

# RED LION IN WINTER: FIRST AMENDMENT AND EQUAL PROTECTION CONCERNS IN THE ALLOCATION OF DIRECT BROADCAST SATELLITE PUBLIC INTEREST CHANNELS

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## I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") may soon issue regulations implementing Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),<sup>1</sup> specifying the public interest obligations required of Direct Broadcast Satellite ("DBS") service providers under the Act. Section 25 has two major components. First, Section 25(a) requires DBS service providers to supply public interest programming on channels they select for broadcast.<sup>2</sup> In addition, Section 25(b) requires DBS providers to set aside four to seven

percent of their transmission capacity for "non-commercial educational and informational programming" over which the DBS provider may exercise no editorial control.<sup>3</sup>

This regulation has been anticipated for quite some time. The rulemaking process was commenced in 1993.<sup>4</sup> In September of that year, however, the United States District Court for the District of Columbia struck down Section 25 as unconstitutional.<sup>5</sup> Three years later, the District of Columbia Circuit Court of Appeals overturned the District Court's ruling, thereby reviving the provision.<sup>6</sup>

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<sup>1</sup> Pub. L. No. 102-385, § 25, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 335 (1994)).

<sup>2</sup> Section 25(a) states:

The Commission shall, within 180 days after [October 5, 1992], initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of Section 312(a)(7) of this title and the use of facilities requirements of Section 315 [of this title] to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this chapter of the Cable Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.

47 U.S.C. § 335(a) (1994).

<sup>3</sup> Section 25(b), in its relevant part, provides:

(1) CHANNEL CAPACITY REQUIRED.— 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 non-commercial programming of an educational or informational nature.

...  
(3) PRICES, TERMS, AND CONDITIONS; EDITORIAL CONTROL.— A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission. . . . The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.

47 U.S.C. § 335(b) (1994).

<sup>4</sup> See *In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations*, 8 FCC Rcd. 1589, *Notice of Proposed Rulemaking* (1993).

<sup>5</sup> See *Daniels Cablevision v. United States*, 835 F. Supp. 1, 12 (D.D.C. 1993). The plaintiffs in *Daniels*, cable television system owner/operators and programmers, argued that several provisions of the 1992 Cable Act (including Section 25) "unconstitutionally interfere[d] with their First Amendment right to 'speak' as they wish[ed] through the cable television systems they own[ed], control[led] or use[d], to the audiences of their choice." *Id.* at 3-4.

<sup>6</sup> See *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 983 (D.C. Cir. 1996) [hereinafter "Time Warner I"].

Arguably, Section 25's two subsections comport precisely with the First Amendment, because of the statute's requirement that DBS providers transmit specific content on their systems. The statute appears to require that commercial programming providers permit the use of their channels for certain political purposes and set aside capacity for use by others in order to meet public interest obligations.<sup>7</sup>

Requirements to serve the public interest, and/or requirement to provide a noncommercial educational/informational programming set-aside may improve information flows and democratic discourse in the electronic mass media, but are they constitutional? Although judicial review ultimately resolved the conflict in favor of the statute's constitutionality, these challenges point to an area of deep division in First Amendment jurisprudence; the division between the right of the speaker/owner to control, and the right of the audience/listeners to hear and know. This hoary debate appeared most recently before the United States Supreme Court in *Denver Area Educational Television Consortium, Inc. v. FCC*<sup>8</sup> ("DAETC") and *Turner Broadcasting System, Inc. v. FCC*<sup>9</sup> ("Turner II"), and is poised to surface again in *Arkansas Educational Television Commission v. Forbes*,<sup>10</sup> a case argued before the United States Supreme Court in the 1997-98 term.

There is no doubt that information flows on politically relevant matters can and should be improved, as financial resources significantly impact our ability as a society to gather, organize and disseminate information. As A.J. Liebling observed, "[f]reedom of the press is guaranteed only to

those who own one."<sup>11</sup> Moreover, information is a commodity. Most content creation, whether in the form of *The New York Times* or "Oprah" is accomplished on a for-profit basis, with stockholders expecting a return on their investment. Owners of private media transmit what will attract audiences, regardless of the content's merit or contribution to democratic self-governance.

At the same time, the Supreme Court has recognized harm to full and free information flows, particularly "the widest possible dissemination of information from diverse and antagonistic sources,"<sup>12</sup> as a justiciable First Amendment problem that may supersede market outcomes. Consequently, the Supreme Court has used intermediate scrutiny<sup>13</sup> to examine access regulation in the video marketplace. Like the Court in *Red Lion Broadcasting Co., Inc. v. FCC*,<sup>14</sup> constitutional scholars have acknowledged that the free market will not by itself always provide information necessary to ensure a robust marketplace of ideas. Professor Cass Sunstein of the University of Chicago, perhaps the foremost authority of this "Madisonian" school of thought, has advocated that speech relevant to self-governance should be given an explicit governmental preference in regulation of the mass media.<sup>15</sup>

As the old saying goes, "even the devil can quote Scripture." It is therefore no surprise that the commercial mass media, particularly television broadcasters, have used wielded their First Amendment sword to ward off the FCC's and Congress' attempts to encourage programming related to self-governance.<sup>16</sup> In the industry's view, the First Amendment guarantees that own-

<sup>7</sup> See generally 47 U.S.C. § 335(b)(1)-(3) (1994).

