

# A Subsidy by Any Other Name: First Amendment Implications of the Satellite Home Viewer Improvement Act of 1999

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## I. INTRODUCTION

The Satellite Home Viewer Improvement Act (“SHVIA”)<sup>1</sup> changed the face of the market for television video services by authorizing direct broadcast satellite (“DBS”) carriers to carry local television stations within their own local markets. Prior to the passage of this law, households could subscribe to satellite-delivered network programming only if they could demonstrate that they could not receive good over-the-air signals from their local network affiliates. Since the passage of SHVIA on November 29, 1999, DBS carriers have become powerful players in the marketplace for video distribution—a market currently dominated by rapidly consolidating cable companies. To encourage this new competitor with cable, SHVIA granted DBS carriers a royalty-free statutory copyright license to carry local broadcast stations in their own markets.<sup>2</sup> In exchange, to ensure the availability of all local channels over satellite, the local carriage provisions of SHVIA (codified at section 338 of the Communications Act) establish that, by 2002, if a DBS system carries a local broadcast station pursuant to this statutory copyright license, the satellite carrier must carry all of the local broadcast stations in that market.<sup>3</sup> On September 20, 2000, this carry-one/carry-all provision was challenged in federal court on the grounds that it violated the First Amendment rights of satellite carriers.<sup>4</sup>

In Part II, this Article examines how the “local-into-local” portion of SHVIA works to equalize the treatment of DBS and cable in the market for the distribution of video services. Part III discusses the constitutional challenge to the law and examines the constitutional geography of SHVIA within the context of current broadcast jurisprudence. Part IV then applies these principles, arguing: (a) DBS has been, and should be, considered a broadcast technology for constitutional purposes; (b) § 338 imposes content-neutral restrictions on speech; (c) § 338 therefore survives under rational basis scrutiny; and (d) alternatively, § 338 survives under intermediate scrutiny as well.

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1. SHVIA was passed as part of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521, Title I.

2. 17 U.S.C. § 122 (Supp. V 1999).

3. 47 U.S.C.A. § 338 (West Supp. 2000).

4. Compl. for Declaratory and Injunctive Relief, Satellite Broad. and Comms. Ass’n of Am. v. FCC (E.D. Va. Sept. 20, 2000) (No. 00-1571-A).

## II. THE SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999: LOCAL CARRIAGE PROVISIONS

DBS services (alternatively known as “Direct-to-Home” or “DTH” services) provide video programming directly to a consumer’s home via satellite transmission to a small receiving dish at the home.<sup>5</sup> The two largest DBS service providers are DirecTV<sup>6</sup> and EchoStar’s Dish Network.<sup>7</sup> DBS had its origins in the large direct-to-home satellite dishes introduced in the 1970s for the reception of video programming transmitted via satellite over the low-power C-band frequencies.<sup>8</sup> Although the C band is still used in some circumstances, DBS service providers currently operate mostly in the Ku band<sup>9</sup> and plan to operate in portions of the Ka band<sup>10</sup> in the near future.<sup>11</sup> Since 1982, DBS service has been governed on an “interim” basis by Part 100 of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>12</sup> and until 1999, consisted mostly of the delivery of national network feeds, nonlocal network stations, and nonbroadcast proprietary programming.

In 1988, the Satellite Home Viewer Act (“SHVA”) became law and

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5. The FCC’s regulations define a “direct broadcast satellite service” as a “radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.” The regulations further state: “In the Direct Broadcast Satellite Service the term direct reception shall encompass both individual reception and community reception.” FCC Safety and Special Radio Servs., 47 C.F.R. § 100.3 (2000).

6. See DirecTV, *About DirecTV*, at <http://www.directv.com/about/aboutpages/0,1119,137,00.html> (last visited Mar. 24, 2001).

7. See Dish Network, *About Dish Network*, at <http://www.dishnetwork.com/content/aboutus/index.shtml> (last visited Feb. 16, 2001).

8. “C band” refers to frequencies between 3 GHz and 6 GHz. MARK E. LONG, *THE DIGITAL SATELLITE TV HANDBOOK* 7 (1999).

9. “Ku band” refers to frequencies between 10 GHz and 17 GHz. *Id.* at 7. For purposes of DBS in the United States, “Ku band” refers to the uplink frequencies at 14.0-14.5 GHz and the corresponding downlink frequencies at 11.7-12.7 GHz. Establishment of Policies and Serv. Rules for the Mobile Satellite Serv. in the 2 GHz Band, *Report and Order*, 15 F.C.C.R. 16,127, para. 78 (2000) [hereinafter *Mobile Satellite Service, Report and Order*].

10. “Ka band” refers to frequencies between 18 GHz and 22 GHz. LONG, *supra* note 8, at 7. For purposes of DBS in the United States, “Ka band” refers to the uplink frequencies at 27.5-30.0 GHz and the corresponding downlink frequencies at 17.7-20.2 GHz. *Mobile Satellite Service, Report and Order, supra* note 9, para. 81.

11. For instance, Local TV on Satellite plans on launching two Ka-band satellites for the provision of service to local markets on a wholesale basis. See *Local TV on Satellite, System Design*, at <http://www.localtv-satellite.com/index1.html> (last visited Mar. 24, 2001). Also, EchoStar plans on launching EchoStar IX, which will operate as a hybrid Ku-band and Ka-band satellite. See Loral, *Space Station/Loral to Build Two More EchoStar Direct Broadcast Satellites*, at <http://www.loral.com/inthenews/000310.html> (last visited Mar. 24, 2001).

12. See 47 C.F.R. § 100.1 *et seq.* (2000).

restricted the reception of satellite-delivered television signals to those “unserved households” that could not receive acceptable over-the-air signals from their local network affiliates with stationary roof-top antennae.<sup>13</sup> SHVA did this through the mechanism of a statutory copyright license. Ordinarily, broadcast television stations possess the exclusive right to create copies of their signals through the retransmission of those signals over other services, because the broadcast signals are considered a copyrighted “compilation” of audiovisual works.<sup>14</sup> In accordance with this right, and with limited exceptions, anyone who seeks to retransmit the signal of an over-the-air broadcast station must first seek permission from the broadcast station prior to doing so. This results in a negotiated copyright “license” to make a copy of the signal for that purpose. By way of contrast, a non-negotiated, “statutory” license (also called a “compulsory license,” because the copyright owner is “compelled” to provide the license) allows the licensee to retransmit the signals of broadcast television stations without having to negotiate for copyright permission with each television station it carries.<sup>15</sup>

After passage of SHVA, disputes regarding the eligibility of subscribers to receive distant television signals soon swept the nation. In 1998, several federal courts found that the satellite industry had systematically violated the terms of its statutory copyright license by signing up ineligible subscribers.<sup>16</sup> As a result, injunctions were ordered that would have terminated subscriber access to satellite signals if the subscribers did not qualify under the “unserved household” definition.<sup>17</sup>

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13. See 17 U.S.C. § 119 (1994).

14. 17 U.S.C. § 102(a)(6) (listing audiovisual works as copyrightable); *id.* § 103 (stating that copyright inheres in compilation works); *id.* § 101 (defining a compilation work as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”).

15. *Id.* §§ 111, 119; *id.* § 122 (Supp. V 1999). Note that the Communications Act separately requires a cable programmer or other multichannel video distributor who wishes to retransmit the signal of a broadcast television station to obtain the consent of that station through “retransmission consent.” 47 U.S.C.A. § 325(b) (West. Supp. 2000). This process is distinct from obtaining copyright clearances pursuant to copyright law, but is arguably related to it. Although commercial television stations have the right to grant retransmission consent, public television stations do not. *Id.* § 325(b)(2)(A).

16. See, e.g., *Primetime 24 Joint Venture v. NBC, Inc.*, 219 F.3d 92, 97-98 (2d Cir. 2000) (noting that satellite carriers have engaged in a pattern or practice of infringing on network copyrights); *CBS Broad., Inc. v. Primetime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (findings of fact and conclusions of law).

17. See *CBS Broad., Inc. v. Primetime 24 Joint Venture*, 1998 U.S. Dist. LEXIS 20488 (S.D. Fla. 1998) (final judgment and permanent injunction); *ABC, Inc. v. Primetime 24 Joint Venture*, 17 F. Supp. 2d 467 (M.D.N.C. 1998), 17 F. Supp. 2d 478 (M.D.N.C. 1998) (summary judgment granted for plaintiff and permanent injunction issued), *aff'd in part*, 184

In 1999, SHVIA addressed these concerns by extending the statutory copyright license for distant signals for another five years<sup>18</sup> and by amending the license in several respects. One notable way SHVIA amended the license was to “grandfather” those subscribers who would have had their eligibility for DBS signals terminated as a result of court injunctions. Other modifications included deleting waiting periods for eligibility and specifying signal measurement methodologies and complaint procedures.<sup>19</sup> SHVIA retained the restriction, however, that a DBS service provider may only deliver a distant “network” station to an “unserved” household that could not otherwise receive this signal over the air.<sup>20</sup> In addition, SHVIA retained the definition of “unserved household” as a household that cannot receive a Grade-B signal from a local network affiliate by use of a conventional, stationary, outdoor rooftop antenna.<sup>21</sup>

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F.3d 348 (4th Cir. 1999).

18. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521, Title I, Sec. 1003.

19. 17 U.S.C. § 119(a)(2)(B) (Supp. V 1999).

20. *Id.* A “network station” is defined in part to include any television broadcast station, including any translator station . . . that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned and operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States.

*Id.* § 119(d)(2)(A). Because this part of the definition does not describe public television stations, which are neither owned nor operated by a television network, the definition specifically provides that a “network station” also includes “a noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934).” *Id.* § 119(d)(2)(B).

Additionally, under the distant license, a DBS service provider may also deliver certain stations, called “superstations,” to all households, regardless of their ability to receive these signals over the air. *Compare id.* § 119(a)(1) with *id.* § 119(a)(2). “The term ‘superstation’ means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier,” *id.* § 119(d)(9)(A), and includes “KTLA-TV (Los Angeles), KWGN-TV (Denver), WPIX-TV (New York), WWOR-TV (New York), WGN-TV (Chicago), and WSBK-TV (Boston).” FCC, *Fact Sheet, Satellite Home Viewer Improvement Act of 1999*, para. 20, at <http://www.fcc.gov/csb/shva/shviafac.html> (last visited Mar. 24, 2001). The Public Broadcasting Service (“PBS”) national satellite feed is also considered a “superstation,” except for purposes of computing the royalty fee. 17 U.S.C. § 119(d)(9)(B). The license that allows DBS service providers to retransmit the PBS national feed expires on January 1, 2002. *Id.* § 119(a)(1).

21. 17 U.S.C. § 119(d)(10)(A). In addition, some households may be eligible for a waiver, despite receiving a signal of Grade-B intensity from the relevant station. *Id.* § 119(d)(10)(B). To receive a waiver, a potential DBS subscriber must first submit his request to the DBS service provider, who then forwards the request to the local network television station, which asserted that retransmission was prohibited. The local network television station has thirty days from the date that it receives the waiver request to either grant or

Responding to the nationwide litigation, while at the same time providing a way to indirectly regulate increasing cable rates, SHVIA also created an incentive for the DBS service to evolve from its role of merely delivering distant network signals to unserved households to its current status of potentially competing with cable in the delivery of both multichannel programming and local broadcast programming.<sup>22</sup> To accomplish this end, SHVIA amended both the Copyright Act of 1976 (“Copyright Act”)<sup>23</sup> and the Communications Act of 1934 (“Communications Act”).<sup>24</sup>

For the first time, SHVIA granted to DBS carriers the permanent right to retransmit the signals of local stations into their own local designated market areas (“DMAs”)<sup>25</sup> without seeking the permission of the local

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deny the request. If the local network television station does not issue a decision within thirty days, the request for a waiver is considered granted, and the DBS service provider may provide the signal. 47 U.S.C.A. § 339(c)(2) (West Supp. 2000).

If a waiver is denied, the potential DBS subscriber can submit a request to the satellite company to have a signal strength test performed at the subscriber’s location to determine whether the subscriber is receiving a signal of at least Grade-B intensity. *Id.* § 339(c)(4). The satellite company and relevant television broadcast station will then select a qualified, independent person to conduct the signal test. *Id.* The test must be provided no later than thirty days after the subscriber submits his request for a test. *Id.* If the satellite company and TV station cannot agree on who is to conduct the signal test, SHVIA requires the parties to use an independent, neutral entity selected by the FCC. *Id.* § 339(c)(4)(B). The entity selected is the American Radio Relay League. Establishment of an Improved Model for Predicting the Broad. Television Field Strength Received at Individual Locations, *First Report and Order*, 15 F.C.C.R. 12,118, para. 23, 20 Comm. Reg. (P & F) 574 (2000). The definition of “unserved household” also creates some exemptions for owners of certain recreational vehicles and commercial trucks, 17 U.S.C. § 119(d)(10)(D) (Supp. V 1999), as well as for certain C-band subscribers. *Id.* § 119(d)(10)(E).

22. Joint Explanatory Statement of the Comm. of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. at H11,792 (daily ed. Nov. 9, 1999) [hereinafter Joint Explanatory Statement].

23. Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976) (codified at 17 U.S.C. § 101 *et seq.* (1994)).

24. 48 Stat. 1064 (June 19, 1934) (codified at 47 U.S.C. § 151 *et seq.*).

