

BARGAINS IN THE INFORMATION MARKETPLACE: THE USE OF GOVERNMENT SUBSIDIES TO REGULATE NEW MEDIA

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INTRODUCTION

Several years ago, the D.C. Circuit upheld against a First Amendment challenge a law that required direct broadcast satellite (DBS) providers to set aside a portion of their capacity for noncommercial educational programming.¹ The Court based its decision on an analogy between DBS—then a new information platform—and broadcasting, the regulation of which had long received reduced First Amendment scrutiny. In an opinion dissenting from the denial of a rehearing *en banc*, Judge Williams (writing for five judges) offered an intriguing insight.² Williams wrote that if the law were constitutional, it would be so not because the government had greater leeway to regulate satellite broadcasting than newspaper publishing, but only as a “condition legitimately attached to a government grant.” Under this view, DBS licenses would be akin to government subsidies like cash grants or tax exemptions offered to encourage favored activities. As such, the government might condition its subsidy on the fulfillment of certain public interest obligations without contravening the First Amendment.

This example suggests that the analogies that judges and policymakers use when confronted by new technologies may profoundly shape the emerging law of information platforms. Choosing the right analogy is important, of course, for assigning new platforms to established regulatory categories and thereby determining how the government *should* exercise its power. It

* Associate Professor, Rutgers University School of Law—Camden. I received helpful comments from Stacey Dogan, Frank Goodman, Mark Nadel and Phil Weiser. I am especially grateful for the research assistance of my former colleagues David Fagan and Brian Smith, and for the support of my mentor, Jonathan Blake, at Covington & Burling in Washington, D.C.

1. *Time Warner Entm't Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

2. *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724-25 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*).

makes all the difference, for example, if we view cable as a common carrier of telecommunications services or as a broadcaster. The selection of analogies is equally important for understanding how the government *may* exercise its power over new technologies, consistent with constitutional constraints. The notion that a spectrum license, or even, as this article suggests, a copyright license, might function as a government subsidy of mass electronic communications could have a significant impact on the government's information technology policy.

In likening government facilitation of mass communications to subsidies for other kinds of speech, it is important to arrive at a subsidized speech doctrine that reflects the array of First Amendment values at stake in the regulation of information platforms. It used to be that free speech interests were deemed not particularly relevant or not especially powerful in many areas of communications regulation. Phone companies, for example, were not considered speakers at all. Broadcasters, although speakers, did not have the same First Amendment status as newspaper journalists because the broadcast medium (electromagnetic spectrum) was considered a scarce resource.³ The emergence of new communications technologies and the convergence of existing media over the past decade have dramatically increased the salience of First Amendment concerns in communications regulation. As a result, the government is finding it increasingly difficult to achieve traditional regulatory policy objectives—such as promoting competition and diversity in the electronic media—in the face of more stringent First Amendment review.⁴

In response to these developments, the government will likely devise new regulatory approaches that steer clear of First Amendment restrictions. This article examines one possible approach: the government's use of speech benefits rather than regulations to promote desired activities in the media marketplace.

3. For more than fifty years, the government has regulated different platforms of media by relying on facts about the nature of the media and long-established doctrinal distinctions between carriers and content-providers. For example, because broadcast frequencies are scarce, the government can license them and regulate broadcasting in a way the courts would not permit in the print context. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation."). Because common carriers do not control their own content, they do not have speech interests that stand in the way of regulation. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *see also United States v. W. Elec. Co.*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987).

4. *See Government in a Bind*, *infra* Part I.C.

Specifically, in the 1999 Satellite Home Viewer Improvement Act (SHVIA),⁵ Congress fashioned a copyright benefit—a compulsory copyright license that allows DBS operators to retransmit local broadcast stations without charge—in order to induce certain behavior—the carriage of local broadcast stations that a DBS operator might not otherwise provide.⁶

The reason an incentive-based regulatory strategy may be fundamental to the future of communications regulation is that radically different presumptions attach to speech subsidies under current First Amendment doctrine. Speech *regulations*, even if they are content neutral, are presumptively invalid under the First Amendment review that has emerged in the last thirty years.⁷ By contrast, burdens on speech that are part of a discretionary speech *benefit* may be treated as presumptively valid ex-

5. See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-531 (1999). For a good discussion of SHVIA, see Andrew D. Cotlar, *A Subsidy by Any Other Name: First Amendment Implications of the Satellite Home Viewer Improvement Act of 1999*, 53 FED. COMM. L.J. 379 (2001) (arguing that SHVIA is constitutional under intermediate or lesser First Amendment scrutiny).

6. In comparison, Congress in the cable context had simply mandated local broadcast station carriage. 47 U.S.C. § 534 (2000). Cable enjoys a compulsory copyright license to carry local broadcast signals, 17 U.S.C. § 111(c)(3) (2000), but the must-carry rules are not contingent on exploitation of the compulsory license. See also *United Video, Inc. v. FCC*, 890 F.2d 1173, 1177 (D.C. Cir. 1989) (reviewing history of regulation of cable industry).

7. Courts have treated DBS differently for purposes of First Amendment review. Compare *Time Warner Entm't Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (holding that satellite technology should be analyzed under the same relaxed standard of scrutiny applied to the broadcast medium), with *Satellite Broad. & Communications Ass'n. v. FCC*, 275 F.3d 337 (4th Cir. 2001), cert. denied, 70 U.S.L.W. 3774 (U.S. June 17, 2002) (NO. 01-1332) (applying intermediate scrutiny to review of SHVIA). In the case of cable, intermediate level scrutiny applies to content neutral regulations. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner I*"). Broadcasting is entitled only to relaxed scrutiny. See *Red Lion*, 395 U.S. at 396-400. Satellite broadcasting relies on scarce spectrum, like terrestrial broadcasting, but is a subscription service that offers an abundance of channels, like cable. There is some question as to whether it even matters how DBS is characterized for appellate review purposes. Specifically, some critics argue that intermediate scrutiny, as a general matter, is unduly deferential to the government and therefore indistinct from relaxed scrutiny. See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). *Turner I*, however, suggests that, at least where Congress acts to fend off speculative harms in the communications industry (as it will almost always do where new technology is at issue), intermediate scrutiny will be applied with teeth. See *Turner I*, 512 U.S. at 664-65 (noting that when Congress acts to burden speech through must-carry requirements, courts must ask whether Congress has shown sufficient economic justification for action and, if so, whether the government can prove that the remedy it adopts "does not burden substantially more speech than is necessary to further the government's legitimate interests." (internal quotes omitted)).

ercises of government largesse.⁸ Whereas the review of regulations favors the regulated, the review of speech subsidies favors the government.⁹

From the standpoint of the benefited speaker, the government's manipulation of the copyright law just as clearly constitutes a "subsidy" as an outright grant of funds or a tax exemption.¹⁰ Thus, the award of a compulsory copyright license to a satellite carrier ought to be treated like a speech benefit to which strings (i.e. carriage of local broadcast signals) have been attached.¹¹ However, the government is not off the hook simply because it has rewarded rather than regulated. The First Amendment is still implicated when conditions on a benefit induce a party to engage in or abstain from speaking. Courts, em-

8. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Congress' choice to fund some activities, but not alternative activities, against a challenge to regulations prohibiting recipients of Title X family planning funds from participating in any activity advocating abortion as an unconstitutional violation of right to free speech); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding the requirement that the NEA consider "decency & respect" as a criterion in making arts grants).

9. After the First Amendment litigation over the requirement that cable providers carry local broadcast stations, we know that even content neutral regulations based on Congress's predictive judgments about the impact of new technology on existing market players and consumers put the government to a significant burden of proof to support its judgments. The government must base its conclusions on substantial evidence (e.g., show "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry."). *Turner I*, 512 U.S. at 665. Moreover, the Court will not allow the deference ordinarily afforded to legislative findings to stand in the way of its exercise of independent judgment. *Id.* at 666. This exacting standard could require years of congressional hearings at the front end and years of litigation at the back end to satisfy a classic First Amendment review. The lapse of this much time is particularly difficult in the technology area where industry must make substantial investment to comply with a technology-forcing law (e.g., in satellite upgrades). To the extent that the government could avoid such delays by inducing, rather than requiring, compliance with public interest goals, it might well be expected to do so.

10. Other communications industry conditional speech benefits, such as the grant of spectrum rights under certain conditions or of physical rights of way, might also be viewed as government subsidies in this manner. Governmental support for public broadcasting, in the form of spectrum licenses and funds, is an obvious candidate for this kind of analysis. For example, noncommercial broadcast licenses are distributed free of charge, without being auctioned, see *Nat'l. Pub. Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), on condition that the licensee refrain from engaging in commercial speech in the form of advertising. Federal funds that are funneled through the Corporation for Public Broadcasting to noncommercial stations are conditioned on the same thing. See 47 U.S.C. § 399b (2000).

11. Because it upheld the constitutionality of SHVIA as if it were a regulation, the Fourth Circuit declined to address the question of whether or not SHVIA operated as a subsidy scheme. See *Satellite Broad. & Communications Ass'n*, 275 F.3d 337, 355 (4th Cir. 2001). The question thus remains open whether the grant of a compulsory copyright license or other nonmonetary benefits in the communications arena constitutes a subsidy for the purposes of First Amendment review.

ploying the murky analysis that has emerged from the subsidized speech cases of the past decade, look to whether or not the government has simply rewarded or effectively coerced certain behavior. This analysis has focused on government pressure and speaker coercion. Such a focus, when trained on subsidies that are used to achieve the traditional communications regulatory goal of more diverse speech,¹² misses an important dimension of media law—the impact of government action on the media marketplace as a whole. The subsidized speech analysis in these contexts ought to look beyond speaker coercion to consider this impact.

Part I of this article begins with a discussion of why the government might choose to “regulate” new media in the long shadow of the First Amendment by attaching conditions to the speech it promotes, rather than by risking classic First Amendment scrutiny of ordinary regulation. Part II reviews the recent subsidized speech cases, identifying a common preoccupation with the question of whether or not government speech subsidies have coerced, rather than simply encouraged, a speaker to communicate in a certain fashion. Against this doctrinal background, Part III discusses the history and structure of SHVIA and why governmentally bestowed copyright benefits may operate as speech subsidies. Part IV returns to the subsidized speech doctrine and suggests two modifications to allow courts to better assess the communicative impact of laws like SHVIA. First, a coercion theory should take into account the process of compromise between industry and government, as well as among competing industries vying for marketplace advantage, that produced the speech exchange. Second, evaluation of the First Amendment impact of the speech exchange should include a

12. Some communications regulation has been justified as promoting First Amendment values by fostering media diversity and competition among communications outlets. It “has long been a basic tenet of national communications policy that the “widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”” *Turner I*, 512 U.S. at 663-64 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion)). The government has attempted to encourage diverse and antagonistic sources of information in the form of limits on television station ownership, cross-ownership between local cable systems and television stations, and local television stations and newspapers. *See generally* HARVEY L. ZUCKMAN ET AL., *MODERN COMMUNICATIONS Law* § 14.4 (2000). The FCC continues to devise new ways to increase media ownership in order to increase the voices of some at the expense of others. *See, e.g.*, *Creation of Low Power Radio Serv.*, 15 F.C.C.R. 2205 (2000) (codified at 47 C.F.R. Parts 11, 73 and 74 (2001)).

frank consideration of whether or not the exchange is likely to add diversity to the information market.¹³

I. THE FIRST AMENDMENT MARCH IN COMMUNICATIONS LAW

The increasing vulnerability of communications regulations to First Amendment challenges under prevailing doctrine explains why the government might choose to offer a benefit to induce, rather than impose a penalty to force, the achievement of public interest goals. Regulation of the electronic communications media by its nature implicates the freedom of speech of the regulated communicators. Nevertheless, that regulation has flourished over the past five decades notwithstanding First Amendment sensitivities because of two distinctions: between the electronic and other media and between the communications pipe and the communication itself. Both of these distinctions, which have kept First Amendment concerns at bay in many areas of communications law, are now receding as a result of technological convergence and proliferation.

Recent decisions striking down communications-related statutes,¹⁴ ordinances¹⁵ and Federal Communications Commis-

13. If it is the autonomy-maximizing and democracy-enhancing theories of the First Amendment that have guided the Court's consideration of speech subsidies, as I suggest below in Part II, I am advocating that courts also consider a third elaboration of First Amendment values also; that speech protections exist to ensure a robust speech market in which ideas compete to persuade. As the Court stated in *Red Lion*, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail". 395 U.S. at 390. See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 56 (1988); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945); Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-89 (1987). But cf. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12-24, 37-46 (1989) (criticizing the marketplace of ideas theory); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988) ("Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate the truth?"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (arguing that marketplace of ideas theory threatens free speech by justifying free expression instrumentally rather than based on notion of individual liberty).

14. See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (invalidating provision requiring that cable operators either effectively scramble sex channels or move such programming to a later time period when children are less likely to be viewing); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (invalidating provision requiring cable operators to block access to sexually explicit material on certain channels).

15. See, e.g., *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (striking down county ordinance that required cable television system that offered high-speed internet service to allow competitors equal access to system).

sion (FCC) rules¹⁶ on First Amendment grounds suggest that government regulation of the electronic media may be doomed. The increasing scope of First Amendment protection is in part simply a reflection of First Amendment jurisprudence generally¹⁷ and the receptiveness of courts to First Amendment arguments.¹⁸ In addition, technological convergence and prolifera-

16. See, e.g., *Time Warner Entm't Co. v. United States*, 240 F.3d 1126, 1131 (D.C. Cir. 2001) (striking down limits on channel capacity that cable operators can assign to affiliated programmers and limits on the number of subscribers that may be served by a cable operator); *Radio-Television News Dirs. Ass'n. v. FCC*, 184 F.3d 872 (D.C. Cir. 1999) (striking down Commission's "personal attack" and "political editorial" broadcast rules, previously upheld by *Red Lion*, under the Administrative Procedure Act because the Commission had announced intention to repeal the rules, but retained them for more than two decades in an impasse over First Amendment questions). For additional evidence of the impact of the *Time Warner* decision on the FCC's rulemaking considerations, see, e.g., *Cross-Ownership of Broadcast Stations and Newspapers, Order and Notice of Proposed Rulemaking*, 16 F.C.C.R. 17283 (2001) [hereinafter *Cross-Ownership NPRM*] (considering revision of the newspaper/broadcast cross-ownership rule and asking for comments of First Amendment considerations in light of *Time Warner*). In several other recent cases, the D.C. Circuit has rejected First Amendment attacks on structural regulation, but has remanded broadcast ownership rules to the FCC as arbitrary and capricious because the FCC has not explained to the court's satisfaction why limits on the aggregation of broadcast properties are necessary in the public interest. See *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027 (rule limiting entities to owning television stations that cover no more than 35% of the nation's television households); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (2002) (rule limiting entities to owning no more than two television stations per market in some markets).

17. In the Supreme Court's last term, it took First Amendment protection for commercial speech to new heights by striking down the same type of law that it had upheld just four years ago. Compare *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (requiring crop growers' contributions to a collective advertising fund), with *United States et al. v. United Foods, Inc.*, 533 U.S. 405 (2001) (distinguishing the earlier case as involving a more comprehensive regulatory scheme). Justice Breyer dissented in *United Foods* to the creation of "a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect." *United Foods, Inc.*, 533 U.S. at 425 (Breyer, J. dissenting). The Court's amenability to First Amendment challenges to economic regulation in the commercial speech context was further evident in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down Massachusetts restrictions on tobacco advertising on the grounds that they did more than what was necessary to effect the desired goal). By contrast, First Amendment challenges to copyright laws have been singularly unavailing. See, e.g., *Eldred v. Reno*, 239 F.3d 372 (2001) (rejecting First Amendment challenge to blanket copyright term extensions), *cert. granted*, 122 S. Ct. 1062 (U.S. Feb. 19, 2002) (No. 01-618); *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (upholding the Digital Millennium Copyright Act and finding that although computer code was entitled to some First Amendment protection as speech, it was entitled to less protection than other forms of speech, such as novels).

18. Frederick Schauer has called the increasing frequency with which plaintiffs wield the First Amendment to avoid economic regulation as "First Amendment opportunism." He traces this back to the leading commercial speech case, *Va. Citizens Consumer Council v. Va. Bd. of Pharmacy*, 425 U.S. 748 (1976), which struck down a

tion¹⁹ are enlarging the set of communications industry activities that receive the most vigorous First Amendment protections.

A. *Technological Proliferation*

American media law has long afforded different levels of First Amendment protection to different media. As a result, the government was able to regulate speech more pervasively where there was less protection.²⁰ In particular, the government has been free to apply some kinds of content controls to the broadcast medium on the grounds that broadcast spectrum is a scarce pub-

state law prohibiting the advertising of pharmaceutical prices – a restriction that would previously have been seen as a restriction on economic liberty, not on free speech rights. See Frederick Schauer, *First Amendment Opportunism*, HARVARD KENNEDY SCHOOL OF GOVERNMENT FACULTY RESEARCH WORKING PAPER SERIES 00-011, at 5 (2000) (draft manuscript), at http://www.ksg.harvard.edu/research/working_papers/index.htm; see also Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1023 (1997) (arguing that the *Turner II* ruling will “inspire First Amendment challenges to all manner of economic restrictions on media.”); see generally Steve Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994).

19. The term technological convergence refers to the increasing ability of one technology, like cable television, to perform functions previously associated with other technologies, like data or voice conversations. The product of technological convergence may be industrial convergence, as previously distinct sectors like the online services sector (e.g., AOL) and the cable television sector (e.g., Time Warner) merge. See, e.g., Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 981 (1997); see also Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 528 (2000) (noting that technological convergence may be a stage, for instance, “in which television programming can be provided via the Internet, over telephone lines, or both; a television, or one kind of television, may itself be a simple computer monitor, connected to various programming sources from which viewers may make selections”). Predictions of the kind of convergence we are now seeing between computers, televisions, and telephones was forecast in the early 1980’s. See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 23 (1983) (“A single physical means—be it wires, cables, or airwaves—may carry services that in the past were provided in separate ways. Conversely, a service that was provided in the past by any one medium—be it broadcasting, the press, or telephony—can now be provided in several different physical ways.”).

20. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (“The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (“differences in the characteristics of new media justify differences in the first amendment standards applied to them.”) (citation omitted); *Action for Children’s Television v. FCC*, 58 F.3d 654, 668-69 (D.C. Cir. 1995) (holding that, for First Amendment purposes, broadcast television and radio are distinct from other media because the rights of viewers and listeners, not of broadcasters, are of principal importance); see generally Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 967 (1998) (“The Court long has been in the habit of saying that each medium of mass expression raises particular First Amendment problems.”).

lic resource.²¹ Thus, broadcasting, and to a lesser extent other electronic media,²² have been subject to a greater number of rules that regulate speech.²³

Ithiel de Sola Pool famously bemoaned the application of differing First Amendment standards to different media and the failure of the courts to honor fully the free speech rights of the

21. The Supreme Court has approved the application of content regulations to broadcasting that it would not countenance for print media. Because “the radio spectrum simply is not large enough to accommodate everybody”, *NBC v. United States*, 319 U.S. 190, 213 (1943), a broadcaster may be required “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.” *Red Lion*, 395 U.S. at 389 (upholding the fairness doctrine, which required a broadcaster to supply free airtime for a reply to a personal attack). *Compare with* *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a right of reply rule in the print newspaper context). *See also* *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 117-18 (1973) (“A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper.”).

22. Both cable and DBS, for example, are subject to access requirements. *See, e.g.*, 47 U.S.C. § 335(b) (2000) (DBS set aside “for noncommercial programming of an educational or informational nature”); 47 U.S.C. § 531 (2000) (cable channels set aside for public, educational, or governmental purposes); 47 U.S.C. § 532(b) (2000) (cable commercial leased access channels). Cable does not use spectrum, but the FCC has regulated it as an offshoot of broadcasting, *see* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (noting that previous holding “sustained the Commission’s authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting”) (discussing the Court’s holding in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972)), and has carried over into cable some of the policies that are justified by spectrum scarcity. In addition, cable regulation has been rooted in is the competition law notion that cable is a gatekeeper to content in its local markets. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647-54 (1994) (“*Turner I*”) (discussing purpose of cable regulation). DBS does use spectrum, but looks more like cable than broadcasting because it is a subscription service. Regulation of DBS has been a hybrid of broadcasting and cable regulation. *See* DBS “Must-Carry” *infra* Part III.A.2.

23. *See, e.g.*, 47 C.F.R. § 73.671 (2001) (broadcasters must air at least 3 hours a week of defined children’s programming); 47 C.F.R. § 73.3526(e)(11) (2001) (broadcasters must maintain publicly accessible files containing lists of programs that they have aired addressing community issues); 47 C.F.R. §§ 73.1941, 73.1944 (2001) (broadcasters must provide reasonable access to federal candidates and equal opportunities to opposing candidates of all races); 18 U.S.C. § 1464 (2000) (providing civil and criminal penalties for “[w]hoever utters any obscene, indecent, or profane language by means of radio communication”); *see also* 47 C.F.R. § 73.3999 (2001) (enforcing prohibition in 18 U.S.C. § 1464); *Compare* *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978) (upholding radio and television restrictions on indecent speech because of the pervasive nature of broadcasting, the ease with which children may access broadcasts, and the scarcity of broadcast spectrum), *with* *Reno v. ACLU*, 521 U.S. 844, 883-85 (1997) (overturning the Communications Decency Act of 1996, which attempted to outlaw indecent speech on the Internet), *and* *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 766 (1996) (holding that there was no evidence of a compelling need to protect children from exposure to offensive material on cable television’s leased access channels).

electronic media.²⁴ Many have echoed Pool's criticisms of mass media regulation, pointing to the proliferation of new technologies.²⁵ There is broad consensus among scholars and policymakers that the growth of communications outlets, notwithstanding the heavy consolidation among them, has extinguished the rationale for a distinction between the print and electronic media for First Amendment purposes.²⁶ It is therefore widely expected

24. POOL, *supra* note 19, at 26-27.

25. See, e.g., Thomas G. Krattenmaker & L.A. Powe Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1719, 1721-24 (1995) (arguing that distinct categories of First Amendment treatment are no longer appropriate). Professors Monroe Price and John Duffy have identified Justice Breyer's hesitancy to categorize technologies for First Amendment purposes because change outpaces the ability to categorize correctly. See Price & Duffy, *supra* note 19. Justices Thomas, Scalia, Rehnquist and Souter at least seem to share a dislike for medium-based First Amendment jurisprudence. See *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 774-78, 812-38 (Souter, J., concurring; Thomas, J., concurring in part and dissenting in part).

