



**Jack N. Goodman**

Senior Vice President & General Counsel  
Legal & Regulatory Affairs  
1771 N Street, NW • Washington, DC 20036-2891  
(202) 429-5459 • Fax: (202) 775-3526  
jgoodman@nab.org

August 5, 2002

### **Ex Parte Communication**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

*Re:* CS Docket No. 98-120, *Digital Must Carry*

Dear Ms. Dortch:

On July 9, 2002, the National Cable & Telecommunications Association submitted for inclusion in the record in this proceeding an opinion prepared by Professor Laurence Tribe. Professor Tribe contended that, were the Commission to modify its interpretation of the “primary video” provision of Section 614(b)(3)(A) of the Communications Act as applied to carriage of digital television signals, that decision would raise significant issues under the First and Fifth Amendments.

NAB asked Jenner & Block, LLC, a firm experienced in constitutional litigation (including representation of broadcasters in defending the must carry statute), to review Professor Tribe’s analysis. Jenner & Block’s response to the Tribe paper is attached.

Jenner & Block initially points out that the Tribe analysis rests on a faulty assumption, *i.e.*, that carriage of multicast broadcast digital programming would occupy more channels on a cable system than would carriage of only one digital programming stream. Because a broadcast digital signal will include 19.4 megabits per second of data within six MHz of spectrum whether it contains one program stream or several, Professor Tribe fundamentally misapprehended the issue before the Commission and this error infects his entire analysis. Indeed, as the Commission is aware, the entirety of a broadcast DTV signal – no matter what program streams it contains – can be carried on digital cable systems in only three MHz of cable capacity, half of the capacity used to carry an analog broadcast signal.

Therefore, Jenner & Block concludes that a rule requiring cable operators to carry the entirety of a broadcast digital signal would not impose any greater burden on cable systems than the analog carriage requirement upheld in *Turner Broadcasting*. As NAB

has previously established in this proceeding, carriage of *both* the analog and digital signals of all local commercial television stations would occupy a far smaller percentage of cable capacity than did carriage of only analog stations when the must carry statute went into effect. The Supreme Court regarded that burden as minimal and acceptable. *Afortior,i* a smaller burden could not raise any First Amendment question.

Jenner & Block go on to rebut Professor Tribe's contention that requiring carriage of an entire broadcast digital signal would not advance the interests Congress sought to protect in the must carry law. They point out that construing "primary video" narrowly would facilitate precisely the conduct by cable systems – preventing local broadcast programming from reaching the audience – that the must carry rules were intended to prevent. By diminishing broadcasters' ability to develop a viable audience for new and innovative digital services, a restrictive carriage rule would deprive cable subscribers and non-subscribers of the full benefits Congress sought to achieve from digital television. The Jenner & Block opinion also points out that Professor Tribe was wrong in asserting that the *Turner* Court did not rely on the Government's substantial interest in promoting fair competition when it upheld the must carry statute.

Jenner & Block comments that all of the arguments made by Professor Tribe concerning the "primary video" issue are materially the same as arguments made by cable operators against must carry generally. Having been thoroughly rejected by the Supreme Court in the *Turner* decisions, those arguments should have no claim to the Commission's attention now.

Turning to the arguments raised by Professor Tribe under the Fifth Amendment,<sup>1</sup> once again Jenner & Block observes that the Tribe analysis rests on a mistaken assumption. Professor Tribe asserts that mandatory carriage of multiple streams of digital broadcast programming would result in a *physical* occupation of cable operators' property. That is incorrect. Carriage rules regulate only the use of a part of cable capacity and do not result in any "permanent physical occupations of real property." Were the Commission to accept the argument that rules dictating the traffic that is carried on a wire or other means of communication would result in a physical taking akin to a condemnation of land, Jenner & Block points out that a vast range of other FCC regulations – including many specifically required by Congress – would be jeopardized.

Instead, whether mandatory carriage rules result in a taking under the Fifth Amendment should be judged under the standard for a "regulatory taking" established by the Supreme Court in *Penn Central* and recently reaffirmed in *Tahoe-Sierra Preservation*

---

<sup>1</sup> The Jenner & Block opinion notes that cable operators raised and abandoned a takings argument in *Turner*, and thus principles of *res judicata* should bar that issue from being considered now.

*Council.* Jenner & Block concludes – as did Congress in considering the 1992 Cable Act – that must carry rules do not result in a taking under *Penn Central*.<sup>2</sup>

Finally, while Professor Tribe’s arguments were addressed specifically to the “primary video” issue, Jenner & Block do point out that the Supreme Court in *Tahoe-Sierra* concluded that temporary regulatory restrictions on property do not result in any taking of that property. If the Commission requires cable operators – as NAB has argued it must under the Communications Act – to carry both analog and digital local broadcast signals while consumers transition to digital television, that dual carriage requirement would be inherently temporary and would under *Tahoe-Sierra* raise no *per se* takings issue under the Fifth Amendment.

Jenner & Block concludes – as should the Commission – that a rule requiring carriage of an entire broadcast digital signal would not present any issue under the First or Fifth Amendments.

Respectfully submitted,



Jack N. Goodman

cc: The Honorable Michael K. Powell  
The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin  
Susan M. Eid, Legal Advisor to the Chairman  
Stacy Robinson, Legal Advisor to Commissioner Abernathy  
Alexis Johns, Legal Advisor to Commissioner Copps  
Catherine C. Bohigian, Legal Advisor to Commissioner Martin  
W. Kenneth Ferree, Chief, Media Bureau  
Jane Mago, General Counsel  
Rick Chessen, Associate Bureau Chief, Digital Television Task Force

Enclosure

---

<sup>2</sup> Even if it could be maintained that must carry rules would result in a regulatory taking, it is far from clear that any constitutional issue would arise since cable operators are compensated by subscribers for the channels used for carriage of local broadcast signals. Indeed, since cable operators pay cable networks for most channels of cable programming, but generally have not paid direct compensation to local broadcasters for use of their programs, it could be argued that must carry provides an economic benefit to cable operators.

