

THE CONSTITUTIONAL RIGHT TO WATCH TELEVISION: ANALYZING THE DIGITAL SWITCHOVER IN THE CONTEXT OF THE FIRST AMENDMENT

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“Normally, technology adoption occurs over a period of time as quality improves and equipment becomes more affordable. In the case of the digital transition, however, consumers are forced to adopt new technology, whether they demand it or not.”¹

“Over and over again, the federal government has demonstrated that it has no clue how it will persuade consumers to switch to Digital TV. Even worse, there’s evidence that federal officials are not taking the issue seriously enough to get the job done.”²

1. Comments of Consumers Union, Consumer Fed’n of Am. & Free Press, *In re Implementation and Administration of a Digital-To-Analog Converter Box Coupon Program Boxes* (2006) (No. 060512129-6129-01), at 8, *available at* http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment0073.pdf [hereinafter Consumers Union Comments].

2. Phillip Swann, *Digital TV: Why the Federal Government Is Screwing It Up*, TVPREDICTIONS.COM, Feb. 6, 2007, <http://www.tvpredictions.com/dtvfeds020607.htm>.

INTRODUCTION

Many commentators consider digital television (“DTV”)³ to be the most significant development in television technology since the advent of color TV.⁴ It is surprising, therefore, that most Americans are unaware of or have very little knowledge about the impending DTV transition.⁵ A recent survey conducted by the Association of Public Television Stations found that over sixty percent of respondents had no idea that the transition was taking place.⁶ Yet for the considerable number of Americans who continue to rely on over-

3. Digital television is a new broadcasting method that uses digital signals (constant streams of ones and zeroes), as opposed to analog signals (continuous fluctuations in the amplitudes or frequencies of radio transmissions), to represent video, voice, or data. See Aaron A. Hurowitz, Comment, *Copyright in the New Millennium: Is the Case Against ReplayTV a New Betamax for the Digital Age?*, 11 COMMLAW CONSPPECTUS 145, 146 (2003) (noting that while digital television and analog television both serve the same purpose—to provide a means through which broadcasters can represent information—their “levels of effectiveness are a world apart”).

4. See, e.g., *Preparing Consumers for the End of the Digital Television Transition: Hearing Before the Subcomm. on Telecomms. and the Internet of H. Comm. on Energy and Commerce*, 109th Cong. 10 (2005) [hereinafter *Preparing Consumers Hearing*] (statement of Lavada E. DeSalles, Member, Bd. of Dirs., Am. Ass’n of Retired Perss.); LENNARD G. KRUGER, CONG. RESEARCH SERV., DIGITAL TELEVISION: AN OVERVIEW I (2006), http://www.opencrs.com/rpts/RL31260_20060822.pdf; see also Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 11 COMMLAW CONSPPECTUS 97, 98 (2003) (explaining that before the development of digital TV, the half century after the arrival of color TV brought only a few minor improvements to the industry, such as stereo audio).

5. See MARK COOPER, CONSUMERS UNION & CONSUMER FED’N OF AM., ESTIMATING CONSUMER COSTS OF A FEDERALLY MANDATED DIGITAL TV TRANSITION: CONSUMER SURVEY RESULTS 4-5 (2005), available at http://www.hearusunow.org/fileadmin/sitecontent/DTV_Survey_Report_Final_6-29-05 (detailing the percentages of households that rely on over-the-air programming); MARK L. GOLDSTEIN, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO LETTER TO CONGRESS ON DIGITAL TELEVISION TRANSITION: ISSUES RELATED TO AN INFORMATION CAMPAIGN REGARDING THE TRANSITION 17-18 (2005), available at <http://www.gao.gov/new.items/d05940r.pdf> [hereinafter GOLDSTEIN, GAO LETTER] (noting that while knowledge regarding the concept of high-definition television has increased over the years, many consumers are “still confused or unaware that at some point in the future analog television will cease operation . . .”); *id.* at 5 (reporting that a survey conducted in 2002 found that eighty-three percent of respondents did not know about or were only somewhat familiar with the digital television transition); Association of Public Television Stations, *APTS Survey Finds Majority of Americans Remain Unaware of DTV Transition*, APTS NEWS ROOM, Jan. 31, 2007, <http://www.aptv.org/news/DTVSURVEY.cfm> [hereinafter *APTS Survey*] (explaining that while a 2006 survey found that some respondents were aware of the digital transition, fifty-three percent of those respondents had no idea when the transition would occur). Perhaps the reason for this lack of awareness is that for most people, the digital switchover will have little, if any, noticeable impact on how they watch television. See COOPER, *supra* (stressing that TV sets that are connected to cable or satellite service will not require digital-to-analog converter boxes); Anne Broache, *Digital TV Switch Set For Early 2009*, CNET NEWS.COM, Dec. 21, 2005, http://news.com.com/Digital+TV+switch+set+for+early+2009/2100-1028_36004429.html (reporting that eighty-five percent of American households already subscribe to cable or satellite TV).

6. *APTS Survey*, *supra* note 5.

the-air (“OTA”) broadcasting,⁷ the digital switchover could leave many without their primary means⁸ of receiving the news,⁹ weather,¹⁰ political information,¹¹ education,¹² and entertainment.¹³

On February 8, 2006, President George W. Bush signed into law the Digital Television Transition and Public Safety Act of 2005 (“DTV Act”).¹⁴ The DTV Act establishes February 18, 2009 as the hard deadline¹⁵ by which television stations must cease using analog signals

7. See MARK L. GOLDSTEIN, U.S. GOV'T ACCOUNTABILITY OFFICE, DIGITAL BROADCAST TELEVISION TRANSITION: ESTIMATED COST OF SUPPORTING SET-TOP BOXES TO HELP ADVANCE THE DTV TRANSITION 0, 3 (2005), available at <http://www.gao.gov/new.items/d05258t.pdf> (finding that nineteen percent of American households rely exclusively on free over-the-air television).

8. See *Transition to Digital Television: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 59 (2001) [hereinafter *Transition to Digital Television*] (statement of Mark Cooper, Dir. of Research, Consumer Fed'n of Am.), available at <http://commerce.senate.gov/hearings/0301coo.pdf> (designating television as “the dominant means of disseminating information in our democratic society”); Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 153 (2006) (asserting that free over-the-air TV is still “the only conduit to regular news, political information, cultural enrichment, education, and democratic engagement” for a significant number of Americans).

9. See Nick Madigan, *61% Get Local News from Newspapers*, BALT. SUN, Feb. 28, 2006, at 2D (reporting that seventy-one percent of respondents in a recent survey said that they rely on network, cable, and satellite TV as their primary or secondary sources of national news); Mike Shaw, *Direct Your Advertising Dollars Away from TV at Your Own Risk*, ADVERTISING AGE, Feb. 27, 2006, at 29 (Midwest Reg. Ed.) (describing a recent Roper study that found that nine out of ten influential Americans choose television as their primary source for the news, but stating that sixty-one percent of consumers primarily look to newspapers for their local news).

10. See David Browne, *The Barometric Pressure Is Just the Beginning*, N.Y. TIMES, Mar. 11, 2007, § 2, at 29 (describing a new talk show on The Weather Channel called “Abrams & Bettes” that is devoted entirely to talk about the weather).

11. See Pew Research Ctr. for the People & the Press, *Cable and Internet Loom Large in Fragmented Political News Universe*, Jan. 11, 2004, <http://people-press.org/reports/display.php3?ReportID=200> [hereinafter *Pew Research Ctr. Politics*] (“While cable news and the Internet have become more important in informing Americans about the election, television as a whole remains the public’s main source of campaign news.”).

12. See Annys Shin, *Diaper Demographic*, WASH. POST, Feb. 24, 2007, at D01 (“Research has shown regular viewers [of Sesame Street] aged 2 and older learned words more quickly than children who watched less.”).

13. See Nielsen Media Research, *Nielsen Issues Most Popular Lists for 2006*, Dec. 20, 2006, <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=7c8e8ee7af0af010VgnVCM100000ac0a260aRCRD> (listing the top ten most watched regularly scheduled TV programs of 2006, including entertainment programs such as American Idol, Dancing with the Stars, NBC Sunday Night Football, Desperate Housewives, and Deal or No Deal).

14. Pub. L. No. 109-171, §§ 3001-3013, 120 Stat. 4, 21-28 (2006).

15. *Id.* § 3002(b). Many sources refer to February 17, 2009 as the deadline for the DTV transition instead of February 18, 2009. See, e.g., DTV.gov Frequently Asked Questions, <http://www.dtv.gov/consumercorner.html> (last visited Aug. 19, 2007) (explaining that most television stations will continue to broadcast in digital and analog formats until the final deadline date for the DTV transition, February 17, 2009). The point of confusion arises from the fact that the DTV Act requires television stations to cease analog broadcasting beginning on February 18, 2009.

and begin broadcasting solely digital data.¹⁶ Upon reclaiming the analog spectrum, the federal government plans to give a portion of it to public safety organizations, such as police and fire departments, and then auction off the rest to raise billions of dollars to help balance the federal budget.¹⁷ To alleviate the transition's burden on consumers, the DTV Act allocates between \$990 million and \$1.5 billion for a digital-to-analog converter box coupon program.¹⁸ Consumer groups argue, however, that this amount is grossly insufficient¹⁹ and that if funding is not increased, millions of consumers will be forced to bear the cost of switching over to DTV directly out of their own pockets.²⁰

This Comment posits that TV owners who rely exclusively on OTA broadcasting have a constitutional right to receive information and thus stresses the importance of an adequate converter box program. Part I traces the history of the digital television transition in the United States and then examines the current digital switchover plan

§ 3002(b)(1). Thus, many commentators refer to February 17, 2009 as the deadline, since that is technically the last day broadcasters can transmit analog signals. Note also that the transition date was not chosen coincidentally. See Stephen Labaton, *Transition to Digital Gets Closer*, N.Y. TIMES, Dec. 20, 2005, at C1 (discussing that lawmakers chose the middle of February for the deadline because it falls two weeks after the Super Bowl and one month before the NCAA Basketball Tournament, two widely watched sporting events).

16. See Comments of New American Foundation et al., *In re Implementation and Administration of a Coupon Program for Digital-to-Analog Converter Boxes* No. 060512129-6129-01 (Sept. 25, 2006), at 2, available at http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment0087.pdf (reporting that by February 18, 2009, TV broadcasters will return 108 MHz of spectrum to the federal government, specifically channels 52 to 69).

17. Jim Puzanghera, *Millions May Miss Digital TV Deadline: The Shift from Analog to the New Format in 2009 Might Leave Many Viewers in the Dark*, L.A. TIMES, Mar. 28, 2007.

18. §§ 3005(a)-3005(b). A digital-to-analog converter box, as defined by the DTV Act itself, is "a stand-alone device that does not contain features or functions except those necessary to enable a consumer to convert any channel broadcast in the digital television service into a format that the consumer can display on television receivers designed to receive and display signals only in the analog television service, but may also include a remote control device." *Id.* § 3005(d).

19. See Associated Press, *Analog TV Broadcasts to End by 2009*, MSNBC.COM, Dec. 21, 2005, <http://www.msnbc.msn.com/id/10563834/> (relating that Jeannine Kenney, senior policy analyst with the Consumers Union, believes that the \$1.5 billion allocation "virtually ensures that on Feb. 18, 2009, tens of millions of televisions will go black"); Broache, *supra* note 5 (discussing that the Consumers Union believes that the funding for the converter box program is "sorely inadequate to meet [the needs of consumers] and [will] still leave \$2 billion in overall out-of-pocket costs . . .").

20. See Consumers Union Comments, *supra* note 1, at 8 (describing that a transition without an adequate box assistance program will force many consumers to expend their own resources to facilitate a transition that they did not ask for); COOPER, *supra* note 5, at 1 (estimating that the direct out-of-pocket expenses for consumers will reach \$3.5 billion nationally).

and its potential impact on OTA-only households. Part II explores the constitutionality of the DTV transition, using First Amendment public forum analysis to argue that the federal government cannot restrict access to television broadcasting unless it does so pursuant to a significant state interest and a narrowly tailored means to achieve this interest, while also leaving open ample alternative channels for communication. Without an adequate converter box program, the current DTV transition plan fails the latter two requirements. This Comment concludes by making recommendations to the National Telecommunications and Information Administration (“NTIA”), urging it to amend its Final Rule²¹ and adopt a two-round coupon distribution process, where each household is limited to only one coupon request per round. Coupled with an increase in funding, this process will ensure that no OTA-only household in the United States will be left without at least one working TV after the digital switchover.

I. THE TRANSITION TO DIGITAL TELEVISION

A. *A Brief History*

In 1987, pressured by broadcasting organizations and companies, the Federal Communications Commission (“FCC”) initiated proceedings to investigate the viability and potential impact of a government-forced digital television transition in the United States.²² After nine years of debate between television manufacturers, broadcasters, and computer companies, the FCC finally adopted a national digital broadcast transmission standard in December 1996

21. The NTIA Final Rule on Digital Television Converter Box Coupon Program (“Final Rule”) is comprised of two parts. NTIA Final Rule on Digital Television Converter Box Coupon Program, 47 C.F.R. § 301 (2007), *available at* http://www.ntia.doc.gov/ntiahome/frnotices/2007/DTVFinalRule_031207.htm [hereinafter NTIA Final Rule Part I]; NTIA Final Rule on Digital Television Converter Box Coupon Program, 47 C.F.R. § 301 (2007), *available at* http://www.ntia.doc.gov/ntiahome/frnotices/2007/DTVFinalRule_2a.htm [hereinafter NTIA Final Rule Part II].

22. KRUGER, *supra* note 4, at 2. The process of regulating the introduction of DTV in the United States, therefore, has exceeded nearly two decades. *Id.*; see Jon M. Peha, *The Digital TV Transition: A Chance to Enhance Public Safety and Improve Spectrum Auctions*, IEEE COMMUNICATIONS, June 2006, at 1, *available at* <http://www.ece.cmu.edu/~peha/DTV.pdf> (discussing Congress’s role as a catalyst and noting that without government regulation broadcasters would have little incentive to transmit digital content until the market deemed it necessary). The goal of the FCC and Congress throughout the process, however, has remained the same: to complete the transition to DTV as quickly as possible, so that the analog spectrum can be freed up and reallocated for other purposes. KRUGER, *supra* note 4, at 9.

based on the recommendations of the Advanced Television System Committee.²³

The very next year, Congress passed the Telecommunications Act of 1996,²⁴ which initially limited DTV licenses to existing broadcasters.²⁵ Under the Act, existing broadcasters were granted digital licenses for free²⁶ and allowed to retain their old analog licenses up until the date of the transition.²⁷ Shortly after the Telecommunications Act, Congress passed the Balanced Budget Act of 1997.²⁸ The Balanced Budget Act set December 31, 2006 as the target deadline for the digital switchover.²⁹ The December 2006 deadline, however, was subject to several conditions.³⁰ The most important condition was the establishment of an eighty-five percent threshold as the percentage of households that must be able to receive digital signals in any given market in order for the transition in that market to proceed.³¹

23. KRUGER, *supra* note 4, at 2. See generally ATSC History: Development of the ATSC Digital Television Standard, <http://www.atsc.org/history.html> (last visited Aug. 19, 2007) (detailing the work of the FCC's Advisory Committee in developing the transmission standard).