<sup>8</sup> See *Denver Area Educ. Tele. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2379 (1996) (holding that Section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 violates the First Amendment).

<sup>9</sup> See *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1184 (1997) [hereinafter "Turner II"] (ruling that must-carry provisions do not violate the First Amendment).

<sup>10</sup> See generally *Arkansas Educ. Tel. Comm'n v. Forbes*, 93 F.3d 497 (8th Cir. 1997), cert. granted, 117 S.Ct. 1243 (1997).

<sup>11</sup> Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L. J. 1719, 1721 n.7 (1995) (citing A.J. LIEBLING, *THE PRESS* 32 (1981) [hereinafter "Krattenmaker"]).

<sup>12</sup> *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>13</sup> See, e.g., *Turner II*, 117 S. Ct. at 1184 (holding that "under the intermediate level of scrutiny applicable to content-neutral regulations, must-carry would be sustained if it

were shown to further an important or substantial governmental interest unrelated to the suppression of free speech. . .").

<sup>14</sup> 395 U.S. 367 (1969) ("Red Lion"); see, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>15</sup> See generally Cass R. Sunstein, *Emerging Media Technology and the First Amendment: The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995).

At least part of the First Amendment inquiry should turn on the relationship between what broadcasters provide and what a well-functioning democracy requires. If we have any sympathy for Brandeis' judgment — shared by Madison — that 'the greatest menace to freedom is an inert people,' we will acknowledge that the marketplace model may not perform an adequate educative role, and that a system of free markets may well disserve democratic ideals (citation omitted).

*Id.* at 1780.

<sup>16</sup> See, e.g., Krattenmaker, *supra* note 11, at 1727 (citing

ers of commercial mass media have exclusive control over their licenses and facilities – no more and no less. While this “high-road” argument might have merit in the context of “Face the Nation” and “60 Minutes,” (where governmental interference would be clearly inappropriate because of the political content and information disseminated), it seems disingenuous when applying this line of thought to programming with almost no “serious literary, artistic, political, or scientific” value.<sup>17</sup>

*Red Lion* and *Miami Herald Publ'g Co. v. Tornillo*<sup>18</sup> are generally cited as emblematic of the Supreme Court's struggle to determine who “owns” the First Amendment. *Red Lion* stands for the principle that legislative bodies may make laws and regulations to alleviate information market failure, vesting ultimate First Amendment rights with the body politic.<sup>19</sup> *Tornillo*, on the other hand, asserts that freedom of the press is inseparable from ownership.<sup>20</sup> Under *Tornillo*, the fact that the federal government grants a license to occupy and use a specific radio frequency does not *ipso facto* give that entity the right to promulgate content requirements as a condition of license, even if the favored programming is conceded to be meritorious.

*Red Lion* notwithstanding, *Tornillo* is functionally the law of the land, even for broadcast television.<sup>21</sup> The Commission has never interfered with a television station's programming schedule to guarantee access to a particular speaker. Likewise, the Commission has only on rare occasions revoked a license because of failure to broadcast in the public interest.<sup>22</sup> Yet the Commission occasionally threatens to let *Red Lion* out of its cage in order to promote “voluntary” compliance with some of its initiatives, relying on its power to renew (or not renew) licenses its only legal enforcement mechanism.

Therefore, Section 25, and in particular Section 25(b), is unique in that rather than relying on general exhortations to serve the public interest, a DBS programming provider is *required* to set a quantifiable amount of bandwidth aside for non-commercial educational and information programming chosen by an independent third party.

This note will examine *Red Lion*, *Tornillo* and the structure of Section 25. This note will conclude with a modest assertion: that *Red Lion*, *Tornillo* and the DBS statute should be understood and adjudicated using an equal protection analysis, in addition to a First Amendment analysis.

## II. DIRECT CONTENT CONTROL— *RED LION*

Information is the raw material of justice. For instance, fair trials cannot take place in the absence of adequate discovery. The police power of the State can compel the production of information in order to promote justice and protect the health, safety and welfare of its citizens. Election-disclosure laws require a political candidate or party organization not only to speak, but to speak truthfully. The Supreme Court has not regarded any of these illustrations as either forced speech<sup>23</sup> or constitutionally impermissible content-based restrictions, although these statutory requirements are content-based by definition.

