/guides/childrens-educational-television> (last updated Jan.

principle of spectrum scarcity, and the associated ideas that the limited amount of stations allows the Government to impose affirmative content obligations on broadcasters.<sup>215</sup>

### C. Newspapers and the Internet

At the other end of the constitutional scale for review of content regulations are the traditional media outlet, the newspaper. Newspaper content is widely protected by the First Amendment. When protected speech in a newspaper is subject to a restraint enforced by a state actor, that restraint is subject to a strict scrutiny test by a reviewing court.<sup>216</sup> Regulation or controls applied by domestic state actors on content on the internet is also judged under a strict scrutiny test.<sup>217</sup>

In 1997, the Court examined early era internet content and decided it was closer to newspapers than broadcasters.<sup>218</sup> As a result, instead of applying a lower level of scrutiny to internet content, the internet became a very open environment for speech, including political speech.<sup>219</sup> Scholars have argued that the decision was correct for the time in which it was made, but even members of the Court have begun to raise questions about its decision as applied to today's circumstances.<sup>220</sup>

After the Court's decision in *Comcast Cable Commc'n v. FCC*, the FCC was forced to change its rules as they relate to the ability of broadband service providers (BSPs) to discriminate against certain internet communications.<sup>221</sup> Advocates opposed to net-neutral regulations argued that forcing BSPs to carry content it disagrees with translates to their consumers being forced to support that content with their dollar.<sup>222</sup>

Importantly, the court's acceptance and application of strict scrutiny's compelling interest and narrow tailoring prongs has historically protected a vast range of viewpoints and ideas from state action while extending protections from state action to compelled speech.<sup>223</sup> Yet, cable's speech protections can be placed squarely in the middle of the constitutional protection hierarchy, above broadcasters, but far below the strict scrutiny applied to the internet or

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26, 2021).

<sup>215</sup> Blevins, *supra* note 193, at 369.

<sup>216</sup> *E.g.* *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606–07 (1982).

<sup>217</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

<sup>218</sup> *Id.*

<sup>219</sup> Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL'Y REV. 361, 365 (2010).

<sup>220</sup> *Reno*, 521 U.S. at 895.

<sup>221</sup> *See Comcast Cable Commc'n v. F.C.C.*, 717 F.3d 982, 1006 (2013).

<sup>222</sup> *See id.*

<sup>223</sup> *See generally supra* Part III.

newspapers.<sup>224</sup>

#### D. C is for Cable And That's Good Enough For Intermediate Scrutiny

While broadcast content can have both types of content regulation, cable is only subject to content regulations that mandate the carriage and retransmission of certain content in the form of media outlets.<sup>225</sup> However, cable does have additional protections against content prohibitions, like indecency when compared to the regulation applied to broadcasters.<sup>226</sup> In practical terms, reviewing courts have applied a standard roughly equivalent to the intermediate scrutiny applied to the regulation of commercial speech.<sup>227</sup>

Cable's regulatory mandates revolve around the source of speech, rather than the content itself.<sup>228</sup> This content neutral approach, focusing on how messages are delivered rather than the specific nature of the message, is akin to the intermediate scrutiny standard applied to expressive conduct in *United States v. O'Brien*.<sup>229</sup>

Courts have struggled with this “yes, but no, sometimes maybe” scrutiny position, with the Justices disagreeing on what level of scrutiny to apply when reviewing cable regulations, before settling on a content neutral scheme.<sup>230</sup> Exploring access issues dealing with the carriage of local broadcast television stations by cable systems, the Supreme Court was supportive of another structural decision focused on diversity and stated in the *Turner* decision: “[t]he first amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure private interests do not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.”<sup>231</sup>

However, The Supreme Court has applied strict scrutiny to content-based FCC restrictions on cable media.<sup>232</sup> In *United States v. Playboy Entertainment Group*, Congress had attempted to block sexually-oriented programming from being aired on cable television between the hours of 10 PM and 6 AM via the Communications Decency Act of 1996.<sup>233</sup> The Court found that the FCC did not

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<sup>224</sup> See *United States v. Playboy Ent. Grp.* 529 U.S. 803 (2000).

<sup>225</sup> Jane A. Strachan, *Tuning into Cable Television's First Amendment Rights*, 11 U. BRIDGEPORT L. REV. 69 (1990).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *U.S. v. O'Brien*, 391 U.S. 367, 384–85 (1968).