24. Pub. L. No. 104-104, 110 Stat. 56 (1996).

25. KRUGER, *supra* note 4, at 2; see *Transition to Digital Television Hearing*, *supra* note 8, at 1 (statement of Sen. John McCain, Chairman of the Comm. on Commerce, Sci., and Transp.) (stating that the Wall Street Journal described the Telecommunications Act as a "planned multi-billion dollar handout for wealthy TV-station owners").

26. See *Transition to Digital Television Hearing*, *supra* note 8, at 1 (statement of Sen. John McCain, Chairman of the Comm. on Commerce, Sci., and Transp.) (noting that non-broadcasting industries must buy similar spectrum at competitive and hence expensive auctions); Varona, *supra* note 8, at 151 (discussing how the FCC granted broadcasters similar free analog licenses when analog TV was just beginning). *But see id.* at 25 (statement of Michael S. Willner, President and Chief Executive Officer, Insight Commc'ns) ("The cable industry's digital transition is happening with our own capital Since the passage of the '96 Telecommunications Act, cable has spent \$42 billion dollars to upgrade its infrastructure.").

27. KRUGER, *supra* note 4, at 2. Because the existing analog television broadcasting system cannot receive digital signals, simultaneous broadcast of the same TV program in both digital and analog formats was intended to allow viewers who have not yet purchased DTV sets or converter boxes to continue to watch television up until the final transition to DTV. *Id.* at 3.

28. Pub. L. No. 105-33, § 3003, 11 Stat. 251, 265 (1997).

29. *Id.* § 3003(14)(A).

30. *Id.* § 3003(14)(B)(iii).

31. LENNARD G. KRUGER & LINDA K. MOORE, CONG. RESEARCH SERV., THE DIGITAL TV TRANSITION: A BRIEF OVERVIEW 2 (2005), available at http://www.opencrs.com/rpts/RS22217_20050812.pdf. The other two conditions that would have extended the deadline were: (1) if at least one television station affiliated with the four largest national networks was not broadcasting a DTV service signal; and (2) if the technology to convert digital transmissions for use on analog sets was not generally available. KRUGER, *supra* note 4, at 2.

As 2006 approached, it became apparent that the eighty-five percent threshold of the Balanced Budget Act would not be met.³² Lawmakers, in turn, immediately began debating a new deadline.³³ Congress, however, did not want to merely extend the previous deadline, where the same exceptions could once again delay the transition.³⁴ Instead, it wanted to adopt a new “hard” date to suppress any prospect of further delay.³⁵ On February 8, 2006, President Bush signed into law the Deficit Reduction Act of 2005.³⁶ The DTV Act was included within and set a new hard deadline of February 18, 2009 for the transition.³⁷

The DTV Act allocates between \$990 million and \$1.5 billion³⁸ for a digital-to-analog converter box coupon program.³⁹ Pursuant to the

32. See KRUGER & MOORE, *supra* note 31, at 2 (explaining that the adoption rate of DTV in the United States has been slower than expected); Broache, *supra* note 5 (stating that the transition to DTV is nowhere near the required eighty-five percent mark). Along with a slower than expected adoption rate, ambiguity regarding how the eighty-five percent would be measured also contributed to the recognition that the threshold would not be met. See Justin Brown, *Digital Must-Carry & the Case for Public Television*, 15 CORNELL J.L. & PUB. POL'Y 73, 78 (2005) (stating that the eighty-five percent rule fails to specifically define what constitutes a “television market”); J.H. Snider, *Multicast Must-Carry for Broadcasters: Will It Mean No Public Interest Obligations for DTV?*, SPECTRUM SERIES ISSUE BRIEF, Dec. 2003, at 2, available at http://www.newamerica.net/files/archive/Pub_File_1416_1.pdf (discussing how the statute is vaguely worded).

33. Considering that it took approximately twenty years for color television to reach an eighty-five percent saturation rate, perhaps the need for a deadline extension should not have come as a surprise. See *Transition to Digital Television Hearing*, *supra* note 8, at 1 (statement of Sen. John McCain, Chairman of the Comm. on Commerce, Sci., and Transp.) (arguing that because it took color TV roughly twenty years and the VCR sixteen years to penetrate their respective markets to the eighty-five percent level, to allow the time for broadcasters to retain their old analog spectrum until eighty-five percent of American homes had digital television was “quite a gift”).

34. See KRUGER, *supra* note 4, at 15 (noting that on February 17, 2005, the House held a series of meetings discussing the need for a hard deadline and the financial and technological necessities accompanying it).

35. See Consumers Union, *4 out of 10 Households Could be Forced to Pay for the Digital Television Transition, New Survey Finds*, CONSUMERSUNION.ORG, June 29, 2005, <http://www.consumersunion.org/pub/2005/06/002455print.html> (“Prompting Congress’[s] sudden attention to a hard date for the transition to digital television [was] the desire to raise revenues by auctioning the analog spectrum broadcasters [were] currently using which will be freed up following the transition.”).

36. Pub. L. No. 109-171, 120 Stat. 4 (2006).

37. Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3002(a)(1)(B), 120 Stat. 4, 21 (2006).

38. If the NTIA certifies to Congress that the initial \$990 million funding is insufficient, then the program may receive additional funding not to exceed \$1.5 billion. *Id.* § 3005(c)(3). The funding estimate allocates up to \$160 million for administrative costs, including up to \$5 million for consumer education. *Id.* §§ 3005(c)(2)(A), (3)(A)(i).

39. *Id.* § 3005. The NTIA is to administer the program. See *id.* § 3005(a)(1) (authorizing the Assistant Secretary for Communications and Information of the Department of Commerce to implement and administer the digital-to-analog converter box program). The Assistant Secretary for Communications and

program, all “eligible households” may request up to two coupons that can be applied towards converter box purchases.⁴⁰ Converter boxes are stand-alone devices that make digital signals viewable on analog TVs.⁴¹ Eligible households must request their coupons between January 1, 2008 and March 31, 2009, inclusive.⁴² Each coupon is worth forty dollars,⁴³ and only one coupon can be redeemed per converter box.⁴⁴

B. The Digital Television Transition and Public Safety Act’s Effect on OTA-Only Households⁴⁵

A recent survey conducted by the Consumers Union and the Consumer Federation of America estimates that thirty-nine percent of U.S. households, approximately forty-two million households,⁴⁶

Information is the administrator of the NTIA. See NTIA, Office of the Assistant Secretary, <http://www.ntia.doc.gov/ntiahome/overview.html> (last visited Aug. 19, 2007) (explaining that the NTIA’s mission is carried out by the Assistant Secretary of Commerce for Communications and Information, who administers five major program offices).

40. Digital Television Transition and Public Safety Act of 2005 § 3005(c)(1)(A). The Act, however, does not define “eligible household.” See Notice of Proposed Rulemaking: Digital-to-Analog Converter Box Coupon Program, http://www.ntia.doc.gov/ntiahome/frnotices/2006/couponprogram_nprm_07202006.htm (last visited Aug. 19, 2007) (highlighting that while the Act defines “converter box,” it does not define “eligible household”).

41. See MARK L. GOLDSTEIN, U.S. GOV’T ACCOUNTABILITY OFFICE, DIGITAL BROADCAST TELEVISION TRANSITION: SEVERAL CHALLENGES COULD ARISE IN ADMINISTERING A SUBSIDY PROGRAM FOR DTV EQUIPMENT 2 n.2 (2005), available at <http://www.gao.gov/new.items/d05623t.pdf> (observing that viewers using set-top converter boxes will be viewing the broadcasters’ digital signals after they have been downconverted to analog, rather than viewing them directly).

42. Digital Television Transition and Public Safety Act § 3005(c)(1)(A). Coupons, however, will expire just three months after issuance. *Id.* § 3005(c)(1)(C). The NTIA proposes that an expiration date of three months after issuance should be printed on each coupon. Notice of Proposed Rulemaking, *supra* note 40. This will, according to the NTIA, encourage consumers to obtain converter boxes in a timely manner. *Id.* It will also “reduce opportunities for waste, fraud, and abuse and provide greater efficiency and certainty in administering the program.” *Id.*

43. Digital Television Transition and Public Safety Act § 3005(c)(4).

44. *Id.* § 3005(c)(1)(B).

45. It is important to note that the figures discussed in this section reflect the state of the nation in 2005. By 2009, these numbers will likely change. See Stephen Labaton, *Transition to Digital Gets Closer*, N.Y. TIMES, Dec. 20, 2005, at C1 (relating that experts believe consumers will be using more digital sets and fewer analog ones by the completion of the transition). How much they will change, however, is difficult to predict. This Comment acknowledges that change can, and likely will, occur over the next few years, yet it proceeds on the assumption (as it must, without clear evidence to suggest otherwise) that the numbers will not change so drastically so as to materially affect its arguments.

46. GENE KIMMELMAN, SENIOR DIR. OF PUB. POLICY AND ADVOCACY CONSUMERS UNION, TESTIMONY ON BEHALF OF CONSUMERS UNION AND CONSUMER FEDERATION OF AMERICA BEFORE THE UNITED STATES S. COMM. ON COMMERCE, SCI., AND TRANSP. REGARDING THE DIGITAL TELEVISION TRANSITION 2 (2005), available at <http://www.commerce.senate.gov/pdf/kimmelman.pdf>.

continue to rely on analog broadcasting for at least some of their television viewing.⁴⁷ The survey also finds that within these households, approximately eighty million TV sets are unconnected to cable or satellite service.⁴⁸ Simple math demonstrates, however, that \$990 million will fund at most 24.75 million coupons (\$990,000,000/\$40 per coupon), and \$1.5 billion will fund at most 37.5 million coupons (\$1,500,000,000/\$40)—less than half the total unconnected TVs in either situation.⁴⁹

Of the eighty million analog TVs in the United States, thirty-five million are located in the homes of the sixteen million American households that rely exclusively on OTA broadcasting.⁵⁰ OTA-only households are the consumers most in need of coupons,⁵¹ since nearly half of these households have income levels below thirty thousand dollars.⁵² Yet the NTIA has decided not to limit coupon

47. COOPER, *supra* note 5, at 5. The Consumers Union (“CU”) and Consumer Federation of America (“CFA”) survey is but one national survey conducted in an attempt to estimate the number of OTA-only TV sets in the United States. The Governmental Accountability Office (“GAO”) and the National Association of Broadcasters (“NAB”), for example, also conducted surveys recently, as did the Consumers Electronics Association (“CEA”). *Id.* The results of the CEA survey, however, diverge widely from those of both the CU/CFA and the GAO/NAB surveys, suggesting that the CEA survey is the outlier. *See id.* at 6 (observing that the CEA survey found less than half as many OTA-only sets as the CU/CFA survey and the GAO/NAB surveys). The results of the GAO/NAB surveys, on the other hand, closely resemble those of the CU/CFA survey, albeit arriving at a slightly smaller number of total OTA-only TV sets. *See id.* (reporting that the NAB and GAO both estimated about seventy-three million OTA-only sets, seven million less than the CU/CFA estimate). The author of this Comment could have chosen to use the GAO/NAB results but instead chose to use the CU/CFA estimate because (1) it is based on more recent data, and (2) it is imperative that Congress use the higher end of estimates when a constitutional question such as the one here is involved. For an explanation as to why the CU/CFA estimate differed from the GAO/NAB estimates, *see id.*

48. *Id.* at 5-6.

49. *See* Consumers Union Comments, *supra* note 1, at 12 (emphasizing that by providing funding sufficient to serve less than half of the eighty million analog-only sets in the United States, Congress delegated a very difficult task to the NTIA). These figures assume that all of the allocated money will go entirely to coupons. Upwards of \$160 million (roughly the value of four million would-be vouchers (\$160,000,000/\$40)), however, can and likely will be spent to administer the assistance program. *See* Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3005 (c) (3) (A) (i), 120 Stat. 4, 24 (2006); *see also* NTIA Final Rule Part I, *supra* note 21, § 301 (“Assuming the entire administrative amount is taken into account, \$1.34 billion would be available for distributing up to 33.5 million coupons.”).

50. KIMMELMAN, *supra* note 46, at 2.

51. *See* COLEMAN BAZELON, ANALYSIS GROUP, ANALYSIS OF AN ACCELERATED DIGITAL TELEVISION TRANSITION 15 (2005), *available at* <http://www.dtvcoalition.com/images/media/DTV%20Transition%20Report.pdf> (identifying a “well-known relationship” between income level and the choice not to subscribe to cable or satellite).

52. *See* GOLDSTEIN, *supra* note 7, at 4 (observing that only twenty-nine percent of both cable and satellite homes have incomes at or below thirty thousand dollars, as compared to forty-eight percent of OTA households). These households are also

eligibility to OTA-only status, at least initially.⁵³ Any household that uses an analog TV will be eligible to request up to two coupons in the initial stage of coupon distribution, irrespective of its income level or whether or not it also subscribes to cable or satellite service.⁵⁴ Only when the initial \$990 million funds are exhausted and the NTIA deems it necessary to request the additional \$510 million allotted to the program by the DTV Act will eligibility be limited to OTA-only households.⁵⁵

Even limiting the additional \$510 million in this way, however, will likely leave millions of OTA-only households without a converter box coupon. The initial \$990 million funding includes up to \$100 million for administrative costs—i.e., costs related to the distribution of coupons.⁵⁶ Assuming the entire administrative amount is used, that will leave \$890 million available to fund 22.25 million coupons (\$890,000,000/\$40). Since each eligible household may request up to two coupons, 22.25 million coupons will potentially provide vouchers to only 11.125 million households (22,250,000/2).⁵⁷

While it is possible that these 11.125 million households will all be OTA-only, this is unlikely. It is more likely that OTA-only households will comprise only a portion of the coupon applicants, perhaps thirty-eight percent,⁵⁸ or 4.24 million. Now, assuming the NTIA can limit

disproportionately represented by minorities and the elderly. *See id.* at 8 (finding that over twenty-three percent of minority households rely on OTA television, whereas less than sixteen percent of white households do the same); Broache, *supra* note 5 (noting that many of the ill-equipped analog TV sets in the United States are operated by the elderly).

53. *See* NTIA Final Rule Part I, *supra* note 21, § 301 (permitting coupons to be distributed initially to all U.S. households). The Digital Television Transition and Public Safety Act arguably does not provide the NTIA with the statutory authority to restrict eligibility to over-the-air-only households. *See* Consumers Union Comments, *supra* note 1, at 2-4; *see also* Comments of the Ass'n for Maximum Serv. Television, Consumer Elecs. Ass'n, and Nat'l Ass'n of Broadcasters i (2006) (No. 060512129-6129-01), at I, *available at* http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment0050.pdf [hereinafter MSTV/CEA/NAB Comments] (asserting that the Act, its legislative history, plain language, and underlying purpose “preclude any implementation of [a coupon] program that would exclude” cable or satellite-served homes from eligibility).

54. *See* NTIA Final Rule Part I, *supra* note 21, § 301 (noting that the Final Rule allows initial coupon distribution to all U.S. households).

55. *See id.* (limiting coupons provided using Contingent Funds to OTA-only households).