25. 17 U.S.C. § 122(a) (Supp. V 1999). *See also* 47 U.S.C.A. § 339(a)(1)(B) (West Supp. 2000) (“[A]ny satellite carrier may also provide service under the statutory license of section 122 of title 17, United States Code, to the local market within which such household is located.”). A DMA, or “‘designated market area’ means a designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Director and Nielsen Station Index United States Television Household Estimates or any successor publication.” 17 U.S.C. § 122(j)(2)(C) (Supp. V 1999). A noncommercial station’s DMA includes “any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station,” and also includes the county in which the station’s community of license is located. *Id.* § 122(j)(2)(A)-(B). *See also* FCC Broad. Radio Servs., 47 C.F.R. § 76.66(e) (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999; Broad. Signal Carriage Issues: CS Docket No. 00-96 Retransmission Consent Issues, *Report and Order*, app. B, 22 Comm. Reg. (P & F) 655 (2000) [hereinafter DBS Order].

stations in advance and without being required to pay royalties in the usual manner associated with a statutory copyright license.<sup>26</sup> In exchange for this “local-into-local,” royalty-free, statutory copyright license, Congress required that, by January 1, 2002, if a satellite carrier carries at least one local signal in a market pursuant to the license, it must upon request carry all local broadcast stations’ analog signals in that market. Section 338 as amended by SHVIA, states:

[E]ach satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).<sup>27</sup>

Thus, as Congress has clarified, the statutory copyright license is conditioned upon satisfying certain carriage obligations.<sup>28</sup>

Under copyright law, however, satellite carriers are not required to use the new statutory copyright license. Use of the license is strictly voluntary, because in lieu of using the statutory copyright license (or prior to January 1, 2002, when the statutory license becomes effective), a satellite carrier may obtain copyright clearances from each local commercial broadcast station before retransmitting the signals of those stations on its DBS system. As Congress explained:

Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market’s broadcast stations to subscribers in that market. The

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26. 17 U.S.C. § 122(c).

27. 47 U.S.C.A. § 338(a)(1) (West Supp. 2000). The local-into-local statutory copyright license does not apply to the retransmission of low-power or television translator stations, 17 U.S.C. § 122(j)(5)(A) (Supp. V 1999), nor does the must-carry provision, which is triggered by the use of the license, 47 U.S.C.A. §§ 325(b)(7)(B), 338(h)(7). The must-carry provision is silent regarding the carriage of digital broadcast signals, as distinguished from analog broadcast signals. The FCC has stated that it will consider the digital carriage obligations of satellite carriers and cable operators in a separate proceeding. DBS Order, *supra* note 25, para. 123.

On January 23, 2001, the FCC released an Order in which it established cable carriage rules for the digital signals of broadcast stations, but again deferred consideration of the issue of digital carriage on satellite systems. Carriage of Digital Television Broad. Signals: Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order and Further Notice of Proposed Rulemaking*, para. 136, 2001 WL 55621 (F.C.C.) (Jan. 23, 2001).

28. “The conference report added the cross-reference to section 122 to the House provision to indicate the relationship between the benefits of the statutory license and the carriage requirements imposed by this Act.” Joint Explanatory Statement, *supra* note 22, at H11,795.

choice whether to retransmit those signals is made by carriers, not by the Congress.<sup>29</sup>

In a separate but related provision, the Communications Act also requires a satellite carrier wishing to retransmit the signal of a broadcast television station to obtain the "consent of retransmission" of that station.<sup>30</sup> The FCC, therefore, requires all commercial stations to elect either retransmission consent or mandatory carriage for the period beginning on January 1, 2002.<sup>31</sup> Underscoring the close relationship between the right of retransmission consent under the Communications Act and the right to negotiate copyright clearances under copyright law, however, the FCC has significantly restricted the ability of satellite carriers to avoid local carriage obligations by simply relying on privately negotiated copyright agreements.<sup>32</sup> The FCC has required that retransmission agreements with commercial stations contain comprehensive copyright clearances from the copyright holders (or assignees) of each of the programs, advertisements, and music aired by the station.<sup>33</sup> If retransmission agreements do not

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29. *Id.* The FCC concurs with this theory:

This provision gives satellite carriers a choice. If satellite carriers provide their subscribers with the signals of local television stations through reliance on the statutory copyright license, they will have the obligation to carry all of the television signals in that particular market that request carriage. If satellite carriers provide local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply.

Implementation of the Satellite Home Viewer Improvement Act of 1999: Broad. Signal Carriage Issues, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 12,147, para. 10 (2000). See also DBS Order, *supra* note 25, para. 15 ("If a satellite carrier provides local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply.").

30. 47 U.S.C.A. § 325(b).

31. FCC Broad. Radio Servs., 47 C.F.R. § 76.66(c) (2000). Commercial stations must elect either retransmission consent or must-carry by July 1, 2001, for the initial four-year period commencing on January 1, 2002, and ending on December 31, 2005. *Id.* § 76.66(c)(1). Thereafter, each election cycle lasts for a period of three years. *Id.* § 76.66(c)(2). Commercial stations must elect their methods of carriage prior to each of these cycles by October 1 of the preceding year. *Id.* § 76.66(c)(4). The statutory retransmission consent option does not extend to public television stations, however, leaving them only mandatory carriage rights where DBS service providers offer local-into-local service. 47 U.S.C.A. § 325(b)(2)(A). That is not to say, though, that public television stations may not negotiate the terms and conditions of carriage, but only that such stations may not withhold their signals from carriage. If it is in a market where local-into-local service is provided, a noncommercial station must request mandatory carriage by July 1, 2001, for the first election cycle, which lasts for four years until December 31, 2005. 47 C.F.R. § 76.66(c)(5). Thereafter, a noncommercial station must request carriage every three years on the same date that commercial stations must elect either retransmission consent or must-carry, i.e., by October 1 preceding the year in which the election cycle commences. *Id.*

32. DBS Order, *supra* note 25, para. 15.

33. *Id.*

contain such comprehensive terms, then the satellite carrier involved is still subject to must-carry requirements.<sup>34</sup> Nevertheless, the choice still rests with satellite carriers as to the preferred method of carriage. They may select either must-carry, with its basic obligation to carry all local stations in that market, or they may choose to negotiate with each local station for carriage and for comprehensive copyright clearances.

In addition to the basic carriage obligation, SHVIA also imposes a variety of other duties in exchange for the use of the statutory license, with the aim of equalizing the regulatory treatment of satellite and cable.<sup>35</sup> These duties are set out in SHVIA and further elaborated upon by FCC regulations that became effective on January 23, 2001.<sup>36</sup> First, satellite carriers must construct and designate local uplink facilities in each designated market in which local service is provided, so that local broadcast stations can deliver their signals for distribution over the DBS system; alternatively, satellite carriers can construct an uplink facility that is acceptable to at least half of the stations asserting the right to carriage.<sup>37</sup> In exchange, the broadcast station asserting its carriage rights is responsible for, and must bear the costs of, providing a “good quality signal” to the uplink facility.<sup>38</sup> Second, satellite carriers are not required to carry duplicative commercial stations in the same market, nor must they carry more than one local station affiliated with the same network, unless such stations are licensed to communities in different states.<sup>39</sup> A satellite carrier must carry all non-duplicative noncommercial stations, however, in markets where it provides local-into-local service.<sup>40</sup> Third, DBS systems

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34. *Id.*

35. “A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station into the station’s local market shall be subject to statutory licensing under this section if . . . (2) with regard to secondary transmissions, the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals. . . .” 17 U.S.C.A. § 122(a) (West Supp. 2000).

36. *See* 47 C.F.R. § 76.66, as added by DBS Order, *supra* note 25. This Order became effective immediately on publication in the *Federal Register* on January 23, 2001. Implementation of the Satellite Home Viewer Improvement Act of 1999: Broad. Signal Carriage Issues/Retransmission Consent Issues, 66 Fed. Reg. 7410 (Jan. 23, 2001).

37. 47 U.S.C.A. § 338(b) (West Supp. 2000); 47 C.F.R. § 76.66(f).

38. 47 U.S.C.A. § 338(b); 47 C.F.R. § 76.66(g).

39. 47 U.S.C.A. § 338(c)(1). *See also* 47 C.F.R. § 76.66(h). “A commercial television station substantially duplicates the programming of another commercial television station if it simultaneously broadcasts the identical programming of another station for more than 50 percent of the broadcast week.” *Id.* § 76.66(h)(6).

40. 47 U.S.C.A. § 338(c)(2); 47 C.F.R. § 76.66(h). *See also* DBS Order, *supra* note 25, paras. 84-90. For purposes of satellite carriage, duplication occurs if, for the first three noncommercial stations carried, a station “*simultaneously* broadcasts the same programming as another noncommercial station more than 50 percent of prime time . . . and more than 50

must carry the entirety of a broadcast signal and must not degrade the broadcast signal.<sup>41</sup> Fourth, although satellite providers need not preserve the channel position or channel number of a broadcast station, local broadcast channels must be retransmitted on contiguous channels, and satellite providers must provide access to such stations on a nondiscriminatory basis, including, on any navigational devices, on-screen program guides, or other menus.<sup>42</sup> Finally, satellite providers are not allowed to accept or request compensation for must-carry rights or channel positioning on their systems.<sup>43</sup> Failure to comply with the basic carriage obligation can give rise to a copyright complaint in federal court,<sup>44</sup> while failure to comply with any of the related FCC regulations can subject a satellite carrier to the FCC's administrative complaint process.<sup>45</sup>

As Congress explained, the purpose of the local carriage obligations was primarily to "preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information

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percent outside of-prime time over a three month period." 47 C.F.R. § 76.66(h)(7) (emphasis added). "[A]fter three noncommercial stations are carried, the test of duplication [is] whether more than 50 percent of prime time programming and more than 50 percent of non-prime time programming is duplicative on a *non-simultaneous* basis." *Id.* (emphasis added).

41. 47 U.S.C.A. § 338(g). The FCC has created regulations that add additional detail to these provisions. Thus, satellite carriers must carry the

entirety [of] the primary video, accompanying audio, and closed captioning data contained in line 21 of the vertical blanking interval, and to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. For noncommercial educational television stations, a satellite carriers must also carry any program-related material that may be necessary for receipt of programming by persons with disabilities or for educational or language purposes. Secondary audio programming must also be carried.

47 C.F.R. § 76.66(j)(1). Satellite carriers may delete signal enhancements, however, and may carry any other auxiliary service transmission at their own discretion. *Id.* Regarding nondegradation, the FCC has stated that "[e]ach local television station whose signal is carried under mandatory carriage shall, to the extent technically feasible and consistent with good engineering practice, be provided with the same quality of signal processing provided to television stations electing retransmission consent." *Id.* § 76.66(k). Satellite carriers are permitted to use reasonable compression techniques, however, when carrying local television stations. *Id.*

42. 47 U.S.C.A. § 338(d); 47 C.F.R. § 76.66(i).

43. 47 U.S.C.A. § 338(e); 47 C.F.R. § 76.66(l).

44. 47 U.S.C.A. § 338(a)(2) ("The remedies for any failure to meet the obligations under this subsection shall be available exclusively under section 501(f) of title 17, United States Code."). Section 501(f)(2) of the Copyright Act authorizes a television broadcast station to "file a civil action against any satellite carrier" that has refused to carry the station's signal, as required under the compulsory license and must-carry provisions of sections 122(a)(2) of the Copyright Act and 338(a) of the Communications Act. 17 U.S.C. § 501(f)(2) (1994).

45. *See* 47 U.S.C.A. § 338(f) (West Supp. 2000); 47 C.F.R. § 76.66(m).

from a multiplicity of sources.”<sup>46</sup> Congress stated that to accomplish these ends, it was necessary to prevent satellite carriers from choosing only certain stations for carriage.<sup>47</sup> In addition, Congress carefully constructed the license to place satellite carriers in a comparable position to cable systems competing for the same customers. Congress concluded that “[a]pplying a must-carry rule in markets which satellite carriers choose to serve benefits consumers and enhances competition with cable by allowing consumers the same range of choice in local programming they receive through cable service.”<sup>48</sup> Exercising its power to legislate prospectively based on its predictive capabilities,<sup>49</sup> Congress anticipated that by 2002, the market share of satellite carriers would have increased and “Congress’[s] interest in maintaining free over-the-air television will be undermined if local broadcasters are prevented from reaching viewers by either cable or satellite distribution systems.”<sup>50</sup>

Through the mechanism of the statutory copyright license, Congress gave satellite carriers a voluntary and economic benefit to assist them in competing with cable, while at the same time imposing obligations similar to those faced by the cable companies. Congress was also aware of the dangers of increased satellite carrier market power, however, and, therefore, it carefully constructed a remedy to ensure the preservation of free, over-the-air television and to promote the widespread dissemination of information from a multiplicity of sources.

### III. SHVIA’S CONSTITUTIONAL GEOGRAPHY

On September 20, 2000, the Satellite Broadcasting and Communications Association (“SBCA”), DirecTV, and EchoStar filed a lawsuit in the Eastern District of Virginia challenging the constitutionality

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46. Joint Explanatory Statement, *supra* note 22, at H11,795.

47. *Id.*

Providing the proposed license on a market-by-market basis furthers both goals by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.

*Id.*

48. *Id.*

49. “[S]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” *Time-Warner Entm’t Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (“*Turner I*”).