<sup>230</sup> *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 657 (1994).

<sup>231</sup> *Id.*

<sup>232</sup> See *United States v. Playboy Ent. Grp.* 529 U.S. 803 (2000).

<sup>233</sup> *Id.* at 806–07.

take the least restrictive means for blocking this unwanted content to achieve Congressional goals.<sup>234</sup> Courts have been consistent when it comes to applying a strict scrutiny test to content-based restrictions on cable media.<sup>235</sup>

#### IV. THE MARKETPLACE OF IDEAS MEETS THE MASS MEDIA MARKETPLACE

The growth of cable programming options presents increasingly common problems in applying traditional marketplace of ideas rhetoric to the contemporary mass media environment. Put simply, mass media systems underlying commercial value come in conflict with that traditional Holmesian metaphor.<sup>236</sup> In our mass media model of communication, the desire to have “market success” requires a speaker to produce ideas that generate mass appeal by targeting the lowest common denominator rather than hitting the high bar of finding truth.<sup>237</sup> Cable’s significant expansions diluted the available batch of quality programming, forcing programmers to rely on cheaply produced programming of dubious quality and questionable value.<sup>238</sup>

Thus, cable is forced to reckon with a slew of problems currently faced in internet spaces as they relate to misinformation with alarming frequency.<sup>239</sup> Where those who spread misinformation may be driven by a want to further their ideological agendas, they also are driven by profit-seeking.<sup>240</sup> In the internet news space, splashy titles and clickbait have become so ubiquitous that even traditionally reliable news sources are succumbing to these tactics, and thus are often spreading misinformation.<sup>241</sup> The Internet is a space where spreading misinformation can be incredibly low-risk with high-reward monetary gains.<sup>242</sup> So too, cable companies face low risks in producing misinformation, as they are protected from reputational harms becoming monetary by subsidy, combined with a high reward for producing that content.<sup>243</sup>

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<sup>234</sup> *Id.* at 827.

<sup>235</sup> *Id.*

<sup>236</sup> *Abrams v. United States*, 520 U.S. 616 (1919) (Holmes, J., dissenting).

<sup>237</sup> See Brandon Monk, *TV Caters to The Lowest Common Denominator and Strips Away Your Ability to Be Unique*, MEDIUM (Jan. 20, 2018), <https://brandonmonk.medium.com/thanks-for-writing-this-here-are-some-thoughts-sparked-by-your-post-2161fceda09e>.

<sup>238</sup> *Id.*

<sup>239</sup> Jevin D. West & Carl T. Bergstrom, *Misinformation in and About Science*, 118 PROCEEDINGS NAT’L ACAD. SCI. U.S. 1, 5 (Apr. 9, 2021).

<sup>240</sup> Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 19 JOURNAL ECON. PERSPS. 211, 217 (2021).

<sup>241</sup> West & Berstrom, *supra* note 239, at 1.

<sup>242</sup> Russ Feingold et al., *Fake News and Misinformation: The Roles of the Nation’s Digital Newsstands, Facebook, Google, Twitter, and Reddit*, STANFORD L. SCH. L. AND POL’Y LAB (2017).

<sup>243</sup> Allcott & Gentzkow, *supra* note 240, at 217.

At the baseline, cable finds itself in a unique place in our media environment: Protected from competition at the local level by franchise agreements with municipalities, bound by controls on content it must-carry, but absent regulatory controls on consumer-friendly packaging of that programming, hemorrhaging customers who opt for cord cutting, and without an incentive to police the programming it provides; cable creates a perfect environment for the subsidy of media outlets that regularly deal in misinformation.<sup>244</sup> Without marketplace mechanisms to help keep programming professional and ethical, cable companies have no incentive to choose quality programming options, preferring more options over better ones.<sup>245</sup>

The traditional view that speech should rise or fall in a marketplace of ideas on its own merit is artificially prevented in the media environment created by a cable provider.<sup>246</sup> Cable, as an industry, relies on the consumer to support programming and content (thus speech), by forcing consumers to pay for it as package.<sup>247</sup> Citizens who wish to access this public space must pay for the access they want, but also any other content or speech they don't use, or in many cases, object to.<sup>248</sup> While much of the debate surrounds objections to ideological viewpoints in news content, advocates for "cleaner" cable packages have also included groups opposed to indecent sexual or profane content.<sup>249</sup>