56. *See* Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3005(c)(2), 120 Stat. 4, 23 (2006) (allocating no more than five million dollars of the initial amount to consumer education).

57. It is true that not every household will request two coupons, but the likely scenario is that most will, since all it requires is a “check of a box.”

58. OTA-only households constitute roughly thirty-eight percent of the U.S. households that continue to rely on analog broadcasting for at least some of their television viewing (16,000,000/42,000,000). *See supra* note 46 and accompanying text

the additional \$510 million to OTA-only households,⁵⁹ and assuming the entire administrative amount allotted by the DTV Act for the additional coupons (\$60 million) is used, the remaining \$450 million will fund 11.25 million coupons ($\$450,000,000/\40) for potentially only 5.625 million OTA-only households ($11,250,000/2$). The NTIA's Final Rule, therefore, could fund coupons for only 9.86 million OTA-only households ($4,240,000 + 5,625,000$), leaving over six million of the sixteen million OTA-only households without at least one converter box coupon.

In the above calculations, it is estimated that thirty-eight percent of the households requesting coupons during the initial stage of coupon distribution will be OTA-only, because OTA-only households comprise that percentage of the households eligible for coupons in the first stage. However, this is likely a generous estimate. Since the converter box program allows online requests,⁶⁰ the millions of OTA-only households that lack computers or Internet access will generally be at a disadvantage when it comes to requesting the first-come, first-served vouchers.⁶¹

The "digital divide" between whites and minorities, and concomitantly between non-OTA-only and OTA-only households, has narrowed over the years.⁶² Nevertheless, researchers have concluded that a noticeable disparity between the two groups still remains.⁶³ A recent study conducted by the Government Accountability Office ("GAO") found that although most consumers are unaware of the impending transition, OTA-only households are particularly

(providing statistical data on how many U.S. households own analog TVs and how many of those households rely exclusively on OTA broadcasting).

59. See *infra* notes 265-267 and accompanying text (explaining why limiting eligibility to OTA-only status, in any stage of the process, will be difficult to enforce).

60. See NTIA Final Rule Part I, *supra* note 21, § 301.

61. See *Digital TV Proposal Could Leave Out Americans Who Need It Most*, CIVILRIGHTS.ORG, Oct. 28, 2005, <http://www.civilrights.org/issues/communication/details.cfm?id=37310> (asserting that minority households are less likely to have access to a home computer and are therefore at a comparative disadvantage). The coupon application process, however, is not limited to online requests. See NTIA Final Rule Part I, *supra* note 21, § 301 (allowing coupon requests by mail, phone, and the Internet). However, the legislative history of the DTV Act expresses an expectation that the NTIA will emphasize electronic media to make coupon distribution more efficient. Notice of Proposed Rulemaking, *supra* note 40. This suggests that the NTIA will stress the electronic application process over the other forms. *But see* NTIA Final Rule Part I, *supra* note 21, § 301 ("[C]onsumers will be made aware of the various ways to access and submit applications for the Coupon Program.").

62. Varona, *supra* note 8, at 187.

63. *Id.*; see *Preparing Consumers Hearing*, *supra* note 4, at 14 (statement of Manuel Maribal, Founder and Co-Chair, Hispanic Tech. and Telecomms. P'ship) (highlighting that although 58.7% of the total U.S. population uses the Internet, only 37.2% of Hispanics have access).

unaware.⁶⁴ Perhaps this is a manifestation of the digital divide itself, since the government releases much of the information regarding the transition over the Internet.⁶⁵

The NTIA also does not expect the coupons to cover the full cost of converter box purchases.⁶⁶ Consumers are expected to cover the difference between the retail price and the forty dollar subsidy.⁶⁷ While the GAO estimates that converter boxes will cost only fifty dollars by 2009,⁶⁸ limited information exists to effectively predict how much they will actually cost.⁶⁹ Some people argue that requiring a

64. GOLDSTEIN, *supra* note 41, at 16 (asserting that some populations are more difficult to inform about the digital switchover, especially consumers whose first language is not English or customers that only receive OTA television); *see Preparing Consumers Hearing*, *supra* note 4, at 17 (reporting that most Hispanic Americans, a group that relies particularly heavily on OTA signals, are not aware of the transition and therefore are not prepared for its impact); PETER GUERRERO, U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE RANKING MINORITY MEMBER, SUBCOMM. ON TELECOMMS. AND THE INTERNET, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, TELECOMMS.: ADDITIONAL FEDERAL EFFORTS COULD HELP ADVANCE DIGITAL TELEVISION TRANSITION 16 (2002), *available at* <http://www.gao.gov/new.items/d037.pdf> (describing that the GAO found that OTA-only users, along with women and people without advanced education, were less likely to know about the DTV transition).

65. *See* GOLDSTEIN, GAO LETTER, *supra* note 5, at 6 (discussing the Federal Communications Commission website, which "provides information about DTV news, terms, and regulatory information, as well as a listing of digital and high-definition television programming and a consumer's guide for digital television sets"); Marc D. Allan, *Are You Ready For the Switch?*, WASH. POST, Jan. 7, 2007, at Y05 (directing consumers to information about the digital transition from several online sources including www.dtv.gov/consumercorner.html and the FAQs section of the NTIA website).

66. *See* Notice of Proposed Rulemaking, *supra* note 40 ("We recognize that the cost of a converter box may be greater than [the Act's stated coupon value of] \$40.").

67. *See id.* (warning that the Deficit Reduction Act of 2005 forbids consumers from using two coupons toward the purchase of a single converter box).

68. *See* GOLDSTEIN, *supra* note 41, at 2 (predicting that the cost of converter boxes will decrease once they are mass-produced).

69. *See* Tam Harbert, *The End of Analog TV Broadcasts Is Near*, ELECTRONIC BUS., June 1, 2006, *available at* <http://www.edn.com/article/CA6339516.html?partner=eb> (describing how few manufacturers are producing digital converter boxes due to the uncertain market size and uncertain converter pricing). According to Harbert, only two manufacturers have boxes on the market, and most of these boxes are stored in warehouses because of their high price (\$250) and low demand. *Id.* Because the details of the converter box assistance program were only recently finalized, manufacturers were not ready to commit significant resources to this project. *See id.* ("[W]ith so many details up in the air, manufacturers aren't exactly lining up to build the boxes."); *cf.* Ex Parte Letter from Members, Comm. on Energy and Commerce, U.S. House of Representatives, to John M. R. Kneuer, Acting Administrator, Commerce for Commc'ns and Info., Nat'l Telecomms. Info. Admin. (Nov. 15, 2006), *available at* http://www.ntia.doc.gov/otiahome/dtv/comments/dtv_coupon_exparte17.pdf [hereinafter Ex Parte Letter from Members] (recounting the advice of several industry representatives to Congress that "consumer friendly and affordable converter boxes would be manufactured if Congress established a firm deadline for the transition"). Experts tend to agree that once manufacturers start producing converter boxes in great volume, the price of the boxes will fall significantly. *See, e.g.*, BAZELON, *supra* note 51, at 15 (acknowledging that the actual

ten dollar co-payment, if that figure is accurate, is more than fair, since consumers are essentially receiving the coupons for free.⁷⁰ Gene Kimmelman of the Consumer's Union argues, however, that "[b]y compensating consumers, Congress isn't giving them anything; it merely holds them harmless from a government mandate that would otherwise make their perfectly good personal property virtually useless."⁷¹ Kimmelman thus argues for a converter box program that fully, rather than partially, compensates consumers.⁷² Whether consumers are entitled to full compensation for a converter box that allows them to receive information, though, is subject to constitutional analysis.

II. THE DIGITAL TELEVISION TRANSITION AND THE FIRST AMENDMENT

The digital television transition is likely to infringe on the First Amendment rights of millions of OTA-only viewers. OTA-only viewers have a constitutional right to receive information,⁷³ yet the current plan will cause many of their TVs to "go black."⁷⁴ Like the right to free speech, the right to receive information is not an absolute right.⁷⁵ It has always been accepted, for example, that the

price drop will depend on how much time manufacturers are given to produce the boxes as well as the total demand for the boxes).

70. See, e.g., E-mail from D. Spencer Pope to the Nat'l Telecomms. Info. Admin. (Aug. 3, 2006, 03:16:51 PM), available at http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment0011.htm ("I strongly believe that it is not the responsibility of the government to issue coupons to 'eligible' households to purchase converter boxes when digital TV replaces analog TV. . . . The government does not need another entitlement program or another reason to increase the deficit any further.").

71. Letter from Gene Kimmelman, Mark Cooper, & Ed Mierzwinski to Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 25, 2005), available at http://www.consumersunion.org/pub/core_telecom_and_utilities/002788.html.

72. See Labaton, *supra* note 15 (quoting Kimmelman, who argued that "the government [is] making your TV go black and then only paying part of the cost for some of the people to make it work again, and none of the costs for others"); Letter from Gene Kimmelman, Mark Cooper, & Ed Mierzwinski to Comm. on Energy and Commerce, U.S. House of Representatives ("Full compensation for the cost of converter boxes is far from a windfall for consumers."). Many consumers are also demanding fully compensated converter boxes. See, e.g., E-mail from Scott Donaldson to the Nat'l Telecomms. Info. Admin. (Sept. 6, 2006, 01:57:00 PM), available at http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment0023.htm ("If the government is going to turn off my analog signal, then they need to give me a converter box [for] FREE.").

73. See *infra* Part II.A.1 (arguing that the Supreme Court has extended the right to receive to the television context).

74. See *infra* Part II.B (explaining that \$990 million will fund coupons for less than half of the eighty million analog TVs currently in the United States).

75. See Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 809 (2005) (describing Justice Rehnquist's view in *Board of Education v. Pico*, 457 U.S. 853, 868 (1982), that there is no absolute right to receive information just as there is

government can impose certain time, place, and manner restrictions on the right to balance government interests.⁷⁶ In the context of TV broadcasting, which is a limited designated public forum,⁷⁷ these restrictions must serve a significant government interest, be “narrowly tailored to serve [the] interest, and . . . leave open ample alternative channels of communication.”⁷⁸ The digital television transition fails the latter two requirements.⁷⁹

A. *The Digital Television Transition Implicates the Rights of OTA-Only Households to Receive Information and Ideas*

Although not explicitly written into the U.S. Constitution,⁸⁰ the Supreme Court and commentators have both repeatedly found that the right to receive information is a natural corollary to the right to free speech.⁸¹ Freedom of speech, courts and commentators argue, would have little to no meaning if the public were not allowed to access it.⁸² As Justice Brennan famously wrote in a concurring opinion: “The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider

no absolute right to free speech); *see also* Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (“[I]t is . . . well settled that the government need not permit all forms of speech on property that it owns and controls.”).

76. *See* Drew Patrick Gannon, Note, *First Amendment Public Forum Analysis: Restrictions on the Right to Receive Information Upheld in Kreimer v. Bureau of Police*, 97 DICK. L. REV. 411, 414 (1993) (recognizing that the government has always been able to restrict individual First Amendment rights to balance community interests).

77. *See infra* Part II.B.3 (demonstrating that television broadcasting is a limited designated public forum because the government intentionally opened it for expressive activity but limited its use to certain speakers).

78. *Kreimer v. Bureau of Police for the Town of Morrison*, 958 F.2d 1242, 1262 (3d Cir. 1992) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

79. *See infra* Part II.B.5 (applying the “time, place, or manner” test to the digital television transition).

80. *See* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

81. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (“[The right to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution . . .”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . .”) (citations omitted); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (“This Court has recognized that ‘in the circumstances of our times the dissemination of information . . . must be regarded as within that area of free discussion that is guaranteed by the Constitution.’”) (citations omitted); *see also* ARLENE BIELEFIELD & LAWRENCE CHEESEMAN, *LIBRARY PATRONS AND THE LAW* 33 (1995) (explaining that the right to receive information is so essential to the fullest exercise of the First Amendment that it “must be considered a necessary penumbral right”).

82. *See, e.g.*, Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 175 (2003) (arguing that the inability to access speech diminishes the guaranteed right of free speech).

them. It would be a barren marketplace of ideas that only had sellers and no buyers.”⁸³ Thus, in many ways, the individual’s right to receive information is simply the mirror opposite of his or her right to free expression.⁸⁴

1. *The Supreme Court recognizes the right to receive information in the television context*

While the Supreme Court has never directly applied the right to receive information to the television context, it has fully recognized the right in dicta. In *Red Lion Broadcasting Co. v. FCC* (“*Red Lion*”),⁸⁵ the Court considered the constitutionality of the FCC’s fairness doctrine, under which the Commission required radio and television broadcasters to notify individuals of personal attacks made against them, provide such individuals scripts or tapes of the attacks, and grant them reasonable opportunities to respond.⁸⁶ Broadcasters challenged this requirement, claiming that the rule abridged their freedom of speech and press.⁸⁷ Disagreeing, the Court wrote, “[a] license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.”⁸⁸ While it agreed

83. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Justice Oliver Wendell Holmes first articulated the marketplace of ideas theory in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that the best measure of truth is for an idea to gain acceptance in the “competition of the market”). Commentators and courts alike have since applied the theory repeatedly to justify the right to receive information. See Mart, *supra* note 82, at 177 (contending that the marketplace of ideas theory has had “a long life in the history of the right to receive information, and has been quoted over and over again”). Co-existent with marketplace of ideas theory are the theories of a well-informed public, individual autonomy, and uninhibited debate. See Kennedy, *supra* note 75, at 792 (describing how these three theories operate hand-in-hand with the marketplace of ideas philosophy); see also *Pico*, 457 U.S. at 868 (“[A]ccess to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”); Whitney M. Smith, Comment, *The Right of Access to Public Forums: Does Failure to Require the Least Restrictive Alternative Result In a Failure to Communicate?*, 36 SETON HALL L. REV. 627, 627 (2006) (“In order for voters to arrive at the correct public policy and ultimately choose the correct candidate, the free exchange of ideas is vital.”).

84. Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 800 (2006) (noting that the “same constitutional standards that protect ideas as they are voiced by a speaker continue to protect these ideas as they are disseminated to—and heard by—listeners”).

85. 395 U.S. 367 (1969).

86. See *id.* at 369, 373-74.

87. See *id.* at 386 (describing the broadcasters’ contention that the First Amendment prohibits the government from forcing a speaker to give equal weight to the views of his or her opponent).

88. *Id.* at 389 (citations omitted).

that the First Amendment plays a major role in public broadcasting, the Court held that “[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount.”⁸⁹ The Court further declared, “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”⁹⁰

2. *The Supreme Court interprets the right to receive information to imply a negative right*

It may seem logical to conclude that since the Supreme Court recognizes an individual’s right to receive information, the Court would similarly recognize a corresponding state obligation to provide information.⁹¹ In the television context, therefore, this obligation would seemingly require the government to supply an operating TV to each individual without the means to purchase one. The Court, however, has never read the right to receive information to require positive government action.⁹² Rather, the right to receive information, like most individual rights,⁹³ has always been used to imply a “negative” right, that is, the right to be free from state interference.⁹⁴ For example, in *Martin v. City of Struthers*,⁹⁵ the Court invalidated a city ordinance forbidding any person from knocking on doors and ringing doorbells to distribute religious materials.⁹⁶

89. *Id.* at 390.