50. Joint Explanatory Statement, *supra* note 22, at H11,795.

of § 338 on First Amendment free speech grounds.<sup>51</sup> On February 9, 2001, the court held oral arguments on various motions to dismiss.<sup>52</sup> In addition, the SBCA and EchoStar each separately appealed the FCC's newly created regulations in the U.S. Courts of Appeals for the Fourth, and Tenth Circuits respectively.<sup>53</sup> The SBCA claimed that the statute violates the satellite carriers' First Amendment free speech rights on the basis of seven separate theories. First, the SBCA alleged that the statute interferes with satellite carriers' protected editorial discretion.<sup>54</sup> Second, the SBCA alleged that § 338 penalizes satellite carriers for engaging in certain kinds of protected speech.<sup>55</sup> Third, the SBCA claimed that the statute makes a content-based preference for independent, local television broadcast programming over other forms of video programming and programming services.<sup>56</sup> Fourth, the SBCA alleged that § 338 constitutes speaker-based discrimination by increasing the relative voice of a certain class of speakers to the detriment

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51. See Compl. for Declaratory and Injunctive Relief, Satellite Broad. and Comms. Ass'n of Am. v. FCC (E.D. Va. Sept. 20, 2000) (No. 00-1571-A) [hereinafter Complaint]. The SBCA also claimed that SHVIA took property without just compensation or due process in violation of the Fifth Amendment. In support of this claim, the SBCA argued that the law requires the satellite carriers "to purchase or lease additional real property and to purchase, lease, and/or construct additional facilities, including local receive facilities, backhaul facilities, uplink center capability, satellite capability, and spectrum rights." *Id.* para. 94. In addition, the SBCA claimed that the statute "works a permanent physical occupation of the real property, personal property, spectrum rights, and other property" of satellite carriers by requiring third parties to install equipment that is physically interconnected with DBS systems. *Id.* para. 96. Therefore, the SBCA alleged that this constitutes a deprivation of property without due process of law in violation of the Fifth Amendment. *Id.* para. 99. In addition, the SBCA also argued that Congress lacked the authority to create the law under the Copyright Clause of the Constitution. It argued that the copyright power granted to Congress is limited to the promotion of creative endeavors generally and does not extend to Congress the power to use copyright law to promote works of particular varieties or by particular authors. *Id.* para. 87. Both of these claims lie beyond the scope of this Article.

52. See *Court to Hear Must-Carry Motions*, SKYREPORT (Feb. 9, 2001), at <http://www.skyreport.com/skyreport/feb2001/020901.htm#one>; *Court to Review Must-Carry Motions*, SKYREPORT (Feb. 12, 2001), at <http://www.skyreport.com/feb2001/021201.htm#one>.

53. See Pet. for Review, EchoStar Satellite Corp. v. FCC, (10th Cir. Feb. 2, 2001) (No. 01-9503); Pet. for Review, Satellite Broad. and Comms. Ass'n v. FCC (4th Cir. Feb. 1, 2001) (No. 01-1151). The National Association of Broadcasters has also appealed a portion of the new regulations in the D.C. Circuit on the basis that the challenged portion is arbitrary and capricious and otherwise contrary to law. Pet. for Review, Nat'l Ass'n of Broads. v. FCC (No. 01-1050) (D.C. Cir. Feb. 1, 2001). By order dated February 9, 2001, the Judicial Panel on Multidistrict Litigation consolidated these appeals in the Fourth Circuit. See Implementation of the Satellite Home Viewer Improvement Act of 1999; Broad. Signal Carriage Issues, Retransmission Consent Issues, *Order*, No. RTC-57, FCC 00-417 (Feb. 9, 2001).

54. Complaint, *supra* note 51, para. 75.

55. *Id.* para. 76.

56. *Id.* para. 77.

of other speakers.<sup>57</sup> Fifth, the SBCA claimed that the statute unlawfully forces satellite carriers to display and associate themselves with the speech of others.<sup>58</sup> Sixth, the SBCA claimed that the statute dictates the content of satellite carriers' own speech by dictating the manner in which on-screen programming guides and menus must present local broadcast television stations.<sup>59</sup> Lastly, the SBCA claimed that the statute violates the First Amendment rights not only of the satellite carriers, but also of national and regional cable programmers, network-affiliated local television broadcast stations, and subscribers to DBS services.<sup>60</sup>

With limited exceptions,<sup>61</sup> content-based governmental restrictions on speech are reviewed under strict scrutiny and thus must be justified by compelling state interests and be narrowly tailored to accomplish those interests.<sup>62</sup> By way of contrast, content-neutral limitations on speech receive intermediate scrutiny,<sup>63</sup> requiring only an important governmental interest unrelated to the suppression of speech and means no greater than necessary to further that interest.<sup>64</sup> It has long been established that a less rigorous level of scrutiny applies to the regulation of broadcast media,<sup>65</sup> however, allowing some limited content restraints as well as certain affirmative obligations on broadcast licensees.<sup>66</sup> For instance, for content-neutral governmental restrictions on broadcast speech, the Supreme Court has applied rational basis scrutiny, requiring means that are only rationally related to a legitimate governmental interest.<sup>67</sup> On the other hand, where the government imposes content-based restrictions on broadcast speech, the Supreme Court has typically used a form of intermediate scrutiny also

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57. *Id.* para. 78.

58. *Id.* para. 79.

59. *Id.* para. 80.

60. *Id.* para. 84.

61. The exceptions include cases where there is a clear and present danger of imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); obscenity, *Roth v. U.S.*, 354 U.S. 476 (1957); and defamation, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

62. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Turner I*, 512 U.S. 622, 642 (1994).

63. *Turner I*, 512 U.S. at 642 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

64. *Id.* at 662 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) and *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

65. *Id.* at 637 (comparing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (television), and *NBC v. United States*, 319 U.S. 190 (1943) (radio), with *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (print), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (personal solicitation)).

66. *Id.* at 638 (citing *Red Lion Broad. Co.*, 395 U.S. at 390).

67. *Red Lion Broad. Co.*, 395 U.S. 367; *NBC*, 319 U.S. 190. See also *Time-Warner Entm't Co. v. FCC*, 93 F.3d 957, 976-77 (D.C. Cir. 1996).

associated with “time, place, and manner” restrictions, content-neutral regulation of cable, and the Court’s commercial speech jurisprudence.<sup>68</sup> The following section describes this dual aspect of constitutional broadcast jurisprudence.

A. *Content-Neutral Regulation of Broadcasting: Rational Basis Scrutiny*

In 1943, the Supreme Court in *NBC v. United States* upheld several FCC regulations, promulgated pursuant to the FCC’s power to regulate broadcasting in “the public interest,” that imposed restrictions on the ability of broadcasters to create contracts with networks—i.e., “chain broadcasting.”<sup>69</sup> Responding to a challenge to the FCC’s statutory authority, the Court held that the Communications Act did not limit the FCC’s role simply to ensuring noninterference between stations, but rather it gave the FCC expansive powers to regulate in the public interest.<sup>70</sup> The Court then turned to a First Amendment challenge and reasoned that, given the unique characteristics of broadcasting, the medium was subject to government regulation.<sup>71</sup> The Court concluded that “the right of free speech does not include . . . the right to use the facilities of radio without a license,”<sup>72</sup> giving the impression that federal restrictions on the free speech of broadcast licensees were subject to what we would now call rational basis scrutiny. The Court was careful to note, however, that the regulations at issue were *content-neutral* in nature, and that if future regulations were viewpoint-specific, the analysis would be wholly different:

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68. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999); *Turner I*, 512 U.S. 622 (1994); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Ward*, 491 U.S. 781 (1989); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

69. 319 U.S. 190.

70. *Id.* at 215-16.

The Act itself establishes that the Commission’s powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. 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. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress could not do this, it committed the task to the Commission.

*Id.*

71. *Id.* at 226. “Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.” *Id.*

72. *Id.* at 227.

Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.<sup>73</sup>

In 1969, the Supreme Court developed this rationale further when it upheld the FCC's now repealed "fairness doctrine"<sup>74</sup> and the related personal attack<sup>75</sup> and political editorial rules<sup>76</sup> under a relaxed standard of review approaching rational basis scrutiny. In *Red Lion Broadcasting Co. v. FCC*,<sup>77</sup> the Supreme Court held that the unique nature of the medium, specifically the scarcity of electromagnetic spectrum, required the licensing authority to ensure that the broadcast spectrum was used productively to serve the public interest.<sup>78</sup> Reflecting on the historically documented chaos that had resulted from unregulated radio use prior to the Radio Act of 1927 and the Communications Act,<sup>79</sup> the Court noted that this state of affairs was directly analogous to the scenario of a powerful person drowning out the voices of the less powerful.<sup>80</sup>

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73. *Id.* at 226.

74. Established in 1949 by the FCC, the fairness doctrine required that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions. Editorializing by Broad. Licensees, *Report of the Commission*, 13 F.C.C. 1246, para. 21 (1949). The purpose of the doctrine was to ensure a well-informed electorate through the balanced expression of diverse viewpoints in a scarce medium.

75. The personal attack rule stated that when, during the presentation of views on a "controversial issue of public importance," an attack is made upon the "honesty, character, integrity or like personal qualities of an identified person or group," the broadcaster must notify the person attacked, and provide a tape or transcript of the attack, within one week and offer a "reasonable opportunity to respond." 47 C.F.R. § 73.1920(a), repealed by 65 Fed. Reg. 66,643, 66,644 (Nov. 7, 2000).

76. The political editorial rule provided that, if a broadcast licensee runs an editorial supporting a legally qualified candidate for elective office, the licensee must inform all other qualified candidates of the editorial and provide a reasonable opportunity for those candidates to respond. *Id.* § 73.1930, repealed by 65 Fed. Reg. 66,643, 66,644 (Nov. 7, 2000).

77. 395 U.S. 367 (1969).

78. *Id.* at 390.

79. *Id.* at 375. "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos." *Id.*

80. Recognizing the "massive reality" of the problem of interference, the Court stated:

The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology. It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934.

Consequently, the Court concluded that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>81</sup> Therefore, *Red Lion* established that, with regard to broadcasting and the First Amendment, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>82</sup>

In rendering its decision, the *Red Lion* Court had two concerns. First, the Court was concerned that governmental regulation and normalization of the medium was necessary to cultivate a fertile environment for free speech. Therefore, regulation served the structural purpose of maintaining those conditions necessary for free speech to thrive.<sup>83</sup> Second, the Court was concerned with the possibility of more powerful persons being able to monopolize the marketplace of ideas to the detriment of the less powerful. Preventing such domination also promoted the free exchange of ideas.<sup>84</sup>

The Court was careful to emphasize, however, that despite the importance of a governmental oversight of the conditions of free expression, the Communications Act itself forbade the federal government from censoring programming.<sup>85</sup> Indeed, the Court specifically stated that if the regulations at issue were content-specific, a more serious constitutional

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*Red Lion Broad. Co.*, 395 U.S. at 388 (citing *NBC, Inc. v. United States*, 319 U.S. 190, 210-14 (1943)). The Court analogized to nuisance law, stating:

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.

*Id.* at 387 (citation omitted).

81. *Id.* at 388.

82. *Id.* at 390.

83. It is this structural perspective that the Court had in mind when it stated:

[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

*Id.* at 390.

84. “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Id.*

85. *Id.* at 382 n.12 (quoting 47 U.S.C. § 326 (1994)).

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

*Id.*

review would have ensued.<sup>86</sup>

In 1996, in *Time-Warner v. FCC*,<sup>87</sup> the D.C. Circuit Court of Appeals built upon these foundations when it upheld against a First Amendment challenge section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Act”)<sup>88</sup> and the FCC’s implementing regulations.<sup>89</sup> The Act and its corresponding regulations required DBS service providers to set aside four percent of their national channel capacity for national providers of noncommercial, educational, and informational programming.<sup>90</sup> The court held that, because of the scarcity of orbital slots and available frequencies, the statute and regulations were to be evaluated by using the broadcast standard of scrutiny announced in *Red Lion*.<sup>91</sup>

After setting forth the appropriate constitutional standard, the D.C. Circuit examined the governmental interest involved, which was to “promote the availability to the public of a diversity of views and information through cable television and other video distribution media,” an interest which it concluded lay “at the core of the First Amendment.”<sup>92</sup> The court then examined the means chosen to effectuate this interest, stating that “either empirical support or at least sound reasoning” must be marshaled in support of measures that may incidentally affect First

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86. *Id.* at 396.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission’s refusal to permit the broadcasters to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues

*Id.*

87. *Time-Warner Entm’t Co. v. FCC*, 93 F.3d 957, 976-77 (D.C. Cir. 1996).

88. 47 U.S.C. § 335(b) (1994).

89. FCC Safety and Radio Servs., 47 C.F.R. § 100.5(c) (2000). *See also* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broad. Satellite Pub. Interest Obligations, *Report and Order*, 13 F.C.C.R. 23,254, 14 Comm. Reg. (P & F) 290 (1998).

90. 47 C.F.R. § 100.5(c)(1).

91. *Time-Warner*, 93 F.3d at 975.

The Supreme Court recognized, in 1969, that because of the limited availability of the radio spectrum for broadcast purposes, “only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time.” . . . The same is true for DBS today. Because the United States has only a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited. Even before the first DBS communications satellite was launched in 1994, the FCC found that “the demand for channel/orbit allocations far exceeds the available supply.”

*Id.* (citations omitted).

92. *Id.* at 976.

Amendment interests.<sup>93</sup> The D.C. Circuit reasoned that, although Congress made no specific findings in support of the noncommercial set-aside, it was not required to do so, given that no DBS system was in operation at the time the 1992 Act was enacted and that Congress may make “deductions and inferences for which complete empirical support may be unavailable.”<sup>94</sup> The court reasoned further that the set-aside represented “nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming” achieved through means that imposed little burden on the DBS operators.<sup>95</sup>

Importantly, in applying the broadcast standard of constitutional review, the D.C. Circuit noted that the set-aside was content-neutral. It held that the set-aside did not require or prohibit the carriage of particular ideas or points of view, penalize DBS operators or programmers based on the content of their programming, compel DBS operators to affirm points of view with which they disagree, or produce any net decrease in the amount of available speech, and left DBS operators free to carry whatever programming they wished on all channels not subject to the set-aside requirements.<sup>96</sup> Because the purpose of the set-aside was to promote speech and not to restrict it, the court concluded that it was a “*reasonable means* of promoting the public interest” and did not violate the First Amendment.<sup>97</sup> Therefore, building upon the precedent established in *Red Lion* and *NBC*, the D.C. Circuit implicitly used the rational basis test to uphold a content-neutral regulation of broadcasting as constitutional.