**JENNER & BLOCK, LLC**

**A Constitutional Analysis of the “Primary Video” Carriage Obligation:  
A Response to Professor Tribe**

**Donald B. Verrilli, Jr. and Ian Heath Gershengorn\***

**INTRODUCTION AND SUMMARY**

The Congressional Budget Office has identified mandatory carriage as the “most significant single determinant” of the pace of the digital transition, and it concluded that a “strong must-carry requirement” is “necessary to achieve the mandated market penetration level by 2006 and end the transition.”<sup>1</sup> Despite that observation, the Commission has thus far resisted the congressional command that cable operators “shall carry . . . the signals of local commercial television stations” and permitted cable operators to refuse carriage of certain broadcast signals.<sup>2</sup> As the National Association of Broadcasters (“NAB”) has elsewhere explained, the Commission’s interpretation is untenable, and it threatens serious harm to broadcasters, the public, and to the transition itself.<sup>3</sup>

The same is true of the Commission’s interpretation of the “primary video” requirement. In the First R&O, the Commission rejected Congress’ instruction that cable

---

\* Donald B. Verrilli, Jr. and Ian Heath Gershengorn are partners in the Washington, D.C. office of Jenner & Block, LLC.

<sup>1</sup> Completing the Transition to Digital Television, Congressional Budget Office, Chapter I (Sept. 1999).

<sup>2</sup> In re Carriage of Digital Television Broadcast Signals, 16 F.C.C.R. 2598, ¶¶ 2-3,12 (2001) (“First R&O”).

<sup>3</sup> NAB/MSTV/ALTV Petition for Reconsideration and Clarification, In re Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, 00-2 (Apr. 25, 2001) (“NAB/MSTV/ALTV Petition for Reconsideration and Clarification”).

operators carry the “entirety” of the free over-the-air broadcast signal and instead endorsed the cable operators’ view that the obligation to carry, at a minimum, the “primary video” of each broadcast signal subject to mandatory carriage requires cable operators to carry only one video stream of a station offering multiple broadcast streams.

The Commission’s statutory argument with respect to primary video is wholly unpersuasive. As the NAB/MSTV/ALTV Petition for Reconsideration and Clarification demonstrates, the rules that currently govern analog carriage also govern digital carriage: cable operators must carry the entirety of free video and audio contained in the broadcast signal. Any contrary interpretation would contravene Congress’ clear intent that broadcasters be permitted to transmit to cable subscribers the same signals that they offer to their over-the-air viewers.

In an effort to bolster their flagging statutory arguments, the cable operators have hired Professor Tribe to offer a constitutional analysis in support of their statutory position (the “Tribe Report”).<sup>4</sup> The Tribe Report, however, is pervasively flawed. First, it rests on what appears to be a fundamental misunderstanding of the technological facts. Contrary to the Tribe Report’s repeated suggestions, the burden imposed by carriage of multiple broadcast streams of a single digital signal is no more than the burden imposed by carriage of a single digital broadcast stream; further, the burden imposed by carriage of a digital broadcast signal – whether multiple streams or a single stream – is less as an absolute matter than the burden imposed by analog must carry that the Supreme Court approved in Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994) (Turner I),

---

<sup>4</sup> See Laurence H. Tribe, Why the Commission Should Not Adopt a Broad View of the “Primary Video” Carriage Obligation, appended to Letter from Daniel Brenner to Marlene Dortch, MM Docket No. 00-39 (July 9, 2002).

and Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (“Turner II”) (collectively, the “Turner cases”). Moreover, given the explosion of cable capacity and the lack of any increase in the absolute burden, the relative burden imposed by carriage of the full video stream is a fraction of that approved in the Turner cases.

Second, the Tribe Report errs in contending that requiring carriage parity “would not be narrowly tailored to any of the governmental interests identified by the Supreme Court in Turner I and Turner II.” Tribe Report at 8. In fact, requiring carriage parity advances the same interests set out in the 1992 Act in precisely the same way: it preserves the benefits of free, over-the-air television; in so doing, it promotes the widespread dissemination of information from a variety of sources; and it offers a counterweight to the clear incentives possessed by cable companies to engage in anticompetitive behavior. Moreover, by helping to hasten the digital transition, the requirement of carriage parity not only furthers these interests but also hastens the government’s independent interest expressed in numerous statutes (including the 1992 Act) and Commission orders to accomplish that transition as quickly as possible.

Third, the cable operators’ expansive view of the Just Compensation Clause is contrary to congressional intent and is flatly inconsistent with governing Supreme Court and D.C. Circuit precedent. As to the former, Congress heard and explicitly rejected the exact takings arguments the cable operators offer here, and the Commission lacks discretion to substitute its own constitutional analysis for that of Congress. As to the latter, the Supreme Court and the D.C. Circuit have made abundantly clear that the taking analysis advanced by the cable operators has no application to the type of regulation at issue here.

More broadly, the analysis in the Tribe Report cannot support a narrow reading of primary video over a broader reading because, if that analysis is correct, then any definition of primary video would cause a taking. Indeed, adoption of the Tribe Report's takings analysis would subject a vast array of FCC regulations both within and outside of the broadcasting industry to takings challenges, wreaking havoc with the Commission's regulatory authority.