90. *Id.*

91. See Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 420 (2006) (arguing that “[r]ights are necessarily correlated with obligations” and providing examples of how most individual rights require others to perform or refrain from performing certain actions).

92. See *id.* (“No one has suggested that the First Amendment obligates the government—or anyone else—to take positive steps to make information or ideas available.”). The assertion that the government must provide an operating TV to all desired viewers is also flawed intuitively. The right to receive information simply appears to be more a desirable privilege than an innate right. See *id.* at 420-21 (asserting that the right not to have expression suppressed is an innate right, but the right not to have the government interfere with receipt of information does not rise to the level of an innate right).

93. See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 867 (2001) (articulating that the Constitution “[does] not bestow rights upon individuals to take some action but only bestow[s] rights to be free from certain rules limiting that action”).

94. See Kennedy, *supra* note 75, at 810 (explaining that most people view the Constitution as “a charter of negative rather than positive liberties”). But see *id.* at 802-05 (asserting that the holdings in *Red Lion* and *CBS v. FCC*, 453 U.S. 367 (1981), imply an affirmative right to receive information).

95. 319 U.S. 141 (1943).

96. *Id.* at 149.

Similarly, in *Thomas v. Collins*,⁹⁷ the Court struck down a statute requiring labor union organizers to register with the Secretary of the State before soliciting members.⁹⁸ As these cases demonstrate, instead of requiring that the government take action, the Court has read the right to receive information to require the opposite—that the government refrain from acting.

It may appear on its face that the Court in *Red Lion* read the right to receive information to require an affirmative governmental act, namely, the act of notifying an individual of personal attacks made against him or her and granting the individual an opportunity to respond.⁹⁹ However, the *Red Lion* Court did not hold that the FCC's fairness doctrine was required by the Constitution, only that it was constitutionally permissible.¹⁰⁰ Likewise, in *CBS v. FCC*,¹⁰¹ the Court upheld the constitutionality of a provision in the Communications Act granting the FCC the ability to revoke a broadcaster's license or construction permit "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for use of a broadcasting station by a legally qualified candidate for Federal elective office"¹⁰² The Court did not, however, hold that the provision, and hence government action, was constitutionally required.¹⁰³

3. *The digital television transition, as it affects OTA-only households, implicates a negative right*

To argue that the digital television transition implicates the rights of OTA-only households¹⁰⁴ to receive information and ideas may at

97. 323 U.S. 516 (1945).

98. *Id.* at 540 (finding the registration requirement to be "quite incompatible" with the First Amendment).

99. See Kennedy, *supra* note 75, at 802 (identifying *Red Lion* as one of few cases that "used the right to receive to require an affirmative act").

100. Bennigson, *supra* note 91, at 418 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969)). The Fairness Doctrine was actually repealed in 1987. DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEAS 338 (1997) (explaining that enforcement problems was the reason for the repeal).

101. 453 U.S. 367 (1981).

102. *Id.* at 377 (quoting The Federal Election Campaign Act, 47 U.S.C. § 312(a)(7) (2000)).

103. *Id.* at 397 (describing the right of access to information as statutory instead of constitutional).

104. While the DTV transition will likely also leave many non-OTA-only households with inoperable analog TVs, those households will have other means—their digital TVs—to receive broadcast information. See GUERRERO, *supra* note 64, at 7 (noting that more than four-fifths of American households receive their primary television service from cable or satellite service); KIMMELMAN, *supra* note 46, at 2 (concluding that many cable and satellite subscribers use analog TVs in their kitchens, home offices, and kids' rooms). Therefore, unlike households that rely

first glance appear to rely on a positive right analysis, since the underlying assumption of the argument seems to be that the government has failed to act affirmatively in providing broadcast information.¹⁰⁵ But further inquiry would reveal that the DTV transition actually implicates a negative right. With the digital transition, the government has done more than simply fail to act affirmatively. The government in fact has *already* acted by making the publicly-owned radio spectrum available for TV transmissions.¹⁰⁶ Moreover, now, through subsequent regulatory *action*, the government is interfering with the individual's ability to receive these analog airwaves.¹⁰⁷ Thus, where the government created the initial availability of analog transmissions for broadcast information and individuals relied upon that availability, to argue that the First Amendment protects the individual's right not to have the government act again to disregard this settled expectation is to argue an implied negative right.¹⁰⁸

B. The Digital Television Transition Impermissibly Infringes on the Rights of OTA-Only Households to Receive Information and Ideas

In dealing with government property,¹⁰⁹ the question of whether a given rule or regulation that implicates a First Amendment right actually abridges that right depends on the nature of forum in which

exclusively on analog signals, the DTV transition will not significantly interfere with the ability of non-OTA-only households to receive information.

105. See Cross, *supra* note 93, at 864 (defining a positive right as "a right to command government action").

106. See Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 618 (2004) ("All television and radio broadcasters in this country operate under licenses granted to them by the federal government.").

107. See Letter from Gene Kimmelman, Mark Cooper, & Ed Mierzwinski, *supra* note 71 (opposing the House's draft of the DTV Act because the funding amount proposed would leave millions of Americans "in the dark").

108. As Professor Frank B. Cross explains, the line between positive and negative rights is a difficult one to draw. Cross, *supra* note 93, at 869 (defining "a negative right [as] one that can always be satisfied by inaction of some kind, even if it may also alternatively be satisfied by a government action"). A positive right, on the other hand, can *only* be satisfied by government action. *Id.*

109. See LILLIAN R. BEVIER, *IS FREE TV FOR FEDERAL CANDIDATES CONSTITUTIONAL?*, 4-21 (AEI Press 1998) (debating whether the public or the government truly "owns" the broadcast airwaves, the interests involved, and the legal implications of such a determination). For public forum purposes, since the government *controls* the property, the question regarding true ownership seems immaterial. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969) (declaring that "Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations" (citing *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933))). Therefore, the broadcast airwaves are considered government property for the purposes of this Comment.

the speech takes place.¹¹⁰ Certain types of fora provide more expansive protections of First Amendment rights.¹¹¹ Others require a much lower level of scrutiny.¹¹² Because television broadcasting is a limited designated public forum,¹¹³ and because the digital television transition regulates activities the government specifically intended to permit,¹¹⁴ the transition must pass a strict three-part test to avoid violating the Constitution, which it fails to do.¹¹⁵

1. *Introducing the public forum doctrine*

In assessing restrictions in government-controlled settings, courts apply the public forum doctrine.¹¹⁶ The Supreme Court first articulated the doctrine in 1939 in *Hague v. Committee for Industrial Organization*,¹¹⁷ where it held that an ordinance requiring a person to obtain a permit to both hold a public meeting and distribute newspapers, pamphlets, and other printed matter in public places was unconstitutional.¹¹⁸ The Court stated, “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹¹⁹ In other words, the use of the public

110. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985) (explaining that the Government’s ability to restrict an individual’s access to a forum depends on whether the forum is public or nonpublic in nature). Compare *United States v. Grace*, 461 U.S. 171, 177 (1983) (recognizing that “the government’s ability to restrict communicative activity in a public forum is very limited”), with *Cornelius*, 473 U.S. at 806 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983)) (emphasis added).

111. See *Perry*, 460 U.S. at 45 (articulating that in traditional public fora, “the rights of the state to limit expressive activity are sharply circumscribed”).

112. See *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) (stating that “[l]imitations on expressive activity conducted on [nonpublic fora] must survive only a much more limited review” than traditional or designated public fora).

113. See *infra* Part II.B.3 (arguing that television broadcasting is a limited designated public forum because it cannot accommodate all of the speakers who wish to use it).

114. See *infra* notes 201-203 and accompanying text (contending that the digital television transition restricts certain members of the public from receiving broadcast information, which was the very purpose for which the television broadcasting forum was created).

115. See *infra* Part II.B.5 (proving that the digital television transition fails the “time, place, or manner” test because it is not narrowly tailored to achieve its goal and does not leave open ample alternative channels for expression).

116. Gannon, *supra* note 76, at 419 n.16 (explaining that the public forum analysis allows courts to resolve the degree of restriction that the government may apply).

117. 307 U.S. 496, 518 (1939).

118. *Id.* at 516.

119. *Id.* at 515.

streets and public parks to express ideas on public questions has historically been “a part of the privileges, immunities, rights, and liberties of citizens,” bestowing a right that the government cannot abridge or deny.¹²⁰

For more than forty years after *Hague*, the Court continued to develop its conception of the public forum doctrine, finally reaching some semblance of clarity in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.¹²¹ In *Perry*, a teachers’ union argued that a collective bargaining agreement which granted a rival teachers’ union exclusive access to a school’s interschool mail system violated its First Amendment rights.¹²² The Court, however, disagreed.¹²³ Because the interschool mail system was not a public forum, the Court held that “the School District had no ‘constitutional obligation per se to let any organization use the school mail boxes.’”¹²⁴ In its discussion, the Court created three categories of fora and articulated a specific test for each.¹²⁵

The first category of public fora is the traditional public forum,¹²⁶ or “places which by long tradition or by government fiat have been devoted to assembly and debate,”¹²⁷ such as public streets and public parks.¹²⁸ In such “quintessential public [fora],” the highest level of scrutiny applies.¹²⁹ In a traditional public forum, the state cannot forbid all “communicative activity”¹³⁰ nor impose a content-based exclusion without proving that it serves a “compelling state interest and that it is narrowly drawn to achieve that end.”¹³¹ Content-neutral time, place, or manner restrictions must be “narrowly tailored to

120. *Id.*

121. *See* 460 U.S. 37, 45-47 (1983) (identifying the three principle categories of fora (traditional, designated, and nonpublic) and establishing a First Amendment test for each).

122. *Id.* at 40-41.

123. *Id.* at 45-47.

124. *Id.* at 48 (citation omitted).

125. *Id.* at 45-46; Varona, *supra* note 8, at 174.

126. *Perry*, 460 U.S. at 45.

127. *Id.*

128. *Id.*; *see* *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (finding that a public street is a traditional public forum even if it runs through a residential neighborhood). *But see* *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (concluding that a sidewalk on a public street that provided access from a parking lot to the post office was not a traditional public forum).

129. Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutional of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1708 (1997) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

130. *Perry*, 460 U.S. at 45; Logan, *supra* note 129, at 1708.

131. *Perry*, 460 U.S. at 45; *see* Logan, *supra* note 129, at 1708 (reiterating that all content-based restrictions must meet the higher level of scrutiny of being “narrowly drawn to serve a compelling government interest”).

serve a significant state interest and leave open ample alternative channels of communication” to be constitutional.¹³²

Designated public fora, or pieces of “public property which the state has opened for use by the public as a place for expressive activity,”¹³³ are the second classification.¹³⁴ Key in distinguishing this category is the element of government intent—in order for an area to qualify as a designated public forum, the government must have intended to open it for public discourse.¹³⁵ The Court divides designated public fora into two subcategories: limited and unlimited.¹³⁶ While unlimited designated public fora are open to everyone,¹³⁷ limited ones are “created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”¹³⁸

Once intentionally opened to “public discourse,” the level of scrutiny for an unlimited designated public forum mirrors that of the traditional public forum, which is the highest level.¹³⁹ The level of scrutiny for a limited designated public forum, however, is not as demanding.¹⁴⁰ In limited designated public fora, the amount of constitutional protection afforded to a First Amendment activity will depend on whether the activity involved was within the government’s contemplation when it created the forum.¹⁴¹ If the activity being restricted was not within the government’s contemplation, then the

132. Logan, *supra* note 129, at 1708 (quoting *Perry*, 460 U.S. at 45).

133. *Id.*

134. *Id.*

135. *Id.* (specifying that neither “inaction” nor “permitting limited discourse” create a designated public forum (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985))).

136. Varona, *supra* note 8, at 174 (offering a municipal auditorium as an example of a space that the Court has found to be an unlimited designated public forum; in contrast, a public university’s meeting facilities, which are only open to certain people for certain activities, hold the designation of a limited designated public forum).

137. *Id.* (stating that “virtually all interested speakers” may engage in expressive activity in an unlimited designated public forum).

138. *Perry*, 460 U.S. at 46 n.7 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)); *City of Madison Joint Sch. Dist. v. Wis. Pub. Employment Relations Comm’n*, 429 U.S. 167 (1976)).

139. Logan, *supra* note 129, at 1708 (noting that the state is under no obligation to open an unlimited designated public forum to public exchange; however, choosing to do so will trigger the “same scrutiny that applies to a traditional public forum”). See Varona, *supra* note 8, at 175 (clarifying that in the case of unlimited designated public fora, “[a]s with traditional public fora, the government may impose reasonable time, place, and manner restrictions, and content-based prohibitions that are ‘narrowly drawn to effectuate a compelling state interest’” (citing *Perry*, 460 U.S. at 46)).

140. Logan, *supra* note 129, at 1708.

141. *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996).

regulation needs only to pass a reasonableness test.¹⁴² On the other hand, if the activity being restricted was within the government's contemplation, then the regulation must pass the same strict test required of speech restrictions in both unlimited designated public fora and traditional public fora.¹⁴³

The third category of public fora is the nonpublic forum.¹⁴⁴ Nonpublic fora are places that are "not by tradition or designation a forum for public communication"¹⁴⁵ Of the three categories of public fora, this category offers the least constitutional protection for First Amendment activities.¹⁴⁶ Speech restrictions in nonpublic fora need only be viewpoint-neutral and reasonable.¹⁴⁷ Examples of nonpublic fora include jailhouse facilities,¹⁴⁸ televised political candidate debates,¹⁴⁹ and public airport terminals.¹⁵⁰

142. *See id.* ("Where the speaker does not come within [the purpose for which the forum was created] . . . the State is subject to only minimal constitutional scrutiny."); Gannon, *supra* note 76, at 415 (charging that the reasonableness test is used if the speech being regulated is "not the type of expression for which the [limited public] forum was created").

143. *Fighting Finest*, 95 F.3d at 229-31. Note that a state need not keep a designated public forum open indefinitely. *Perry*, 460 U.S. at 46. It reserves the right to remove the "public" character of the forum whenever it wants. However, as long as it continues to keep the forum open, it is bound by the rules described. *Id.*

144. *See Perry*, 460 U.S. at 46-47 (indicating that the internal school mailing system in question was not open for general use by the public but rather only with the permission of the school principal, thus removing the system from the realm of public fora).

145. *Kreimer v. Bureau of Police for Town of Morrison*, 958 F.2d 1242, 1256 (3d Cir. 1992) (citing *Perry*, 460 U.S. at 46).

146. *See id.* (reasoning that the state may reserve a nonpublic forum for its intended purposes so long as the regulation is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view") (citation omitted). *But see* Logan, *supra* note 129, at 1709, 1714 (arguing that for First Amendment purposes, the Court treats nonpublic fora in much the same way as it treats limited public fora).

147. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 789 (1985) (expounding that to determine whether a restriction was reasonable, "the reasonableness must be assessed in the light of the purpose of the forum and all surrounding circumstances").

148. *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (characterizing the State's relationship to a jailhouse facility as "no less than [that of] a private owner of property" and rejecting the claim that the arrest of students protesting on jailhouse grounds was a violation of their First Amendment rights).

149. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1983) (characterizing the debate as a nonpublic forum, "from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of its journalistic discretion").

150. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (holding that a public airport terminal is a nonpublic forum because the relative lateness with which the terminal has appeared precludes it from being a traditional public forum and "the frequent and continuing litigation evidencing the operators' objections belies any such claim" that the terminal has been intentionally opened for public discourse and thus is a designated public forum). For further examples of nonpublic fora, see Varona, *supra* note 8, at 176.

2. *The public forum doctrine applies to television broadcasting*

While courts generally apply the public forum doctrine to tangible pieces of property, they have yet to restrict the public forum analysis in such a manner.¹⁵¹ For example, in *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁵² the Supreme Court applied the public forum doctrine to a University of Virginia student activities fund.¹⁵³ Recognizing that the fund was a “forum more in a metaphysical than in a spatial or geographical sense,” the Court nevertheless held that the same principles of forum analysis applied because the fund was a conduit through which people communicated ideas.¹⁵⁴ Similarly, although the television analog spectrum is not a tangible piece of property, broadcasters nevertheless use the spectrum as a platform to disseminate ideas.¹⁵⁵

Furthermore, while some commentators¹⁵⁶ argue that the Court in *Arkansas Educational Television Commission v. Forbes*¹⁵⁷ already explicitly precluded the public forum analysis from entering the context of TV broadcasting,¹⁵⁸ this is simply not true.¹⁵⁹ As Professor Anthony E. Varona of the American University Washington College of Law writes, “[w]hile the *Forbes* case seriously hinders the ability of political candidates to rely upon the public forum doctrine in demanding access to broadcast debates, it has little if any bearing on the theory that the broadcast spectrum itself is a limited public forum with broadcast licensees as the relevant speakers.”¹⁶⁰ Varona points out that the *Forbes* Court itself applied the forum analysis,¹⁶¹ finding it a “nonpublic forum, from which AETC could exclude Forbes in the

151. Logan, *supra* note 129, at 1710.

152. 515 U.S. 819 (1995).

153. *Id.* at 830.

154. *Id.*; Logan, *supra* note 129, at 1710.

155. See Logan, *supra* note 129, at 1711 (“The broadcast spectrum is . . . the forum in which broadcast speech takes place.”).

156. E.g., Douglas C. Melcher, Note, *Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedom of Broadcasters*, 67 GEO. WASH. L. REV. 100, 119 (1998) (“The Court’s decision in *Forbes* should be read as a rejection of the notion that the broadcast spectrum generally constitutes a public forum because the application of the public forum doctrine is even less tenable in the context of private broadcasting than in public broadcasting. Accordingly, the public forum analysis no longer provides a viable alternative approach for determining the constitutionality of free access.”).

157. 523 U.S. 666 (1998).

158. See *id.* at 672-73 (asserting that the public forum doctrine should not be mechanically extended to the “very different context of public television broadcasting”).

159. See Varona, *supra* note 8, at 181-82.

160. *Id.*

161. *Id.* at 182.

reasonable, viewpoint-neutral exercises of its journalistic discretion.”¹⁶²

3. *Television broadcasting is a limited designated public forum*

Despite its unique ability to widely disseminate information and ideas,¹⁶³ television broadcasting is not a traditional public forum.¹⁶⁴ Although it is a very important “place” for the exercise of free speech, unlike public streets and public parks, television has not “immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁶⁵ The relative newness with which TV has arrived in American culture, puts into question any qualification requiring history and tradition.¹⁶⁶ Furthermore, because of its restricted capacity, the broadcast spectrum is unable to accommodate all desired speakers.¹⁶⁷

Instead, TV broadcasting is a designated public forum.¹⁶⁸ The state does not create a designated public forum by inaction or by merely allowing limited discourse.¹⁶⁹ Rather, the government creates a designated forum only by intentionally opening a nontraditional forum for expressive activity.¹⁷⁰ With TV broadcasting, the government’s intent was clear—to provide a new platform for the communication of ideas, hoping that such access to information

162. *Id.* (quoting *Forbes*, 523 U.S. at 676).

163. See Phillips, *supra* note 106, at 616-17 (using the film *It’s a Wonderful Life*, which did poorly at the box office but has since become “one of our most treasured holiday classics,” as an example of “the unique power of broadcasting”).

164. Logan, *supra* note 129, at 1711; Varona, *supra* note 8, at 179.

165. See Varona, *supra* note 8, at 179 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

166. *Cf. Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (holding that an airport terminal is not a traditional public forum, or one that “immemorially” has been used for public expression, because of the “lateness with which [it] has made its appearance” and the “rather short history of air transport”).

167. See Varona, *supra* note 8, at 179 (comparing the broadcast spectrum to other types of places classified by the Supreme Court as “unlimited designated public fora”); see also Logan, *supra* note 129, at 1711 (“[A]ccess to the spectrum is limited to those broadcasters who have received a license to use airwaves, and they may program their channels as they see fit as long as they abide by their public interest obligations.”).

168. See Graham, *supra* note 4, at 141 (opining that the decision to adopt a licensing regime precludes the medium from characterization as an unlimited designated public forum); Logan, *supra* note 129, at 1711 (noting that while television can be understood as a designated public forum, it is not an unlimited designated public forum).

169. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

170. *Id.* at 802 (suggesting that the Court has previously examined the “nature of the property and its compatibility with expressive activity to discern the government’s intent”).

would develop a more knowledgeable and democratically-engaged population.¹⁷¹

TV broadcasting is not an unlimited designated public forum, however, for much the same reason that it is not a traditional public forum.¹⁷² Whereas school board meetings,¹⁷³ public university facilities,¹⁷⁴ and other types of places the Court has classified as unlimited designated public fora share the common characteristic of being open to all speakers, TV broadcasting is not open to everyone who wishes to access it.¹⁷⁵

Rather, TV broadcasting is a limited designated public forum.¹⁷⁶ A limited designated public forum is created when the government opens a nonpublic forum to the public but limits its use in some way.¹⁷⁷ Here, the FCC reserved the broadcast spectrum for select speakers by imposing license requirements.¹⁷⁸ Additionally, the FCC limited speech to certain subjects by enacting regulations that favor, for example, political campaign speech and children's educational programming.¹⁷⁹ It is important to note, however, that the *receipt* of broadcast information was open to everyone.¹⁸⁰ The government did not have to affirmatively grant permission to every viewer who wished

171. See Varona, *supra* note 8, at 150 (explaining that the broadcasting medium was initially regarded as "a vast and fertile public forum with great potential as a democratic resource").

172. *Id.* at 179.

173. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976).

174. *Widmar v. Vincent*, 454 U.S. 263 (1981).

175. See Varona, *supra* note 8, at 179 (noting that "broadcast frequencies cannot accommodate all, or even most, interested speakers"); see also Graham, *supra* note 4, at 141; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

176. See Varona, *supra* note 8, at 180 (categorizing the broadcast medium as a limited designated public forum, if the medium even "qualifies as a public forum at all"); see also Graham, *supra* note 4, at 141 (explaining that television cannot be characterized as a designated public forum because the government only provides access for a select group of speakers through the licensing regime); Logan, *supra* note 129, at 1712 (asserting that "an analysis of the Court's non-public forum cases . . . indicates that the broadcast spectrum is best characterized as a limited designated public forum").

177. See *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (noting that limitations may apply to the kinds of speakers or the topics of discussion).

178. Varona, *supra* note 8, at 180 (explaining how the licensing scheme restricts the broadcast spectrum to broadcasters).

179. Logan, *supra* note 129, at 1713.

180. See Phillips, *supra* note 106, at 617 (analogizing broadcasting signals to farmer's seeds, as they are "designed to be scattered across a wide and fertile land").

to watch television.¹⁸¹ So long as the viewer possessed the requisite technology, the FCC permitted him or her to receive OTA signals.¹⁸² This is important because it demonstrates that the government intended to create a forum that was limited to select speakers but not limited to select listeners.¹⁸³

4. *Content-neutral restrictions that regulate permitted activities in limited public fora must satisfy the “time, place, or manner” test*

The level of constitutional protection afforded to a First Amendment activity in a limited public forum depends on the type of activity involved.¹⁸⁴ If the activity is of the type the government specifically intended to permit, then the level of protection is quite high.¹⁸⁵ Conversely, if the activity is not of the type the government intended to permit, then the level of protection is significantly lower.¹⁸⁶ In *Kreimer v. Bureau of Police for Town of Morrison*,¹⁸⁷ the U.S. Court of Appeals for the Third Circuit analyzed whether a public library had the authority to create and enforce a patron policy that

181. *Cf. Kreimer v. Bureau of Police for Town of Morrison*, 958 F.2d 1242, 1260 (3d Cir. 1992) (positing that the “facts do not suggest that the government must affirmatively grant permission to each resident who wishes to enter [the library] on each occasion”).

182. Of course, in order for the television to receive these signals clearly, it must be within a certain distance of the broadcast tower. *See* WAVE 3 TV Louisville, KY: Why Digital TV is Better, <http://www.wave3.com/global/story.asp?s=841653> (last visited Aug. 19, 2007) (noting that analog signals weaken over distance, causing “snow” to appear on the screen).

183. Given this, it is arguable that TV broadcasting is actually a limited public forum as it relates to speakers but an unlimited public forum as it relates to listeners. Unfortunately, there is little case law or scholarship on whether the public forum analysis can be bifurcated in this manner. For the purposes of this Comment, however, the distinction has little relevance since the DTV transition restricts First Amendment activities that the government specifically intended to permit, meaning the same strict test is applied whether TV broadcasting is designated as a limited or an unlimited public forum.

184. *See* Eva DuBuisson, Comment, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C. L. REV. 301, 333 (2006) (implying that regulations in limited public fora that “confine the forum to the purposes for which it was created” are treated differently than regulations that place limits on the purposes themselves).

185. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (“Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”); *see also* Gannon, *supra* note 76, at 415 (explaining that the same strict test from the traditional and designated fora will be applied to regulations in limited public fora that restrict permitted activities).

186. *See* *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (emphasizing that under *Perry* any restriction on the “reserved non-public uses” in a limited public forum need only pass the reasonableness standard); Gannon, *supra* note 76, at 415 (articulating that in limited public fora, if the speech being regulated is of the type the government specifically intended to permit, then it is subject to the reasonableness test (citing *Kreimer*, 958 F.2d at 1260)).

187. 958 F.2d at 1242.

regulated the use of its facilities.¹⁸⁸ In 1989, the library expelled Richard R. Kreimer, a homeless person, on at least two separate occasions for violating various rules of the policy.¹⁸⁹ Basing his First Amendment claim on the constitutional right to receive information, Kreimer, a frequent patron of the library,¹⁹⁰ stressed in his brief the “vital role played by public libraries” in encouraging the fullest exercise of that right.¹⁹¹

The court reviewed the seminal cases dealing with the right to receive information and agreed with Kreimer that the rules limiting access to the public library implicated his constitutional right to receive.¹⁹² To evaluate whether the restriction was constitutional, the court applied the public forum analysis.¹⁹³ It deemed the public library a limited designated public forum¹⁹⁴ and noted that content-neutral restrictions that do not limit the activities that the government specifically intended to permit in a designated public forum need only be “reasonable” to be constitutional.¹⁹⁵ The court also stated, however, that “[i]n contrast, [content-neutral¹⁹⁶] time, place or manner regulations that limit permitted First Amendment activities within a designated public forum are constitutional only if they are ‘narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for

188. *Id.* at 1246.

189. *Id.* at 1247. Kreimer was actually the principal reason why the library rules were created in the first place. *See id.* (describing how the library enacted the written policy after a seven-month period in which Kreimer exhibited such inappropriate behavior as staring at other patrons and library staff, talking loudly to himself and others, exuding an offensive odor, and acting belligerently and with hostility towards the library director).

190. *Id.* at 1246.

191. *See* BIELEFIELD & CHEESEMAN, *supra* note 81, at 43.

192. *Id.* at 43; *see Kreimer*, 958 F.2d at 1255 (“Our review of the Supreme Court’s decisions [in *Martin v. City of Struthers*, *Lamont v. Postmaster General*, *Griswold v. Connecticut*, *Stanley v. Georgia*, *Red Lion*, and *Board of Education v. Pico*] confirms that the First Amendment . . . encompasses the positive right of public access to information and ideas.”); *see generally supra* note 81 and accompanying text (analyzing the Supreme Court’s case law on the relationship between the right to receive information and the First Amendment right to free speech).

193. *Kreimer*, 958 F.2d at 1256.

194. *Id.* at 1259.

195. *Id.* at 1256 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

196. The court in *Kreimer* did not specifically include content-neutrality as part of its analysis because both Kreimer and the government conceded that the library regulations did not restrict First Amendment activities on the basis of content or viewpoint. *Id.* at 1262. Nevertheless, the court implied that content-neutrality would have been a part of its analysis if the parties did not stipulate as such. *Id.* (“Significantly, the parties do not contend that any of the challenged regulations purport to restrict First Amendment activities on the basis of content or viewpoint.”).

communication of information.”¹⁹⁷ Applying the “time, place, or manner” test to one of the library policies¹⁹⁸ and the reasonableness test to others,¹⁹⁹ the court found that the library’s policy as a whole passed constitutional muster.²⁰⁰

5. *The digital television transition fails the “time, place, or manner” test*

The digital television transition regulates permitted First Amendment activities.²⁰¹ The television broadcasting forum was created so that the public could receive broadcast information.²⁰² The DTV transition, however, restricts certain members of the public from accessing this information by regulating the manner in which broadcast speech is to be received.²⁰³ Thus, the stricter “time, place, or manner” test should apply.²⁰⁴ As articulated by the courts, the “time, place, or manner” test involves three basic questions: (1) whether the restriction is content-neutral; (2) whether the restriction is narrowly tailored to serve a significant government interest; and (3) whether the restriction leaves open ample alternative channels for communication.²⁰⁵

197. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted)).

198. *Id.* at 1264 (applying limited designated forum analysis to a rule that “would require the expulsion of a patron who might otherwise be peacefully engaged in permissible First Amendment activities within the purposes for which the Library was opened, such as reading, writing or quiet contemplation”).

199. *Id.* at 1262-63 (stating that rules prohibiting patrons from harassing other patrons are simply meant to prohibit disruptive behavior and to permit maximum use of the library facilities; thus, they need only to pass the reasonableness test).

200. *Id.* at 1246.

201. *Cf. id.* at 1264 (charging that a rule requiring the expulsion of patron “whose bodily hygiene is offensive so as to constitute a nuisance to other persons” restricts permissible library activities, such as reading and writing, and thus must be reviewed under the “time, place, or manner” test).

202. *See Varona, supra* note 8, at 149 (explaining that the FCC agreed to give television broadcasters free analog TV licenses if they agreed to air programming that served the public interest).

203. The digital television transition is a “manner” restriction. Beginning on February 18, 2009, television stations will be allowed to broadcast programming only via digital signals, and likewise consumers will be able receive information only via these digital transmissions. Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3002(b), 120 Stat. 4, 21 (2006). The transition thus restricts the manner in which speech is being communicated in the TV public forum.