### B. *Content-Based Broadcast Regulation: Intermediate Scrutiny*

By contrast, when the Supreme Court has evaluated content-based restrictions on broadcasting, the Court has typically applied intermediate scrutiny. In *FCC v. League of Women Voters*, the Supreme Court struck down a content-based ban on editorializing by noncommercial broadcast licensees, holding that content-based restrictions on broadcast operations would be upheld only if the restrictions were “narrowly tailored to further a

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93. *Id.* (quoting *Century Comm. Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)).

94. *Id.* (quoting *Turner I*, 512 U.S. 622, 665 (1994)).

“Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.” . . . “[S]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.”

*Id.* (quoting *Turner I*, 512 U.S. at 665-66).

95. *Id.*

96. *Id.* at 977 (citing *Turner I*, 512 U.S. at 647).

97. *Id.* (emphasis added) (internal citations omitted).

substantial government interest.”<sup>98</sup> Thus, the Court examined the statute under a form of intermediate scrutiny usually associated with the examination of content-neutral “time, place, and manner” restrictions,<sup>99</sup> restrictions on nonbroadcast speech by cable operators,<sup>100</sup> or content-neutral restrictions on commercial speech.<sup>101</sup>

In *League of Women Voters*, the Court built upon the foundation laid by *Red Lion* and sought to clarify “the essential meaning of [its] prior decisions concerning the reach of Congress’ authority to regulate broadcast communication,”<sup>102</sup> emphasizing that “the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area.”<sup>103</sup> The Court reviewed various broadcast content controls—including decisions involving both the reasonable access requirements of § 312(a)(7)<sup>104</sup> and time, place, and manner restrictions on indecent material<sup>105</sup>—and concluded that content-based restrictions on broadcast operations had been upheld “only when the Court was satisfied that the restriction is narrowly tailored to further a substantial government interest.”<sup>106</sup> The Court identified two governmental interests in support of the ban on editorializing—protecting noncommercial stations from becoming vehicles for government propaganda and preventing those stations from being captured by private interest groups bent on expressing partisan views<sup>107</sup>—and concluded that even if these interests were substantial, the means chosen to accomplish them were both underinclusive and overinclusive and thus not sufficiently “narrowly tailored.”<sup>108</sup> By

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98. 468 U.S. 364, 380 (1984). In analyzing the ban on editorializing, the Court found that the restriction was content-based in two respects. First, the restriction was “specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection.” *Id.* at 381. Second, the scope of the ban was defined solely by the content of the suppressed speech, for “in order to determine whether a particular statement by station management constitutes an ‘editorial’ proscribed by [section] 399, enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern ‘controversial issues of public importance.’” *Id.* at 383.

99. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

100. See *Turner I*, 512 U.S. 622 (1994).

101. See *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, of N.Y.* 447 U.S. 557 (1980).

102. *League of Women Voters*, 468 U.S. at 376.

103. *Id.* at 378.

104. *Id.* at 378-79 (citing *CBS, Inc. v. FCC*, 453 U.S. 367 (1981)).

105. *Id.* at 380 n.13 (citing *Pacifica Found.*, 438 U.S. at 726).

106. *Id.* at 380.

107. *Id.* at 384-85.

108. *Id.* at 395-99.

requiring that content-based restrictions on broadcast operations be “narrowly tailored to further a *substantial* government interest,” the Court apparently applied the intermediate standard of scrutiny typically used when examining content-neutral “time, place, and manner” restrictions on nonbroadcast speech.<sup>109</sup> Although the phrase “narrow tailoring” is typically associated with strict scrutiny, it has also been applied in the intermediate scrutiny context to mean something less than a perfect match between ends and means.<sup>110</sup> Therefore, the use of narrow tailoring is consistent with intermediate scrutiny.

Intermediate scrutiny was also used by the Supreme Court to evaluate content-neutral regulations of *nonbroadcast* speech within the cable context. In *Turner Broadcasting System, Inc. v. FCC* (“*Turner I*”), the Supreme Court upheld a statute that required cable systems to carry the signals of local broadcast stations.<sup>111</sup> At the outset of the *Turner I* opinion, the Court noted that the rationale for applying a less rigorous standard of First Amendment scrutiny to cases of broadcast regulation did not apply in

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109. *Id.* at 380. See also *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). (“Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.”); see also *Turner I*, 512 U.S. 622, 662 (1994). For variants on the intermediate standard of scrutiny as it applies to cases of sex discrimination, see *United States v. Virginia*, 518 U.S. 515, 532 (1996) (stating that the law must “serve[] ‘important governmental objectives’” and the means employed must be “‘substantially related to the achievement of those objectives’”) (citations omitted). In *Cnty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), however, a plurality of the D.C. Circuit applied strict scrutiny to invalidate a federal statute requiring public broadcasters to retain and make available recordings of all broadcasts when any issue of public importance is discussed. The court held that this statute was content-based broadcast regulation and thus constitutional only if “essential to a compelling governmental interest.” *Id.* at 1111. The court also questioned the applicability of *Red Lion* in cases of content-based broadcast regulation, stating, “Certainly spectrum scarcity cannot be invoked to support a government attempt to penalize or suppress speech, based on its general content.” *Id.* at 1111 n.21 (plurality opinion).

110. For instance, the Supreme Court has concluded that within the context of intermediate scrutiny, narrow tailoring “need not be the least speech-restrictive means of advancing the Government’s interests,” but is satisfied if the regulation “‘promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Turner I*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799). In other words, in the context of intermediate scrutiny, narrow tailoring requires only that the “means chosen do not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Id.* See also *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (describing “narrow tailoring” in the intermediate scrutiny context as “‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’”) (quoting *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

111. *Turner I*, 512 U.S. at 643 (upholding 47 U.S.C. § 534 (Supp. IV 1998) (commercial must-carry), and 47 U.S.C. § 535 (noncommercial must-carry)).

the context of cable regulation.<sup>112</sup> It held that the statute did not distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.<sup>113</sup> Rather, it was merely a content-neutral regulation designed “to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.”<sup>114</sup> Consequently, the Court applied an intermediate level of scrutiny, which would uphold the statute, provided that it furthered an important or substantial governmental interest unrelated to the suppression of free speech and that any incidental restrictions on speech did not burden substantially more speech than necessary to further those interests.<sup>115</sup>

The Court found that the must-carry policy was designed to further three interrelated and important governmental interests identified by Congress: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”<sup>116</sup> The Court was unable to determine whether cable must-carry was narrowly tailored to further important governmental interests, however, and remanded the issue to the district court for further factual development.<sup>117</sup>

Three years later, the Supreme Court affirmed the district court’s conclusion in *Turner Broadcasting System, Inc. v. FCC* (“*Turner II*”) that cable must-carry was narrowly tailored to further important governmental interests.<sup>118</sup> The Court first held that the record supported Congress’s predictive judgment that the must-carry provisions furthered important governmental interests.<sup>119</sup> In evaluating whether a substantial or direct relationship existed between the interests identified and the means chosen, the Court noted that its inquiry was limited to whether Congress reached reasonable conclusions supported by substantial evidence, rather than reweighing the evidence or substituting its own judgment for that of Congress.<sup>120</sup> The Court then concluded that the means chosen did not

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112. *Id.* at 638-39.

113. *Id.* at 643.

114. *Id.* at 649.

115. *Id.* at 662 (citations omitted).

116. *Id.*

117. *Id.* at 665.

118. 520 U.S. 180 (1997).

119. *Id.* at 213.

120. *Id.* at 199.

The Constitution gives to Congress the role of weighing conflicting evidence in

burden substantially more speech than was necessary to further those interests.<sup>121</sup> In making this determination, the Court reaffirmed that under intermediate scrutiny, content-neutral regulations are not “invalid simply because there is some imaginable alternative that might be less burdensome on speech.”<sup>122</sup>

The standard announced in *League of Women Voters* also bears strong similarity to the intermediate level of scrutiny used in cases of commercial speech regulation.<sup>123</sup> In fact, without citing either *Red Lion* or its progeny, the Supreme Court applied commercial speech jurisprudence in a case involving a content-based restriction on broadcasting, holding that intermediate scrutiny, not strict scrutiny, applies in cases of content-based broadcast restrictions on speech.<sup>124</sup> In *Greater New Orleans Broadcasting Association v. United States*, the Supreme Court invalidated a federal statute that forbade broadcasters from carrying advertising about privately operated commercial casino gambling, regardless of the station’s or casino’s location.<sup>125</sup> In examining the validity of this content-based restriction on broadcast speech, the Court used the *Central Hudson* four-

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the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress’ findings and conclusions, including its findings and conclusions with respect to conflicting economic predictions.

*Id.* “The issue before us is whether, given conflicting views of the probable development of the television industry, Congress had substantial evidence for making the judgment that it did.” *Id.* at 208.

The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress. [citation omitted] In making that determination, we are not to “re-weigh the evidence *de novo*, or to replace Congress’ factual predictions with our own.”

*Id.* at 211 (citation and internal quotations omitted).

121. *Id.* at 215-16. “Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable.” *Id.*

122. *Id.* at 217 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). “Our precedents establish that when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker’s First Amendment interests.” *Id.* at 217-18.

123. *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993) (observing “that the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context”).

124. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999).

125. *Id.* In 1993, the Supreme Court upheld this statute as it applied to broadcast advertising of the Virginia lottery by a radio station located in North Carolina where no such lottery was authorized. *See Edge Broad. Co.*, 509 U.S. 418.

part intermediate scrutiny test applicable to the regulation of commercial speech.<sup>126</sup> Under this test, the Court first examines whether the restricted speech activity is “lawful” and not “misleading.”<sup>127</sup> If the speech is both lawful and not misleading, the Court then examines whether the asserted governmental interest is “substantial.”<sup>128</sup> If the interest is substantial, then the Court inquires whether the regulation “directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”<sup>129</sup> In *Greater New Orleans Broadcasting*, the Court invalidated the ban on casino gambling advertising because the federal policy of discouraging gambling was so equivocal and “pierced by exemptions and inconsistencies” that the broadcast ban could not directly advance any consistently stated governmental purpose.<sup>130</sup>

Therefore, under *League of Women Voters* and *Greater New Orleans Broadcasting*, government-imposed, content-based restrictions on broadcast licensees receive intermediate scrutiny, the same test used for content-neutral regulation of nonbroadcast cable operations. Although the Supreme Court in *Greater New Orleans Broadcasting* may not have relied upon the *Red Lion* rationale as explicitly as it did in *League of Women Voters*, by using the same standard of constitutional review, the Court surely signaled that it was not yet willing to abandon the usefulness of that reasoning for its broadcast jurisprudence.

### C. *Is Red Lion’s Scarcity Doctrine Still Viable?*

The Supreme Court still adheres to a lower level of constitutional scrutiny when evaluating restrictions on broadcast speech, be they content-neutral or content-based. The spectrum scarcity rationale articulated by the Court in *Red Lion* has come under considerable attack, however, ever since its inception.<sup>131</sup> Despite this chorus of criticism, the scarcity doctrine seems

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126. *Greater New Orleans Broad. Ass’n, Inc.*, 527 U.S. at 183 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 188-95.

131. *See Turner I*, 512 U.S. 622, 638 n.5 (1994) (citing *Telecomms. Research and Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986); LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 87-90 (1991); LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-209 (1987); MATTHEW L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 7-18 (1986); Laurence Winer, *The Signal Cable Sends—Part I: Why Can’t Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 218-40 (1987); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1072-74 (1994)). *See also* RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed., 1997) (surveying and criticizing potential

to have remarkable staying power within the judiciary, and continues to remain the law.

For instance, in *Red Lion*, the Court recognized that technological advances may have limited the problem of scarcity, but the Court declined to consider the question, arguing instead that even if this were true, economic scarcity would suffice to justify regulation.<sup>132</sup> In *League of Women Voters*, the Court again refused to reconsider whether technological innovations had eliminated the scarcity rationale underlying the FCC's ability to regulate in the public interest, including its ability to impose diversity requirements.<sup>133</sup> Speaking for the Court, Justice Brennan noted that although the scarcity rationale had come under some criticism, the Court was "not prepared . . . to reconsider [its] long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."<sup>134</sup> In 1985 and 1987, the FCC arguably sent the signal sought by the Supreme Court when the Commission issued its *Fairness Report* and repealed the "fairness doctrine" on the dual grounds that the doctrine was arbitrary and that the scarcity rationale was no longer constitutionally viable.<sup>135</sup> The FCC's opposition to the scarcity doctrine has been less than steadfast, however, as the agency has recently attempted to revive the importance of public interest obligations and the scarcity doctrine under new political leadership.<sup>136</sup>

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theories to replace the scarcity doctrine); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 926-30 (1997); Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1740-41 (1995); Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1081 n.121 (1994); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1013-20 (1989).

132. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400 n.28 (1969).

133. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

134. *Id.* at 376 n.11.

