Riding on a Diamond in the Sky: The DBS Set-Aside Provisions of the 1992 Cable Act

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NOTES

RIDING ON A DIAMOND IN THE SKY:1 THE DBS SET-ASIDE PROVISIONS OF THE 1992 CABLE ACT

As with all communications technology utilizing the electromagnetic spectrum, Direct Broadcast Satellite (DBS) systems have fallen under the watchful eyes of Congress and the Federal Communications Commission (FCC). Despite being the most successful consumer electronics product ever introduced,2 DBS has been unable to escape the “public trustee” status that has shackled traditional broadcasting systems for decades. Section twenty-five of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), which Congress incorporated into the Telecommunications Act of 1996 (“1996 Act”) as section 335,3 placed a series of obligations on DBS operators designed to foster access to the DBS platform.4 Among these obligations, the requirement that operators set aside four to seven percent of their carriage capacity for noncommercial, educational, or informational programming5 is at best a dubious application of the public interest mandate. DBS programmers challenged the set-aside requirement as soon as Congress enacted it, but a significantly divided panel of the U.S. Court of Appeals for the District

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1. The title of this Note is taken in part from the Dave Matthews Band song “Satellite” (“Like a diamond in the sky, how I wonder . . . .”). DAVE MATTHEWS BAND, Satellite, on UNDER THE TABLE AND DREAMING (RCA Records 1994).
2. See Paul Farhi, Dishing Out the Competition to Cable TV, WASH. POST, Oct. 12, 1996, at H1 (“In terms of speed of sales . . . DBS [is] the most successful new consumer electronics product ever marketed.”).
5. See id. § 25(b)(1), 47 U.S.C. § 335(b).
of Columbia Circuit ultimately upheld the obligation in *Time Warner Entertainment Co. v. FCC*.\(^6\) In November 1998, after a delay of nearly six years, the FCC finally adopted regulations to implement the set-aside requirements of the 1992 Cable Act.\(^7\)

This Note explores the rationale for imposing a set-aside requirement on the fledgling DBS technology. The first section provides a brief history of the DBS industry, including an overview of DBS technology, a survey of current DBS providers, a comparison of DBS to competing video programming services, and an examination of the relevant statutory and judicial provisions governing the DBS industry. The second section discusses judicial treatment of mass media regulation by examining the foundational cases that first supported the principle of programming in the public interest. Against this backdrop, this Note then explores the courts' attempts to apply such principles to the DBS public interest requirement in *Daniels Cablevision, Inc. v. United States*\(^8\) and *Time Warner*. The third section discusses the regulations released by the FCC in late 1998. Finally, the fourth section offers a critique of the rationale behind the imposition of public interest programming requirements on DBS providers. This section disputes the applicability of the models developed in *Red Lion Broad. Co. v. FCC*\(^9\) and *FCC v. Pacifica*\(^10\) to this new technology, and argues for an alternative view of DBS's obligation to the public interest—one that would better account for DBS's unique attributes and role in the mass media marketplace.

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6. 105 F.3d 723, 723 (D.C. Cir. 1997) (denying rehearing en banc and thereby upholding panel decision in *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996), that the set-aside requirements do not violate DBS providers' First Amendment rights).


THE BUSINESS OF DIAMONDS IN THE SKY

The Game and Its Players

Once the subject of science fiction, DBS technology has existed for almost two decades. Although the FCC first authorized DBS service on an interim basis in 1982, full-scale commercial service did not begin until June 1994. DBS works by transmitting programs from the Earth to satellites positioned in specific geostationary orbital “slots,” which then disseminate

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13. See id. For a brief description of the fates of the original DBS permittees, see 2 BRENNER ET AL., supra note 11, § 15.04[3], at 15-17 to -19.


15. These “slots” derived from an international agreement forged at the 1983 Region II Administrative Radio Conference (“RARC-83”), which allocated 500MHz of broadcast spectrum for DBS. The United States received eight orbital “slots,” with 32 DBS “channels” available at each slot. See Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 F.C.C.2d 250, 251 (1983); 2 BRENNER ET AL., supra note 11, § 15.02[1], at 15-4 to -5. Only satellites positioned in the 101, 110, and 119 degree west latitude slots are capable of delivering programming to the entire continental United States—these are known as “CONUS” slots. See id. § 15.02[1], at 15-5. Four of the remaining five satellite slots are able to transmit only to the western United States—those at 148, 157, 166, and 175 west latitude, respectively. See id. The remaining slot—61.5 degrees west latitude—is capable of hosting a satellite to serve the Eastern United States. See id. Using current digital compression technology, one DBS channel can actually transmit five to seven video programs simultaneously. See DirecTV, Inc. v. FCC, 110 F.3d 816, 821 (D.C. Cir. 1997). Upon completion of the RARC-83 proceedings, the FCC reassigned these orbital slots to private commercial entities. See generally 2 BRENNER ET AL., supra note 11, §§ 15.02[2]-.03[1], at 15-5 to -6 (describing FCC licensing of orbital slots to pri-
the programs directly to customers who pay to receive the service. Unlike traditional C-Band satellite dishes designed to capture low-powered signals from a multitude of orbiting satellites, the newer DBS systems use mid-to high-power signals transmitted in the Ku-band. As a result, DBS dishes need not be the size of roadside billboards: the high-powered services DirecTV/USSB and EchoStar use eighteen to twenty-four inch dishes, while the mid-powered service Primestar uses thirty-six inch dishes.

The public's response to this new media technology has been remarkable. The DBS market grew from 1.7 million subscribers in September 1995 to over 10.2 million subscribers by November 1998, establishing DBS as the fastest growing consumer electronics product of all time. DirecTV, owned by Hughes Communications, remains the industry leader, capable of delivering over 200 channels of video and audio programming to its four million subscribers. Primestar, a joint venture of several cable
programmers, provides its 2.2 million subscribers with 160 channels transmitted at mid-power. EchoStar, the only "independent" DBS provider, offers 240 video and audio channels to

“ordered in concert with" DirectTV, offers an additional 20 premium movie channels as well as access to various pay-per-view events. See id. Originally an independent DBS provider, USSB appears to be on the verge of selling its assets to DirecTV’s parent company, Hughes Communications. See id. at para. 77.


Originally, each Primestar partner served those Primestar subscribers in its respective cable territory. See Kasrel, supra, at 818. With the completion of a corporate restructuring in early April 1998, Primestar became a stand-alone national company. See Price Colman, Primestar All Rolled Up, BROADCASTING & CABLE, Apr. 6, 1998, at 160. Primestar is now on the verge of being acquired by Hughes Electronics, parent company of rival DBS provider DirecTV. See Judith Evans, DirecTV Agrees to Buy Rival Primestar Inc.: $1.8 Billion Deal Likely to Face Scrutiny, WASH. POST, Jan. 23, 1999, at E1. But see Price Colman, A High Card in Primestar Deal, BROADCASTING & CABLE, Mar. 1, 1999, at 10 [hereinafter Colman, High Card] (noting the ability of EchoStar, as a minority bondholder in Primestar, to kill the Primestar/DirecTV deal). Such a deal, if it actually occurs, likely would result in the eventual demise of Primestar and conversion of its customers to DirecTV’s high powered system, leaving DirecTV and EchoStar as the only two DBS providers in the United States. See, e.g., Price Colman, DirecTV Bags Primestar, BROADCASTING & CABLE, Jan. 25, 1999, at 1.

24. See Fifth Annual Report, supra note 22, at para. 61; DTH Subscribers, supra note 19. Primestar had planned to provide high-power DBS service “within three to four years.” Donna Petrozzello, EchoStar Tops Analysts’ Lists, BROADCASTING & CABLE, Sept. 21, 1998, at 83 (quoting Primestar Chairman Carl Vogel). Such hopes most likely evaporated with the collapse of the NewsCorp merger deal. See Farhi & Mills, supra note 23, at C1; Lippman, supra note 23, at B14.

25. EchoStar’s independent status made it an attractive takeover candidate for those desiring to enter the nascent DBS market. An early merger deal with Rupert Murdoch’s News Corporation fell apart in June 1997, leaving EchoStar in questionable financial shape. See News Corp. Sells Satellite Unit for 31% Stake in Primestar,
about 1.8 million subscribers under the name "DISH Network." A fourth DBS provider, mid-powered AlphaStar, filed for bankruptcy in May 1997 and dissolved after reaching a peak of roughly 50,000 subscribers. Other entities are in a position to enter the fray in the next few years.


26. See Fifth Annual Report, supra note 22, at para. 61; DTH Subscribers, supra note 19. As a result of its recent acquisition of NewsCorp's DBS assets, EchoStar expects to be able to offer 500 channels of programming by Fall 1999. See Farhi, supra note 25, at D1.


28. The FCC has issued DBS licenses to Continental Satellite Corporation and Dominion Video Satellite, Inc., but the two companies have not yet launched any satellites. Tempo, originally a subsidiary of TCI Satellite Entertainment, launched a satellite in March 1996, and is authorized to provide 11 channels of DBS service. See Fourth Annual Report, supra note 27, at 1077 para. 67 & n.239. Shortly after gaining approval to provide DBS service, however, Tempo became part of Primestar, thereby eliminating it from the ranks of potential new entrants to the DBS market. See James McConville, TCI Satellite Group to be Spun Off, BROADCASTING & CABLE, Nov. 18, 1996, at 104; see also Colman, High Card, supra note 23, at 1 (noting DirecTV and Echostar bids for the Tempo assets held by Primestar).

The only entity with a full-CONUS slot not providing DBS service is MCI Worldcom/News Corp, which bid $692.5 million at a 1996 FCC auction for the 110 degree west slot. See Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996). As indicated previously, however, MCI Worldcom/News Corp. recently scrapped plans to provide its own service and sold its assets to EchoStar in return for $1.25 billion in stock and an agreement to carry various Fox channels. See Farhi, supra note 25, at D1; see also supra notes 25-26 (describing the EchoStar System).
Rivals to DBS in the Video Marketplace

As a relatively new multi-channel video programming distributor (MVPD), DBS providers must establish and preserve their market share in the fiercely competitive atmosphere that characterizes the video programming industry in the twilight of the twentieth century. The primary rival is clear: cable television. Now available to 97.1% of all television households in the United States, cable dominates the MVPD marketplace. DBS continues to challenge cable television's lock on program delivery.

In enacting the 1996 Telecommunications Act, Congress intentionally encouraged such direct competition for similar services that could result in lower rates and better service for consumers of both technologies. Although cable remains the undisputed "big kid on the block," DBS is proving to be a strong competitor, often offering far more channels and better picture quality than otherwise available through conventional cable television. Cable television, however, has a major competitive advantage—it

29. See Fourth Annual Report, supra note 27, at 1049 para. 14. By the end of the first half of 1997, 64.2 million households had subscribed to cable, and 68.2% of all homes "passed" by cable subscribed to at least the basic tier. See id. at 1049-50 para. 15.

30. See generally Fifth Annual Report, supra note 22, at para. 62 ("DBS continues to represent the single largest competitor to cable."); Fourth Annual Report, supra note 27, at 1040-41 para. 11 (noting that DBS service is widely available and constitutes a significant alternative to cable).

31. See Third Annual Report, supra note 14, at 4362 para. 4 ("[S]ome cable system operators appear to be taking steps to improve their service offerings in response to the availability of DBS service."); see also Fifth Annual Report, supra note 22, at para. 63 (noting that "DBS subscribers continue to report higher levels of customer satisfaction," a factor that has spurred the development of digital cable services); Alicia Mundy & Jim Cooper, Cable Rate Battle Brews, MEDIA WEEK, Mar. 2, 1998, at 6 (noting Rep. Billy Tauzin's (R-La.) preference for "competition with DBS as a way to counter [cable] rate hikes"). But see Stephen Labaton, Cable Rates Rising As Industry Nears End of Regulation, N.Y. TIMES, Mar. 8, 1999, at A1 (noting that cable rates have increased 22 percent since the passage of the 1996 Act and that DBS has not yet provided the level of competition Congress envisioned).

32. See Fifth Annual Report, supra note 22, at para. 63 (noting "superior channel capacity . . . digital quality picture, CD-quality sound, and specialized programming" as the main advantages cited by subscribers of DBS over cable); Fourth Annual Report, supra note 27, at 1062 para. 42 ("DBS digital quality picture and sound are superior to analog cable transmission.").
retransmits local broadcast television signals, a feature that DBS providers currently are unable to offer on a large scale.

There are several forms of MVPD systems. Multi-channel multipoint distribution services (MMDS), also known as "wireless cable" systems, use microwave frequencies to distribute programming to rooftop antennas of subscribers. By July 1997,

33. See Stephen R. Effros, Content Regulation: Broadcast Signal Carriage and Obscenity/Indecency—A Year of Preliminary Skirmishes Leading Up to the Final Rounds, in CABLE TELEVISION LAW 1997, at 7, 10 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3993, 1997) (noting that "localism is seen as a marketing advantage for cable systems" in the multi-channel marketplace). The DBS industry recognizes this advantage, and has taken steps to begin carrying local channels through "spot beaming" technology. See Fourth Annual Report, supra note 27, at 1160 n.823. EchoStar is the industry leader in this regard, spot-beaming local network affiliates to otherwise unserved subscribers in 13 large urban markets. See Fifth Annual Report, supra note 22, at para. 67. Although the technological capability to spot beam exists, copyright laws have not kept pace with technology. See Cynthia Littleton, DBS Chiefs Powwow in LA, BROADCAST & CABLE, Feb. 10, 1997, at 46; see also Heather Fleming, Sky Goes to Capitol Hill for Quick Copyright Fix, BROADCAST & CABLE, Mar. 17, 1997, at 35 (discussing Sky DBS's lobbying efforts in Congress to change copyright law with respect to local broadcast signals). Under the Satellite Home Viewer Act of 1988, EchoStar is only permitted to provide local service to those customers who are currently "unserved" by local television stations. See 17 U.S.C. § 119(2) (1994). "[A]n unserved subscriber is one who cannot receive a Grade-B strength signal over the air 50% of the time when using a rooftop antenna." Paige Albinik, EchoStar Gets Local OK, BROADCASTING & CABLE, Aug. 31, 1998, at 17; see also 17 U.S.C. § 119(d)(10)(A-B) (setting forth the limit on DBS provision of local service).

