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## Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation

Anthony E. Varona

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# Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation

Anthony E. Varona\*

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## INTRODUCTION

Since its inception in 1941, broadcast television<sup>1</sup> has exerted an unparalleled influence in the shaping of American culture, identity and values. At its best, television is an equalizer and educator. It serves as a point of common focus; a bridge between people of different races, religions, cultures, and socioeconomic classes. Television has brought us together to experience momentous historical events as one nation. Some of those televised experiences, like the 1969 Apollo moon landing, were engrossing moments of national pride whose black-and-white images are etched in the American psyche. Other shared broadcast experiences, such as the events of September 11, 2001, were powerful for very different reasons, but television still helped us to survive them as a united people.

At its worst, television is what former Federal Communications Commission (FCC) Chairman Newton Minow famously described as “a vast wasteland,”<sup>2</sup> littered with exploitative programming that does more to pollute than enrich our democracy and culture. Television has, at times, broadened the perspectives of some of the most isolated of viewers by serving as a “window on the world” by presenting different ideas, and showing new traditions.<sup>3</sup> But television has at other times transmitted a distorted reflection of our nation and its communities and cultures, inhibiting the democratic system of self-government it was intended to promote.<sup>4</sup>

Congress was aware of the potential power and influence of broadcasting when it reserved for broadcast licensees a uniquely privileged status among federally regulated

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1. My focus in this article is on free, over-the-air commercial television, as distinguished from cable, satellite and other fee-based subscription television services and non-commercial, educational (“public”) broadcast television, which are subjected to different federal regulations. For an examination of the different television services, see generally HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* (2d ed. 1998).

2. Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961), *reprinted in* NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT*, app. 2 at 188 (1995).

3. See JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 192-94, 263-70 (1978) (positing that by presenting selective and biased perspectives, television “dims the mind” and provides viewers with an artificial view of the world.).

4. See *id.*

communications industries. Broadcasters are considered “public trustees.”<sup>5</sup> In exchange for the exclusive right to broadcast over a “channel” of publicly owned radio frequency spectrum in a community of license (typically a major metropolitan area), broadcasters enter into social contract of sorts with the American people, which creates an attendant obligation to broadcast in furtherance of the “public interest, convenience and necessity.”<sup>6</sup>

Congress implemented this “public trustee doctrine,” which is alternately referred to as the “public interest standard,” in the recognition that broadcasting held the promise of fostering a more deliberative democracy by cultivating, through locally produced and directed programming, a politically informed and engaged citizenry.<sup>7</sup> In exchange for the *quid* of a television license capable of generating great power and profit, broadcasters as public trustees are expected to deliver the *quo* of locally oriented “public interest” programming that informs and enriches viewers.

Although the FCC has vacillated over time on the definition of “public interest” programming, and whether it encompasses a defined set of mandatory minimums for the broadcasting of such programs, it has consistently deemed locally oriented political campaign coverage, local public affairs programs, educational and cultural programming, and programs targeted at children and other special communities, as public interest programming consistent with the programmer’s role as public trustee.<sup>8</sup> The Supreme Court

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5. See *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973) (noting that “very early the licensee’s role developed in terms of a ‘public trustee’ charged with the duty of fairly and impartially informing the public audience”); see also STUART M. BENJAMIN ET AL., *TELECOMMUNICATIONS LAW & POLICY* 118 (3d ed. 2001); 3 HARVEY L. ZUCKMAN ET AL., *MODERN COMMUNICATIONS LAW* 115-226 (3d ed. 1999).

6. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, §§ 301, 302a, 303, 309, 318 (codified as amended at 47 U.S.C. §§ 151-613 (2000)) (requiring that licensing and Commission enforcement decisions be made in furtherance of “public interest, convenience and necessity”).

7. See CHARTING THE DIGITAL BROADCAST FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 21 (Dec. 18, 1998) (noting that broadcast regulation “sought to cultivate a more informed citizenry, greater democratic dialogue, [and] diversity of expression”), available at <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf> (last visited Nov. 14, 2004).

8. Congress has consistently characterized the local origination and targeting of programming as “[a] primary objective and benefit of our Nation’s

repeatedly has upheld the public trustee doctrine against First Amendment challenges on the grounds that the broadcast spectrum is a scarce, publicly owned resource. In 1969's *Red Lion Broadcasting Co. v. FCC*,<sup>9</sup> the Court characterized this "scarcity rationale" as founded in the notion that "there are substantially more individuals who want to broadcast than there are frequencies to allocate."<sup>10</sup> Because of spectrum scarcity, "the Government is permitted to put restraints on licensees" in order to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."<sup>11</sup> Although broadcasters, scholars and dissenting judges have subjected the *Red Lion* scarcity rationale to withering criticism, Congress and the courts continue to regard it as valid.

Despite its lofty aspirations, the public trustee doctrine has been a failure since its inception. Broadcasters have successfully opposed nearly all efforts by Congress and the FCC to define, quantify and enforce the public interest standard. Over the last twenty-five years, the FCC has repealed almost all of its substantive public interest regulations, relying instead on marketplace forces in the individual television markets to guide broadcasters' decisions concerning the nature and content of all of their programming. The few remaining vague public interest rules, such as requiring that broadcasters air "programming that responds to the issues of concern to the community,"<sup>12</sup> are virtually ignored by broadcasters and unenforced by the FCC. In fact, the FCC has not penalized a television licensee for failure to satisfy its public interest

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system of regulation of television broadcasting." See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1461 (1992) (requiring cable systems to carry the signals of local television stations on their basic tier of service).

9. 395 U.S. 367 (1969).

10. *Id.* at 388.

11. *Id.* at 390. The Court reasoned that "it is the right of . . . listeners, not the right of broadcasters, which is paramount." *Id.*; see also *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), quoting *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966) ("A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'").

12. See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1077 (1984) (Report and Order) [hereinafter TV Deregulation Report and Order], *recon. denied*, 104 F.C.C.2d 358 (1986), *aff'd in part and remanded in part sub nom.*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

obligations in over twenty-five years.

The typical commercial television broadcaster today airs very little locally oriented public affairs programming, coverage of local and regional political campaigns, children's educational and informational programs, or other public interest programming. For example, a 2003 study of forty-five local television stations in seven media markets found that less than one-half of one percent of the average station's programming schedule is devoted to public affairs programming.<sup>13</sup> Another study found that in the seven weeks preceding the November 2002 midterm elections, more than half of the evening news broadcasts aired in the top fifty media markets did not include any coverage of political campaigns.<sup>14</sup> Viewers of those television stations were more apt to receive their political information from slanted campaign advertising than from what is ostensibly "objective" news coverage.<sup>15</sup> More recently, viewers without access to subscription cable, satellite television networks, and broadband Internet service received little coverage of the Democratic and Republican presidential nominating conventions, with the three major commercial television networks airing only three hours total of live coverage for each of the conventions.<sup>16</sup> In addition, although the public trustee doctrine incorporates the duty to "serve[] the

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13. ALLIANCE FOR BETTER CAMPAIGNS, ALL POLITICS IS LOCAL, BUT YOU WOULDN'T KNOW IT BY WATCHING LOCAL TV (2003) [hereinafter ALL POLITICS IS LOCAL], available at <http://www.ourairwaves.org/reports/display.php?ReportID=12> (last visited Nov. 14, 2004). The study found that the surveyed stations aired three times as many reruns of the situation comedy "Seinfeld" than local public affairs programs. *Id.*

14. MARTIN KAPLAN, ET AL., LOCAL TV NEWS COVERAGE OF THE 2002 GENERAL ELECTION 1, available at <http://www.learcenter.org/pdf/LCLNARreport.pdf> (last visited Oct. 21, 2004).

15. *Id.* (noting that despite the absence of political campaign coverage, eighty percent of those local broadcasts aired at least one paid political advertisement and more than half aired three or more ads). Another study by the Alliance for Better Campaigns concluded that despite broadcasters' unwillingness to cover political campaigns, they view political candidates as lucrative advertising clients. It suggested that in the two months preceding the November 2002 elections, broadcasters raised their advertising rates for candidates by 53 percent. See ALLIANCE FOR BETTER CAMPAIGNS, PROFITEERING ON DEMOCRACY: HOW THE TELEVISION INDUSTRY GOUGED CANDIDATES IN CAMPAIGN '02 (2003), available at <http://www.bettercampaigns.org/reports/display.php?ReportID=11> (last visited Nov. 14, 2004).

16. See Joanne Ostrow, *Party Confabs Falling to Cable*, DENVER POST, July 22, 2004, at F-03.

educational and informational needs of children,”<sup>17</sup> some television licensees have considered such animated comedy programs as “The Jetsons” and “The Flintstones” and game shows, such as “Wheel of Fortune,” as satisfying that duty.<sup>18</sup> As public interest programming has become scarce on broadcast television, advertising of all sorts has skyrocketed, with prime time advertising on major network affiliates up thirty-six percent between 1993 and 2003.<sup>19</sup>

Although television broadcasters typically attack the constitutionality of the public trustee doctrine when the government tries to enforce it, they are quick to don the mantle of public trustees when it is politically expedient. For example, when then-Senator Robert Dole (R-Kan.) and Senator John McCain (R-Ariz.) demanded in 1996 that television broadcasters pay fair market value for new digital television (DTV) channels by means of competitive bidding (*i.e.*, auctions), broadcasters launched a massive lobbying campaign claiming that their status as public trustees exempted them from paying for spectrum, unlike many other FCC digital licensees who have paid in excess of \$20 billion in spectrum fees since 1994.<sup>20</sup> The broadcasters prevailed in what was called the “lobbying coup of the decade,”<sup>21</sup> winning additional digital channels estimated to be worth \$70 billion, at no cost to them.<sup>22</sup> Soon

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17. Children’s Television Act of 1990, 47 U.S.C. § 303(b) (2000).