135. Inquiry into Section 73.1910 of the Comm'n's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broad. Licenses, *Report*, 102 F.C.C.2d 142, 58 Rad. Reg.2d (P & F) 1137 (1985); Syracuse Peace Council Against Television Stations WTVH Syracuse, N.Y., *Memorandum Opinion and Order*, 2 F.C.C.R. 5043, 63 Rad. Reg.2d (P & F) 1073 (1987), *recons. denied*, 3 F.C.C.R. 2035 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

136. For instance, in response to a court order to either repeal or justify the political editorial and personal attack doctrines, the FCC stated that the FCC, Congress, and the courts have repudiated the "dicta" in *Syracuse Peace Council* that questioned the spectrum scarcity doctrine. Repeal or Modification of the Personal Attack and Political Editorial Rules, *Order and Request to Update Record*, para. 17, 2000 WL 1468707 (F.C.C.) (Oct. 4, 2000). See also *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999); *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

Moreover, in 1994, the Supreme Court again refused to overrule its *Red Lion* scarcity rationale, although it did state that the alternative formulation of the scarcity doctrine in terms of “economic scarcity” was misconceived, because “the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies [its] broadcast jurisprudence.”<sup>137</sup> Even as recently as 1997, the dissent in the *Time-Warner* case, while reluctant to extend the broadcast jurisprudence to the new medium of DBS, acknowledged that the *Red Lion* scarcity rationale was “not in such poor shape that an intermediate court of appeals could properly announce its death.”<sup>138</sup>

Critics often argue that because the “new economy” has seen a startling explosion in the number and variety of media outlets, there is no need to regulate the broadcast spectrum to enhance the diversity of voices—these voices can be heard just as well over cable or the Internet.<sup>139</sup> It is not immediately obvious, however, that even in this new economy, spectrum scarcity does not pose a problem for free expression. For instance, with the concentration of cable ownership, it is certainly arguable that diversity of expression may be threatened. In addition, although the Internet may potentially allow any man to be his own publisher, Internet access is by no means universal, and the ability to have one’s material “found” by users is increasingly controlled by a very small number of “gateway” search engines.

Moreover, there is a great deal of evidence that broadcast spectrum is actually becoming more scarce because of a variety of factors. For instance, the transitional strategy for converting all television broadcasting to a digital format requires that each television broadcast licensee operate two television broadcast stations—one in digital and one in analog on different frequencies—until eighty-five percent of viewers in the relevant market are capable of receiving digital signals, at which point the analog spectrum is returned to the government.<sup>140</sup> It is anticipated by many industry observers, however, that this period of transition will take longer than the target date of 2006 and, indeed, may never end in some markets.<sup>141</sup> Therefore, because

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137. *Turner I*, 512 U.S. 622, 640 (1994).

138. *Time-Warner Entm’t Co. v. FCC*, 105 F.3d 723, 724 n.2 (1997) (per curiam) (Williams, J., dissenting) (denying en banc rehearing).

139. See, e.g., *Repeal or Modification of the Personal Attack and Political Editorial Rules, Order and Request to Update Record*, 15 F.C.C.R. 19,973 (2000) (Powell, Comm’r, dissenting), *vacated by Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

140. 47 U.S.C.A. § 309(j)(14) (West Supp. 2000).

141. See Alan Breznick, *FCC Commissioners Differ Over Merger Authority, DTV Transition*, COMM. DAILY, Dec. 1, 2000, (quoting Commissioner Powell that the 2006

of the digital transition, spectrum has actually become more scarce with many television broadcast licensees broadcasting on additional channels for a potentially indefinite period of time. Additionally, the growth of terrestrial wireless telephony; wireless Internet access; wireless cable; and satellite-delivered television, radio, data services, and telephony, has precipitated what former Chairman Kennard termed a "spectrum drought."<sup>142</sup> Indeed, just as increases in computer processing power encouraged the development of computer programs that required greater processing resources, the development of spectrum-hungry wireless technology merely fuels wireless applications that demand more spectrum for efficient operation. This fact, coupled with the threat of "spectrum drought," has prompted the FCC to propose a more flexible approach to wireless spectrum licensing, so that secondary markets for spectrum can efficiently distribute spectrum where it is needed most.<sup>143</sup> It is unclear at this time, however, whether this strategy will alleviate the increasing problem of spectrum scarcity in the United States.

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deadline is "unrealistic"). In addition, in recent hearings before the Senate Commerce, Science and Transportation Committee, Senator John McCain has stated that by 2006, "this country will have neither the transmission facilities, nor the digital content, nor the reception equipment needed to ensure that 85% of the population will be able to receive digital television as their exclusive source of television." *Hearing on the Transition to Digital Television Before the Senate Comm. on Commerce, Science and Transp.*, 107th Cong. (2001), available at <http://www.senate.gov/~commerce/hearings/0301jsm.pdf> (statement of Sen. John McCain) (last visited Apr. 2, 2001) [hereinafter *Digital Television Hearing*]. At the same hearing, James L. Gattuso, Vice President for Policy and Management at the Competitive Enterprise Institute, concurred, stating that "[b]ased on current adoption rates, digital television is extremely unlikely to achieve the 85 percent goal by 2006" and predicting further that it is more likely that DTV adoption would rank at 30 percent at best. *Digital Television Hearing, supra*, available at <http://www.senate.gov/~commerce/hearings/0301gat.pdf> (statement of James L. Gattuso) (last visited Apr. 2, 2001). Moreover, Dr. Joseph S. Kraemer, Director of LECG, an economics consulting firm, presented evidence at this hearing that the 85 percent benchmark could only be achieved by 2006-2008 under the best of circumstances, including the adoption of must-carry and all-channel receiver rules. Otherwise, a moderately paced transition would likely yield the 85 percent benchmark between 2010-2012, and a slower paced transition would yield the 85 percent benchmark sometime after 2014. *Digital Television Hearing, supra*, available at <http://www.senate.gov/~commerce/hearings/0301gat.pdf> (statement of Joseph S. Kraemer) (last visited Apr. 2, 2001).

142. William E. Kennard, *Spectrum: The Space Odyssey*, Remarks Before the Indus. Telecomms. Ass'n (Oct. 5, 2000), at <http://www.fcc.gov/commissioners/kennard/speeches.html> (last visited Mar. 6, 2001).

143. Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Dev. of Secondary Markets, *Notice of Proposed Rulemaking*, para. 6, 2000 WL 1736657 (F.C.C.) (Nov. 27, 2000) (noting that "in recent years rising demand has created a shortage of spectrum available for the deployment of both mobile and fixed wireless technologies and services in the United States"). See also Principles for Promoting the Efficient Use of Spectrum by Encouraging the Dev. of Secondary Markets, *Policy Statement*, paras. 3-10, 2000 WL 1760080 (F.C.C.) (Dec. 1, 2000).

Therefore, if critics can describe *Red Lion* and its progeny as moribund, they must rest their arguments not on the pragmatic justification of increased spectrum availability, but on other, more theoretical or philosophical grounds. A full defense of *Red Lion* is beyond the scope of this Article, but it is worth noting at least two broad theoretical concerns. First, critics charge that the simple scarcity of a good does not require governmental allocation of those goods.<sup>144</sup> Those who advance this position argue, for instance, that all economic goods are scarce—including “newsprint, ink, delivery trucks, computers and other resources”—and therefore not everyone who wishes to publish a newspaper may do so.<sup>145</sup> These critics also charge, however, that a relaxed constitutional jurisprudence does not—and should not—apply to newspapers by virtue of this scarcity. Similarly, a relaxed constitutional analysis should not apply to the broadcast medium.<sup>146</sup> By arguing via analogy to the newspaper medium, however, these critics have ignored the Supreme Court’s explicit understanding that “the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies [its] broadcast jurisprudence.”<sup>147</sup>

Second, recognizing the unique problem of interference within the broadcast spectrum, critics also charge that the importance of avoiding interference between broadcasters does not necessarily require the management of broadcasting content.<sup>148</sup> Thus, under this view, the governmental management role is reduced to that of a “traffic cop” that ensures that broadcasters not interfere with each other’s signals. Despite the attractive simplicity of this argument, it runs contrary to decades of congressional, judicial, and administrative interpretation regarding the FCC’s authority to license the use of the airwaves in the “public interest.”<sup>149</sup>

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144. See *Time-Warner Entm’t Co. v. FCC*, 105 F.3d 723, 724 (1997) (per curiam) (Williams, J., dissenting) (denying en banc rehearing).

145. *Id.* (quoting *Telecomms. Research and Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986)).

146. *Id.*

147. *Turner I*, 512 U.S. 622, 640 (1994).

148. *Time-Warner Entm’t Co.*, 105 F.3d at 725 (per curiam) (Williams, J., dissenting) (denying en banc rehearing).

149. *NBC, Inc. v. United States*, 319 U.S. 190, 215 (1943).

The Act itself establishes that the Commission’s powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. 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. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And

Deference to congressional intent requires that any reinvention of the government's role in this area should come from the people's representatives through appropriate legislation, rather than through judicial reversal.

Until these broader, more philosophical arguments have been accepted by the courts or by Congress, the scarcity rationale should not be immediately dismissed as dead law. The scarcity rationale is still, for better or for worse, the underlying basis of our broadcast jurisprudence. Indeed, the government management of an increasingly crowded radio spectrum may become even more relevant than before as the "new economy" continues to mature.

#### IV. APPLYING THE "RELAXED" BROADCAST STANDARDS

There is little doubt that, like broadcasters and cablecasters, DBS operators engage in speech-related activities.<sup>150</sup> As a preliminary matter, however, the D.C. Circuit has held that no First Amendment right exists "to make commercial use of the copyrighted works of others," except where such activity falls within the category of "fair use."<sup>151</sup> Thus, where Congress deliberately conditions the use of a statutory copyright license on compliance with FCC policies, generally no First Amendment right is implicated.<sup>152</sup> Nevertheless, assuming that the DBS operators' rights of free expression are somehow implicated, the First Amendment rights of broadcasters have been traditionally limited. This section argues that the DBS service is a broadcast medium for constitutional purposes, and that § 338 is content-neutral. In light of these two facts, § 338 easily passes muster under rational basis scrutiny, and, in the alternative, it also survives intermediate scrutiny.

##### A. *The DBS Service Is a Broadcast Medium for Constitutional Purposes*

DBS carriers use the limited resources of the radio spectrum to uplink and downlink their video programming to subscribing members of the public via satellite.<sup>153</sup> On one hand, because it uses the radio spectrum to

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since Congress could not do this, it committed the task to the Commission.  
*Id.* at 215-16.

150. *Turner I*, 512 U.S. at 636 (declaring that "[t]here can be no disagreement . . . [c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment").

151. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (holding that cable syndicated exclusivity rules do not violate the First Amendment).

152. *Id.*

153. Implementation of the Satellite Home Viewer Improvement Act of 1999: Broad.

deliver its services to large regions of the country with the intent of attracting subscribers, the DBS service may seem to resemble a broadcast service. The FCC has determined that for *regulatory* purposes, however, wireless subscription services like DBS are not broadcast technology because they are directed solely to subscribers and are not accessible to the public at large.<sup>154</sup> Nevertheless, in 1996, the D.C. Circuit in its *Time-Warner* decision affirmed that, despite its regulatory status, the DBS service is a broadcast technology for *constitutional* purposes, reasoning that DBS uses the scarce resource of the broadcast radio spectrum and noting that orbital slots for DBS service are limited.<sup>155</sup> As the court stated:

The Supreme Court recognized, in 1969, that because of the limited availability of the radio spectrum for broadcast purposes, “only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time” . . . . The same is true for DBS today. Because the United States has only a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited. Even before the first DBS communications satellite was launched in 1994, the FCC found that “the demand for channel/orbit allocations far exceeds the available supply.”<sup>156</sup>

One critic has charged that, in holding that DBS is a broadcast technology for constitutional purposes, the *Time-Warner* court “ignored the FCC’s own preliminary classification of DBS as a nonbroadcast service.”<sup>157</sup> This criticism misses a critical distinction, however, between the FCC’s *regulatory* treatment of DBS and the court’s treatment of DBS for *constitutional* purposes.

The regulatory treatment of DBS has been the subject of debate since the inception of the technology.<sup>158</sup> The term “broadcasting” is defined in the Communications Act as “the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”<sup>159</sup> When the FCC began to regulate DBS in 1982, it

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Signal Carriage Issues, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 12,147, para. 8 (2000).

154. See Subscription Video, *Report and Order*, 2 F.C.C.R. 1001, paras. 32-34, 62 Rad. Reg.2d (P & F) 389 (1987); Nat’l Ass’n for Better Broad. v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

155. *Time-Warner Entm’t Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996).

156. *Id.* (citations omitted).

157. See Richard L. Weber, Note, *Riding on a Diamond in the Sky: The DBS Set-Aside Provisions of the 1992 Cable Act*, 40 WM. & MARY L. REV. 1795, 1817 (1999).

158. For an illuminating discussion of the broadcast/nonbroadcast distinction as it applies to DBS and other subscription services, see Howard A. Shelanski, *The Bending Line Between Conventional “Broadcast” and Wireless “Carriage,”* 97 COLUM. L. REV. 1048 (1997).

159. 47 U.S.C.A. § 153(6) (West Supp. 2000). Similarly, the National

envisioned that DBS would be a broadcast service, but left open the possibility that licensees could elect to provide services either as “broadcasters, common carriers, private radio operators, or some combination or variant of these classifications.”<sup>160</sup> As of 1998, the FCC reported that all DBS licensees had chosen regulation as nonbroadcast, noncommon carriers.<sup>161</sup> In 1984, the D.C. Circuit affirmed these regulations in *National Association of Broadcasters v. FCC*, but vacated the FCC’s decision to treat as nonbroadcasters those DBS program providers that leased channels from satellite companies to provide programming directly to homes (“customer-programmers”).<sup>162</sup> The court’s analysis of the FCC’s past policies and its independent analysis of the Communications Act led it to conclude that such services were broadcasts:

When DBS systems transmit signals directly to homes with the intent that those signals be received by the public, such transmissions rather clearly fit the definition of broadcasting; radio communications are being disseminated with the intent that they be received by the public. That remains true even if a common carrier satellite leases its channels to a customer-programmer who does not own any transmission facilities; in such an arrangement, someone—either the lessee or the satellite owner—is broadcasting.<sup>163</sup>

The court concluded that the FCC could not, without reasoned explanation, depart from the FCC’s previous conclusion that

“[t]he primary touchstone of a broadcast service is the intent of the broadcaster to provide radio or television program service without

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Telecommunications and Information Agency (“NTIA”) also defines broadcast as “the distribution of electronic signals to the public at large using television (VHF or UHF) or radio (AM or FM) technologies.” NTIA, Dep’t of Comm. Pub. Telecomms. Facilities Program, 15 C.F.R. § 2301.2 (2000).

