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June 9, 1992

ARLIN M. ADAMS
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Representative John D. Dingell
Chairman, House Committee on Energy
and Commerce
2225 Rayburn House Building
Washington, D.C. 20515

Re: Proposed Cable Must-Carry Provisions

Dear Mr. Chairman:

Enclosed is a constitutional analysis prepared by myself and Deena Schneider, of our office, covering the must-carry provisions of H.R. 4850, the Cable Television Consumer Protection and Competition Act, and the amendment to that bill offered by Representative Ritter to exclude from the general must-carry rules commercial television stations predominantly used for "sales presentations or program-length commercials." The House Subcommittee on Telecommunications and Finance adopted this amendment to H.R. 4850 on April 8, 1992.

During my tenure on the United States Court of Appeals, in my practice, and as a result of teaching First Amendment courses at the University of Pennsylvania Law School, I developed considerable expertise in this area. My colleague Deena Schneider's practice has for some time involved her in First Amendment issues in the communications field, particularly with respect to the cable industry.

As our analysis shows, in our judgment the general must-carry provisions of H.R. 4850 may well violate the First Amendment. The amendment to these provisions proposed by Representative Ritter and incorporated by the Subcommittee serves the salutary purpose of bringing H.R. 4850 into greater congruence with its apparent purposes and thus reduces the possibility that the bill will be declared unconstitutional. In our view, the amendment does not raise additional First Amendment issues.

Sincerely,

Arlin M. Adams

Arlin M. Adams

Enclosure

SUMMARY

The House is currently considering inclusion of "must-carry" provisions in H.R. 4850, the Cable Television Consumer Protection and Competition Act adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992. Under must-carry, cable systems would be required to carry as part of their program offerings the broadcast signals of qualified television stations within the local viewing areas of their communities. The Subcommittee has incorporated into H.R. 4850 an amendment offered by Representative Ritter that excludes from the general must-carry requirements commercial television stations that are predominantly used for "sales presentations or program-length commercials."

The must-carry provisions under consideration raise several significant constitutional questions:

1. There Is a Significant Issue Concerning Constitutionality of Any Must-Carry Provisions.

-- Two sets of must-carry rules adopted by the FCC have already been rejected by the Courts under the First Amendment.

-- To withstand inevitable constitutional scrutiny, any new must-carry provisions will have to be precisely drawn so as to be necessary to further the government interests that supposedly support the must-carry concept: the fostering of the local system of broadcasting, diversity of programming, and competition among programmers.

2. Provisions That Would Require Home-Shopping and Other Direct-Marketing Dominated Stations To Be Carried on the Basic Tier Would Be Unconstitutional.

-- Requiring cable systems to carry home-shopping and other direct-marketing dominated stations would not enhance localism, program diversity, or competition (the apparent government interests supporting must-carry), and would therefore violate the First Amendment.

-- Provisions granting must-carry status to home-shopping and other direct-marketing dominated stations would provide an irrational and unfair preference to one competitor in the marketplace and would encourage the conversion of television stations to home-shopping and direct-marketing formats. Because neither result forwards the supposed purposes of must-carry, these provisions would be unconstitutional.

3. The Ritter Amendment Excepting Home-Shopping and Direct-Marketing Dominated Stations from the General Must-Carry Provisions of H.R. 4850 Alleviates the First Amendment Concerns That Would Result from Granting These Stations Must-Carry Status.

-- The amendment applies to all home-shopping and direct-marketing dominated stations and allows cable operators to decide for themselves whether to carry such stations.

-- In fine-tuning H.R. 4850 to bring it into greater congruence with its apparent purposes, the amendment in fact enhances the possibility that must-carry will pass constitutional muster and will not itself be constitutionally infirm.

DISCUSSION

1. In Order To Survive Challenge Under the First Amendment, Any Must-Carry Provisions Adopted by Congress Must Be Precisely Drawn To Further a Substantial Governmental Interest with the Narrowest Necessary Effect on Speech.

Any must-carry provisions that are included in a cable bill will be subject to challenge under the First Amendment. The Courts have already struck down two sets of must-carry rules adopted by the FCC.¹ It is clear from these and other applicable decisions that to be sustained under the First Amendment, any new must-carry provisions will have to be drafted with great precision.