34. See Glen O. Robinson, The New Video Competition: Dances with Regulators, 97 COLUM. L. REV. 1016, 1041-42 & n.82 (1997). The DBS industry's interest in local broadcast programming may have opened the mass media equivalent of a Pandora's Box: must-carry regulation. Originally applied to the cable television arena, the extension of must-carry regulation to DBS would mandate that each DBS provider "offer all local signals in all local markets they choose to serve as soon as they enter that market." Paige Albinik, Satellite Rewrite Stalled by Must-Carry Debate; Broadcasters, DBS Spar over Requirements for Local-into-Local, BROADCASTING & CABLE, May 4, 1998, at 20 (emphasis added). Currently, EchoStar only carries local network affiliate stations, electing not to carry independent local stations. See Top 25 Dish Network Programming Questions: 4. How Do I Get My Local Networks? (visited Mar.24,1999)<http://www.dishnetwork.com/service/questions/programming.htm#aq107>. Must-carry could force DBS providers to add independent local stations, which traditionally attract smaller audiences than national networks. Such a development could demand the allocation of satellite space that otherwise could be utilized for more profitable national programming.

35. See Third Annual Report, supra note 14, at 4386 n.152. Analog MMDS Systems currently provide up to 33 channels, and require a "line of sight" path between the transmitter and receiving antenna. See Fifth Annual Report, supra note 22, at
approximately 252 wireless cable systems were in operation, serving about 1.1 million subscribers. Satellite Master Antenna Television (SMATV) systems essentially function as private cable systems, transmitting programming from a single “headend” through the airwaves to rooftop antennas on commonly owned buildings. Programming is then relayed throughout each building using traditional cable wiring.

Local telephone companies were at one time thought to be the best potential rival to traditional cable services. The 1996 Act allowed telephone companies to provide cable service, and with an extensive existing network of wires in place, such a feat would—at least, theoretically—be relatively simple. Theory, though, is often far removed from reality, and the telephone companies have yet to obtain a significant foothold in the cable industry.

Other nascent MVPD alternatives are on the horizon, but simply are not players in the current MVPD marketplace. Internet video service, which is already available on a limited basis, is one of these alternatives. By either “downloading” a

para. 81. In July 1996, however, the FCC authorized digital MMDS. See Fourth Annual Report, supra note 27, at 1079 para. 72. With current digital compression technology, the number of available channels could be increased as much as six-fold. See id. at 1079-80 para. 72 & n.261.

36. See Fourth Annual Report, supra note 27, at 1080-82 paras. 73-75.
37. See Third Annual Report, supra note 14, at 4403 para. 80.
38. See id.; see also Fifth Annual Report, supra note 22, at paras. 88-94 (discussing the technology and current status of SMATV in the MVPD marketplace).
39. See generally Fourth Annual Report, supra note 27, at 1099-104 paras. 108-17 (discussing the potential entry of local exchange carriers (“LECs”) into the MVPD market in the wake of the 1996 Act). Recently, Bell Atlantic abandoned a plan to deliver cable service through its lines in the Washington D.C. area, opting instead to sell DBS service to its customers. See Mike Mills, Dial T for Television; Bell Atlantic Challenges the Cable Industry by Offering Direct-Broadcast Satellite Service, WASH. POST, Sept. 14, 1998, at F10. In a nutshell, “video over phone lines proved too expensive to be offered profitably by Bell Atlantic or other local phone companies” at this time. Id. Advances in Internet video, however, may allow local phone companies to provide their own video services at some point in the future.
41. See generally Fourth Annual Report, supra note 27, at 1099 para. 108 (explaining that LECs do not yet have a “national presence in the MVPD market”).
42. See id. at 1094-96 paras. 97-102. Although the Internet is a promising alternative to broadcasting, the FCC notes that current problems with limited bandwidth and transmission delays inherent in the Internet inhibit development of Internet video
video programming file or visiting a web-site with "streaming" capabilities, users are able to receive video and audio programming directly through their personal computers. With an estimated 132.3 million Americans using the Internet by the year 2000, Internet video service represents a logical transmission method for the wide-ranging delivery of mass programming. Indeed, the DBS industry has recognized the Internet's potential and has moved to capitalize on the revolution by instigating high-speed Internet access as part of its subscription service.

Traditional broadcast television interests remain noncompetitors; for now, the relationship between DBS and broadcast television is symbiotic. Network programs are still far and away the most popular programs on television, regardless of the transmission method. As such, network broadcast programs are

as a full-fledged video program delivery system. See id. at 1094 para. 97; see also Richard Tedesco, Video Streaming: The Not Ready for Prime Time Medium, BROADCAST & CABLER, May 25, 1998, at 22 (noting the lack of bandwidth on the Internet). But see Kevin Maney, The Next Big Bang: Communications, USA TODAY, Oct. 8, 1998, at 1B (forecasting a "bandwidth explosion" likely to occur within the next few years).

43. See Fourth Annual Report, supra note 27, at 1095 paras. 99-101. "Downloading" is currently the most common method of receiving video programming from the Web: one simply visits the webpage where the programming is located, saves it, and plays it back at his or her convenience. See id. at 1095 para. 100. "Streaming" involves real-time transmission of programming directly to the recipient, but often requires the purchase and installation of special software. See id. at 1095 para. 101. More modern methods of streaming technology—that employed by WebTV, for example—require only that a user visit the site to receive the programming. See id. at 1095-96 para. 102.


45. Currently, it is estimated that some 30,000 websites (including the sites of 30 television stations) regularly stream video. See Tedesco, supra note 42, at 22. Some of these entities—notably C-SPAN and Fox News Channel—already are streaming their programming on the Internet as they send it out over cable feeds. See id.

46. See Fifth Annual Report, supra note 22, at para. 75 (noting DirectTV's "DirectDUO" satellite-delivered, high-speed Internet service and similar efforts by EchoStar).

47. See Howard A. Shelanski, The Bending Line Between Conventional "Broadcast" and Wireless "Carriage," 97 COLUM. L. REV. 1048, 1077 (1997) (noting that, by not carrying local television stations, "DBS . . . creates, at least for now, a market niche and incentive for local broadcasting at the same time it increases competition for general audience broadcasting").

48. See Fifth Annual Report, supra note 22, at para. 96 ("During the 1997-98 tele-
highly desirable candidates for inclusion on any MVPD, including DBS, and such carriage potentially benefits both entities. Broadcast television also is the primary method of receiving local signals for those using DBS systems—though intense pressure from the industry to allow carriage of local signals on DBS systems may result in the necessary alterations to copyright law to allow carriage of local broadcast signals on DBS.49

Perhaps underscoring the immense fluidity of the video programming marketplace, some broadcasters recently indicated that they may attempt to convert the spectrum allocated to them by the FCC for the creation of High Definition Television (HDTV) service into small subscription television services.50 This tactic—known as “multicasting”—has received intense criticism from Congress and other MVPDs, and is unlikely to materialize anytime soon.51

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49. Under 17 U.S.C. § 119(a)(2)(B) (1994), DBS operators are allowed to offer broadcast network service only to households located in “unserved” areas. See Third Annual Report, supra note 14, at 4408 n.292. The DBS industry consistently has lobbied for revision of this statute. See, e.g., Copyright Issues and Primestar's Future Top Busy DBS Agenda, COMM. TODAY, Feb. 9, 1998, available in 1998 WL 5264687; Fleming, supra note 33, at 35. The industry's efforts soon may bear fruit: In August 1997, the United States Copyright Office recommended that Congress amend the Satellite Home Viewer Act (SHVA) to eliminate the Grade-B signal strength standard, and in 1998 two bills were introduced in Congress to amend SHVA. See Fifth Annual Report, supra note 22, at paras. 65-66. Although neither bill passed, both indicate a willingness on the part of members of Congress to reexamine this area. See id.; see also supra notes 33-34 and accompanying text (discussing the competitive advantage enjoyed by cable operators providing local programming).

50. See generally John M. Higgins, Making Sense of Multicasting, BROADCASTING & CABLE, Sept. 8, 1997, at 14, 14-17 (discussing the networks' move away from HDTV to multicasting). Essentially, broadcasters would use the HDTV spectrum to broadcast several channels of pay television instead of the one HDTV channel for which the FCC originally allocated the spectrum. Two plans have been suggested: the ABC plan, which calls for creating three or four subscription channels from the spectrum and using them to either compete with cable or bolster various MSOs; and the Sinclair Broadcasting plan, which calls for several local broadcasters to pool their spare digital channels to create wireless cable systems. See id.

51. See id. Rep. Billy Tauzin (R-La.), Chairman of the House Telecommunications Subcommittee, has threatened “serious new obligations—both financial and public interest” if broadcasters attempt to use their HDTV spectrum for multicasting. Id. at 16. Cable industry lobbyists also have been quick to point out that the 1996 Act
The Rules of the Game

The 1996 Act, although extensively overhauling several aspects of telecommunications regulation, did relatively little to alter the rules of the DBS game. The governing provisions for DBS were established primarily with the Satellite Home Viewer Acts of 1988 ("1988 SHVA")\textsuperscript{52} and 1994 ("1994 SHVA"),\textsuperscript{53} and the 1992 Cable Act.\textsuperscript{54} These earlier acts—especially the 1992 Cable Act—were the first to reflect congressional response to the revolutionary changes occurring in the previously separate realms of common carrier telephone service, computers, broadcasting, and cable television. The provisions of these acts relevant to DBS emerged unscathed from the 1996 Act drafting process, and remain in effect today.

The need for major alterations in the regulatory schemes for these various telecommunications media became evident as a result of the "technological convergence" phenomenon.\textsuperscript{55} As Professors Krattenmaker and Powe observed, "[N]either producers nor purchasers of audio or video information should find much use, in the near future, for such terms as 'television,' 'computer,' 'telephone,' or 'radio.' These objects are no longer distinct does not allow broadcasters to take advantage of the program access rules that allow DBS, wireless cable, and telco video to carry cable programming. See \textit{id}. Such opposition from cable is not surprising: "Even a single broadcaster's three-or-four channel package could hurt if it included CNN, HBO and ESPN for considerably less than the $35 most cable subscribers pay." \textit{id}.


55. \textit{See generally} Thomas G. Krattenmaker & L.A. Powe, Jr., \textit{Converging First Amendment Principles for Converging Communications Media}, 104 \textit{Yale L.J.} 1719, 1719-20 (1995) (noting that "telecommunications technologies and media are converging" and arguing that convergence has rendered current regulations hopelessly out of date).
Technologies that used to “carry” only programming or data supplied by other parties—cable television and telephones—now supply their own programming on their own systems. The vast bulk of those receiving programs produced by “broadcasters,” on the other hand, now receive those programs over cable wires, telephone wires, or other subscription services.

DBS presents the quintessential example of what has happened in the world of telecommunications:

DBS . . . is capable of sending both addressed signals and public transmissions receivable by anyone with the proper equipment . . . . On the one hand, DBS is simply broadcast from a taller mast; on the other hand, DBS operators can lease capacity on their transponders to independent information service providers, programmers, and packagers . . . that merely want carriage of their signals to viewers.

With this blurring of the broadcast/carriage distinction, Congress and the FCC had to fashion new rules to encompass both facets of this MVPD system.

The 1988 SHVA was notable for two reasons: it authorized the FCC to initiate rulemaking proceedings on syndicated exclusivity ("syndex") and the secondary transmission of superstations and network stations. The syndex rules for satellites function much like their counterparts for cable—they allow a supplier of

56. Id. at 1719.
58. See Fourth Annual Report, supra note 27, at 1039 para. 11. “Broadcasters” generally are defined as those entities that use their own conduits to indiscriminately transmit their own messages to members of the general public. “Carriers” are those entities that use their own conduits to transmit the messages of other parties to selected private parties. See Shelanski, supra note 47, at 1048.
59. Shelanski, supra note 47, at 1062-63 (citations omitted).
syndicated programming to contract with a broadcast television station to be the exclusive presenter of the program in its local broadcast area. The secondary transmission requirements subject the DBS provider to statutory licensing when transmitting broadcast network or cable "superstation" signals "to the public" and charge subscribers a fee for that retransmission. More importantly, they forbid the secondary transmission of primary network television signals "to a subscriber who does not reside in an unserved household"—in essence, statutorily banning the retransmission of local broadcast television signals to those already able to receive those signals over the air. These provisions have proven frustrating to DBS providers searching for ways to include local programming on their systems.