26. See, e.g., THOMAS G. KRATENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING, 204-19 (1994); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 138 (1990); Robert Corn-Revere, *Rationales and Rationalizations—Chapter 1: Red Lion and the Culture of Regulation*, 5 COMM.LAW CONCEPTUS 173, 179 (1997); see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (criticizing the assertion that broadcast frequencies are in fact scarce, much less that scarcity justifies reduced First Amendment protection, and arguing that the apparent scarcity is a function of a discretionary licensing regime). The FCC itself has asked the Court to deprive it of the ability to regulate under this theory. See *Complaint of Syracuse Peace Council, Memorandum Opinion and Order*, 2 F.C.C.R. 5043, 5057-58 (1987), *aff'd sub nom.* *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (repealing the fairness doctrine); see also *Repeal or Modification of the Personal Attack and Political Editorial Rules, Order and Request to Update Record*, 15 F.C.C.R. 19973 (2000) (Powell, Comm'r, dissenting) (arguing that the "new economy" renders broadcast regulation designed to increase diversity of voices obsolete), *vacated by Radio—Television News Dirs. Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). And at least four Supreme Court Justices have opined that the scarcity rationale is dead. See *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 233 (1997) ("*Turner II*") ("It is undisputed that the broadcast stations protected by must-carry are the "marginal" stations within a given market . . . the record on remand reveals that any broader threat to the broadcast system was entirely mythical."); see also *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 813 (Thomas, J., concurring in part and dissenting in part) (noting First Amendment distinctions among the media have been "dubious from their infancy"); *Action for Children's Television v. FCC*, 58 F.3d 654, 672-75 (D.C. Cir. 1995) (Edwards, C.J., dissenting) (criticizing *Red Lion's* scarcity rationale). However, the Court of Appeals for the District of Columbia Circuit recently upheld the scarcity rationale and extended it to another context—the scarcity of orbital slots available to DBS operators. See *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 973-77 (D.C. Cir. 1996). Charles Logan provides an excellent history of the scarcity rationale and proposes an alternative public forum basis for broadcast regulation. See Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997). A particularly interesting criticism of the scarcity rationale is that even if there were a reason to distinguish radio spectrum from other scarce resources (like printing presses),

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that the Supreme Court will cease to distinguish between broadcast and other media regulation.²⁷

If and when this happens, much of the public interest regulation of the electronic media would disappear.²⁸ Today, notwithstanding the persistence of heterogeneous First Amendment standards for communications industries, the repeal or dilution of ownership restrictions on the number of television stations a broadcast network may own is imminent.²⁹ Restrictions on the

most forms of mass media communication, not just broadcasting, use spectrum. See Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 285-95 (1994). Newspapers, for example, use spectrum licenses to transmit their copy from their newsrooms to their presses.

27. The argument for harmonizing all media regulation depends on the substitutability of one medium for another. In the FCC's annual report on the status of competition in the market for the delivery of video programming, mandated by the 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. §548(g) (2000), the agency ponders whether or not the "one-to-one" audio and video webcasting media are effective substitutes for the increasingly consolidated "one-to-many" electronic media. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report*, 17 F.C.C.R. 1244 (2002). Substitutability in this sense is usually viewed as a matter of penetration, rather than format or viewer experience. The same is true when the FCC assesses media diversity in considering the repeal or change of media ownership rules. After the important copyright case, *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001) (holding that reproduction of newspaper content in electronic form is not a revision of the periodicals under copyright law 17 U.S.C. § 201(c) because the content appeared in an altered context), differences in format may be legally significant under copyright law to the extent that the user of the digital medium experiences the content differently in the new format. If this emphasis on the viewer's experience, rather than on the content, prevails in the communications area, interactive and passive (if any) electronic media might not be deemed substitutable, thereby leaving open the possibility of differential regulation.

28. The Court may never face the question since the FCC and Congress have done away with most broadcasting content controls, notwithstanding the latitude provided by the scarcity rationale to regulate broadcasting. Those controls that remain sting only rarely and mostly symbolically. Enforcement of the indecency regulations, for example, is extremely rare. See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*, 16 F.C.C.R. 7999 (2001) (reviewing enforcement actions and process). A day spent listening to the radio or watching television will convince anyone that broadcasters are not discernibly chilled by these regulations from airing expression that is very close to the line. See Robinson, *supra* note 20; Logan, *supra* note 26.

29. An appeals court has ruled that the FCC's retention of the rule limiting network ownership of local broadcast stations to no more than the number of stations that can reach 35% of the nation's audience was arbitrary and capricious, and remanded the rule to the FCC for further justification. The court rejected, however, the networks' argument that the cap was unconstitutional. *Fox TV Stations Inc. v. FCC*, 280 F.3d 1027 (2002). The FCC has now initiated a proceeding that is likely to result in sweeping changes to broadcast ownership rules. See Third Biennial Review of Broad. Ownership Rules, *Notice of Proposed Rulemaking*, 2002 FCC LEXIS 4671 (Sept. 12, 2002).

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ability of a cable system to own television stations in its local areas have already been removed,³⁰ and permission to own both television stations and a newspaper in a local area is probably close at hand.³¹

B. Technological Convergence

The second feature of communications law that has supported speech-burdening regulation is the formerly bright line, based largely on tradition rather than function, between carriers and speakers.³² That carriers were expected to engage in nondiscriminatory carriage of expression, and not themselves to engage in expressive activities, was a bedrock principle of communications law.³³ The tradition of common carrier regulation “constrained [courts] to turn a deaf ear” to common carriers’ First Amendment challenges to regulations that restricted communication.³⁴ The convergence of technologies dissolves the once rigid

30. *Fox TV Stations Inc.*, 280 F.3d at 1027.

31. The FCC now waives the rule against TV-newspaper cross-ownership to permit mergers. See, e.g., Applications of UTV of San Francisco, Inc., et al., *Memorandum Opinion and Order*, 16 F.C.C.R. 14975 (2001) (approving the application of Fox Television Stations to acquire ten television stations held by Chris-Craft Industries and its subsidiaries); see also *Time Warner Entm’t Co. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000) (striking down limits on channel capacity that cable operators can assign to affiliated programmers and limits on the number of subscribers that may be served by a cable operator).

32. See, e.g., Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071 (1992).

33. The definition of a common carrier has never been particularly well crafted. The Communications Act of 1934 unhelpfully relies on the body of law developed for railroads and other transporters to define a common carrier as “any person engaged as a common carrier for hire.” 47 U.S.C. § 153(10) (2000); ZUCKMAN ET AL., *supra* note 12, at 547-48 (detailing development of Communications Act of 1934); see also 47 U.S.C. § 153(49) (2000) (including, by amendment of the Telecommunications Act of 1996, telecommunications carriers as common carriers). The common law has defined a common carrier as one that “hold[s] oneself out indiscriminately to the clientele one is suited to serve”. *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). See also *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (distinguishing between access requirements permissibly imposed on common carriers and those imposed on cable operators who enjoy journalistic freedom).

34. *United States v. W. Elec. Co.*, 846 F.2d 1422, 1431 (D.C. Cir. 1988). See also *United States v. W. Elec. Co.*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987) (“These [telephone] companies, which have never been publishers . . . cannot bootstrap their own failure to make the showing necessary for the relief of their obligations under an antitrust decree into an infringement of their First Amendment rights.”). Ithiel de Sola Pool noted that although common carriers have not benefited from First Amendment protections:

In its own way the law of common carriage protects ordinary citizens in their right to communicate. The traditional law of a free press rests on the assumption that paper, ink, and presses are in sufficient abundance that, if government simply keeps hands off, people will be able to express themselves freely. The law of common carriage rests on the opposite assumption that, in

distinction between carriers and content producers, resulting at times in the extension of speech protection to the mere transmission of speech, which historically did not raise First Amendment sensitivities. Thus, at the same time that First Amendment protections are deepening for traditional content media, First Amendment protections are broadening to operators of communications conduits that were not traditionally associated with expressive activity.

A major milestone in the extension of free speech protections came in the mid-1990's when telephone companies succeeded in First Amendment challenges to rules that kept them out of the video business and had long been viewed as valid structural regulation of monopolies.³⁵ More recently, telephone companies have prevailed in a First Amendment challenge to another rule that attempted to prevent them from using proprietary customer information to gain competitive advantage in new services.³⁶

the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate.

POOL, *supra* note 19, at 106.

35. See *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (holding that the cross-ownership ban that prohibited incumbent telephone companies from providing video was unconstitutionally over-broad under the intermediate scrutiny test), *vacated and remanded for consideration of mootness*, 516 U.S. 415 (1996). The Telecommunications Act of 1996 repealed the ban on telephone company provision of video. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (repealing 47 U.S.C. § 533(b)). For a discussion of common carriers' First Amendment arguments, see Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281 (1998) and Robinson, *supra* note 18. Both authors are critical of the application of heightened First Amendment scrutiny to structural, line-of-business separation requirements that have long characterized telephone regulation in the U.S., both before and after the 1984 AT&T breakup. Justice Breyer has implied that the constitutionalization of telecommunications structural regulation revives *Lochner* through the First Amendment. See Respondents' Oral Argument, 1995 U.S. TRANS LEXIS 107 at *30 (Dec. 6, 1995) and *United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415 (1996), where Justice Breyer commented:

Is suddenly this whole big economic area going to be turned over to courts? Because we're going to retreat from giving Congress quite a lot of discretion when it tries to deal with the structure of industries, and we're going to use the First Amendment - other people in history have used other amendments to sort of go into economic regulation in great depth.

See also *United States et al. v. United Foods, Inc.*, 121 S.Ct. 2334, 2348 (2001) ("I do not believe the First Amendment seeks to limit the Government's economic regulatory choices . . . any more than does the Due Process Clause.") (Breyer, J., dissenting) (citation omitted).

36. *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (holding that FCC rule against use of customer proprietary network information did not satisfy the test articulated in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) for restrictions on commercial speech).

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Basic common-carrier type access regulation is also increasingly suspect under the First Amendment. A Florida district court recently held that a local franchise authority violated cable systems' free speech rights by requiring proprietary systems to open their facilities to competing online services, even though incumbent telephone companies have such interconnection duties.³⁷ The question of what kinds of access requirements the government can legitimately place on proprietary networks, such as cable modem services³⁸ or interactive television services,³⁹ will almost certainly be debated in First Amendment terms at the FCC.

On the horizon is the question of whether the FCC or Congress can adopt rules that curtail the power of electronic television program guide providers to favor the programming of jointly owned or affiliated services by requiring the display of unaffili-

37. See *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000). This decision has been criticized by Professors Mark Lemley and Larry Lessig, who argue persuasively that the mere transmission of third-party content, without the process of selection or editorial control, is not activity that should receive heightened First Amendment protection. See Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 955 n.79 (2001); see also Harold Feld, *Whose Line is it Anyway? The First Amendment and Cables Open Access*, 8 COMM. L. CONSPECTUS 23 (2000) (criticizing idea that owners of cable lines have First Amendment right to control ISP choice over those lines). Another court, considering the same issue, avoided First Amendment issues by concluding that the access requirements would not result in the association of the carried speech with the cable company. *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1149, 1154 (D. Or. 1999), *rev'd on other grounds* 216 F.3d 871 (9th Cir. 2000); *accord MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001). Strikingly, the Florida open access decision invalidates access requirements where the cable operator is essentially acting as a passive carrier (in the case of the cable modem service) even though cable systems acting more like editors (in the case of cable video service) must provide access channels for public, governmental and other uses. See *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 973 (D.C. Cir. 1996) (rejecting facial challenge to 47 U.S.C. 531(b), which authorizes local franchising authorities to designate channels for "public, educational, or governmental use"). The cable industry's claims that it is not technically feasible to satisfy cable modem open access requirements help to explain the Florida decision, although it now appears that at least relatively open access is feasible. See *America Online, Inc. and Time Warner Inc.*, 65 Fed. Reg. 79861 (FTC, Dec. 20, 2000) (proposed consent agreement) (imposing some degree of open access on AOL Time Warner as a merger condition).

38. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Judgment and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002) (concluding that cable modem service is an information service, rather than a telecommunications or cable service, and seeking comment on how much service should be regulated).

39. See *Nondiscrimination in the Distribution of Interactive Television Services Over Cable, Notice of Inquiry*, 16 F.C.C.R. 7718 (2001).

ated programming in a nondiscriminatory fashion.⁴⁰ Consideration of these access questions will include claims of reduced and forced speech. Thus, as telecommunications transport and media content converge, exacting First Amendment scrutiny could well extend to previously regulated activities such as interconnection or data transmission.

C. *Government in a Bind*

Even where speech-affecting media regulations have been upheld, the government faces high evidentiary burdens when these regulations are designed to combat a speculative harm. This was the lesson of *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (Turner II), in which the Court upheld the statutory requirement that cable systems retransmit local broadcast signals. The *Turner* litigation suggests that the courts will not be particularly deferential to legislators or regulators that impose speech burdens, even content-neutral ones, in the pursuit of media diversity or other policy goals. When legislating or regulating prospectively, the government must have a well-developed factual record that can withstand the claim that new technology or marketplace developments will address the government's fear in the absence of intervention.⁴¹

With the growing prominence of First Amendment defenses to communications regulation and the difficulty in regulating prospectively, government will have two choices: to abandon communications policies that tread on expressive activities⁴² or

40. There already are such nondiscrimination rules for "open video systems"—a category of service that was designed to allow the telephone companies to provide video services. The electronic program guide nondiscrimination rules were thus adopted without First Amendment challenges as a species of common carrier regulation, even though they interfere with a carrier's promotion through the guide of its affiliated content. See 47 C.F.R. § 76.1512 (2001).

41. For an interesting proposal of the types of evidentiary burdens the government should face, see Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281 (2000) (arguing that there should be a presumption against legislation that is based on predictive harms where First Amendment principles are at stake).

42. As Professor Yochai Benkler has shown, most communications policies—even those that ostensibly have little to do with expressive activity such as the allocation and licensing of spectrum—directly impact speech. See Benkler, *supra* note 26. The FCC is attempting to reduce its involvement in both the regulation of spectrum, see, e.g., Service Rules for the 746-764 and 776-794 MHz Bands, *Second Report and Order*, 15 F.C.C.R. 5299 (2000) (creating "guard band manager" licensees in the 700 MHz band who will engage in the business of subdividing the spectrum they acquire at auction and leasing it to third parties), *aff'd on recon.*, 16 F.C.C.R. 21633 (2001) (granting flexibility to facilitate voluntary clearing of incumbent broadcasters in the 700 MHz band), and of equipment, see, e.g., Amendment of Part 15 of the Commission's Rules Regarding Spread Spectrum Devices, *First Report and*

to achieve those policy goals in ways that are subject to reduced First Amendment scrutiny. In this regard, it is possible that an increased sensitivity to First Amendment issues combined with general deregulatory tendencies, could end the regulatory urge. It is more likely, however, that the impulse to regulate the media, particularly to promote voices that do not fare well in the marketplace or to influence the structure of media ownership and access, will persist notwithstanding the changes in First Amendment doctrine.⁴³ Accordingly, innovative approaches to public interest regulation will be necessary, not only for government initiatives in the content area, but also for attempts to preserve competition and access in the midst of consolidation and vertical integration.⁴⁴

D. SHVIA Responds to First Amendment Trends

SHVIA, which is discussed in greater detail in Section III, is one example of the type of innovative legislation necessary to withstand scrutiny in the current First Amendment environment. With the repeal of cable rate regulation in the Telecommunications Act of 1996,⁴⁵ it became important government policy to promote multichannel video service alternatives to cable. In 1999, Congress passed SHVIA to help the burgeoning DBS industry to compete with cable by facilitating DBS operators' provision of local broadcast signals, something DBS provid-

Order, 15 F.C.C.R. 16244 (2000) (allowing frequency hopping spread spectrum technologies to operate on an unlicensed basis under Part 15 of the FCC's rules to allow for the development of innovative wireless devices).

43. Indeed, some scholars, notably Professor Cass Sunstein, support a resurgence of government involvement in the media content business through the use of incentives rather than regulation. For example, he has suggested using "points" in the auctioning of spectrum for preferred licensees and subsidizing the production of high-quality programming for public broadcasting. Cass R. Sunstein, *Emerging Media Technology and the First Amendment: The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995); see also Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499 (2000). Former FCC Chairman Reed Hundt supported Professor Sunstein's ideas. See, e.g., The Repeal or Modification of the Personal Attack and Political Editorial Rules, *Statement of Chairman Reed E. Hundt*, 1997 FCC LEXIS 4225 (Aug. 11, 1997) ("Many, such as Professor Cass Sunstein, argue that the values embodied in the First Amendment should be furthered through content-specific, through viewpoint-neutral, rules."). But cf. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 64-67 (2000) (criticizing Sunstein's arguments for expanding viewpoint diversity through government action).

44. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 16 F.C.C.R. 6005, 6078-80 (2001); *Cross-Ownership NPRM*, *supra* note 16, at ¶ 13 (discussing concentration of media outlets).

45. Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

ers had not done before. SHVIA made the retransmission of local broadcast signals significantly easier and cheaper by giving DBS operators a benefit that cable had enjoyed since 1976. This was a compulsory copyright license to retransmit local broadcast signals free of charge and without burdensome copyright negotiations.

To harmonize the regulatory regimes for cable and DBS, particularly as they relate to the carriage of local broadcast signals, Congress had to find some way to ensure that DBS operators, like cable, would carry the more marginal local broadcast stations along with the most popular network affiliates. Cable carriage of all local broadcast stations, Congress found when it legislated cable “must-carry,” was necessary to further the goal of media diversity, particularly for the sizeable minority of Americans that do not subscribe to cable. Non-carriage of local broadcast stations, Congress thought, would deprive those stations of sufficient audience penetration to survive as a free, over-the-air mass medium.⁴⁶ With the growing market share of DBS, and the hope that DBS would rival cable in most markets, Congress had the same concerns about the non-carriage of local broadcast signals on DBS. But when it came to DBS, Congress did not impose must-carry rules as it had with cable. Instead, it tied the obligation to carry local broadcast signals to a DBS operator’s decision to avail itself of the compulsory copyright license in a given market. In effect, Congress offered to relieve DBS operators of otherwise applicable copyright liability for the unauthorized retransmission of local broadcast signals in any market if the DBS operators agreed to retransmit all local signals in such market.

In important respects, this exemption from ordinary copyright law is a form of federal subsidy designed to put DBS “speakers” on a competitive par with cable, while at the same time preserving the broadcast television medium for those who do not subscribe to DBS or cable. By manipulating copyright law, the federal government offered to relieve DBS operators of the arduous and expensive process of clearing copyrights from hundreds of copyright owners whose works are included in a television broadcast signal. The condition of the offer was that those operators who took advantage of this royalty-free compulsory copyright license had to use the license to retransmit all local signals in a given market.⁴⁷

46. See discussion *infra* at III.A.1.

47. See 17 U.S.C. §§ 119(a), 122 (2000). Congress has also recently conditioned its subsidy of schools’ and libraries’ telecommunications infrastructure, under the

In the next section, I will outline how the use of government subsidies, like the grant of a compulsory copyright license, provides government with a tool to shape information policy in ways it might not be able to do by regulatory force. Then, in Section III, I will return to SHVIA to assess the First Amendment impact of this novel use of a copyright entitlement.

II. THE SUBSIDIZED SPEECH DOCTRINE

The First Amendment review of regulations is characterized by a categorical rigidity that does not exist when the courts are assessing subsidies. In the regulatory context, the courts first determine how closely they will scrutinize a regulation. Judgment flows from the determination as to whether the regulation implicates the First Amendment to a high degree (because it, is content-based),⁴⁸ to a lesser degree (because it, is content-neutral),⁴⁹ or not at all (because the law addresses conduct or speech that is not constitutionally protected).⁵⁰ By contrast, where the government has offered a benefit, conditioned on the relinquishment of protected speech rights, the First Amendment analysis is fairly amorphous. The courts do not categorize speech subsidies, subjecting different conditions to different levels of scrutiny, but ask generally whether the conditions on the speech benefits unconstitutionally coerce a beneficiary to surrender protected

Schools and Libraries Discount or E-rate program, on the use of technology that filters or blocks material that is obscene, child pornography, or harmful to minors. *See* Children's Internet Prot. Act, 20 U.S.C. §§ 6301 note, 7001, 9134 (2000), 47 U.S.C. §§ 254, 609 note, 902 note (2000). A district court recently held that this statute violated the First Amendment. *See* Am. Library Assoc. v. United States, 201 F. Supp. 2d 401 (E.D.P.A. 2002), U.S. S. Ct. appeal filed, 71 USLW 3177 (Sept. 6, 2002) (No. 02-361).

48. The consideration of content as the most salient First Amendment characteristic can be traced to *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("[O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.") *See generally* DANIEL A. FARBER, *THE FIRST AMENDMENT* 21 (1998). Content-based speech restrictions violate the First Amendment absent a compelling government interest furthered by the restrictions and narrow tailoring. *See also* *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic").

49. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (finding that injunction against activities of abortion protesters was not directed at content of speech and therefore was valid).

50. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (finding that obscenity was beyond constitutional protection); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (noting that cases involving defamation, obscenity, incitement to crime, and fighting words have upheld regulation because of "constitutionally proscribable content").

speech rights.⁵¹ Ostensibly, as discussed below, the determinative factor has been whether the speaker has been coerced into saying something that would not have been said, but for the subsidy program.