As the eminent telecommunications law expert Henry Geller pointed out, the current system of licensing and trusteeship is based on the history of radio regulation; the present system is just one of several options, which included licensing frequencies to be shared among multiple entities during the course of a broadcast day or week, that

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*Red Lion*, 395 U.S. at 390 (citation omitted) to illustrate the government's public interest justification for encouraging improved programming); Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1027 (1996) [hereinafter “Brenner”] (stating that large companies are often better-suited to fight for their First Amendment freedoms).

<sup>17</sup> *Miller v. California*, 413 U.S. 15, 23 (1973).

<sup>18</sup> See generally 418 U.S. 241 (1973) [hereinafter “*Tornillo*”].

<sup>19</sup> See generally *Red Lion*, 395 U.S. 367.

<sup>20</sup> See generally *Tornillo*, 418 U.S. 241.

<sup>21</sup> Even the harshest critics of *Red Lion* concede that the Commission has never energetically pursued the doctrine.

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See, e.g., Krattenmaker, *supra* note 11, at 1729 n.57 (stating that “FCC efforts to create quality programs that broadcasters do not wish to air, while sporadic, have been unsuccessful. . .”) (citation omitted).

<sup>22</sup> See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 231 (1982) [hereinafter “Fowler”] (stating that “the Commission's bark has been worse than its bite.”) (citation omitted).

<sup>23</sup> See *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). The Supreme Court stated, “[w]e long have realized that significant encroachments on First Amendment rights of the sort that compelled disclosure [or forced speech] imposes cannot be justified by a mere showing of some legitimate governmental interest.” *Id.*

Congress considered in 1927 and 1934.<sup>24</sup> The result of Congressional debate was a classic political tradeoff; in exchange for local monopolies and free spectrum, broadcasters were instructed by the Commission to program their frequencies in the public interest.<sup>25</sup> Those public interest obligations included Section 315(a)<sup>26</sup> (access by political candidates) and the personal attack and editorial rules.<sup>27</sup>

Red Lion Broadcasting challenged the constitutionality of the Commission's personal attack and broadcast editorial rules, which the Commission tried and failed to revise as recently as August 1997.<sup>28</sup> The *Red Lion* Court found an explicit duty under Section 315 to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."<sup>29</sup> The Court emphasized that a license to broadcast or monopolize a frequency was not *of itself* a First Amendment right:

[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share 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.<sup>30</sup>

At the same time, the Court emphasized that outright censorship was strictly forbidden by Section 326 of the 1934 Act.<sup>31</sup> Nonetheless, the

Court stated that the scarcity of radio frequencies permitted the Government to put modest restraints on licensees' control of their stations, in favor of others whose views should be given the opportunity to be heard:

. . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.<sup>32</sup>

The underlying issue in *Red Lion* is whether or not physical scarcity of spectrum is a legitimate rationale for a relaxed level of scrutiny. Rather, the core issue concerns the availability of information about public affairs. Many of the objections raised to *Red Lion* are based on a somewhat disingenuous misinterpretation that the case concerns spectrum scarcity. Spectrum scarcity is relevant *solely* because it is an impediment to free access to the fulfillment of underlying speech rights.

<sup>24</sup> See Henry Geller, *Turner Broadcasting, The First Amendment, and the New Electronic Delivery Systems*, 95 MICH. TELECOMMS. & TECH. L. REV. 1, 4-5 (1995) [hereinafter "Geller"]; see also *Red Lion*, 395 U.S. at 390-91.

<sup>25</sup> See Geller, *supra* note 24, at 5, 53.

<sup>26</sup> In its relevant portion, 47 U.S.C. § 315(a) states:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed . . . upon any licensee to allow the use of its station by any such candidate . . ."

*Id.*

<sup>27</sup> When considered by the *Red Lion* Court, the rules had been amended to read:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time . . . offer . . . a reasonable opportunity to respond over the licensee's facilities.

. . .

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the

licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial . . . an offer of . . . a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

*Red Lion*, 395 U.S. at 373-75 (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969)).

<sup>28</sup> See generally Updated Comments Invited Regarding the Personal Attack and Political Editorial Rules and Related Pleadings, *Public Notice*, 12 FCC Rcd. 4688 (1996); see also Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, *Public Notice*, (Aug. 8, 1997) <[http://www.fcc.gov/Bureaus/Miscellaneous/Public Notices/1997/pnmc7015.html](http://www.fcc.gov/Bureaus/Miscellaneous/Public%20Notices/1997/pnmc7015.html)> (suspending rulemaking indefinitely because a majority of the Commission was unable to agree upon any resolution of the issues).

<sup>29</sup> *Red Lion*, 395 U.S. at 380 (citing 47 U.S.C. § 315(a) (1995)).