160. Inquiry into the Dev. of Regulatory Policy in Regard to Direct Broad. Satellites for the Period Following the 1983 Reg’l Admin. Radio Conference, *Report and Order*, 90 F.C.C.2d 676, para. 84, 51 Rad. Reg.2d (P & F) 1341 (1982), *recon. denied*, 94 F.C.C.2d 741, 53 Rad. Reg.2d (P & F) 1637 (1983). These regulations stated that those DBS applicants that provided either free or subscription service directly to homes and that retained control over the content of their transmissions would be treated as broadcasters. Alternatively, a DBS satellite owner was considered a nonbroadcaster if it chose instead to operate as a common carrier, in which case it would have to offer satellite transmission services indiscriminately to the public pursuant to a tariff under the provision of Title II of the Communications Act. Also not treated as a broadcaster under the regulations were those who leased satellite transponders from DBS common carriers and who used the leased channels to distribute programming via satellite to individual homes, so-called “customer-programmers.” *Nat’l Ass’n of Broads. v. FCC*, 740 F.2d 1190, 1200 (D.C. Cir. 1984) (discussing FCC DBS regulations).

161. Implementation of Section 25 of the Cable Television Consumer Prot. and Competition Act of 1992; Direct Broad. Satellite Pub. Interest Obligations, *Report and Order*, 13 F.C.C.R. 23,254, para. 7, 14 Comm. Reg. (P & F) 290 (1998).

162. 740 F.2d 1190.

163. *Id.*

discrimination to as many members of the general public as can be interested in the particular program as distinguished from a point-to-point message service to specified individuals. . . . broadcasting remains broadcasting even though a segment of the public is unable to view programs without special equipment.”<sup>164</sup>

Therefore, the court held that “DBS, at least when directed to individual homes, *is* radio-communication intended to be received by the general public—despite the fact that it can be received by only those with appropriate reception equipment,”<sup>165</sup> and vacated a portion of the FCC’s Order.

In 1987, the FCC determined that all wireless subscription video services, including DBS, were to be classified as wireless “point-to-multi-point” services, rather than as broadcasting.<sup>166</sup> The D.C. Circuit affirmed this change in policy in 1988.<sup>167</sup> The court noted in *National Association for Better Broadcasting v. FCC* that the Commission had typically looked to the licensee’s intent to determine whether a particular transmission constituted a “broadcast.”<sup>168</sup> For many years, the FCC looked to the content of the transmissions to ascertain the intent of the licensee, reasoning that broadcasts did not occur when the transmissions were designed to be of interest only to a limited segment of the public.<sup>169</sup> The new policy, however, changed the focus to the mode of operations of a wireless service, holding that all subscription services are nonbroadcast services if they demonstrate an intent to limit “receipt and enjoyment” to paying subscribers.<sup>170</sup> The FCC determined that a sufficient index of this intent included requiring the use of special antennae and/or signal converters so that the signal can be viewed at the home, encrypted signals designed to limit access, and private contractual arrangements.<sup>171</sup> In affirming the change in policy, the court reasoned that, because the statutory definition of broadcasting was ambiguous, the agency interpretation of this term merited *Chevron* deference.<sup>172</sup> The D.C. Circuit concluded that a change in agency interpretation alone was not arbitrary or capricious if the agency offered a

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164. *Id.* (quoting Further Notice in the Matter of Subscription Television Serv., 3 F.C.C.2d 1, 9-10 (1966)).

165. *Id.* at 1204 (emphasis added).

166. Subscription Video, *Report and Order*, 2 F.C.C.R. 1001, paras. 32-34, 62 Rad. Reg.2d (P & F) 389 (1987) [hereinafter *Subscription Video Report and Order*].

167. Nat’l Ass’n for Better Broad. v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

168. *Id.* at 666.

169. *Id.* at 666-67.

170. *Subscription Video Report and Order*, *supra* note 166, para. 32.

171. *Id.* para. 41.

172. *Nat’l Ass’n for Better Broad.*, 849 F.2d at 668 (citing *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 844 (1984)).

reasoned explanation, and in this case, the FCC did just that.<sup>173</sup>

The FCC, with the blessing of the courts, has thereafter generally treated DBS subscription services as nonbroadcast technology. This regulatory status, however, has been weakened somewhat by subsequent legislation. In the 1992 Act, Congress directed the FCC to adopt rules to impose on DBS providers public interest or other requirements that were strikingly similar to those required of broadcasters.<sup>174</sup> For example, DBS carriers now must provide reasonable access to their facilities to candidates for federal elective office on request,<sup>175</sup> as well as equal opportunities for legally qualified candidates for *any* public office to use their facilities.<sup>176</sup> Therefore, the 1992 Act, together with the *Time-Warner* decision and the FCC's differential treatment, arguably may lend credence to the contention that the nonbroadcast quality of DBS service is not as obvious as it might appear at first glance.

Most importantly, however, the complex regulatory treatment of DBS may be irrelevant to its constitutional status. The *Time-Warner* court may simply have treated DBS as a broadcast service for *constitutional* purposes, given the use of the broadcast spectrum and the unique limitations of that medium, and may not have intended to define it as a broadcast service for *regulatory* purposes. Viewed from this perspective, the *Time-Warner* court's decision to classify DBS as a broadcast service for constitutional purposes does not represent an unwarranted departure from the FCC's regulatory classification, because the two classifications serve separate and distinct purposes. For instance, the regulatory classification relies, as a matter of statutory construction, on the definition of "broadcasting" in the Communications Act and the intent of a licensee to restrict its radio communications by some technological method.<sup>177</sup> By contrast, the constitutional classification demands understanding of the First Amendment and its core value of wide dissemination of ideas from diverse

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173. *Id.* at 669.

174. Cable Television Consumer Prot. and Competition Act of 1992, 102 Pub. L. No. 385, 102 Stat. 1501, § 25(a) (codified at 47 U.S.C. § 335 (1994)).

175. 47 U.S.C. § 335(a); FCC Safety and Special Radio Servs., 47 C.F.R. § 100.5 (b)(1) (2000).

176. 47 U.S.C. § 335(a); 47 C.F.R. § 100.5(b)(2). The FCC still defines DBS as a wireless technology that distributes its services directly to the general public, a quality shared with broadcasters. 47 C.F.R. § 100.3 (defining "Direct Broadcast Satellite Service" as "[a] radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. In the Direct Broadcast Satellite Service the term direct reception shall encompass both individual reception and community reception.").

177. *See supra* notes 166, 172.

sources.<sup>178</sup> Therefore, it is entirely rational, and perhaps especially appropriate, for the term “broadcasting” to mean one thing under the Communications Act and something else under the Constitution. In the case of DBS, it is now established that the service is a broadcast technology for constitutional purposes.

*B. Section 338 Is Content-Neutral*

The Supreme Court has held that “[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”<sup>179</sup> Conversely, the Court has also held that “laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.”<sup>180</sup> The SBCA claims that § 338 is content-based in two respects. First, the SBCA alleges that the carriage of particular programming triggers § 338.<sup>181</sup> Second, the SBCA claims that the statute is designed to promote the programming of independent broadcasters over network or other proprietary programming.<sup>182</sup>

A strong argument can be made, however, that the local carriage obligations attached to the use of the royalty-free statutory license comprise a content-neutral form of broadcast regulation, because the statute does not obligate a DBS service provider to carry any particular programming or to espouse any particular “ideas or views.”<sup>183</sup> Nor is a DBS carrier penalized for the expression of any particular views. Rather, the carriage obligations apply evenhandedly to all DBS carriers who choose to carry local stations pursuant to the royalty-free statutory copyright license, and the regulations

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178. *See supra* note 155.

179. *Turner I*, 512 U.S. 622, 643 (1994); *id.* (citing *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (“Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign”); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (whether municipal ordinance permits individuals to “picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not”).

180. *Id.* at 643; *id.* (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (stating that an “ordinance prohibiting the posting of signs on public property ‘is neutral—indeed is silent—concerning any speaker’s point of view’”)); *id.* (citing *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (noting that a “State Fair regulation requiring that sales and solicitations take place at designated locations ‘applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds’”)).

181. Mem. in Supp. of Pl’s Mot. for Summ. J. as to the First Amendment Issues, at 8, 12-13, *SBCA v. FCC*, (E.D. Va. 2000) (No. 00-1571-A) [hereinafter Mem. in Supp. of Pl’s Mot. for Summ. J. as to the First Amendment Issues].

182. *Id.* at 23-28.

183. *See supra* note 179.

are designed to address content-neutral concerns.

Unlike those cases where particular points of view triggered speech-restrictive laws,<sup>184</sup> the obligation of satellite carriers to carry all local broadcast stations within a market is *triggered by the use of a substantial government subsidy*—i.e., the use of the royalty-free statutory copyright license—not by the content of the programming carried.<sup>185</sup> To illustrate this point, a satellite carrier that does not avail itself of the statutory copyright license could potentially carry the same stations and programming as a satellite carrier that uses the statutory license. The difference is that the former would have to negotiate with each station for carriage on the DBS system, while the latter's use of the statutory license would make such negotiation unnecessary. Congress made this aspect of § 338 abundantly clear in the Conference Report accompanying SHVIA when it stated that satellite carriers had a choice whether to incur local carriage obligations, and that satellite carriers were free to carry any programming they wanted without using the statutory license if they could clear the property rights.<sup>186</sup> The use of the statutory copyright license is therefore independent of the

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184. Compare *Burson*, 504 U.S. at 197 (“Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign.”), and *Boos*, 485 U.S. at 318-19 (stating that whether municipal ordinance permits individuals to “picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not”), with *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (“[I]n order to determine whether a particular statement by station management constitutes an ‘editorial’ proscribed by § 399, enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern ‘controversial issues of public importance.’”).

185. The local carriage obligations are triggered only when a satellite carrier “provid[es], under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station . . . .” 47 U.S.C.A. § 338(a)(1) (West Supp. 2000) (emphasis added).

186. “Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market’s broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress.” Joint Explanatory Statement, *supra* note 22, at H11,795. The FCC concurs with this theory: “This provision gives satellite carriers a choice. If satellite carriers provide their subscribers with the signals of local television stations through reliance on the statutory copyright license, they will have the obligation to carry all of the television signals in that particular market that request carriage. If satellite carriers provide local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply.” Implementation of the Satellite Home Viewer Improvement Act of 1999: Broad. Signal Carriage Issues, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 12,147, para. 10 (2000). See also DBS Order, *supra* note 25, para. 15 (“If a satellite carrier provides local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply.”).

programming carried and is not triggered by the carriage of any particular programming or the expression of any point of view. As opposed to cable “must-carry,” SHVIA allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license.<sup>187</sup>

Moreover, SHVIA does not deprive any programmers of potential access to carriage by satellite carriers. As discussed above, *satellite carriers remain free to carry any programming for which they are able to acquire the property rights*. The provisions of SHVIA allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market’s broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by Congress.<sup>188</sup> In sum, unlike laws triggered by the expression of particular views, § 338 is triggered by the use of the statutory copyright license, and is therefore content-neutral.

In addition, Congress made it clear that the local carriage provisions served the interest of localism in broadcasting, not because it preferred the programming of local broadcast stations to national programming outlets, but because a healthy and decentralized system of local broadcasters better served the public interest in diversity in the marketplace of ideas. Congress explicitly stated that SHVIA was designed with the following two principles in mind: First, SHVIA’s legislative history stated that “promotion of competition in the marketplace for the delivery of multichannel video programming is an effective policy to reduce costs to consumers;”<sup>189</sup> and, second, the legislative history emphasized the importance of “protecting and fostering the system of television networks as they relate to the concept of localism.”<sup>190</sup> In stating the particular purposes underlying § 338, Congress noted that the local carriage provision was “intended to preserve free television for those not served by satellite or cable systems and to promote the widespread dissemination of information from a multiplicity of sources”—interests that the Supreme Court has found to be substantial and unrelated to the suppression of free

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187. Compare 47 U.S.C.A. §§ 534-535, with *id.* § 338. See also Joint Explanatory Statement, *supra* note 22, at H11,795.

188. Joint Explanatory Statement, *supra* note 22, at H11,795.

189. *Id.* at H11,792.

190. *Id.* It also recognized that in creating a statutory copyright license, it was acting “in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the government’s intrusion on the broader market in which the affected property rights and industries operate.” *Id.*

expression.<sup>191</sup>

In enacting SHVIA and § 338, Congress intended not simply to favor one class of programmers over another, but to preserve the structural integrity of the nation's broadcasting system by supporting the principles of localism, universal service, and diversity.<sup>192</sup> As the Conference Report pointed out, given Congress's prediction that DBS carriers would only voluntarily carry those stations liable to produce substantial revenues, these principles would not have been served if DBS carriers were not encouraged via the statutory copyright license to carry all local stations where local service is provided.<sup>193</sup>

Moreover, as the Conference Report discussed, § 338 was intended to create a viewpoint-neutral *conditional grant* of a royalty-free statutory license—analogous to an indirect subsidy—in exchange for local carriage obligations. Citing *Rust v. Sullivan*, the Conference Report stated that “the proposed licenses are a matter of legislative grace, in the nature of subsidies to satellite carriers, and reviewable under the rational basis standard.”<sup>194</sup>

In *Rust*, the Supreme Court upheld regulations limiting the ability of federal funding recipients to engage in abortion-related activities using such funds. The Court stated:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of

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191. *Id.* at H11,795 (citing *Turner I*, 512 U.S. 622, 663 (1994)).