The delineation of when speech has been coerced in the context of a government benefit program is the “subsidized speech doctrine”—an offshoot of the confused unconstitutional conditions “doctrine.”⁵² Even as compared with other applications of unconstitutional conditions theories, the subsidized speech doctrine presents an unsatisfying resolution of the difficult question of when government can encourage what it cannot require. At the outset, there is no predicting when a court, faced with what might be considered a complaint about the terms of a government speech subsidy, will apply the subsidized speech doctrine at all, or stick with classic First Amendment doctrine.⁵³ Furthermore, when the subsidized speech doctrine is applied, it is done

51. Another way to frame the question is whether the government has more latitude to achieve as patron what it could not as sovereign. Justice Souter proposes a further distinction between government as patron and government as speaker and buyer. When government speaks (as in a no-smoking campaign) or buys (as in art for government buildings), he believes it should be permitted to decide what is said. But when government merely sponsors others to speak, it should remain neutral as to what is said. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 610-11 (1998) (Souter, J., dissenting); see also Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151 (1996) (one way to look at the subsidized speech cases is to distinguish “managerial domains” in which the government is implementing governmental policy to attain institutional ends and public discourse in which the government is a market participant in the open speech market). In several recent cases in other contexts, courts have made the same distinction between government as market participant and as regulator, telling the government that when it plays in the market, it is subject to the rules of the market. See, e.g., *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996) (government liable for damages if U.S. reneges on earlier bargain as a result of a subsequent change in law); *Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1202 (2002) (government acts as a creditor, not regulator, when communications licensee defaults on installment payments due to government for spectrum auction).

52. See generally Louis Michael Seidman, *Reflections on Context and Constitution*, 73 *MINN. L. REV.* 73, 75 (1988) (noting the “wildly inconsistent results” of unconstitutional conditions cases).

53. The unconstitutional conditions doctrine is variously invoked or ignored in any given case involving conditions on a government subsidy. See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *HARV. L. REV.* 84, 102-04 (1998); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 *MINN. L. REV.* 543, 549 n.19 (1996); Richard A. Epstein, *Forward: The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *HARV. L. REV.* 4, 10-11 (1988) (the unconstitutional conditions doctrine “roams about constitutional law like Banquo’s ghost, invoked in some cases, but not in others.”).

so without the multi-factored test that has been developed in other areas of unconstitutional conditions doctrine.⁵⁴

In fact, in the subsidized speech context, the word “doctrine” is used only for ease of reference to the decisions, which reflect sharply divergent views. At one end of the spectrum is the view that government has nearly unfettered freedom to tailor a speech-related benefit in ways that touch on protected speech rights since it has the power to deny the benefit in the first place.⁵⁵ At the other end of the spectrum is the view that government may not burden speech indirectly where direct regulation would be impermissible.⁵⁶ Between these poles lies the approach the Court has ostensibly adopted, which is that government subsidies will be upheld unless the funding scheme is “‘manipulated’ to have a ‘coercive effect’” on beneficiaries of the subsidy.⁵⁷ Of course, important issues emerge in the articulation of what it means to be manipulated or coerced.

Distinguishing between the constitutionally permissible tailoring of a governmental benefit and the impermissible application of pressure on a beneficiary to relinquish protected rights is, what one scholar has termed, the “true Okefanokee of constitu-

54. The Court has articulated four limitations on the federal government’s use of its spending power to induce behavior on the part of states that it could not compel. The exercise of the spending power must be in pursuit of the “general welfare.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (holding that federal statute conditioning grant of federal highway funds to states on states’ adoption of minimum drinking age does not violate Tenth Amendment). Congress must condition receipt of the federal funds “unambiguously . . . [so that the recipients may] exercise their choice knowingly, cognizant of the consequences of their participation.” *Id.* The conditions on federal grants must be related “to the federal interest in particular national projects or programs.” *Id.* Finally, Congress cannot induce states “to engage in activities that would themselves be unconstitutional.” *Id.* at 210.

55. The principle that the greater power to deny a benefit altogether includes the lesser power to deny a benefit for speech-related reasons is famously articulated by Justice Holmes: a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (1892). Although the Court ostensibly abandoned the greater–includes–the–lesser principle, in fact, at least Justices Rehnquist, Scalia and Thomas continue to invoke the principle to approve government conditions on speech benefits. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (Rehnquist, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 174 (1991); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (Scalia, J., dissenting). In other contexts, Justice Scalia has rejected the greater–includes–the–lesser principle. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), in which Justice Scalia embraced the position that the state’s greater right to prohibit “fighting words” did not include the lesser right to prohibit fighting words that constitute hate speech.

56. *See Finley*, 524 U.S. at 610-11 (Souter, J., dissenting).

57. *Id.* at 587 (quoting *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

tional law.”⁵⁸ These cases have turned on such considerations as whether the government is funding its own speech (conditions allowed) or private speech (conditions invalidated), on whether the beneficiaries may avoid the restrictions with private funds (conditions allowed) or are bound by the restrictions once they accept the benefit (conditions invalidated), on whether the speech-related criterion for award of a benefit is simply one of many flexibly applied criteria (conditions allowed), on whether the subsidy supports expression in a public forum (conditions not allowed), and on whether the subsidy is used to distort an institution’s traditional function (conditions not allowed).

Considerable criticism has been leveled at the subsidized speech cases, most often on the grounds that the unconstitutional conditions doctrine permits government control over expressive activities that would not be permitted in the absence of a government subsidy.⁵⁹ While scholars have proposed a number of theories upon which to build a more coherent subsidized

58. Robinson, *supra* note 18, at 921. For instance: the government may prohibit lobbying as a condition of tax exemptions, but it may not prohibit public broadcasters from editorializing as a condition of federal funding. Compare *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (“*TWR*”), with *League of Women Voters*, 468 U.S. at 364. Likewise, the government may condition the funding of artists and of family planning clinics on the expression of particular viewpoints, but it may not so condition the funding of legal services or the funding of specialized university-supported journals. Compare *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *Rust*, 500 U.S. at 173, with *Velazquez*, 531 U.S. at 533, and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). See generally Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289 (1980). Some scholars have resisted the whole notion of an unconstitutional conditions “doctrine” as such and suggest that the propriety of a government bargain depends on both the governmental and constitutional interest in any given case. The best exposition of this view is in Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990) (recommending that courts examine whether government has constitutionally sufficient justification for interfering with a protected right) and Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337 (1989) (proposing that test ought to be whether condition imposes “constitutionally troublesome” burden). Professor Steven Shiffrin has taken a similar approach within the subsidized speech context in advocating that courts approach speech subsidies using an “eclectic” balancing of interests. See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 609 (1980) (“The variety of human communicative situations is sufficiently complex and involves enough variables that approaches at high levels of abstraction are of limited assistance.”).

59. See, e.g., David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 683-97 (1992); Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119 (1999); Post, *supra* note 51, at 151; see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (dealing with unconstitutional conditions generally). Another perspective is offered by Ep-

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speech doctrine,⁶⁰ the Court has so far ignored these proposals and abstained from identifying any single theory of the First Amendment that would make sense of the extremely factually contingent subsidized speech decisions.⁶¹ To the extent that the Court has gravitated, at least in its rhetoric, to any theory, it is that the First Amendment's primary purpose is to preserve speaker autonomy.

Subsection A below examines the Court's preoccupation with coercion, identifying certain limitations the Court has imposed on the government's ability to design speech subsidies. Subsection B provides a critique of the use of coercion and an alternative explanation for the confused subsidized speech cases.

A. *Speaker Coercion*

The Court in its 1987 decision, *Regan v. Taxation with Representation ("TWR")*, announced a simple and startlingly confident position on the government's freedom to define the contours of its speech subsidies: "a legislator's decision not to subsidize the exercise of a fundamental right does not infringe the right."⁶² This statement, referring to the government's decision not to subsidize the lobbying activities of non-profit organizations through the tax relief provided for other non-profit activities, draws on the concept that the greater power includes the lesser.

stein, *supra* note 53 (the unconstitutional conditions doctrine should be a check only against monopoly, collective action problems and externalities).

60. See, e.g., Cole, *supra* note 59 (measure constitutionality with reference to listener effects); Heyman, *supra* note 59 (measure constitutionality by reflecting on community purposes and respect for persons); Schauer, *supra* note 53 (measure constitutionality by taking into account the type of institution that is subsidized); Post, *supra* note 51 (measure constitutionality by whether the government is acting as manager or patron); Sullivan, *supra* note 59 (measure constitutionality with respect to effect on distributive justice); Kreimer, *supra* note 59 (measure constitutionality against baselines of history, equality and prediction); Mitchell Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) (measure constitutionality using combinations of coercion test (grounded in normative discourse relevant to particular area of the law) and purpose and germaneness tests).

61. The disconnect between First Amendment decisions and the underlying theories of the First Amendment and conceptions of First Amendment values is a problem throughout contemporary First Amendment doctrine. See, e.g., Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249-50 (1995) ("Although the pattern of the Court's recent First Amendment decisions may well be (roughly) defensible, contemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech.").

62. *TWR*, 461 U.S. at 549; see also *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

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Since the government may choose to refrain from subsidizing non-profit activities entirely, it may also choose to subsidize such activities selectively. A basic assumption is that the beneficiary of government largesse is entirely free to accept or reject a government benefit along with the conditions attached to it. Therefore, by choosing to accept the benefit, the speaker is not coerced into abandoning a constitutional right. As Justice Cardozo, evaluating the impact of a tax benefit upon a beneficiary, wrote:

[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.⁶³

The notion that government is absolutely free to give benefits so long as the recipient has no claim upon them, and is free to reject them, is applied in varying degrees depending on the case. The Court has noted that the freedom to accept or reject a benefit may be illusory. The beneficiary might in fact be “given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.”⁶⁴ The task in subsidized speech cases is to determine when a real choice exists and when it does not.

The Court has identified, more or less, six limitations on the wide discretion *TWR* granted the government to define its benefits. Four of these limitations—and all of those that have been decisive—rely heavily on an assessment of how the speech benefit affects the speaker to distinguish between a non-subsidy and

63. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937). Kathleen Sullivan convincingly argues that the Court lacks a coherent account of the point at which temptation or deprivation becomes coercion. *See Sullivan, supra* note 59, at 1427-55.

64. *Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) (striking down a state's attempt to condition the use of highways on a private carrier's acceptance of common carrier liability—a requirement that could not have been imposed directly under pre-*Lochner* notions of substantive due process). *See also Sherbert v. Verner*, 374 U.S. 398 (1963) (invalidating under free exercise clause denial of state unemployment benefits for unemployment ensuing from refusal to work on Sabbath on grounds that condition on benefit forced choice between working under intolerable burden or forfeiting benefits); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”).

a penalty.⁶⁵ In keeping with an autonomy-maximizing approach to the First Amendment,⁶⁶ the Court looks for some measure of coercion⁶⁷ to determine whether the speaker is alienated from her own expression by accepting the government's conditions on its speech benefits.

1. "No Alternatives" Limitation

Rust v. Sullivan, which upheld regulations that prohibited doctors from using Title X federal funds to discuss abortion, most cogently stated the extent of the government's power to influence speech through subsidies.⁶⁸ *Rust* adopted the greater includes

65. The distinction between a penalty and a non-subsidy shares many of the problems of the distinction between a right and a privilege—a distinction long lambasted as an illusion. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); see also *Elrod v. Burns*, 427 U.S. 347, 360-61 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 644 (1973); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). Whether or not a non-subsidy is a penalty depends, as Professor Cass Sunstein has noted, on the relationship between government power and the activity that is or is not supported. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990). Whether a non-subsidy is a penalty depends, as Professors Seth Kreimer and Richard Epstein have noted, on the baseline against which we measure whether the government's support is a gratuitous benefit or its non-support an impermissible threat. See Kreimer, *supra* note 59, at 1352-59 and Epstein, *supra* note 53, at 13. At least one scholar, Professor Michael McConnell, accepts the distinction between non-subsidies and penalties relatively uncritically, identifying non-subsidy cases as those in which the speaker, by forfeiting the benefit, need only pay the costs of exercising the speech right and penalty cases, in which the speaker loses much more. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1013-15 (1991); see also Lynn Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) (making a similar distinction in the federalism context between regulatory spending and reimbursement spending). Perhaps more than any other case, *Lyng v. Int'l Union*, 485 U.S. 360 (1988), undermines McConnell's distinction. There, the Court held that the government's denial of food stamps to striking workers was a constitutional expression of Congress's choice not to subsidize strikers. In this case, forgoing food stamps in order to strike imposed a cost greater than simply the cost of exercising the constitutional right to strike. As discussed below, the debate over what constitutes a benefit rages in the federalism context and is far from settled. See, *infra*, notes 195, 203-204.

66. See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6768 (1989); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 1440 (1989).

67. One might expect the Court to use a theory of coercion to determine whether or not what seemed like an optional government program was really not optional at all as a practical matter. For example, in the context of arts funding, the Court might consider empirical evidence about what other funding sources were available and whether the government program was simply one of many alternatives a beneficiary might have. This is not the way coercion has figured in the cases. It has not operated as a tool to distinguish subsidies from regulations, but as a way to evaluate the impact on the beneficiary of what is accepted, without inquiry, as a subsidy.

68. *Rust v. Sullivan*, 500 U.S. 173, 179-80 (1991).

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the lesser concept by holding that the “[g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program.”⁶⁹ The Court did not admit that Title X discriminated among viewpoints, even if such discrimination is permissible in the context of a government-funded program. Rather, by employing semantic legerdemain, it went so far as to say that when it funds specific messages selectively, “the [g]overnment has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”⁷⁰

The *Rust* Court went on to define three limitations on the government’s right to limit some speech in the service of promoting other speech.⁷¹ First, the government cannot leverage its subsidy to restrict speech that is outside of the federally funded program. This “no alternatives” limitation prevents the government from leaving the recipient no alternative outlet for his preferred speech. The Title X restrictions in *Rust* passed this test because they were attached to the funds, not to the recipient, leaving the doctor recipients at least theoretically free to speak about abortion outside of a Title X counseling program.⁷² Had the program not permitted the doctors to advise on abortion options on their own time and with private funds, the speech restrictions presumably would have failed this test because they would have allowed no alternatives.

The *Rust* Court traced the “no alternatives” limitation to *FCC v. League of Women Voters*, which held that the government could not use its contribution to public television stations to prevent public broadcasters from airing privately funded editorials.⁷³ Viewed more broadly, the “no alternatives” limitation

69. *Id.* at 193. For a particularly incisive critique of *Rust* and its description of unconstitutional conditions, see Cole, *supra* note 59 at 683-97.

70. *Rust*, 500 U.S. at 193.

71. Arguably, it defined more. For example, the Court also distinguished the Title X restrictions from those that deny support to a small group of citizens because of the content of their speech, as was the case, for example, with a state sales tax exemption the Court struck down because it was offered to certain specialty magazines, but not to general interest magazines. See *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987). As Professor David Cole has pointed out, this articulation of a particular class of unconstitutional conditions is not sensible since all speech-related subsidies have the effect of “singling out a disfavored group on the basis of speech content,” namely the group that does not receive the subsidy because it seeks to express a different message.” Cole, *supra* note 59, at 690.

72. See *Rust*, 500 U.S. at 198-99.

73. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984). In subsequent cases, the Court has addressed the impact of speech subsidies on private activities by redirecting its focus from the expansiveness of the condition to the nature of the

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descends from the earliest unconstitutional conditions cases, where courts used germaneness to distinguish coercive penalties from non-coercive non-subsidies. The idea is that if the government is manipulating its subsidy to exact some unrelated abdication of rights, then the subsidy is more likely to be a penalty with a “coercive effect” than a mere non-subsidy.⁷⁴ Thus, in *Speiser v. Randall*, the Court struck down a law conditioning receipt of a property tax exemption on the recipient’s pledge of loyalty.⁷⁵ In *Perry v. Sindermann*, the Court held that the state could not condition employment as a college professor on the professor’s refraining from criticizing the college in state congressional testimony.⁷⁶ If the conditions are germane to the subsidy, it is more likely that the Court will find that the conditions legitimately shape the government program by defining what is and what is not subsidized.⁷⁷

2. “Public Arena” Limitation

Warning that “funding by the government, even when coupled with the freedom of the fund recipients to speak outside the scope of the government-funded project, is [not] invariably sufficient to justify government control over the content of expression,”⁷⁸ the *Rust* Court placed a second limitation on government speech subsidies. Citing public forum and academic freedom cases, the Court stated that subsidies do not excuse government from observing the neutrality traditionally expected of it in certain settings. This “public arena” limitation was developed further in *Rosenberger v. Rector & Visitors of the University of Virginia*.⁷⁹ In that case, the Court held that when the University created a limited public forum through a general student activities fund, but then discriminated on the basis of viewpoint in re-

government program. In doing so, it recast its *Rust* holding as relying on the fact that the “counseling activities of the doctors under Title X amounted to governmental speech . . . [and that] viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or instances, like *Rust*, in which the government ‘used private speakers to transmit specific information pertaining to its own program.’” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); quoting *Rosenberger v. Rector & Visitors of the University of Va.*, 515 U.S. 819, 833 (1995)).

74. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Ragland*, 481 U.S. at 237).

75. 357 U.S. 513 (1958).

76. 408 U.S. 593 (1972).

77. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987).

78. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991).

79. 515 U.S. 833 (1995).

fusing to fund student religious groups, it violated the First Amendment rights of the students who were not funded.⁸⁰

The *Rosenberger* Court, finding that when the State is the speaker it may make content-based choices,⁸¹ agreed with *Rust's* insistence on the government's right to ensure that "[w]hen the government disburses public funds . . . to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."⁸² At the same time, it expanded on *Rust's* allusion to a public arena limitation, stating that viewpoint-based restrictions are improper when the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."⁸³

It remains to be seen whether the "public arena" limitation will be limited to situations in which the government supports a public forum *per se* or if it will be applied more generally to situations in which the government promotes a range of private speech.⁸⁴ If the former is the case, then *Rosenberger* hardly qualifies as a subsidized speech case at all. When a public forum exists, there is a constitutional right to access that forum.⁸⁵ Thus, if the "public arena" limitation on the tailoring of speech subsidies were limited to actual public fora, permission to use the forum would not be a subsidy, but a constitutional imperative. Accordingly, any limitation of this right would be by definition

80. *Id.* at 834; *See also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 217 (2000).

81. *Rosenberger v. Rector & Visitors of the University of Va.*, 515 U.S. 819, 833 (1995).

82. *Id.*

83. *Id.* at 834. *Rosenberger* also relied on the germaneness principle. When a state establishes a limited public forum for a particular purpose, it may confine the exercise of editorial discretion to that purpose. *Id.* at 829. But the "[s]tate may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Id.*

84. Justice Scalia's position—that *Rosenberger* should be limited on its facts to actual public fora, see *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., concurring) (the viewpoint discrimination in *Rosenberger* was found unconstitutional "because the government had established a limited public forum")—prevailed in *Finley* where the Court declined to require neutrality from the government in the area of arts funding. Justice Souter's position—that *Rosenberger* applies more broadly when the government funds a diversity of views, see *id.* at 613 (Souter, J., dissenting) (the "NEA, like the student activities fund in *Rosenberger*, is a subsidy scheme created to encourage expression of a diversity of views from private speakers")—prevailed in *Velazquez*, although the Court admitted that *Rosenberger* was only instructive and not controlling. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 534 (2001).

85. *See, e.g.*, Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29-30.

unconstitutional. If, however, the “public arena” limitation is not limited to public fora, it would give the Court another tool to distinguish penalties from non-subsidies where the government has no constitutional duty to support speech.⁸⁶ That is, while the government can keep its wallet shut, when it chooses to extend its largesse to a select few, it penalizes those who are excluded. For them, the deprivation of the benefit is experienced as a penalty and their desire to avoid a penalty coerces them into giving up constitutional rights.⁸⁷

3. “Core Speech” Limitation

Finally, the *Rust* Court held that speech subsidies must not be aimed at “the suppression of dangerous ideas.”⁸⁸ The rationale behind this limitation, the “core speech” limitation, is that the government must not “discriminate invidiously in its subsidies” for the purpose of silencing ideas it deems dangerous.⁸⁹ Because it found that the Title X conditions were not viewpoint

86. Professor David Cole’s articulation of a proper sphere of government neutrality builds on the “public arena” limitation. His view is that the government, even when it subsidizes speech, has a duty of neutrality in speech fora that by tradition or design host contesting views.

Whether or not the first amendment requires the state to subsidize such institutions at all, once the state chooses to do so, first amendment values dictate that the state’s subsidies be allocated in such a way as to respect the autonomy and independence of the speakers within them, in the interest of protecting both the liberal values of autonomy and the republican ideal of a forum for civic dialogue.

Cole, *supra* note 59, at 711.

87. If one is guided by the autonomy-maximizing theory of the First Amendment in examining speech subsidies, the broad reading of *Rosenberger*, which did not limit its holding to public or limited public fora, would reduce the applicability of *Rust* to conditions attached to mass media speech at least where such conditions are viewpoint specific. While it is quite clear under prevailing doctrine that even a publicly funded mass medium is not a public forum, see *Ark. Ed. Television Comm’n v. Forbes*, 523 U.S. 666 (1998), government subsidies to the electronic media are like university grants in that they are given to encourage a diversity of voices.

88. *Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

89. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (“*TWR*”) (quoting *Cammarano v. United States*, 385 U.S. 498, 513 (1959)); *see also* *Bd. of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (holding that removal of government-purchased books from school library violates First Amendment if done to suppress ideas); *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (striking down on First Amendment grounds government assistance that “is directed at, or presents the danger of suppressing, particular ideas”). The Appeals Court decision in *Velazquez* expressly relied on this rationale in its decision invalidating the LSC restrictions (“[D]ifferent types of speech enjoy different degrees of protection under the First Amendment The strongest protection of the First Amendment’s free speech guarantee goes to the right to [criticize] government or advocate change in governmental policy In our view, a lawyer’s argument to a court that a statute, rule, or governmental practice standing in the way of a client’s claim is unconstitutional or otherwise illegal falls far closer to the First Amendment’s most protected categories

discriminatory, the *Rust* Court avoided the question of whether or not a government program that suppressed speech in the area of abortion rights could be considered the suppression of a dangerous idea.⁹⁰ This is the only limitation that focuses on the type of speech that is burdened and the impact of such burdens on public discourse. It is difficult to chart the boundaries of this “core speech” limitation because the Court has never explicitly ruled on this ground. However, as Part IV below suggests, the inquiry into the quality and importance of the affected speech is not reserved for obviously dangerous ideas. Rather, furtive judgments about the perceived value of the speech burdened by federal subsidies best explain the results in the recent subsidized speech cases, even though the Court has yet to justify the invalidation of a speech subsidy on these grounds.