<sup>30</sup> *Id.* at 389. The Court explained that the First Amendment is not irrelevant to public broadcasting, as the above quotation might lead one to believe. The Court emphasized that the First Amendment plays a major role in public broadcasting by forbidding FCC interference with the right of free speech. See *id.* at 389-90.

<sup>31</sup> See *id.* at 389-90 (citations omitted); see 47 U.S.C. § 326 (1994).

<sup>32</sup> *Red Lion*, 395 U.S. at 390 (citations omitted).

Other technical impediments might possess equally important constitutional significance. The opinion's essence is that *all* must be allowed an opportunity to speak in a democracy. Moreover, *Red Lion* begs a question: by what fair, impartial and content-neutral means should representative viewpoints be determined, without active government intervention?

This questions presents a dilemma. Government intervention to improve discussion of public affairs and promote viewpoint diversity is probably an impermissible content-based distinction.<sup>33</sup> Antagonistic or diverse viewpoints in speech cannot be determined without reference to content.<sup>34</sup> Therefore, under this constraint, is it possible to craft a content-based preference for public interest speech that could pass constitutional muster?

A potential solution to the problem of "benign" intervention may be to assert that it is constitutional for certain viewpoint neutral speech, such as educational and informational programming, to receive "encouragement," at the same time that all other speech receives protection. So long as such preferences are not viewpoint-based, this distinction might not be considered inimical to the Constitution.<sup>35</sup> Affirmative action for speech can be encouraged using the "oppression vs. assistance" test that Justice Stevens posits in his dissenting opinion in *Fullilove v. Klutznick*.<sup>36</sup> This dissenting opinion, however, begs the question of when programming can be characterized as informational or educational. This note does not at-

tempt to answer these questions, although this obstacle should not be insurmountable.

### III. CONTINGENT, CONTENT-TRIGGERED STRUCTURAL REGULATION – *TORNILLO*

Decided five years after *Red Lion*, *Tornillo* was as critical of access regulation as *Red Lion* was supportive. The Supreme Court's opinion in *Tornillo* blurs the distinction between inclusive and exclusive regulation, turning the First Amendment into a zero-sum game where encouragement of one form of speech results in censorship of all else that might have occupied that time slot or place on the page.<sup>37</sup>

At issue in *Tornillo* was Florida's right of reply statute, which provided that a personal attack by a newspaper column against a candidate for nomination or election gave the candidate the right to demand that the newspaper print, free of charge, any reply the candidate may make to the charges of a newspaper column.<sup>38</sup> Advocates of the statute argued that economic changes in American society had "place[d] in a few hands the power to inform the American people and shape public opinion."<sup>39</sup> Nonetheless, the Court stated that a legal "compulsion to publish that which 'reason' tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other

<sup>33</sup> See *Time Warner Entertainment Co., L.P. v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997) (*en banc*) [hereinafter "Time Warner II"] (Williams, J., dissenting). "As a subject-matter specification . . . the DBS requirement [, for example,] would normally be 'content-based' and subject to strict scrutiny. . . ." *Id.*

<sup>34</sup> See *id.*

<sup>35</sup> A regulation of this nature, however, should probably be subjected to at least intermediate scrutiny. Both the United States Supreme Court and courts of inferior jurisdiction have, in the author's opinion, tended to conflate content-based and viewpoint-based analyses in order to overstate the danger to free expression engendered by certain viewpoint-neutral, content-based regulations like Section 25. The failure to distinguish meaningfully between content-based and viewpoint-based restrictions has led to much of the confusion in this area of jurisprudence.

<sup>36</sup> See 448 U.S. 448, 532-54 (1980) (Stevens, J., dissenting); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) [hereinafter "Adarand"]. "The majority's concept of 'consistency' ignores a difference, fundamental to the idea of equal protection, between oppression and assistance." *Id.* at 205.

<sup>37</sup> See *Tornillo*, 418 U.S. at 256; see also *Buckley*, 424 U.S. at 48-49 (ruling that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."); see also Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1506 (1995).

<sup>38</sup> See FLA. STAT. ch. 104.38 (1974). Florida's "right of reply" statute stated:

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.

*Tornillo*, 418 U.S. at 244-45 n.2.

<sup>39</sup> *Tornillo*, 418 U.S. at 241, 250 (citing BEN H. BAGDIKIAN, *THE INFORMATION MACHINES* 127 (1971)); see also BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY*, 216-17 (1983).

virtues, it cannot be legislated."<sup>40</sup>

Furthermore, the Court noted the possible chilling effect that Florida's right-of-reply statute might have on the newspaper owner's speech:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.<sup>41</sup>

It is difficult to distinguish *Tornillo* and *Red Lion* on their facts, except by asserting, as an *ipse dixit*, that print and broadcast media are "different" in a constitutionally relevant fashion.<sup>42</sup> It is unfortunate that *Red Lion* is not cited in *Tornillo*, and that *Red Lion* does not cite to any print-medium right-of-reply statutes to resolve this dichotomy between print and broadcast media.