In its Quincy decision rejecting the FCC's first version of must-carry rules, the Court of Appeals for the District of Columbia Circuit held that such rules cannot pass constitutional muster unless they "further an important or substantial governmental interest [and] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."² The Court then determined that the FCC had failed to demonstrate either that the rules furthered a substantial governmental interest or that they were drafted as narrowly as possible to accomplish that interest.

The basis for the must-carry rules articulated by the FCC in Quincy was the supposed threat to the system of local broadcasting presented by the potential exclusion of local sta-

tions from cable coverage. The Court concluded that the FCC had failed to prove that this was a "real" as opposed to "merely a fanciful threat."³ The Court held that the FCC had not adequately demonstrated "that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat."⁴

The Court then concluded that in any event, the FCC's initial must-carry rules were broader than necessary to fulfill its expressed purpose of protecting "localism."⁵ The Court first noted that "the rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator."⁶ The Court also pointed out that the rules protect "every broadcaster, regardless of whether or to what degree" the broadcaster in fact is threatened by the operation of a cable system.⁷ As a result, the Court found the rules to constitute an impermissible "blunderbuss approach."⁸

In its Centucky Communications decision, the Court likewise struck down the FCC's second version of must-carry rules, because the FCC again had failed to demonstrate the necessary "substantiality of the governmental interest" and to adopt rules that were sufficiently narrow in operation to provide the requisite "congruence between means and ends."⁹

The legal standards set forth in Quincy and Century Communications will also apply to any must-carry provisions of a cable bill that ultimately is passed. In short, the constitutionality of the must-carry provisions will turn on (1) whether there is a substantial governmental interest that supports the provisions and (2) whether the provisions are narrowly drawn so that their terms are essential to further that interest.

Presumably, the governmental interest offered in support of the must-carry provisions of H.R. 4850 will be the protection of the system of local broadcasting, coupled with related concerns for public access to diverse programs and competition among programmers.¹⁰ It remains unclear whether the Courts will determine that there is sufficient basis for these supposed interests to uphold any must-carry provisions in a cable bill. What is clear, however, is that the provisions of H.R. 4850 without the Ritter Amendment would not be upheld because they would not forward the supposed governmental interests that support must-carry and because they would be overly broad in providing unnecessary must-carry status favoring one communications company over non-broadcast competitors providing the same type of programming.

2. **Provisions That Would Require Cable Systems To Carry Home-Shopping and Other Direct-Marketing Dominated Stations on the Basic Tier Would Not Advance the Supposed Goals of Must-Carry and Would Be Unconstitutional.**

The "basic tier" of a cable system is made up of those services that a subscriber receives for the minimum cost of signing up for cable. The must-carry provisions proposed in H.R. 4850 would require cable systems in general to devote one-third of their channel capacity to carriage of local commercial television stations on the basic tier. Although certain aspects of these provisions may be constitutionally valid, others would violate the First Amendment.

For example, the provisions of H.R. 4850 guarantee the inclusion in the basic tier of qualified local affiliates of commercial broadcast networks and of local independent commercial television stations. These provisions might be found to be constitutional, since they appear to be generally consistent with the supposed purposes of must-carry to foster local broadcasting and diversity and competition in programming.

However, to the extent that absent the Ritter Amendment H.R. 4850 would guarantee basic-tier carriage of local broadcast stations used virtually exclusively (as much as 90% of the day) by a single home-shopping company, or devoted to a direct-marketing format such as "infomercials" (one-half or hour-long marketing endeavors), the bill would be unconstitutional. Stations devoted to such programming are not truly fostering localism; nor do they increase program diversity or enhance competition

among program suppliers. Therefore, mandated cable carriage of home-shopping or direct-marketing dominated stations would do nothing to further the apparent governmental interests underlying must-carry.

Indeed, to the extent that H.R. 4850 without the Ritter Amendment would require cable systems to carry national home-shopping or other direct-marketing dominated stations on the basic tier, the bill would serve no purpose other than to give these stations favored treatment against their non-broadcast competitors. This preferential effect would not be consistent with an attempt to foster local broadcasting or program diversity and would in fact be inconsistent with the goal of promoting competition in the marketplace. In our judgment, the bill would therefore be invalidated by the Courts as lacking the "congruence between means and ends" required under the First Amendment.