4. “Objective Criteria” Limitation

The two major subsidized speech cases following *Rust* added three more *desiderata* for determining the constitutionality of conditions attached to a government speech subsidy. In *National Endowment for Arts v. Finley*, the Court upheld a requirement that the NEA take into consideration general standards of “decency and respect” for Americans’ diverse beliefs and values in selecting arts grant recipients.⁹¹ The argument before the Court was that the NEA, like the university in *Rosenberger*, was sponsoring a diversity of speech and therefore was not entitled to direct the speech so funded. The Court distinguished *Finley* from *Rosenberger*, stating that, in dispensing support for the arts, “the Government does not indiscriminately ‘encourage a diversity of views from private speakers’ The NEA’s mandate is to make esthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*.”⁹² Thus, the consideration of a particular viewpoint, *i.e.* decency, in awarding grants was not constitutionally

of speech than abortion counseling or indecent art.” *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999).

90. Similarly, in *Finley*, the Court avoided the question of whether a government program that suppressed indecent speech qualified as the suppression of dangerous ideas by finding that the program was not viewpoint discriminatory. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

91. *Id.* at 587-88.

92. *Id.* at 586 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 833, 834 (1995)).

problematic because “absolute neutrality is simply ‘inconceivable.’”⁹³

Important to the Court’s decision was the fact that the decency provision was not dispositive, but was merely a factor to be taken into account.⁹⁴ Because the NEA grant makers could give whatever weight they wanted to the decency factor, the *Finley* Court determined that the statute under review did not discriminate on the basis of viewpoint. As the *Rust* Court had before it, the *Finley* Court minimized the seriousness of the speech restriction by obliterating the government’s viewpoint in its construction of the subsidy.⁹⁵ The reliance of the *Finley* Court on the subjectivity of the grant criteria yields the “objective criteria” limitation on the government’s power to craft speech subsidies. A speech subsidy may be unconstitutional if it is distributed according to objective criteria but then denied on the basis of particular viewpoints.⁹⁶

93. *Id.* at 585. This was not a case in which the government had “leverage[d] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints.” *Id.* at 587.

94. *Id.* at 583-84.

95. In *Finley*, like *Rust*, the Court tried to avoid upholding a viewpoint-discriminatory subsidy by denying that the conditions on the subsidy were viewpoint based. In *Rust*, the Court stated that in conditioning Title X funding on no abortion counseling, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Similarly, in *Finley*, the Court wrote that the standards of decency provision does not “engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face”. *Finley*, 524 U.S. at 583; see also *id.* at 587 (“If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.”). These are odd statements, given the facts that the Title X subsidy required the promotion of pro-natal policies and proscribed the exploration of controversial abortion options and the NEA grants favored mainstream art over controversial art. The Court’s dicta in both cases attempt to avoid the discomfort of upholding clearly viewpoint-discriminatory, but nevertheless putatively constitutional, conditions on speech subsidies.

96. The “objective criteria” limitation explains both a previous Supreme Court decision and a subsequent lower court holding. In *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), the Court struck down postal regulations that denied preferential second-class mail privileges to *Esquire* magazine because it contained content the Postmaster General deemed indecent. Central to the Court’s holding was the fact that the subsidy was generally available to magazines according to “objective standards which refer in part to their contents, but not to the quality of their contents.” *Id.* at 152; see also *id.* at 148 (the magazines must be “published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry”). Thus, the government exceeded constitutional limits by tailoring its generally available subsidy on the basis of viewpoint-based judgments. The distinction between a general subsidy distributed in a discriminatory manner and a special subsidy distributed properly according to subjective criteria is of course illusive. The facts in *Hannegan* might have resembled those in *Finley* had the government, in order to support the distribution of certain magazines, con-

Like the “public arena” limitation, the “objective criteria” limitation is a variation on the penalty/non-subsidy distinction. Where the subsidy is otherwise available on an objective basis, the non-subsidy of certain speech resembles a penalty for those who would otherwise be entitled to the subsidy but for their desire to engage in the non-subsidized speech. Where the subsidy is distributed selectively according to subjective criteria, no one is entitled to the subsidy and, therefore, denial of the subsidy is simply a non-subsidy, not a penalty.

5. “Private Speech” Limitation

The most recent subsidized speech case, *Legal Servs. Corp. v. Velazquez*, articulated the fifth and sixth limitations on the government’s powers of speech subsidization.⁹⁷ In *Velazquez*, the Supreme Court held unconstitutional a law prohibiting Legal Services Corporation (LSC) grantees from receiving LSC funds if their representation of indigent clients involved “an effort to amend or otherwise challenge” existing welfare laws.⁹⁸

The Court distinguished *Velazquez* from *Rust* on the grounds that the LSC program was “designed to facilitate private speech” (like the University’s journal subsidies in *Rosenberger*) and not to promote a “governmental message” (like Title X’s pro-life message).⁹⁹ “The advice from the attorney to the client and the advocacy by the attorney to the courts,” wrote Justice Kennedy, “cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.”¹⁰⁰ The “private speech” limitation is

structed a postal subsidy to be awarded on a competitive basis to the producers of content the government believed to be of particular merit. In *Brooklyn Inst. of Arts and Sciences v. City of N.Y.*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999), a district court invalidated the New York City’s requirement that the Brooklyn Museum of Art shut down a risqué exhibit in order to continue to receive previously-appropriated city subsidies. The Court distinguished the case from *Finley* on the grounds that the museum subsidy had already been appropriated on objective grounds, but was subsequently withdrawn to squelch certain viewpoints.

97. *Velazquez*, 531 U.S. 533 (2001).

98. *Id.* at 539 (internal quotations omitted).

99. *Id.* at 542.

100. *Id.* at 542-43. The Court noted that although *Rust* “did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech,” subsequent cases have seen *Rust* as an instance in which the government used private speakers to transmit information about its own program. *Id.* at 541 (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 833, 833 (1995)). *Velazquez* also distinguished *Rust* on a variant of the “no alternatives” limitation. Instead of looking to whether or not the recipient of the subsidy had alternative avenues of expression outside of the subsidized program,

another lens through which to view the penalty/non-subsidy distinction. A speaker who is merely delivering the government's message will feel less penalized by losing support to deliver that message than one who is delivering his own message.

6. "Institutional Distortion" Limitation

The *Velazquez* Court also posited an "institutional distortion" limitation to the government's discretion to subsidize its speech benefits. This is the first limitation to focus on the impact of the subsidy on the listener rather than on the speaker or the speech. The Court observed that "[w]here the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations."¹⁰¹ The conditions on LSC funding, the Court concluded, "distort[ed]" the "usual functioning" of an expressive medium. This distortion in *Velazquez* was particularly problematic because the judicial function is one of the checks on government and distortion of that function by the legislature is "inconsistent with accepted separation-of-powers principles."¹⁰²

B. *Effect of Speech Subsidies on Public Discourse*

The coercion analysis ostensibly looks at how conditional speech subsidies function and how they affect the speaker's autonomy without reference to the type of speech that they may burden. Does the condition restrict the beneficiary's freedom to say what he wants in his own time and with private funds? Does the condition shape the government's own speech or the speech of private parties? The use of coercion as a constraint on the government's power of patronage has tremendous appeal, but it is too slippery a concept to do the work that the Court assigns it.

the Court looked at whether or not the client served by the recipient had other alternatives if the subsidized recipient was restricted in the services she could provide.

101. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001). The Court read this "accepted usage" principle into a number of cases, including *League of Women Voters*, which it said stood for the proposition that the "First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium." *Id.* The institutional distortion theory picks up on ideas that are central to Professor Cole's theory that subsidies should be judged by the way they impact listeners, *Cole supra* note 59, and Professor Schauer's theory of an institutionally-specific First Amendment review. *See Schauer, supra* note 53.

102. *Velazquez*, 531 U.S. at 546. However, as the dissent convincingly argued, the proffered antecedents for this limitation suggest nothing of the kind. *See id.* at 550 (Scalia, J. dissenting). Rather, as discussed in Section II.B. below the Court conjured it up to buttress the vulnerable "government speech" holding.

The protection of personal liberty simply cannot explain the results in the subsidized speech cases. This Section provides a critique of the use of coercion-based factors alone to decide the subsidized speech cases.

I suggest that the Court itself is not satisfied with this analysis and seems to be moved by considerations that go beyond the speaker. For example, speech that is more closely related to core political expression is more likely to be protected even where burdens on such speech have been bargained for and not coerced.¹⁰³ What the Court has done, if not what it has said, is better justified by a theory of the First Amendment that values free speech protections for their instrumental value in a democratic political system.¹⁰⁴

1. Speaker-Based Limitations Are Unsatisfactory

The subsidized speech cases are hard to reconcile, as a critical examination of just a few of them shows. Decisions that ostensibly turn on the question of when inducement becomes coercion, of when liberty surrendered is liberty denied, will inevitably appear somewhat arbitrary. But the conundrum of speaker autonomy is not solely responsible for the doctrinal confusion. Also to blame is the Court's unweighted, and sometimes unacknowledged, consideration of factors that have little to do with speaker impact or questions of coercion. The Court reveals, through its reach outside of the speaker's interest to anchor its decisions, the weakness of speaker-based limitations on subsidized speech.

Finley introduces the "objective criteria" limitation on the government's power to subsidize speech selectively, allowing an otherwise unconstitutional criterion for the award of a benefit to be saved if all the other criteria are subjective and the government does not specify which criterion is dispositive. The subsidy

103. When I say that a particular factor better justifies or explains the subsidized speech decisions, I mean that it has been necessary, although perhaps not sufficient, to the outcome of those cases.

104. The view that the purpose of the First Amendment is to benefit society, not the individual, by exposing citizens to the ideas that are essential to republican government is most famously espoused by Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1965) (the First Amendment is a safeguard for responsible collective decision making, not for individual rights); see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (2d ed. 1995). Another account of democracy reconciles the autonomy-maximizing view of the First Amendment with the democratic process view in locating self-governance not in responsible decision-making but in the mere act of deciding. See, e.g., Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523 (1997).

survives if it is distributed according to multi-factored standards rather than rules. This distinction cannot possibly be right.¹⁰⁵ After all, the college admissions process is notoriously vulnerable to an unconstrained balancing of factors. It takes into account all sorts of constitutionally unproblematic criteria like geography, family legacies, grades, extracurricular activities, and the artistry of the application essay. Certainly, though, the Court would strike down a law that state schools must consider, in their balancing of these considerations, the political affiliation of the student.¹⁰⁶ Thus, it cannot be that the indecency limitation falls on the acceptable side of the penalty/non-subsidy divide simply because it is one of many factors that judges of art may consider.

The “private speech” limitation is similarly unconvincing as an explanation of *Velazquez*. The LSC program was not designed to foster an array of private speech, as distinct from government speech, but to provide for the representation of indigent clients who were denied welfare benefits. The upshot of the LSC representation is not a variety of views, but a single view—that the client was wrongfully denied benefits to which she was entitled. The Title X doctor’s speech in *Rust* is no more “government speech” than is the LSC lawyer’s speech in *Velazquez*. The doctor has been subsidized to counsel women with respect to family

105. For a criticism of *Finley* on this point, see Schauer, *supra* note 53, at 95 (“It is hard to imagine that the result in *Texas v. Johnson* would have been different had the degree of respect shown for the American flag been merely a ‘factor’ to be considered in deciding when unofficial uses of the flag would be permitted.”) (citations omitted).

106. Justice Souter makes the further point in his dissent that whether a benefit is given out competitively has no bearing on the constitutionality of the criteria for the benefit. That a government program is competitive is simply because of the economic fact of scarcity. “Scarce money demands choices, of course, but choices ‘on some acceptable [viewpoint] neutral principle,’ like artistic excellence and artistic merit; ‘nothing in our decision[s] indicate[s] that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.’” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 524, 614-15 (1998) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 833, 835 (1995) (Souter, J., dissenting)). Justice Souter also cites *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676 (1998) for support of his neutral principle concept. See *id.* But this case, which held that a public television station may exclude candidates from a televised debate on the basis of neutral selection criteria like their standing in the polls, shows how difficult it is to come up with viewpoint-neutral criteria when making competitive selections. The leading candidates, who are included in the debate, will almost always have more mainstream positions with greater mass appeal than those of the more marginal candidates who are excluded from the debate. This is not to say that Justice Souter is wrong in criticizing the *Finley* majority’s distinction between generally available and selective benefits, but simply to point out that the line Justice Souter would draw between neutral and non-neutral conditions on scarce government speech benefits may be no more definite.

planning in some ways, but not in others. The LSC lawyer has been subsidized to represent indigent clients on some welfare benefit claims, but not on others. Both programs were designed to provide some, but not all, counseling and legal services to eligible clients. Neither program was designed as a platform for government expression. In both cases, the viewpoint-based restrictions on speech were imposed to further government interests – a pro-natal policy in one case and reduced impact litigation in the other.¹⁰⁷ Let us suppose that the central question in the subsidized speech cases is whether or not the limitations on the subsidy threaten “to drive ‘certain ideas or viewpoints from the marketplace.’”¹⁰⁸ The muzzles on doctors, who are often the only medical personnel poor women will see, and those on lawyers, who are often the only legal personnel poor welfare benefit applicants will see, would seem to have just that effect regardless of how the speech is characterized.¹⁰⁹

Another distinction the majority in *Velazquez* drew between the LSC and Title X restrictions on speech was that the former distorted the “usual functioning” or “accepted usage” of the subsidized institution.¹¹⁰ The condition that LSC funds not be used for constitutional challenges resulted in such distortion by “altering the traditional role of the attorneys” and by “prohibit[ing] speech and expression upon which courts must depend for proper exercise of judicial power.”¹¹¹ It is hard to see how the legal profession is more distorted by lawyers’ being limited in what they say than the medical profession is by doctors’ being so limited. It must be that in *Velazquez*, it was the distortion of the judicial process in particular, not institutional distortion generally, that was of concern. One can only conclude that it was the disabling of speech that challenges the government’s order, and is at its

107. Even if there were a valid distinction for constitutional purposes between the speech in *Rust* and in *Velazquez*, why wouldn’t the force of that distinction produce different results—that is, a disallowance of the condition attached to the subsidy—in *Finley* and *TWR*? Both *Finley* and *TWR* involved not only private speech, but programs that sponsored a diversity of views.

108. *Finley*, 524 U.S. at 587 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); see *Cole*, *supra* note 59, at 704-06.

109. In fact, the impact of the constraints on the doctor’s “government speech” is probably greater because the doctor is not permitted to even identify that abortion is an option. The doctor’s patient may well leave the session unaware of the idea that has been suppressed. The lawyer, by contrast, may identify the legal issue she cannot pursue and therefore at least allow the client to seek help elsewhere.

110. *Velazquez*, 531 U.S. at 543.

111. *Id.* at 544-45.

core political speech, that was problematic, and not the impact of the government program on speaker autonomy.¹¹²

2. Speech Based Considerations Play a Role

Since the indicia of coercion the Court has apparently used in the subsidized speech decisions to protect speaker autonomy do not adequately support the results of those cases, something else must be going on. An alternative underpinning for many of the decisions is that the First Amendment is primarily a tool for democratic self-government.¹¹³ In other words, a version of the Court's "core speech" limitation is silently at work in many of the subsidized speech cases.

A central purpose of the First Amendment is to guarantee an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹¹⁴ In keeping with this view, the Court has shown special consideration for expressly political speech and affords such expression heightened scrutiny.¹¹⁵ At the same time, the Court has made clear that the "First Amendment does not protect speech and assembly only to the extent it can be characterized as political [F]ree speech and a free press are not confined to any field of human inter-

112. See *id.* at 1053-65 (Scalia, J., dissenting). See also *Leading Cases*, 115 HARV. L. REV. 306, 431 (2001).

113. The First Amendment functions as the "guardian of our democracy." *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). The most conspicuous contemporary supporters on the Left and Right of the view that the purpose of the First Amendment is principally to safeguard and support political deliberation are Cass Sunstein, see, e.g., SUNSTEIN, *supra* note 104, and Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Of course, the range of speech that commentators consider to be political or necessary to public discourse is very broad and it changes over time. Judge Robert Bork initially suggested that the category of political speech should include only that speech that is "explicitly political", *id.* at 20, but then expanded his view of what should be protected to include "many forms of speech and writing that are not explicitly political." ROBERT H. BORK, *THE TEMPTING OF AMERICA* 333 (1990). Similarly, the dean of the political process First Amendment theorists, Alexander Meiklejohn, shifted from a narrow view of political speech as that directly related to government, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948), to a view that protected speech important to self-government includes speech such as "novels and dramas and paintings and poems". Alexander Mikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 (quoting Kalven, *Metaphysics of Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16). What binds the democracy theorists is not their definition of what speech should be protected but why speech should be protected.

114. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

115. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982); *In re Primus*, 436 U.S. 412, 437-38 (1978); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

est.”¹¹⁶ Because it is both difficult and dangerous to distinguish between speech that is necessary or useful for citizenship and other kinds of speech,¹¹⁷ full First Amendment protection extends to “expression about philosophical, social, artistic, economic, literary, or ethical matters.”¹¹⁸

The Court has used the subsidized speech doctrine to protect core First Amendment political speech to a degree that it does not when the government directly regulates speech. Subsidies that curb core First Amendment public discourse are invalidated while those that affect speech peripheral to First Amendment purposes are upheld.¹¹⁹ Where the right is of fundamental importance to a deliberative democracy, such as the right to broadcast editorials or the right to criticize a law in court, the government will have a much harder time defending a burden on this right as a condition of a benefit.¹²⁰ However, where the right is farther from core First Amendment concerns, such as the right to discuss medical alternatives or the right to create indecent art, the government will be given more latitude in crafting its benefit package to discourage these expressions.¹²¹ While the existence

116. *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 223 (1967).

117. *See, e.g., Cohen v. Cal.*, 403 U.S. 15, 16 (1971) (“[O]ne man’s vulgarity is another’s lyric.”); *Winters v. N.Y.*, 333 U.S. 507, 510 (1948) (“What is one man’s amusement, teaches another’s doctrine.”).

118. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). *See generally* ZUCKMAN ET AL., *supra* note 12, §1.2.

119. The subsidized speech decisions, in dicta, do recognize the special place of political speech in the First Amendment canon, but the political character of the speech is not determinative. *See, e.g., FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375-76 (1984) (political speech “is entitled to the most exacting degree of First Amendment protection”); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (burdening legal representation “implicat[es] central First Amendment concerns.”). In other contexts as well, the Court has accorded political speech special protection. *See, e.g., Connick v. Myers*, 461 U.S. 138, 143-46 (1983) (discussing history of First Amendment protection for political speech by public employees).

120. It should be noted that *Rust*, in dicta, analogizes Congress’ speech limitations on family planning funds to the establishment of the “National Endowment for Democracy to encourage other countries to adopt democratic principles . . . [without at the same time funding] a program to encourage competing lines of political philosophy such as communism and fascism.” *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Even though the example concerns a limitation on political speech, it does not really involve a limitation that goes to core First Amendment values. As Professor Robert Post has pointed out, the National Endowment for Democracy directs speech at foreigners who do not enjoy First Amendment rights at all and, in any case, are not likely to be indoctrinated by U.S. propaganda that simply adds another voice to the mix. Post, *supra* note 51, at 192. The example would be much more problematic if it concerned the funding of government speech in the U.S.

121. In *TWR*, the Court upheld subsidies (in the form of tax exemptions) for the activity of nonprofits that did not involve lobbying. Interestingly, the Court did not give much credence to the notion that lobbying was a critical component of political self-determination such that an inducement to give up those activities might com-

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of a core speech burden would probably not be sufficient to invalidate a government subsidy in all cases, it is a more important factor than the Court has admitted and its explicit elevation over other factors might well lead to a less confused subsidized speech doctrine.

Further reflection on the subsidized speech cases reveals how the concern for core First Amendment speech better explains the outcomes than does a concern for personal liberty. For instance, the *Finley* Court presumably would have taken a different view of a grant criterion relating to criticism of the government, even if it *was* one of many indeterminate criteria. If Congress had told the NEA that it should consider whether or not the candidate artists would depict the President in an unflattering light as a factor in awarding grants, the Court would not likely have been constrained by the “objective criteria” limitation in striking down the law. Indecent art, as opposed to anti-government art, is simply not core political speech.

Likewise, suppose that *Rust* had dealt not with medical counseling but with abortion advocacy and the government had subsidized advocates of women’s health so long as they did not take pro-choice positions. It is likely that the *Rust* Court would have found that this condition on a speech subsidy fell within the “core speech” limitation and was constitutionally impermissible because political advocacy is different from medical counseling. The difference between the suppression of abortion counseling and the suppression of pro-choice advocacy turns on the fact that the counseling implements an existing policy and is the *product* of a public debate while political advocacy shapes future policy and *contributes* to the public debate.¹²²

Reliance on the “core speech” limitation serves to explain the invalidations of government speech subsidies that preceded *Rust*. In *Speiser v. Randall*, for example, the problem was not that the loyalty oath condition penalized the exercise of rights of expression, but that the denial of the benefit was “aimed at the sup-

promise democratic values. Alexander Meikeljohn’s work would support the rather odd view that expressive activities like fiction may be more important to self-government than the communication of paid lobbyists with government officials. See MEIKELJOHN, *POLITICAL FREEDOM* 55-76, 160, 63 (1960).

122. Justice Scalia excoriated the *Velazquez* majority for making a distinction between doctors’ and lawyers’ speech. “The only difference between *Rust* and the present cases is that the former involved ‘distortion’ of (that is to say, refusal to subsidize) the normal work of doctors, and the latter involves ‘distortion’ of (that is to say, refusal to subsidize) the normal work of lawyers.” *Velazquez*, 531 U.S. at 562 (Scalia, J., dissenting).

pression of dangerous ideas.”¹²³ In *Perry v. Sindermann*, the expression burdened by acceptance of the government benefit was the core political speech of Congressional testimony.¹²⁴ In *League of Women Voters*, the Court focused primarily on the nature of the speech burden, which was based “solely on the . . . content of the suppressed speech” and was “motivated by nothing more than a desire to curtail expression of a particular point of view” on issues of public importance.¹²⁵ This focus on core speech also explains *Velazquez*. In that case, the Court explained that the restriction placed on LSC regarding taking on cases with constitutional dimensions “implicat[es] central First Amendment concerns.”¹²⁶ Accordingly, it stated that Congress’s funding decision “cannot be aimed at the suppression of ideas thought inimical to the Government’s own interest.”¹²⁷

Thus, an alternative reading of the subsidized speech cases is that the Court is less concerned with the potentially coercive effect of a conditional speech subsidy than it is with the injury the subsidy might do to free expression that is closely tied to democratic self government.¹²⁸ At the very least, it appears clear that the autonomy-maximizing rationales cannot alone support the subsidized speech decisions. A reliance on speaker autonomy as the linchpin for the constitutionality of speech subsidies becomes even more unstable when it comes to dealing with communications industry subsidies like SHVIA than it is in cases in which the subsidy goes to individual speakers.