*Tornillo* asserts that a violation of the First Amendment occurs, regardless of form or intent, when the government trespasses on the proprietary right of the owner/speaker. In the *Tornillo* Court's view, whether the speaker presents news, political invective, hate speech, violence, fluff or prurience, or whether the speaker is an individual, a television network, a newspaper conglomerate or a cable company, the First Amendment prohibits virtually all government-erected barriers to entry into the marketplace of ideas.<sup>43</sup> Individuals choosing not to speak, whether they lack the desire or financial ability, should not be compelled or encouraged to speak using the resources of another.<sup>44</sup>

<sup>40</sup> *Tornillo*, 418 U.S. at 256.

<sup>41</sup> *Id.* at 257.

<sup>42</sup> Arguably, one difference might be the use of governmental property (electromagnetic spectrum) as an input of production.

<sup>43</sup> *Tornillo*, 418 U.S. at 255 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973) [hereinafter "*Columbia*"]) "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers – and hence advertisers – to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Id.*

<sup>44</sup> The *Tornillo* Court continued:

the penalty resulting from the compelled printing of a reply is exacted in terms of the cost of printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. [A] newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an eco-

#### IV. DIRECT BROADCAST SATELLITE PROGRAMMERS, SECTION 25 AND NON-CONTINGENT SET-ASIDES

The resource question is the crux of both *Red Lion* and *Tornillo*. The resource question also gave rise to the debate over the future of Section 25 of the 1992 Cable Act, which added Section 335 to the Communications Act of 1934. Section 335 required the Commission to implement rules mandating a minimum level of political programming by DBS providers.<sup>45</sup> The provision also required DBS providers to set aside channels for noncommercial educational and informational programming at reasonable rates.<sup>46</sup>

The Commission initiated a rulemaking to implement the statute in March 1993.<sup>47</sup> Shortly thereafter, a coalition of video industry plaintiffs brought suit against the Commission, challenging the constitutionality, not only of Section 25, but also of several sections of the 1992 Cable Act and the Cable Communications Policy Act of 1984.<sup>48</sup> The United States District Court for the District of Columbia issued an injunction staying the rulemaking proceeding and struck down the provision later that year.<sup>49</sup>

The District Court's rationale for striking down Section 25 was simple. The court held that Congress failed to make any record indicating that "regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest."<sup>50</sup> In the absence of a record, the opinion stated, it was unnecessary to determine

economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

*Id.* at 256-57 (emphasis omitted).

<sup>45</sup> See 47 U.S.C. § 335(a) (1994).

<sup>46</sup> See 47 U.S.C. § 335(b)(1)-(3) (1994).

<sup>47</sup> See *In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, Notice of Proposed Rulemaking*, 8 FCC Rcd. 1589, para. 1 (1993).

<sup>48</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984) (codified at 47 U.S.C. §§ 521 *et seq.* (1994)); see *Daniels*, 835 F. Supp. at 1.

<sup>49</sup> See *Daniels*, 835 F. Supp. at 8 (ruling that the provisions in the 1992 Cable Act seem to be unconstitutional because either they "impose content-related burdens on speech" or they do not serve any significant regulatory purpose to justify the "burdens they impose" on speech).

<sup>50</sup> *Id.*

whether the statute was content-neutral or content-based, because under either standard the government would be unable to demonstrate that the need was compelling, important or even rational.<sup>51</sup>

The Commission appealed to the District of Columbia Circuit and oral arguments were presented in November 1994. The panel in this case reviewed the issues for almost two years. Finally, in August 1996, the District of Columbia Circuit overturned the District Court's ruling, citing *Red Lion* at length for the proposition that the scarcity of satellite orbital slots was analogous to the shortage of television frequencies in *Red Lion*.<sup>52</sup> The Circuit Court explicitly acknowledged that it balanced the First Amendment rights of broadcasters against those of the viewer<sup>53</sup> and the balance conclusively tilted toward the rights of the viewer.<sup>54</sup>

However, neither the regulation nor its underlying justification are content-neutral. In addition to the statute's facial references to "noncommercial educational and informational programming" and "national educational programming services," the court cites a chain of First Amendment cases that reference the communication's diversity, multiplicity of sources and balanced presentation on issues of public importance.<sup>55</sup> The court ruled that the saving grace of the set-aside was the tremendous number of channels under the DBS operator's editorial control.<sup>56</sup> As with *Turner II*, the provisions "leave [DBS] operators free to carry whatever programming they wish on all channels not subject to [the set-aside] requirements."<sup>57</sup>

In February 1997, the D.C. Circuit denied Time Warner's request for a rehearing en banc.<sup>58</sup> Five judges, however, signed a dissenting opinion which discussed the infirmity of the spectrum scarcity doctrine and implied that the number of channels on a DBS system militated toward strict scrutiny, not away from it.<sup>59</sup> Where the panel decision counted the limited number of satellite positions and determined that access was scarce, Judge Williams and the dissenting members of the D.C. Circuit counted the total channels available and came to the opposite conclusion.<sup>60</sup> Time Warner did not file a petition for writ of certiorari with the United States Supreme Court. Hence, a definitive answer from the highest Court in the land about whether certain types of speech can be preferred for set-aside purposes is still pending.