Although copyright issues bar DBS from carrying most local broadcast programming, DBS is able to carry cable programming as a result of the Primestar Consent Decrees. The outcome of a Department of Justice suit against Primestar and its cable industry owners, the Primestar Consent Decrees prevented Primestar from acquiring exclusive DBS rights to any of the sixty-one "national video programming services existing as of May 1, 1992," regardless of whether one or more of the Primestar partners controlled the service. This allowed all DBS service providers an equal shot at acquiring programming from cable programming suppliers. Furthermore, the Primestar

63. See United Video, Inc. v. FCC, 890 F.2d 1173, 1176 (D.C. Cir. 1989). The syndex system helps to prevent overexposure of certain popular programs, thereby fragmenting the viewing audience and diminishing the programs' value to advertisers. For a general primer on the rationale behind syndex rules, see id. at 1177-81 (examining the FCC's arguments in favor of the reinstatement of syndex rules for cable providers after an eight-year absence).


65. Id. § 119(a)(5)(A). The regulation mandates several more requirements, including various copyright protection provisions and royalty fee payment arrangements. See id. §§ 119(b)-(c).

66. See supra note 34 and accompanying text.


68. Id. at 362-63 (citations omitted).

69. See Neal R. Stoll & Shepard Goldfein, A Report Card on Enforcement,
Consent Decrees contained anti-retaliation language, prohibiting "multi-channel distributors like Primestar from retaliating against a programming vendor for failing to provide exclusive rights." The Cable Acts and Primestar Decrees failed to resolve the issue of public interest programming requirements for DBS programmers. The regulation of DBS services was not the top priority of the 1992 Cable Act; instead, the 1992 Cable Act focused squarely on cable television systems and represented a legislative response to immense inflation in cable rates after Congress deregulated the cable industry in the late 1980s, as well as a response to the convergence trend. The 1992 Act "promulgated regulations governing, among other things, programming access, carriage, and ownership limits." Despite its predominant focus on cable, however, the 1992 Act formally established regulation of DBS in the public interest for the first time.

With no DBS systems in operation at the time of its enactment, the drafters of the 1992 Cable Act based their decisions regarding DBS regulation on the traditional regulatory schemes designed for other media. Section 25(a) of the Act stated that, "at a minimum," DBS providers would be subject to political access requirements mandated for broadcasters. Section 25(a) also instructed the FCC to consider how best to serve the principle of "localism" with DBS satellites.

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70. Saylor, supra note 67, at 363 (citations omitted).
72. Saylor, supra note 67, at 323.
73. See Cable Television Consumer Protection and Competition Act of 1992 § 25(a), 47 U.S.C. § 335(a) (1994) (mandating the imposition of the access to broadcast time requirement in 47 U.S.C. § 312(a)(7) and the use of facilities requirement in 47 U.S.C. § 315); see also infra notes 166-71 (examining political access requirements of the FCC public interest obligations order).
74. See Cable Television Protection and Competition Act of 1992 § 25(a), 47 U.S.C.
Section 25(b)(1) represents the more problematic of the two prongs of DBS service obligations, and is the main focus of this Note. Under the statutory set-aside requirement:

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.75

DBS operators are allowed to utilize any unused channel capacity reserved under this section of the statute until such space is claimed.76 Further, DBS operators remain able to implement "reasonable prices, terms, and conditions" when making channel capacity available to eligible program suppliers.77 The set-aside requirement does, however, represent a clear loss of editorial control for the system operators.78 As editorial control over content represents perhaps the most fundamental of program content decisions, the regulation instantly appeared ripe for a First Amendment challenge.

§ 335(a). Although never firmly defined by Congress or the FCC, the principle of localism, along with diversity and competition, has become a mainstay of government regulation of television programming. See THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 85-87 (2d ed. 1998); Michael W. Maseth, The Erosion of First Amendment Protections of Speech and Press: The "Must Carry" Provisions of the 1992 Cable Act, 24 CAP. U. L. REV. 423, 444 (1995) (noting that "Congress has decided that there is an inherent value in local broadcasting which is not present in other types of speech"). "Localism" becomes a difficult concept to quantify when applied to DBS satellites, which leave signal "footprints" hundreds of miles in diameter. See generally JOHN R. BITTNER, LAW AND REGULATION OF ELECTRONIC MEDIA 353 (2d ed. 1994) (defining "footprint" as "that area on the earth's surface covered by the satellite's signal"). Although DBS providers can "spot beam" local signals to unserved customers in some local markets, this alone will not cure the fundamental vagueness inherent in the localism principle.

75. 47 U.S.C. § 335(b)(1).
76. See id. § 335(b)(2).
77. Id. § 335(b)(3).
78. See id. ("The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.").
DBS Regulation and the Courts

History of Judicial Treatment of Telecommunications Regulation

When ruling on challenges to the regulation of telecommunications media, the courts often have treated regulations differently based on the type of media involved.79 Print media, including newspapers and magazines, traditionally have received the broadest First Amendment protection.80 Accordingly, in Miami Herald Publishing Co. v. Tornillo,81 the Supreme Court held that to mandate a “right of reply” for those criticized by a newspaper would be an impermissible intrusion upon the publisher’s editorial freedom.82 In contrast, broadcasting historically has received far less protection. In Red Lion Broadcasting Co. v. FCC, the Supreme Court noted that “scarcity” of the electromagnetic spectrum justified regulation of the airwaves “in the public interest.”83 Because the FCC’s grant of a broadcast license gave Red Lion the ability to use this scarce resource for its broadcast in the first place, the Court reasoned that the First Amendment would allow a mandate that the broadcaster “conduct himself as a proxy or fiduciary with obligations” to foster access to various diverse viewpoints.84

Other “public interest” precedents grew from the foundation of Red Lion, further distancing broadcast from print media. For example, in FCC v. Pacifica Foundation, the Court upheld the FCC’s power to mandate time restrictions on certain program-

79. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (“Different communications media are treated differently for First Amendment purposes.”); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”).
80. See generally Lee C. Bollinger, Jr., Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 1 (1976) (“The Supreme Court has accorded the print media virtually complete constitutional protection from attempts by government to impose affirmative controls such as access regulation.”).
82. See id. at 254-58.
84. Id. at 389.
ming, reasoning that broadcasting is a "uniquely pervasive" and "uniquely accessible" medium of communication. Under the *Pacifica* model, broadcasters that are granted exclusive access to a scarce public resource—the electromagnetic spectrum—must consider the public interest when selecting programming. The ascension of MVPDs presented courts with regulations requiring providers to give up entire stations to the "public interest," even when such stations did not utilize the scarce resource of broadcast spectrum. Cable programmers soon challenged the resulting "must-carry" requirements in *Turner Broadcasting System, Inc. v. FCC* ("Turner I"). In *Turner I*, the Court upheld the must-carry requirements mandated of cable providers on the grounds that they "preserved the benefits of free, over-the-air local broadcast television" and promoted "the widespread dissemination of information from a multiplicity of sources." Viewed against this backdrop, the DBS public interest requirements presented the problem of trying to graft solutions tailored for older forms of media onto a new form that defied rigid classification. These proposed solutions faced intense judicial scrutiny.

**Daniels Cablevision**

The DBS set-aside provisions prompted an immediate court challenge—though not from the most likely source. Although DBS providers appeared ready to accept the set-aside without protest, DBS programming suppliers attacked the set-aside

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85. See FCC v. Pacifica Found., 438 U.S. 726, 748-51 (1978). This was the beginning of the "intruder" theory of broadcasting, which posits that individuals should be "protected" from confrontation with potentially undesirable material in the privacy of their home. See ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 134 (1983).

86. See *Pacifica*, 438 U.S. at 748-51; see also *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 638 (1994) (noting that "the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees"); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207, 227-28 (1982) (citing *Pacifica* as an example of the "impact" theory for "regulating broadcast content under the public interest standard").


88. Id. at 662-63.
requirement on the ground that it would reduce the number of channels available on DBS systems for the carriage of their programming.\textsuperscript{89}

In \textit{Daniels Cablevision, Inc. v. United States}, the DBS programmers argued that "[t]he DBS service provisions accord a preference to speakers whose ostensible mission is to enlighten rather than to entertain," thereby favoring such speakers on the basis of their programming content.\textsuperscript{90} The U.S. District Court for the District of Columbia agreed, adding that "[t]here is absolutely no evidence in the record upon which the Court could conclude that regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest."\textsuperscript{91} Noting that the government failed to indicate that educational television was "in short supply in the homes of DBS subscribers," the district court refused to allow any "conscripting [of] DBS channel space" in the absence of "a valid regulatory purpose or some other legitimate government interest."\textsuperscript{92}

A direct victory for programming suppliers and a tangential windfall for DBS providers, \textit{Daniels Cablevision} ultimately provided little more than a temporary shield against the imposition of the set-aside requirement. \textit{Time Warner Entertainment Co. v. FCC}\textsuperscript{93} ("\textit{Time Warner I"), decided August 30, 1996, destroyed that shield when a three-judge panel of the D.C. Circuit filed a per curiam opinion upholding the constitutionality of the set-aside provisions.\textsuperscript{94} Time Warner argued that the set-aside provisions must be subjected to strict scrutiny review.\textsuperscript{95} Unlike in \textit{Daniels Cablevision}, however, the \textit{Time Warner I} court was far less receptive to the programmer's argument. Despite Time

\textsuperscript{89} See Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 8 (D.D.C. 1993). Although it appears at first glance that the DBS programming suppliers may have had questionable standing to bring suit, U.S. District Judge Thomas Penfield Jackson found that "[t]he asserted injury is traceable to section 25, and it clearly would by [sic] remedied by the declaratory relief the plaintiffs seek."\textit{Id.} For purposes of this Note, Judge Jackson's standing determination is assumed to be correct.

\textsuperscript{90} Id. at 8.

\textsuperscript{91} Id.

\textsuperscript{92} Id. at 8-9.

\textsuperscript{93} 93 F.3d 957 (D.C. Cir. 1996).

\textsuperscript{94} See id. at 962.

\textsuperscript{95} See id. at 974.
Warner's pleading to the contrary, the court took the unusual step of entertaining an argument that the district court previously had not considered, and in so doing crafted an opinion that used the full force of broadcast television jurisprudence to smash through the Daniels Cablevision shield.96

Time Warner I and the Spectre of Broadcast Regulation

“Our resolution of the legal issue presented here does not require the consideration of facts not already in the record, and for us to ignore the obvious similarity between DBS and broadcasting would do nothing to preserve the integrity of the judicial process.”97 With that pronouncement, the D.C. Circuit exercised its discretion to review a critical point of law not contemplated by the earlier panel: Were DBS systems “analogous to broadcast television and therefore subject to no more than heightened scrutiny”?98 The Time Warner I court found that DBS systems were members of the broadcast family, albeit much more sophisticated ones, and as such shared the same basic technological feature that justified regulation of their siblings—spectrum scarcity.99

First propounded in the 1943 National Broadcasting Co. v. United States decision,100 the spectrum scarcity rationale hit its high water mark in Red Lion. This regulatory rationale postulates that because electromagnetic spectrum is a “scarce” resource, the government may allocate available frequencies by granting relatively few licenses for broadcasting purposes.101 In

96. See id. at 974-75.
97. Id. at 975.
98. Id. The court cited Roosevelt v. E.I. du Pont de Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992), to justify its discretion to consider an issue raised for the first time on appeal that does not “depend on any additional facts not considered by the district court.” Time Warner, 93 F.3d at 975 (citing E.I. du Pont de Nemours, 958 F.2d at 419 & n.5).
99. See Time Warner, 93 F.3d at 975.
100. See National Broad. Co. v. United States, 319 U.S. 190, 226 (1943) (“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.”).
101. “Scarce” in this instance essentially means that the FCC hands out less spectrum for free than there are people who want to use the spectrum. It is not technological scarcity—we have far more usable spectrum today than in Marconi’s day. See,
return for this government grant, the government requires the licensee to "[s]hare his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."

As Professors Krattenmaker and Powe argue: "This model allows governments to intervene to promote First Amendment values by mandating a more diverse programming fare than broadcasters might otherwise choose." \(^{103}\) Red Lion remains the bedrock of broadcast regulation—its scarcity rationale has been attacked and weakened, but it survives nonetheless.\(^ {104}\)

Perhaps the strongest feature of the scarcity rationale is its adaptability to changing situations. The original justification for government control of the airwaves was based on interference problems—there were simply too many broadcasters broadcasting over each other on the few frequencies available, and simply not enough licensed frequencies to go around.\(^ {105}\) As the number of alternative mass media systems blossomed, scarcity changed to fit the new communications landscape—the "bottleneck" theory

e.g., Thomas W. Hazlett, Physical Scarcity, Rent Seeking, and the First Amendment, 97 COLUM. L. REV. 905, 926-27 (1997) (arguing that advances in technology led to the expansion of the radio spectrum). Instead, the real issue is one of fundamental economic scarcity—too few dollars available to support the maximum possible number of stations in any given market. This distinction has fueled extensive criticism of the scarcity rationale for public interest obligations. See generally DE SOLA POOL, supra note 85, at 151 (noting that "the number of stations depends on the amount of advertising dollars or on other funding sources in the community"); Fowler & Brenner, supra note 86, at 223 (same); Hazlett, supra, at 926-27 (arguing that physical scarcity is an empty concept and only economic scarcity is meaningful).

\(^ {102}\) Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969); see also Bollinger, supra note 80, at 9 (noting that under this rationale, "when only a few interests control a major avenue of communication, those able to speak can be forced by the government to share").

\(^ {103}\) Krattenmaker & Powe, supra note 55, at 1721.