## ARGUMENT

### **I. Interpreting “Primary Video” to Require Carriage of the Entirety of the Free Over-The-Air Broadcast Signal Would Impose No Burden On Cable Operators Beyond That Approved by the Supreme Court in the Turner Cases And Already Imposed by the Commission With Respect To Digital Signals.**

The Tribe Report's principal argument is that the burden on cable operators from having to carry up to six separate streams for each channel is sufficiently severe as to violate the First Amendment.

At the outset, two critical points inform the constitutional analysis of the FCC's interpretation of primary video. First, in the Turner cases, the Supreme Court rejected a First Amendment challenge to the Commission's analog must carry rules which required carriage of a broadcaster's entire 6 MHz analog signal. Second, as the Commission has already acknowledged, the 1992 Act requires at a minimum that cable operators carry the digital signal of broadcasters after the transition. Against this backdrop, the Tribe Report's First Amendment argument is specious.

The Tribe Report argues first that requiring broadcasters to carry the entire signal of a broadcaster with multiple streams would “multipl[y]” the burden on cable broadcasters who would “be forced to assign six or more cable programming channels to

each local market,” preventing cable operators from choosing programming “on a wide swath of their channels.” Tribe Report at 4. But the report’s portrayal of the burden imposed by mandatory carriage of the entire digital broadcast signal is misstated in at least three ways.

First, the entire First Amendment analysis in the report rests on a fundamental error. Despite what the report says, requiring carriage of all of the separate free programming streams of a broadcaster’s digital channel imposes no greater burden than requiring carriage of a broadcaster’s single digital channel. A digital broadcast signal will include 19.4 megabits per second of data within 6 MHz of spectrum whether it contains one program stream or the six program streams hypothesized in the Tribe Report. From the perspective of the cable operators’ capacity – and the First Amendment – there is simply no difference between a broadcaster’s decision to broadcast its signal as a single stream or as multiple streams. Here, the Commission has already made clear that broadcasters have the right under the 1992 Act to demand carriage of a broadcast digital signal. See, e.g., First R&O at ¶ 12. Given that the primary video analysis addresses principally whether that signal will contain a single stream or multiple streams, and given that in either case the signal will occupy the same amount of cable capacity, the First Amendment rights of cable operators are not implicated.

Second, as an absolute matter, the total cable capacity to be used by a digital broadcast signal is substantially less than the capacity used by a single analog signal in the Turner cases, and the Supreme Court held in those cases that the burden imposed by mandatory carriage of analog signals is constitutionally permissible. Because of modulation techniques available to cable operators, carriage of the entire digital broadcast

signal will use only 3 MHz of cable capacity.<sup>5</sup> Because the burden imposed by digital carriage is significantly less – indeed only half – of the burden imposed and approved in the Turner cases, the constitutionality of a mandatory carriage of digital signals follows a fortiori.

The Tribe Report’s only response is to protest that the Supreme Court “did not grant broadcasters a permanent easement or other property right of 6 MHz of space on cable systems.” Tribe Report at 7. But that is beside the point – the broadcasters do not claim that the Court bestowed any such property right; instead Congress gave broadcasters the right to swap their 6 MHz of analog spectrum for digital spectrum. The key point is that the digital signals carried over the spectrum Congress provided to broadcasters uses less cable capacity than the analog signals at issue in the Turner cases, and thus the Turner cases foreclose any First Amendment challenge.

Third, as a relative matter, the burden to be imposed by mandatory carriage of digital signals is significantly less than the burden approved in the Turner cases, because cable capacity has increased exponentially, while broadcast stations have not (and even if they had, the statute imposes a one-third cap on the stations to be carried); indeed, even carriage of both the analog and the digital signals will use less capacity as a percent of total cable capacity than did analog must carry at the time the Court decided the Turner cases. The Tribe Report seeks to avoid these dispositive facts by suggesting that the constitutional analysis “does not depend on the precise number of stations that cable systems are technologically able to carry at any given moment in time,” because “any

---

<sup>5</sup> See Reply Comments of NAB/MSTV/ALTV at 18 (Aug. 16, 2001), submitted in In re Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, 00-2 (“Reply Comments of NAB/MSTV/ALTV”).

interference with cable operators' discretion creates a First Amendment issue." Tribe Report at 5 (emphasis in original). But Turner II forecloses this argument, as the Court undertook a detailed analysis of the percentage of cable capacity devoted to mandatory carriage. See Turner II, 520 U.S. at 214; see also 520 U.S. at 228 (Breyer, J., concurring) ("I agree further that the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time").

The Tribe Report retreats then to the proposition that predictions about cable's usable capacity "are hazardous at best." Tribe Report at 6. But the evidence is to the contrary. Indeed, the Tribe Report's assertion ignores and contradicts the cable operators' own statements to the FCC and the SEC describing the rapid expansion in cable capacity.<sup>6</sup> Few predictions in this industry are as safe as the prediction that cable capacity will continue to expand, and that the relative burden of mandatory carriage of the entire digital broadcast signal will continue to rapidly decrease.

Finally, the Tribe Report suggests that there will be no surplus capacity because any such capacity will go to provide services such as "high speed Internet services" and telephony. Tribe Report at 6. But whatever the First Amendment implications of limiting the capacity that cable operators may devote to their own programming choices, there are surely no First Amendment implications in limiting the capacity that cable operators may devote to their Internet services and telephony, businesses that do not

---

<sup>6</sup> See, e.g., Comments of NAB/MSTV/ALTV at 31-32 (June 11, 2001), submitted in In re Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, 00-2; Reply Comments of NAB/MSTV/ALTV at 6-8.

implicate the editorial discretion the First Amendment protects. See, e.g., Reply Comments of NAB/MSTV/ALTV at 35-36.