As Representative Ritter and the Subcommittee noted in proposing and adopting his amendment to H.R. 4850, a single home-shopping company -- Home Shopping Network, Inc. ("HSN") -- uses UHF stations as well as satellite feed to place its programs on cable systems. These UHF stations devote their broadcast time almost exclusively to the retransmission of satellite-delivered national sales presentations which are also available on many cable systems through HSN's cable network. Granting must-carry status to these stations would in no way further the governmental interests in localism and diversity on which must-carry is supposedly based but would merely provide preferential treatment to

ESN vis-a-vis other home-shopping companies such as QVC Network, Inc. that have confined their programming to cable.

In addition, others may try to convert stations into conduits for home-shopping and other direct-marketing formats such as one-half and full-hour "infomercials" in order to qualify for must-carry status under H.R. 4850. Again, encouraging such conversion of stations to home-shopping or direct-marketing domination would not serve the goals that must-carry is designed to fulfill and would have the result of favoring one competitor over another based only on its use of broadcast facilities.

The fact is that there is no reason why home-shopping company or other direct-marketing dominated stations should receive must-carry status of any kind:

-- Home-shopping and direct-marketing dominated stations by their very nature do not enhance the local system of broadcasting, because they are used almost exclusively for the remote broadcasting of nationally-transmitted sales presentations.

-- Home-shopping and direct-marketing dominated stations by practice do not enhance program diversity because they present an insignificant amount of local programming.

-- Favored treatment for home-shopping and direct-marketing dominated stations over competing cable programming services a fortiori would be anti-competitive.

As a result, a bill that included must-carry status for home-shopping or other direct-marketing programs merely because they were carried on broadcast stations would be the type of must-carry regulation that has been invalidated in the past as "'grossly' over-inclusive [because] the rules indiscriminately protect each and every broadcaster"¹¹ without regard to whether the supposed purposes of must-carry are furthered.

3. Rather Than Raising New Constitutional Issues, the Ritter Amendment Ameliorates Some of the Concerns Created by the General Must-Carry Provisions of H.R. 4850.

In proposing his amendment to H.R. 4850, Representative Ritter specifically recognized the significant First Amendment questions raised by legislation that would force some cable systems to carry home-shopping stations on their basic tier despite the primarily non-local and duplicative nature of the programming offered by those stations. Representative Ritter further noted that mandating cable carriage of home-shopping stations would confer an unfair advantage on one home-shopping company utilizing both broadcast and cable distribution systems over competing programmers and other special-interest cable networks, since many of these other networks would inevitably be forced off many cable systems due to inadequate channel capacity.

Representative Ritter proposed to avoid these unfortunate and legally suspect effects of H.R. 4850 with an amendment removing from must-carry status any commercial television station

"predominantly utilized for the transmission of sales presentations or program-length commercials." As the House Subcommittee recognized in adopting the Ritter Amendment on April 8, 1992, by making H.R. 4850 more congruent with its supposed goals of increasing localism and program diversity and competition, the amendment increases the likelihood that the legislation will pass constitutional muster. Thus, the amendment is a positive development from a First Amendment point of view.

It comes as no surprise that the only home-shopping company that currently uses both UHF stations and cable feeds to distribute its programming is unhappy at the prospect of losing its preferential position under H.R. 4850 and therefore seeks to defeat the Ritter Amendment. In an attempt to preserve the unfair advantage that it would receive under H.R. 4850 as originally drafted, this company has launched a baseless attack on the amendment on First Amendment grounds and as a denial of equal protection.

The arguments advanced against the amendment turn the constitution on its head. As we have already shown, without the amendment H.R. 4850 itself would be highly unlikely to survive a challenge under the First Amendment, because it would extend must-carry protection to stations that do not promote the goals of must-carry and because it would grant one home-shopping company favored treatment over its competitors.