Though the widespread dropping of OAN from the cable stream has re-illuminated the regulatory paradox of subsidizing speech a la carte cable packaging, the problem is no less evident elsewhere—even among non-political speech.<sup>250</sup> Consumers who want access to some cable channels are put into a box where they are forced to pay for programming that they either do not want or do not use.<sup>251</sup> The franchise arrangements between a municipality and the local cable provider mean that these arrangements are being supported by state action.<sup>252</sup> In the case of OAN, or other "news" channels, this means citizens are being compelled, with the approval and involvement of a state actor, to subsidize political speech they may disagree with.

In other words, the monopoly protection has produced a glut of speech. Though this may be a good thing in abstract, in practice this glut of subsidized speech helps relatively few consumers in comparison to how much it helps the

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<sup>244</sup> See *supra* note 239–42 and accompanying text.

<sup>245</sup> See MONK, *supra* note 237.

<sup>246</sup> See *Abrams v. United States*, 520 U.S. 616 (1919) (Holmes, J., dissenting).

<sup>247</sup> Goldfarb, *supra* note 124, at 11, 19, 22.

<sup>248</sup> *Id.*

<sup>249</sup> See *id.*; see also *United States v. Playboy Ent. Grp.* 529 U.S. 803 (2000).

<sup>250</sup> See Brodtkin, *supra* note 27; see also Gans, *supra* note 33.

<sup>251</sup> See Brodtkin, *supra* note 27; see also Gans, *supra* note 33.

<sup>252</sup> See *supra* Part II.

content creators.<sup>253</sup> Thus, the economic incentives of the current cable industry has resulted in more, but not necessarily better, content packages.<sup>254</sup> The per-channel subscriber fees assessed whether or not a consumer uses a channel, which reduces many market incentives for an informational gatekeeper, like a cable news channel, to produce self-sustaining, quality programming.<sup>255</sup>

Under the traditional interpretation of the marketplace of ideas concept, the loss of any political speech is regrettable.<sup>256</sup> Yet, the same theoretical model tells us that speech should stand or fall on its own merits when it competes with other speech.<sup>257</sup> The situation with OAN is a perfect example of this duality; the loss of its viewpoint, even just as an alternative to other conservative leaning information sources, is something to be mourned.<sup>258</sup> Unable to compete, and no longer subsidized, the channel folded.<sup>259</sup> The market speaks loudly and, in the case of OAN, quickly. A channel which actively engaged in the distribution of misinformation failed in an open marketplace, just as its ideas failed in the marketplace of ideas.<sup>260</sup>

This begs the question: why are consumers asked to foot the bill for channels that could not otherwise survive on their own viewership? While the First Amendment has generally been interpreted to seek more speech, and not less, it is also well accepted that speech exists in a marketplace, where it should be given democratic value judgments.<sup>261</sup> This tension is all the more pronounced in the case of the cable subsidy regulatory regime. Under this status quo, all cable consumers are asked to foot the bill for channels that otherwise could not economically survive without the subsidy.<sup>262</sup> Even more troubling, consumers are asked to subsidize speech they may actively abhor, contributing to a Bradburian dystopia where the truth is drowned out by the most shocking or the easily-digestible.<sup>263</sup>

Setting aside the reality that subscribers to cable are paying a monthly fee to

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<sup>253</sup> See Brodtkin, *supra* note 27; see also Gans, *supra* note 33; see also *supra* Part II.

<sup>254</sup> RYVICKER, *supra* note 75, at 2, 33–34.

<sup>255</sup> West, *supra* note 239, at 1, 6 (outlining that absent reputational costs of promulgating low quality information; the drive for advertising revenues are the only incentives content creators face).

<sup>256</sup> See *Abrams v. United States*, 520 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

<sup>257</sup> See *id.*

<sup>258</sup> See Brodtkin, *supra* note 27; see also Gans, *supra* note 33.

<sup>259</sup> See *id.*

<sup>260</sup> See *id.*; Bursztynsky, *supra* note 28; Ecarma, *supra* note 27.

<sup>261</sup> See *Abrams*, 250 U.S. at 616, 618–19.