III. SHVIA AND SUBSIDIZED SPEECH

In the face of more rigorous First Amendment review of communications regulations, Congress turned to a speech subsidy, in the form of a copyright license, to soften judicial scrutiny of its broadband video policies. In this section, I will review how SHVIA came to be and how it offered relief from copyright liability in exchange for local station carriage. I will then demonstrate that SHVIA is the kind of benefit that “counts” for the subsidized

123. *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (internal quotations omitted).

124. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

125. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383-84 (1984).

126. *Velazquez*, 531 U.S. at 547.

127. *Id.* at 549.

128. Justice Scalia has made his views on this issue explicit, going so far as to state that government may allocate funding “*ad libitum*,’ insofar as the First Amendment is concerned,” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., dissenting), but circumscribing this *laissez faire* approach where the subsidy is aimed at the suppression of dangerous ideas. See *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting).

speech doctrine, even though it does not involve cash grants from the government to the speaker. Finally, I will show how the coercion-based subsidized speech doctrine fails to vindicate important First Amendment values in this and other information policy contexts.

A. *The Creation of SHVIA*

One of the most persistent goals of U.S. communications policy has been the creation and preservation of a nationwide system of local, advertising-supported, over-the-air broadcast stations.¹²⁹ This goal justified the original assignment of television stations in the 1950's to hundreds of communities across the country. Although this system of spectrum assignments was not particularly efficient,¹³⁰ it furthered the goals of localism and the diversity of ownership and content.¹³¹ As the Supreme Court has noted, "Congress designed this system of allocation to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern."¹³² Localism has also justified the ownership restrictions that limit broadcasters' ability to aggregate licenses and certain

129. See, e.g., Cable Act, S. Rep. No. 92, 102d Cong. 42 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175 ("There is no doubt that, over the past forty years, television broadcasting has provided vital local services through its programming, including news and public affairs offerings and its emergency broadcasts."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*"Turner I"*) ("[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'") (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)); Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, *Report and Order*, 1 F.C.C.R. 864, 865 (1986) (discussing value of local broadcast television stations in providing "a means for community self-expression" as one of rationales for original FCC must-carry rules).

130. The most spectrally efficient way of designing a broadcast system given the technology of the time would have been to provide for the operation of powerful regional stations with large service areas, much in the way that European systems were built. By contrast, in the 1950's, the FCC dispersed television station permits throughout smaller towns as well as urban centers within larger regions in order to "protect[] the interests of the public residing in smaller cities and rural areas . . . [and ensure that] as many communities as possible . . . have the advantages that derive from having local outlets that will be responsive to local needs." *Sixth Report and Order*, 17 Fed. Reg. 3905, ¶¶ 68, 79 (1952).

131. The statutory justification for these assignments is Section 307 of the Communications Act, which obligates the Commission to manage the limited television spectrum so that, to the extent possible, all communities are served by local stations. 47 U.S.C. § 307(b) (2000) ("[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.").

132. *Turner I*, 512 U.S. at 663.

other media interests within a geographic area¹³³ and rules that protect the programming exclusivity of local network affiliates.¹³⁴

1. Cable Must-Carry

The growth of cable penetration and its metamorphosis into a competitor to broadcast television posed a threat to the continued vitality of local broadcast stations. Congress believed that if cable systems chose not to carry the local signals (which was particularly likely in the case of independent and public television stations with less mass appeal than the network-affiliated stations), then cable subscribers would be unlikely to view the stations, viewership-based advertising dollars would drop dramatically, and the local stations would likely disappear.¹³⁵ As a result, viewers that did not subscribe to cable would be left with fewer television signals.¹³⁶

In 1992, Congress adopted the Cable Television Consumer Protection and Competition Act (Cable Act), which required most local cable systems operating in a given market to transmit the

133. See 47 C.F.R. § 73.3555(b)-(c) (2001); see also Telecomms. Act of 1996, S. Rep. No. 23, 104th Cong. 69 (1995) (“Any modification in the national [broadcast television station] ownership cap is important because of localism concerns. Local television stations provide vitally important services to our communities. Because local programming informs our citizens . . . and provides other community-building benefits, we cannot afford to undermine this valuable resource.”) (additional views of Sen. Hollings); H.R. Rep. No. 104-204 (1995) at 118-19 (noting that the law is intended to serve the goals of “competition and diversity,” while “maintaining several independent voices in each local market”); 141 Cong. Rec. E1571, E1573 (daily ed. Aug. 1, 1995) (“The drastic and indiscriminate elimination of mass media ownership rules . . . would eviscerate the public interest principles of diversity and localism Because American society is built upon local community expression, the policy favoring localism is fundamental to the licensing of broadcast stations.”) (statement of Rep. Markey); Review of the Commission’s Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policies and Rules, *Second Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21655, 21659-60 (1996) (discussing the principal goals of the local television ownership rule).

134. Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, *Report and Order*, 3 F.C.C.R. 5299, 5311 (1988).

From a regulatory standpoint, broadcasters are governed by unique regulatory mechanisms that are designed to ensure they will serve their communities of license. In short, the Communications Act and our regulations have held broadcasters to a standard of operating in the public interest, convenience and necessity, with obligations to serve their local communities.

Id.

135. See *Turner I*, 512 U.S. at 646-47 (citing detailed congressional findings in Cable Act that because of the economic incentives of cable not to carry local broadcast signals, the availability of free local broadcast would be threatened without must-carry requirements).

136. See *id.* (same).

local broadcast signals, subject to certain limitations.¹³⁷ These requirements were designed “to guarantee the survival of a medium that has become a vital part of the Nation’s communication system” and that provides the only source of video programming for millions of people who cannot afford or do not have access to subscription television.¹³⁸ The cable must-carry rules were the product of a detailed factual record—summarized in 21 legislative findings—drawn from more than 30,000 pages and more than a dozen hearings held over three years.¹³⁹ Because must-carry rules had come and gone in the decades preceding the Cable Act,¹⁴⁰ Congress was presented with comprehensive evidence about the relationship between carriage rules and the behavior of cable systems and the welfare of local television stations.

137. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §§ 534 and 535). The FCC has adhered, in one form or another, to the idea that cable systems should be required to carry broadcast signals since the early 1960s. *See Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963), *aff’d* 32 FCC 459 (1962) (upholding prohibition on microwave import of distant television signals by a cable system based on potential adverse effects on local broadcasters unless local signals were carried and not duplicated); *see also* Laurence H. Winer, *Red Lion of Cable*, 15 CARDOZO ARTS & ENT. L.J. 1 (1997). In 1966, the FCC expanded must-carry rules to all microwave-fed cable systems and a year later to all cable systems. *See* Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by CATV Systems and Related Matters, *Second Report and Order*, 2 F.C.C. 2d 725 (1966). In 1972, the FCC refined its must-carry rules to make them compatible with the newly adopted comprehensive rules for the cable industry. *See* Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to CATV Systems, *Report and Order*, 36 F.C.C. 2d 143 (1972). In 1984, the FCC adopted rules requiring cable operators to carry all local or significantly viewed broadcast signals without regard to cable capacity or program duplication. *See* 47 C.F.R. §§ 76.57-76.61 (1984). When those rules were held unconstitutional, *see Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1440-43 (D.C. Cir. 1985), the FCC adopted an interim approach in 1986 that relied on an “A/B switch” to allow viewers to alternate between cable and broadcast programming and made other changes to reduce cable’s burden. *See* Carriage of Television Broadcast Signals by Cable Television Systems, *Report and Order*, 1 F.C.C.R. 864 (1986), *modified in part*, 2 F.C.C.R. 3593 (1987), *rev’d sub nom. Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). These rules too were struck down, largely because there was insufficient evidence to support the asserted governmental interest—the protection of local broadcast stations from cable operators’ anticompetitive behavior. *See* *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir. 1988) *cert. denied*, 486 U.S. 1032 (1988).

138. *Turner I*, 512 U.S. at 647.

139. *See* H.R. Rep. No. 862, 102d Cong. 1-5 (1992).

140. *See supra* note 137; *see generally* *United States v. Southwestern Cable Co.*, 392 U.S. 157, 165-66 (1968), *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1438-43 (D.C. Cir. 1985), *cert. denied by Nat’l Ass’n of Broad. v. Quincy Cable TV*, 476 U.S. 1169 (1986).

The Supreme Court deferred to the fact-finding of Congress in upholding the Cable Act's must-carry rules in *Turner II*, but only after three years of litigation¹⁴¹ and a remand back to district court for more factual development "yielding a record of tens of thousands of pages" of evidence.¹⁴²

The Court in its initial decision held that the must-carry rules "impose burdens and confer benefits without reference to the content of speech"¹⁴³ and were therefore content neutral regulations.¹⁴⁴ As a result, the rules are analyzed under an intermediate scrutiny test,¹⁴⁵ under which content neutral regulations are upheld if they are narrowly tailored to further an important or substantial governmental interest¹⁴⁶ unrelated to the suppression of free speech.¹⁴⁷ The Court remanded the case, requiring that the government show "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry."¹⁴⁸ The "substantial deference" afforded to Congress's predictive judgments would not, the Court warned, foreclose independent judicial judgment of whether the must-carry provisions were supported by "reasonable inferences based on substantial evidence."¹⁴⁹

A majority of five ruled in *Turner II* that the must-carry requirements survived intermediate scrutiny. They were valid regulations narrowly tailored to serve the important and content-neutral governmental interests in "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of

141. On a direct appeal from the United States District Court of the District of Columbia, the Supreme Court had vacated and remanded the case for factual development of the record. See *Turner I*, 512 U.S. at 668.

142. *Turner Broad. v. FCC*, 910 F. Supp. 734, 755 (D.C. 1995) (granting summary judgment for the government).

143. *Turner I*, 512 U.S. at 643.

144. *Id.* at 642 ("[T]he 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

145. See *United States v. O'Brien*, 391 U.S. 367 (1968).

146. The interests identified by the court were: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Turner I*, 512 U.S. at 662.

147. See *id.*

148. *Id.* at 664-65.

149. *Id.* at 666. In *Turner II*, the Court did not refer to courts' independent judgment, but it did rely on the lower court findings of fact, in addition to legislative findings, in deciding the case. See Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312 (1998).

sources, and (3) promoting fair competition in the market for television programming.”¹⁵⁰ Justice O’Connor, joined by three other justices, dissented from both *Turner* opinions. In the first case, she wrote that the must-carry provisions were content-based because they favored the transmission of local broadcast content over other content, and therefore should be subject to strict scrutiny.¹⁵¹ In the second case, she wrote that the provisions failed even intermediate scrutiny.¹⁵² The *Turner II* dissent further contested that a majority even existed for the proposition that the must-carry rules were content-neutral. Justice Breyer’s concurrence, which provided the fifth vote, suggested that the content of local broadcast stations was relevant to Congress’ adoption of must-carry rules. Therefore, the dissent argued, the rules should have been strictly scrutinized as content-based regulation.¹⁵³

2. DBS “Must-Carry”

DBS, which was licensed in the mid-1990’s, provides cable-like services from satellites and competes head-on with cable in most markets.¹⁵⁴ Once DBS was able to transmit local signals, from both a technical and legal standpoint, it was likely that DBS would pose the same threat to local broadcasting as cable did. However, when it came time to address must-carry rules for DBS, the government took a very different approach than it had with cable. It shifted from direct regulation to a subsidy with strings in attempting to safeguard the local broadcasting system.

150. *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”) (quoting *Turner I*, 512 U.S. at 662). Only a plurality based its decision on all three government interests. The majority considered only the government’s interests in preserving the free, over-the-air local broadcast television system and promoting the widespread dissemination of information from a multiplicity of sources as substantial government interests.

151. *See Turner I*, 512 U.S. at 676-77, 680-82 (O’Connor, J. dissenting).

152. *See Turner II*, 520 U.S. at 229 (O’Connor, J. dissenting).

153. *See id.* at 234. Justice Breyer rejected the plurality’s reliance on the statute’s efforts to promote fair competition between broadcasting and cable, but rather rested on the two other objectives of preserving local broadcast television and promoting a multiplicity of information sources. *See Turner II*, 520 U.S. at 226-28 (Breyer, J. concurring).

154. The first DBS customers were in rural areas where cable did not penetrate. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report*, 15 F.C.C.R. 978, 1016 (2000). However, by the time must-carry rules were considered, DBS was competing with cable in the urban and suburban markets. By 2000, the DBS industry had almost 13 million subscribers, representing more than 15% of households subscribing to a multichannel video service. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, 16 F.C.C.R. 6005, 6037 (2001).

This shift can be explained both by *Turner I* and by the different histories and structures of cable and DBS.

Given the high burdens of proof *Turner I* imposed on the government, Congress might well have been gun-shy to adopt must-carry rules for satellite via direct regulation. This is particularly true because the threat DBS posed to local broadcasting was even more speculative than the threat of cable.¹⁵⁵ Since DBS had never before carried local broadcasting signals, and there had been no on-again, off-again history of must-carry in the satellite context, there were no data about the impact of non-carriage on the local broadcast system. There was thus no independent factual record that DBS must-carry rules were necessary to preserve access to broadcast signals. Even if there had been such a record, the lukewarm response of the *Turner* cases to such a record could hardly have given the government much comfort.

The functional differences between cable and satellite provided another reason to approach DBS must-carry differently. The starkest difference was that cable must-carry rules applied to an industry that had been retransmitting local broadcast signals—indeed to an industry that was built on the retransmission of such signals—for decades. Since 1976, the cable industry enjoyed a statutory license enabling systems to retransmit local television broadcast signals without having “to negotiate with every copyright owner whose work was retransmitted”¹⁵⁶ and without

155. Professor Stuart Benjamin has written about the difficulty Congress has in legislating on the basis of predictive harms, especially in the communications area, and argues that any such legislation affecting First Amendment rights should be presumptively invalid unless there is a likelihood of irreparable harm. See Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281 (2000).

156. H.R. REP. NO. 94-1476, at 89 (1976). The cable statutory license is codified at 17 U.S.C. § 111(c) (2000). The adoption of this license was part of the general revision of the copyright laws in 1976. Prior to this revision, cable companies had transmitted local broadcast signals without any copyright liability because the courts had held that retransmission of a broadcast signal without permission was not a copyright violation. See, e.g., *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). With the 1976 Copyright Act amendments, Congress clarified that owners of a copyright in an audiovisual work have the exclusive right to perform or display the work publicly, or to authorize a public display or performance of the work. 17 U.S.C. §§ 106(4), (5) (2001). As a result, cable operators would be subject to copyright liability for the retransmission of broadcast signals. See 17 U.S.C. §§ 111(d), (f) (2001); H.R. REP. NO. 94-1476, at 89 (1976) (“cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . copyright royalties should be paid by cable operators to the creators of such programs.”). But Congress also concluded that a compulsory license would be desirable to reduce the transaction costs for cable systems that otherwise would have to obtain authorization from each owner of

having to pay any copyright royalties. Cable had enjoyed a compulsory copyright license to transmit broadcast stations for sixteen years before must-carry rules took hold.¹⁵⁷

Whereas cable's right to transmit local signals preceded the duty to carry them, for DBS, the right and the duty were considered simultaneously. The DBS industry was launched in the 1980's as a national subscription television alternative to cable. DBS was unable, until recently, to carry local stations into local markets. This is because DBS satellites covered the entire nation and lacked the capacity they would have needed to transmit every local station into *every* market and then to block access to non-local signals in any given market. Rather than transmit local stations into local markets, DBS operators carried a few broadcast stations from large markets on their systems nationwide, and for this they obtained a compulsory copyright license in 1988.¹⁵⁸ In the mid-1990's, DBS operators began to develop the capacity to target local signals into local markets. Industry representatives told Congress that unless they had a compulsory license to transmit these local signals, notwithstanding the grow-

a copyright in each of the programs contained in the broadcast—a task Congress concluded “would be impractical and unduly burdensome.” H.R. REP. NO. 94-1476, at 89 (1976).

157. The Copyright Act of 1976 provided for a compulsory license for secondary transmission by cable companies. *See* 17 U.S.C. § 111(d) (2001) (codifying Copyright Act of 1976 as amended). Over the next sixteen years, until the passage of the Cable Act in 1992, the FCC attempted to craft must-carry rules, but in each instance, the rules were struck down by lower courts. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (striking down FCC must-carry rules because the FCC failed to prove a substantial governmental interest and the rules were overbroad); *see also Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (striking down FCC rules that were revised after *Quincy*). Accordingly, must-carry did not stick to cable until the Cable Act and the *Turner* cases.

158. The 1988 Satellite Home Viewer Act, Pub. L. No. 100-667, §202(2), 102 Stat. 3949 (1988) (codified at 17 U.S.C. §119(a)(2)) provided DBS operators with a compulsory copyright license to retransmit the signals of network broadcast stations, but only in such a way that would not trench on the local network-affiliate's audience. The license permitted the distribution of non-local (or distant) broadcast stations, upon payment of a royalty to the Copyright Office, to “unserved” households a feed to those households that could not receive an acceptable over-the-air signal from their local network affiliates with a roof-top antenna. By claiming that the majority of their subscribers were unserved, satellite carriers used the compulsory license to serve a large number of subscribers, even those that could receive local broadcast signals over the air. Several district courts enjoined this activity, finding that transmitting distant broadcast signals to households that could in fact receive those signals over the air violated copyright law. *See ABC, Inc. v. Primetime 24 Joint Venture*, 67 F. Supp. 2d 558 (M.D.N.C. 1999), *aff'd*, 2000 WL 1648875 (4th Cir. Nov. 3, 2000) (unpublished table decision); *CBS Broad., Inc. v. Primetime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998); *Echostar Communications Corp. v. CBS Broad.*, 265 F.3d 1193 (11th Cir. 2001), *cert. denied* 112 S. Ct. 1964 (U.S. May 20, 2002) (01-1450).

ing skepticism in general about compulsory licenses,¹⁵⁹ they would not be able to compete effectively with cable. According to DBS representatives, potential subscribers were not content to receive national programming packages over DBS while relying on a different means of reception (over-the-air or cable) to access local broadcast station signals.¹⁶⁰ For DBS to compete effectively, they said, it had to have a compulsory license along the lines of cable's license.¹⁶¹

The request of the DBS industry for a compulsory license to carry local broadcast signals raised the issue of must-carry. Concerned that DBS would be able to cherry-pick the most desirable

159. Compulsory copyright licenses are an extremely rare intrusion by the government into the marketplace for copyrighted material. See U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, at iv (1997) [hereinafter *Copyright Office Report*] ("Compulsory licenses are an exception to the copyright principle of exclusive ownership for authors of creative works, and, historically, the Copyright Office has only supported creation of compulsory licenses when warranted by special circumstances."). In fact, prior to the enactment of SHVIA, there were only five compulsory copyright licenses in existence: See Act of March 4, 1909, ch. 320(e), 35 Stat. 1075 (1909), *superseded by* 17 U.S.C. § 115 (2001) (phonograms); 17 U.S.C. § 118 (2001) (public broadcast use of music and works of art); 17 U.S.C. § 111 (2001) (cable retransmission of local broadcasts); 17 U.S.C. § 119 (2001) (satellite retransmission of distant broadcast signals); 17 U.S.C. § 114(d)(2), (f)(4) (2001) (noninteractive digital transmissions of sound recordings). The Copyright Office generally believes that "the better solution when an industry seeks to make use of large numbers of copyrighted works is through negotiation between collectives representing the owner and user industries, rather than by a government administered compulsory license." *Copyright Office Report*, at iv.

[A]s early as 1981, the Copyright Office had recommended the elimination of the cable compulsory license and full copyright liability for cable systems' retransmission of distant signals, based on a finding that the cable industry had progressed from an infant industry to a vigorous, economically stable industry which no longer needed the protective support of the compulsory license.

Id.

160. See, e.g., *Copyright Compulsory License Improvement Act: Hearing Before the Courts and Intellectual Prop. Subcomm. of the House Judiciary Comm.*, 106th Cong. 33 (1999) (statement of David Moskowitz, Senior Vice President and General Counsel, EchoStar Communications Corp.) ("[M]ost of the people who walk into a satellite dealer's showroom turn around and walk out because they can't get their local TV channels through DBS."); *Video Competition: Multichannel Programming: Hearing Before the Telecomm., Trade, and Consumer Protection Subcomm. of the House Commerce Comm.*, 105th Cong. 44 (1998) (statement of Eddy W. Hartenstein, President, DIRECTV, Inc.) ("It is uneconomical for consumers who wish to receive only their local broadcast channels via cable and the rest of their programming via DBS or another alternate provider to do so when they are required to pay more than \$20 per month for basic cable.").

161. See, e.g., *Copyright Licensing Regimes Covering Retransmission of Broad. Signals: Hearing Before the House Subcomm. on Courts and Intellectual Prop.*, 105th Cong. 42 (1997) [hereinafter *House Hearing (1997)*] (statement of Steven J. Cox, Senior Vice President, DIRECTV, Inc.) ("[T]he satellite license needs to be revised so as to place DBS providers on a more equal footing with their cable competitors, who currently drive [sic] competitive advantages from the terms of the cable compulsory license.").

broadcast programming, representatives of the cable industry contended that “there would be no parity of treatment under either the copyright or the communications laws” unless must-carry obligations went along with a satellite compulsory license.¹⁶² In addition, the broadcast industry claimed that a compulsory license without must-carry requirements would allow DBS operators to pick winning and losing broadcast stations in each market, thereby undermining the objectives of the cable must-carry rules.¹⁶³

Congress, by adopting SHVIA, attempted to balance the DBS industry’s desire for a compulsory license to transmit local broadcast signals into local markets with the cable industry’s desire for regulatory parity, as well as the broadcast industry’s desire for must-carry requirements. It did so by conditioning a DBS operator’s use of the compulsory license in any given market on its carriage of local broadcast signals. The hope was that the license would promote competition between DBS and cable providers, while the constraints on the license would preserve the structure of local broadcasting.¹⁶⁴ The compulsory license, Section 122 of Title 17, authorizes DBS providers to deliver local television broadcast station signals to subscribers in the stations’ local markets without paying any royalty fee to the owners of copyrights in the programming transmitted in such signals.¹⁶⁵ Satellite carriers that transmit local broadcast signals pursuant to the Section 122 compulsory license were required, with certain exceptions, to “carry upon request the signals of all television broadcast stations located within the local market” beginning January 1, 2002.¹⁶⁶

The particular design of SHVIA was meant to account for the “practical differences” between cable and satellite by al-

162. *Id.* (statement of Decker Anstrom, President and CEO, National Cable Television Ass’n). *See also id.* at 32 (statement of Senator Kohl) (Satellite providers should have “obligations roughly analogous to those imposed on cable television.”).