## V. GOVERNMENT-PROVIDED SPEECH FORUMS —PUBLIC BROADCASTING

Presently, educational, cultural and public affairs programming continue to receive federal funding through the various public broadcasting acts.<sup>61</sup> The goals behind public broadcasting remain worth pursuing: to create an information system responsive to the interests of people located throughout the United States and to facilitate the development of programming which expresses "diversity and excellence."<sup>62</sup> Unfortunately, federal cutbacks and relaxed standards for noncommercial underwriting have made public broadcasting look and behave similar to its for-profit brethren.<sup>63</sup>

<sup>51</sup> See *id.*

<sup>52</sup> See *Time Warner I*, 93 F.3d at 975.

<sup>53</sup> See *id.* (citing *Columbia*, 412 U.S. 94, 102-103).

<sup>54</sup> See *id.* (citing *Red Lion*, 395 U.S. at 390 (holding that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, . . . and other ideas . . . which is crucial.")).

<sup>55</sup> See *id.* at 976-77 (discussing 47 U.S.C. § 335(b)(2) (1994)).

<sup>56</sup> See *id.* at 976. The Court focused on the fact that the government does not direct the content of the programming that DBS operators must carry. The Court further stated:

[t]he design and operation of the challenged provisions confirm that the purposes underlying [their] enactment . . . are unrelated to the content of speech. The rules [under Section 25] . . . 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. They do not compel [DBS] operators to affirm points of view with which

they disagree. . . . Because Section 25 is 'a reasonable means of promoting the public in diversified mass communications,' it does not violate the First Amendment rights of DBS providers.

*Id.* at 977.

<sup>57</sup> *Time Warner I*, 93 F.3d at 977 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645-49 (1994) [hereinafter "*Turner I*"]).

<sup>58</sup> See *Time Warner II*, 105 F.3d at 724.

<sup>59</sup> See *id.* at 724.

<sup>60</sup> See *id.* at 725. The five dissenting Judges stated that at the time of this opinion, there were four DBS providers, with each providing between 45 and 75 video channels, and 30 music channels. Hence, the Judges concluded, "*Red Lion's* factual predicate - scarcity of channels — is absent here." *Id.*

<sup>61</sup> 47 U.S.C. § 396 (1994) (codifying the funding, legislative intent and restrictions regarding federally subsidized public radio and television broadcasting).

<sup>62</sup> See 47 U.S.C. § 396(a)(5) (1994).

<sup>63</sup> See, e.g., Paul Fahri, *Seeking a Word from Their Sponsors*, WASH. POST, Aug. 11, 1997, at 17. For example, public broad-

It is not constitutionally suspect for the government to create and distribute its own special interest and educational television and radio programs; indeed, this was the idea behind creating the Corporation for Public Broadcasting ("CPB").<sup>64</sup> CPB could continue as an appropriate vehicle for funding speech from diverse and antagonistic sources, however it is currently under political attack for exactly that reason.<sup>65</sup>

In order for the programming on public broadcasting to become more inclusive of diverse voices and viewpoints, San Francisco telecommunications attorney Christopher Witteman suggests that CPB structure its governance according to a model provided by the West German broadcasting system.<sup>66</sup> In this system, local public broadcasting stations are run by boards of directors, required by law to be official representatives of a diverse range of political, religious, labor, business, youth, arts and educational groups.<sup>67</sup> A statutory requirement, like that of the West German system, that the boards of local public broadcasting stations be comprised of representatives from specific non-profit and governmental entities may create a more diverse programming lineup for local stations. On a national level, a board comprised of such diverse representatives might be an appropriate administrative body for DBS's non-profit set-aside.

However, while programming created under such a system might be more representative of the wide-ranging interests of the population, even under this model, "[t]he problem of providing public broadcasting with a [politically] insulated source of income still remains."<sup>68</sup> Indeed, the funding problem faced by CPB is even more pronounced with the DBS public interest set-aside, which makes *no* provision for funding the production and distribution of the educational and informational programming that Congress has mandated.

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casting companies have begun to hire prominent sales firms to market them. *See id.*

<sup>64</sup> *See, e.g.,* CARNEGIE COMMISSION, A PUBLIC TRUST: THE REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING 41-59 (1979).