<sup>262</sup> Chipty, *supra* note 76 (showing that the top six competitors in network television control 75% of total cable and broadcast networks prime time viewership ratings and make up 81% of advertising revenues).

<sup>263</sup> See West, *supra* note 239 (outlining that absent reputational costs of promulgating low quality information, the drive for advertising revenues are the only incentives content creators face).



access channels that exist only to market direct sale products, no better example of this process exists than the story of the cable outlet TLC. TLC (The Learning Channel) was founded in 1972 as a joint project between the Department of Health Education and Welfare and NASA.<sup>264</sup> As the first cable channel to be legally distributed via NASA satellite to cable systems in both the US and Canada, The Learning Channel was originally intended to become an informative and instructional network focused on providing education through the medium of TV.<sup>265</sup> Far from its initial design, the channel now provides a steady diet of cheaply produced reality programming, virtually all of which is of extremely limited in terms of educational or informational value.<sup>266</sup>

While the value of such programming is admittedly inherently subjective, the informational environment cable provides is also somewhat suspect in terms of the traditional views of the public sphere.<sup>267</sup> Rather than an environment where ideas can freely compete and truth can be discovered by citizens, the media environment that cable news generates is decidedly closed.<sup>268</sup> Cable with bundled systems is more akin to the gatekeeper model for information that broadcast stations provide, where the viewpoint of elites is distributed across the public sphere with extremely limited opportunities for a two way, interactive, system of communication to occur.<sup>269</sup> In communication terms, there's a sender and a receiver, but only the sender gets to speak, and the receiver has to pay for it regardless of whether or not the receiver wants to, or wants to listen.<sup>270</sup> The soapbox speaker and the carnival barker are subsidized through state action that functionally shakes down the passersby.<sup>271</sup>

Cable news programming exacerbates this mass media production model in two other important ways. First, cable news programming is intended for a "mass" audience, rather than a local one, and its informational streams are produced with a decidedly national focus to their content.<sup>272</sup> Second, the effort to maintain a partisan-focused audience increases the incentives to use outrage

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<sup>264</sup> Kirsten Acuna, *The 40-Year Transformation of How TLC Went From The Learning Channel to the Home of Honey Boo*, Business Insider (Nov. 28, 2012), <https://www.businessinsider.com/history-of-tlc-from-learning-channel-to-honey-boo-boo-2012-11>.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *See id.*

<sup>268</sup> *See* RYVICKER, *supra* note 75 (showing that cable programming is worth \$54.8 billion, and the top 5 studios take 68% of that total, and the top 9 studios take 78%).

<sup>269</sup> *See supra* Part II.

<sup>270</sup> *See id.*

<sup>271</sup> *See id.*

<sup>272</sup> *See* Bursztyn et al., *supra* note 7.

as the underlying premise of programming choice and gatekeeper functions.<sup>273</sup> The focus on national news and opinion provides access for an easy to understand “us-versus-them” approach.<sup>274</sup> An important part of this process is the amplification of viewpoint that cable provides to its speakers. Just as the subscriber fees work to enhance speech that is not marketplace viable on its own, the subsidy of that speech through an authoritative model delivery system also results in artificial viewpoint amplification.<sup>275</sup>

The artificial amplification of viewpoints effects the traditional marketplace mechanisms for the valuation of speech on its merits. The disparity that amplification creates magnifies viewpoints, altering the traditional relationship between the speaker and the audience.<sup>276</sup> In broadcasting, courts historically favored the rights of the audience to receive information.<sup>277</sup> Yet in cable, while the court has favored the audience, the FCC’s regulations have largely acted to protect the speaker and the gatekeepers.<sup>278</sup> Problematically, the subsidy provided by the per-subscriber fees protects the voices of the amplified, as cable providers have near unlimited gatekeeping power to choose which voices to amplify.

#### V. OUR ANSWER: A LA CARTE CABLE

Fortunately, resolving this complex problem is simple. To release the tensions of the misinformation subsidy, all that is needed is to follow the deregulatory path Congress has already implemented and provide consumers the choice of which cable channels they’d like to subscribe to—what these authors call a la carte cable.<sup>279</sup> This kind of deregulation, in the form of a regulatory action to require a la carte cable package availability by local cable providers, puts in the hands of consumers the power to choose speech they want to support and receive.