204. *See Kreimer*, 958 F.2d at 1262 (noting that time, place, or manner restrictions that limit permitted First Amendment activities within a designated public forum are unconstitutional, unless they pass a stringent test).

205. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *see Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 175 (2002) (applying intermediate scrutiny to the “manner” restriction of an ordinance requiring a permit for door-to-door advocacy to find a First Amendment violation); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (finding that the Park Service’s camping prohibition in national parks was not an unreasonable time, place, or manner restriction).

a. The digital television transition is content-neutral

The digital television transition satisfies the first prong of the “time, place, or manner” test. The requirement of content-neutrality hinges on “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁰⁶ The DTV transition does not restrict First Amendment activities on the basis of content. Rather, the transition restricts First Amendment activities on the basis of technology. It is *how* viewers receive the message, not the message itself, that the transition restricts.

b. The digital television transition serves a significant government interest but is not narrowly tailored to achieve this interest

The digital television transition fails the second prong of the “time, place, or manner” test. The second prong of the test actually has two requirements. A restriction on permitted speech in a limited public forum must: (1) serve an important government interest and (2) be narrowly tailored to achieve this end.²⁰⁷

A central goal of the DTV transition is to free up significant spectrum space so that a portion of the space can be reassigned to police, paramedics, and other public safety responders.²⁰⁸ Public safety is clearly an important government interest,²⁰⁹ and after the

206. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark*, 468 U.S. at 295).

207. *Id.* at 798 (“Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests . . .”).

208. See GOLDSTEIN, *supra* note 41, at 4 (describing the spectrum reassignment as “a critical goal of the United States”). But see Graham, *supra* note 4, at 112 (postulating that “auction fever” was the driving force behind the 1996 Telecommunications Act).

209. The digital television transition serves other government interests as well. For example, auctioning off the excess analog spectrum will generate billions of dollars in revenue. See Drew Clark, *Estimates Vary on Value of Spectrum*, NAT’L JOURNAL’S TECH. DAILY, Aug. 1, 2005, <http://www.freepress.net/news/9524> (reporting that the Brattle Group for Qualcomm and the High Tech DTV Transition Coalition conducted a study that “pegged the value of spectrum at as much as \$28 billion”). At least \$7.363 billion of this revenue will be used toward closing the budget gap. LINDA K. MOORE, CONG. RESEARCH SERV., SPECTRUM USE AND THE TRANSITION TO DIGITAL TV 1 (2006), available at http://www.opencrs.com/rpts/RS22218_20060110.pdf. Moreover, converting to digital will clear up valuable spectrum space that can be used for “innovative telecommunications technologies such as wireless broadband.” KRUGER, *supra* note 4, at 13. Neither of these government interests, however, is “significant” in the sense that is required by the test. Admittedly, the Court does not specify what it means when it uses the term “significant.” However, if raising money or encouraging the adoption of advanced technologies qualifies as a significant government interest, then the requirement of substantiality would scarcely be a requirement at all.

terrorist attacks of September 11th²¹⁰ and the tragedy of Hurricane Katrina,²¹¹ it is plainly evident that this country needs to improve its public safety communications.²¹² On September 11th, police and firefighters reported not being able to communicate with one another or with helicopters during the rescue mission.²¹³ Consequently, the 9/11 Commission recommended that Congress grant additional radio spectrum to first responders to prevent similar problems from occurring in the future.²¹⁴ Congress, however, failed to act on these recommendations.²¹⁵ As a result, many of the same communication issues that plagued the September 11th attacks resurfaced four years later in New Orleans, with helicopters being unable to communicate with ground rescuers in the aftermath of

210. See Jon M. Peha, *Protecting Public Safety With Better Communications Systems*, IEEE COMMUNICATIONS, Mar. 2005, at 1, available at http://www.ece.cmu.edu/~peha/protecting_public_safety.pdf (“[F]irefighters were using incompatible communications equipment that could not receive the order [to evacuate the World Trade Center North Tower on 9/11]. People watching television at home knew that the unimaginable had already occurred—that the World Trade Center’s South Tower had collapsed—but many firefighters inside the North Tower would never learn of this.”). See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <http://www.9-11commission.gov/report/index.htm> [hereinafter THE 9/11 COMMISSION REPORT] (recounting the circumstances surrounding the September 11th attacks and providing recommendations for better preparedness in the future).

211. See Broache, *supra* note 5 (“Reports of bungled communications during Hurricane Katrina upped the urgency [to set a hard deadline for transferring part of the broadcast spectrum to emergency services.]”); Alice Lipowicz, *Katrina Forces Rethinking*, WASH. TECHNOLOGY, Aug. 21, 2006, http://www.washingtontechnology.com/news/21_16/cover-stories/29150-1.html (describing how the destruction of Hurricane Katrina forced the nation to “redefine, once again, its perceptions of what is needed for effective emergency preparedness and response”). See generally A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006), available at <http://katrina.house.gov> (investigating the preparation for and response to Hurricane Katrina at the local, state, and federal level).

212. See Peha, *supra* note 22, at 1 (“It was painfully clear after the 9/11 terrorist attacks and many other incidents that improving America’s public safety communications would save lives.”) (citations omitted).

213. Grant Gross, *Senator Calls for Quicker Digital TV Transition*, INFO WORLD NEWS, Oct. 18, 2005, http://www.infoworld.com/article/05/10/18/HNsenator_tv_1.html?RADIO%20FREQUENCY%20IDENTIFICATION%20-%20RFID.

214. *Id.*; THE 9/11 COMMISSION REPORT, *supra* note 210, at 397; see also LINDA K. MOORE, CONG. RESEARCH SERV., PUBLIC SAFETY, INTEROPERABILITY AND THE TRANSITION TO DIGITAL TELEVISION (2005), available at <http://www.bna.com/webwatch/CRSdigitaltv.pdf> (stating that when the 9/11 Commission Report recommended to Congress to “support pending legislation which provides for the expedited and increased assignment of radio spectrum for public safety purposes,” it was referring to the Homeland Emergency Response Operations (“HERO”) Act and its imposition on the FCC to complete its DTV transition on time).

215. See Gross, *supra* note 213 (quoting Sen. John McCain) (“Can we really afford to wait until 2009 before we go ahead and transfer this spectrum? I thought it should’ve happened many years ago.”).

Hurricane Katrina.²¹⁶ Senator John McCain and other backers of the digital television transition insist that the allocation of additional spectrum will vastly improve the performance of emergency response groups.²¹⁷

The DTV transition, however, is not narrowly tailored to improve the country's public safety communications. Narrow tailoring in the "time, place, or manner" context is not synonymous with the least restrictive means test often used in strict scrutiny analysis.²¹⁸ Rather, a "time, place, or manner" regulation simply needs to promote an important government interest that would be "achieved less effectively absent the regulation."²¹⁹ Although seemingly a very deferential standard, the Supreme Court in *Ward v. Rock Against Racism*²²⁰ noted this "does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."²²¹

The DTV transition substantially burdens more speech than is necessary to further the government's public safety goals. For one, improving public safety does not require that the government retake the entire radio spectrum licensed to analog TV channels. This is evidenced by the fact that Congress will allocate only a portion of the reclaimed airwaves to public safety purposes;²²² most of the spectrum will be auctioned off to private companies.²²³ What results from this wholesale reclamation of the analog spectrum is the

216. *Id.*

217. *See id.* But see Peha, *supra* note 22, at 1 (emphasizing that any new allocation of spectrum to public safety will be wasted like much of today's public safety spectrum unless Congress acts even further). At a New America Foundation forum on the DTV transition in Washington, D.C. last year, Senator McCain poignantly said, "I'm embarrassed to stand before you today and know that some of the human tragedy that took place as a result of Hurricane Katrina could have been avoided if Congress had acted in a more timely fashion." Gross, *supra* note 213.

218. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984)).

219. *Id.* at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

220. 491 U.S. 781 (1989).

221. *Id.* at 799.

222. See Jon M. Peha, *From TV to Public Safety: The Need for Fundamental Reform in Public Safety Spectrum and Communications Policy* 13 (New Am. Found., Working Paper No. 15, 2006), available at http://www.newamerica.net/files/WorkingPaper15_TVtoPublicSafety_Peha_FINAL.pdf (noting that because of the transition to DTV, 84 MHz of new radio spectrum space will become available for use, 24 MHz of which will be transferred to public safety).

223. See Puzanghera, *supra* note 17 (stating that major telecommunications firms like AT&T, Inc. are expected to pay upwards of ten billion dollars for the excess radio spectrum so that they can use it for broadband wireless services).

disenfranchisement of millions of analog TV viewers.²²⁴ If Congress were instead to take back only the necessary amount required to upgrade the country's public safety communications, it would achieve its public safety objectives without substantially burdening the rights of millions of analog TV owners.²²⁵

Moreover, cutting off TV access for millions of Americans with analog systems will actually work *against* the government's public safety interests. The national Emergency Alert System ("EAS"), for one, relies on the ubiquity of TV for its effectiveness.²²⁶ Although digital television, digital cable, and various other new technologies are now required to participate in EAS, for those households that cannot receive digital signals (and in February 2009 suddenly will not receive analog signals), this requirement is immaterial.²²⁷ Additionally, even in a less macro-level emergency-type situation, TV access is important for public safety on a daily basis, since it provides weather forecasts, local crime reports, missing children alerts, and other important safety information.

*c. The digital television transition does not "leave open ample alternative channels for communication of the information"*²²⁸

Alternative channels of broadcast information exist for OTA-only households.²²⁹ OTA-only households, for example, have the option to buy converter boxes on their own, subscribe to cable or satellite service, or purchase brand new digitally-compatible TVs.²³⁰ However,

224. See *supra* Part II.B (explaining that the distribution process adopted by the NTIA will leave over six million OTA-only households without at least one set-top converter box).

225. Perhaps the government could create some sort of incentive program for broadcasting companies to voluntarily hand over enough spectrum space. Or, alternatively, perhaps the government could require that all TV broadcasters give back some, but not all, of the spectrum allocated to them.

226. See Emergency Alert System, 47 C.F.R. § 11.1 (2005) (discussing that the purpose of the EAS is to provide "the President with the capability to provide immediate communications and information to the general public at the National, State and Local Area levels during periods of national emergency"); FEDERAL COMMUNICATIONS COMMISSION, EMERGENCY ALERT SYSTEM: "LIFE SAVING MESSAGES" TO THE NATION 2, http://emd.wa.gov/telcom/documents/fcc_eas.ppt#257 (last visited Aug. 19, 2007) (explaining that the EAS must be available to the President within ten minutes from any location). Note that voluntary EAS systems at the state and local level also exist. *Id.*

227. For a discussion on enlisting the help of public television in developing the new digital emergency alert system, see Lipowicz, *supra* note 211.

228. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)).

229. See GUERRERO, *supra* note 64, at 13 (asserting that households can choose to maintain their television service by purchasing additional equipment).

230. See Harbert, *supra* note 69 ("Over the next 1,000 days or so, consumers will have to decide whether to buy a new digital TV, hook up their analog sets to a

to say that the government has left these channels “open” is not entirely accurate, since for many OTA-only households, none of these options are financially feasible²³¹—especially where many OTA-only households made the initial investment in their analog TVs expecting them to last their entire electronic lifetimes²³² and are only now finding out about the digital transition.

Television, moreover, is not the only medium through which OTA-only households can receive broadcast information.²³³ Newspapers and magazines, for example, discuss the news and weather. Yet it is undeniable that most households rely heavily on TV for this type of information.²³⁴ Furthermore, TV offers significant advantages that the print medium, whose readership is currently in decline,²³⁵ cannot. For example, to receive information from newspapers and magazines,

premium service such as cable or satellite or buy a converter box . . .”) (internal citation omitted).

231. See GUERRERO, *supra* note 64, at 12 (indicating that although the price of DTV technologies is expected to drop dramatically, “the cost still may be a burden to many households, particularly low-income households”).

232. KIMMELMAN, *supra* note 46, at 1; see COOPER, *supra* note 5, at 1 (reporting that televisions normally have a useful life of fifteen years or more); Jeremy Pelofsky, *US Broadcasters Object to Planned Digital TV Bill*, REUTERS, Sept. 21, 2004, http://www.usatoday.com/tech/news/techpolicy/2004-09-21-digital-tv-bill_x.htm (“Consumer Electronics Association estimates that Americans replace their sets only every eight to 10 years.”).

233. See Pew Research Ctr. Politics, *supra* note 11 (reporting that to learn about the 2004 presidential campaign Americans watched TV, read newspapers, read TV news magazines, listened to talk radio, and surfed the Internet).

234. See *Preparing Consumers Hearing*, *supra* note 4, at 10 (statement of Lavada E. DeSalles, Member, Bd. of Dirs., Am. Ass’n of Retired Perss.) (explaining that since 1935, when the television was first publicly demonstrated, “consumers have had a growing reliance on television technology”); *Average Home Has More TVs than People*, USA TODAY, Sept. 21, 2006, available at http://www.usatoday.com/life/television/news/2006-09-21-homes-tv_x.htm (reporting that the average American home has more TV sets (2.73) than people (2.55)). Americans also continue to watch TV at record levels. *Nielsen Media Research Reports Television Popularity Is Still Growing*, NIELSON MEDIA RESEARCH, Sept. 21, 2006, <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=4156527aacc010VgnVCM100000ac0a260aRCRD>. In the 2005-06 television year, each American household watched on average eight hours and fourteen minutes of TV a day, up three minutes from last year. *Id.* Additionally, the average amount of TV watched by each individual was up three minutes as well, from four hours and thirty-two minutes to four hours and thirty-five minutes a day. *Id.*

235. See Journalism.org, *Newspapers: The State of the News Media*, http://www.stateofthenewsmedia.org/narrative_newspapers_audience.asp?cat=3&media=2 (last visited Aug. 19, 2007) (noting that some fifty-five million newspapers are sold each day, but their readership continues to drop as readers go online or to cable TV for their news). The Internet is another medium through which people can receive broadcast information. However, at this point, the Internet does not reach enough American homes to be a viable alternative. See Enid Burns, *U.S. Internet Adoption to Slow*, CLICKZ STATS DEMOGRAPHICS, Feb. 24, 2006, <http://www.clickz.com/showPage.html?page=3587496> (reporting that thirty-seven percent of U.S. homes, or thirty-nine million households, are currently without Internet access).

one must be able to read.²³⁶ With the broadcast medium, however, literacy is not nearly as relevant of an issue. Also, information travels over the airwaves much quicker than it does through the printing press, often live.²³⁷ One could imagine a situation, such as a national emergency, where this timeliness would prove extremely beneficial to the broadcaster, the viewer, and the government. Thus, information received through newspapers and magazines is less accessible and qualitatively different (i.e., less current) than information broadcast through television, making the print medium a less than comparable alternative.