**II. The Requirement That Cable Operators Carry the Entirety of the Free Over-The-Air Signals Advances Both the Interests Approved by the Court in the Turner cases and the Government’s Interest in a Rapid Transition.**

The Tribe Report also suggests that a requirement that cable operators carry the entire broadcast signal fails to advance the interests that Congress set forth and that the Court approved in the Turner cases. That analysis is wrong.

In the 1992 Cable Act, Congress made “unusually detailed statutory findings” regarding the ability and incentive of cable operators to refuse carriage of the signals of many broadcasters, as well as the harm resulting from that refusal. Turner I, 512 U.S. at 646. Congress found that “because cable systems and broadcast stations compete for local advertising revenue,” and “because cable operators have a vested financial interest in favoring their affiliated programmers over broadcast stations,” cable operators have an “economic incentive . . . to delete, reposition, or not carry local broadcast signals.” Id. Congress concluded that “absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened.” Id. Congress passed the 1992 Act to reduce the threat to broadcasters arising from cable operators’ discriminatory conduct because “[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.” Id. (internal quotation omitted). Justice Breyer succinctly noted in Turner II that “without the statute, cable systems would likely carry significantly

fewer over-the-air stations, that station revenues would decline, and that the quality of over-the-air programming would suffer.” 520 U.S. at 228 (Breyer, J., concurring).

By narrowly construing the term “primary video” to exclude from carriage all but one free, video programming stream, the Commission has facilitated precisely the dangers that Congress sought to avoid in the 1992 Act. Cable operators continue to “compete for local advertising revenue” and have “a vested financial interest in favoring their affiliated programmers over broadcast stations,” and they thus retain an “economic incentive . . . to delete, reposition, or not carry local broadcast signals.” Under the interpretation of primary video advanced by the cable operators and adopted by the Commission, the cable operators will now have the power to refuse carriage of multiple streams of broadcast material.

The consequences of this Commission action are severe. By giving cable operators control over the ability of a broadcaster to realize a return on investment in multiple program streams, the Commission has created a powerful disincentive for broadcasters to invest the huge sums needed to develop multiple streams of locally-oriented programming or innovative video services. As a result, cable subscribers and non-subscribers alike will be deprived of the full benefits that digital technology enables, including programming selected to reflect the tastes and needs of their local communities. That result is particularly unfortunate in light of Congress’ express recognition in Section 336 of the Communications Act of the value of innovative digital services and multiple broadcast streams for broadcasters and viewers alike. See Section 336 (directing the Commission to provide “Broadcast Spectrum Flexibility” with respect to licenses for advanced television services.)

The long-term effect of the Commission's decisions is even more severe. Broadcasters deprived of the ability to take advantage of the full economic opportunity that digital technology offers will face a substantial disadvantage in competition for critical advertising revenue. The Commission's decision thus threatens to undermine the viability of local broadcast stations in the digital age, leading to precisely the decline in the quality and diversity in over-the-air programming that Congress sought to forestall.<sup>7</sup>

The Tribe Report contends nevertheless that a more restrictive interpretation of primary video is necessary to satisfy the First Amendment. The report suggests, for example, that carriage of one of a broadcaster's multiple streams and services "would seem fully to satisfy the governmental interest in preserving the benefits of free broadcast television." Tribe Report at 8. But, as noted, the inevitable result of the Commission's narrow construction of the term "primary video" to exclude from carriage all but one free, video programming stream creates a powerful disincentive for broadcasters to develop multiple streams of locally-oriented programming or innovative video services. Those viewers who receive their programming exclusively from over-the-air television,

---

<sup>7</sup> To show that the less restrictive interpretation of primary video is constitutional, the broadcasters need not demonstrate that the interpretation offered by the cable operators would cause "a complete disappearance of broadcast television nationwide." Turner II, 520 U.S. at 191. Instead, it is sufficient to show that the multiple programming streams of "significant numbers of broadcast stations will be refused carriage of cable systems," and those "broadcast stations will either deteriorate to a substantial degree or fail altogether." Id. at 191-92 (quoting Turner I, 512 U.S. at 666). NCTA's response to Chairman Powell's voluntary plan for advancing the digital transition, in which cable operators refused to commit to carriage of any enhancements to digital signals other than High Definition Television, provides ample factual support for a conclusion that cable operators will use their gatekeeper facilities to prevent innovative broadcast digital services from reaching an audience. See Letter from Robert Sachs, President and CEO of NCTA, to Chairman Michael Powell (May 1, 2002).

as well as cable subscribers themselves, would thus be deprived of the full benefits that digital technology offers for free broadcast television.

Moreover, it is precisely the ability to offer multiple streams of programming and innovative services that makes digital television so attractive. The inability to obtain carriage in a digital world for the full panoply of programming and services could have a devastating impact on broadcasters, with a corresponding impact on viewers who rely on those broadcasters for their programming.<sup>8</sup>

The Tribe Report next suggests that carriage of multiple video streams would not be narrowly tailored to the interest in promoting information from a multiplicity of sources because affording the same broadcaster carriage for multiple broadcast streams does not increase programming from a multiplicity of sources. Tribe Report at 9. But, again, that argument is doubly mistaken. First, carriage of multiple broadcast streams of the same broadcaster does provide additional diversity, as it allows broadcasters the flexibility to use their multiple streams to provide innovative services that cable programmers may not be currently providing and that would not otherwise be available in a single stream broadcast. More important, the ability to offer the full range of services available over digital programming and to have access to the cable audience is essential to the survival of some broadcasters in a digital world, which is in turn the critical element Congress identified in preserving the “widespread dissemination of information from a multiplicity of sources.”

---

<sup>8</sup> The Tribe Report’s citation to Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), is bewildering. Fox recognized that carriage rules are essential to preventing discrimination by cable operators. The potential for such discrimination will only increase in a digital world.