A la carte, while explored by the FCC in a proceeding in 2006, was rejected over economic concerns. While arguably valid at the time, these concerns have not withstood the historical test in the intervening years.

Although reviewing courts have not directly taken on the compelled speech argument this paper presents, compelled speech precedent provides us with some solid dicta to work with to make a case.<sup>280</sup> First, we must accept the

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<sup>273</sup> *See id.*

<sup>274</sup> *See id.*

<sup>275</sup> *See id.*; *supra* Part II note 271.

<sup>276</sup> *See supra* Part II.

<sup>277</sup> *See generally supra* Part III.B.

<sup>278</sup> *See generally supra* Part II.

<sup>279</sup> GOLDFARB, *supra* note 179, at 3.

<sup>280</sup> *Turner Broad. Sys., Inc. v. Fed. Comm’n..Comm’n.*, 520 U.S. 180, 225–26 (1997) (Breyer, J. concurring).

premise articulated in *Wooley v. Maynard* that, “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.”<sup>281</sup>

Second, the relationship between a subscriber fee and a cable outlet’s speech includes a governmental agency as an intermediary, and thus the fee becomes a mandatory for access.<sup>282</sup> By its very nature, requiring someone to speak by mandating what one must choose to say interferes with their freedom of speech.<sup>283</sup> The Supreme Court has stated that forced contribution of money is only constitutional (in strict scrutiny test) when funds are used for germane purposes, and not for advocacy of broader political causes.<sup>284</sup> That position that remains true, even when the compelled speech was mandated by a governmental body, and even when that body is removed from normal government.<sup>285</sup> In those situations, as it is with cable providers, the Court has separated political advocacy, arguing that it should be treated differently.<sup>286</sup>

By this logic, a subscriber fee results in a speech-supporting subsidy that allows speech to stand regardless of consumers’ valuations. In terms of cable programming, this includes speech that relies on this assessed subsidy in order to pollute the public sphere with misinformation.<sup>287</sup> Because the relationship between a local government and a cable provider forces a consumer to pay money that is used for speech, the franchise agreement therefore interferes with the consumer’s freedom of expressive association, because it forces that person to associate themselves with the message.<sup>288</sup>

In terms of misinformation, cable news outlets, supported by the enforced subsidy of the subscriber fees, rely on the amplification process but also routine recitation and framing to deliver their messages.<sup>289</sup> Long an element of mass communication, “routine recitation may make its message familiar. Through regularity, it may become a comfort and an internal source of authority for consultation.”<sup>290</sup> Or put more simply, “what one regularly says may have an influence on what and how one thinks.”<sup>291</sup> Followed to its logical conclusion,

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<sup>281</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

<sup>282</sup> *See supra* Part I.A.

<sup>283</sup> *See* *Turner* 520 U.S. at 185.

<sup>284</sup> *Keller v. State Bar of Cal.*, 496 U.S. 1, 9 (1990).

<sup>285</sup> *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>286</sup> *See, e.g., id.*

<sup>287</sup> *See, e.g.*, Brendan Nyhan, *Why the “Death Panel” Myth Wouldn’t Die: Misinformation in the Health Care Reform Debate*, FORUM, 2010, at 1.

<sup>288</sup> *Aboud v. Detroit Bd. of Ed.*, 431 U.S. 209, 224 (1977).

<sup>289</sup> Seana Shiffirin, *What is Really Wrong with Compelled Association?*, 99 NW L. REV. 839 (2005).

<sup>290</sup> *Id.* at 854.

<sup>291</sup> *Id.* at 855.

forcing consumers to pay for speech they disagree with in turn promotes the dissemination of misinformation and can even alter what those citizens think.<sup>292</sup> This results in compelled speech supported by a state actor, not exactly what Justice Holmes was talking about when he first articulated the concept of the marketplace of ideas.<sup>293</sup>