<sup>65</sup> *See* Christopher Witteman, *West German Television Law: An Argument for Media as an Instrument of Self-Government*, 7 HASTINGS INT'L & COMP. L. REV. 145, 204 (1983) [hereinafter Witteman].

<sup>66</sup> *See generally id.* at 207; *see also* Sunstein, *supra* note 15, at 1778 n.88.

<sup>67</sup> *See* Witteman, *supra* note 65, at 162, n.130.

## VI. CONCLUSION – TOWARD AN "EQUAL PROTECTION" INTERPRETATION OF THE FIRST AMENDMENT

The end of physical scarcity in a variety of electronic media<sup>69</sup> could present a real opportunity for an explosion in the diversity of communication. Insofar as governments possess the ability to reserve carriage capacity for themselves, they can act to relieve market failure without falling prey to the accusation that they are commandeering the electronic media's editorial control of governmental speech. The DBS non-commercial set-aside provision permits the federal government to encourage its preferred speech without dictating content to private parties. Applying this principle to broadcast entities may be appropriate as broadcast television stations convert to digital transmission and begin to "multiplex" their spectrum into multiple discrete channels.<sup>70</sup>

The phenomenal growth of the Internet demonstrates that individuals have been waiting for an electronic medium of mass communication, and finally, entry barriers are low enough to permit millions of people to participate.<sup>71</sup> The Internet, however, has not made the access concerns of *Red Lion* obsolete. In fact, the concerns are more relevant than ever; while the Internet has permitted greater individual self-expression, the monopolization of the dominant media by large commercial entities has occurred and continues to occur.<sup>72</sup> Consequently, the convergence of television and the Internet may drown individual voices in a sea of commercial Internet programming.

In the end, the real issue that permeates both *Red Lion* and *Tornillo* is money; specifically, money that makes mass communication possible. *Red Lion*, *Tornillo* and the *Time Warner II en banc* dissent are simply *San Antonio Independent School Dis-*

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<sup>68</sup> *Id.* at 207, n.532.

<sup>69</sup> Including, *inter alia*, DBS, broadcast television, and the Internet.

<sup>70</sup> *See* Kyle Pope, *High-Definition TV is Dealt A Setback*, WALL ST. J., Aug. 13, 1997, at B5.

<sup>71</sup> *See* Brenner, *supra* note 16, at 1032 (concluding that "[t]he Internet may be the greatest equalizer of communications yet devised."); *see* Sunstein, *supra* note 15, at 1781-84.

<sup>72</sup> *See* Sunstein, *supra* note 15, at 1783 (discussing that with Internet use, citizens are able to express their views and receive answers more effectively, particularly in the political context).



*trict v. Rodriguez*<sup>73</sup> dressed up in First Amendment clothing. This is the reason that cases such as *Adarand Constructors Inc. v. Pena*,<sup>74</sup> which discuss inclusion and exclusion, deprivation and access, resonate so strongly in this line of jurisprudence. The right of reply, PEG access and the DBS set-aside statutes represent attempts to give all Americans the same right to speak and be heard that Rupert Murdoch, Ted Turner and Michael Eisner enjoy.<sup>75</sup> Voting and speech, two quintessentially political rights embraced by all Americans, must be available on a more-or-less equal basis if our formal political egalitarianism is to have any meaning.

As a political matter, it is understandable that governmental entities prefer private entities to bear the costs of equal protection in the speech market. Requiring corporate entities to provide for a speech costs less than government subsidized speech and avoids the inevitable political problems that have dogged both the CPB and the NEA in subsidizing speech that someone, somewhere, does not like.

However, American jurisprudence has continually declined to acknowledge that equal protection under the law is at least partially dependent on equal access to financial and physical resources.<sup>76</sup> The conservative position is that viewpoint scarcity created by economic scarcity is not relevant to the meaning of the First Amendment.<sup>77</sup> This viewpoint, which purports to leave the First Amendment to the market, assumes that freedom of speech could still be considered an equal right, not withstanding its practical unavailability.

The proprietary view of the First Amendment fails to acknowledge its political significance; it is just another principle of property law. When placing the commercial marketplace ahead of the marketplace of ideas, the equal protection con-

text of the First Amendment is not served and the political process is manipulated in support of non-egalitarian outcomes. Both results are undesirable. In the same way that affirmative action was designed to redistribute economic power to disadvantaged groups, *Red Lion's* goal was to distribute political power to the same disadvantaged groups.

A serious commitment to CPB and its extension to other electronic media, or the extension of public access principles to terrestrial broadcast stations would contribute significantly to equal protection concerns. Moreover, the recently announced plans of ABC and Sinclair Broadcasting to multiplex their digital signals<sup>78</sup> suggests that a modest set aside of digital spectrum as a condition of license may be a worthwhile policy objective. Such a policy would improve access to information and impose minimal speech interference upon licensees.