192. In addition to being expressed in the Conference Report, this concern for localism, universal service, and diversity was confirmed in floor statements made by members of Congress:

In proceeding legislatively, we have tried to remain true to two important communications values, namely localism and universal service. We have tried to balance these values even as we factor in the innovative changes that have occurred in satellite technology, as well as the dire need for greater competition to incumbent cable companies in the video marketplace.

145 Cong. Rec. at H11,816 (Nov. 9, 1999) (statement of Rep. Markey).

193. Joint Explanatory Statement, *supra* note 22, at H11,795.

Providing the proposed license on a market-by-market basis furthers both goals by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.

*Id.*

194. *Id.*

the other.<sup>195</sup>

Although the Court did note that the government cannot impose “unconstitutional conditions” on the “receipt of a benefit,”<sup>196</sup> the Court distinguished funding restrictions that placed conditions on the *recipient* from those that placed conditions on the *program or service funded*.<sup>197</sup> Whereas the former may be invalid, the latter do not violate any constitutional protection, because a recipient could engage in the disfavored activity without the use of federal funds.<sup>198</sup>

Similarly, DBS carriers are free to carry the local broadcast signals of any station for which they can acquire the rights and need not depend on the royalty-free statutory copyright license to provide these stations to their subscribers. Like the subsidy in *Rust*, the statutory copyright license imposes conditions on *use* of the license, not on the *user*. Therefore, where the government provides a subsidy to encourage certain kinds of behavior, but places constitutionally acceptable conditions on the subsidy, the Supreme Court has held that the government is not engaging in content-based discrimination. With regard to § 338, the conditional royalty-free statutory copyright license is directly analogous to a conditional subsidy, except that where ordinary subsidies involve the distribution of money from the public treasury or the granting of a tax credit, the subsidy in § 338 gives satellite carriers a limited reprieve from the strictures of copyright law through the mechanism of a royalty-free statutory copyright license.

The Supreme Court’s recent decision in *Legal Services Corp. v. Velazquez*<sup>199</sup> does not contradict this interpretation. In *Velazquez*, the Court held unconstitutional a law prohibiting Legal Services Corporation (“LSC”) lawyers from receiving LSC funds if their representation of indigent clients involved an effort to amend or otherwise challenge existing welfare law.<sup>200</sup> Justice Kennedy, writing for a 5-4 majority, interpreted *Rust* as a case in which the government “used private speakers to transmit information pertaining to its own program,”<sup>201</sup> but reasoned that *Rust* was

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195. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding regulations limiting the ability of Title X fund recipients to engage in abortion-related activities with those funds).

196. *Id.* at 196 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *FCC v. League of Women Voters*, 468 U.S. 364 (1984)).

197. *Id.* at 197.

198. *Id.* The “‘unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” *Id.* at 197.

199. 2001 U.S. LEXIS 1954 (Feb. 28, 2001).

200. *Id.* at \*9.

201. *Id.* at \*15-16 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). “[V]iewpoint-based funding decisions [can be sustained] in instances in

inapposite to the facts in *Velazquez*, because the LSC lawyers were not government speakers, directly or indirectly.<sup>202</sup> The Court then interpreted its precedent as establishing that, where viewpoint-based funding restrictions affect the diversity of views from private speakers in a medium of expression and “distort its usual functioning,” the courts must engage in a more searching examination.<sup>203</sup> The Court then concluded that the medium of expression distorted by the LSC restriction was the legal system itself—an effect that implicated the core values of the First Amendment, separation-of-powers principles, and fundamental concepts of statutory reviewability.<sup>204</sup>

Broadly construed, the *Velazquez* decision may stand for the proposition that a subsidy indirectly facilitating private speech, and conditioned on a viewpoint-based funding restriction that “distorts” the usual functioning of the expressive medium, violates the First Amendment’s free-speech guarantee. As discussed previously, however, § 338 is not viewpoint-based. Moreover, the rebroadcast of local signals into local markets was not an established medium of expression prior to the passage of § 338, as DBS providers did not have the legal right to implement “local-into-local” service until the law passed.

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which the government is itself the speaker ... or instances, like *Rust*, in which the government uses private speakers to transmit information pertaining to its own program.” *Id.* (citing *Bd. of Regents of the Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000); *Rosenberger*, 515 U.S. at 833).

202. “The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.” *Id.* at \*18.

203. *Id.* (“Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program’s purposes and limitations.”).

204. “Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited.” *Id.* at \*21. In addition, the restriction “prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power,” *id.* at \*23, and “threaten[ed] severe impairment of the judicial function,” *id.*, a result that was “so inconsistent with accepted separation-of-powers principles” as to be “an insufficient basis to sustain or uphold the restriction on speech.” *Id.* at \*24. Moreover, the Court reasoned that the funding restrictions effectively insulated current welfare laws from constitutional scrutiny and other legal challenges, insofar as an indigent client was unlikely to find other counsel to pursue such claims. *Id.* at \*25-26. The Court stated, for instance, that unlike the petitioners in *Rust* who were able to obtain abortion counseling outside the federally funded program from unaffiliated doctors, there “often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits.” *Id.* at \*25. Accordingly, the Court stated, “We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.” *Id.* at \*28-29.

Nevertheless, an even narrower construction of the *Velazquez* decision may be more plausible, as its principles may apply only in cases where the government indirectly restricts speech near the core of First Amendment protection, namely criticism of laws, regulations, or policies. *Velazquez*'s scope may narrow even further, however, in light of the Court's reliance on the fact that the LSC restrictions implicated separation-of-powers principles as well as fundamental concepts of statutory reviewability. By contrast, however, § 338 does not obviously implicate the special values articulated by the Court in *Velazquez*. It does not restrict the ability of DBS providers to criticize governmental actions. Nor does it in any way implicate fundamental concepts of judicial review or separation-of-powers principles. Lastly, in the DBS context, unlike the situation in *Velazquez*, in which the plaintiffs could not pursue their constitutional or statutory challenges outside of the subsidized program, DBS operators may freely step outside of the copyright subsidy program to carry local broadcast signals into local markets. For these reasons, *Velazquez* is more than likely irrelevant to the analysis of the constitutionality of § 338.

### C. Section 338 Survives the Rational Basis Test

Once § 338's content-neutrality is established, it is relatively easy to see how it passes the rational basis test. First, Congress's power to regulate interstate commerce carries with it the ability to preserve the network-affiliate system by imposing restrictions on a nationwide broadcast medium.<sup>205</sup> Moreover, the Supreme Court has already concluded that the interests in preserving the benefits of free over-the-air television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming do not relate to the suppression of free expression and serve important or substantial governmental interests.<sup>206</sup> In addition, the Supreme Court has held that the first two interests lie at the core of the values protected by the First Amendment guarantee of free speech.<sup>207</sup> Lastly, the

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205. *NBC, Inc. v. United States*, 319 U.S. 190, 227 (1943) (declaring that "[t]he licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce").

206. *Turner I*, 512 U.S. 622, 662-63 (1994).

207. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (declaring that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee"); *see also* *Time-Warner Entm't Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996) (declaring that "[a]n essential goal of the First Amendment is to achieve 'the widest possible dissemination of information from diverse and antagonistic sources.' . . . Broadcasting regulations that affect speech have been upheld when they further this First Amendment goal.") (quoting *FCC v. Nat'l Citizens*

means used must be rationally related to the legitimate ends, and empirical evidence or sound reasoning will suffice where specific findings are not possible.<sup>208</sup> As explained above, it was Congress's considered judgment that, by 2002, the market power of DBS carriers would tempt them to carry only some broadcast stations and not all broadcasters, to the detriment of diversity in broadcasting.<sup>209</sup> Section 338 attempted to forestall this possibility by providing a limited incentive to carry all broadcast stations while at the same time respecting market forces.

It is true that, at the time of enactment, no figures were available regarding the share of the market DBS carriers would possess by 2002 or the effect of this market share on local broadcasting, because DBS local-into-local service had not yet been inaugurated. Congress reasonably predicted that given the envisioned effect of the legislation, however, the DBS carrier market share of the multichannel video distribution market would significantly increase by 2002. Congress also predicted that, once this market presence was established in certain areas, DBS carriers would choose to carry only some broadcast stations. This prediction was based on Congress's experience with the cable industry's refusal to carry some local stations in the absence of cable must-carry legislation during the 1980s.<sup>210</sup>

In general, Congress's predictions were prophetic. On September 8, 2000, the SBCA reported to the FCC that DBS viewership nationwide totalled approximately 14.5% of all television households (as compared with cable's 70% viewership), and that DBS providers gained more than three million subscribers between June 1999 and June 2000. In addition, DBS providers had achieved a market penetration rate of more than 30% in three states and nearly 40% in one state, Montana.<sup>211</sup> Moreover, recent figures indicate that DirecTV now serves nine million subscribers and offers local television signals to "about 60[%] of the U.S. households in 38 markets," making it the third largest provider of multichannel video programming in the country after AT&T Broadband and Time Warner Cable.<sup>212</sup> These same figures indicate that EchoStar serves five million

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Comm. for Broad. 436 U.S. 775, 799 (1978) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

208. *Time-Warner Entm't Co.*, 93 F.3d at 976.

209. Joint Explanatory Statement, *supra* note 22, at H11,795.

210. *Id.* at H11,795 ("Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.") (citing H.R. REP. NO. 102-628, at 51 (1992); S. REP. NO. 102-92, at 62 (1991)).

211. See Comments of the SBCA, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132 (Sept. 8, 2000), at 6.

212. Ted Hearn, *One Year Later, DBS Law Has Big Impact*, MULTICHANNEL NEWS (Nov. 27, 2000) at 1.

subscribers and offers local television signals in thirty-four markets “that include about 60[%] of the U.S. population.”<sup>213</sup> Despite satellite carriers’ protestations to the contrary, this increasing market share has encouraged both EchoStar and DirecTV to carry only the local affiliates of the four major commercial networks in selected local markets while steadfastly refusing to carry other nonaffiliated local channels.<sup>214</sup> In point of fact, both EchoStar and DirecTV have refused to carry any local public television stations, with the exception of WGBH in Boston.<sup>215</sup>

The SBCA has objected that the method chosen to preserve local broadcasting actually discourages the carriage of local stations in the top markets and thus thwarts the end desired by Congress, namely full carriage of all local broadcasters over DBS.<sup>216</sup> The SBCA argues that for every local station a DBS service provider must carry in a top market, that provider retains less capacity for the carriage of local stations in lower markets, and, therefore, the means chosen to effectuate the ends are irrational.<sup>217</sup>

The SBCA’s argument, however, overlooks a variety of factors. First, it ignores the traditionally low standard associated with judicial evaluations of congressional rationality.<sup>218</sup> Second, the argument disregards the fact that business concerns often drive satellite carriers’ decisions not to provide service to smaller or rural markets, reflecting the carriers’ resource allocation priorities rather than congressional irrationality. Lastly, Congress

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213. *Id.*

214. For local programming on EchoStar’s Dish Network, see Dish Network, *Programming—Local Networks*, at <http://www.dishnetwork.com/content/programming/locals/index.shtml> (last visited Mar. 26, 2001). For local programming on DirecTV, see DirecTV, *Local Channels Are Now Available*, at <http://www.directv.com/howtoget/howtogetpages/0,1076,224,00.html> (last visited Mar. 26, 2001). DirecTV and EchoStar do claim that they carry the local signals of WB and UPN stations as well as some independent stations in selected markets. See Decl. of Stephanie Campbell, ¶ 18, and Decl. of Michael S. Schwimmer, ¶ 19, in Exs. to Pl.’s Mot. for Summ. J. as to First Amendment Issues, *supra* note 181.

215. Both EchoStar and DirecTV carry the PBS national feed on their national services, but this feed does not replicate a great deal of programming provided by local public television stations to serve the needs and interests of their local communities. Moreover, the authorization to use the PBS national feed expires on January 1, 2002. 17 U.S.C. § 119(a)(1) (Supp. V 1999).

216. Mem. in Supp. of Pl.’s Mot. for Summ. J. as to the First Amendment Issues, *supra* note 181, at 21-23.

217. *Id.*

218. *Turner II*, 520 U.S. 180, 199 (1997).

The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress’ findings and conclusions, including its findings and conclusions with respect to conflicting economic predictions.

*Id.*

attempted to enact the Rural Local Broadcast Signal Act (“Rural Signal Act”) on the same day and as part of the same legislation to address this concern with rural and smaller markets.<sup>219</sup> Recognizing that “major satellite carriers intended to provide local broadcast TV stations via satellite only in the largest markets rather than in more rural areas,” a previous version of the Rural Signal Act established a program, jointly managed by a variety of administrative agencies, to “guarantee loans not exceeding \$1.25 billion for providing local broadcast TV signals in rural areas.”<sup>220</sup> Sponsors dropped this provision in response to a filibuster threat from Senator Gramm and replaced it with the current provision that called for the FCC to report to Congress on its findings regarding rural access to local television signals over satellite and to study the use of “wireless cable” service to such areas.<sup>221</sup> A new version of the original loan guarantee program was subsequently added as part of the Commerce-Justice appropriations package, however, and became law at the end of last year.<sup>222</sup> Thus, it cannot be said that Congress was acting irrationally when it focused on local service in the larger markets through § 338 without addressing the delivery of local signals over DBS to rural areas. Congress merely bifurcated its concerns about delivery of local signals in larger markets and smaller markets, addressing the latter in a later session and in a separate law.