\(^ {104}\) Scholars and practitioners of telecommunications law regularly call for the dismantling of the scarcity-based system of regulation, and have done so for years. See, e.g., DE SOLA POOL, supra note 85, at 151; Fowler & Brenner, supra note 86, at 221-26; Hazlett, supra note 101, at 926-30; Krattenmaker and Powe, supra note 55, at 1740-41; 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).

\(^ {105}\) See generally DE SOLA POOL, supra note 85, at 113-17 (discussing the beginnings of governmental control of broadcast spectrum).
of scarcity arose, positing that access to the public via a particular type of programming delivery system can be defeated by "gatekeepers" at strategic points in the system.106 Many commentators have unmasked the scarcity rationale as nothing more than economic in nature—frequencies are available, but funding to acquire one and set up a broadcast operation is scarce.107

Relying on Red Lion and its scarcity rationale, the Time Warner I court concluded that the use of spectrum by DBS operators is equivalent to the use of spectrum by traditional broadcast media,108 thereby condemning DBS operators to the fate of traditional television broadcasters. It appears, however, that the court ignored the FCC's own preliminary classification of DBS as a nonbroadcast service: "[w]e think subscription services may properly be classified as point-to-multipoint (nonbroadcast video) services that fall outside the definition of broadcasting."109 The FCC's justification for differentiating "subscription video" services from regular broadcasting hinged on the system operator's intent:

The dual nature of STV [subscription television] is that while it may be available to the general public, it is intended for

106. "Bottleneck" theory enables the FCC to mandate that cable television, which does not use the broadcast spectrum to deliver programming directly to the homes of its subscribers, nevertheless must allow certain levels of public, educational, and governmental access to its system. See Winer, supra note 71, at 47 (criticizing the "gatekeeper control" supposedly exercised by cable companies as grounds for shackling cable with public interest requirements); see also infra notes 202-03 and accompanying text (explaining the "bottleneck" scarcity rationale).

107. See, e.g., Fowler & Brenner, supra note 86, at 223 (noting that "[t]he scarcity rationale focuses on the wrong scarce resource, megahertz, instead of advertising dollars"); Lively, supra note 104, at 1081 n.121 (arguing that a need to meet certain financial qualifications to receive a broadcast license "define[s] an industry to which access is conditioned by affordability").


109. Subscription Video Services, Notice of Proposed Rulemaking, 51 Fed. Reg. 1817, 1818 (1986); see also Subscription Television; Change in Classification, 52 Fed. Reg. 6152, 6153 (1987) ("[T]he definition of "broadcasting" in the Communication Act turns on the intent of the purveyor of a service that its programming be available to the indeterminate public . . . . [S]ervices which, through technology, limit access to only paying subscribers may be classified as non-broadcast services.").
the exclusive use of paying subscribers. Availability and use are separate concepts. . . . Mass appeal and mass availability are factors which weigh in favor of finding that a particular activity is broadcasting. However, those factors may be negated by clear, objective evidence that the programming is not intended for the use of the general public.\footnote{110}

Although the general public is invited to partake of a DBS provider’s wares, an individual must first subscribe to a DBS service to do so legally. This difference was not appreciated fully by the court, which consequently lumped DBS in with traditional broadcast services.\footnote{111}

Once the court misclassified DBS, the rest of the \textit{Time Warner I} opinion quickly fell into place. Recognizing that “the inherent physical limitation on the number of speakers who may use the . . . medium has been thought to require some adjustment in traditional First Amendment analysis,”\footnote{112} the court applied the same “relaxed standard of scrutiny that . . . the [Supreme] Court ha[d] applied to the traditional broadcast media.”\footnote{113}

Without the need for a compelling governmental interest to sustain the regulation, the government’s policy of promoting “the availability to the public of a diversity of views and information through cable television and other video distribution media” presented a sufficient governmental interest to justify the “hardly onerous” burden placed on DBS operators.\footnote{114} The court noted that the government conceded to Time Warner’s assertion that the FCC had made no findings regarding the need for the DBS set-aside, but quickly added that any findings would be unnecessary\footnote{115} and impossible.\footnote{116}

\begin{thebibliography}{116}
\footnotesize
\item[110] Subscription Video Services, 51 Fed. Reg. at 1820; see also Shelanski, supra note 47, at 1066 (analyzing the revision of the STV rules).
\item[111] See \textit{Time Warner}, 93 F.3d at 976 (noting that the set-aside is simply “a new application of a well-settled government policy . . . as a condition of their being allowed to use a scarce public commodity”).
\item[113] \textit{Time Warner}, 93 F.3d at 975.
\item[114] Id. at 976 (quoting Cable Television Consumer Protection and Competition Act of 1992 § 2(b)(1), Pub. L. No. 102-385, 106 Stat. 1460, 1463 (1992)).
\item[115] See id. (“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
\end{thebibliography}
With that background established, the *Time Warner I* court's next step was inevitable: "Section 25, then, represents nothing more than a new application of a well-settled government policy of ensuring public access to non-commercial programming." Looking for a final pillar of support, the panel then associated cable's "must carry" rules with the DBS set-aside and turned to the language of *Turner I*: "The rules . . . do not require or prohibit the carriage of particular ideas or points of view."  

Almost as a throw-away point, the court noted that "the over-riding objective in enacting must carry was . . . to preserve access to free television programming . . . . Section 25 serves a similar objective; its purpose and effect is to promote speech, not to restrict it." This rationale—preservation of free television programming—seems inappropriately stolen from cable television. While cable television systems carry local broadcast television signals, DBS systems do not. DBS subscribers depend on local broadcast stations to provide information in the same way as those who do not subscribe to any type of MVPD systems. There simply is no direct competition present between DBS systems and local, free broadcast television.

**The Time Warner II Dissent: Scarcity Under Fire**

Within six months, the D.C. Circuit handed down yet another opinion on the matter. Upon consideration of Time Warner's Suggestions for Rehearing En Banc, a majority of the judges denied a rehearing of *Time Warner I* without issuing an opinion on the merits. The five dissenting judges were not so reticent. Writing for his dissenting colleagues, Circuit Judge Stephen

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116. See id. ("Congress could not have made DBS-specific findings for the simple reason that no DBS system was in operation at the time the 1992 Act was enacted. Congress had to base its decision to require set-asides on its long experience with the broadcast media.").

117. Id.

118. Id. at 977 (quoting *Turner*, 512 U.S. at 647).

119. Id.

120. See supra notes 33-34 and accompanying text.

121. See *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 (D.C. Cir. 1997).
Williams professed a “genuine uncertainty about the correct outcome” of the case had it been reheard.\textsuperscript{122} Citing “fatal defects” in the earlier panel’s legal theory,\textsuperscript{123} he strenuously objected to the use of scarcity as the legal theory with which to uphold the set-aside.\textsuperscript{124} Indeed, Judge Williams even took a swipe at the continued validity of \textit{Red Lion} itself.\textsuperscript{125}

Acknowledging the differences between DBS and traditional broadcasting, Judge Williams noted that “[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting.”\textsuperscript{126} The dissent then followed the lower panel’s lead, equating DBS with cable television.\textsuperscript{127} Where the lower panel used \textit{Turner I} to support the imposition of scarcity-combatting regulations on DBS, the dissenters in \textit{Time Warner II} distinguished DBS’s large capacity from normal broadcasting, arguing to limit the reach of the spectrum scarcity doctrine in the process.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 724 (Williams, J., dissenting).
\item \textsuperscript{123} \textit{See id.} (Williams, J., dissenting) (“I believe there were fatal defects in the panel’s legal theory for upholding the 1992 Cable Act’s requirement that direct broadcast satellite . . . providers set aside several channels for noncommercial programming of an educational or informational nature.” (citing \textit{Time Warner}, 93 F.3d at 973-77)).
\item \textsuperscript{124} \textit{See id.} (Williams, J., dissenting) (“DBS is not subject to anything remotely approaching the ‘scarcity’ that the court found in conventional broadcast in 1969.”).
\item \textsuperscript{125} \textit{See id.} at 724 n.2 (Williams, J., dissenting). Judge Williams wrote:

\begin{quote}
\textit{Red Lion} has been the subject of intense criticism. Partly this rests on the perception that the “scarcity” rationale never made sense . . . [a]nd partly the criticism rests on the growing number of available broadcast channels. . . . While \textit{Red Lion} is not in such poor shape that an intermediate court of appeals could properly announce its death, we can think twice before extending it to another medium.
\end{quote}

\textit{Id.} (Williams, J., dissenting).
\item \textsuperscript{126} \textit{Id.} at 724 (Williams, J., dissenting). Judge Williams also pointed out that “DBS provides a given market with four times as many channels as cable, which (even without predicted increases in compression) offers about 10 times as many channels as broadcast. Accordingly, \textit{Red Lion}’s factual predicate—scarcity of channels—is absent here.” \textit{Id.} at 725 (Williams, J., dissenting).
\item \textsuperscript{127} \textit{See id.} at 725 (Williams, J., dissenting) (“[T]o the extent that \textit{Turner I} distinguishes \textit{Red Lion} on grounds of lack of scarcity in cable . . . DBS falls on the cable rather than the broadcast side of the line.”).
\item \textsuperscript{128} \textit{See id.} (Williams, J., dissenting) (“Broadcast regulation rests upon the unique physical limitations of the broadcast medium.” (quoting \textit{Turner Broad. Sys., Inc. v. FCC}, 512 U.S. 622, 637 (1994))).
\end{itemize}
Next, the dissent confronted the content specific nature of the set-aside regulation, and once again tied its argument to an issue explored in *Turner I*. In *Turner I*, the issue was "must-carry"—a scheme designed to facilitate access to cable systems by local broadcast television stations.\textsuperscript{129} The *Turner I* court found those rules to be content-neutral,\textsuperscript{130} a conclusion that supported the original *Time Warner I* panel opinion.\textsuperscript{131} The dissent drew a sharp distinction between the DBS set-aside and *Turner I*’s must-carry provisions: "Whereas the must-carry provisions reviewed in *Turner* mandate access for particular stations regardless of their programming content, the DBS provision speaks directly to content, creating an obligation framed in terms of 'noncommercial programming of an educational or informational nature.'"\textsuperscript{132} The dissenters found this statutory intent to "advance one particular type of programming" unacceptable, concluding that "as a simple government regulation of content, the DBS requirement would have to fall."\textsuperscript{133}

Despite the seemingly anti-set-aside fervor mustered by Judge Williams and his dissenting colleagues, the dissent offered a possible foundation for the set-aside not considered by the prior panel—the possibility of a conditional governmental grant or subsidy to the DBS providers.\textsuperscript{134} The dissenting judges noted that under *Rust v. Sullivan*,\textsuperscript{135} "[t]he government may subsidize some activities and not others."\textsuperscript{136} They then considered the government’s argument that it has the "power to retain control

\textsuperscript{130}. See id. at 643-46.
\textsuperscript{131}. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) ("[T]he government does not dictate the specific content of the programming that DBS operators are required to carry.").
\textsuperscript{132}. *Time Warner*, 105 F.3d at 726 (Williams, J., dissenting) (quoting 47 U.S.C. § 335(b)(1) (1994)).
\textsuperscript{133}. Id. (Williams, J., dissenting).
\textsuperscript{134}. See id. at 727 (Williams, J., dissenting).
over the 'public domain' as a rationale for reserving four to seven percent of the spectrum. The dissent ultimately rejected this theory, however, pointing out that "the [Supreme] Court has not clearly committed itself to treating spectrum licenses as conditioned grants."

**IMPLEMENTATION OF THE SET-ASIDE: THE DBS PUBLIC INTEREST REGULATIONS**

After the Daniels Cablevision/Time Warner challenges to the set-aside were resolved, the FCC was able to complete the rulemaking process it began half a decade earlier when it issued a Second Notice of Proposed Rulemaking. Heralding its regulations as "ensur[ing] real benefits for the American consumer, while creating workable rules for the industry," the FCC endeavored to temper imposition of the set-aside mandate.

As a preliminary matter, the FCC concluded that all DBS satellite licensees were required to comply with the public service obligations in section 335.142. This finding included Primestar: despite its formal status as a medium powered fixed satellite service, Primestar was unable to escape the DBS public interest obligations placed on its high-powered brethren also found to be covered by the statute.

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137. *Id.* at 727 (Williams, J., dissenting).
138. *See id.* (Williams, J., dissenting).
139. *Id.* (Williams, J., dissenting). Of note, the *Time Warner I* panel failed to cite *Rust v. Sullivan* in support of its holding.
142. *See DBS Public Interest Obligations Report and Order, supra* note 7, at para. 21.
143. *See Fourth Annual Report, supra* note 27, at 1070 para. 54 & n.185.
144. *See DBS Public Interest Obligations Report and Order, supra* note 7, at paras. 6, 14, 18-28 (noting, in part, the FCC's proposal to streamline and consolidate rules for DTH-FSS in Part 25 with those in Part 100 governing DBS service).
Definition of National Educational Programming Suppliers

Section 335(b)(3) mandates that DBS reserve public interest channels for “national educational programming suppliers.”\(^{145}\) Under the statute, this term includes “any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.”\(^{146}\) As no definition of this term existed in section 335 itself, the FCC examined the rest of the statute for some indication of congressional intent.