A la carte may have been an idea before its time, but its time is now and the marketplace for consumers to choose the individual programming streams they want is vibrant. In a landscape dominated by streaming services and cord cutting, a la carte cable may indeed be the solution for securing cable's place in the future of television and video content.<sup>294</sup> Cable news and entertainment programming should be subjected to the same up or down, sink or swim marketplace mechanisms as any other media outlet.<sup>295</sup> Protectionist mechanisms for what is already a monopoly service neither improve the health of the public sphere nor improve consumer choice.<sup>296</sup> Most consumers use only a fraction of the channels they are provided.<sup>297</sup> Allowing consumers the opportunity to vote with their support of programming is consumer- and First Amendment-friendly.<sup>298</sup> Allowing a content neutral, consumer centric approach also removes any initiative or incentive for the government to consider First Amendment-infringing legal solutions to misinformation, such as the bills that were introduced during the pandemic to regulate vaccine (mis)information.<sup>299</sup>

The FCC has been committed to marketplace solutions for content issues since the early 1980s for broadcasters and it is past time to extend that philosophy to cable.<sup>300</sup> The availability of cable content was used as a cudgel to repeal content protections for broadcasters like the PTAR and Syndex rules, yet with the range of internet content that is available, somehow cable's ability to force consumers to subsidize content they disagree with has remained in place.<sup>301</sup> It is inconsistent and the subsidy for misinformation continues because the FCC will not implement a simple requirement for an alternative service tier to a bundle.

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<sup>292</sup> See, e.g., Nyhan, *supra* note 287 at 1.

<sup>293</sup> See *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>294</sup> LEICHTMAN, *supra* note 74 (detailing cable's large losses to streaming services).

<sup>295</sup> See generally Part II.

<sup>296</sup> See generally Part I.

<sup>297</sup> See Ryvicker, *supra* note 75.

<sup>298</sup> See generally Part III; *Turner Broad. v. Fed. Comm'n. Comm'n.*, 512 U.S. 622, 633 (1994).

<sup>299</sup> Dorit Rubinstein Reiss, *Anti-Vaccine Misinformation and the Law: Challenges and Pitfalls*, 18 *IND. HEALTH L. REV.* 85, 90 (2021) (discussing the First Amendment barriers to regulating misinformation).

<sup>300</sup> Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 *L. & CONTEMP. PROBS.* 77, 81, 86, 88 (1987).

<sup>301</sup> *Id.* at 103, 119.

We live in an age of information, but information is only a raw material. It takes skill and training to convert information to knowledge. While the entire conceptual understanding of the marketplace of ideas is tied to the concept of truth, quick and easy access to the volume of information that is available does not always balance the enlightenment equation. Instead, one's objective truth is often tied to the information one chooses to access.

One of the most significant changes of the internet age is the reality that there is not a shared collective truth. Just a few decades ago, most information was passed through the gatekeepers of a handful of professional (and often commercial) media outlets.<sup>302</sup> Consumer choice for information sources was limited, but to one degree or another, informed citizens used similar media sources - major television networks - to find truth.<sup>303</sup>

The age of internet and social media changed the traditional equation, making anyone with Wi-Fi and a half-baked or better opinion into a potential information source. Professional standards like objectivity and practices like fact checking and gatekeeping were cast aside in favor of the hot take and fact free opinions.<sup>304</sup> Information streams, some of questionable merit, began to flood the public sphere, magnified by algorithm and user interactions.<sup>305</sup> All too frequently, the currency of the marketplace of ideas is being converted from information to misinformation.<sup>306</sup> Cable news, now faced with nearly unlimited competition, remediated itself to adapt to this change, not by taking the high road, but far too often by trying to outdo its new competitors.<sup>307</sup> This is especially consequential when considering that, even in the social media age, television is a more important source of political news and information for politically interested individuals.<sup>308</sup>

Although "fake news" is as old as mass media itself, concerns over disinformation have reached a fever pitch in our current media environment.<sup>309</sup> Online media outlets' heavy reliance on user-generated content has altered the traditional gatekeeping functions and the professional standards associated with

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<sup>302</sup> See Farhad Manjoo, *How the Internet Is Loosening Our Grip on the Truth*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html>. (last visited November 22, 2022).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Xizhu Xiao & Porismita Bora Yan Su, *The Dangers of Blind Trust: Examining the Interplay Among Social Media Use, Misinformation Identification, and News Trust on Conspiracy Beliefs*, 30(8) PUB. UNDERSTANDING SCI. 977 (2021).

<sup>306</sup> See, e.g., Bursztyn et al., *supra* note 7 (showing misinformation on cable news surrounding the COVID-19 pandemic).