Therefore, when viewed in its proper context, § 338 easily passes rational basis scrutiny. The statute is a content-neutral regulation of

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219. Joint Explanatory Statement, *supra* note 22, at H11,796, explaining Title II of the “Intellectual Property and Communications Omnibus Reform Act of 1999.”

220. *Id.* at H11,797.

221. See Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, Title II. See also Arthur Brodsky, *Rural Loan Program Eliminated from SHVA*, COMM. DAILY, Nov. 19, 1999; Arthur Brodsky, *SHVA Bill Trimmed of Rural Provisions*, COMM. DAILY, Nov. 12, 1999. On December 8, 2000, the FCC determined that terrestrial wireless cable technology could share the spectrum at 12.2-12.7 GHz with DBS and proposed service rules for the new Multichannel Video Distribution and Data Service (“MVDDS”). Quoting section 2002(a) of the Rural Local Broadcast Signal Act, the FCC opined that these rules would promote Congress’s mandate “to make a determination [] regarding licenses or other authorizations for facilities that will utilize, for delivering local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets, spectrum otherwise allocated to commercial use.” Amendment of Pts. 2 and 25 of the Comm’n’s Rules to Permit Operation of NGSO FSS Sys. Co-Frequency with GSO and Terrestrial Sys. in the Ku-Band Frequency Range, *First Report and Order and Further Notice of Proposed Rulemaking*, para. 289-90 (Dec. 8, 2000), 2000 WL 1804138 (F.C.C.).

222. “A bill making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 2001, and for other purposes.” Pub. L. No. 106-553, 114 Stat. 2762 (enacting the “Launching Our Communities’ Access to Local Television Act of 2000,” H.R. 5548, Title X).

broadcasting designed to serve the legitimate interests of preserving localism in broadcasting through the network-affiliate relationship and promoting the widespread dissemination of information from a multiplicity of sources.

*D. Section 338 Survives Intermediate Scrutiny*

As discussed above, should a court find that the conditional copyright exemption contained in § 338 constitutes a content-based regulation of broadcasting, or that § 338 is content-neutral but that DBS systems should be viewed as a nonbroadcast technology, the court would be required to apply intermediate scrutiny.<sup>223</sup> Thus, under *League of Women Voters*, a court would have to examine whether § 338 is narrowly tailored to further a substantial governmental interest,<sup>224</sup> and, under *Greater New Orleans Broadcasting*, it would be obligated to ask whether the restriction on lawful and nonmisleading speech directly advances a substantial governmental interest in a way that is “not more extensive than is necessary to serve that interest.”<sup>225</sup> Similarly, under the intermediate scrutiny associated with content-neutral regulation of nonbroadcast technology, announced in the *Turner* cases, § 338 would survive if it supported an important or substantial governmental interest unrelated to the suppression of free speech and did not burden substantially more speech than was necessary to further those interests.<sup>226</sup>

The three interests underlying SHVIA and § 338 are important and substantial. As explained above, Congress intended to foster three interests: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”<sup>227</sup> The Supreme Court has held that all three interests are substantial or important and are unrelated to the suppression of free expression.<sup>228</sup> In addition, the Court has also held that the first two interests lie at the core of the values protected by the First Amendment guarantee of free speech.<sup>229</sup>

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223. *See supra* Part III.B.

224. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

225. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183 (1999) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)).

226. *Turner I*, 512 U.S. 622, 662 (1994).

227. *Id.*

228. *Id.* at 663.

229. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *Time-Warner Entm’t Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996).

Moreover, these interests are directly advanced by the means chosen, which are narrowly tailored to accomplish the identified interests. In this regard, the test does not require an objective evaluation of whether the means chosen were appropriate. Although Congress must demonstrate that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree,”<sup>230</sup> “the Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest.”<sup>231</sup> Thus, the direct advancement and narrow tailoring elements are satisfied in the intermediate scrutiny context if Congress considered whether the means chosen are proportional to the ends identified.<sup>232</sup>

Indeed, Congress had already anticipated this inquiry in the legislative history to § 338. The Conference Report argued that its carefully constructed copyright exemption would withstand intermediate scrutiny because “no narrower alternatives” would have achieved its goals.<sup>233</sup> For instance, Congress examined and rejected the possibility that DBS subscribers would install over-the-air antennae with A/B switches, or subscribe to cable service in addition to their DBS service, to receive local stations not otherwise carried on DBS.<sup>234</sup> Congress also examined and

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230. *Greater New Orleans Broad. Ass’n, Inc.*, 527 U.S. at 188 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

231. *Id.* When considering whether the cable must-carry statute was narrowly tailored, the Supreme Court in *Turner II*, stated that “our cases establish that content-neutral regulations are not ‘invalid simply because there is some imaginable alternative that might be less burdensome on speech.’” *Turner II*, 520 U.S. 180, 217 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). *See also id.* at 217 (“Our precedents establish that when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker’s First Amendment interests.”).

232. For instance, the Supreme Court has concluded that within the context of intermediate scrutiny, narrow tailoring “need not be the least speech-restrictive means of advancing the Government’s interests” but is satisfied if the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Turner I*, 512 U.S. at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *Albertini*, 472 U.S. at 689)). In other words, in the context of intermediate scrutiny, narrow tailoring requires only that the “means chosen do not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Turner I*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799). *See also Greater New Orleans Broad. Ass’n, Inc.*, 527 U.S. at 188 (1999) (terming “narrow tailoring” in the intermediate scrutiny context as “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served”) (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

233. Joint Explanatory Statement, *supra* note 22, at H11,795.

234. *Id.* Regarding A/B switches, the Supreme Court in *Turner II* detailed the reasons for Congress’s rejection of A/B switches as a less restrictive alternative within the cable must-carry context. The Court reiterated testimony that “many households lacked adequate

rejected the use of national feeds as an alternative to local carriage obligations, concluding that national feeds would thwart its identified interests by “siphon[ing] potential viewers from local over-the-air affiliates.”<sup>235</sup> Because there were no acceptable alternatives that would preserve local, over-the-air broadcasting better than the means chosen, Congress concluded that “trading the benefits of the copyright license for the must carry requirement [was] a fair and reasonable way of helping viewers have access to all local programming while benefiting satellite carriers and their customers.”<sup>236</sup>

The DBS industry has argued that DBS poses no threat to local broadcasting, because, unlike cable companies, DBS carriers are not a “bottleneck” monopoly of vertically integrated video services.<sup>237</sup> Thus, they argue that cable television carriers may pose a threat to local over-the-air broadcasting, because they compete with the stations carried for advertising revenue. By contrast, the DBS industry has claimed that DBS carriers have strong incentives to carry local stations because they are not vertically integrated.<sup>238</sup>

Nevertheless, an examination of local carriage rosters indicates that DBS carriers are carrying only those local stations affiliated with the four largest networks.<sup>239</sup> For instance, neither EchoStar’s Dish Network nor DirecTV offer the local signals of public television stations, with the exception of WGBH in Boston. Therefore, despite the DBS industry’s protestations to the contrary, Congress was substantially correct in its evaluation: In this transitional period before local must-carry is triggered, DBS carriers have displayed little tendency to carry the signals of all broadcast stations in those markets where local service is provided. Moreover, although DBS carriers are not currently vertically integrated with program providers, this may soon change. For instance, General

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antennas to receive broadcast signals; A/B switches suffered from technical flaws; viewers might be required to reset channel settings repeatedly in order to view both UHF and cable channels; and installation and use of the switch with other common video equipment (such as videocassette recorders) could be ‘cumbersome or impossible.’” *Turner II*, 520 U.S. at 219-20.

235. Joint Explanatory Statement, *supra* note 22, at H11,795.

236. *Id.*

237. Mem. in Supp. of Pl’s Mot. for Summ. J. as to the First Amendment Issues, *supra* note 181, at 33-34.

238. *Id.*

239. See DirecTV, *Local Channels Are Now Available*, at <http://www.directv.com/howtoget/howtogetpages/0,1076,224,00.html> (last visited Mar. 26, 2001); Dish Network, *Programming—Local Networks*, at <http://www.dishnetwork.com/content/programming/locals/index.shtml> (last visited Mar. 26, 2001). See Decl. of Stephanie Campbell, ¶ 18 and Decl. of Michael S. Schwimmer, ¶ 19, in Exs. to Pl’s Mot. for Summ. J. as to First Amendment Issues, *supra* note 181.

Motors, owner of Hughes and its subsidiary DirecTV, has reportedly been seeking a buyer for DirecTV, which possesses 65% of the DBS market.<sup>240</sup> News reports have indicated that DirecTV likely will soon be sold to an alliance between Rupert Murdoch's NewsCorp and John Malone's Liberty Media Group, two entities with substantial programming interests, although Viacom, Comcast, Sony, and Disney have also been reported as potential buyers.<sup>241</sup>

The DBS industry's most familiar complaint, however, is that § 338 imposes excessive burdens because the statute demands an unreasonable amount of limited channel-carrying capacity from DBS carriers.<sup>242</sup> This complaint primarily arises in the regulatory context, where it is claimed that DBS carriers are technically barred from carriage of all local television stations in the country because of alleged limitations on channel-carrying capacity.<sup>243</sup> Despite how the DBS industry frames it, however, the issue is not whether full carriage of *all* the television stations in the nation is possible,<sup>244</sup> but whether DBS carriers have the capacity to carry every local station in *those markets* where local service is provided.

Nevertheless, an evaluation of the channel-carrying capacity of the DBS infrastructure is made exceedingly difficult by the industry's reluctance to release this information to the public. A recent report on the DBS industry's channel-carrying capacity derived from publicly available sources and filed with the FCC by the Association of America's Public Television Stations, however, indicates that the limitations on capacity have been vastly overstated.<sup>245</sup> The report states that "virtually complete carriage of local television signals . . . is well within the potential productive capacity of DBS systems that can be realistically deployed and efficiently exploited using available technical knowledge and spectrum assignments."<sup>246</sup> Currently, EchoStar and DirecTV have a combined

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240. Bruce Branch, *GM Having Trouble Getting Right Price for Hughes Electronics*, COMM. DAILY (Nov. 27, 2000).

241. Skyreport, *GM Board to Meet, Hughes on the Agenda?* (Dec. 4, 2000), at <http://www.skyreport.com/skyreport/dec2000/120400.htm#three>; Bruce Branch, *Hughes Moves Closer to Selling DirecTV*, COMM. DAILY, Dec. 20, 2000; Bruce Branch, *Murdoch Reportedly Close to Finalizing DirecTV Deal*, COMM. DAILY, Feb. 8, 2001.

242. See Comments of the SBCA, CS Docket No. 00-96 (July 14, 2000), at 3-6; Reply Comments of EchoStar, CS Docket No. 00-96 (Aug. 4, 2000), at 9; Reply Comments of DirecTV, CS Docket No. 00-96 (Aug. 4, 2000), at 29-31.

243. See *supra* note 242.

244. There are 1,663 full-power television stations in the nation. FCC, News Release, *Broadcast Totals as of September 30, 2000*, (Dec. 1, 2000) 2000 FCC LEXIS 6301.

245. Strategic Policy Research, *Channel-Carrying Capacity of DBS Systems*, CS Docket No. 00-96 (Nov. 17, 2000), at 4.

246. *Id.*

capacity of approximately 960 channels.<sup>247</sup> The report indicates that by using “spot-beam” technology, which directionalizes down-link signals and allows for reuse of spectrum more efficiently, DBS carriers could triple their current channel-carrying capacity.<sup>248</sup> Moreover, by using spectrum in the Ka band, DBS carriers can use higher-frequency satellites with smaller antennae and more spot beams per satellite, allowing for a single Ka-band satellite to carry all of the local analog broadcast stations in the nation with capacity to spare.<sup>249</sup> Both spot-beam technology and the Ka band are either being used now by DBS carriers or will be used in the near future. Therefore, no technical impediment exists to prevent the hypothetical full carriage of all of this nation’s full-power television stations by DBS carriers, although realistically, DBS carriers will likely only serve a fraction of all local markets.

It is evident, therefore, that Congress considered other apparently less restrictive alternatives, but dismissed them after careful consideration. It is further evident that, despite the satellite industry’s protestations to the contrary, the industry is not interested in the full carriage of all local television stations and may presently, or in the future, possess a direct economic incentive to refuse carriage of unaffiliated broadcast stations. Lastly, the satellite industry’s claims of limited capacity, although difficult to assess, are vastly overstated and pose no technical impediment to full carriage of all local broadcast stations in markets where local-into-local service is provided. Accordingly, § 338 would survive intermediate scrutiny, because it is narrowly tailored to advance substantial governmental interests.

## V. CONCLUSION

By adding § 338 to the Communications Act, the Satellite Home Viewer Improvement Act of 1999 established local satellite carriage obligations in exchange for the significant benefit of a royalty-free statutory copyright license. In drafting this legislation, Congress intended both to encourage the development of the DBS industry as a competitor of cable and to preserve the system of local, free, over-the-air broadcasting. Although § 338 may indirectly affect the free speech interests of satellite carriers, it is a carefully constructed, content-neutral regulation of a broadcast technology. According to the relaxed broadcast standard of scrutiny associated with *Red Lion* and its progeny, this restriction of free speech is therefore constitutional, because it is rationally related to the

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247. *Id.* at 2.

248. *Id.* at 2-3.

249. *Id.* at 3.

legitimate governmental interests noted above. Alternatively, § 338 may survive under intermediate scrutiny as well, because it is narrowly tailored to serve substantial governmental interests.