It found part of its definition in section 397(6), a provision that defines the term “noncommercial educational broadcast station.”\(^{147}\) The FCC applied this language, and defined a noncommercial educational television station as

> a television or radio broadcast station that (i) “is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association,” or (ii) “is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.”\(^{148}\)

In defining “public or private educational institutions,” the FCC noted that Congress provided no definition in the 1996 Act, and adopted a definition of its own creation from another setting: Instructional Television Fixed Stations (ITFS).\(^{149}\) Under this definition, a “public or private educational institution[]” must be “an accredited institution or governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.”\(^{150}\)

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146. DBS Public Interest Obligation Report and Order, supra note 7, at para. 76 (quoting 47 U.S.C. § 335(b)(5)(B)).
148. DBS Public Interest Obligations Report and Order, supra note 7, at para. 78 (quoting 47 U.S.C. § 397(6)).
149. See id. at para. 80. ITFS stations primarily provide programming to students enrolled in accredited public or private learning institutions. See id.
150. Id.
As to the term "national," the FCC again noted the absence of guidance in the statute or its legislative history. In this instance, it interpreted the term broadly, and included "local, regional, or national domestic nonprofit entities that qualify... and produce noncommercial programming designed for a national audience." It indicated, however, a belief that Congress "intended to limit eligibility to entities that share the same essential characteristics as those listed," and rejected the possibility that a commercial entity with an educational mission could qualify for the set-aside.

The FCC also allowed for joint ventures with commercial entities in instances in which the participants could demonstrate that the venture itself is noncommercial and has an educational mission. Having defined eligible providers of national educational programming, the FCC elected not to provide any guidance on defining the statutory requirement for "educational or informational" programming, insisting that no elaboration on the term was needed.

The Selection of a Four Percent Set-Aside

With some flexibility to set the level of the set-aside, the FCC solicited comment on the appropriate percentage of channel capacity to dedicate to educational and informational purposes. Those entities in favor of a seven percent set-aside cited growth of the capacity of DBS systems during the six years since the 1992 Act, as well as the ample supply of programming available to program that level of channels. The DBS industry, in favor of a four percent set-aside (only because an argument for a

151. See id. at para. 92.
152. Id.
153. Id. at para. 85. The FCC added that it would use the Internal Revenue Code's definition of nonprofit as the default definition to determine if an entity qualified as an eligible national educational programming supplier, though it reserved the right to deviate from the default definition for those entities that may not lend themselves to such rigid classification. See id. at para. 87.
154. See id. at para. 89.
155. See id. at para. 94.
156. See id. at para. 72.
157. See id. at para. 73.
lower percentage was not an option) argued that the supply of eligible programming was limited and that it was still too soon to shackle the industry with a large public interest requirement.¹⁵⁸

To the likely relief of the DBS industry, the FCC adopted the lowest level of set-aside available—four percent of channel capacity, rounded upwards in the event the calculation produces a fraction.¹⁵⁹ This mandate reflected a clear understanding of the unique position of DBS in the MVPD market:

We [the Commission] choose four percent, instead of a higher number, because we find it in the public interest to put the minimum burden on this industry that currently has relatively little market power. We find that imposing the maximum set-aside percentage now might hinder DBS in developing as a viable competitor in the MVPD market and that this factor outweighs possible benefits in establishing a higher percentage.¹⁶⁰

The FCC indicated its desire that providers broadcast educational and informational programming as soon as possible following enactment of the regulations, and stated that it would monitor compliance with the regulation.¹⁶¹ The FCC also set limits on how to determine the number of available channels for purposes of computing the set-aside. The FCC excluded audio-only channels—a fixture on DBS systems—from the total channel count due to the FCC’s belief that Congress intended only those channels providing video programming to be included in any determination of “total channel capacity” under section 335(b).¹⁶²

Additionally, the FCC stated that the four percent set-aside would apply without regard to any existing programming contracts.¹⁶³ In other words, DBS systems would have to provide the

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¹⁵⁸. See id.
¹⁵⁹. See id. at para. 74.
¹⁶⁰. Id.
¹⁶¹. See id.
¹⁶². See id. at paras. 69-70; see also id. at para. 71 (mandating quarterly calculation of the total number of channels available for video programming by each DBS licensee).
¹⁶³. See id. at para. 75.
channels regardless of whether the set-aside would require the DBS providers to terminate existing channels.\textsuperscript{164} It also limited qualified programmers to one initial channel per system, stating that such a limit would increase opportunities for other qualified entities to gain access.\textsuperscript{165}

\textit{Political Access Requirements}

In addition to the set-aside, the 1992 Act imposed political access requirements on DBS providers.\textsuperscript{166} In formulating regulations for political access, the FCC evinced a clear appreciation for the status of DBS as a national MVPD.\textsuperscript{167} While indicating that section 312(a)(7) intended to guarantee access for presidential and vice-presidential candidates, the FCC acknowledged the potential technical and financial burdens involved in providing access for candidates for the House of Representatives and Senate, and declined to issue firm guidelines on when and under what circumstances such access must be granted to congressional candidates.\textsuperscript{168}

Instead, the FCC adopted a reasonableness test for political access to the DBS platform.\textsuperscript{169} Noting that determinations of reasonableness would be made on a case-by-case basis, the FCC provided a list of factors it would consider in making such determinations.\textsuperscript{170} Most importantly for those DBS systems carrying terrestrial broadcast signals, however, the FCC gave DBS services an out: "where DBS providers carry the programming of a terrestrial broadcast television station, it is the responsibility of the terrestrial broadcaster and not the DBS provider to satisfy the political broadcasting requirements of Sections 312(a)(7)."\textsuperscript{171}

\begin{itemize}
\item \textsuperscript{164} See id.
\item \textsuperscript{165} See id. at paras. 116-17.
\item \textsuperscript{166} See 47 U.S.C. § 312(a)(7) (1994) (requiring provider to furnish reasonable access to “a legally qualified candidate for Federal elective office”).
\item \textsuperscript{167} See DBS Public Interest Obligations Report and Order, supra note 7, at para. 38.
\item \textsuperscript{168} See id.
\item \textsuperscript{169} See id. at para. 41.
\item \textsuperscript{170} See id. Factors include the amount of time requested, the number of candidates in the race, possible programming disruption, technical difficulties of providing access, and availability of reasonable alternatives. See id.
\item \textsuperscript{171} Id. at para. 42.
\end{itemize}
Editorial Control

Many commentators argued that in demanding a set-aside, Congress also intended to prohibit DBS providers from selecting among qualified programmers vying for set-aside spots. The FCC rejected this argument, finding instead that the statute banned editorial control over individual programming carried on the reserved channels. In the words of the FCC, "we see no reason to conclude that allowing the DBS provider to select the programmer would contravene the fundamental Congressional purpose of making noncommercial educational or informational programming available." To that end, the FCC allowed DBS providers to select from among qualified programmers in the event that demand exceeded capacity on the system. Furthermore, the FCC stated its belief that DBS providers could consider factors relating to programming in selecting from among qualified programmers—they just could not exercise control over the programming itself. This differed from the FCC's traditional view of the leased access provisions governing the reservation of a portion of a cable system's channel capacity for public interest—a difference the FCC believed appropriate in light of the unique attributes of each of the two MVPDs. The FCC also reserved to DBS providers the right to "take action to ensure that only qualified programs are carried on the reserved channels."

Localism

The FCC effectively ducked the question of the appropriateness of additional requirements that realized the FCC's longstanding interest in localism. Noting that the statute provided no guidance in applying the concept of localism to DBS sys-

172. See id. at para. 99.
173. See id.
174. Id. at para. 100.
175. See id. at para. 114.
176. See id. at para. 102.
177. See id. at paras. 103-06.
178. Id. at para. 110.
tems,\textsuperscript{179} the FCC sided with DBS providers, and acknowledged the overwhelming technological and economic obstacles preventing national DBS services from providing local programming service.\textsuperscript{180} The FCC also noted a legal barrier to imposition of a localism requirement on DBS providers: the 1988 Satellite Home Viewer Act.\textsuperscript{181} Consistent with these findings, the FCC elected not to impose a localism requirement on DBS services.\textsuperscript{182}

Rejection of Additional Public Interest Requirements

The cable television industry pushed for the application of public interest obligations beyond the set-aside, arguing that the FCC should interpret the language of the statute to include must-carry obligations, program access rules, PEG channel requirements, and cross-ownership prohibitions, among others.\textsuperscript{183} Further, the cable industry insisted that the FCC provide a "level, competitive playing field" for all MVPDs.\textsuperscript{184} Naturally, the DBS industry opposed the imposition of these requirements, and cited differences between its service and cable.\textsuperscript{185}

The FCC agreed with the DBS providers that DBS is a "separate and distinct" service, and "a relatively new entrant attempting to compete with an established, financially stable cable industry."\textsuperscript{186} Citing the "disparity in market power" between DBS providers and cable operators, the FCC rejected the cable industry's request for "regulatory parity."\textsuperscript{187} Although the FCC heard demands for additional requirements, it cited the relative youth of the DBS industry and deferred imposing such requirements on DBS at this point in its development.\textsuperscript{188}

\textsuperscript{179} See id. at para. 53.
\textsuperscript{180} See id. at paras. 49-54.
\textsuperscript{181} See id. at para. 53.
\textsuperscript{182} See id. at para. 54. The Commission did, however, state its willingness to revisit this issue if the economic and technical impediments to providing local service were resolved in the future. See id.
\textsuperscript{183} See id. at para. 56 (noting National Cable Television Association comments).
\textsuperscript{184} Id.
\textsuperscript{185} See id. at para. 58.
\textsuperscript{186} Id. at paras. 59-60.
\textsuperscript{187} Id. at para. 60.
\textsuperscript{188} See id. at paras. 63-64.
FORCING THE OLD TO FIT THE NEW—A CRITIQUE OF THE SET-ASIDE

As drafted by Congress and implemented by the FCC, the set-aside requirement is vulnerable to attack on several fronts. The criticisms this Note presents derive from the following simple truth: The justifications for public interest programming have failed to keep pace with the technological and marketplace realities of video programming distribution at the dawn of the twenty-first century.

The Inapplicability of the Scarcity Model to DBS

As modern technology expands the number of mass media systems and offerings, the chorus of Red Lion detractors grows, calling into question the spectrum scarcity rationale for broadcast regulation that seemed so secure only a decade ago. The rationale lingers on, however, far overstaying its welcome. Indeed, half of the D.C. Circuit believed that the spectrum scarcity concept had enough merit left to apply to DBS providers.189 Scarcity of the spectrum itself has become a relative term.190

In the 1950s, there was only one programming delivery system for the famous "Lucy Does a TV Commercial" episode of "I Love Lucy"—broadcast television.191 To date, there are at least ten different video programming delivery systems that could carry a specific half-hour episode of "Seinfeld" into the home.192 Many UHF and VHF broadcast frequencies remain unallocated in all but the largest markets.193 As posited by the Time Warner II

190. As Mark Fowler and Daniel Brenner noted, "Technology is an independent variable that makes scarcity a relative concept." Fowler & Brenner, supra note 86, at 222.
191. This episode was first broadcast on May 5, 1952. See 100 Greatest Episodes of All Time, TV GUIDE, June 28 - July 4, 1997, at 67.
192. Available systems include: broadcast television, cable television, DBS satellite television, C-Band satellite interception of network feeds, MMDS, LMDS, Internet Video (streaming or downloaded), videocassette tape, videodisc (laserdisc or DVD), and computer CD-Rom. See, e.g., Fourth Annual Report, supra note 27, at 1048-98 paras. 12-106.
193. See, e.g., Third Annual Report, supra note 14, at 4408 n.293 (noting that
dissent, "DBS provides a given market with four times as many channels as cable, which . . . offers about ten times as many channels as broadcast." The opinion proceeded to calculate that, in theory, a total of 480 DBS channels were available on the east coast and 840 DBS channels were available on the west coast by February 1997. Evidently, then, there are actually numerous avenues available to those wishing to bring their message to the public through the mass media. The only true scarcity involved is a scarcity of economic resources necessary to purchase carriage of one's message on a media system using the spectrum.

To be a valid rationale for public interest regulation of DBS systems, a scarcity theory would need to be grounded in a resource that is actually scarce. One possible application of the spectrum scarcity rationale would be to limit its focus to the only truly scarce feature of the DBS system—the satellite slots themselves. There are only three CONUS slots assigned to the United States from which a DBS satellite can transmit programming to the entire country. Much like a grant to use a radio frequency in the 1940s, a grant to use one of these slots carries with it the implication that no one else will be able to control that slot. The majority in Time Warner I adopted this ration-
nale: "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." 198

The problem with the court's analysis is that it simply is not that easy to translate scarcity of spectrum into scarcity of space while maintaining the same regulatory rationale. Although it is true that no one else can use exactly the same broadcast frequency in the same local area without causing interference,199 this situation does not exist with satellite slots. With a satellite in a given slot, several people can make use of that slot simultaneously—DBS satellite owners may lease transponder space to independent programming distributors.200 In short, it is not just one entity providing programming from a particular satellite slot, it is dozens of entities. This brings DBS more in line with cable television, as noted by the Time Warner II dissent.201 Cable television systems, of course, possess a scarce resource in the network of cables passing by the homes and businesses in their service areas. Usually, only one cable system exists in any given local market.202 This creates the "bottleneck" scarcity rationale: anyone wanting to provide programming service to a community via cable television must deal with the local cable franchise to get their programs through that bottleneck.203

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198. Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996); see also 2 BRENNER ET AL., supra note 11, § 15.02[1], at 15-5 (noting the allotment of only three CONUS slots and eight total slots to the United States).
199. See Time Warner, 105 F.3d at 725 (Williams, J., dissenting).
200. See Shelanski, supra note 47, at 1063 ("DBS operators can lease capacity on their transponders to independent information service providers, programmers, and packagers . . . that merely want carriage of their signal to viewers.").
201. See Time Warner, 105 F.3d at 725 (Williams, J., dissenting) ("DBS falls on the cable rather than the broadcast side of the line.").
202. For an excellent discussion of the law governing the establishment and modification of cable franchises, see 1 BRENNER ET AL., supra note 11, §§ 3.01-08, at 3-8 to -84. Although exclusive franchises are prohibited by the 1992 Cable Act, there is little incentive to "overbuild" a second system of cables in a given service area. See id. § 3.06[5][a], at 3-54 to -55. Brenner notes that out of approximately 7,000 cable systems, there are only about three dozen "overbuilds." See id.
203. See, e.g., Lively, supra note 104, at 1076 ("Because franchising requirements and capital costs have conspired toward establishing monopolistic conditions in the
The bottleneck argument falls apart, however, when applied to DBS. While a local cable system has the power to bottleneck all programming traveling down its network of land-based wires, no single DBS provider can monopolize DBS delivery of programming to any local area because each provider has two DBS rivals and, most likely, a local cable system with which to compete. Unlike cable systems, which almost always have a de facto local monopoly, DBS systems must vie amongst themselves for programming and viewers. A programmer's inability to gain carriage on one DBS service does not bar it from access to the entire medium of communication in its community, as there are rival providers that could provide the desired access. For this reason, a bottleneck rationale for regulation seems inappropriate when applied to DBS providers.