18. See Policies & Rules Concerning Children’s Television Programming, Revision of Programming Policies for Television Broadcast Stations, 11 F.C.C.R. 10,660, 10,661-62 (1996) [hereinafter Children’s Television Order]; Policies and Rules Concerning Children’s Television Programming Revision, 8 F.C.C.R. 1841, 1842 (1993) (Notice of Inquiry).

19. Steve McClellan, *Ad Clutter Keeps Climbing*, BROADCASTING & CABLE, Dec. 22, 2003, at 13 (noting that 17 minutes out of each hour of prime time network broadcasting is now devoted to advertising), available at <http://www.keepmedia.com/pubs/BroadcastingCable/2003/12/22/340933> (last visited Nov. 14, 2004).

20. See *Hearings Before the Comm. on Commerce, Sci. and Transp.*, 103d Cong., 304-15 (1994) (statement of Edward Fritts, President & CEO of the National Association of Broadcasters); see also Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 GEO. WASH. L. REV. 686, 692-95 (1997) (detailing the many benefits broadcasters have wrested from Congress and the FCC based on their claims of public trustees); Henry Geller, *Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 37, 39 n.9 (1998), available at <http://www.ciaonet.org/conf/asp06/asp06c.html> (last visited Nov. 14, 2004).

21. Paul Taylor, *Superhighway Robbery*, NEW REPUBLIC, May 5, 1997, at 20.

22. *Id.*; see Paul Farhi, *Broadcast Executives Say Dole Vented Anger at Them*, WASHINGTON POST, Jan. 12, 1996, at F1. The new digital channels have

after their legislative victory, broadcasters reverted to attacking the constitutional foundations of the same public trustee doctrine they used to justify their demand for free digital spectrum. In 1999, the FCC initiated a proceeding to determine whether it should impose more substantial public interest requirements upon television broadcasters that were by then beginning to exploit the benefits of the new digital spectrum, including the “multicasting” of various pay-per-view and subscription subchannels as well as “datacasting” services.<sup>23</sup> Broadcasters quickly attacked the constitutionality of any new public interest requirements. For example, CBS, like almost all of its fellow broadcast licensees, argued that the *Red Lion* scarcity rationale for broadcast regulation is no longer valid “in light of the explosion in the number and type of media outlets.”<sup>24</sup> CBS went so far as to dispute the government’s claim that broadcast airwaves are a publicly owned resource.<sup>25</sup> The FCC’s proceeding on new public interest duties is still open, with no new specific public interest requirements on the horizon.<sup>26</sup>

In light of the apparent shortcomings in broadcast regulation, it is necessary to examine how and why United States television broadcast regulation has reached its current state of dysfunction and incoherence. This article analyzes the causes of the public trustee doctrine’s failure and identifies what can be done to redeem it so that the American people are no longer shortchanged and disserved by the television licensees entrusted to serve their interests.

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been characterized as “priceless” to broadcasters because of their profit making potential. Louis Jacobson & Bara Vaida, *Broadcast Blues*, 35 NAT’L J. 2560, 2561 (2003).

23. See Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C.R. 21,633, 21,633 ¶ 3 (1999) (Notice of Inquiry) [hereinafter FCC 1999 Digital Public Interest Programming Proceeding].

24. Comments of CBS Corp., Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, at v (filed Mar. 27, 2000).

25. *Id.* CBS contends that “electromagnetic spectrum is not a thing which can be owned . . . [but] exists only by virtue of electromagnetic radiation, which is produced by a radio transmitter sending energy through space, and can only be utilized through broadcasters’ investment of capital and initiative.” *Id.*

26. See Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, Report and Order, MB Docket No. 03-15, FCC 04-192 (August 4, 2004) (Statement of Commissioner Michael J. Copps) (urging resolution of the still-pending 1999 proceeding with the promulgation of heightened public interest requirements for television broadcasters).

Section I of this article traces the origins and history of the public trustee doctrine, starting with its conception following the dawn of radio and its codification in the 1927 Radio Act and the 1934 Communications Act, continuing through the FCC's many failed attempts at interpreting and enforcing public interest requirements, and concluding with the contemporary era of deregulation and the contentious transition to digital television.

Section II examines why the public trustee doctrine has failed. It identifies and studies the three irreconcilable contradictions upon which the public trustee doctrine was precariously premised, and which doomed it from its inception: the First Amendment tensions inherent in the public trustee doctrine that have rendered it unworkable, the myth of broadcasters as politically agnostic entities at journalistic arms' length from government, and the economic and marketplace demands that make broadcasting in the "public interest" a commercial impossibility. This section concludes with an analysis of how the increasing consolidation of media ownership has further eroded the public trustee doctrine.

Section III examines a number of existing proposals for reforming television regulation, and presents a new proposal to require television broadcasters to subsidize access to broadband Internet connections in low-income and underserved communities. The Internet has created the "uninhibited marketplace of ideas" that television and the broadcast public trustee doctrine failed to create. Yet, as more middle-class and upper-class Americans rely on the Internet for political and electoral information and activism, news, employment, education, community organization, and basic communication, lower income Americans and all Americans in underserved parts of the country continue to encounter barriers blocking their access to America's "electronic town square." This section concludes with a discussion of how a television-to-Internet cross-subsidy would be consistent with Congress's and the FCC's existing programs dedicated to promoting universal access to telecommunications and access to the Internet by the poor and marginalized. I also explain how this proposal may avoid a number of the political, economic and constitutional obstacles that have blocked or stalled previous attempts at reforming the public trustee doctrine.

## I. THE MYTHOLOGY OF TELEVISION BROADCASTERS AS PUBLIC TRUSTEES

### A. THE ORIGINS OF AMERICAN BROADCAST REGULATION

The first attempt by the United States to regulate radio broadcasting was President Theodore Roosevelt's formation on July 12, 1904, of an interdepartmental board including representatives from the Departments of Agriculture, Commerce, Labor, Navy, and War, which was charged with developing a radio regulation policy for the United States.<sup>27</sup> The Interdepartmental Board recommended charging the Navy with regulating ship-to-shore radio communications, authorizing the Army to erect radio stations that would not interfere with maritime communications, and asking Congress to pass legislation preventing monopoly control of radio communications.<sup>28</sup> On January 23, 1908, the world witnessed the lifesaving utility of broadcasting when the ocean liner *Republic* summoned nearby vessels after having collided with the Italian ship *Florida*.<sup>29</sup> The new technology of radio was credited with averting what surely would have been a catastrophic loss of life.<sup>30</sup>

In 1912, Congress returned to radio regulation, enacting the 1912 Radio Act as part of its obligations under the international treaty the United States signed at the Third International Wireless Conference in London.<sup>31</sup> Virtually

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27. MARVIN BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY 4 (2000) (citing *Radio Service Bulletin No. 117*, U.S. Department of Commerce, Bureau of Navigation, at 26 (December 31, 1926)).

28. See *id.* at 4-5 (citing LINWOOD S. HOWETH, HISTORY OF COMMUNICATIONS — ELECTRONICS IN THE UNITED STATES NAVY 76-77 (Washington, D.C.: U.S. Government Printing Office, 1963)).

29. BENSMAN, *supra* note 27, at 6.

30. *Id.* Shortly after the disaster, President Roosevelt urged Congress to pass legislation requiring the outfitting of all oceangoing vessels with radios. *Id.* Congress heeded his call and passed the Wireless Ship Act of 1910, placing jurisdiction over radio regulation in the Departments of Commerce and Labor. Pub. L. No. 61-262, 36 Stat. 629-30 (1910) (forbidding any steamship carrying or licensed to carry fifty or more individuals to leave any seaport in the United States unless equipped with radio equipment and a crewmember trained to use it).

31. Pub. L. No. 62-264, 37 Stat. 302 (1912). The 1912 Radio Act empowered the Secretaries of Commerce and Labor to grant radio station licenses upon request, allocated certain frequencies for government use, adopted standardized distress signals, and imposed certain technical requirements. *Id.* Congress articulated two principal purposes in enacting the

anyone who requested a broadcast license received one as broadcast spectrum was bountiful at the time the 1912 Act was passed.<sup>32</sup> Interference problems seldom surfaced because the number of radio stations in existence was much smaller than the number of available broadcast “channels” in the major metropolitan areas, and radio was still viewed principally as a navigation aid and novelty.

World War I catalyzed the development of the broadcasting industry. The American and European militaries experimented with the use of low-powered radio equipment for battlefield communications and for communicating between ground stations and war ships, submarines, and airplanes.<sup>33</sup> By 1918, the United States Navy had integrated radio communications into its tactical arsenal.<sup>34</sup> President Wilson’s Secretary of the Navy, Josephus Daniels, forcefully advocated the nationalization of the radio industry as a national defense system, and lobbied unsuccessfully for Navy Department control of all broadcasting.<sup>35</sup> Still, by 1920, there were only 272 land radio stations licensed in the United States.<sup>36</sup>

On November 2, 1920, Westinghouse’s pioneering radio broadcast station KDKA in Pittsburgh demonstrated the civilian utility of radio broadcasting by reporting the Harding-Cox presidential election results as soon as they were released by the voting authorities.<sup>37</sup> The success of this broadcast resulted in a sharp increase in requests for broadcast licenses from the Department of Commerce. On September 15, 1921, the Department’s Bureau of Navigation Radio Service licensed

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1912 Radio Act. The first was “to promote safety of life and property at sea and to promote commerce by facilitating the dispatch of ships.” *Hearings on Legislative, Executive, Judicial Appropriation Bill for 1922 Before the Subcomm. of the House Comm. on Appropriations*, 66th Cong. 1218 (1920). The second stated purpose of the new statute was “to secure by the fullest use of radio communication by federal regulation, made necessary by the fact that in the present state of the art the unregulated use by interference would impair or prevent almost all use.” *Id.*

32. See CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK* 41 (2000) (stating that the “number of licensed broadcasters grew to exceed spectrum’s capacity to provide all with a clear signal.”).