The defect in the attack on the Ritter Amendment is its failure to recognize that the burden on free speech at issue here

is created by the general must-carry provisions of H.R. 4850 and not by the amendment. H.R. 4850 requires cable operators to carry the signals of qualified local commercial television stations. In contrast, the amendment merely excepts certain types of stations from this requirement and permits cable operators to carry or not to carry the signals of those stations as they wish. Moreover, the exception of these stations from the general must-carry requirements is based on the fact that the programming offered by these stations does not forward the purported goals of must-carry. For all these reasons, the amendment furthers constitutional goals and clearly does not create any new constitutional concerns.

One home-shopping company has complained that the amendment is designed to discriminate against its stations alone based only on the content of their speech. While Representative Ritter and the House Subcommittee identified combined use of UHF and cable affiliates by one home-shopping company as a reason for the amendment to H.R. 4850, they did not confine their concerns to that company's activities. Rather, Representative Ritter and the Subcommittee also noted that other "infomercial" (program-length commercial) producers are now trying to recruit other UHF stations to similarly convert their programming schedules into strings of virtually non-stop commercials.

The Ritter Amendment is broadly drafted to cover any home-shopping or direct-marketing dominated station that seeks to use must-carry to avoid competition and guarantee cable carriage

of its non-local broadcasts. Moreover, the amendment does not restrict or forbid carriage of such stations by cable operators; instead, it merely excludes those stations from the general must-carry provisions of H.R. 4850. For both these reasons the amendment is quite different from the statute involved in the News America case, which by design restricted the speech of a single company.¹²

The fact that the Ritter Amendment excepts certain stations from the general must-carry provisions of H.R. 4850 based on the nature of the programming of those stations does not create a constitutional problem, because it is the nature of those stations' programming that does not warrant their being given must-carry status in the first place. Under these circumstances, the Mosley case, which prohibits governmental distinctions between speakers based on the content of their speech,¹³ is inapposite. In any event, unlike the situation in Mosley, where by ordinance only labor picketing was permitted near a public school, under the amendment cable operators would "still [be] free to choose" to carry a home-shopping or direct-marketing dominated station over a competing home-shopping, direct-marketing, or other cable network.¹⁴ The amendment thus does no more than refuse to extend the automatic protection of must-carry beyond what is needed to achieve its stated goals.

The amendment proposed by Representative Ritter and adopted by the House Subcommittee is a modest, narrowly-drawn effort to remedy one of the First Amendment concerns clearly

presented by the general must-carry provisions of H.R 4850. As such, it should be endorsed by Congress and not itself subjected to baseless constitutional attacks.

FOOTNOTES

1. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
2. Quincy, supra, 768 F.2d at 1450-51, quoting United States v. O'Brien, 391 U.S. 367, 377 (1968).
3. Quincy, supra, 768 F.2d at 1454 and 1457, quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).
4. Quincy, supra, 768 F.2d at 1459.
5. Id. at 1459-62.
6. Id. at 1460.
7. Id. at 1461.
8. Id. at 1462.
9. Century, supra, 835 F.2d at 300-04.
10. See H.R. Rep. No. 682, 101st Cong., 2d Sess. 62 (1990).
11. Quincy, supra, 768 F.2d at 1460.
12. See News America Publishing, Inc. v. FCC, 844 F.2d 800, 814-15 (D.C. Cir. 1988).

13. See Police Department v. Mosley, 408 U.S. 92, 96 (1972).
14. See National Association of Independent Television Producers & Distributors v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).



Cornell Law School

June 5, 1992

Representative John D. Dingell
Chairman, House Committee on Energy and Commerce
2125 Rayburn House Building
Washington, D.C. 20515

Dear Chairman Dingell:

I write with regard to the constitutionality of Representative Ritter's amendment to H.R. 4850, an amendment that would neither require nor prevent cable systems from carrying commercial television stations or video programming services that are "predominantly utilized for the transmission of sales presentations or program length commercials." The amendment was adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992.

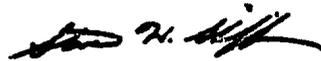
I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the First Amendment. I am the principal co-author of The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991) (with Dean Choper of Berkeley), the most extensively used casebook in the field. I also co-author a set of casebooks that together with their yearly supplements are widely used in American law schools. For example, I am the co-author responsible for freedom of speech in Constitutional Law: Case-Comments-Questions (West Publishing Co. 7th ed. 1991) (with William Lockhart, Yale Kamisar, and Jesse Choper).