The Inapplicability of the Localism Principle and the Unfounded Concern for Local Broadcast Television

The scarcity rationale itself comports with one of the FCC's most frequently stated "public interest" goals—the preservation of free, over-the-air television. Indeed, to preserve the carriage of free, over-the-air television service, Congress and the FCC have required carriage of local television stations on cable systems. This is the foundation of the "must-carry" rationale for cable television: it gives local broadcasters exposure to customers on cable television systems, thereby continuing their commercial viability.

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cable industry, Congress determined that 'market position gives cable operators the power and incentive to harm broadcast competitors.'" (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 633 (1994)).

204. See supra notes 21-26 and accompanying text (discussing the three DBS providers currently offering service); supra note 29 and accompanying text (discussing cable television); see also Henry Geller, Public Interest Regulation in the Digital TV Era, 16 CARDOZO ARTS & Ent. L.J. 341, 347 (1998) ("DBS is not a bottleneck multi-channel provider like cable.").


206. For a brief discussion of the history and rationale behind must-carry rules, see 1 BRENNER ET AL., supra note 11, at §6.06[1] at 6-59 to -61; see also Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 224-25 (1997) (upholding the validity of a must-carry regulation against a First Amendment challenge).
Although few would argue that the profusion of new media technology has reached the point at which broadcast television can be eliminated entirely, the FCC's "free" television mantra nevertheless shows signs of being more myth than reality. Although viewers pay no fee to receive programming over broadcast television stations, they must pay for the equipment itself—a television and antenna. Advertising finances the cost of programming, thus creating "free" television programming but raising the cost of all products and services advertised on television.\textsuperscript{207} Although harder to compute in dollar impact, social costs such as decreased attendance at community functions and decreased membership in fraternal organizations arguably lead to reduced societal productivity and involvement.\textsuperscript{208}

Moreover, free television is an anomaly in the world of mass media. As Laurence Winer notes, "[a]ll other forms of mass media are not free and no one expects them to be."\textsuperscript{209} Only broadcast radio joins over-the-air television as a mass media system where the only consumer investment required is the purchase of a receiving device.\textsuperscript{210}

\textsuperscript{207} See In re Review of the Commission's Regulations Governing Television Broad., Television Satellite Stations Review of Policy and Rules, Further Notice of Proposed Rule Making, 10 F.C.C.R. 3524, 3553 n.91 (1995) ("Viewers may be said to pay for over-the-air television through their purchase of advertised products, a portion of the price of which reflects the cost of advertising . . . ."); Winer, \textit{supra} note 71, at 41.

\textsuperscript{208} Robert Putnam is perhaps the best known advocate of the position that television is responsible for a decline in social involvement and our civic culture. See Robert Putnam, \textit{Bowling Alone: America's Declining Social Capital}, J. DEMOCRACY, Jan. 1995, at 65; see also Thomas B. Edsall, \textit{TV Tattered Nation's Social Fabric, Political Scientist Contends}, WASH. POST, Sept. 3, 1995, at A5 (noting Putnam's suggestion that "television has profoundly undermined the nation's civic culture"). As the title of his article indicates, Putnam examined the decreased participation in bowling leagues, fraternal organizations, choral groups, and other civic or social groups over the years, and notes a negative correlation among the hours of television watched per day and the level of civic involvement and social trust. See Edsall, \textit{supra}, at A5.

\textsuperscript{209} Winer, \textit{supra} note 71, at 39.

\textsuperscript{210} It also should be noted that the Internet has the potential to be such a system. The "receiving" device is the computer and a modem. In order to gain access to the Internet, however, one must purchase a software package and pay a fee to an Internet service provider. This "subscription" element prevents most Internet access from being considered "free."
Both the scarcity and free television theories underlying public interest become almost entirely untenable when examining the transition from the traditional NTSC television broadcast signal to the HDTV signal.\textsuperscript{211} Rather than expand the limited number of speakers on the airwaves, the FCC gave huge chunks of new spectrum to an industry that already possessed a large portion of spectrum—the incumbent broadcast television operators.\textsuperscript{212} Moreover, instead of preserving a service that the poor can receive on their current television sets, the FCC mandated the phasing out of conventional television broadcasting,\textsuperscript{213} a mandate that, while gradual, will nevertheless force all consumers to invest in new receiving equipment costing thousands of

\textsuperscript{211} HDTV (also known as “Digital Television” (“DTV”) or “Advanced Television” (“ATV”)) transmissions offer higher picture quality and CD-quality sound. See Fourth Annual Report, supra note 27, at 1092-93 nn.346 & 348. A HDTV television set is required to receive the signals. See id. at 1093 n.348.

\textsuperscript{212} See In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, 12 F.C.C.R. 14,588, 14,593-94 para. 8 (1997) (limiting initial eligibility for digital television licenses to “persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station or both”). The FCC’s rationale for this action was that such largess would speed the delivery of HDTV programming to the public without interfering with the provision of standard television service. See id. at 14,595 para. 11 (noting that such a method of allocation would “promote an orderly transition to the new service”); Harry A. Jessell, FCC’S New Licensing Plan: Members Only, BROADCASTING & CABLE, Aug. 26, 1991, at 50-51.

\textsuperscript{213} The FCC has set the year 2006 as a deadline for the cessation of analog television service. See Advanced Television Systems, 62 Fed. Reg. 26,966, 26,981 (1997). In order to accomplish the transition with minimal disruption to the viewing public, the FCC issued DTV licenses to incumbent broadcasters, see supra notes 211-12 and accompanying text, and implemented a timetable for construction and activation of DTV systems in various markets. See Digital Television Broadcasting Stations, 47 C.F.R. § 73.624(d) (1998) (ordering construction of DTV facilities by network affiliates in the ten largest markets by May 1, 1999, and construction of DTV facilities by all commercial broadcasters by May 1, 2002). For a time, licensees will broadcast in analog and digital, see id. § 73.624(b), allowing the public a grace period in which to acquire the HDTV sets (or set-top converter boxes) that will be necessary to receive television signals after 2006, see Advanced Television Systems, 62 Fed. Reg. at 26,981 (noting the FCC’s desire to “ease[e] the introduction of digital services”). By 2003, licensees must begin phasing out their analog broadcasting operations by simulcasting 50% of the video programming of the analog station on the DTV channel; by 2005, stations must simulcast their entire programming lineup. See 47 C.F.R. §§ 73.624(f)(ii), (iii). On December 31, 2006, analog television will become part of history as the last analog licenses expire. See Fifth Annual Report, supra note 22, at para. 97.
dollars. This alone undercuts the FCC’s “preserve free TV” mantra, and severely compromises the FCC’s credibility as a defender of “access” to the machinery of mass communication.

This criticism aside, the FCC properly appraised the role of DBS in local video programming marketplaces: because DBS serves a national market, it was not appropriate to subject DBS to public interest requirements deriving from the localism principle. Local stations have not been denied access to DBS subscribers—those subscribers still must view local television stations to obtain local information. Consequently, there is no direct threat to local broadcasters from DBS, and DBS subscribers remain able to get local news and information from their local broadcasters.

**The Inapplicability of the Intruder Rationale**

One of the rationales the Court offered in *Pacifica* was that the “uniquely pervasive” and “uniquely accessible” broadcast media may allow messages to enter the homes of potential viewers who do not wish to be exposed to the message. This “intruder” theory often is used to justify content-based regulation of indecency, a type of programming that could be unwelcome by parents and damaging to children. Accordingly, broadcasters bound by a duty to act as fiduciaries “in the public interest” must avoid airing such content at certain times. Subscription television services, however, function as “invitees”—subscribers join the service with an awareness of the type of programming available on the service. Additionally, several MVPDs—includ-

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ing DirecTV and EchoStar—offer "blocking" technology to combat the potential intrusion of undesirable programming into the home.\textsuperscript{220}

As a subscription service, DBS cannot be described accurately as an "intruder." Like the telephone services at issue in \textit{Sable Communications, Inc. v. FCC},\textsuperscript{221} and the cable services at issue in \textit{Denver Area Educational Telecommunications Consortium v. FCC},\textsuperscript{222} a service received only after the recipient takes affirmative steps to receive the programming is more accurately termed an "invitee" into the home.\textsuperscript{223} In light of the "intruding" characteristics of traditional broadcast television, the imposition of a public interest "toll" for entrance into American households is arguably a reasonable method of guaranteeing that at least a minimum level of public interest programming will reach broadcast television viewers. That same toll imposed on an "invitee," however, smacks of protectionism for the intruders. Essentially, section 335 requires that a paid "invitee" into the home carry along a host of educational and informational materials, despite the "uniquely pervasive" presence of "intruders" who are obligated to provide much of the same material.

\textbf{Inapplicability of Other Paternalistic Concerns}

The intruder theory is not the only paternalistic rationale used to support the imposition of a public interest mandate on DBS. First, proponents of the set-aside contend that DBS should carry public interest programming because it is good for America, that a system that "does not invade an individual's home without the individual's consent" should not be subjected to regulations based on concerns for unwelcome intrusion).


\textsuperscript{221} 492 U.S. 115 (1989).

\textsuperscript{222} 518 U.S. 727 (1996).

\textsuperscript{223} See Lively, \textit{supra} note 104, at 1075 (arguing that the pervasiveness rationale is inapplicable to cable, a medium that shares with DBS the need for "affirmative acts of engagement" on the part of the subscriber in order to receive programming).
This argument presupposes that Americans would not support educational programming if the set-aside were not in place. This is simply not borne out by the facts: DBS subscribers have chosen to subscribe with full knowledge of the programming content available on their respective systems. Many potential subscribers would agree with the FCC's assessment of educational television as something of value, and likely would incorporate such a consideration into their choice of an MVPD system.

An additional flaw of this argument is the arrogance with which its supporters presume to suppose just what type of programming is "good" for Americans. Professors Krattenmaker and Powe best express the shortcoming of this rationale: "In short, the public interest is whatever the people who enforce it want it to be. In defining the public interest, enforcers tend to be motivated by partisan political goals and by their own program preferences." The assertion that public interest programming is valuable most likely is correct; the contention that the same type of programming is as valuable to every citizen as it is to members of the FCC and Congress is, however, a more tenuous conclusion.

Further, some critics argue that DBS should carry public interest programming because all other broadcasters carry public interest programming. This argument underappreciates the unique attributes of the DBS platform: it has far more outlets for diverse viewpoints than any other MVPD, and subscribers

224. See generally Krattenmaker & Powe, supra note 55, at 1725 n.28 (defining such programming as "merit programming"—"programming deemed so valuable that broadcasters [are] required to air it, even if few (if any) viewers or listeners wished to tune it in").

225. THOMAS G. KRATTENMAKER & LUCAS A. POWE, REGULATING BROADCAST PROGRAMMING 144 (1994); see also Krattenmaker & Powe, supra note 55, at 1725 ("When regulators conclude that viewers and listeners are not tuning in to what the consumers need, regulators tend to counter by attempting to make the merit programming available everywhere. In this fashion, all viewers and listeners...should, at least occasionally, encounter and benefit from good programming.").

226. In a 1996 speech, then-FCC Chairman Reed Hundt noted that "all media have typically been party to some sort of social compact." See Reed Hundt, Speech at Broadcasting & Cable Interface Conference (Sept. 24, 1996), Reinventing the Social Compact, ¶ 29 (visited Mar. 24, 1999) <http://www.fcc.gov/Speeches/Hundtspeech637.txt>.
must default to broadcast television, with all its attendant public interest requirements, in order to view local channels. That "everyone else" needs a public interest mandate to stimulate the creation of educational and informational programming does not warrant requiring the same mandate for DBS. DBS has a need to fill its immense channel capacity with a variety of programming, including informational and educational programming. With more channels splitting the same viewership pie, DBS has an incentive to target smaller audiences.\(^2\) This "narrowcasting" allows DBS to target those who wish to view educational and informational programming on a scale never before achieved by any other media system. This fact cuts against the initial reaction that DBS should be treated like all other forms of broadcasting.