33. See BENSMAN, *supra* note 27, at 11-12.

34. See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 224-25 (1994).

35. See *id.*

36. BENSMAN, *supra* note 27, at 14.

37. *Id.* at 29; see also STARR, *supra* note 34, at 328.

the first “limited commercial stations.”<sup>38</sup>

Between December 1, 1921, and December 1, 1922, the total number of U.S. radio stations rose from 23 stations to 570 stations, with the total number of radio receivers in use in the United States numbering between 500,000 and 1,000,000.<sup>39</sup> Commentators predicted that broadcasting would “perfect democracy” by creating an electronic town square accessible to everyone, everywhere.<sup>40</sup> As Americans’ standard of living and average salaries rose, so did their demand for access to radio programming. As the demand for radio station licenses increased, the sales of radio receivers also increased dramatically.<sup>41</sup>

Concerned that the burgeoning broadcasting industry needed more federal oversight, then Secretary of Commerce Herbert Hoover attempted to use the limited statutory authority granted to the Department of Commerce in the 1912 Act to deny applications from stations for potential interference and to revoke licenses from stations causing interference.<sup>42</sup> In 1923, the U.S. Court of Appeals for the District of Columbia Circuit held that the Secretary lacked the authority to use potential interference as a reason for denying or revoking a broadcast license. Furthermore, a federal district court in Illinois held three years later that the Secretary had no authority under the 1912 Act to impose any restrictions on frequency, transmitter power, or hours of operation.<sup>43</sup> Unable to regulate, Secretary Hoover embarked on a mission to foster self-regulation in the broadcast industry.<sup>44</sup>

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38. BENSMAN, *supra* note 27, at 29 (citing Letter from William Downey to Kenneth Gopen 40 (May 8, 1932) (on file with National Archives Record Group)). The Bureau initially allocated only one frequency, 832.8 kHz, for use by all commercial radio stations. *Id.* The increase in the number and transmitter power of stations depleted that allocation almost immediately, and the Bureau allocated a second frequency (618 kHz) to accommodate the overwhelming demand. *Id.*

39. BENSMAN, *supra* note 27, at 30.

40. See STARR, *supra* note 34, at 331.

41. BENSMAN, *supra* note 27, at 31.

42. Hoover v. Intercity Radio Co., 286 F. 1003, 1004 (1923).

43. *Intercity Radio Co.*, 286 F. at 1006-07; United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926).

44. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 10-12 (St. Martin’s Press 3d ed. 1982). In 1922, Secretary Hoover convened the first of four industry conferences devoted to discussing the federal response to the need for increased radio regulation. *Id.* At the First Radio Conference, attendees decided unanimously that self-regulation would not be enough to

### 1. The Growing Cacophony

Almost 600 commercial radio stations were on the air by the end of 1925, and because most of these stations were based in major metropolitan areas, the lack of comprehensive federal regulations governing frequency use, transmission power, and hours of operation resulted in unacceptable levels of interference.<sup>45</sup> By that time, the federally allocated spectrum was already depleted and stations, aware that the federal government had no real enforcement authority, changed their frequencies and boosted their transmission power in the hopes of drowning out any newcomers. As the Supreme Court noted in 1943, “With everybody on the air, nobody could be heard.”<sup>46</sup> The broadcast industry was in such chaos that President Calvin Coolidge addressed the issue in his December 7, 1926, message to Congress:

Due to the decisions of the courts, the authority of the Department [of Commerce] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value.<sup>47</sup>

Despite the President’s call for legislation, and the growing demand from industry participants themselves for more federal oversight, Congress was unable to agree on how best to structure a federal regulatory regime.<sup>48</sup> It was not until 1927

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facilitate the efficient and effective growth of broadcasting. *Id.* At the Third National Radio Conference in 1924, Secretary Hoover noted that the radio broadcasting industry “is probably the only industry in the United States that is unanimously in favor of having itself regulated.” *Id.* at 11 (citing quotation in SYDNEY W. HEAD, BROADCASTING IN AMERICA: A SURVEY OF TELEVISION AND RADIO, 126 (1976)).

45. *Id.* at 11.

46. National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1943). It added: “Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.” *Id.* at 213.

47. H.R. DOC. NO. 69-483, at 10 (1927).

48. KRASNOW ET AL., *supra* note 44, at 12. The majority-Republican House of Representatives favored granting more expansive licensing and regulatory authority to the Secretary of Commerce, whereas the Democratic Senate wanted an independent and permanent commission dedicated to the regulation of the industry. *Id.* Senator Clarence C. Dill (D-WA), chairman of the Senate Interstate Commerce Committee, argued that the power and influence of radio broadcasting militated against the delegation of regulatory authority to the Secretary of Commerce alone, asserting that “[t]he exercise of this power is fraught with such possibilities that it should not be entrusted to

that the House and Senate agreed to create the independent Federal Radio Commission (FRC).<sup>49</sup>

## B. CONGRESSIONAL CODIFICATION OF BROADCAST PUBLIC TRUSTEESHIP

### 1. The 1927 Radio Act

The Radio Act of 1927 created the FRC to serve for an initial trial period of one year and to adjudicate applications for station licenses, renewals, and certain technical permits.<sup>50</sup> Sections 9 and 11 of the 1927 Radio Act state that “the licensing authority . . . [shall] determine that the public interest, convenience, or necessity would be served by the granting [of a broadcast license].” Congress failed to define what it meant by “public interest” in either the statutory text or the legislative history. This led one commentator to posit that the phrase meant “as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.”<sup>51</sup>

The FRC not only was hampered by its temporary status; its work was impeded by the failure of Congress to appropriate any money for its operations.<sup>52</sup> The effectiveness of the FRC

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any one man nor to any administrative department of the Government. This regulatory power should be as free from political influence or arbitrary control as possible.” *Id.* (quoting S. REP. NO. 69-772, at 2 (1926)).

49. Pub. L. No. 69-632, 44 Stat. 1162 (1927); *see also* KRASNOW ET AL., *supra* note 44, at 12 (asserting that most of the language of the final enacted version of the 1927 Radio Act originated in a bill introduced by Representative Wallace H. White of Maine in 1923, authorizing the Secretary of Commerce to serve as the “traffic cop of the air”).

50. KRASNOW ET AL., *supra* note 44, at 12-13. The nascent FRC was comprised of five members appointed by the President with the advice and consent of the Senate. *Id.* at 13. The Department of Commerce retained the power to assign station call letters and prescribe qualifications for licensees. *Id.*

51. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930), *quoted in* Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 214-15 (1982).

52. KRASNOW ET AL., *supra* note 44, at 13. The FRC was, however, permitted to spend any unspent funds earmarked in the Department of Commerce budget for communications regulation. *Id.* Congress allowed the FRC to hire a staff of twenty employees, including support staff and engineers, to assist the commissioners with building a regulatory structure to address a burgeoning industry in 1927 in which there were 732 stations with 129 of

was also limited by the vagueness of the 1927 Radio Act, which although stronger and clearer in its treatment of broadcast regulation than the 1912 Radio Act, still provided scant guidance to the regulators about the scope of their authority.<sup>53</sup>

This state of affairs persisted through the change in presidential administrations. In 1933, President Franklin D. Roosevelt commissioned Daniel C. Roper, then Secretary of Commerce, to prepare a report proposing a new legislative and regulatory response to the broadcasting industry.<sup>54</sup> The Roper Commission's January 1934 report recommended the creation of a "new or single regulatory body, to which would be committed any further control of two-way communications and broadcasting."<sup>55</sup>

One of the Roper Commission's points of deliberation involved the question of whether the United States should follow the lead of the United Kingdom and regulate broadcasting as a state-controlled, nonprofit enterprise funded with public money, or whether it should remain a private, commercial enterprise.<sup>56</sup> Perhaps as its first lobbying coup, the newly formed National Association of Broadcasters (NAB) entered into an agreement with the American Newspaper Publishers Association in which the broadcasters agreed not to compete directly with the newspapers in the provision of news if the publishers would support the broadcasters in their efforts

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those stations broadcasting on unauthorized frequencies that interfered with other stations' signals. *Id.* (quoting LLEWELLYN WHITE, *THE AMERICAN RADIO: A REPORT ON THE BROADCASTING INDUSTRY IN THE UNITED STATES FROM THE COMMISSION ON FREEDOM OF THE PRESS* 200 (1947)); *see also* BENS MAN, *supra* note 27, at 200.

53. KRASNOW ET AL., *supra* note 44, at 13-14. The annual reauthorization statutes necessary for prolonging the FRC's uncertain existence became a means of legislative retooling that threatened to further hamper the Commission's effectiveness. *Id.* at 14. An example of Congress's tinkering was the Davis Amendment to the 1928 renewal act, which required the FRC to allocate radio station licenses evenly across all of the nation's regions and states. *Id.* The Davis Amendment passed on account of the suspicions of legislators from the South, West, Midwest who perceived the FRC as favoring high-powered stations in the North and East. *Id.*

54. *Id.*

55. *Id.* at 14-15 (quoting *STUDY OF COMMUNICATIONS BY AN INTERDEPARTMENTAL COMM.* 73D CONG. 144 (1934)). The Report urged the consolidation of the communications regulatory functions of the FRC, Interstate Commerce Commission, Department of Commerce and the Postmaster General into the new comprehensive agency. *Id.* at 14.

56. *See* STARR, *supra* note 34, at 340-46.

to keep broadcasting private and commercial.<sup>57</sup> The deal held and the Roper Commission decided against recommending the emulation of the British broadcasting model.