Radio, on the other hand, is at first glance a more comparable alternative. Like television, radio does not exclude those who cannot read. Moreover, radio can broadcast information as quickly as television can.²³⁸ The only difference between the two types of media seemingly is the visual component. Radio listenership, however, has been in steady decline over the past decade.²³⁹ In a 1998 Pew Research Center survey, forty-nine percent of Americans reported listening to radio news the day before.²⁴⁰ In 2006, this number dropped to thirty-six percent.²⁴¹ Furthermore, Americans on average spend roughly half the time listening to radio news as they do watching TV news.²⁴² This is likely because the radio audience is

236. See Reginald Roberts, *Read This so Someone Else Might Get the Chance to Learn How a New Campaign Is Spreading the Word: Four Out of 10 Adults in New Jersey are Illiterate*, THE STAR-LEDGER, Oct. 12, 2006, at 35, available at <http://www.newjerseyread.s.org/DocumentFiles/57.doc> (noting that one out of five adults in New Jersey cannot read a newspaper, "let alone the warnings and directions on a medicine bottle") (citation omitted).

237. See *Consumers Still Use TV and Print Newspapers as Their Primary News Sources*, RESEARCH ALERT, Apr. 21, 2006, at 5 ("Print newspapers cannot offer up-to-the-moment news, so it's not surprising that only 5% of consumers look to print for news happening now."). More than four out of ten Americans get their current news from TV. *Id.*

238. Andy Rooney, *For Love of the Newspaper*, ALBANY TIMES UNION, Dec. 16, 2006, at A8 (explaining that newspaper circulation is in decline partly because "radio and television often get there first with the news").

239. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, NEWS CONSUMPTION AND BELIEVABILITY STUDY: ONLINE PAPERS MODESTLY BOOST NEWSPAPER READERSHIP 14 (Pew Research Ctr. for the People & the Press 2006), available at <http://people-press.org/reports/pdf/282.pdf> (explaining that fewer people rely on radio news now than they did in the 1990s).

240. *Id.*

241. *Id.*

242. See *id.* at 10 (finding that Americans spend on average thirty minutes watching television news, compared to only fifteen minutes on average listening to the radio).

made up largely of automobile commuters,²⁴³ where listening time is often contingent upon travel time spent in the car.²⁴⁴

As a result of the rise of TV,²⁴⁵ as well as the rise of deregulation and consolidation,²⁴⁶ the character of radio news has also changed dramatically over the years.²⁴⁷ Radio news was once very local in nature and widely available.²⁴⁸ Now, radio listeners are limited to very few news programming choices.²⁴⁹ It could be argued that should the DTV transition result in a significant number of analog TVs losing operability, radio will capitalize on the newly disenfranchised audience and return to its original form. Yet this assertion is speculative at best. The fact of the matter is that radio has been in decline, causing little radio news, especially local news, to be on the air today,²⁵⁰ and nothing suggests a looming countertrend.²⁵¹

III. RECOMMENDATIONS

The importance of ensuring that the right to receive information is a protected First Amendment right, and not just judicial rhetoric,

243. *Id.* at 14.

244. See ARBITRON, RADIO TODAY: HOW AMERICA LISTENS TO RADIO 11 (2006), available at <http://www.arbitron.com/downloads/radiotoday07.pdf> (postulating that “if you work or drive to school, the bulk of your radio listening is more likely to occur away from home”).

245. See *id.* at 4 (providing that in the last two years time spent listening to radio has decreased forty-five minutes per week because of the recent “onslaught of competing entertainment,” such as MP3 players, morning TV news shows, and other emerging media).

246. See Journalism.org, Radio: Ownership, http://www.stateofthenewsmedia.org/2006/narrative_radio_ownership.asp?cat=5&media=9 (last visited Aug. 19, 2007) (reporting that Clear Channel Communications owns 1190 radio stations and 136 radio news stations, while Cumulus Broadcasting Inc., the next closest broadcasting company, owns 303 and 33, respectively).

247. See Journalism.org, Radio: Content Analysis, http://www.stateofthenewsmedia.org/2006/narrative_radio_contentanalysis.asp?cat=2&media=9 (last visited Aug. 19, 2007) (explaining that radio stations have stopped producing local news as a result of the deregulation of the 1980s and the consolidation of the industry in the 1990s).

248. Patricia Sullivan, *As the Internet Grows Up, the News Industry Is Forever Changed*, WASH. POST, June 19, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/13/AR2006061300929.html> (last visited Sept. 10, 2007).

249. See Journalism.org, Radio: News Investment, http://www.stateofthenewsmedia.org/2006/narrative_radio_newsinvestment.asp?cat=6&media=9 (last visited Aug. 19, 2007) (reporting that a 2004 RTNDA/Ball State survey revealed that the average radio station in the United States produced fewer than forty minutes of local radio news each day).

250. See Journalism.org, Radio: Content Analysis, http://www.stateofthemedi.org/2006/narrative_radio_contentanalysis.asp?cat=2&media=9 (last visited Aug. 19, 2007) (commenting that apart from quantity, the quality of local news programming has also deteriorated, for of the media studied, local news stations relied upon “the shallowest sourcing and explored the fewest angles . . .”).

251. See Sullivan, *supra* note 248 (asserting that the radio industry’s top twenty-five groups are not expected to post revenue increases above 2.3 % in 2006).

cannot be stressed enough.²⁵² Premised on the notion that freedom of speech encourages lively discussion, robust debate, and ultimately a better informed citizenry,²⁵³ the right to receive information ensures that the government cannot “assume[] a guardianship of the public mind” and arbitrarily deny individuals the ability to “separate [for themselves] the true from the false”²⁵⁴ While the parameters of the right to receive have never been fully developed,²⁵⁵ it is vital that the government start taking this right seriously, particularly in the broadcasting genre where Americans rely so heavily for their information.²⁵⁶

The digital television transition has the likely potential to leave millions of Americans without their primary means of receiving information.²⁵⁷ While there are certain situations on which the government can justifiably place limits on the individual’s right to receive, the government here has failed to assert a sufficient reason for why it needs to restrict the rights of so many Americans.²⁵⁸ Fortunately, there is a very practical solution to the problem that will allow the government to achieve its goals while at the same time protect the individual’s right to receive—provide all OTA-only households with at least one set-top converter box.²⁵⁹ This way, the digital switchover will not even implicate, let alone infringe, the right to receive information.²⁶⁰

252. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.”).

253. See FRALEIGH & TUMAN, *supra* note 100, at 6-7 (“In a democratic society, the people hold the ultimate power to control their government. To make rational decisions about the fate of society, citizens must have access to all ideas about government policy.”).

254. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

255. Kennedy, *supra* note 75, at 790 (articulating that the Supreme Court has never given the right to receive information its full support).

256. See Phillips, *supra* note 106, at 617 (explaining that broadcast television and radio are the primary sources of news and information for most Americans).

257. See *supra* Part II.B (illustrating how the converter box program will fail to provide converter boxes for over six million OTA-only households).

258. See *supra* Part II.B.5 (demonstrating that the digital television transition, as planned, is an unconstitutional restriction on the right to receive).

259. It will be administratively difficult to ensure that all OTA-only households are receiving at least one coupon. One way to determine whether most OTA-only households are receiving coupons, however, is to inquire on the coupon application form whether the applicant is a member of an OTA-only household. Consumers Union Comments, *supra* note 1, at 11. The NTIA could then use this information to determine whether or not its targeted efforts are succeeding by comparing the number of coupon applicants who claim to be from an OTA-only household to the estimates of OTA-only households from the surveys discussed above. *Id.* at 11-12.

260. A coupon subsidy, of course, does not actually guarantee an OTA-only household a set-top converter box. All it guarantees is a coupon worth \$40 that can be applied toward the purchase of a converter box. Thus, there is still the issue of a

The NTIA at one point flirted with the idea of making economic need a requirement for coupon eligibility. The policy rationale for an economic need requirement is that it would better ensure that OTA-only households receive converter box coupons.²⁶¹ Such a limitation, however, would actually have been counter-productive.²⁶² Although poorer households do represent a significant portion of the consumers that rely exclusively on OTA TV, still more than half of the group earns more than \$30,000 annually.²⁶³ Rather than adopt an economic need requirement, the NTIA chose instead to implement a two-stage distribution process, with second stage eligibility being limited to OTA-only status.²⁶⁴

The NTIA should revise this Final Rule for a number of reasons. First, as the NTIA itself recognizes, limiting eligibility to OTA-only households will be difficult to enforce.²⁶⁵ There is currently no list designating which U.S. households rely exclusively on analog TV.²⁶⁶ Creating such a list—perhaps by obtaining a list of cable and satellite subscribers and using the process of elimination—will cost significant

potential co-payment that millions of OTA-only households will have to deal with. *See supra* note 66 and accompanying text (noting that the FCC is not expecting the \$40 to cover the entire cost of a converter box purchase). How much the co-payment will be, or whether there will even be a co-payment, will likely remain unknown until manufacturers start producing converter boxes in significant quantities. *See* GOLDSTEIN, *supra* note 41, at 1-2 (reporting that several manufacturers believe converter boxes “could sell for as little as \$50 once they are produced in high volume”); Phillip Swann, *RCA Unveils Digital TV Converter*, TVPREDICTIONS.COM, Mar. 13, 2007, <http://www.tvpredictions.com/rcaconverter031307.htm> (explaining that while RCA unveiled a new design for a converter box that will ensure local TV reception when the switchover occurs, it kept quiet as to the converter’s price); Phillip Swann, *Samsung Unveils Digital TV Converter*, TVPREDICTIONS.COM, Mar. 15, 2007, <http://www.tvpredictions.com/samsungtuner031507.htm> (detailing Samsung’s announcement that it will introduce a new DTV converter box by the end of 2007 and noting that Samsung did not reveal a price). Until the amount of co-payment is known, it will be difficult to assess whether the cost is sufficiently burdensome on an individual such that it violates his or her right to receive.

261. *See* Notice of Proposed Rulemaking, *supra* note 40 (inviting comment on whether the NTIA should consider economic need as a requirement for coupon eligibility and if so whether “economic need” should be determined by the federal poverty level or some other income level); *see also* GOLDSTEIN, *supra* note 41, at 10 (describing how the government could impose a means test to restrict eligibility of coupons to low-income households).

262. *See* Ex Parte Letter from Members, *supra* note 69 (suggesting that a means test for program eligibility would create administrative burdens that would “make it more difficult for consumers to make use of the converter box program”); Consumers Union Comments, *supra* note 1, at 9 (charging that to limit availability of coupons to consumers based on arbitrary factors, such as income level, jeopardizes consumer acceptance of the transition).

263. *See* GOLDSTEIN, *supra* note 41, at 1. In fact, according to the GAO, six percent of OTA-only households have income levels over \$100,000. *Id.* at 0.

264. NTIA Final Rule Part II, *supra* note 21, § 301.

265. *Id.*

266. *Id.*

amounts of money, time, and resources.²⁶⁷ Second, whether the NTIA can lawfully restrict eligibility in the second phase of coupon distribution is questionable.²⁶⁸ Finally, even if limiting eligibility were practical, economically wise, and legal, this process will nevertheless leave millions of OTA-only households without at least one set-top converter box.²⁶⁹

The NTIA should instead adopt a two-round distribution process, open to both OTA-only and non-OTA-only households in both rounds, where each household is eligible to make only one coupon request per round.²⁷⁰ Coupled with an increase in funding,²⁷¹ this process will guarantee that every OTA-only household that requests a coupon will receive one. Alternatively, the NTIA could restrict households to only one coupon throughout the entire application process. However, this option would likely require that Congress amend the DTV Act.²⁷² An increase in funding will also require amendment of the current law, but unlike the ability to request two

267. *Id.* Moreover, unless the NTIA allocates significant resources to confirming eligibility, there is great potential for “waste, fraud and abuse.” *Id.*

268. The DTV Act arguably does not provide the NTIA with the statutory authority to restrict eligibility to OTA-only households. See Consumers Union Comments, *supra* note 1, at 2-4; see also MSTV/CEA/NAB Comments, *supra* note 53, at i (asserting that “the Act, its legislative history, its underlying purpose and the plain meaning of its language” argue against establishing a coupon program that would exclude cable or satellite-served homes from eligibility).

269. See *supra* Part II.B (explaining that NTIA’s Final Rule will likely leave over six million OTA-only households without at least one box).

270. This Comment assumes that limiting the subsidy program directly to OTA-only households will pose significant administrative challenges and will not be a practical option. See *supra* notes 265-269 and accompanying text. See generally GOLDSTEIN, *supra* note 41, at 0 (listing the several administrative challenges that will likely arise in implementing a subsidy program, including determining who would be eligible to receive the coupons if eligibility was limited to solely OTA-only households).

271. See Consumers Union Comments, *supra* note 1, at 18 (suggesting that the NTIA request additional funding in light of the administrative and functional difficulties it will encounter while implementing the digital transition).

272. This might not necessarily be true, since the text of the DTV Act simply limits coupons to a two-per-household maximum. Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3005(c)(1)(A), 120 Stat. 4, 23 (2006). Restricting households to only one coupon, therefore, is technically consistent with this requirement. Nevertheless, the language of the statute seems to imply heavily that Congress intended for eligible households to be able to request two coupons. See *id.* § 3005(c)(1)(B) (“Two coupons may not be used in combination toward the purchase of a single digital-to-analog converter box.”). Either way, the goal is to eliminate the first-come, first-served aspect of the current coupon program, in turn eliminating the possibility of having coupons run out before all OTA-only households even get a chance to request one. See Ex Parte Letter from Members, *supra* note 69 (opposing the NTIA’s proposal to limit participation in the converter box program to OTA-only households because, among other things, “[i]t is bad enough that consumers will have to apply for coupons and hope they receive their coupons before the money runs out”).

coupons, Congress has already demonstrated its ability to adapt when it comes to the amount of funding.²⁷³

The increase in funding is crucial.²⁷⁴ At this point, there are forty-two million households in the United States that rely on analog broadcasting for at least some of their television viewing.²⁷⁵ Yet the current funding allocated to the program will subsidize at most 37.5 million coupons.²⁷⁶ Thus, even with a two-round distribution process, where each household can request only one coupon per round, if funding is not increased, coupons could very well run out in the first round before all households have had a chance to request one. To guarantee that all OTA-only households receive at least one set-top converter box, the number of coupons made available to consumers must at least equal the number of households eligible for coupons. Therefore, the current \$1.5 billion total must be raised to *at least* \$1.68 billion (42,000,000 analog households x \$40) and likely more, since this figure does not take into account the potential \$160 million budgeted for administrative costs.²⁷⁷ True, costs may be partially offset by the number of households that will choose to make the digital upgrade.²⁷⁸ How many households will do this, however, is difficult to predict.²⁷⁹

273. See Roy Mark, *Senate Joins House in Approving DTV Bill*, INTERNETNEWS.COM, Dec. 21, 2005, <http://www.internetnews.com/bus-news/article.php/3572611> (reporting that the Senate's original proposal allocated \$3 billion for the converter box program).

274. An increase in funding may not be as bleak of an option as it would first appear, especially considering the current political climate. As David Rehr, the President of the National Association of Broadcasters ("NAB"), notes, Democrats now control Congress and they are traditionally more consumer-friendly than Republicans. John Eggerton, *NAB, Democrats and the Election*, BROADCASTING & CABLE, Nov. 13, 2006, <http://www.broadcastingcable.com/article/CA6390449.html>. Thus, it is very possible that Congress could increase the \$1.5 billion earmark. See *id.* But see Swann, *supra* note 2 (indicating that neither Republicans nor Democrats have taken action to move a recently introduced bill that would further consumer awareness of the digital transition).