My conclusion is that the Ritter Amendment is clearly constitutional. Assuming Congress decides to enact must-carry rules of the type specified in H.R. 4850, Congress need not mandate access for televised-shopping stations. Congress has broad latitude in dealing with commercial speech. Indeed, to saddle cable system operators with a forced regime in which televised-shopping stations are coercively granted privileged access raises constitutional questions that would seriously imperil must-carry legislation.

Myron Taylor Hall, Ithaca, New York 14853-4901 ~ Fax: (607) 255-7193

Must-carry rules have twice been declared unconstitutional. If H.R. 4850 becomes law, must-carry will be challenged again. Again it will be claimed that government is wrongly substituting its conception of good speech for that which would be chosen in the editorial discretion of the cable system operator. What better present could be provided to a litigator opposing must-carry legislation than the granting of privileged access to cable for televised-shopping stations predominantly utilized for sales presentations? What litigator would not use the forced imposition of commercialism as exhibit A in an attempt to show that the private editorial decisions of cable system operators are superior to those mandated by big government? Those who seek to defend must-carry legislation will have a hard enough road to hoe without providing this kind of litigating advantage to their opponents. The granting of privileged access to cable for televised-shopping stations is a river boat gamble that the proponents of must-carry need not and should not take.

Sincerely,



Steven H. Shiffrin
Professor of Law

Statement of

**Steven H. Shiffrin
Professor of Law
Cornell University**

Regarding

**The Ritter Amendment
to H.R. 4850**

To the

**Committee on Energy and Commerce
United States House of Representatives**

June 3, 1992.

I appreciate the opportunity to submit this statement to the Committee regarding the Ritter Amendment to H.R. 4850, the Cable Television Consumer Protection and Competition Act of 1992.

My name is Steven Shiffrin. I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the First Amendment. I am the principal co-author of The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991) (with Dean Choper of Berkeley), the most extensively used casebook in the field. I also co-author a set of casebooks that together with their yearly supplements are widely used in American law schools. For example, I am the co-author responsible for freedom of speech in Constitutional Law: Case-Comments-Questions (West Publishing Co. 7th ed. 1991) (with William Lockhart, Yale Kamisar, and Jesse Choper).

I write with regard to the constitutionality of Representative Ritter's amendment. Subject to exceptions not important here, the must-carry provisions of H.R. 4850 would effectively force cable system operators to allocate a certain percentage of their channels to retransmit qualified local broadcast signals (the "must-carry" rules). A major purpose of H.R. 4850 is to assure that cable system operators not exclude local sources of news and diverse programming. If passed, the must-carry rules would be premised in large part on the view that the "public's right to receive a diversity of voices is served by ensuring public access to free local broadcast television

stations." H.R. Rep. 101-682, 101st Cong., 2d Sess. 62 (1990). Recognizing a potential conflict with the public interest, Congressman Ritter proposed an amendment to the must-carry provisions of H.R. 4850 to ensure that cable system operators would not be forced to carry the signal of any commercial television station that is "predominantly utilized for the transmission of sales presentations or program length commercials." The amendment was adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992.

The Ritter Amendment is clearly constitutional. Assuming Congress decides to enact must-carry rules of the type specified in H.R. 4850, Congress need not confer must-carry status on every type of broadcast station, including those stations utilized primarily as conduits for virtually-continuous sales presentations.

Congress has broad latitude in dealing with commercial speech. In appropriate circumstances such as these, it can discriminate against commercial speech; it can discriminate between types of commercial speech; and it certainly can decide to support local programming without supporting all types of local programming

* particularly when it has not engaged in point of view discrimination

* when it continues to permit cable system operators broad discretion to carry televised-shopping broadcasters or networks

*when it leaves televised-shopping channels on a level playing field

* and when it has forged a good faith accommodation among the rights of cable system operators, speakers, and audiences.

Indeed, to saddle cable system operators with a forced regime in which televised-shopping stations are coercively granted privileged access raises constitutional questions that would seriously imperil must-carry legislation.