Similarly meritless is the ipse dixit in the Tribe Report that ensuring carriage of the entire multicasting stream “would not appear to be narrowly tailored to any interest in ‘promoting fair competition,’ because “[o]nce a broadcaster is assured that its primary programming stream will be carried, any governmental interest in ‘fair competition’ is fully satisfied.” Tribe Report at 10. But, again, effective competition is impossible if the bottleneck cable operators have the ability to deny their direct competitors – the broadcasters – access to two-thirds of the potential audience for the most valuable and innovative of services and programming. That is all the more the case given the substantial investment that the transition to digital and the development of innovative services requires.<sup>9</sup>

Although the interests identified and approved in the Turner cases are more than sufficient to justify a more expansive reading of “primary video,” such a reading also serves the government’s important interest in ensuring a rapid transition to digital. The

---

<sup>9</sup> Nor is there any basis for the assertion in the Tribe Report that a “majority of the Court rejected” promoting fair competition as an important government interest. In fact, four Justices squarely embraced the proposition that promoting fair competition was an important government interest, and Justice Breyer did not reach the question because he found the 1992 Act constitutional “whether or not the statute does or does not sensibly compensate for some significant market defect.” 520 U.S. at 226 (Breyer, J., concurring). In addition, the Tribe Report understates the extent to which a majority of the Court – and Justice Breyer in particular – found troubling the incentive and ability of cable operators to use their monopoly power to disfavor broadcasters. Indeed, Justice Breyer expressly agreed that a cable system “constitutes a kind of bottleneck that controls the range of viewer choice,” and that “without the [must-carry] statute, cable systems would likely carry significantly fewer over-the-air stations, that station revenues would therefore decline, and that the quality of over-the-air programming on such stations would almost inevitably suffer.” *Id.* at 228 (Breyer, J., concurring). That is exactly the kind of discrimination against broadcasters that will occur in the absence of a proper definition of primary video: cable operators will refuse carriage of the all but one of the broadcasters streams, and the station revenues of broadcasters and the quality of over-the-air programming on such stations will decline.

Tribe Report asks the Commission to turn a blind eye to that interest on the ground that “the Commission may not manufacture post hoc rationalizations for its must-carry rules” without effectively converting First Amendment analysis into “mere rationality review.” Tribe Report at 10.

At the outset, the Tribe Report is mistaken because the importance of and need for a rapid transition are reflected in the 1992 Cable Act itself. Section 614(b)(4)(B), for example, expressly directs the Commission to revise its carriage rules to accommodate “advanced television.”

In any event, case law from the Supreme Court and the D.C. Circuit demonstrates that the Commission has the power to provide what the Tribe Report misleadingly refers to as “post hoc rationalizations” in the normal course of promulgating statutorily authorized rules, and that the courts will examine justifications raised both by Congress and by agencies. This is especially the case in the context of regulation enacted pursuant to the Communications Act, an area in which “the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the ‘public interest.’” FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978). Congress’s broad statutory grant has led the Court to permit the Commission to weigh carefully First Amendment interests when deciding how to enforce and implement the Communications Act. See National Citizens Committee, 436 U.S. at 795-97 (permitting the Commission to rely on its “judgment” and “experience” to make “change[s] in policy [that are] reasonable administrative response[s] to changed circumstances in the broadcasting industry”); see also Columbia Broadcasting System,

Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973). Indeed, here, Congress expressly directed the Commission to address issues relating to “advanced television” when it passed Section 614(b)(4)(B).

The Tribe Report’s argument to the contrary confuses a court’s conceded lack of power to hypothesize rationales that the government did not offer with the previously undisputed power of an agency – particularly an agency that plays the critical expert role the Commission plays in the administration of the Communications Act in general and in the 1992 Cable Act in particular – to describe the important government interests that its actions are intended to advance. See, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143-44 (1940) (“But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.”).

Ultimately, “intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed.” City of Erie v. Pap’s A.M., 529 U.S. 277, 313 (2000). The Commission thus can and should justify its actions to aid in judicial review of the Commission’s actions.

Unsurprisingly, none of the three cases cited in the Tribe Report supports a contrary conclusion. Tribe Report at 10. Edenfield v. Fane found that, unlike rational

basis review, First Amendment scrutiny does not allow courts “to supplant the precise interests put forward by the State with other suppositions.” Edenfield, 507 U.S. 761, 768 (1993). Edenfield says nothing of the Commission’s power to offer justifications for the rules it promulgates in response to statutory grants of authority. Board of Trustees of State University of New York v. Fox only requires “the government goal to be substantial, and the cost to be carefully calculated.” Fox, 492 U.S. 469, 480 (1989). Fox thus does little to support the contention that the Commission may not adopt its own justifications for rules and statutory interpretations needed to address changes in circumstances. Finally, the Tribe Report cites First National Bank of Boston v. Bellotti, 435 U.S. 765, 785-90 (1978); but Bellotti exclusively examined the constitutionality of a legislative enactment and said nothing about the Commission’s power to rationalize its own interpretations of statutory mandates. In short, the interest in ensuring a rapid transition to digital provides additional grounds for rejecting the cable operators’ First Amendment arguments.

Finally, turning from a discussion of the particular interests to be advanced by the primary video provision, the Tribe Report emphasizes that any carriage requirement imposes significant First Amendment burdens on cable operators. Tribe Report at 3-5. But that is an argument not against primary video, but against must carry itself, which the Court already upheld in the Turner cases. The cable operators’ effort to reargue the Turner cases before the Commission must be rejected.