In enacting protective legislation for speech, governments could rely on their general authority to regulate business if reliance upon the implicit Equal Protection facet of the First Amendment is insufficient.<sup>79</sup> The Supreme Court's decisions in *Nollan v. California Coastal Commission*<sup>80</sup> and *Dolan v. City of Tigard*<sup>81</sup> permit local governments to require in-kind compensation in connection with the costs of regulation if the "roughly proportionate" nexus between the governmental interest at stake and the extent to which the value of the regulated property may be diminished.<sup>82</sup> In a world in which the amount of bandwidth available for communications has increased dramatically, owners of the electronic media will find it more and more difficult to make the case that set-aside regulation is a regulatory burden that amounts to a "taking" under the Fifth Amendment.<sup>83</sup>

*Turner I* and *Turner II* represent the proposition that structural regulation of the speech market can withstand scrutiny if its language is content-

<sup>73</sup> See 411 U.S. 1, 28-29 (1973) (stating that wealth is not a suspect classification and does not provide an "adequate basis for invoking strict scrutiny", differences in wealth which impact legal rights are not a violation of the Equal Protection clause).

<sup>74</sup> See generally 515 U.S. 200 (1995).

<sup>75</sup> See, e.g., Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1075-77 (1994); see David Ehrenfest Steinglass, *Extending PruneYard: Citizens' Right to Demand Public Access Cable Channels*, 71 N.Y.U. L. REV. 1113, 1145 n.158 (1996) [hereinafter "Steinglass"]; see Witteman, *supra* note 65, at 157; see Sunstein, *supra* note 15, at 1792-94; see Fowler, *supra* note 22, at 223 (discussing economic resources' effects on First

Amendment rights).

<sup>76</sup> See *Adarand*, 515 U.S. at 272-74 (Ginsburg, J., dissenting); see *Rodriguez*, 411 U.S. at 117-24 (Marshall, J., dissenting).

<sup>77</sup> See, e.g., Krattenmaker, *supra* note 11, at 1731 (stating that the First Amendment is best served by a process of "bidding" for information and entertainment).

<sup>78</sup> See Pope, *supra* note 70, at B5.

<sup>79</sup> See, e.g., Steinglass, *supra* note 75, at 1157-58.

<sup>80</sup> See 483 U.S. 825, 837 (1987).

<sup>81</sup> See 114 S. Ct. 2309 (1994).

<sup>82</sup> *Id.* at 2317-20.

<sup>83</sup> See U.S. CONST. amend. V; see generally *Nollan*, 483 U.S. 825; see generally *Dolan*, 114 S. Ct. 2309.

neutral.<sup>84</sup> Although the D.C. Circuit's current position includes approving at least some content-based distinctions, the issue has not been answered definitively by the Supreme Court. *Tornillo*, however, suggests that the Federal Government cannot step in and dictate to private speakers the programming that, in the government's view, would best serve the public interest, even assuming that such programming could be clearly identified.<sup>85</sup> Set-asides solve this problem. Governmental entities, particularly the Federal Government, could issue licenses to itself and fund itself, or seek compensation from spectrum users. As long as a sufficient nexus exists between the compensation sought and the activity being regulated,<sup>86</sup> there should be no objection to receiving in-kind compensation for taxes, licensing fees, auction proceeds or other payments.

Is there a sufficient nexus to prevent Section 25 from turning into a "takings" case dressed in First Amendment clothing? Probably, but the basis to defend this kind of statute, that set-asides are compensation or part of a licensing fee, should be clearly stated rather than turned into an ambiguous and conflicted "right to hear."

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<sup>84</sup> See *Turner I*, 512 U.S. at 662-63; see *Turner II*, 117 S. Ct. at 1186.

<sup>85</sup> See generally *Tornillo*, 418 U.S. 241 (1974).

<sup>86</sup> See *Nollan*, 483 U.S. at 837; see *Dolan*, 114 S. Ct. at 2317-

*Red Lion* conveys the message that there is no constitutional right to a twenty-four hour a day, seven day a week license; nor is there a constitutional right to provide a communications service without providing some compensation to the governmental entity whose property makes the communications service possible. A modest set-aside of capacity does not infringe multi-channel providers' speech rights because the provider remains capable of speaking from the vast majority of channels. Its analogue is putting aside land in a development for public parks as part of a municipality's approval of a subdivision of land.<sup>87</sup> There is no intrusion that forces the operator to change her message or chill speech that she may or may not choose to make on her remaining channels.<sup>88</sup> Set-asides like those created by Section 25 serve both the First Amendment and the Equal Protection Clause by guaranteeing that more would-be speakers will be granted the opportunity to join in the exercise of one of our most important constitutional rights.

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<sup>87</sup> See *Denver*, 116 S. Ct. at 2394.

<sup>88</sup> See *Turner I*, 512 U.S. at 652, 663.