DISCUSSION

For constitutional purposes, commercial speech is that speech which "propose[s] a commercial transaction." Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). Accord Board of Trustees v. Fox, 492 U.S. 469, 473-74 (1989); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986). Since the Ritter Amendment focuses upon stations that are "predominantly utilized for the transmission of sales presentations or program length commercials," the amendment has plainly targeted commercial speech.

This conclusion is not affected by the fact that such stations may include entertaining material. Indeed, the Court has firmly hold that speech proposing a commercial transaction falls within the commercial speech category even if it contains a message of genuine political or public interest. In Board of Trustees v. Fox, 492 U.S. 469, 473-74 (1989), for example, sellers of housewares had marketed their goods by resort to "Tupperware parties" in college dormitories. The sellers argued that their speech was outside the commercial speech category because during the course of the parties

the sellers discussed matters such as how to be financially responsible and how to run an efficient home. The Court observed that "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."¹ The Court easily concluded that the Tupperware party was an exercise in commercial speech:

"Including these home economics elements no more converted [the seller's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68 (1983), communications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. * * *'²

Whether intermittent conversation on a televised-shopping station is about recipes, home economics, or even discussions of important public issues, the fact is that a station predominantly utilized for the transmission of sales presentations is engaged in commercial speech and is subject to the commercial speech doctrine.

As the Court stated in Fox, that doctrine does not afford commercial speech full First Amendment protection:

"Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of first

¹. 492 U. S. at 474.

². Id. at 474-75.

amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'³

Thus, even though content regulation of non-commercial speech for the most part is permitted only under extraordinary circumstances, the standards involving commercial speech are far more relaxed.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) is an important case in point. San Diego enacted an ordinance that imposed substantial restrictions on the display of outdoor advertising signs. The ordinance permitted onsite commercial signs, but with few exceptions prohibited noncommercial signs and offsite commercial signs.⁴ The Court held that San Diego could ban commercial billboards without banning non-commercial billboards and that it could ban off-site commercial billboards without banning on-site commercial billboards. Thus government could favor noncommercial speech over commercial speech and some forms of commercial speech over others.⁵

³ 492 U.S. at 477 (emphasis added), quoting Ohralik v. Ohio Bus. Ass'n., 436 U.S. 447, 456 (1978).

⁴ Thus a market could advertise itself and its products on the property where the market stood, but not off the site of the market, e.g., down the block.

⁵ San Diego was not similarly free to favor commercial speech over noncommercial speech. White, J., joined by Stewart, Marshall, and Powell, JJ., found the ordinance defective first, because it discriminated against noncommercial speech (permitting commercial signs on business sites while prohibiting non-commercial signs) and second, because it discriminated between types of noncommercial speech (making exceptions for signs involving governmental functions, time/weather/news/public service signs, and temporary political campaign signs). Brennan and Blackmun, JJ., concurred on different grounds.

The Court again recognized the lesser degree of protection for commercial speech and observed that so long as substantial interests were furthered in accord with constitutional prerequisites,⁶ the ordinance was constitutional. As Justice White explained, that test was easily met:

The Court made it clear, however, that if the statute's severability provision was interpreted to prohibit offsite commercial signs while permitting onsite commercial signs and noncommercial signs generally, the First Amendment did not stand in the way. See White, J., joined by Stewart, Marshall, Powell, and Stevens, JJ., *id.* at 493-512. Stevens, J., joined those aspects of the opinion dealing with commercial speech, but thought White, J., was overly protective of noncommercial speech.

⁶ The language most frequently cited is that appearing in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). Government regulation of commercial speech is permitted if the regulation "directly advances" "substantial" governmental interests by "means not more extensive than is necessary to serve" the governmental interest. The latter part of the test has been subject to varying interpretations. Despite several prior decisions stating a view more protective of commercial speech, *Board of Trustees v. Fox*, *supra*, at 480, concluded that all the holdings of the cases actually required was a reasonable fit between the legislature's ends and the means chosen to accomplish those ends:

"What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends" [citing *Posadas*, 478 U.S. at 341] - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' [citing *Id. v. R.M.J.*, 455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means, but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed."