<sup>307</sup> West, *supra* note 239, at 1.

<sup>308</sup> Allcott & Gentzkow, *supra* note 240, at 223.

<sup>309</sup> *Id.*

traditional news organizations.<sup>310</sup> The idea of objectivity-focused informational content has largely been substituted for a realist acceptance of the power and popularity of opinion-driven news.<sup>311</sup>

This landmark change to citizen access to information as the commercial media industry began to reshape its offerings to fit into the new media ecosystem. In no place was this more evident than the cable news networks that provide 24 hours of news a day. The remediation process to make those channels look more like internet information sources included a targeting shift where viewer political leanings were considered, moving from all-news, to a blended version focused heavily on the sharing of opinion, eventually adopting the model perfected by talk radio a generation earlier.<sup>312</sup> Programming focused on reinforcing the existing biases of its viewers at the expense of exposing those viewers to multiple viewpoints became a warm snuggly blanket for misinformation to bed down in.<sup>313</sup>

Yet, one part of the commercial media equation was not balanced; the need for advertiser support for these new programming options. This problem expanded into a range of programming options besides informational content.<sup>314</sup> The solution was an old one, the artificial subsidy to cable channels provided by subscriber fees.<sup>315</sup> As these outlets have increasingly adopted opinion over information, this subsidy is increasingly supporting the dissemination of misinformation.<sup>316</sup>

Problematically, the search for a regulation solution to limiting misinformation is limited by the First Amendment's almost ironic protection of the speech that is polluting the marketplace of ideas that the Amendment is intended to protect. Designing a content-neutral scheme to directly regulate media content is not only a complex legal problem, it is likely a non-starter.<sup>317</sup> State actors are (rightly) unable to censor or remove content based on the ideological leanings of the content, and media disinformation directly implicates political speech about controversial topics.<sup>318</sup> In an era where cross-platform news media is ubiquitous, the legal status quo has effectively ensured media platforms have near-total discretion to control—or more accurately, not

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<sup>310</sup> Feingold et al., *supra* note 242.

<sup>311</sup> *Id.*

<sup>312</sup> *See, e.g.,* Bursztyn et al., *supra* note 7 (showing misinformation on cable news surrounding the COVID-19 pandemic).

<sup>313</sup> *See, e.g., id.*

<sup>314</sup> *See generally supra* Part II.

<sup>315</sup> *Id.*

<sup>316</sup> Allcott & Gentzkow, *supra* note 240.

<sup>317</sup> *See generally supra* Part III (outlining the many protections the First Amendment affords to media).

<sup>318</sup> *See generally supra* Part III.

control—the truthfulness of disseminated content.<sup>319</sup>

A market-based, bottom-up approach to content regulation could end run the problems that plague government regulation of cable media. Industry research has suggested that cable “news” outlets generate more revenue from per-subscriber fees applied by cable companies than from advertising carried by those channels.<sup>320</sup> In terms of cable news, per-channel costs are the highest costs in a monthly cable bill.<sup>321</sup> This means that more than eighty to ninety million cable subscribers subsidize content that attracts fewer than two million viewers daily.<sup>322</sup>

In an a la carte market, the high costs of entry to cable programming will decrease frivolous content by encouraging producers to appeal to a broader, more engaged swath of consumer with higher quality content.<sup>323</sup> Similarly, reputational costs to a serial misinforming station such as OAN will prove to be much more immediately damaging. This will give rise to an environment where news networks are encouraged to report more accurately, held directly accountable by the consumer.

While a la carte cable packaging, where consumers purchase packages of channels they select, has been proposed before, this paper takes a different approach to advocating for the practice proposing that a la carte cable packaging provides a solution to the subsidy of misinformation. This results in a system of reverse compelled speech means that news organizations keep their subsidy while advocating against the interests of those footing the bill.<sup>324</sup>

Eliminating this involuntary subsidy flips the status quo on its head by making trustworthiness part of the bottom line, incentivizing prudent news self-regulation in an entirely content-neutral manner.<sup>325</sup> The failure of deregulation to include a provision for a la carte cable functionally means that a cable subscriber is being compelled, through government action, to pay for speech that they may disagree with.<sup>326</sup> This forced taking has reduced the need for cable outlets to responsibly produce content that attracts a sellable audience, creating a perfect environment for information sources to deal in misinformation at scale,

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<sup>319</sup> See generally *supra* Part V.