The Overlooked Value of Existing Informational and Educational Programming

The immense channel capacity of DBS and other MVPDs has stimulated the development of many educational and informational channels. The presence of these existing services exposes an inherent flaw in the term "national educational programming supplier."\(^2\) Although the FCC has done an excellent job of implementing a working definition of the term, it cannot correct Congress's disregard for the value of for-profit educational and informational programming. The set-aside provisions of the 1992 Cable Act and 1996 Act deny access to a chorus of voices who have as much to offer as those who qualify under these provisions, and virtually guarantee that access will be denied to those without the financial clout to set up a station.

A number of channels on DBS systems provide the "diversity of voices"\(^2\) that regulators sought to achieve through public interest licensing. Carriage of CNN and MSNBC, for example,

\(^2\) This trend has been labeled the "demassification" of the mass media. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *Yale L.J.* 1805, 1842-43 (1995) (citing ALVIN TOFFER, THE THIRD WAVE 171-83 (1980)).


\(^2\) Hazlett, *supra* note 101, at 932.
provide subscribers with up-to-the-minute news and information. 230 These services thrive today because their creators saw an untapped market. Section 335(b)(5)(B), however, denies “educational” status to these entities because they are commercial stations—products of the video programming marketplace, sponsored by advertisers. 231 Likewise, the Discovery Channel presents some of the most detailed, thoughtful, and enlightening programs about the natural world aired on television. 232 The History Channel is an additional example, as is Home and Garden Television, the Learning Channel, and the TV Food network. 233 Section 335 would give preference, though, to a noncommercial outlet, regardless of the resources or quality of the end product.

In each of these examples, the market for educational and informational programming created a demand upon which private, for-profit entrepreneurs capitalized. To assume that a subscriber to a pay television service did not first evaluate its level of educational and informational programming is to assume that he or she simply does not care about such offerings. 234 If that is truly the case, it is unreasonable to assume that non-commercial educational programmers will be able to gain any viewership at all. 235 If, however, we assume that the video pro-

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232. See, e.g., Jane Hall, Company Town BBC, Discovery to Co-Produce Shows, L.A. Times, Mar. 20, 1998, at D4 (describing the partnership between Discovery Communications and the British Broadcasting Corporation (BBC) that gives Discovery right of first refusal on BBC programming in science, nature, and history that might have otherwise been shown on PBS).
234. Indeed, as Professors Krattenmaker and Powe note, “when given the option of watching exactly what a regulator or critic prefers, viewers often watch something else.” Krattenmaker & Powe, supra note 55, at 1725.
235. As former ABC News analyst Jeff Greenfield wryly points out, “when you no
gramming marketplace consumer is thoughtful, it follows that he or she most likely examined all available programming options to determine the best selection for his or her viewing needs. It is, therefore, entirely appropriate to credit DBS providers for their existing commercial, educational, and informational channels in determining how much (if any) additional programming is necessary to satisfy the public interest.

Failure to Resolve Conflicts with Preceding Statutes and Rules

Section 335 and the regulations fail to account for conflicts with other controlling authority. An excellent example occurs in relation to PBS: Perhaps the ideal candidate for a set-aside slot, the “public telecommunications entity” section of the definition seems tailor-made for PBS. PBS, however, would need copyright laws altered to be able to provide programming to most DBS subscribers—such transmissions would intrude on the local signals of its own affiliates, which would be unacceptable under the 1988 Act.236

Home shopping channels present an additional issue. Although these channels are usually for-profit entities, the FCC nevertheless has held that home-shopping broadcast stations are in the public interest, and has granted such stations must-carry privileges on cable television systems.237 Those same stations would be ineligible for a set-aside slot under section 335 and the FCC’s rules. Such discrepancies undermine the legitimacy of the current DBS public interest mandate.

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237. See In re Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992: Home Shopping Station Issues, Report and Order, MM Docket No. 93-8, 8 F.C.C.R. 5321 (1993); see also 1 BRENNER ET AL., supra note 11, § 6.06[2][a][iv], at 6-64 (explaining that the FCC voted that home-shopping stations did serve the public interest).
Failure to Insist on High Quality Programming

Beyond granting access, of course, section 335 does nothing to ensure the quality or accuracy of educational programming. It leaves unresolved the issue of funding public interest programming—"simply put, it takes money to produce high quality educational programming."\textsuperscript{238} For example, the Children's Television Endowment, an organization created by statute to support high quality, educational programming, asked Congress for $24 million to accomplish this task in 1994.\textsuperscript{239} Such sums are the reality of providing high quality programming.

The FCC should be applauded for allowing the creation of joint ventures with for-profit entities to supply programming to those entities receiving reserved channels on DBS systems.\textsuperscript{240} This, however, is far from a perfect solution, and does little to mitigate the congressional assumption that the public will tune in to lesser quality programming simply because of its "noncommercial" status. Such a belief assumes that the public has no interest in the quality of the programming at all.

The Unconstitutionality of the Set-Aside

Arguably, the biggest criticism of the DBS set-aside mandate is its preference of one type of programming content over all others. As noted by the \textit{Time Warner II} dissenters, the DBS set-aside is hardly content-neutral: "[T]he DBS provision speaks directly to content, creating an obligation framed in terms of 'noncommercial programming of an educational or informational nature.'"\textsuperscript{241} Under section 335 and the regulations, programming that does not conform to the regulators' definition of "edu-

\begin{footnotesize}
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\item \textsuperscript{238} Ronald J. Krotoszynski, Jr., \textit{The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail}, 95 MICH. L. REV. 2101, 2129 (1997) (book review).
\item \textsuperscript{239} See \textit{Newton N. Minow \& Craig L. Lamay, Abandoned in the Wasteland: Children, Television, and the First Amendment} 160 (1995). The Endowment received a mere $1 million in 1994, and only $2.5 million in 1995. \textit{See id.}
\item \textsuperscript{240} See DBS Public Interest Obligations Report and Order, supra note 7, at paras. 88-89.
\item \textsuperscript{241} \textit{Time Warner Entertainment Co. v. FCC}, 105 F.3d 723, 726 (D.C. Cir. 1997) (Williams, J., dissenting) (quoting 47 U.S.C. § 335(b)(1) (1994)).
\end{enumerate}
\end{footnotesize}
cational or informational" is ineligible for a set-aside channel.\textsuperscript{242} Such decisions are made on the basis of programming content, and preclude other speakers from gaining access to those channels based entirely on the perceived deficiency of their message.

The Supreme Court has clearly stated its disdain for content-based regulations in a variety of contexts.\textsuperscript{243} As noted in Rosenberger v. Rectors and Visitors of University of Virginia, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional."\textsuperscript{244} Traditionally, content-based regulations are subject to strict scrutiny: such regulations must be supported by a compelling government interest and designed to further that interest using the least restrictive means available.\textsuperscript{245} For example, in Sable Communications, the Court held unconstitutional a statute banning indecent telephone communications, on the ground that although the government had shown a compelling interest, it had failed to show that it used the least restrictive means to address the issue.\textsuperscript{246}

\textsuperscript{242} Cf. Winer, supra note 71, at 29 (noting, in relation to must-carry rules for cable, that "the legislation favors certain classes of speakers over others based on the subject matter of their programming. This is content based regulation by any 'common sense' meaning of that term.").


\textsuperscript{244} 515 U.S. at 828 (citations omitted); see also R.A.V., 505 U.S. at 382 ("Content-based regulations are presumptively invalid.").

\textsuperscript{245} See Sable Communications of Cal., Inc., v. FCC, 492 U.S. 115, 126 (1989); see also RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 4:1-4:3, at 4-2 to -3 (1998) (noting that strict scrutiny is the default test for examining all content-based regulation of speech).

\textsuperscript{246} See Sable Communications, 492 U.S. at 126, 131.
The *Time Warner* panel skirted the issue of whether or not the DBS set-aside was content-based by analogizing DBS to broadcasting—because it used the same “scarce” spectrum, it must be analyzed under “the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media.” Such a conception of DBS is flawed, however; as noted by the *Time Warner II* dissenters, the “scarcity” rationale underlying *Red Lion* is not applicable to DBS. This fact alone calls into doubt the decision to apply “relaxed scrutiny” to the DBS set-aside requirement.

As additional support for its view that strict scrutiny was not required, the *Time Warner I* panel analogized the DBS set-aside requirement to must-carry regulations imposed on cable television systems. Citing to *Turner I*, the court stated that “[t]he rules . . . do not require or prohibit the carriage of particular ideas or points of view. They do not penalize [DBS] operators or programmers because of the content of their programming.” This may be true for must-carry regulations, which demand carriage of local broadcast stations regardless of the content of the programming they air, but analogizing the set-aside to must-carry misses the mark.

As noted by the *Time Warner II* dissenters, the must-carry provisions at issue in *Turner I* mandated access for particular stations, whereas the DBS provision “speaks directly to content,” and as such should be subject to strict scrutiny. Furthermore, in *Turner I* and *Turner II*, the Court took great pains to state that the must-carry provisions did not regulate the content of speech placed on cable systems. The set-aside explicitly

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249. See *Time Warner*, 93 F.3d at 977.
250. *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994)).
253. See *id.* (Williams, J., dissenting) (noting that the set-aside mandate “explicitly seeks to advance one particular type of programming,” that is, “noncommercial programming of an educational or informational nature”).
254. *See Turner*, 512 U.S. at 649 (“[I]n our view . . . Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable
seeks to promote one particular type of speech—that which is noncommercial and of an educational or informational nature. In short, must-carry mandates access for particular speakers, regardless of the content of their message; the set-aside demands a specific type of content, regardless of the speaker endeavoring to deliver the message. Such a regulation is content-based, and as such should be held unconstitutional. The Time Warner II dissent noted the likely end result of such an analysis: "[A]s a simple government regulation of content, the DBS requirement would have to fall.

EDUCATIONAL AND INFORMATIONAL PROGRAMMING FOR THE NEXT MILLENNIUM: PRINCIPLES FOR THE COMMISSION TO FOLLOW

This Note asserts that the Time Warner II dissenters properly analyzed the DBS set-aside issue, and that the set-aside should be held unconstitutional. Given that such a finding is unlikely in the near future, this section offers several suggestions that would better account for the unique attributes of DBS in the MVPD marketplace.

Abandon the Scarcity Rationale as a Governing Principle

When the Supreme Court decided Red Lion, only a limited number of channels were available in any given market. In 1969, broadcast television represented the entire video programming universe; cable had not yet achieved its high level of penetration across the nation, and DBS service, wireless cable, and the World Wide Web were the stuff of science fiction. Although...
the "peculiarly relaxed First Amendment regime" crafted in *Red Lion* may have been appropriate for the technology of broadcast television in the late 1960s, it is becoming increasingly antiquated as the twentieth century draws to a close.

The scarcity rationale supporting *Red Lion* and the majority of public interest regulation imposed on broadcasters has outlived its usefulness. Calls for its demise in the broadcasting arena are numerous; extending it to advanced technologies that do not share the same "scarcity" problem is ill-advised. To put it simply, the scarcity rationale was devised to apply to broadcast television—a forum in which each licensee controlled one station—in a local market that, at most, offered about fifteen rival broadcast television stations. As of this writing, a single DBS licensee can offer at least ten times as many stations over its portion of the spectrum. Concern over the "scarcity" of the electromagnetic spectrum necessarily evaporates in the face of a technology that mines this resource so effectively. Perhaps the *Red Lion* court said it best: "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." DBS is just such a new media technology, and its unique attributes should be considered fully by Congress and the FCC when imposing public interest guidelines. Surely, regulators can do better than to look to a thirty-year-old Supreme Court case decided when DBS was not even thought of as technologically feasible.

**Appreciate Alternative Outlets**

Unquestionably, public interest programming has immense value. As Eugene Volokh has noted, "part of the value of the

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260. See *supra* note 193 (noting that an average of 15.5 stations are available in each of the largest 20 television markets).
261. See *supra* notes 22, 24, 26 and accompanying text (discussing channel capacity of DirecTV, Primestar, and EchoStar, respectively).
mass media is that they expose readers to topics and viewpoints
the readers didn't select. C-SPAN presents the classic case for
imposing a public interest requirement on MVPD's: it provides
viewers with a glimpse into the workings of American democracy
at its highest level. Surely, mandating carriage of such a station
on DBS would be "in the public interest." Such an argument,
however, fails to appreciate the presence of alternative
sources of the same information: for-profit all-news networks
report news of congressional initiatives and activities, the
various speeches given on the floor of both Houses are recorded
in the Congressional Record; and various Internet webpages
carry text of speeches and bills. Furthermore, the fact that C-
SPAN exists successfully on cable provides an incentive for DBS
providers to offer similar stations. In short, the video program-
ming marketplace has reached a point at which various MVPDs
are willing to transmit programming to smaller audiences in
order to entice them to subscribe to their services.

What has made this all possible, of course, is the presence of
real competition in the MVPD marketplace. This was not always
the case—only a few years ago, the only MVPD available to

263. Volokh, supra note 227, at 1834. Volokh also postulates that the mass media
gives viewers a "shared base of information" with which to interact, thereby creating
common ground and strengthening social cohesion. Id. at 1835-36.

264. Since 1979, C-SPAN has televised the proceedings of the House of Representa-
tives; it added C-SPAN2 in 1986 to provide coverage of the Senate. See Patricia
Brennan, C-SPAN; America's Town Hall, Marking 10 Years, WASH. POST, Apr. 2,
1989, at Y5. It is funded almost entirely by the industry, and run as a nonprofit
cooperative. See id.