In other words, the least restrictive means test or a reasonable facsimile is no longer required. Over the years, if anything, the test for the protection of commercial speech has become less demanding than it was at the time of *Metrodata*.

* * * San Diego has obviously chosen to value one kind of commercial speech -- onsite advertising -- more than another kind of commercial speech -- offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance -- onsite commercial advertising -- its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted."⁷

⁷ Id. at 512 (emphasis added). For cases following Chromedia, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); National Advertising v. Downers Grove, 561 N.E.2d 1300 (Ill.App. 1990). See also Ackerly Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 519, 522 n. 16 (1st Cir. 1989) (citing Chromedia, supra with approval).

Similarly, it does not follow from the fact that government would require cable system operators to carry broadcast stations that contain commercial advertising mixed in with regular programming that it must require cable system operators to carry two shopping stations predominantly utilized for the transmission of sales presentations or program-length commercials.

Indeed, it is not even clear that the Ritter Amendment would have to meet the kind of test applied in Metromedia. Metromedia involved a ban of commercial speech on offsite billboards. The Ritter Amendment bans no speech. It merely refuses to give predominantly-commercial broadcasters the extraordinary benefits of must-carry.⁸

Another significant case indicating the low level of protection for commercial speech is Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, supra. In Posadas, a gambling casino in Puerto Rico objected to legislation that prohibited gambling casinos from advertising to Puerto Rican residents. Puerto Rico permitted other forms of gambling to its residents including advertising for horse racing, cockfighting, and the lottery. One gets the impression that some lobbies were just stronger than others. Nonetheless, even without legislative findings, the Court upheld the Puerto Rican legislative scheme.

The one circumstance in which commercial speech has been afforded meaningful protection has been when government attempted to suppress a particular truthful message. Most of those cases have involved attorney advertising. For example, in the most recent case, Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) invalidated a rule prohibiting an attorney from stating on his letterhead that he had been certified by a nationally prominent organization. Even that decision was 5-4 and two of the Justices in the majority (Brennan and Marshall, JJ.) have since resigned from the Court.

⁸ Thus the appropriate analogy might be to Rust v. Sullivan, 500 U.S. 82 (1991). The Court there held that government could subsidize the giving of advice about family

But assuming the Ritter Amendment were treated as a regulation of commercial speech, substantial interests would support it. Congress is entitled to the view that the interest in sponsoring local news and diverse programming which it believes outweighs the free speech interests of the cable system operators is not of similar weight when a broadcast station used predominantly for commercial speech is involved. The Ritter Amendment leaves to the cable system operator the discretion to determine whether to carry a health channel, CSPAN, CSPAN II, or other diverse fare such as movies, sports, music, or specialized presentations aimed at individual segments of the national audience -- or a televised-shopping channel. It would be singularly odd if the First Amendment were read to require government to discriminate in favor of commercial speech.

Indeed, a must-carry bill that did not include the Ritter Amendment would itself present serious constitutional problems. In striking down previous must-carry legislation, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C.Cir. 1985), cert. denied, 476

planning while excluding the use of its benefits for information about abortion. Rust is an enormously controversial decision given that abortion is a fundamental constitutional right, that poor patients are in danger of being deprived of information and perhaps even deceived, and that the state is seen to be intruding on the practice of medicine. One need go nowhere near as far as Rust to recognize that government can promote diverse programming without promoting commercial speech. Government can make value choices in defining a curriculum, in selecting books in a library, in establishing the National Endowment for Democracy, and in a multitudinous array of activities. Just as government can refuse to include commercials in public schools, it can refuse to include televised-shopping channels in must-carry legislation. See generally M. Yudof, When Government Speaks (1983); Shiffrin, Government Speech, 27 UCLA L. Rev. 565 (1980).

U.S. 1169 (1986) recognized that substantial First Amendment interests were at stake. The Court noted that the rules were "explicitly designed to '[favor] certain classes of speakers over others.'" Id. at 1451. That kind of favoritism was seen to impinge not only on the constitutional interests of cable programmers and their intended audiences, but also constituted a deep intrusion into the editorial autonomy of cable system operators. So understood, must-carry rules must at the very least meet the requirements of United States v. O'Brien, 391 U.S. 367 (1968)⁹ and may ultimately be required to meet even more stringent requirements.