In any event, the Tribe Report ignores that “there are important First Amendment interests on the other side as well.” Turner II, 520 U.S. at 226 (Breyer, J., concurring). As the Court emphasized in Turner I, “assuring that the public has access to a multiplicity

of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” Turner I, 512 U.S. at 663. Indeed, 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 (internal quotation omitted), because it “facilitate[s] the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve.” Turner II, 520 U.S. at 226 (Breyer, J., concurring). The Court in the Turner cases balanced the First Amendment interests at stake and held that a requirement that cable operators carry each broadcaster’s full 6 MHz signal up to the statutory cap did not violate the First Amendment. The same result is required here.

### **III. The Just Compensation Clause Provides No Basis for a Restrictive Interpretation of Primary Video.**

The Tribe Report concludes by arguing that the Commission should avoid an expansive interpretation of the primary video carriage obligation because such an interpretation would present “serious questions” under the Just Compensation Clause of the Fifth Amendment, as defined by Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Tribe Report at 12. But the Loretto arguments contained in the Tribe Report offer no justification for adopting a narrow view of the primary video obligation.

At the outset, the mere existence of “serious questions” regarding the Just Compensation Clause provides no basis for reading a statute narrowly. As the Supreme Court has made clear, construing a statute to avoid a possible takings challenge “does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible

applications of a statute or regulation.” United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 (1985) (internal citation omitted).

Avoidance is particularly inappropriate here as a means to justify a narrow rather than a broad interpretation of primary video, because the Just Compensation Clause treats both interpretations the same. Even the cable operators do not attempt to draw a constitutional line between a broad and a narrow reading of the “primary video” carriage obligation. Tribe Report at 12-15. Nor could that line be drawn, for such a distinction would turn on the quantity of property allegedly taken, and “constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.” Loretto, 458 U.S. at 437. Nor is it an answer to claim that a broad primary video interpretation would “commandeer an additional five channels per broadcaster.” Tribe Report at 14. For if requiring cable operators to carry channels of broadcast signals indeed takes “private property for public use” without compensation, then the requirement is unconstitutional regardless of whether the cable companies must accommodate one, five, or one hundred channels. In any event, as demonstrated above, carriage of a single digital broadcasting stream uses the same cable capacity as carriage of multiple broadcasting streams, and thus the takings analysis is the same for both. Whatever else may be true about the takings analysis, it cannot be used as a basis to distinguish between the competing primary video interpretations.<sup>10</sup>

---

<sup>10</sup> In the challenge to the Commission’s analog must carry rules that were at issue in the Turner cases, the cable operators raised and then abandoned a takings challenge to the Commission’s rules. Given that the Just Compensation Clause provides no basis for treating mandatory carriage of the entire analog signal differently from mandatory carriage of the entire digital signal, basic principles of res judicata counsel strongly against the Commission’s relying on a takings argument at this stage in the implementation of the 1992 Act.

Moreover, Congress has already heard and rejected arguments that mandatory carriage constitutes a taking, concluding that “[t]he reestablishment of signal carriage requirements will not, therefore, result in any unconstitutional taking of cable operators’ property without compensation.” H. Rep. No. 102-628 at 67. The Tribe Report’s suggestion that separation of powers concerns and deference to Congress somehow supports the cable operators’ position, Tribe Report at 16-18, is mistaken. To the contrary, to credit takings arguments that Congress has expressly rejected is an affront to congressional decisionmaking and a breach of the Commission’s paramount duty to discern and follow congressional intent. See Building Owners & Managers Assoc. Int’l v. FCC, 254 F.3d 89, 102-03 (D.C. Cir. 2001) (Randolph, J., concurring) (“Since the political branches have made a legislative choice to accept federal liability for takings, the federal courts must respect that determination.”).<sup>11</sup>

In any event, the Loretto arguments advanced by the cable companies present no serious issues regarding the proper interpretation of primary video. In Loretto, the Supreme Court held that a “permanent physical occupation of real property” presumptively constitutes a taking requiring “just compensation.” 458 U.S. at 427-28.

---

<sup>11</sup> Congress has, of course, provided a mechanism through the Tucker Act to compensate cable operators should Congress’ confidence in the absence of any viable takings challenge prove misplaced. Building Owners, 254 F.3d at 102-03 (Randolph, J., concurring) (“By passing the Tucker Act, Congress generally bound itself to paying for authorized takings by the federal government, regardless whether the specific liability in any particular case was intended or foreseen.”). Given that Congress has set up a clear scheme for compensating those who suffer from regulatory takings, the Commission should not hesitate to discharge its statutory responsibilities. As the Court in Riverside explained: “the possibility that the application of a regulatory program may in some instances result in the taking of . . . property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred.” 474 U.S. at 128.

The Court refused, however, to “question the equally substantial authority upholding a State’s broad power to impose appropriate restrictions upon an owner’s use of his property.” Id. at 441. Loretto thus on its face demonstrates the most significant difficulty with any attempt to fit must-carry obligations into the Loretto framework: carriage requirements in no way resemble the type of “permanent physical occupations of real property” subject to Loretto’s per se rule. In Loretto, the Court characterized the injury to the plaintiff as “a special kind of injury [because] a stranger directly invades and occupies the owner’s property.” Loretto, 458 U.S. at 436 (emphasis added). The Court stressed that “such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.” Id. (emphasis added). A requirement that cable operators carry even many different channels of a divided digital spectrum merely regulates the manner in which cable companies allocate and employ their cable lines. Unlike the condemnation of real property – such as a farmer’s crops, see Tribe Report at 14 – carriage obligations do not give dominion or ownership rights over the real property (cable lines) to the government or to third parties. See Loretto, 458 U.S. at 440 n.19 (distinguishing landlord-tenant regulations from permanent physical occupations on the basis of ownership distinctions). The cable operators are not complaining, for example, that a broad interpretation of the primary video rule would permit broadcasters to install additional equipment on the cable operators’ property or would require moving or making modifications to or seizing control of the operators’ lines.