275. KIMMELMAN, *supra* note 46, at 2.

276. See *supra* notes 48-49 and accompanying text (emphasizing that \$1.5 billion will subsidize less than half of the eighty million analog TV sets in the United States).

277. See *Analog TV Broadcasts to End by 2009*, *supra* note 19 (predicting that "after subtracting operating and other costs," the \$1.5 billion will subsidize coupons for fewer than seventeen million households).

278. See *APTS Survey*, *supra* note 5 (explaining that nine percent of respondents to a recent survey stated that they would "buy a digital television set [after the transition] so that they can continue to receive over-the-air broadcasts"); Ted Hearn, *Don't Panic. Yet.*, MULTICHANNEL NEWS, Feb. 19, 2007, at 14, <http://www.multichannel.com/article/CA6417227.html> (stating that the NTIA predicts 115 million digital TV sets will be sold by the end of 2008).

279. Compare Broache, *supra* note 5 (reporting FCC estimates that only seven percent of households will rely exclusively on OTA-broadcast by 2009), with *APTS Survey*, *supra* note 5 (reporting that forty-five percent of respondents to a recent survey said that they would "do nothing" or that they did not know what they would

For the two-round distribution process to work, OTA-only households must be made aware that the transition date is fast approaching and that they will need a digital-to-analog converter box if they want to continue to watch TV.²⁸⁰ Because the DTV Act currently allocates only \$5 million to consumer education,²⁸¹ the NTIA must request additional funding for education.²⁸² The government must also improve its consumer education efforts.²⁸³ Much of the reason why the American public has not already accepted DTV more widely can be traced to the government's failure to take this task more seriously.²⁸⁴ It is also pivotal that DTV education efforts are sensitive to the fact that a significant portion of

do when the country switches over to digital). It is unknown, moreover, whether those who choose to upgrade to digital will nevertheless continue to rely on their older, analog sets as secondary sources of information.

280. See generally Ex Parte Letter from Members, *supra* note 69 (“[C]onsumer education will be critical to the success of any digital television transition plan.”). One potentially effective way to ensure at least a minimal level of awareness is to mail all U.S. households a postcard alerting them of the box assistance program and telling them how to apply for the coupons. New American Foundation et al., *supra* note 16, at 7-8.

281. Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3005(c)(2), 120 Stat. 4, 23 (2006).

282. See Consumers Union Comments, *supra* note 1, at 13-14 (noting that while the NTIA proposes to complement “the education efforts of broadcasters, manufacturers, retailers, and consumer groups” with its allotted \$5 million, “[m]any industry stakeholders may have incentives not to provide consumers with fair and balanced information”); David Hatch, *Democrats Seek Changes to Digital Converter Plan*, NATIONAL JOURNAL’S INSIDER UPDATE, Nov. 17, 2006, available at http://38.118.71.136/njtelecomupdate/2006/11/democrats_seek_changes_to_digi.html (relaying that Democrats seek an increase in the \$5 million allocated to consumer education because it is “woefully inadequate”).

283. See *Preparing Consumers Hearing*, *supra* note 4, at 4 (statement of Rep. Markey, Member, House Comm. on Energy and Commerce) (highlighting that to this day a “shockingly high number of consumers” continue to purchase analog TV sets); GOLDSTEIN, GAO LETTER, *supra* note 5, at 6 (reporting that consumers still do not understand that analog signals will no longer be used to transmit TV signals and that they will no longer have a choice between digital and analog); GUERRERO, *supra* note 64, at 15 (“In a telephone survey of 1,000 randomly selected American households, we found that many people have little understanding of the DTV transition and its implications.”); Swann, *supra* note 2 (explaining that in February 2007, the FCC asked Congress for a “pathetic” \$1.5 million to fund a 2008 consumer education campaign that would in part educate children on the transition).

284. See *Preparing Consumers Hearing*, *supra* note 4, at 3 (statement of Rep. Dingell, Ranking Member, House Comm. on Energy and Commerce) (“Consumer adoption is the linchpin to a successful DTV transition. Until we reach all Americans with accurate information about the transition, there is no way we can declare it a success.”); GUERRERO, *supra* note 64, at 15 (stating that consumer adoption of DTV has been slow in part because many Americans are unaware of the impending transition and uninformed about DTV products). *But see id.* at 19 (statement of David H. Arland, Vice President, Commc’ns and Gov’t Affairs, Thomson Connectivity Bus. Unit, on behalf of TTE Corp.) (“The consumers electronic industry is keenly aware of the need to educate all Americans about the DTV transition and has been doing so for several years.”).

the OTA-only population is non-English speaking.²⁸⁵ Fortunately, recent evidence suggests that the FCC is aware of this pressing need.²⁸⁶

Along with making OTA-only households more aware of the impending transition, and accordingly better prepared for it, increased DTV education will also save the government money in the long run. Knowing that the transition is about to occur, more consumers will make the conscious choice to upgrade to DTV.²⁸⁷ With fewer analog TV users, fewer converter boxes will be required.²⁸⁸ Moreover, presumably some consumers will recognize that the converter box vouchers are limited and therefore will not request one unless needed; or consumers might only request one instead of the allowable two.²⁸⁹

285. See GOLDSTEIN, GAO LETTER, *supra* note 5, at 8 (concluding that since TV advertisements will undoubtedly be used to inform the public, “it might be beneficial to produce and broadcast these advertisements in Spanish”); Letter from Gene Kimmelman, Mark Cooper, & Ed Mierzwinski, *supra* note 71 (explaining that non-English speaking consumers may need “dual-language educational messages, labeling and information”); Letter from Frank Lopez, United States Hispanic Chamber of Commerce Foundation, to Milton Brown, Office of the Chief Counsel, Nat’l Telecomms. and Info. Admin. (Sept. 11, 2006), *available at* http://www.ntia.doc.gov/otiahome/dtv/comments/dtvcoupon_comment_0033.pdf (urging Congress to include a component in the coupon subsidy program that focuses specifically on the Hispanic population).

286. See GOLDSTEIN, GAO LETTER, *supra* note 5, at 6 (noting that the FCC has told the GAO that it has developed numerous consumer publications in both English and Spanish). How seriously it will take the need, however, is another question, but recent developments seem to suggest a genuine effort. See *id.* (explaining that the FCC has met with a number of organizations, including the Hispanic Technology and Telecommunications Partnership, to discuss the possibility of a joint consumer education effort); William Triplett, *FCC wants \$1.5 Mil to Educate Consumers*, DAILY VARIETY, Feb. 6, 2007, at 4, *available at* <http://www.variety.com/article/VR1117958709.html?categoryid=1236&cs=1> (stating that the FCC plans to distribute DTV information in English, Spanish, Chinese, Korean, and other languages).

287. See Allan, *supra* note 65 (describing the increasing readiness of Americans to convert to DTV by noting that even though 2009 is a few years away, “11.4 million digital TVs were sold in the United States in 2005, with about 19.7 million digital sets purchased in 2006”).

288. See Peha, *supra* note 22, at 2 (maintaining that the best way to delay the transition is to purchase a smaller number of digital-to-analog converters and thereby reduce demand for DTV service).

289. See Consumers Union Comments, *supra* note 1, at 10 (affirming that consumers can self-select for the coupon program “based on their subjective sense of need”).

CONCLUSION

The United States²⁹⁰ is in the midst of a technological revolution.²⁹¹ DTV promises to bring to the American people greatly improved picture, better sound quality, increased programming options, and many other new features currently being developed.²⁹² Moreover, DTV is far more flexible and efficient than analog TV.²⁹³ Thus, the digital switchover will free up significant spectrum space that the government can reallocate for other purposes.²⁹⁴ The current plan is to hand over some of the reclaimed spectrum to police and other public safety responders,²⁹⁵ while auctioning off the rest to private companies for commercial use.²⁹⁶

290. Digital television represents a significant change in television technology not only in the United States but also in many countries around the world. See Richard E. Wiley, Chairman, FCC Advisory Comm. on Advanced Television Serv., Keynote Address at the Digital Television Conference (Nov. 12, 1996), available at http://www.wrf.com/publication.cfm?publication_id=7872 (noting that by 1987 Japan and Western Europe had both been developing advanced television technologies for well over a decade, while the United States was a “non-factor” in the development). For a brief overview on how the United Kingdom, Canada, and Japan are currently dealing with the transition to DTV, see GUERRERO, *supra* note 64, at 14.

291. See Hurowitz, *supra* note 3, at 145 (suggesting that as society continues towards complete digitalization, “the Internet and digital media [will] become ubiquitous household goods”); Labaton, *supra* note 15 (quoting Rep. Joe L. Barton of Texas, Head of the Energy and Commerce Committee, who predicted that by February 17, 2009, “[a] great technical revolution that has been in the making for years will finally be complete”).

292. KRUGER, *supra* note 4, at 1; see *Transition to Digital Television Hearing*, *supra* note 8, at 1 (statement of Sen. McCain, Chairman, Senate Comm. on Commerce, Sci., and Transp.) (explaining that digital television technology has the potential to bring movie-quality picture and CD-quality sound into the homes of American consumers); Allan, *supra* note 65 (quoting Jim Krause, an Indiana University professor who studies developments in television technology, who believes that “[d]igital TV still isn’t as good as what you get in most movie theaters . . . but it’s much closer [to it than analog]”). But see Digital TV Facts, Why is the TV Broadcasting Standard Changing from Analog to Digital?, <http://dtvfacts.com/56/why-is-the-tv-broadcasting-standard-changing-from-analog-to-digital/> (last visited Aug. 19, 2007) (noting that “[t]o get the full effect [of DTV], [viewers] need a high-definition set, and the broadcaster and . . . cable or satellite provider must provide a high-definition signal”).

293. See GOLDSTEIN, GAO LETTER, *supra* note 5, at 3-4 (explaining that while television stations can transmit only one analog signal in the 6 MHz of radio spectrum currently allocated to them, in the digital format, broadcasters can use this same 6 MHz of spectrum to simultaneously transmit multiple signals, a concept known as “multicasting”).

294. See Digital TV Facts, *supra* note 292 (explaining that the DTV transition will leave more airwaves available for additional channels or interactive data services).

295. *Id.*

296. *Id.*; see generally Labaton, *supra* note 15 (noting that “wireless telephone companies and others have been urging the quick auction of [reclaimed analog] licenses to expand their broadband and other services” to help raise money for the Treasury to eliminate its deficit). But see MOORE, *supra* note 209, at 5 n.21 (explaining that there are some commentators, including Gene Kimmelman of the Consumers Union, who advocate for the government keeping a portion of the freed up spectrum unlicensed). This auction process will generate billions of dollars in

The transition to DTV, however, cannot be rushed to completion at the expense of millions of Americans' First Amendment rights.²⁹⁷ As established in *Red Lion*, TV viewers have a constitutional right to receive information and ideas.²⁹⁸ In the words of Justice Byron White, "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . may not constitutionally be abridged either by Congress or by the FCC."²⁹⁹ For millions of viewers, television is more than just a form of entertainment;³⁰⁰ it is their primary means of receiving the news, weather, politics, and other important information.³⁰¹ The public safety goals of the DTV transition are laudable,³⁰² but the government can achieve these goals through substantially less restrictive means.³⁰³

This Comment does not suggest that the current digital switchover plan is hopeless from a constitutional perspective and that Congress

revenue. See CONG. BUDGET OFFICE, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE: DIGITAL TELEVISION TRANSITION AND PUBLIC SAFETY ACT OF 2005 2 (2005), available at http://www.cbo.gov/ftpdocs/68xx/doc_6810/SenCommRec.pdf (estimating that auctioning off the reclaimed radio spectrum will raise about \$10 billion); KRUGER & MOORE, *supra* note 31, at 5 (clarifying that "[a]lthough estimates vary, spectrum auctions of frequencies in the 700 MHz band have typically been projected to gross \$20 billion to \$30 billion."); Labaton, *supra* note 15 (emphasizing that the significant auction proceeds could be used to offset growing federal deficits). How much revenue will be generated will likely depend on a number of factors, including when the auctions take place as well as the date on which the auctioned spectrum will be cleared and available for use. MOORE, *supra* note 209, at 5.

297. See *Preparing Consumers Hearing*, *supra* note 4, at 5 (statement of Rep. Terry, Member, House Subcomm. on Telecomms. and the Internet) ("[W]e need to move the digital transition forward, but we don't want to disenfranchise people from their TVs."); *id.* at 3 (statement of Rep. Dingell, Ranking Member, House Comm. on Energy and Commerce) ("We simply can not afford to leave 21 million exclusively over-the-air television households without the means to obtain local news, weather, and other information upon which they depend each day.").

298. See *supra* Part II.A.1 (illuminating how dicta in *Red Lion* strongly suggests a right to receive information in the television context).

299. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

300. See *Preparing Consumers Hearing*, *supra* note 4, at 14 (statement of Manuel Maribal, Founder and Co-Chair, Hispanic Tech. and Telecomms. P'ship) (explaining that Hispanic immigrants are dependent on OTA television for information that will keep them informed so that they can better assimilate into American society).

301. See *id.* at 10 (statement of Lavada E. DeSalles, Member, Bd. of Dirs., Am. Ass'n of Retired Perss.) (explaining that television "provides consumers with life saving weather forecasts, information on government, politics, and community news"); see also *supra* notes 9-13 and accompanying text (describing how the U.S. population generally relies on television to receive information about the news, weather, political information, education, and entertainment, respectively).

302. See Gross, *supra* note 213 (emphasizing Sen. McCain's argument that the DTV transition has the potential to save lives during crises by freeing-up the broadcast spectrum for use by emergency responders).

303. See *supra* Part II.B.5.b (arguing that the DTV transition is not narrowly tailored to further the government's public safety goals because it requires the reacquisition of the entire analog spectrum when only a portion of the spectrum is needed to upgrade public safety).

must therefore drastically amend the plan if it is to carry forward with the transition. Instead, this Comment demonstrates that while the current plan has the likely potential to violate the First Amendment rights of millions of OTA-only TV owners, it is nevertheless very “fixable.” As such, it is imperative that Congress carefully analyze the plan, reevaluate it, particularly as the transition date nears, and amend it as necessary.³⁰⁴ The goal to cut off all analog broadcasting by February 2009 remains viable. However, the government must start *now* to ensure that by this date—whether through a fully-funded, sufficient converter box program,³⁰⁵ increased education efforts,³⁰⁶ a combination of the two, or some other way—viewers will be able to watch TV on their analog sets just as they did before.³⁰⁷

304. See Swann, *supra* note 2 (predicting that “millions of Americans . . . will be unable to get TV signals on that fateful day [February 18, 2009]” if the government does not change how it is currently dealing with the DTV transition).

305. See *supra* Part III (urging the NTIA to adopt a two-round distribution process and increase funding so that OTA-only households will be guaranteed at least one converter box voucher when the digital transition begins).

306. See *APTS Survey*, *supra* note 5 (“In order for the DTV transition to be successful, consumers must be well-informed and primed to adapt successfully to the new technology. This cannot occur unless there is a comprehensive, coordinated national consumer outreach effort.”).

307. See Swann, *supra* note 2 (asserting that the government needs to get serious about the transition, for if it does not, it may be forced to extend the deadline once again).