## 2. The 1934 Communications Act

After listening to demands for more expansive regulation from the Roper Commission, regulators, broadcasters and citizens alike, Congress enacted the Communications Act of 1934 (1934 Communications Act), which established a permanently funded and staffed Federal Communications Commission (FCC) with broad authority over all forms of telecommunication.<sup>58</sup> The 1934 Communications Act incorporated most of the contents of the 1927 Radio Act, abolished the FRC, and directed that the new FCC make licensing decisions – specifically, decisions concerning grants of initial licenses as well as license renewals – in accordance with “public interest, convenience, or necessity.”<sup>59</sup> The Act provides that all radio frequency spectrum in the United States is publicly owned.<sup>60</sup> In that respect, broadcast radio frequencies can be likened to other valuable public resources, such as national forests and wildlife, over which the federal government and its delegates also serve as public trustees.<sup>61</sup>

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57. *Id.* at 40-41.

58. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613 (2000)).

59. 47 U.S.C. § 303. The 1934 Communications Act specified a three-year term for broadcast licensees. In 1981, the license term was extended to five years for television stations and seven years for radio stations. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241(a), 95 Stat. 736 (1981). The broadcast license terms were extended once again, to eight years for television stations, in the Telecommunications Act of 1996 Pub. L. No. 104-104, § 203, 110 Stat. 56, (1996).

60. 47 U.S.C. § 301 (“provid[ing] for the use of such channels, but not the ownership thereof”).

61. For an excellent history of the public trust doctrine in the environmental area, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). The public trust doctrine has its roots in the legal digests of the Sixth Century Roman Emperor Justinian, and specifically his concept of *jus natural*, or “natural law.” See Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 31-32 (2000); see also Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 728 (1989). Interestingly, the Supreme Court’s leading and still binding case in this area, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) provides that the government must guard against the privatization of public trust resources and specifically:

Like its 1927 predecessor, the 1934 Communications Act did not define the term “public interest” nor elaborate on the obligation of broadcasters to be public trustees, instead delegating implicit authority to the FCC to interpret these obligations.<sup>62</sup>

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The State can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

*Id.* at 453.

62. See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L. J. 427, 447 (2001). According to Randolph J. May, senior fellow and Director of Communications Policy Studies at The Progress and Freedom Foundation, this delegation may violate the nondelegation doctrine, which requires Congress to make important policy choices itself and not delegate those decisions to agencies without providing those agencies with adequate guidance. *Id.* at 429, 434-35. May writes that the public interest standard of broadcast regulation “has proven so indeterminate that, in adopting it, Congress passed off to the new agency the power to make law in a way that would surely shock [John] Locke and the founders of our nation.” *Id.* at 428.

More than three hundred years ago, in the second of his famous *Two Treatises*, John Locke wrote that the legislature ‘cannot transfer the [p]ower of [m]aking [l]aws to any other hands. For it being but a delegated [p]ower from the [p]eople, they, who have it, cannot pass it over to others.’

*Id.* at 427-28 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 380 (Peter Laslett ed., 2d ed. 1970) (1690)). May acknowledged that the nondelegation doctrine has been dormant since its heyday in the 1930s, where the Supreme Court applied it to strike down delegations of authority in the National Industry Recovery Act, a New Deal law, in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Id.* at 435-38. He posits, nevertheless, that the public interest standard is so vague and devoid of statutory meaning that it fails to satisfy the contemporary nondelegation doctrine requirement that legislative delegations provide an “intelligible principle” to guide agency action. *Id.* at 442-43. He concedes, however, that the current Supreme Court has upheld delegations of authority with little guidance, citing to the public interest standard as a constitutional delegation. *Id.* at 443. In *Whitman v. American Trucking Ass’n*, 51 U.S. 457, 474 (2001), Justice Scalia, writing for a unanimous Court, upheld delegations of legislative power in the Clean Air Act to the EPA by citing to the public interest standard as one example of a broad delegation of authority sustained by the Court. *Id.* at 443-44. And in *Mistretta v. United States*, 488 U.S. 361 (1989) Justice Scalia noted that the Court would be hard pressed to strike down any delegation as “too vague to survive judicial scrutiny” when the Court has upheld the public interest standard. *Id.* at 443 (citing 488 U.S. 361, 416 (Scalia, J., dissenting)). May’s argument is undermined by the fact that in the *Schechter Poultry* case, the Supreme Court expressly distinguished the Interstate Commerce Code, which itself contained vague delegation language – empowering the Interstate Commerce Commission to regulate railroads as “the public convenience and

### C. EARLY ATTEMPTS TO INTERPRET THE PUBLIC INTEREST STANDARD

In its short seven-year existence, the FRC never issued a coherent definition of the public interest standard. Instead, it made case-by-case determinations of individual station practices that satisfied the standard. In May 1927, it allowed stations to increase daytime transmitting power when broadcasting “service programs,” which it defined as “those of educational and religious institutions, civic organizations, and distributors of market and other news.”<sup>63</sup> The following year the FRC denied sixty-two stations permission to continue broadcasting because the stations had aired programming that was contrary to the public interest by containing false statements, personal attacks, and the excessive reliance on phonograph recordings to the detriment of local service.<sup>64</sup> In announcing these decisions, the FRC declared that the primary interests at stake were not those of the broadcasters, but rather that “emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public.”<sup>65</sup> The FRC interpreted the public trustee doctrine as requiring that broadcast stations “be operated as if owned by the public.”<sup>66</sup> Specifically, the FRC asserted that “[i]t is as if people of a community should own a station and turn it over to the best man in sight with this injunction: Manage this station in our interest. . . . The standing of every station is determined by that conception.”<sup>67</sup>

In *Great Lakes Broadcasting Co.*,<sup>68</sup> the FRC adjudicated a

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necessity may require” – which served as a source of the vague “public interest, convenience and necessity” language in the 1934 Communications Act. See MINOW & LAMAY, *supra* note 2, at 4.; see also Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930) (“Public interest, convenience or necessity’ means about as little as any phrase that the drafters of the [Radio] Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.”).

63. 1 F.R.C. 14 (1927).

64. 2 F.R.C. 16, 151-62 (1928).

65. *Id.* at 170.

66. *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. BAR J. 5, 14 (1950) (internal quotation omitted).

67. *Id.*

68. 3 F.R.C. 32 (1929), *aff’d in part and rev’d in part*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

conflict among three Chicago area radio stations for a “clear channel” frequency.<sup>69</sup> It determined that its selection of the prevailing station would be determined by the station with the best public interest broadcasting performance, defined as meeting the:

tastes, needs and desires of all substantial groups among the listening public . . . in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interests to all members of the family find a place.<sup>70</sup>

In its decision, the FRC emphasized the importance of broadcasters’ duty to create a “marketplace of ideas” for the public, declaring that “the public interest requires ample play for the free and fair competition of opposing views” and “that [this] principle applies . . . to all discussions of issues of importance to the public.”<sup>71</sup>

The FRC also asked about programming and public interest content in initial station applications and license renewals, including the requirement that applicants list the amount of weekly programming aired in six categories classified as “entertainment,” “religious,” “commercial,” “educational,” “agricultural,” and “fraternal.”<sup>72</sup>

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69. A “clear channel” is a frequency that is reserved nationally for only one station or a very small number of stations located far apart. Clear channels prevent any risk of distant channel interference caused by atmospheric conditions. See STARR, *supra* note 34, at 349.

70. *Great Lakes Broadcasting*, 3 F.R.C. at 34.

71. *Id.* at 33.

72. *Jurisdiction of Radio Comm’n Hearings on H.R. 8825 Before the House Comm. on the Merchant Marine and Fisheries*, 70th Cong., 1st Sess. 21-26 (1928). The FRC also applied a broad definition of public interest in denying renewals to licensees whose programming contravened public health and safety. For example, in 1930 the FRC denied the license renewal application of KFKB, a station in Milford, Kansas, because its operator, Dr. John Brinkley, operated the station exclusively for his own commercial interest and not that of the public. *KFKB Broadcasting Ass’n v. FRC*, 47 F.2d 670, 672 (D.C. Cir. 1931). Dr. Brinkley apparently treated the station as a means of building his experimental “goat gland” medical practice. The main programming on the station consisted of three daily programs featuring Dr. Brinkley answering medical questions from his listeners. *Id.* Noting that the doctor’s answers usually included a recommendation for pharmaceuticals that he marketed himself, it concluded that the licensee’s practice of diagnosing patients over the radio, in the absence of any in-person examination, was contrary to the public health and therefore not public interest programming. *Id.*

Although the FCC's birth in 1934 fostered a more comprehensive federal approach to communications regulation, it did not result in a more precise articulation of the public interest standard. In the FCC's first decade, devising a workable, standard definition of public interest programming was not a priority.<sup>73</sup> To the contrary, although its predecessor had reviewed station programming for public interest content in license renewal proceedings, the FCC discontinued that practice, instead approving license renewal applications in groups, essentially rubberstamping the recommendations of the FCC's engineering, legal, and accounting departments, which performed a content-neutral review of station performance.<sup>74</sup>

Some early FCC licensing decisions did, however, contain references to the importance of the public trustee doctrine in educating the electorate on pressing issues of public concern. For example, in *Mayflower Broadcasting Corp.*,<sup>75</sup> the Commission clarified that the statutory duty to broadcast in the "public interest" imposed on licensees the obligation to be "sensitive to the problems of public concern in the community and to make sufficient time available, on a non-discriminatory basis, for the full discussion thereof."<sup>76</sup> Similarly, in *Metropolitan Broadcasting Corp. (WMBQ)*,<sup>77</sup> the FCC instructed that a licensee had "a recognized duty to present well-rounded programs on subjects which may be fairly said to constitute public controversies of the day within the framework of our democratic system of government."<sup>78</sup>

### 1. The "Blue Book"

Facing criticism for its piecemeal approach to defining what duties were required of broadcast public trustees, the FCC finally turned to clarifying the public interest programming requirements for broadcasters under the 1934 Communications Act in the early 1940s. FCC Commissioner Clifford J. Durr began abstaining from voting upon station license renewal applications, reasoning that the renewal

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73. See Bill F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C. L. REV. 1057, 1061-62 (1982).