Control over the physical property in question is central to any Loretto inquiry. The Court explained that the appellant’s injury “might have been obviated if she had owned the cable and could exercise control over its installation.” Loretto, 458 U.S. at 440 n.19. Even under the most broad interpretation of “primary video,” cable companies would continue to exercise exclusive control over the affected physical property. A broad interpretation thus avoids “a permanent physical occupation of [ ] property of the kind that [the Court] ha[s] viewed as a per se taking.” Eastern Enterprises v. Apfel, 524 U.S. 498, 530 (1998); see also Yee v. City of Escondido, 503 U.S. 519, 532 (1992) (rejecting takings claim because the challenged government action “is a regulation of petitioners’ use of their property and thus does not amount to a per se taking”).<sup>12</sup>

The difficulty of conceptualizing how must-carry obligations physically occupy any real property is ample evidence in itself that Loretto does not apply. The Loretto Court explained that “whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute.” Loretto, 458 U.S. at 437; see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465, 1478 n.17 (2002) (“When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or

---

<sup>12</sup> The Cable Act, like the Coal Act at issue in Apfel, “does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act . . . .” Apfel, 524 U.S. at 541 (Kennedy, J., concurring in part and dissenting in part). As Justice Kennedy noted in Apfel, “To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise.” Id.

regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.”).

Moreover, acceptance of the expansive takings analysis offered by the cable operators would belie the Court’s own admonition in Loretto that “[o]ur holding today is very narrow.” 458 U.S. at 441; see also FCC v. Gulf Power Corp., 480 U.S. 245, 251 (1987). Indeed, the Supreme Court and the Courts of Appeals have consistently rejected attempts to expand the Loretto notion of a permanent physical occupation of property. See, e.g., United States v. Sperry, 493 U.S. 52, 62 n.9 (1989) (deduction from monetary award); United States v. 0.59 Acres of Land, 109 F.3d 1493, 1497 (9th Cir. 1997) (refusing to extend Loretto to occupation by electromagnetic fields generated by power lines); Samaad v. City of Dallas, 940 F.2d 925, 938 (5th Cir. 1991) (noise from adjacent property is not a Loretto taking).

Were the Commission to follow the advice of the cable operators, a wide range of congressional and Commission regulatory requirements would come under attack. For example, the leased access provisions and the PEG provisions of the Communications Act would be immediately subject to attack, as would the analog must-carry provisions the Supreme Court upheld in Turner II. See 520 U.S. at 224-25. Indeed, even outside of broadcasting, accepting the arguments in the Tribe Report would subject a host of Commission regulations, including common carriage itself, to a Loretto analysis. The primary video provisions would be just the tip of the iceberg.<sup>13</sup>

---

<sup>13</sup> Indeed, the result would be breathtaking. The Supreme Court has never applied a Loretto analysis either to common carriage requirements or to the regulatory requirements such as the interconnection, access to unbundled elements, and resale obligations that provide the critical foundations for the Telecommunications Act of 1996.

Nothing in the Tribe Report compels such a radical reworking of takings jurisprudence. The Tribe Report cites, for example, Justice O'Connor's dissent in Turner I to support the proposition that "a common carriage obligation for 'some' of a cable system's channels would raise substantial Takings Clause questions." Tribe Report, at 14 (citing Turner I, 512 U.S. at 684 (O'Connor, J, concurring in part and dissenting in part). But that is disingenuous. Justice O'Connor wrote: "Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system of time-sharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies . . . ." Id. at 684. That off-hand reference to "possible Takings Clause issues" implicated under a different statutory scheme can hardly be a basis for asserting "substantial questions" for a Commission charged with the responsibility of implementing the mandates of congressional statutes.

The Tribe Report's analogies to business property condemnation cases, see Tribe Report at 15, are similarly inapposite. Must-carry obligations do not condemn "business property with the intention of carrying on the business." See Kimball Laundry v. United States, 338 U.S. 1, 12 (1949) (cited in Tribe Report at 15). Kimball, a classic example of a business condemnation case, provides an apt contrast to the regulatory character of

---

See 47 U.S.C. 251(c). For more than a century, and as reaffirmed this past Term in Verizon v. FCC, 122 S. Ct. 1646 (2002), takings claims have been governed by the deferential approach epitomized by FPC v. Hope Natural Gas, 320 U.S. 591 (1944). The approach put forth by the Tribe Report would subject these obligations to a Loretto analysis, overturning this century of jurisprudence and undermining the foundations of the Commission's regulation of telecommunications.

mandatory carriage obligations. In Kimball, the Army took over a private laundry plant and ran it exclusively as “a laundry for personnel in the Seventh Service Command.” 338 U.S. at 3. The defining aspect of the taking in Kimball was the complete and unambiguous takeover of the plant by the government. See id. at 14; see also Tahoe-Sierra Preservation Council, 122 S. Ct. at 1479 n.18 (discussing similar distinctions with respect to other wartime takings cases). As noted above, mandatory carriage obligations in contrast do not condemn the physical lines owned by cable companies.

Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), is not to the contrary and, indeed, forecloses the cable operators’ Loretto claim. In Bell Atlantic, petitioners challenged Commission rules that permitted both “physical co-location” (in which the equipment of a Competing Access Provider (“CAP”) is placed in the central office of a Local Exchange Carrier (“LEC”)) and “virtual co-location” (in which the LEC “owns and maintains the circuit terminating equipment, but the CAP designates the type of equipment that the LEC must use and strings its own cable to a point of interconnection”). 24 F.3d at 1444. The D.C. Circuit applied Loretto to the “physical co-location” only, declining to apply physical occupation doctrine to the Commission’s virtual co-location rules. The broad interpretation of primary video carriage obligations would create an even less intrusive “taking” than the virtual co-location rules did. Unlike the virtual co-location rules, under which a CAP “designates the type of equipment that the LEC must use,” Bell Atlantic, 24 F.3d at 1444, a broad primary video interpretation would not give broadcasters any authority over the type of equipment cable companies could use.

At most, then, must-carry regulations unexceptionally deprive cable companies of unfettered use of corporate assets in order to provide minimal public access to broadcasters – an action befitting the label “regulatory taking,” Tahoe-Sierra Preservation Council, 122 S. Ct at 1481, and triggering only a deferential and “fact specific inquiry” under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). See Tahoe-Sierra Preservation Council, 122 S. Ct at 1481, 1484. Under that inquiry, the Court “examine[s] ‘a number of factors’ rather than a simple ‘mathematically precise’ formula” Id. at 1481. Significantly, the cable operators have not even tried to make out a case that any interpretation of primary video would result in a taking under the Penn Central analysis. And with good reason, for there is simply no taking under Penn Central.

As noted above, because the burdens on cable operators are the same whether those operators are carrying a single broadcast digital stream or multiple such streams, the decision to mandate carriage of the entire signal has no constitutional significance under the Penn Central or any other analysis. But even taking the cable operators’ claims more broadly, Penn Central affords no relief. The core of that fact-specific inquiry involves three factors: “(1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; and (3) the ‘character of the governmental action.’” Building Owners, 254 F.3d at 99, n.13 (quoting Penn Central, 438 U.S. at 124); see also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). In evaluating those factors, the analysis focuses on “the parcel as a whole” rather than just the portion of the property alleged to have been taken. Id. at 1483-84; see also Penn Central, 438 U.S. at 130-31.

First, in the context of a cable operator's entire system, the economic burden imposed by mandatory carriage is minimal, because of the statutory cap, the existence of some voluntary carriage, and the rapid expansion in cable capacity. Indeed, the Court in the Turner cases relied on precisely these factors to reach the analogous conclusion that the 1992 Act imposed no unconstitutional burden on cable operators under the First Amendment.

Second, the must-carry requirements do not interfere with any "distinct investment backed expectations," a critical factor in the Penn Central analysis. Instead, these requirements simply constitute duties that a reasonable property owner would expect in a regulated industry. See, e.g., General Tel. Co. of the Southwest v. United States, 449 F.2d 846, 864 (5th Cir. 1971) ("The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992) (noting that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless"); United States v. Branch, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (noting that principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability "[b]ecause of the 'State's traditionally high degree of control of commercial dealings'" (quoting Lucas v. South Carolina Coastal Council, 505 U.S. at 1027)). Indeed, carriage obligations of the sort at issue in the 1992 Cable Act have been a part of cable regulation from the beginning. See, e.g., United States v. Southwestern

Cable Co., 392 U.S. 157, 166-67 (1968) (mandatory carriage of certain broadcast signals); United States v. Midwest Video Corp., 406 U.S. 649, 653-55 (1972) (mandatory origination provisions); Black Hills Video Corp. v. FCC, 399 F.2d 65, 67 (8th Cir. 1968) (must carry rules); 47 U.S.C. § 531(b) (PEG provisions); 47 U.S.C. § 532(b)(1) (leased access provisions); see also H. Rep. No. 102-628, at 67 (“since signal carriage rules were central to regulation of cable television for many years, and most cable systems have continued to carry a number of local over-the-air signals, imposition of the signal carriage regulations would not disturb any reasonable expectations of investors in cable systems.”).

Moreover, even in the absence of mandatory carriage rules, carrying local broadcast signals has been an expected – indeed, central – function of cable systems. No plausible argument can be maintained that rules requiring such carriage would result in use of the cable property that is inconsistent with reasonable investor expectations.

Third, the character of the governmental action precludes any argument of a taking under Penn Central. As the D.C. Circuit has observed, “the character of the governmental action depends both on whether the government has legitimized a physical occupation of the property, and whether the regulation has a legitimate public purpose. District Intown Properties Limited Partnership, 198 F.3d 874, 879 (D.C. Cir. 1999) (internal citations omitted). Here, as shown, there is no physical occupation of the property, and the Supreme Court in the Turner cases has affirmed that the must carry obligations have a legitimate public purpose. See, e.g., Turner I, 512 U.S. at 663 (noting

that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order”).<sup>14</sup>

In short, the must-carry obligations are simply regulations that “arise[ ] from some public program adjusting the benefits and burdens of economic life to promote the common good,” Penn Central, 438 U.S. at 124, and thus are unobjectionable.<sup>15</sup> The Just Compensation Clause is thus irrelevant to the proper interpretation of those obligations.

### CONCLUSION

Nothing in the First or Fifth Amendment prevents the Commission from concluding that the primary video provision requires a cable operator to carry a broadcaster’s entire free over-the-air digital signal as part of cable operator’s must-carry obligations.

---

<sup>14</sup> Although the analysis in the Tribe Report does not address directly the impact of the Just Compensation Clause to carriage of both analog and digital signals, it is worth noting that such dual carriage would be temporary, and the Court has noted that such temporary takings implicate only reduced takings concerns. See Tahoe-Sierra Preservation Council, 122 S. Ct at 1482-84.

<sup>15</sup> In this sense, a broad primary video interpretation would fall under the large category of regulations that commonly “curtail[ ] some potential for the use or economic exploitation of private property.” Andrus v. Allard, 444 U.S. 51, 65 (1979).