Although there is constitutional controversy about what First Amendment test benefits cable system operators, it is clear that impositions upon cable system operators have been looked at with substantial care, and must-carry provisions have twice been invalidated. See Quincy, supra; Century Communications Corp. v. FCC, 835 F.2d 292 (D.C.Cir. 1987), clarified, 837 F.2d 517 (D.C.Cir. 1988), cert. denied, 108 S.Ct. 2014 (1988). Among other things, Quincy objected to the fact that the must-carry rules "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable system operator." 768 F.2d at 1460. See also Century Communications, 835 F.2d at 293.

⁹ O'Brien requires a showing that legislation furthers a substantial governmental interest by means no greater than essential to further that end.

As the Seventh Circuit recognized in Chicago Cable Communications v. Cable Comm'n, 879 F.2d 1540, 1550 (1989), the "important qualities embodied in the term 'localism'" include community pride, cultural diversity" and the like. Nationally-broadcast commercial speech hardly fits the associations connoted by the term localism. Even if commercial speech fit the conception of localism, Quincy would seem to call for a determination of the extent to which the imposition of more commercial speech through mandatory access for televised-shopping stations would be piled on top of already existing local advertising. No court could possibly miss the fact that there is no shortage of commercials on television today.¹⁰

As the District of Columbia Court of Appeals observed in both Century Communications and Quincy, the goal of localism has been previously described by the FCC in quite modest terms. The objective was described as the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" 835 F.2d at 294; 768 F.2d at 1439. More recently, the FCC described its goal as preserving a "modicum of local programming." Quincy, 768 F.2d at 1434. Even if the assurance of significantly more than a modicum of local programming were regarded as a substantial interest by the courts,

¹⁰ Cable operators, of course, remain free under the Ritter Amendment to provide more commercial speech and free to determine which supplier (or suppliers) best serves the interests of consumers, but localism can not be used as a talisman to force access by televised-shopping channels.

there has been no showing that the inclusion of televised-shopping stations in must-carry is at all important.

For example, if cable system operators were not required to carry stations that fall within the scope of the Ritter Amendment in cities like Boston, they would still carry network stations or affiliates as well as independent stations including at least one public broadcasting station. It is hard to believe that courts will hold that the autonomy of cable system operators, the rights of cable programmers, and the rights of audiences can all be infringed for the incremental dose of localism provided by the relatively-insignificant "local" programming of a station predominantly utilized for the retransmission of sales presentations or program length commercials. Localism is a respectable interest; it is not a respectable obsession. The judges who have previously considered must-carry legislation have exhibited no signs of sharing any such obsession.

CONCLUSION

Commercial speech has always been a stepchild in the First Amendment family. Indeed, for most of our history, speech proposing a commercial transaction has been afforded no First Amendment protection; it has never received generous First Amendment protection. The Ritter Amendment denies legislated appropriation of scarce cable channels to serve as a conduit of commercial speech at the expense of those competing for the same channel capacity to

propagate opinion. This is in keeping with our constitutional traditions.

Indeed, the Ritter Amendment strengthens the constitutional case for must-carry legislation. It shows that Congress has appropriately considered the rights and interests of cable system operators without blindly pursuing a distorted conception of localism. It shows Congressional sensitivity to long recognized constitutional values.

Must-carry rules have twice been declared unconstitutional. If H.R. 4850 is passed, must-carry will be challenged again. Again it will be claimed that government is wrongly substituting its conception of good speech for that which would be chosen in the editorial discretion of the cable system operator. What better present could be provided to a litigator opposing must-carry legislation than the granting of privileged cable access to broadcast stations predominantly utilized for sales presentations? What litigator would not use the forced imposition of commercialism on a cable system operator as exhibit A in an attempt to show that the private editorial decisions of cable system operators are superior to those mandated by big government? Those who seek to defend must-carry legislation will have a hard enough road to hoe without providing this kind of litigating advantage to their opponents. The granting of privileged access to cable for televised-shopping stations is a river boat gamble that the proponents of must-carry need not and should not take.