74. See *id.*

75. 8 F.C.C. 333 (1940).

76. *Id.* at 340.

77. 8 F.C.C. 577 (1941).

78. *Id.* at 577.

applications did not contain enough information on whether and how the licensees had been offering public interest programming to their listeners.<sup>79</sup> In response to Commissioner Durr's demands, the FCC in 1946 released a staff report entitled "Public Service Responsibilities of Broadcast Licensees," which became widely known as the "Blue Book" because of its blue cover, and which served as the FCC's first policy statement explaining the 1934 Communications Act's public interest standard.<sup>80</sup>

The Blue Book specified that licensees were required to devote an "adequate" amount of broadcast time to the coverage of local, national and international issues of public concern.<sup>81</sup> It instructed broadcasters that they were expected to air a "reasonable" number of "sustaining" programs, meaning programs not sponsored by commercial advertising but funded by the broadcaster itself, and local live programming.<sup>82</sup> It warned licensees that they should limit advertising to "a reasonable amount" of overall programming time.<sup>83</sup> A new FCC broadcast license renewal form required applicants to report on their program offerings in six categories: education, entertainment, news, religion, discussion and talks.<sup>84</sup>

Broadcasters fought the Blue Book vehemently.<sup>85</sup> Soon after its release, NAB President Justin Miller waged a three-month lobbying campaign, attacking the Blue Book's articulation of public interest programming preferences as invalid under the 1934 Communications Act and the First Amendment.<sup>86</sup> Growing weary of the NAB's intensifying lobbying, the FCC distanced itself from the Blue Book's programming requirements. For the next fourteen years, the FCC rarely addressed public interest programming and seldom invoked the Blue Book requirements. Although the license

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79. See Chamberlin, *supra* note 73, at 1062, n.20 (citing CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, BROADCASTING AND GOVERNMENT REGULATION IN A FREE SOCIETY 7 (1959)).

80. FCC, PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES (1946) [hereinafter Blue Book].

81. *Id.* at 12-39.

82. *Id.*

83. *Id.* at 40-47.

84. Chamberlin, *supra* note 73, at 1063 n.24 (citing FCC, BROADCAST APPLICATION, § IV at 1 (1947)).

85. *Id.* at 1063 n. 25 (citing Richard J. Meyer, *Reaction to the "Blue Book,"* 6 J. BROADCASTING 295 (1962)).

86. Chamberlin, *supra* note 73, at 1063 n.25.

renewal forms still required the information on public interest programming addressed in the Blue Book, those disclosures were largely ignored by the Commission's application reviewers.<sup>87</sup>

By the late 1950s, several FCC Commissioners and much of the viewing public had grown frustrated with the FCC's failure to elucidate and actually enforce the public interest standard. The quiz show scandals in 1958 and 1959, which involved the very high-profile rigging of highly rated television quiz shows, and the radio disc jockey "payola" controversy, where disc jockeys accepted money from record promoters in exchange for playing their records on the air, also motivated a number of watchdog groups, private citizens, and elected officials to demand that the FCC impose and enforce more meaningful public interest standards on broadcasters.<sup>88</sup>

## 2. The 1960 Programming Statement

The Commission attempted again to articulate coherent and meaningful public interest programming requirements in the "1960 Programming Statement."<sup>89</sup> Unlike the Blue Book, and perhaps to avoid the lobbying frenzy that the Blue Book

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87. *Id.* at 1064 (citing ERIK BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: THE GOLDEN WEB 228, 292-93; Address by Commissioner K. Cox, "Public Services Responsibilities of Broadcast Stations," to Boston Federal Executive Board (Sept. 9, 1965)). An example of the laxity of the FCC's approach to evaluations of the quality and quantity of public interest programming was its treatment of the license renewal application of station WOAX, which had refused to air any public interest programming. A senior officer of the licensee's parent corporation, in fact, had directed that public interest programming should not be broadcast on the station. 6 Rad. Reg. (P & F) 1101, 1101-03 (1950). Despite warnings from the FCC that the station needed to improve its public interest record, the Commission did not take action against the licensee's license, although it did reprimand the station's management and refused to grant permission for expanded facilities. See 15 F.C.C. 270, 271 (1950); see also 6 Rad. Reg. (P & F) 1101, 1101 (1950). For additional examples of the FCC's lax enforcement of the Blue Book standards, see Chamberlin, *supra* note 73, at 1064 n.28.

88. See Commission Programming Inquiry, 44 F.C.C. 2303, 2303-05 (1960) (en banc); see also THOMAS A DELONG, QUIZ CRAZE: AMERICA'S INFATUATION WITH GAME SHOWS 218-26 (1991); HALBERSTAM, DAVID, THE FIFTIES 643-66 (1993). The quiz show scandals received so much press attention that Congress held hearings on the matter. See *Hearings on Television Quiz Shows Before a Special Subcomm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959) (pt. 1).

89. See generally Commission Programming Inquiry, 44 F.C.C. 2303 (1960) (en banc).

sparked, the 1960 Programming Statement noted that the First Amendment required that licensees be given broad latitude and discretion in meeting their public interest duties.<sup>90</sup> Whereas the Blue Book threatened to deny renewal of broadcast licenses in the absence of a record of compliance with the public interest requirements, the 1960 Programming Statement made no such explicit warning. Instead, it attempted to balance the First Amendment right of licensees to decide the content and nature of their own programming with the statutory duty of broadcasters to air public interest programming.<sup>91</sup> The Statement clarified that although the First Amendment forbade the Commission from dictating programming content, the licensee was bound by the 1934 Communications Act to broadcast in the public interest in exchange for its free use of broadcast spectrum.

The 1960 Programming Statement prescribed that the FCC would grant broadcast license applications only to those licensees who had demonstrated that they had been operating their stations in the public interest.<sup>92</sup> The 1960 Statement also provided a nonexhaustive, nonexclusive list of fourteen “major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located.”<sup>93</sup> Those elements were:

- (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs.<sup>94</sup>

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90. *See id.* at 2306-08, 2311-14, 2316.

91. *See id.* at 2308, 2314.

92. *See id.* at 2309, 2310, 2315. It stated that the “principal ingredient” of a licensee’s public interest broadcasting compliance was a “diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of his service area.” *Id.* at 2312. It emphasized that the licensee was required to proactively ascertain the public interest programming most needed by the members of the station’s viewing audience, and not depend on the FCC to prescribe a certain public interest formulation. *Id.* at 2314. The Statement clarified that the “honest and prudent judgments” of the licensee in determining community public interest programming needs would “be accorded great weight by the Commission.” *Id.*

93. *Commission Programming Inquiry*, 44 F.C.C. at 2314.

94. *Id.* In propounding this list, the Statement warned that they are “neither all embracing nor constant . . . [T]hey do not serve and have never been intended as a rigid mold or field formula for station operation.” *Id.* The

The 1960 Statement did not define these various public interest programming elements, nor instruct stations or the FCC application reviewers themselves on what amount or combination of these elements would satisfy the broadcaster's public interest programming requirements under the 1934 Act. The list was so broad that broadcasters were hard-pressed to find programming that could not be characterized as fitting at least one of the enumerated categories of public interest programming.

The 1960 Statement also directed broadcasters to determine the needs, tastes and desires of their communities of license in order to air programming responsive to those needs. This resulted in the FCC's adoption of formal "ascertainment" rules, which required broadcasters to document interviews with community members in a variety of different areas.<sup>95</sup>

### 3. FCC Reluctance to Enforce the 1960 Statement

The FCC rarely cited the Statement in reviewing broadcasters' license renewal applications. For nearly two decades, the FCC's Broadcast Bureau, the division of the FCC to which the Commissioners delegated authority to review and recommend a grant or denial of renewal applications, rarely recommended denial of license renewal applications on the grounds that the licensee had failed to satisfy its public interest

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1960 Policy Statement also dispensed with the Blue Book's preference for "sustaining" (licensee-underwritten) instead of commercially sponsored programming. The 1960 Statement clarified that commercial sponsorship may enable viewers to have access to more public interest programming. *See id.* at 2315.

95. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, Report and Order, 27 F.C.C.2d 650, 656-58 (1971). The Commission enforced the 1960 Statement by means of a revised license renewal form that took the Commission over four years to draft and adopt. *See* Chamberlin, *supra* note 73, at 1066. The revised form required that the licensee document its efforts to ascertain and meet the "needs and interests of the public served by the station." *Id.* at 1066 n. 44. The form instructed the applicant to detail its efforts in three principal programming categories: "public affairs," "news" and "all other programs, exclusive of Entertainment and Sports." *Id.* at 1067 n. 45. The form defined "public affairs" programs as including "talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national and international affairs." *Id.* "Political programs" were "those which present candidates for public office or which give expression (other than in station editorials) to views on such candidates or on issues subject to public ballot." *Id.*

programming requirements.<sup>96</sup> The Broadcast Bureau would perform an apparently superficial review of renewal applicants' public interest programming representations, and would then recommend license renewal to the Commissioners in large groups of sometimes hundreds of applications at a time.<sup>97</sup> Although individual Commissioners would, from time to time, protest the laxity in the Commission's application (or lack thereof) of the 1960 Statement, their protests were unheeded by colleagues.<sup>98</sup> For the two decades following the 1960 Statement, the Commission rarely investigated a station's compliance with its public interest broadcasting requirements.<sup>99</sup> When it did, it almost always approved the renewal of the license, with no penalties, despite a record of minimal or no public interest programming.<sup>100</sup>

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96. See Chamberlin, *supra* note 73, at 1068-69.

97. See, e.g., Renewals of Broadcast Licenses for Indiana, Kentucky, and Tennessee, 1973, 42 F.C.C.2d 900 (1973) (approving the renewal, *en masse*, of 374 license renewal applications).