265. Underscoring the validity of these for-profit stations as providing acceptable
alternatives is the decision by many cable companies to drop C-SPAN and/or C-
SPAN2 to make room for such commercial entities. See Paige Albinia, C-SPAN's
Loss is Fox News' Gain, BROADCASTING & CABLE, Jan. 13, 1997, at 128. Note, how-
ever, that part of this large scale dumping of C-SPAN is attributable to Fox News
Channel's $10-$11 per subscriber offer to cable systems that carry its channel. See
id.


267. Not to be outdone by cable (or each other), all three DBS providers have
elected to carry C-SPAN and C-SPAN2. See, e.g., Channel Line-up (visited Mar. 23,
1999) <www.dishnetwork.com/programming/lineup/index.html>; DirecTV Channel Line-
up (visited Mar. 23 1999) <www.directv.com/programming/listing.html>; Easy to Get:
most of the public was the local cable television system.\textsuperscript{268} As noted by the FCC and several commentators, there are now alternative avenues of communication available to anyone who wishes to disseminate their speech in the video marketplace.\textsuperscript{269} As a result, every station owner is catering to a smaller portion of the potential audience, creating a desperate need for programming to fill all the available stations in the MVPD universe.\textsuperscript{270}

This need for programming extends to educational and informational programming. In a fragmented marketplace, where many players are angling for smaller and smaller portions of the potential audience, such programming can create a valuable market niche for programming providers.\textsuperscript{271} Such is the case with the \textit{Discovery Channel}, which has become such an attractive commodity on cable and DBS systems that it now has the third largest MVPD distribution network in the United States.\textsuperscript{272} The \textit{Discovery Channel} demonstrates the power of identifying a market niche and tailoring programming to fit that target audience.\textsuperscript{273} More importantly, it shows that the commercial marketplace can and will generate high quality educational and informational programming in response to marketplace forces. Although such a result may not have been attainable in the past when only fifteen television stations were available in the market, it has been achieved in the multiple MVPD marketplace of

\textsuperscript{268} See, e.g., Maseth, \textit{supra} note 74, at 430 (noting that "without the presence of another multichannel video programming distributor, a cable system faces no local competition")

\textsuperscript{269} See, e.g., DBS Public Interest Obligations Report and Order, \textit{supra} note 7, at para. 2 (noting the potential of DBS "to provide significant competition in the market for multichannel video programming distribution"); Fourth Annual Report, \textit{supra} note 27, at 1048-99 paras. 12-107 (discussing competitors in the markets for the delivery of video programming); Fowler & Brenner, \textit{supra} note 86, at 225-26.

\textsuperscript{270} This need is partially responsible for the profusion of network television series reruns seen on many independent local broadcast stations and cable networks. See Paul Farhi, \textit{Cable Undercuts Networks by Rerunning Current Hits; Competition Altering Economics of TV}, \textit{WASH. POST}, Feb. 3, 1999, at A1.

\textsuperscript{271} See Fowler & Brenner, \textit{supra} note 86, at 210, 234 (arguing that in the pre-DBS era broadcasters are marketplace competitors, and should be regulated as such).

\textsuperscript{272} See John Carmody, \textit{The TV Column}, \textit{WASH. POST}, May 12, 1997, at B6. The Discovery Channel currently is available in over 71 million homes. See \textit{id}.

\textsuperscript{273} For additional examples of successful for-profit educational and informational stations, see \textit{supra} note 233 and accompanying text.
the 1990s. Any attempt to impose public interest regulation on new media technologies like DBS therefore should carefully examine alternative distribution outlets—both on and off such systems—to accurately determine if the public interest demands a set-aside mandate.

Create a Noncontent-Based Set-aside

Congress and the FCC seemingly are giving preference to a particular type of speech—noncommercial, educational, or informational—based solely on its content. This conscription of DBS channel space in favor of a certain type of speech occurs to the detriment of other speakers with potentially important messages who may wish to gain carriage on a DBS system. To properly support a set-aside, Congress and the FCC should adopt a method of selecting programmers that functions independent of the content of a programmer’s message.

One option would be to implement a leased access or public access set-aside. Originally designed for cable television systems, either option would enable individuals who wanted to gain carriage on a DBS platform to do so by creating their own programming. Public access channels are those set aside by a cable franchise for the use of members of the general public, usually on a first-come, first-served basis and at minimal cost. Leased access channels are designated for the use of commercial programmers not affiliated with the cable company, usually at a greater cost than public access channels. DBS licensees could

274. Further diversity is on the horizon: with over 132 million users predicted by the year 2000, see supra note 44 and accompanying text, the Internet continues to grow at an astonishing rate. Furthermore, the Internet is in a better position than any other media technology to fulfill the dream of video on demand, the ability for the public “to choose from home—at any time convenient to them—any TV show or movie they want.” Volokh, supra note 227, at 1831.

275. See, e.g., Krotoszynski, supra note 238, at 2129 (“[P]ermitting government to pick and choose among speakers, in order to weed out undesirable or unworthy speakers, would present a threat of broad-based viewpoint-based censorship.”).

276. For a brief description of the history of leased access and public access channels, see 1 BRENNER ET AL., supra note 11, §§ 6.04-05, at 6-32 to -59.

277. See id. § 6.04[3][b], at 6-39. Traditional public channels often function as modern day televised soapboxes, carrying short, one time messages by those who reserved a block of time. Alternatively, such channels can carry regularly scheduled programming. See id. § 6.04[2] n.5, at 6-33.

278. See id. § 6.05, at 6-50; see also Denver Area Educ. Telecomm. Consortium,
be required to maintain one or more public access or leased access channels, and select those whose programs would be aired using nondiscriminatory, noncontent-based methods. Such a scheme would help to achieve the goals of access and diversity in the MVPD marketplace, but would not condition such access on the content of one's message.279

Of course, imposition of such a mandate would not be problem-free. Perhaps the most obvious impediment to such a scheme would be the sheer scope of the endeavor: by virtue of DBS's national and regional audience, there likely would be a greater number of applicants for the limited channel space than one would expect to find on a cable system with a local viewing audience. This same problem would doom the creation of governmental access channels from the start. Traditionally reserved for access by the local government that granted cable system its franchise, such a set-aside would be untenable when imposed on an MVPD that serves thousands of local communities.280

Any public or leased access selection process would need to be designed to provide an equal chance of access to all interested persons—a system of first-come, first-served simply may not be up to the task. Additionally, it would be difficult to determine who should be eligible for such access. The point is not that such a solution would be free of problems, but rather that such a solution would be free of content-based regulation and therefore would expand the diversity of voices available on DBS systems. Such a strategy should be the goal of any attempt to set aside channels on DBS or any other MVPD.

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Inc. v. FCC, 518 U.S. 727, 734 (1996) ("A 'leased channel' is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties.").

279. See Krattenmaker & Powe, supra note 55, at 1727-31 (arguing that government should "foster access by speakers to media" and "foster diversity in the media marketplace" while allowing content-based editorial control to remain with private entities).

280. For a description of government access channels, see 1 BRENNER ET AL., supra note 11, § 6.04, at 6-32 to -50; id. § 6.04[3][a], at 6-38 (noting that governmental access channels are intended by Congress "to show local government at work").
Acknowledge the Importance of Quality Programming

Educational and informational programming should not be thrust upon individuals by governmental fiat. Instead, programming should earn its way onto a subscription service, based on its merit. This scheme is both realistic and achievable. The market has produced excellent educational programming in response to viewer demand, and there is no reason to think that such programming will fade from DBS menus as the number of subscribers increases. Nor is there reason to dismiss the validity of for-profit educational messages simply based on their economic sponsorship; quality educational programming does not follow a priori from "noncommercial" status.

CNN's "Cold War" documentary provides an example of quality educational television by a for-profit programmer. First aired in September 1998, the documentary produced twenty-four hours of educational and informational television at an estimated cost of $12 million. That a commercial network would bankroll such programming indicates that quality educational television can stand on its own in the commercial marketplace.

The counterargument is that the marketplace will not provide an adequate amount or quality of this type of programming to all viewers because of market deficiencies. For example, because there is little incentive in the marketplace to produce quality educational programming for children, such program-

281. See supra notes 229-33 and accompanying text (discussing examples of educational programming currently available).
283. The proliferation of documentary programs provides further evidence that commercial entities are interested in providing quality educational and informational programs. See John Consoli, More of Same Is Not So Bad, MEDIAWEEK, Nov. 30, 1998, available in 1998 WL 19050262.
284. See Krautenmaker & Powe, supra note 225, at 40 (noting the argument that "regulation of broadcasting in the 'public interest' is necessary to correct errors that would arise from subjecting broadcast programming to the discipline of private markets alone"); Minow & Lamay, supra note 239, at 11 (arguing that the market has failed to produce adequate children's programming); Krotoszynski, supra note 238, at 2132 (noting that "an educational program aimed at very young children will never be aired in prime time" because the opportunity costs involved are too great).
ming simply will not exist outside the confines of non-commercial providers.\(^{285}\) Some have argued that an unregulated commercial marketplace will produce programs strictly designed to entertain children—"talk shows and violent cartoons which are often nothing but thinly disguised commercials."\(^{286}\) In the broadcast arena, such concerns led Congress to pass the Children's Television Act of 1990,\(^{287}\) which required the FCC to consider whether licensees had "served the educational and informational needs of children."\(^{288}\) At first blush, it seems reasonable to assume that some type of regulation is needed to guarantee that such merit programming will be carried on DBS systems.

The imposition of regulation like the Children's Television Act on DBS providers is, at best, premature. As Judge Jackson noted in Daniels Cablevision, the FCC has failed "to demonstrate that educational television is presently in short supply in the homes of DBS subscribers."\(^{289}\) Indeed, as noted earlier, the market has produced a remarkable amount of educational and informational programming on DBS systems.\(^{290}\) Cable and DBS carry entire stations dedicated to quality educational and informational programs that have been extremely successful.\(^{291}\) Although concerns about a lack of quality educational television on local broadcast television stations may be valid, the dynamics of the multiple MVPD marketplace are far different. Concerns over the deficiencies of the local broadcast television market should not be extended to the multiple MVPD marketplace, which thrives by providing all types of niche programming, including educational and informational programming.\(^ {292}\) Simply put, several

\(^{285}\) See KRATTENMAKER & PowE, supra note 225, at 81-84.

\(^{286}\) Minow & Lamay, supra note 239, at 11.


\(^{290}\) See supra note 229-33 and accompanying text.

\(^{291}\) Two of the three most carried MVPD channels are educational and informational: CNN and the Discovery Channel. See Carmody, supra note 272, at B6.

\(^{292}\) See, e.g., Krotoszynski, supra note 238, at 2133 (noting cable channel's strategy of targeting niche markets); Volokh, supra note 227, at 1842-43 (noting that the "individualization" and "demassification" of the media allow for better targeting of viewers than ever before).
for-profit entities have the desire and necessary resources to provide this type of programming. If the end goal is to develop quality programming, any regulation imposed should credit DBS for the carriage of such programming, regardless of the financial status of its source.

CONCLUSION

Programming in the public interest is a laudable goal. Television has immense potential as a device to disseminate information on a wide variety of diverse educational topics. The broadcast standard of public interest programming—kidvid obligations, public service announcements, and the like—has been a part of the television landscape for quite some time and arguably has been very successful in ensuring a minimum level of programming in the public interest. Public interest programming has allowed for the dissemination of diverse viewpoints and has demanded that the providers of broadcast television service take into account the children's educational interests. In the pre-MVPD world of video programming, it was probably the only way Congress and the FCC had to guarantee a measure of diverse and informative programming that broadcasters would not be likely to provide otherwise.

Today's video marketplace, however, is far different. Customers can choose from a myriad of programming service options, each one with uniquely different physical advantages and limitations. To bring all these services under the public interest standard established in Red Lion would be equivalent to treating all children of the same family in the same way, regardless of their unique attributes or special needs. In much the same way that overly restrictive parenting likely would stifle the youngest child in the family, that same tactic applied to DBS, the newest member of the MVPD family, unnecessarily reins in a remarkable new technology without appreciating its unique facets.

Based on its huge channel-carrying capacity, DBS per se is providing far more diversity than broadcast television. In addition to their own educational offerings, DBS systems utilize local broadcast television stations, thereby accommodating the entire range of broadcasting public interest requirements to their subscribers. On a more fundamental level, consumers may consider the amount of educational and informational programming
already present on a particular DBS system even before deciding to subscribe to this video technology. Primestar, DISH Network, and DirecTV compete against each other to attract customers who want educational and informational programming, but they also compete against other mass media outlets that offer such programming. As a result, to hold on to their market share, DBS providers must respond to consumer demand for quality educational and informational programming, a fact that Congress and the FCC should consider when imposing a set-aside.

Compelling carriage of unaffiliated programming undercuts the legitimacy of programming already in the marketplace, overlooks the presence of such programming on local broadcast stations, and dismisses the availability of these messages from alternative media technologies. For these reasons, Congress and the FCC should abandon the DBS public interest requirements in the 1996 Act. Given the unlikely chance that Congress will reassess or abandon the 1996 Act anytime in the near future, however, the best resolution would be to revisit the DBS public interest requirements with an appreciation of DBS's position in the market. Specifically, the FCC must place a premium on high quality educational and informational programming. Access for providers should be determined not under a paternalistic judgment of what is good programming, but under fair criteria that appreciate viewpoints and programming that diverge from the mainstream. Lastly, the FCC must properly account for the immense contributions of commercial providers of these services, as well as the de facto presence of local television service and alternative media outlets in the homes of DBS subscribers.

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