<sup>320</sup> See, e.g., Karl Bode, *Millions of Americans Are Unwittingly Funding Tucker Carlson’s Show*, VICE (Apr. 21, 2021), <https://www.vice.com/en/article/93y5v8/millions-of-americans-are-unwittingly-funding-tucker-carlsons-show-george-floyd-derek-chauvin>.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Karl Bode, *Thanks to Crappy Cable Channel Bundles, Non-Watchers Hugely Subsidize Tucker Carlson and Fox News*, TECHDIRT (Apr. 29, 2021).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

which is polluting the public sphere.<sup>327</sup>

## VI. CONCLUSION

Cable finds itself in a unique place in our media environment. Protected from competition at the local level by franchise agreements with municipalities, bound by controls on content it must-carry, but absent regulatory controls on consumer-friendly packaging of that programming, and without any marketplace incentives to police the programming it provides, cable creates a perfect environment for the subsidy of media outlets that regularly deal in misinformation.<sup>328</sup> Without marketplace mechanisms to help keep programming professional and ethical, cable companies have no incentive to choose quality programming options, preferring quantity over quality options.<sup>329</sup>

Ironically, the expanding number of cable channels actually reduced the quality of programming across the channels, as the limited amount of programming available on the open market forced content providers to turn to cheaply produced programming to fill their schedules.<sup>330</sup> The monopoly-protected, consumer-funded economic structure led to cable channels filled with programming that follows peculiar reptile-themed tow truck companies, struggling gold miners, oversexed co-eds in staged feats of athletic skill, eccentric pawn shop owners, families with lottery-like fertility treatment results and a dermatologist whose shtick it is to explosively drain her patients inflamed skin conditions.<sup>331</sup>

While one can actively debate the merits or weaknesses of the information supplied by OAN, (as well as Fox News and Newsmax), cable news channels have been tied by researchers to the distribution of misinformation on a range of issues from election politics to the COVID-19 pandemic. In at least one example, the election misinformation distributed by these stations has resulted in the station settling a substantial defamation claim and disavowing claims it had made over several weeks.<sup>332</sup>

Under the traditional interpretation of the marketplace of ideas concept, the loss of any political speech is regrettable. Yet, the same theoretical model tells us that speech should stand or fall on its own merits when it competes with other

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<sup>327</sup> *Id.*

<sup>328</sup> *See, e.g.,* Bode, *supra* note 320.

<sup>329</sup> *See* Leichtman, *supra* note 74.

<sup>330</sup> *See* Acuna, *supra* note 264.

<sup>331</sup> *See TV Schedule*, TLC (last visited Nov. 9, 2022), <https://www.tlc.com/shows/tv-schedule>.

<sup>332</sup> Cristina Cabrera, *OAN Admits Bogus Georgia Election Fraud Conspiracy Theory It Hyped Was Bogus*, TALKING POINTS MEMO (May 10, 2022).



speech.<sup>333</sup> The situation with OAN is a perfect example of this duality, and the loss of its viewpoint, even just as an alternative to other conservative leaning information sources, is something to be mourned. However, the important takeaway is this: A channel that actively engaged in the distribution of misinformation failed in an open marketplace, just as its ideas failed in the marketplace of ideas.<sup>334</sup>

It could be easy to conflate an objection to the viewpoint of a cable news channel with a desire to silence the outlet. Collectively, the authors do not object to the speech these outlets engage in, but we do reject the need for a state actor to indirectly mandate the subsidy of that speech. The regulatory issue is therefore not viewpoint, but the subsidy of viewpoint. This paper proposes to correct the misinformation subsidy by implementing a deregulatory action, in the form of a regulatory action to enforce a la carte cable packaging on local cable providers. Our desire is simply to ensure that cable programmers withstand the same tests of the marketplace that any other commercial media outlet faces, and we believe it is far past the time for this regulatory solution to be implemented.

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<sup>333</sup> See *Abrams v. United States*, 250 U.S. 616, 625 (1919) (Holmes, J., dissenting).

<sup>334</sup> See Shiffman, *supra* note 13; Gans, *supra* note 33; Mastrangelo, *supra* note 33.