98. For example, in 1967, the Commission granted *en masse* the license renewals of 265 stations in Indiana, Kentucky and Tennessee over the objections of Commissioners Kenneth Cox and Nicholas Johnson, who found it unacceptable that 39 of these stations had devoted less than 1% of their weekly programming schedule to "public affairs" programming, and 12 had proposed less than 5% news programming. See *In re License Renewals in Indiana, Kentucky and Tennessee*, 10 Rad. Reg. 2d (P & F) 944, 944-46 (1967) (Cox and Johnson, Comm'rs, dissenting). Six years later, the Commission approved the renewal of 374 licenses *en masse* over the dissent of Commissioner Johnson, who took issue with the majority having "approv[ed] the behavior of yet another batch of stations, some good and some bad, without its ever enunciating any criteria by which to judge whether the licensees' performance serves the public interest." Renewals of Broadcast Licenses for Indiana, Kentucky, and Tennessee, 1974 342 F.C.C. 2d 900, 900 (Johnson, Comm'r, dissenting); see also Renewals of Broadcast Licenses for Arkansas, Louisiana & Mississippi, 42 F.C.C.2d 3, 3 (1973) (Johnson, Comm'r, dissenting).

99. See, e.g., Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 27 F.C.C.2d 580, 586-87 (1971) (Notice of Inquiry).

100. See e.g., Titanic Corp., 34 F.C.C.2d 501 (1972) (approving the license renewal of Duluth, Minnesota FM radio station WGGR despite station's adoption of an "all-music" format with regularly commercial advertising and little or no news or public affairs programming). In rare cases where the Commission penalized the station by, for example, renewing the license for a shortened term (e.g., 18 months instead of the standard 3-year license term), a station's failure to provide adequate public interest programming was usually coupled with serious violations of the Commission's technical or operational rules, which are not related to programming content. See, e.g., Application of WSER, Inc., Elkton, MD for Renewal of License, 29 F.C.C.2d 441 (1971) (granting short-term license renewal as penalty for FCC rule violations).

#### 4. The Codification of the Fairness Doctrine

In addition to issuing its 1960 Statement, the FCC in the early 1960s attempted to clarify the requirements of the fairness doctrine, which until that point had existed as a scattered series of statements in a number of decisions and orders spanning the previous three decades.<sup>101</sup> Congress codified the “standard of fairness” in its 1959 Amendments to the Communications Act of 1934, where it reminded broadcasters of their “obligation . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”<sup>102</sup>

As ultimately interpreted by the FCC, the fairness doctrine consisted of two interrelated obligations: First, broadcasters were required to cover vitally important controversies in their communities; and second, in doing so, broadcasters were required to provide a reasonable opportunity for the presentation of contrasting viewpoints.<sup>103</sup> The U.S. Supreme Court upheld the constitutionality of the fairness doctrine in 1969’s *Red Lion Broadcasting v. FCC*, where it emphasized the important role of broadcasters in promoting “an uninhibited marketplace of ideas.”<sup>104</sup>

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involving improperly licensed personnel, falsification of station operating logs, improper transmitter operating power and, as an incidental element, the broadcasting of “public affairs” programming accounting for only 1.11 percent of the station’s programming schedule).

101. For example, in 1929, the FRC declared that the public trustee doctrine required broadcasters to devote “ample play for the free and fair competition of opposing views . . . [on] all issues of importance to the public.” See *Great Lakes Broadcasting Co.*, 3 F.R.C. 32, 33 (1929), *aff’d in part and rev’d in part*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930). In 1949, the FCC again declared that the public trustee doctrine required broadcasters to cover issues of public importance, and it characterized as “paramount” the “right of the public to hear a reasonably balanced presentation of all responsible viewpoints” during such coverage. *Editorializing by Broadcasting Licensees*, 13 F.C.C. 1246, 1258 (1949).

102. 1959 U.S.C.C.A.N. at 2584; 47 U.S.C. § 315(a) (2000); see also Jerry V. Haines, *Political Broadcasting Amendments to the Communications Act of 1934*, in *THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS 1934-1996* 176 (Max D. Paglin, ed., 1999).

103. See *Columbia Broadcasting Sys., Inc., v. Democratic Nat’l Comm.*, 412 U.S. 94, 110-11 (1973); see also *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, para. 1-3 (1974) (Fairness Report), *recon. denied*, 58 F.C.C.2d 691 (1976), *aff’d sub nom.* *Nat’l Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977).

104. 396 U.S. 367, 390 (1969).

#### D. DEREGULATION AND THE *DE FACTO* DEATH OF THE PUBLIC TRUSTEE DOCTRINE

The 1980s ushered in a sea of change in the FCC's regulatory approach. The FCC was now led by political appointees steeped in the Chicago School's sanctification of free markets as the infallible purveyors of the public interest.<sup>105</sup> Abandoning any pretense of enforcing the public trustee doctrine, in the 1980s the FCC embarked on a "private marketplace" approach to broadcast regulation. The reoriented FCC viewed its role as regulating only when marketplace competition failed. Mark Fowler, the FCC Chairman appointed by President Reagan, made his deregulatory philosophy clear by declaring that "television is just another appliance, it's a toaster with pictures."<sup>106</sup> In a 1982 *Texas Law Review* article co-authored with Daniel Brenner, Fowler asserted that in the new media marketplace, "traditional broadcasting is just one of many information delivery systems."<sup>107</sup> Accordingly, Congress and the FCC needed to "focus on broadcasters not as fiduciaries of the public, as their regulators have historically perceived them, but as marketplace competitors."<sup>108</sup> Fowler argued that in prescribing "public interest" programming, the FCC violated both the First Amendment and Section 326 of the Communications Act (which forbids government censorship of broadcast licensees).<sup>109</sup> Speaking to a broadcast industry association early in his tenure as chairman, Fowler encouraged a marketplace approach to regulation:

I believe that we are at the end of regulating broadcasting under the trusteeship model . . . . Under the coming marketplace approach, the Commission should, so far as possible, defer to a broadcaster's judgment about how best to compete for viewers and listeners because this serves the public interest.<sup>110</sup>

Fowler's marketplace approach to regulation prevailed and the Commission eliminated many of its broadcast regulations,

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105. See e.g. George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON. 1 (1962).

106. Bernard D. Nossiter, *Licenses to Coin Money: The FCC's Big Giveaway Show*, 241 NATION 402 (1985) (quoting a radio speech delivered by Mark Fowler).

107. Fowler & Brenner, *supra* note 51, at 210.

108. *Id.*

109. *Id.* at 217-18.

110. Mark S. Fowler, *The Public's Interest*, Address at a Meeting of the International Radio and Television Society (Sept. 23, 1981), in 4 COMM. & L. 51, 52 (Winter 1982).

including the requirements to ascertain community programming needs, maintain program logs, air minimum amounts of public affairs programming and limit advertising time.<sup>111</sup> It announced that it would “no longer routinely review a licensee’s programming in the uncontested renewal context”<sup>112</sup> because the marketplace itself would correct the deficiencies of individual television stations in airing public interest programming.<sup>113</sup> The FCC eliminated many of its public trustee requirements for license renewals<sup>114</sup> and instituted a “postcard renewal” mechanism, whereby renewal applications are filed by means of a small postcard form which virtually guaranteed renewal without any meaningful review of a licensee’s performance.<sup>115</sup> It also increased the term of television licenses from three to five years<sup>116</sup> and increased the total number of stations one entity could own from twenty-one to thirty-six stations (twelve each in television, AM radio, and FM radio).<sup>117</sup> The FCC’s sweeping deregulation efforts also

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111. See TV Deregulation Order, *supra* note 12, at 1099; see also Deregulation of Radio, 84 F.C.C.2d 968, 977-90 (1981), *aff’d in part and remanded in part sub nom.* Office of Communications of the United Church of Christ v. FCC, 709 F.2d 1413 (D.C. Cir. 1983).

112. 98 F.C.C.2d at 1093. When a station’s license renewal application is contested by means of a Petition to Deny filed by, for example, an aggrieved citizen taking issue with the licensee’s failure to air programming responsive to local needs and issues, the Commission declared that the station “should be able to respond by pointing not only to its own programming that may have addressed such issue, but also to other television stations available in the community that could reasonably have been relied upon to address such issues.” *Id.* at 1094.

113. See *id.* at 1087 (“It appears . . . that the failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations. In this respect, market demand is determining the appropriate mix of each licensee’s programming.”).

114. See 47 U.S.C. 309(k) (2000). The FCC may also impose a forfeiture sanction (*i.e.*, a fine) for violations of specific rules. Forfeiture Proceedings, 62 Fed. Reg. 43,474, 43,475 (Aug. 14, 1997) (codified at 47 C.F.R. § 1.1-1.8004 (2001)). The FCC may also grant a shortened license renewal term as a quasi-probationary period for licensees with concerning public interest records. See Children’s Television Order, *supra* note 18, at 10,662-63.

115. See Revision of Applications for Renewals of License of Commercial and Non-Commercial AM, FM and Television Licensees, 49 Rad. Reg. 2d (P & F) 740, 741 (1981).