163. *See, e.g., Copyright Licensing Regimes Covering Retransmission of Broad. Signals (Part II): Hearing Before the House Subcomm. on Courts and Intellectual Prop.*, 105th Cong. 6 (1998) [hereinafter *House Hearings (1998)*] (statement of James J. Popham, Vice President and General Counsel, Ass’n of Local Television stations) (carriage requirements “are critical to ensure that [satellite transmissions of local signals] enhances rather than undermines local over the air broadcasting.”).

164. Congress’s legislative goals were two-fold: (1) to level the competitive playing field between cable and satellite, see H.R. Rep. No. 106-79, pt. 1, at 11 (1999); and (2) to preserve free over-the-air television for all Americans, even as an increasing number of Americans receive local broadcast signals via cable or satellite. *See* H.R. Conf. Rep. No. 106-464, at 101 (1999) [hereinafter *Conference Report*].

165. *See* Pub. L. No. 106-113, § 1002, 113 Stat. 1501, 1501-23 (1999) (codified at 17 U.S.C. § 122).

166. 47 U.S.C. § 338(a)(1), (g) (2001).

lowing a satellite carrier to choose whether to incur any must-carry obligations in a particular market in exchange for the benefits of the statutory license.¹⁶⁷ Thus, according to the FCC's order implementing SHVIA, a satellite carrier has two options for carrying local broadcast signals in any given market:

If a satellite carrier provides its subscribers with the signals of local television stations through reliance on the statutory copyright license, they will have the obligation to carry all of the commercial [and some of the noncommercial] television signals in that particular market that request carriage. If a satellite carrier provides local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply.¹⁶⁸

The choice given to the satellite carriers reflects the bargain struck between the DBS industry and Congress and negotiated out with competing industries. Operators would agree to carry all local broadcast content in a given market in return for the ability to carry the local broadcast content they wanted royalty free. DBS operators remain free to carry no local broadcast signals in any or all markets. They also remain free to carry the local signals of their choice if they negotiate for the copyrights in the market. It is only if they take advantage of the subsidy conferred by the compulsory license that they are under any obligation to carry local broadcast signals and then only in those markets in which they use the compulsory license.

B. Is SHVIA a Speech Subsidy?

In adopting SHVIA, Congress bid for a relaxed standard of judicial review by explaining that SHVIA was a government speech subsidy and that the must-carry provisions were nothing more than a limitation of the subsidy. The Conference Report explains:

[T]he must carry provisions of this Act neither implicate nor violate the First Amendment. Rather than requiring carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must carry obligation in a particular market in exchange for the benefits of the local statutory license. It does not deprive any programmers of potential access to carriage by satellite carri-

167. H.R. Conf. Rep. No. 104-464, at 92 (1999).

168. Implementation of the Satellite Home Viewer Improvement Act of 1999: Broad. Signal Carriage Issues, Retransmission Consent Issues, *Report and Order*, 16 F.C.C.R. 1918, 1926 (2000).

ers. Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market's broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress. The proposed licenses are a matter of legislative grace, in the nature of subsidies to satellite carriers, and reviewable under the rational basis standard.¹⁶⁹

Even as a specimen of legislative grace, does SHVIA really operate in much the same way as a conventional speech subsidy in the form of a monetary government grant? SHVIA looks very different from the subsidies in the leading subsidized speech cases, which have involved the exercise of Congress' spending power to grant cash subsidies or taxing power to grant tax deductions.¹⁷⁰ SHVIA, by contrast, relies on the government's powers, under the Commerce Clause, to regulate interstate communications and under the Copyright Clause, to define the scope of the rights of copyright holders.¹⁷¹ While the typical subsidized speech case involves a transfer of wealth in the form of cash from the public to the subsidized parties, SHVIA involves a transfer of wealth in the form of an exemption from copyright liability from the copyright owners to the DBS operators.¹⁷² The question is

169. *Conference Report, supra* note 164, at H11795. The Conferees also noted that they were "confident that the proposed license provisions would pass constitutional muster even if subjected to the *O'Brien* standard applied to the cable mandatory carriage requirement." *Id.*

170. *See, e.g.,* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (lawyers); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (artists); *Rust v. Sullivan*, 500 U.S. 173 (1991) (subsidy to doctors); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (public broadcasters); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (non-profit organization). Other subsidies have dealt with federal employment. *See, e.g.,* *Perry v. Sindermann*, 408 U.S. 593 (1972); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

171. *See Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 429 (1984) (stating that the Constitution has assigned to Congress the task of defining the scope of copyright protection); *see also Goldstein v. California*, 412 U.S. 546, 562 (1973).

172. A district court has decided that differences between cash and other subsidies do matter. *Satellite Broad. & Communications Ass'n v. FCC*, 146 F. Supp. 2d 803, 816 (E.D. Va. 2001) ("*SBCA*"), *aff'd*. 275 F.3d 337, and *cert. denied*, 122 S. Ct. 2588 (U.S. June 17, 2002) (No. 01-1332). The court dismissed a First Amendment challenge to SHVIA on a motion to dismiss under the *Turner/O'Brien* standard of intermediate scrutiny. The court did not dispute that SHVIA confers a benefit on DBS operators. However, drawing on a dictionary definition of subsidy, the court concludes that SHVIA is not a "subsidy" because it "does not entail the grant of government funds, or other benefits obtained through the use of government funds (i.e., property, government-created jobs, etc.), to confer a benefit." *Id.* at 829.

whether these differences between SHVIA and the traditional subsidies render SHVIA a speech-reducing regulation rather than a speech-enhancing subsidy.¹⁷³ The decision to treat a government intervention as a subsidy or regulation is significant in terms of judicial review. Speech-supporting subsidies, as we have seen, are not subjected to the presumption of invalidity that attaches to speech-restricting regulations. Moreover, the treatment of government action as speech-supporting rather than regulatory relieves the government of having to satisfy the intensively fact-based and stringent review called for by the *Turner* cases. This relief could be particularly welcome for a government that is enacting proactive legislation against speculative harms in a rapidly changing technological environment.

1. Regulations vs. Subsidies

The central inquiry in the subsidized speech area is whether the government can claim that the burdens it places on speech

Rather, the court classified SHVIA as a license, which is defined as “[t]he permission by competent authority to do an act which, without such permission, would be illegal, a trespass, a tort, or otherwise not allowable.” *Id.* at 829.

The Fourth Circuit affirmed the district court’s decision, without any discussion of the subsidy question. *See* *Satellite Broad. & Communications Ass’n of Am., et al. v. FCC*, 275 F.3d 337 (4th Cir. 2001). On appeal, the court noted that because the obligations SHVIA imposes are not triggered until the provider avails itself of the compulsory license, the obligations are content neutral. *Id.* at 354. Moreover, the court agreed that the purpose behind SHVIA—namely, the desire to promote localism through the survival of independent broadcast stations—was indistinguishable from the issue in *Turner I*, and therefore the same level of scrutiny must apply. *Id.* at 354-55. The Fourth Circuit found that the obligations under SHVIA did not burden substantially more speech than was necessary to serve the government’s legitimate interests and, therefore, the provisions were valid under the *O’Brien* test. *Id.* at 366.

173. There is another way in which SHVIA differs from the subsidies at issue in the leading subsidized speech cases. In most of those cases, the government was inducing action—the creation of “decent” art or the avoidance of abortion counseling—that it *clearly* could not have compelled. In SHVIA, whether or not the government could compel the local broadcast signal carriage that it seeks to induce is a murkier question of law (depending on the appropriate level of scrutiny) and fact (depending primarily on the extent of the burden of carriage on the satellite carriers and the regulatory alternatives at the government’s disposal). Under these circumstances, there is substantial economy in first considering whether the conditions attached to the subsidy are coercive. If the answer is no, the law is upheld without a protracted discovery process during which time technology continually remakes the facts and the satellite industry invests in the capabilities to carry local signals that may not be required. If the answer is yes, only then need the court go on to the question of whether or not the conditions, now viewed as regulations, are constitutional. For a good discussion of how quickly technology developments outstrip the process of judicial review, see Stuart M. Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999).

simply serve to define the limits of the benefits it is offering. As we have seen, the unconstitutional conditions literature and cases have not really focused on the threshold question of what defines a benefit, but on the secondary question of whether the denial of a benefit operates as a penalty rather than a non-subsidy. At the threshold level, the doctrine only distinguishes “direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”¹⁷⁴ The Court has contrasted federal regulatory programs with federal subsidy programs, noting, “[t]here is a basic difference between [the two].”¹⁷⁵ Regulations directly restrict speech while subsidies do not, unless the subsidy is “manipulated to have a coercive effect.”¹⁷⁶

This subsidy/regulation distinction serves to distinguish “I’ll pay you to say x” from “Say x or I’ll put you in jail.” But it does not distinguish the distribution of cash subsidies from non-cash subsidies like: “I’ll give you this broadcast license if you’ll say x” or “I’ll extend your copyright term if you’ll say x.” The subsidy/regulation distinction the Court has drawn focuses solely on whether or not there is a conditional grant of a benefit or an unconditional exercise of government power. Under this binary approach, the SHVIA compulsory license is clearly a subsidy, rather than a regulation, in that it is conditional and does not directly regulate speech. SHVIA, like a monetary subsidy, is a speech benefit that Congress is not constitutionally required to provide and attaches conditional speech burdens that recipients are free to reject.

The shortcoming of this approach is that this definition of “subsidy” would seem to encompass too much. Government “regulation” of private speech through the copyright law and communications law is almost always achieved through licensing. The operation of most media of mass communications requires government permission in such forms as a broadcast license, a DBS license, or a cable franchise. While the Internet is unlicensed, the means to access the Internet, through wires, cables, or by wireless means, require some kind of government license or permit.¹⁷⁷ All of these licenses and permits are conditional on com-

174. Kreimer, *supra* note 59, at 1316 (quoting *Maher v. Roe*, 432 U.S. 464, 475-76 (1977)).

175. *Maher*, 432 U.S. at 475.

176. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (internal quotation omitted).

177. Even access to the Internet through a WiFi or other unlicensed network usually relies on licensed wireless or wired operators to complete the connection to the Internet backbone.

pliance with applicable federal or state and local rules and regulations. For any service where the licensee has not paid full market value (e.g. for its spectrum license¹⁷⁸ or its use of public rights of way),¹⁷⁹ the licenses and permits are government benefits and the licensee's obligations could be recast as conditions of their license.¹⁸⁰ Since courts will more readily approve conditions attached to benefits than they will regulations, the government could avoid more exacting First Amendment scrutiny by ensuring that the burdens it places on speech are part of a discretionary speech-related license or other non-monetary benefit.

Must we not, then, consider whether there is an antecedent question, one largely ignored by the Court¹⁸¹ and by the commen-

178. Congress granted the FCC the right to auction spectrum licenses in 1993. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 6002, 107 Stat. 312, 387-92 (codified at 47 U.S.C. § 309(j) (2000)). All the licenses issued prior to this date, such as to DBS operators and broadcasters, were not auctioned. The law currently forbids the use of auctions in a number of circumstances, such as for the provision of broadcasting by incumbents or international satellite services. See Telecomms. Act of 1996, Pub. L. No. 104-104, § 204(a), 110 Stat. 56; 47 U.S.C. § 309(k) (2000) (providing for renewal of broadcast licenses); Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act") of 2000 § 647, 47 U.S.C. § 765f (2000) (preventing FCC from having authority to conduct competitive bidding for orbital locations or spectrum). The FCC has the freedom to provide bidding credits to certain parties (such as small businesses), see 47 U.S.C. § 309(j)(4)(D) (2000), and has significant flexibility in structuring its auctions. Any profit from the auction (that is, revenue over the cost of administering the auction), however, goes straight to the U.S. Treasury and cannot be earmarked by the FCC for communications-related projects. See *id.* at § 309(j)(8)(A).

179. Public rights of way are licensed by state authorities in the case of telephone wires and local authorities in the case of cables. See Telecomms. Act of 1996, Pub. L. No. 104-104, § 253(c), 110 Stat. 56; 47 U.S.C. § 253 (2000) (preserving the rights of state and local authorities to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers that use those rights-of-way); see also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1984) (addressing city's refusal to grant cable system access to poles or underground conduits). While administrative or franchising fees are levied, these rights of way are not sold.

180. The D.C. Circuit has upheld the requirement that DBS operators devote a portion of their capacity to educational programming, analyzing it under the *Red Lion* relaxed standard. *Time Warner Entm't Co. v. FCC*, 105 F.3d 723 (D.C. Cir. 1997). This requirement might just as readily have been justified as a condition of the benefit of a license. See, e.g., *id.* at 724-25 (Williams, J., dissenting from denial of rehearing *en banc*) (acknowledging that there was an argument to be made that DBS public interest requirements might be justified as a condition of the grant of a license to use federal spectrum). A former FCC Chairman, Reed Hundt, has casually suggested that broadcast obligations could be viewed in the same way. See, e.g., Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters*, 45 DUKE L.J. 1089 (1996). See also Charles Logan, *Getting Beyond Scarcity: A New Paradigm For Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1730-46 (1997).

181. For example, a recent article discussing the unconstitutional conditions doctrine in the federalism context notes that it is unclear how the Court would analyze

tary,¹⁸² of what kinds of discretionary speech supports qualify as a “subsidy” for the subsidized speech analysis?

2. Cash vs. Non-Cash Benefits

A cash/non-cash distinction provides an appealing way to limit the class of benefits that would qualify for the “subsidized speech” analysis.¹⁸³ When it gives out cash grants to support artists, civil lawyers or family planning counselors, the government is acting in its capacity of patron, not regulator. The beneficiaries of the government’s largess have, as a baseline, no constitutional, statutory or other right to receive the cash, and they are better off with the grant, notwithstanding the strings that may be attached.¹⁸⁴ But does an exemption from copyright

the question of whether or not the federal government may condition enforcement of the federal copyright law (that is, a non-monetary benefit) on state waiver of sovereign immunity. See Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (and How Not to)*, 79 TEX. L. REV. 1037, 1151 (2001).

182. Kathleen Sullivan, for example, answers the question “What government benefits give rise to unconstitutional conditions problems?” by answering simply “Those benefits that government is permitted but not compelled to provide. In our current constitutional order, this category includes most government benefits, as the Court has taken a broad view of permissible redistribution and a narrow view of affirmative government obligations.” Sullivan, *supra* note 59, at 1422. She does not go on to propose any method to distinguish some discretionary government activity, such as issuing permits, creating private rights of action, creating exemptions from the law, or enforcing the law, from the granting of cash subsidies. This is typical.

183. See *Satellite Broad. & Communications Ass’n v. FCC*, 146 F. Supp. 2d 803, 823 (E.D. Va. 2001) (“SBCA”), *aff’d*, 275 F.3d 337, *and cert. denied*, 122 S. Ct. 2588 (U.S. June 17, 2002) (No. 01-1332). In the Tenth Amendment context, the fact that a federal government subsidy emanates from the government’s Spending Clause, rather than Commerce Clause, power is significant. This is because the Spending Clause provides the federal government with the power to act upon the states when it lacks such power under the Commerce Clause. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”); see also *United States v. Butler*, 297 U.S. 1, 66 (1935) (for the first time announcing that the Spending Clause allows Congress “to authorize expenditure of public moneys for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution.”) (citation omitted). Thus, the fact that the government acted pursuant to its Spending power answers the question of whether or not the government had the affirmative power to act in light of the Tenth Amendment limitations on that power (or, put another way, the Tenth Amendment’s restatement that the federal government is a government of enumerated powers). By contrast, in the First Amendment context, the question is not about whether or not the government has the affirmative authority to act, but whether that action violates an independent constraint on government power.

184. Professor Frederick Schauer has labeled government-funded speech as “government enterprise.” He contrasts the First Amendment issues that arise in government enterprise cases to classic First Amendment cases. In the former, the government burdens speech supported by its own resources. In the latter, the

liability really act any differently? In the pre-SHVIA world, DBS operators had to obtain copyright licenses to retransmit local broadcast station signals. They had no constitutional entitlement to transmit these signals at all, and certainly not free of charge.¹⁸⁵ By relieving DBS operators of the ordinary obligation to obtain copyright licenses, SHVIA provides a benefit that Congress is under no constitutional obligation to grant and that DBS operators have no right to expect. The operation of SHVIA, in this sense, is very similar to cash subsidies in the form of arts grants or legal services funding, which are also constitutionally optional benefits to which the recipients are not entitled.

It might be argued that the baselines for SHVIA beneficiaries and cash grant beneficiaries are meaningfully different with respect to the recipient's alternatives. The recipient of a cash payment from the government's support of an activity (*e.g.*, exclusively pro-life speech) has the legal right to engage in the activity without the government's intervention, whereas the DBS operators do not have the legal right to retransmit broadcast programming on a royalty-free basis in the absence of a compulsory copyright license. However, this is simply to state that a benefit in the form of cash adds a positive, while a benefit in the form of a license removes a negative. In this respect, the license acts much like a tax exemption – otherwise known as a “tax expenditure” – which the Court has determined to be the functional

speech burdens attach to speech supported by the speaker's resources. *See* Schauer, *supra* note 53. It is clear where cash subsidies fit under this scheme, but less clear where non-cash benefits fit, particularly where granting of the benefit imposes a monetary opportunity cost on the government. The distinction does not help us to distinguish cases in which the government is engaged in enterprise (through its spending powers) from those in which the government is dispensing some other kind of benefit (through its regulatory powers). When my speech is supported by a spectrum license for which I have not paid full value, is my speech supported by the government or by myself? It is some combination of the two.

185. The courts have unequivocally held that there is no First Amendment right to violate copyrights. *See* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (holding that a magazine's advance publication of excerpts from the memoirs of Former President Gerald Ford infringed the copyright thereon on the grounds that copyright's idea/expression dichotomy “strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression”); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (rejecting First Amendment challenge to FCC regulations that allow a syndicated television program supplier to agree to allow the program to be broadcast exclusively by a single station in a local broadcast area on the grounds that there is “no first amendment right . . . to make commercial use of the copyrighted works of others.”); *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (rejecting First Amendment challenge to blanket copyright term extensions), *cert. granted sub nom.*, *Eldred v. Ashcroft*, 122 S. Ct. 1062 (U.S. Feb. 19, 2002) (No. 01-618).

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equivalent of a cash payment in the subsidized speech context.¹⁸⁶ If the salient feature of a license is that it permits what would otherwise be illegal activity, a tax exemption operates like a license in that it permits the non-payment of taxes, the payment of which would otherwise be required.

The only real difference between the copyright benefit and a cash subsidy,¹⁸⁷ a tax exemption,¹⁸⁸ or another non-cash benefit like government employment¹⁸⁹ is that a subset of taxpayers (the copyright owners) pays for the compulsory license benefit rather than the taxpayers at large.¹⁹⁰ The fact that a compulsory license effectuates a redistribution of benefits from copyright owners, rather than from the government, is unimportant to the question of whether or not SHVIA provides a benefit that is experienced by recipients as government largesse.¹⁹¹ The impact of the benefit on the recipients—the real focus of the unconstitutional conditions analysis—does not depend on whether or not the government provided a cash subsidy to pay for copyright roy-

186. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (“*TWR*”) (“Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.”). However, the Establishment Clause cases have found a constitutionally significant difference between tax exemptions (constitutionally unproblematic) and cash expenditures (problematic). See, e.g., *Walz v. Tax. Comm’n of City of N.Y.*, 397 U.S. 664 (1970) (holding that a tax exemption for church property does not violate the Establishment Clause as a subsidy would). The dormant Commerce Clause cases also distinguish between tax exemptions and cash subsidies, but find exemptions from generally applicable taxes to be more constitutionally problematic than are subsidies. See, e.g., *New Energy Co. of Ind. v. Limbich*, 986 U.S. 269 (1988).

187. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (subsidy to lawyers); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (subsidy to artists); *Rust v. Sullivan*, 500 U.S. 173 (1991) (subsidy to doctors).

188. See, e.g., *TWR*, 461 U.S. at 540.

189. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (government may not condition public employment on refraining from criticizing college administration); *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) (government may condition public employment on refraining from supporting opposition party when political affiliation is appropriate requirement for the job).

190. That the cash benefit was paid for by a subset of taxpayers—those in states that participated in the waste disposal program—did not make a difference in *N. Y. v. United States*, 505 U.S. 144 (1992).

191. A similar kind of “subsidy” is the following: Congress passes a law that individuals may, for the first time, sue their HMO’s for damages up to \$1.5 million. Twenty-five years later, Congress passes another law that lowers the damages cap to \$0.5 million for any HMO that abstains from advising patients on controversial cloning procedures. The HMO and its medical personnel may will claim that the speech-related conditions on the offer of reduced damages violates their First Amendment rights. The fact that the subsidy is a reduction in possible damages (a subsidy which the federal government does not pay for and which takes the form of relief from a pre-existing legal regime) does not make this case meaningfully different from *Rust*.

alties or provided an exemption from copyright royalty payments.

There is an intuitive appeal in limiting liberty-expanding subsidies to cash, which may appear to be easily refused without undue detriment.¹⁹² But the refusal of cash benefits, like food stamps¹⁹³ and unemployment benefits,¹⁹⁴ may reduce liberty to a much greater degree than the refusal of non-cash benefits, like the right to transmit programming on a royalty-free basis.¹⁹⁵ That is, in some cases, cash may more readily be viewed as an entitlement, the deprivation of which is felt as the heavy hand of government regulation.¹⁹⁶

192. See *Col. Sav. Bank v. Fl. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 697 (1999) (Breyer, J. dissenting) (noting intuitive appeal of belief that “it is somehow easier for the State, and hence more voluntary, to forgo [federal beneficence] than to refrain from ‘otherwise lawful activity,’ or that it is somehow more compelling or oppressive for Congress to forbid the State to perform an ‘otherwise lawful’ act than to withhold ‘beneficence.’”).