116. See Amendment to Section 73.1020 of the Commission’s rules: Station License Period, 88 F.C.C.2d 355, 355 (1981). Congress authorized the extension of license terms by means of the 1981 appropriations law, Omnibus Budget Reconciliation Act, Pub. L. No. 93-35, 95 Stat. 357 (1981). See *id.*

117. See Amendment of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 49 Fed. Reg. 31,877,

included its elimination of the fairness doctrine in 1987, reasoning that it contravened the First Amendment by chilling the speech of broadcasters.<sup>118</sup>

The evisceration of the public trustee doctrine continued into the 1990s. In 1993, the FCC ruled that licensees of “home shopping” broadcast television stations “are serving the public interest, convenience and necessity.”<sup>119</sup> The FCC made this decision despite a record showing that these stations devote virtually all of their airtime to product advertising and sales programming delivered by satellite uplink, with almost no airtime devoted to the airing of local public interest programming.<sup>120</sup>

On the heels of such sweeping deregulation, it is no wonder that the FCC’s broadcast license renewal system is a “farce.”<sup>121</sup> Absent serious technical, ownership, or criminal violations, license renewals today are essentially “rubber-stamped”

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para. 5 (August 9, 1984). The “seven station” rule had prohibited an individual from holding a cognizable ownership interest in seven television, seven AM radio and seven FM radio stations. The revised rule allowed for a total of 12 stations in each service. The FCC also shut down a proceeding initiated in 1977 to designate a common standard for AM Stereo broadcasting by refusing to specify a standard, claiming that “a reliance on market forces . . . is the most prudent course to follow.” See *Radio Broadcast Services, AM Stereophonic Broadcasting*, 47 Fed. Reg. 13,152, 13,155 (Mar. 29, 1982). The FCC proclaimed that its reliance on marketplace forces to determine a broadcast standard “is a bold, new step for the Commission to take.” *Id.* at 13,158. Marketplace forces never coalesced around one AM stereo standard, and AM stereo never became a viable medium. See Bruce C. Klopfenstein & David Sedman, *Technical Standards and the Marketplace: The Case of AM Stereo*, 34 J. BROADCASTING & ELEC. MEDIA 171, 181-85 (1990).

118. See *Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York*, 2 F.C.C.R. 5043, 5049-50 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff’d sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

119. Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 5321, 5328 para. 36 (1993) (Home Shopping Station Issues).

120. *Id.* In light of the Commission’s declaration, cable systems were required to treat home shopping channels the same as all other local television channels in carrying them on the basic cable subscription tier in compliance with the “must carry” provisions of section 4(g)(2) of 1992 Cable Act. *Id.* at para. 37.

121. Todd Shields, *Copps Criticizes Broadcast License Renewals*, WWW.MEDIaweek.com, 23 July 2003 (quoting FCC Commissioner Michael Copps). Copps also quipped, “It’s not called ‘postcard renewal’ for nothing.” Molly Peterson, *North Carolinians Air Complaints About FCC Media Rules*, CONGRESS DAILY, Oct. 27, 2003, at 6.

regardless of the applicant's record as a public trustee.<sup>122</sup> There has been no revocation of a television station license for failure to satisfy the public interest standards in a half century, and the Commission has renewed licenses of stations with absolutely no local news and public affairs programming.<sup>123</sup> Speaking of the FCC's deregulatory era, Reed Hundt, FCC Chairman under President Bill Clinton, declared that "[t]he FCC essentially dismantled the public interest standard in the early 1980s by conflating the 'public interest' with anything sponsors will support."<sup>124</sup>

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122. Commissioner Copps has been quoted as saying, "We've strayed too far from the rigorous licensing process that we used to have. Now, unless you're a wife beater or a child molester or something like that, you can pretty much count on getting your license by just filing some papers." Edmund Sanders, *FCC to Scrutinize License Renewals*, LOS ANGELES TIMES, Sept. 30, 2003, at C9; see also David Ranii, *Media Activists Feeling Feisty*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 4, 2003, at D1.

123. See Henry Geller, *Mass Communication Policy: Where We Are And Where We Should Be Going*, in DEMOCRACY AND THE MASS MEDIA 290, 304 (Judith Lichtenberg ed., 1990); see also Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 533 (1996) (noting that "the Commission for at least fifteen years has not taken away a single one of the approximately 1,500 Television licenses or 10,000 radio licenses in this country for failure to serve the public interest"). Although private citizens can review their local station's public inspection file to review their claims of public interest programming, the FCC does not require those claims to be specific. Andrew Schwartzman the President of the Media Access Project, says: "Nobody looks at these files because they are pointless and not specific enough to be able to make a public interest assessment." Sallie Hofmeister, *Is Broadcast TV Worth Saving?*, CHICAGO TRIB. (June 8, 2003), at 4. In its Comments submitted in the 2000 Public Interest Obligations Proceeding, People for Better TV quoted Helen Grieco, President of California NOW, in describing her experience reviewing two public inspection files:

Earlier this month I visited two stations, KTVU-TV and KRON-TV. While these stations provide a standard list of community issues, it is clear from the program reports to the FCC that this list isn't worth the paper it's printed on. Not only are their lists so generic as to be unhelpful, it's clear that they don't change from quarter to quarter (quite unlike the challenges in our very diverse community).

Comments of People for Better TV, Public Interest Obligations of TV Broadcast Licensees, MM Docket 99-360 at 17-18 (filed Mar. 27, 2000). People for Better TV also quotes other community leaders who attempted to review their local stations' public inspection files and were refused and turned away, one station in South Carolina recommending that the viewer file a Freedom of Information Act request. *Id.* at 27-28.

124. Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1094 (1996). In arguing for the promulgation and enforcement of clearer public interest requirements, Hundt reasoned:

[I]t is clear that Congress meant to require broadcasters to do more than what they would do anyway in order to compete in the video

## 1. Telecommunications Act of 1996

Media deregulation continued into the 1990s, reaching its apex in the 1996 Telecommunications Act (1996 Act), the most sweeping and complex reform of federal telecommunications law since 1934.<sup>125</sup> A central purpose of the 1996 Act was the elimination of many significant cross-market barriers that prohibited market players in one industry from providing service in other sectors.<sup>126</sup>

The Act further deregulated the broadcast industry, eliminating all restrictions on the total number of radio stations owned by one company or individual at one time<sup>127</sup> and ending the national television station ownership cap.<sup>128</sup> The Act raised the limit of common ownership of television stations to thirty-five percent of the U.S. population, up from twenty-five percent (set in 1985),<sup>129</sup> and directed the FCC to revisit the issue of the caps on the common ownership of television stations in one local market (known as the television duopoly

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marketplace for audience and for advertising revenue. There would be no need for the Commission to determine whether a licensee is serving the public interest if all that means is that the broadcaster is in business competing against other broadcasters and other providers of video programming . . . . Clearly, broadcasters are subject to distinct public interest obligations not imposed on other media.

*Id.* at 1090.

125. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. (2000)) (amending the Communications Act of 1934).

126. For example, subject to a showing of competition in the local telephone marketplace, the “Baby Bell” regional telephone companies were allowed to enter the long distance and cable marketplace, long distance companies could offer local service, and cable television companies – whose rates were deregulated – could offer telephone service.

127. See 47 U.S.C § 253(a) (establishes that no rule or regulation “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate commerce or intrastate telecommunications service”). Supporters of the elimination of the radio ownership cap, such as Senator Conrad Burns (R-Mont.), reasoned that with 11,000 radio stations and an average of 25 stations in each market, there was sufficient diversity and competition in American radio and that ownership limits were superfluous. Senator Burns declared that “[r]adio operators are ready to . . . operate without stifling ownership rules. They need total deregulation to allow them to compete in the new digital marketplace.” S.R. REP. NO. 104-23 at 65 (1995).

128. Telecommunications Act of 1996 § 202(c)(1)(A) (eliminates “restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in”).

129. *Id.* § 202(c)(1)(B) (increases “the national audience reach limitations for television stations to 35 percent”).

rule).<sup>130</sup> It also ordered the FCC to review all of the broadcast ownership rules biennially to determine “whether any of such rules are necessary in the public interest as a result of competition” and to “repeal or modify any regulation it determines to be no longer in the public interest.”<sup>131</sup>

Despite its deregulatory impetus, the 1996 Telecom Act encompassed a number of new directives justified, in part, by the public trustee doctrine. Recognizing that “television influences children’s perception of the values and behavior that are common and acceptable in society,” the 1996 Telecom Act incorporated the Communications Decency Act of 1996 (“CDA”), which required all new television sets with screens larger than 13 inches to be equipped with “V-chips” that allow parents and guardians to block programs with graphic sex or violence not suitable for children.<sup>132</sup> The Telecom Act also directed the FCC to develop a television ratings code in the event the broadcast industry failed to develop and adopt its own system.<sup>133</sup>

#### E. VERY LITTLE *QUID* FOR LOTS OF *QUO*: BROADCASTERS’ COMPLIANCE WITH THE SURVIVING PUBLIC INTEREST REQUIREMENTS

Today, television and radio broadcasters still enjoy the privileges of their status as public trustees, but there is little public service required of them. Several of the requirements imposed on television licensees, justified by the public trustee doctrine, include the duty to provide equal employment opportunities, to not discriminate on the basis of any federally protected status, and to incorporate into their station signals closed captioning for the deaf and a video description service for the blind.<sup>134</sup>

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130. *Id.* § 202(c)(2). In the Conference Report for the 1996 Telecom Act, Congress directed the FCC to “revise the rule as is necessary to ensure that broadcasters are able to compete fairly with other media providers while ensuring that the public receives information from a diversity of media voices.” 142 Cong. Rec. H 1145 (1996).

131. Telecommunications Act of 1996 § 202(h).

132. *Id.* §§ 551(a)(1), 551(c).

133. *Id.* § 551(b)(1).

134. See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, Report and Order, 60 F.C.C.2d 226, 229-30 (1976); FCC Broadcast Radio Services, 47 C.F.R. pt. 79 (2003); Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §303(u)); Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1997, Video Programming Accessibility, 11 F.C.C.R. 19,214 (1996) (Report).

### 1. Locally Responsive Programming

Perhaps the most important of the remaining public interest programming requirements is that broadcasters air “programming that responds to issues of concern to the community”<sup>135</sup> and maintain and make publicly available quarterly reports documenting such programming.<sup>136</sup> The FCC continues to recognize that such programming is important to maintaining an informed electorate and promoting deliberative democracy.