193. See *Lyng v. Int’l Union*, 485 U.S. 360 (1988) (holding that statute making a household ineligible to participate in the food stamp program when any member of the household was on strike was rationally related to the legitimate governmental objective of maintaining neutrality in private labor disputes).

194. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that refusal to extend unemployment benefits where claimant refused to work on Saturday because of religious beliefs was an impermissible burden on the claimant’s constitutional right to the free exercise of her religion).

195. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, in his dissent in *Col. Sav. Bank*, 527 U.S. 666 (1999), responded to the majority’s claim that a federal benefit to a state that consisted of allowing a state to engage in a particular form of interstate commerce on certain conditions was a more coercive offer than the grant of highway funds:

Given the amount of money at stake [more than \$20 billion in 1998], it may be harder, not easier, for a State to refuse highway funds than to refrain from entering the investment services business. It is more compelling and oppressive for Congress to threaten to withhold from a State funds needed to educate its children than to threaten to subject it to suit when it competes directly with a private investment company.

Col. Sav. Bank, 527 U.S. at 697 (Breyer, J., dissenting) (citation omitted).

196. This was certainly true in *Col. Sav. Bank*, in which the Court held that Congress, in the exercise of its commerce power, cannot require a state to waive its immunity from suit in federal court as a condition of being permitted to engage in otherwise legal activity (the investment services business). The Court drew a distinction between the threat of a sanction (or, in other words, the withholding of an entitlement) in *Col. Sav. Bank* from the threat of withholding a mere gratuity in *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Dole*, Congress conditioned its grant of highway funds to a State on condition that the state adopt a minimum driving age—a demand Congress might not be able to impose through regulation. Because Congress has no obligation to disburse funds to the states, these funds are gifts, which can be conditioned upon the abdication of the states’ rights except under limited circumstances (which have not yet been identified). The *Col. Sav. Bank* majority accepted that the “intuitive difference” between a “denial of a gift” and a “sanction” might “disappear [] when the gift that is threatened to be withheld is substantial enough.” *Col. Sav. Bank*, 527 U.S. at 687.

Distinguishing benefits from entitlements and refusals to subsidize from penalties is a difficult exercise that depends on where one locates the baseline obligations of government.¹⁹⁷ It is an exercise that should not be short-circuited by drawing a bright line between benefits that involve cash and non-cash benefits. Moreover, it is hardly relevant from whence the government's power to offer the benefit comes, whether that is the Commerce, Copyright, Spending, or Tax Clause.¹⁹⁸ The essence of the benefit in unconstitutional conditions cases is not that it is cash or even that it is the government's cash,¹⁹⁹ but that it is a discretionary exercise of government power and it is optional for the recipient.

3. Reliance Interests

If the cash/non-cash distinction is not the right one, what is? Another possible distinction is a temporal one. For example, if the speech-burdening conditions are imposed at the same time as the benefit is dispensed, then the benefit is truly a subsidy because the recipient has not relied on receiving the benefit only to find that the benefit now has strings attached. By contrast, if the recipient has been enjoying the benefit without the speech burdens, then the imposition of speech-related conditions to the benefit after the fact might remove the "beneficial" quality of the benefit because the baseline has moved from the absence to the presence of an expectation. A distinction between subsidies and non-subsidies based on temporal considerations captures the same sense of fairness as many equitable doctrines, such as considering reliance interests in assessing damages for breach of contract.²⁰⁰

If we are to be guided by reliance interests, then SHVIA would qualify as a subsidy and many of the cash subsidies at issue in the subsidized speech cases would not. Because SHVIA creates a new benefit, the withholding of the benefit for refusal to comply with the attendant conditions is in an important sense

197. See generally Kreimer, *supra* note 59.

198. See, *infra*, note 204.

199. Whether or not speech is considered "government speech" has become important in the unconstitutional conditions cases, after *Velazquez*. But it is important for determining whether or not the conditions on the benefit are permissible, not for the threshold determination of whether or not there is a conditional benefit in the first place. Since the federal government uses non-federal funds as inducements, see, e.g., *N.Y. v. United States*, 505 U.S. 144 (1992) (waste disposal program), there is no reason to think it cannot use non-federal non-cash benefits as inducements.

200. See, e.g., Restatement (Second) of Contracts § 349 (1981) (discussing damages based on reliance interest).

less punitive, and thus less “regulatory,” than the withholding of cash subsidies on which a beneficiary has relied. The doctor who has for years received federal funds to support a full-service family planning service, but then feels obliged to decline those funds when they are attached to a “gag rule” against abortion will experience the loss of the subsidy as a punishment. The Court views the doctor’s decision to sacrifice the subsidy in favor of exercising her speech rights as a decision that places her in no worse a position than if the government had offered her no subsidy in the first place.²⁰¹ But the fact that the doctor has relied on federal funds *does* make her worse off when she refuses the grant.

By contrast, a DBS operator is no worse off for rejecting the SHVIA subsidy than it would have been had SHVIA never been enacted, except that it may suffer competitive disadvantage in comparison to operators that accept the subsidy. The DBS operator has not relied on the subsidy and has operated successfully without it.²⁰² A definition of subsidy that required the contemporaneous provision of the benefit and imposition of the burden would exclude many cash grants that are the clearest and least controversial examples of government subsidies, while including a benefit like SHVIA.

4. Government Monopoly

Perhaps the universe of government benefits that could be viewed as speech subsidies should be limited to those benefits over which the government is merely one of many possible providers. Cash would generally fall into this category.²⁰³ The artist

201. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

202. The baseline in the case of SHVIA is critical to distinguishing the type of benefit it offers from other licenses, such as, for example, a permit to rally in the park. DBS operators, pre-SHVIA, could exercise their First Amendment rights by carrying all or no local broadcast signals in any market they chose, provided that they satisfied ordinary copyright obligations. They had no constitutional right to a compulsory copyright license. See *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981) (the First Amendment does not require “judicial creation of a compulsory licensing scheme in derogation of the law of copyright as passed by Congress”). What SHVIA offers is a way to carry local broadcast signals much less expensively, subject to certain speech burdens. DBS operators do not need the SHVIA license to transmit the programming they want and may, if they choose, ignore the inducement of SHVIA to carry material they would otherwise refuse. By contrast, demonstrators must obtain the government’s permission to exercise their First Amendment rights of association and speech. If the demonstrators refuse a permit that is conditioned on the transmission of speech they dislike, they would be unable to exercise their First Amendment rights to demonstrate. The baseline in the park case is a constitutional entitlement to rally.

203. It is unrealistic to assume that cash grants, merely because they consist of cash, could actually be obtained through non-governmental sources. After all, states cannot realistically go to any other source to procure highway funds. See Lynn

or lawyer who refuses a federal government grant could, at least theoretically, turn to other public or private sources of funds. In contrast, there are no alternatives to the precise benefit SHVIA provides—relief from copyright liability. Distinguishing between benefits the government alone can dispense and those that might be available from private sources in constitutional interpretation captures the intuition that the government should have more leeway to conduct itself as a market participant than as a market referee.²⁰⁴ In the subsidized speech context, the argument would go, the government should have the benefit of the

Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 106-07 (2001) (discussing federal government monopoly over sources of state revenue). The subsidized speech cases contain only the most glancing discussion of the real life opportunities for the beneficiaries of federal funding to obtain alternative funds. *Velazquez* contains the most overt discussion of this point, noting that when an attorney withdraws, an indigent client is unlikely to find alternative representation. 531 U.S. 533, 546-47 (2001). The Court noted that this was in contrast to *Rust*, where the patient seeking abortion counseling funded by the government also “could consult an affiliate or independent organization.” *Id.* at 547.

204. This is a distinction that has been rejected in the federalism context. *See Col. Sav. Bank v. Fl. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999). In drawing his distinction between gratuities and entitlements in *Col. Sav. Bank*, Justice Scalia focused not on the nature of the benefit (that is, on whether the benefit flowed exclusively from the government as sovereign), but on the expectations of the beneficiary. Thus, because a state would normally expect to be able to participate in the investment services business without federal interference, the unconditional freedom to participate in that market is an entitlement. Contrast this, Justice Scalia said, with *Petty v. Tennessee*, in which government exercise of a more naked regulatory power against the states (the withholding of consent to an interstate compact unless the states waived sovereign immunity) was upheld. There, “the granting of such consent is a gratuity” even though the states depended entirely on the federal benefit to conduct their activity. *Id.* The fact that the benefit flows from the federal government’s regulatory, as opposed to spending, powers has not seemed important to the Court in the commandeering context either. In a case involving Congress’ power to induce states to adopt certain waste disposal regulations, for example, the Court upheld, as equivalent, Congress’ offer of funding to states that regulated radioactive wastes and Congress’ offer of free access to special disposal sites to states that did so. *See N.Y. v. United States*, 505 U.S. at 167-68. The one provision ruled invalid was not an incentive, but a direct regulation that compelled states to choose between two alternatives, neither one of which could be imposed directly. *Id.* at 149. *See also Nollan v. Cal. Coastal Comm.*, 483 U.S. 825 (1987), which dealt with the question of whether the state could condition the grant of a residential beachfront building permit on the surrender of a pedestrian easement for public passage between beaches, and can be viewed as a Fifth Amendment unconstitutional conditions case. There, the court struck down the condition because there was no nexus between the benefit (a building permit) and the condition (concession of property rights). However, the Court suggested that had the condition been more closely related to the benefit—had it involved, for instance, the creation of a public viewing spot in exchange for the right to block the view—the condition would have been permissible. Nowhere in this dicta did the Court suggest that the government had less latitude to condition grants of permits than it would to condition the grants of other kinds of benefits.

more deferential review when it is competing with other potential benefactors to influence the speech market.

Even if the distinction between core and extracurricular governmental activity were the right one for defining subsidies, it would be a mistake to differentiate too sharply between a compulsory copyright license and cash. A compulsory copyright license is unlike other licenses that the government dispenses, such as a license to practice law or to erect a building, in that those who receive the compulsory license can usually obtain the same benefit through other means, namely by licensing the rights from the copyright owners through a rights management system or through individual negotiations.²⁰⁵ A compulsory copyright license, while not a cash grant, has a discernable market value and results from government participation in a market to reduce the costs of a private actor.

Government licenses to use spectrum have a different, but related, character.²⁰⁶ Like recipients of cash grants and compulsory copyright licenses, the recipients of licenses to use spectrum for speech have no constitutional or other entitlement to the license.²⁰⁷ But unlike the beneficiaries of a compulsory copyright

205. The Copyright Office believes “that for licensing the copyrighted works retransmitted by cable systems and satellite carriers, the better solution is through negotiation between collectives representing the owner and user industries, rather than by a government administered compulsory license.” U.S. Copyright Office, *A Review of the Copyright License Regimes Covering Retransmission of Broad. Signals* at iv (Aug. 1, 1997), available at <http://www.copyright.gov/docs/study.pdf> (last visited Sep. 23, 2002). ASCAP already has a cable and satellite licensing program for music. See *ASCAP Cable and Satellite Licensing*, available at <http://www.ASCAP.com/licensing/tvcablesatellite.html> (last visited Sep. 23, 2002).

206. Broadcast regulation has long been treated, at least informally, as a “social compact” based on a “quid pro quo.” See Remarks of Rep. Edward Markey, Chairman, Subcommittee on Telecommunications and Finance, Broadcasting/Cable Interface VIII (Omni Shoreham Hotel, Washington, D.C., Oct. 4, 1994) (suggesting that broadcasters would not obtain legislation that liberalized ownership limits unless they supported the V-chip proposal), *quoted in* ZUCKMAN, ET AL., *supra* note 12, at § 15.4 n.84; see also Applications of Stockholders of CBS, Inc. and Westinghouse Elec. Corp., *Memorandum Opinion and Order*, 11 F.C.C.R. 3733 (1996) (newspaper-television ownership restriction waived after company agreed to provide specific amounts of children’s programming); Applications of Capital Cities/ABC, Inc. and the Walt Disney Co., *Memorandum Opinion and Order*, 11 F.C.C.R. 5841 (1996) (newspaper-television ownership restriction not waived because company did not agree to air specific amounts of children’s programming). There are other examples of unofficial bargaining between broadcasters and the FCC, including the trade that broadcasters made to submit to the imposition of children’s programming requirements in return for the allocation of digital television spectrum in the mid-1990s. See Robinson, *supra* note 18, at 917-18.

207. The government, while it must distribute licenses in accord with due process, need not distribute the licenses for speech purposes at all. It could, if it wanted to, decide that all spectrum should be used for military and common carriage point-to-point (e.g., telephonic) uses.

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license, spectrum users are not assured of market substitutes for the government grant. As long as the federal government monopolizes the distribution of spectrum use rights,²⁰⁸ the recipients of these rights cannot use spectrum to disseminate their speech without a federal license.²⁰⁹ However, in the case of spectrum licenses, unlike the case of licenses to practice law or construct buildings, the government is not simply acting as a gatekeeper; it is distributing rights to use scarce resources that have a market value by virtue of their scarcity. Again, as with a compulsory license, when the government distributes spectrum licenses at less than market value, it is relieving private actors of an expense they would otherwise bear.²¹⁰

Such a result does not square with the reason for treating the government more liberally in the subsidized speech context in the first place, which is that the importance of government neutrality diminishes when the government elects to promote speech.

In the end, none of the categorical distinctions between subsidies and non-subsidies discussed above really works. The determination of what kinds of discretionary benefits are so discretionary that they qualify as speech subsidies—the antecedent question—poses the very same questions as the subsidized speech analysis itself. The question is, what distinguishes a “liberty-expanding offer” from a “liberty-reducing threat”?²¹¹ In determining whether or not the conditions attached to a subsidy or

208. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (arguing that spectrum is not really public property and there is no natural necessity for the government to monopolize the distribution of spectrum rights).

209. The FCC is considering how to privatize the market for spectrum, see Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 24203 (2000), and critics starting with Ronald Coase in the 1950's have argued that spectrum use rights ought to be converted to private property rights. See, e.g., Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). If spectrum is privatized to some extent, giving prospective licensees the ability to obtain spectrum for some services from private parties without the consent of the government, then even government spectrum licenses become benefits that are obtainable elsewhere.

210. Certainly, public opinion seems to view broadcast licenses as financial windfalls for the broadcaster. To wit, the 1997 allocation by the FCC of what some estimated to be \$70 billion in digital spectrum to broadcasters for free sparked a slew of editorial criticism. See, e.g., Donald Devine, *The New Robber Barons*, THE WASH. TIMES, April 10, 1997, at A14; Robert W. McChesney, *Digital Highway Robbery: Where is the 'Competition' the Telecommunications Act was Supposed to Provide?*, THE NATION, April 21, 1997, at 22; Alan Murray, *The Outlook: Digital TV Giveaway Foils Campaign Reform*, WALL STREET JOURNAL, March 17, 1997, at A1.

211. Kreimer *supra* note 59, at 1352.

benefit impose constitutional burdens, it has been argued that the distinction can only be drawn by reference to the baseline expectations of the government's duties towards the offeree.²¹² As we have seen, baselines are equally important to the prior question of whether a government program is a subsidy at all or simply a regulation with a conditional component.

Therefore, without going through the unconstitutional conditions inquiry into the impact of the government benefit on the speaker, there is no way to determine at the outset whether a subsidy operates as a benefit rather than a regulation.²¹³ As long as courts continue to consider the First Amendment implications of regulations and subsidies so differently, there will be an impulse to limit sharply what qualifies as a subsidy based on yet more categorical distinctions, which already make up much of contemporary First Amendment jurisprudence. Because the most likely distinctions between a copyright entitlement like SHVIA and other kinds of government subsidies are not compelling.

The benefits the government distributes to information technology industries, both cash and non-cash, must at least be considered for eligibility as speech subsidies entitled to more deferential First Amendment review.

IV. IMPROVING THE SUBSIDIZED SPEECH DOCTRINE

This section applies the Court's subsidized speech doctrine to SHVIA and explores the implications of the result. Not surprisingly, given the indeterminacy of the doctrine, the various limitations on the government's freedom to condition speech subsidies fail to provide a rule of decision for determining the constitutionality of SHVIA. More importantly, the doctrine overlooks factors that are particularly important to the operation of communications industry subsidies, specifically: (1) the course of bargaining in the creation of the subsidy; and (2) whether the subsidy's bargain serves to increase opportunities for speech and discourse. These additional considerations, alas, do not make the doctrine easier to apply, but they do give fuller effect to the

212. *See id.* at 1349.

213. Faced with this potential expansion of the class of cases that could be reviewed under the more deferential subsidized speech standard, courts might well decide that only cash subsidies qualify as subsidies. A more rigorous approach that acknowledges the hollowness of a cash/non-cash distinction could fortuitously result in a narrowing of the divide between heightened classic First Amendment scrutiny and deferential subsidized speech review.

First Amendment goals of a vibrant speech exchange as well as speaker autonomy.

A. *Failure of the Doctrine to Provide Principled Rule*

As discussed above, SHVIA is best viewed as subsidized speech, rather than an outright requirement that that DBS operators carry local broadcast signals.²¹⁴ Therefore, SHVIA is properly analyzed under the subsidized speech doctrine. Each of the six limitations on the government's ability to subsidize speech is discussed below.

1. The "No Alternative" Limitation

The "no alternative" limitation precludes the government from conditioning the subsidy in a way that burdens the speaker's expression outside of the subsidized channel. At the most basic level, SHVIA fails this test because a carrier that takes advantage of the compulsory copyright license in a given market must carry all stations in that market. There is no alternative method by which a carrier can make use of the license but buy its way out of the attendant burdens.²¹⁵

214. See *supra* Part III.B. It is possible, however, to analyze SHVIA as a plain regulatory restriction. A reviewing court treating it as such would apply a traditional First Amendment analysis—balancing the government's interests against those of the DBS industry, and then considering whether the restriction is sufficiently narrowly tailored—as the Supreme Court did in *Turner II*. The District Court for the Eastern District of Virginia, applying such an analysis, found SHVIA constitutional under *Turner II*'s intermediate scrutiny standard. See *Satellite Broad. & Communications Ass'n v. FCC*, 146 F. Supp. 2d 803 (E.D. Va. 2001) ("*SBCA*"), *aff'd*, 275 F.3d 337, and *cert. denied*, 122 S. Ct. 2588 (U.S. June 17, 2002) (No. 01-1332). In affirming, the Fourth Circuit recognized the possibility of a subsidized speech argument, but found it unnecessary to address the argument because it affirmed on traditional First Amendment grounds. *SBCA v. FCC*, 275 F.3d 337, 355 n.6 (4th Cir. 2001).

215. The "no alternative" test is a rough fit for SHVIA because the statute operates on a market-by-market basis. A DBS provider may take advantage of the compulsory copyright license in Philadelphia, while using purely private funds in New York in order to retain control over the selection of local stations. Furthermore, it is hard to contemplate what "alternative" is foreclosed by SHVIA. If we consider SHVIA as a restriction on an operator's ability to broadcast local channels of its choice, SHVIA passes the "no alternative" test because it mandates the distribution of *all* local channels that do not substantially duplicate content. Thus, even if an operator chooses to take SHVIA's conditional subsidy, there are no local channel alternatives that are foreclosed because SHVIA requires the carrier to "speak" them all. If we view SHVIA's conditions as a restriction on a carrier's ability to transmit national signals (because of capacity constraints), then SHVIA most certainly passes the "no alternative" test because a carrier is always free to use private money to increase its capacity to broadcast additional national channels.

2. The “Public Arena” Limitation

The “public arena” limitation requires the government to respect the traditional neutrality that speakers expect in a public setting. Thus, the government cannot restrict the expression of some viewpoints in places that it has subsidized in an effort to foster speech. SHVIA passes this limitation easily: a DBS satellite system is a private broadcast entity, not a public forum or other public arena.²¹⁶ Furthermore, SHVIA does not burden viewpoints.

3. The “Core Speech” Limitation

The “core speech” limitation prevents the government from using a subsidy to suppress ideas that it views as dangerous. There is no evidence that SHVIA was passed for such a purpose. Like most communications industry subsidies, SHVIA does not implicate core speech.²¹⁷

4. The “Objective Criteria” Limitation

The “objective criteria” limitation prevents the government from distributing benefits according to objective criteria, but then attaching content-based restrictions on receipt of the benefit. SHVIA’s subsidy is granted on an objective basis—DBS providers are given a compulsory license to retransmit local stations. However, because the conditions on the subsidy are also objective (once a carrier retransmits one local station using the compulsory copyright license) it must retransmit all local stations in that market and are not content-based, SHVIA passes the objective criteria limitation.

216. There is some support for applying the public arena limitation to any situation where the government, in the words of Justice Souter, creates “a subsidy scheme . . . to encourage expression of a diversity of views from private speakers.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 613 (1998) (Souter, J., dissenting). SHVIA would certainly meet this test: Congress expressly adopted SHVIA’s conditions in order to promote the diversity of speech provided by local broadcasters. *Conference Report*, *supra* note 164, at 101. If DBS qualified as a public forum in this context because of the government’s interest in fostering diverse voices, then most regulated communications industries would so qualify as well. It is more likely that the Court will continue to apply this limitation only to actual public fora, as traditionally determined. *See, e.g., Finley*, 524 U.S. at 599.

217. The obvious exception to this generalization about communications subsidies is *League of Women Voters* in which the government required public television stations to refrain from broadcasting editorials in exchange for funding. *See League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (1984).

5. The “Private Speech” Limitation

The “private speech” limitation precludes the government from placing speech restrictions on subsidy programs that foster purely private speech. SHVIA seems to run afoul of this limitation. The speech restriction imposed by the carry-one-carry-all rule only affects the speech of DBS operators who are private speakers. Central to *Velazquez*’s holding was the Court’s view that private individualized advice could not “even under a generous understanding of the concept” be characterized as an expression of the government’s viewpoint. However, Congress very plainly expressed an interest in maintaining local broadcast voices and structured SHVIA to benefit the local broadcast speakers. Congress’s express desire to support local broadcast voices might conceivably make SHVIA more analogous to *Rust*, where Congress expressed a desired viewpoint on abortion.²¹⁸ But it is unlikely that local stations could be considered a cohesive viewpoint. The Fourth Circuit’s *SBCA* decision supports such a conclusion.²¹⁹

6. The “Institutional Distortion” Limitation

The final limitation on government subsidies, the “institutional distortion” limitation, serves to prevent the government from altering the usual and historical functioning of a given medium. SHVIA’s speech subsidy passes this test. First, DBS service is a relatively new technology and, the industry is not old enough to have traditions that the subsidy would distort. Second, to the extent that SHVIA distorts the DBS industry, it seeks to distort it by preserving the existing television programming topology.

A. *Improving the Doctrine*

An analysis of SHVIA within the current subsidized speech doctrine illustrates the failure of that doctrine to provide a clear answer. In large measure, this failure stems from the Court’s cases. The Court has never attempted to delineate the various limitations in a comprehensive manner, and has never offered a hierarchy of the limitations on the government’s power to structure subsidies. Setting aside the “core speech” and “institutional distortion” limitations, which do not reflect the Court’s central concern for speaker autonomy, SHVIA might be objectionable

218. Note that this position also goes to the heart of the satellite broadcaster’s view that SHVIA is content-based discrimination.

219. *SBCA v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001).

under two of the four remaining limitations on the government's power to condition speech subsidies (the "no alternatives" and "private speech" limitations). The mere fact that SHVIA is content neutral could arguably be dispositive,²²⁰ but, as we have seen, the subsidized speech cases do not compel such a result. Mechanical application of the various coercion-based limitations on the government's freedom to structure speech subsidies yields no conclusive result.

The Court's subsidized speech decisions also overlook considerations that are particularly relevant when it comes to assessing the First Amendment import of restrictions on communications industry speakers. First, the doctrine does not compel an examination of the history by which the subsidy-with-restrictions was adopted. To the extent that the Court's doctrine looks to prevent coercion, it is meaningful whether the regulated industry agreed to, or advocated for, the subsidy in exchange for the concomitant restrictions. Second, the focus on coercion and speaker autonomy at the expense of other normative First Amendment values shortchanges what is often the organizing principle of communications law—the promotion of speech. When a speech subsidy is used to regulate the communications arena, the speech restriction may actually result in speech promotion. For example, both the benefit and burden attending SHVIA could be viewed as speech promoting: the subsidy allows the carriage of local stations and the condition (carry-one-carry-all) ensures a diverse speech marketplace. As the discussion of the outcomes of the leading subsidized speech cases above suggests, the Court is more attuned to the interests of listeners than the rationales for the decisions suggest.²²¹ In the communications area, the interests of listeners ought to be explicitly invoked.

220. Edwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000) notes that ordinary First Amendment cases increasingly turn on the distinction between content-neutral and content-based regulation and criticizes the Court's line-drawing in this context. The subsidized speech cases are not necessarily affected by the same dualism, as evidenced by *TWR*, in which a content-neutral condition on a subsidy (that a non-profit organization refrain from lobbying in order to receive favorable tax treatment) was not treated notably different from a content-based condition. In fact, in the same case, a content-based exception to the condition on the subsidy (in the case of veterans organizations) was permitted. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548-49 (1983) ("TWA").

221. See, *infra*, Section II.B.

1. Considering the Subsidy's History

Communications industries are well represented in Congress. Therefore, the ultimate allocation of benefits is highly likely to reflect a compromise among competitors. Current subsidized speech doctrine putatively looks primarily at the speech restrictions and their effect on speakers when implemented. The doctrine ignores, however, the speaker's role in crafting the bargain, and indeed, the possibility that the speaker may have agreed to the restrictions in order to receive the benefits of the subsidy. Where the speaker has played a prominent role in the creation of the subsidy, the coercion inquiry should be trained on the bargain's formation, not on its implementation. If the speaker was not coerced into accepting the bargain when it was struck, the speaker should not be able to subsequently claim that the bargain is coercive.²²²

Many provisions of communications law reflect the allocation of benefits among industries: payments from some telecommunications carriers to others;²²³ access to programming from some video distributors to others;²²⁴ and the provision of video distribution capacity from some distributors to some content providers.²²⁵ Each time Congress or the FCC attempts to make adjustments to one of these allocations, the industries participate in the process through lobbying, testimony, and filed comments. Furthermore, unlike the subsidies at issue in the leading subsidized speech cases, which go to underserved or under-represented populations, subsidies in the communications industry tend to benefit large well-funded corporations.²²⁶

222. This is not to say that formal rules such as estoppel or duress should apply. Rather, it is an attempt to interject process considerations into the doctrine of subsidized speech, where they are currently lacking. See Epstein, *supra* note 53, at 11-12 (“[T]he doctrine of unconstitutional conditions is directed toward the substance of various conditions, regardless of the course of negotiations between the individual . . . and the state.”).

223. See, e.g., 47 C.F.R. §§ 51.703 (requiring local exchange carriers to provide for reciprocal compensation for the transport and termination of telecommunications traffic with telecommunications carriers); 47 C.F.R. § 69.1-69.5 (requiring payments from long distance telephone companies to local telephone companies for the origination and termination of telecommunications traffic).

224. See, e.g., 47 C.F.R. § 76.1000-76.1001 (requiring cable operators to allow competitors to transmit vertically integrated programming).

225. See, e.g., 47 C.F.R. § 76.1503 (requiring Open Video Systems to carry video programming services); 47 C.F.R. § 76.56 (requiring cable companies to carry broadcast programming).

226. Professor Neil Netanel has proposed that legislative history be considered in the First Amendment review of laws that redistribute copyright entitlements in favor of industry. Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001). He argues that when copyright law is modified as

Public representation does not eliminate the chances for government coercion. In fact, if coercion is relevant to the constitutionality of speech subsidies where the speech is incidental to the activity (e.g., to representing indigent clients, providing pre-natal care, running non-profits), then coercion might be an even more important consideration for communications industries where speech *is* the beneficiary's activity. Where the medium is the message and the message is the business, presumably the loss of a speech subsidy for rejection of its conditions might be even more painful for a communications industry than for another beneficiary. However, the existence of coercion ought to be assessed differently where entitlements are adjusted among various competing industries against a complex regulatory backdrop.²²⁷ Because of the broader regulatory context in which SHVIA arose, DBS carriers were bargaining not only with the government, but also with the broadcast and cable industries. Because the government's consideration of benefits and burdens become the battlefields for competitive advantage, the way in which the bargain is struck and the compromises made should be important determinants of coercion.

All of the relevant industry players participated in the lengthy development of SHVIA.²²⁸ SHVIA's legislative history

a result of industry rent seeking at the expense of the public domain, the modifications should be more constitutionally suspect. *Id.* at 69-74. That analysis would not apply to SHVIA. An examination of SHVIA's legislative history shows that industry sat on both sides of the debate (for and against must-carry). Industry was not allied against the public because SHVIA merely allocates copyright and communications access benefits among various industry players, rather than reducing the scope of public domain material.

227. In recent years, the Court has found the regulatory context in which a speaker operates important for defining the scope and weight of the speech rights affected by regulation. The Court has in effect deemed that a speaker who participates in a heavily regulated industry has already sacrificed some of the autonomy that the First Amendment protects. *See, Reno v. ACLU*, 521 U.S. 844 (1997) (distinguishing speech restrictions on the Internet and on broadcasting because broadcasting is a highly regulated sector), *and United States v. United Foods*, 533 U.S. 405 (2001) (invalidating provision that requires commercial speech because it is not part of larger regulatory structure). With SHVIA, the government hoped to promote DBS without unfairly disadvantaging cable (by imposing must-carry obligations on cable, but not on satellite carriers) or upsetting the balance between cable and broadcast television that Congress thought it had achieved in the 1992 Cable Act (by making it easy for satellite to cherry-pick the most popular broadcast programming to the detriment of those stations the Cable Act sought to preserve). *See supra* Part III.A-B.

228. While the satellite broadcast industry is relatively new, DBS carriers were looking for ways to access broadcast stations years before SHVIA. SHVIA, after all, is the Satellite Home Viewer *Improvement* Act, which "improved" on two earlier efforts in the area. *See* Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949; Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477.

reveals traditional negotiations between politically sophisticated and powerful corporations—the DBS carriers (EchoStar and DirecTV) on one side and the broadcasters on the other. The satellite operators wanted a compulsory copyright license that would allow them access to the same local programming that their cable competitors had.²²⁹ The broadcasters opposed a grant of a compulsory copyright license to DBS carriers without attendant must-carry obligations.²³⁰ The cable industry sided with the broadcasters, contending that “there would be no parity of treatment under either the copyright or communications laws” unless satellite carriers that benefited from a cable-like compulsory licenses were burdened by cable-like must-carry obligations.²³¹ This process, by which the subsidies in SHIVA were crafted, should figure into the measure of coercion. Unfortunately, the subsidized speech doctrine currently does not take into account the course of negotiations between government, those it subsidizes, and related industries.²³²

The legislative record shows how the accommodation process lead to a bill that neither side found unduly coercive. For example, when broadcasters prevailed in persuading Congress that it should adopt some form of must-carry, the DBS carriers requested that Congress delay implementing the requirement so that the DBS carriers could increase their channel capacity to handle the new obligations.²³³ Congress accommodated the car-

229. See *House Hearing, supra* note 161, at 42 (statement of Steven J. Cox, Senior Vice President DIRECTV, Inc.) (“[T]he satellite license needs to be revised so as to place DBS providers on a more equal footing with their cable competitors, who currently drive [sic] competitive advantages from the terms of the cable compulsory license.”).

230. A broadcast industry representative told Congress that allowing DBS carriers to pick winners and losers by selectively carrying stations in each market “would be a giant step backward in the progress that the Congress has made in trying to preserve local free over-the-air service.” *Id.* at 154 (statement of Wade H. Hargrove, Counsel, Network Affiliated Stations Alliance).

231. *Id.* at 80 (statement of Decker Anstrom, President and CEO, Nat. Cable Television Association).

232. Professor Monroe Price, addressing First Amendment review of communications laws generally, has written that judges “can throw complex federal compromises . . . into a cocked hat.” Monroe E. Price, *Congress, Free Speech, and Cable Legislation: An Introduction*, 8 CARDOZO ARTS & ENT. L.J. 225, 228 (1990); see *id.* at 231 (“Structural policies advocated by first amendment zealots may be the best ones for the society. But they should be justified for their overall value to the community, not insisted upon only as required by the constitution.”).

233. See *Copyright Compulsory License Improvement Act: Hearing on H.R. 768 Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 29 (1999) (statement of David Moskowitz, Senior Vice President and General Counsel, EchoStar Communications Corp.) (“We are asking that legislation allow local-into-local with a grace period [before any carriage obligations apply.]”); S. 2494, *The Multichannel Video Competition Act of 1998: Hearing Before*

riers; SHVIA allowed DBS providers to use—for two years—the copyright portions of SHVIA without having to comply with the carry-one-carry-all provisions until January 1, 2002.²³⁴

The DBS carriers accepted this bargain because their experience taught that the lack of local stations on satellite television was the primary impediment to the growth of the DBS market.²³⁵ Subsequent evidence shows that the satellite carriers were correct. During the period in which satellite carriers had an unconditional right to broadcast local stations, the DBS carriers saw their subscribership grow substantially.²³⁶ The FCC has explicitly linked this growth to SHVIA.²³⁷ In cases like SHVIA, where satellite operators specifically requested that Congress enact SHVIA as it was finally drafted,²³⁸ courts should consider the course of bargaining when assessing any subsequent claims that the law impermissibly coerces them to forego protected speech.

Of course consideration of the legislative history will not always support a pro-government outcome, as it does with SHVIA. For example, in *Reno v. ACLU*, the Court struck down the Com-

the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 105th Cong. 23 (1998) (statement of Charles C. Hewitt, President, SBCA) (“[I]f the technology was there, we would certainly support [must-carry] . . . I think that is why we agreed to a phase-in.”). See *supra* note 214 for an explanation of the capacity restraints of DBS.

234. 47 U.S.C. § 338(a) (2000).

235. *Copyright Compulsory License Improvement Act: Hearing on H.R. 768 Before Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 33 (1999) (statement of David Moskowitz, Senior Vice President and General Counsel, EchoStar Communications Corp.) (“[M]ost of the people who walk into a satellite dealer’s showroom turn around and walk out because they can’t get their local TV channels through DBS.”).

236. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report*, 17 F.C.C.R. 1244, 1247 (2002) (“Between June 2000 and June 2001, the number of DBS subscribers grew from almost 13 million households to about 16 million households, which is nearly two and a half times the cable subscriber growth rate.”).

237. *Id.* (“The continued growth of DBS is, in part, attributable to the authority granted to DBS operators to distribute local broadcast television stations in their local markets by the Satellite Home Viewer Improvement Act of 1999.”).

238. See *Reauthorization of the Satellite Home Viewer Act: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. 70 (1999) (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar Communications Corp.); S. 2494, *The Multichannel Video Competition Act of 1998: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 105th Cong. 7 (1998) (statement of Charles C. Hewitt, President, SBCA). This is not to say that satellite operators would not have preferred a compulsory license free of the carry-one-carry-all condition. Their First Amendment challenge of SHVIA was curious in that even if they had prevailed, they were unlikely to convince a court to preserve the license, but sever and strike down the conditions. Instead, they likely would have been left without any compulsory license whatsoever.

munications Decency Act²³⁹ on First Amendment grounds, in part because Congress conducted no hearings on the bill and did not offer any findings to explain the need for the legislation.²⁴⁰ Thus if Congress had failed to consult with the satellite carriers in crafting a compulsory copyright license, a consideration of the history might result in a conclusion that SHVIA *is* coercive. However it may cut, the history of the negotiations should inform the question of whether a subsidy is coercive. The current subsidized speech doctrine simply does not require such consideration.

2. Considering Speech Enhancement

A coercion analysis, even one rich enough to take process into account, is too focused on speaker autonomy to capture the First Amendment value of speech diversity which plays such a central role in communications industry regulation. Much contemporary First Amendment law proceeds from the notion that the government should stay out of the “marketplace of ideas,” allowing ideas to compete on their merits for public acceptance.²⁴¹ It is a commonplace argument since the New Deal that the marketplace for goods and services might be distorted by wealth, imperfect information, or collective action problems, and government intervention is sometimes required to correct the market.²⁴² Electronic media regulation applies to the information market the same skepticism about market dynamics that has, since the New Deal, characterized economic regulation.

While satellite carriers depict SHVIA as an undue restriction on their editorial control,²⁴³ the carriage restrictions have more to do with increasing speech (through the preservation of marginal broadcast stations) than with suppressing freedom. Congress tried to preserve more speech by “helping viewers have

239. Communications Decency Act, Pub. L. No. 104-104, Title V, 110 Stat. 56 (1996).

240. *Reno v. ACLU*, 521 U.S. 844, 858, 879 (1997).

241. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

242. See, e.g., Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-89, 791 (1987); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW*, 140, 155-58, 195 (1987).

243. *SBCA v. FCC*, 275 F.3d 337, 371 (4th Cir. 2001); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). But see C. Edwin Baker, *Turner Broad.: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 62-80 (arguing that structural regulation of media companies should be treated as ordinary economic regulation); C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982) (arguing that First Amendment protection should be afforded to the press, but not passive carriers).

access to all local programming while benefiting satellite carriers and their customers.”²⁴⁴ Thus, it “structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations.”²⁴⁵

In the absence of a compulsory license to facilitate the carriage of local stations, DBS subscribers would have less access to local channels and non-DBS subscribers would have less access to local content as the erosion of the potential audience leads to a weakening of local programming.²⁴⁶ If Congress had adopted a compulsory copyright license that did not require carriage of all local stations, DBS subscribers would, assuming a functioning market, receive the precise number of local stations they desired. But non-DBS subscribers might lose stations that fail for lack of viewer exposure. By requiring the carriage of these types of programming, SHVIA’s conditions promote speech by giving DBS and non-DBS subscribers access to a greater variety of speech.²⁴⁷

With respect to viewers who receive their programming through traditional over-the-air transmissions, the effect is particularly acute. Because the lack of satellite carriage causes local broadcasting to decline, the viewing choices of over-the-air viewers are restricted by the market choices of DBS subscribers. Over-the-air viewers are irrelevant to the programming choices of DBS providers. But the programming choices of DBS provid-

244. See *Conference Report, supra* note 164, at 102 (“the congressional policy of localism and diversity of broadcast programming, which provides locally-relevant news, weather, and information”); see also Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, § 2(a)(6), 106 Stat. 1461 (1992) (“There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.”).

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245. *Conference Report, supra* note 164, at 92.

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246. See *SBCA v. FCC*, 275 F.3d 337, 349 (4th Cir. 2001).

No rational doubt may exist that a local station denied access to a portion of its in market audience is injured. Lack of carriage reduces potential audience and, therefore, actual audience. Reduced audiences translate to reduced revenue. Even where revenue reductions are less than fatal, they still affect a station’s ability to provide the best practicable service to the public. At best, a local station which a satellite carrier refuses to carry would be placed at a demonstrable disadvantage vis-à-vis competing broadcast television stations which are carried.

Id. (quoting *Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Part II): Hearing Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 105th Cong. 68 n.38 (1998) (statement of James J. Popham, Vice President and General Counsel, Association of Local Television Stations)).

247. In fact, some commentators believe that regulation of the electronic media to ensure a greater diversity of voices is not just desirable from a First Amendment perspective, but constitutionally compelled. See, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

ers are directly relevant to the viewing choices available to over-the-air viewers. Congress expressly recognized this problem and, in SHVIA, sought to inject the interests of the over-the-air viewers into the DBS providers' programming decisions.²⁴⁸

Both the subsidy and the limitations on the subsidy were designed to promote speech via the preservation and transmission of local broadcast signals.²⁴⁹ That there are First Amendment interests on both sides should not exempt a speech burden from scrutiny, but it does suggest that the analysis ought to be different.²⁵⁰ A court might conclude from the standard coercion analysis that satellite carriers face tremendous pressure to sacrifice speech interests. It ought to be relevant that, if the carriers succumb to this pressure, there will be more speech available to the public.²⁵¹ Judgments about whether or not subsidies enrich the

248. *Conference Report*, *supra* note 164, at 102.

249. There are many examples of regulation that burdens some speech while enhancing other speech, such as defamation law and campaign financing restrictions. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998). The *Turner* cases of course dealt with such a regulation.

250. Balancing between the speaker's interest and the government's interest is a hallmark of modern First Amendment jurisprudence and finds expression in the triad of strict, intermediate and rational basis scrutiny. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). To reduce the possibility that ad hoc balancing will degenerate into standardless and overly fact dependent constitutional determinations, the Court has created categories of speech (e.g., commercial, viewpoints, content-neutral) that weight the balance and determine the outcome of many cases. *See generally* Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 817-20 (1998) (discussing the early debate about the merits of First Amendment balancing, as well as criticism of First Amendment speech categories). In a handful of recent opinions and concurring opinions, Justice Breyer employs a more nuanced balancing approach that takes into account not just the speaker's and the government's interests, but the competing First Amendment values that are at stake when the government regulates the media and other institutional speakers in the name free speech. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 225-295 (1997) (*Turner II*), (Breyer, J., concurring) (balancing viewers' interests in a diverse array of local broadcast channels with cable operators' interests in editorial control over their systems); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743-44 (1996) (balancing cable programmers' interests in access to cable channels against cable operators' interests in editorial control over their systems); *Bartnicki v. Vopper*, 532 U.S. 514, 536-41 (2001) (Breyer J., concurring) (balancing the right of the media to publish and the individual's right of privacy in private speech); *Nixon v. Shrink Miss. Gov't. PAC*, 528 U.S. 377, 399-405 (Breyer J., concurring) (balancing the candidate's speech rights with the public's interests in political elections that are free from corruption and the appearance of corruption).

251. To the extent that satellite carriers are not vertically integrated with program suppliers, as is generally the case today, they are likely to be guided in their selection of programming by the tastes of their subscribers. Even so, subscribers may be benefited by SHVIA carriage obligations in two ways. First, the less popular broadcast stations like the educational stations might be a public good that ratings would not select for. *See, e.g.*, Cass R. Sunstein, *Television and the Public Interest*,

information marketplace ought not to supplant the autonomy-maximizing or democracy-enhancing values in assessing the constitutionality of speech subsidies. Certainly, a subsidy might be unconstitutional no matter how much speech is enhanced. Nevertheless, the regulatory encouragement of speech—by fostering localism through spectrum licensing and fostering of speech diversity through access requirements and ownership restrictions—embodies a constitutional norm that should be preserved in subsidized speech analysis, particularly in cases where the government is allocating entitlements to speak. A broader balancing of the burdens and benefits of a speech subsidy package in subsidized speech analysis supports this goal.

CONCLUSION

I have argued in this piece that speech subsidies may come in many forms, not necessarily cash grants or tax exemptions, and may even take the form of a copyright entitlement, as in the case of SHVIA. The prevailing test of constitutionality in the subsidized speech cases turns on whether or not the speaker has been coerced into giving up speech rights in order to get a government subsidy. I have tried to show that this coercion test fails to yield predictable and justifiable results in the leading subsidized speech cases because, as many scholars have noted, there is no readily discernable resting point in the slide from inducement to compulsion. It is not surprising, then, that the Court has, without much analysis, supplemented the coercion test with considerations of the value of the speech disfavored by the government, censoring only those subsidies that burden core First Amendment speech voicing political dissent or motivating political discussion.

When it comes to communications industry subsidies like SHVIA, I suggest that the existing test of speaker coercion is particularly inept. This is because the subsidies are often bargained for by the industry beneficiaries themselves from a standpoint of political strength and sophistication. Any coercion analysis must take into account the course of bargaining between and among the communications industries, and the government. More significantly, the coercion analysis focuses too much on speaker impact and too little on listener impact. The entire

88 CALIF. L. REV. 499 (2000). Second, a less popular broadcast station might still be more popular in its local market than a national programming service that would take its place. However, because carriage of a local station is so much more expensive than carriage of a national station in terms of capacity consumed per subscriber, the carrier is likely to choose the national over the local service.

structure of electronic media regulation is designed to promote a diversity of voices and accessibility of speech. Government subsidies to the communications media, like its regulations, ought to be judged in substantial part by whether they enrich the speech market so that distinct voices are accessible in the increasingly concentrated mass media space. It is likely that, as more and more communications regulations fall to First Amendment challenges, government will turn increasingly to speech subsidies to achieve communications policy goals. If so, courts ought to be prepared to apply a more nuanced subsidized speech doctrine which pays more attention to the dynamics of industry bargaining and to the speech market as a whole.