Despite the core importance of localism to the public trustee doctrine, recent studies demonstrate that commercial television broadcasters are airing little or no locally-oriented public interest programming. In a January 2000 two-week study of the programming schedules of 142 commercial broadcast stations across twenty-four television markets, Professor Philip M. Napoli concluded that broadcasters aired an average of only 1.1 hours of local public affairs programming per station, with an average overall total of only 6.52 hours of local public affairs programming per television market (*i.e.*, metropolitan area).<sup>137</sup> Of the 47,712 hours of broadcast programming on the surveyed stations, a mere 156.5 hours or 0.3% were devoted to local public affairs programming, and 1.06% was devoted to both local and non-local (regional or national) public affairs programming.<sup>138</sup> These figures contrasted sharply with the 4.6% of local public affairs programming broadcast between 1973 and 1979.<sup>139</sup> Napoli concluded that broadcasters devote very little broadcast time to public affairs programming and that marketplace incentives have failed to motivate the provision of such programming.<sup>140</sup>

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135. TV Deregulation Order, *supra* note 12, at 1077.

136. See FCC Broadcast Radio Services, 47 C.F.R. §§ 73.3526 (2004); FCC Broadcast Radio Services, 47 C.F.R. 73.3527 (2004).

137. PHILIP M. NAPOLI, MARKET CONDITIONS AND PUBLIC AFFAIRS PROGRAMMING: IMPLICATIONS FOR DIGITAL TELEVISION POLICY, REPORT PREPARED FOR THE BENTON FOUNDATION 9 (2000). Napoli applied the FCC’s own definition of “public affairs programming,” which includes: “programs dealing with local, state, regional, national or international issues or problems, documentaries, mini-documentaries, panels, roundtables and vignettes, and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings, congressional hearings and the like.” *Id.* at 4 (citation omitted).

138. *Id.* at 9.

139. TV Deregulation Order, *supra* note 12, at 1081.

140. Napoli, *supra* note 137, at 15. He writes:

[A]lthough larger markets provide a greater aggregate amount of

An October 2003 study of forty-five commercial television stations in seven media markets found that less than one-half of one percent of total programming was devoted to local public affairs. It concluded that “there is a near blackout of local public affairs [programming]” on commercial television.<sup>141</sup> By contrast, 14.4% of the surveyed stations’ programming consisted of home shopping and “infomercial” shows, 9.9% consisted of reality and game shows, and 7.9% consisted of sporting events.<sup>142</sup> These findings, and similar findings by other researchers,<sup>143</sup> contradict the fundamental justification for the FCC’s sweeping 1984 deregulation order which posited that broadcast licensees “will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives.”<sup>144</sup>

Some broadcasters have argued that their local news programming – some of which includes several hours each weekday in some larger markets like New York, Los Angeles and Washington, D.C. – encompasses significant local public affairs (and therefore, public interest) coverage. These claims are contradicted, however, by a 1999 study by the Project for Excellence in Journalism, which examined the local news

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local public affairs programming, individual stations do not respond to increasingly competitive market conditions by producing more public affairs programming. Nor, for that matter, do they respond by reducing the amount of local public affairs programming they provide . . . . Thus, the provision of local public affairs programming appears highly resistant to economic influences.

*Id.*

141. See ALL POLITICS IS LOCAL, *supra* note 13; see also Jennifer Harper, *Study Finds ‘Near Blackout’ of Local Public Issues on TV*, WASHINGTON TIMES, Oct. 28, 2003, at A10.

142. See ALL POLITICS IS LOCAL, *supra* note 13.

143. See, e.g., MEDIA ACCESS REPORT AND THE BENTON FOUNDATION, WHAT’S LOCAL ABOUT LOCAL BROADCASTING (April 1998), available at <http://www.benton.org/publibrary/television/whatslocal.html> (last visited October 14, 2004). The report revealed that in a two-week programming survey of five television markets (Chicago, IL, Phoenix, Ariz., Nashville, TN, Spokane, WA and Bangor, ME), the forty commercial broadcasters provided only 46.5 hours (out of 13,250 total programming hours), or 0.35% of the total programming schedule, of local public affairs programming, which it defined as “programs devoted to local issues of governance or civic affairs.” In three of the surveyed markets – Nashville, TN, Spokane, WA, and Bangor, ME – there was no local public affairs programming aired at all during the two-week survey. Thirty-five percent of the stations surveyed provided no local news programming whatsoever and 25% offered no local programming at all, offering only national network or satellite syndicated programming. See *id.*

144. TV Deregulation Order, *supra* note 12, at 1080.

offerings of the top-rated commercial broadcast stations in twenty cities over a two-week period.<sup>145</sup> That study found that most news stories are low quality, “superficial and reactive.”<sup>146</sup> In addition, it is now common practice for network affiliate stations to devote significant portions of their already scarce local news programs to the promotion of network programming, network entertainment celebrities, as well as the recent releases of affiliated enterprises, like motion picture studios.<sup>147</sup>

An important form of locally responsive programming is coverage of political campaigns and elections.<sup>148</sup> A 2002 study of 10,000 local news broadcasts on 122 stations in the top fifty markets concluded that less than half (44%) of local television news broadcasts devoted any coverage at all to political campaigns in the seven weeks leading up to the November 2002 elections.<sup>149</sup> Fifty-six percent of broadcasters provided no political campaign coverage whatsoever.<sup>150</sup> Of the forty-four percent of stations that aired any political campaign coverage, less than fifteen percent were about local campaigns, including races for the U.S. Congress.<sup>151</sup> The average political story lasted less than ninety seconds, and fewer than thirty percent of the campaign stories featured candidates speaking for themselves.<sup>152</sup> Of those, the average candidate sound bite was

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145. See Tom Rosenstiel et al., *Local TV News, What Works, What Flops and Why*, COLUMBIA JOURNALISM REVIEW, Jan/Feb 1999, available at <http://archives.cjr.org/year/99/1/pej/main.asp>.

146. *Id.*; see also Jim Upshaw, *Network Profit Motive Cheats Voters Out of Information*, THE OREGONIAN, December 17, 2000, at F1 (“Stressed by daily ratings data, many newsrooms tailor coverage more to the hour’s hot cultural buzz than to long-term social concerns”). Network news programs also have tailored much of their programming to sensationalistic, tabloid-like fare in order to draw more viewers and keep them tuned in throughout the entire broadcast. See *id.*

147. ROBERT MCCHESENEY, THE PROBLEM OF THE MEDIA 85-86 (Monthly Review Press) (2004) (citing multiple examples, like CBS affiliates’ regular “reports” on contestants on the “Survivor” reality program and ABC affiliates’ promotion of Disney’s 2001 motion picture “Pearl Harbor”).

148. See Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C.R. 21,633, 21,647 (1999) (Notice of Inquiry) (“The Commission has long interpreted the statutory public interest standard as imposing an obligation on broadcast licensees to air programming regarding political campaigns”).

149. THE LEAR CENTER LOCAL NEWS ARCHIVE, LOCAL TV NEWS COVERAGE OF THE 2002 GENERAL ELECTION 4 (2003), available at <http://www.localnewsarchive.org/pdf/localTV2002.pdf>.

150. *Id.*

151. *Id.* at 5.

152. *Id.* at 4.

only twelve seconds long.<sup>153</sup> In 2000, the Center for Media and Public Affairs documented that seventy-one percent of the network news election coverage focused not on the substance of the campaigns, but on the “horserace” elements (*i.e.*, which candidate was ahead in the polls and by how much).<sup>154</sup> It also reported that network evening news coverage of the presidential candidates dropped from forty-three seconds in 1968 to less than eight seconds in 2000.<sup>155</sup>

Of all political coverage, perhaps the most important to our democracy is coverage of the Democratic and Republican presidential nominating conventions. Here too, broadcasters have cut their coverage significantly. In 1972, ABC, CBS and NBC devoted 180 hours of total airtime to both party conventions.<sup>156</sup> In 2000, that figure plummeted to a scant twenty-two hours total.<sup>157</sup> In 2004, the party conventions were almost absent from free commercial television. Each of the three major broadcast networks aired only three hours of live programming for each of the conventions.<sup>158</sup> At 8:05 p.m. on July 26, 2004, the opening night of the Democratic National Convention, Al Gore, former Vice President and winner of the popular vote in the 2000 presidential race, addressed the delegates. Instead of Gore’s speech, network television viewers on the East Coast were treated to reruns of situation comedies on ABC and CBS, and reality programming on Fox and NBC.<sup>159</sup>

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153. *Id.*

154. *Campaign 2000 Final: How TV News Covered the General Election Campaign*, MEDIA MONITOR, Nov./Dec. 2000.

155. *Id.*

156. See Editorial, *Prime-time Politics*, BOSTON GLOBE, July 15, 2004, at A10

157. See *id.*

158. See Ostrow, *supra* note 16; see also Jim Rutenberg, *Network Anchors Hold Fast to Their Dwindling 15 Minutes*, N.Y. TIMES, July 26, 2004, at P1. Jim Lehrer, who anchored extensive convention coverage on behalf of the Public Broadcasting Service, addressed the following complaint to the lead anchors of the ABC, CBS and NBC evening news programs:

We’re about to elect a president...at a time when we have young people dying in our name overseas, we just had a report from the 9/11 commission which says we are not safe as a nation, and one of these two groups of people is going to run our country. The fact that you three networks decided it was not important enough to cover in prime time, the message that gives the American people is huge. As a citizen, it bothers me.

*Id.*

159. See, *e.g.*, TV Guide (Metropolitan New York City Edition), July 26, 2004.

CBS directed viewers interested in convention coverage to its website (www.cbs.com) while NBC directed viewers to its cable networks, MSNBC and CNBC.<sup>160</sup> Thus, television viewers without broadband Internet connections, or cable or satellite television subscriptions, had very little access to live convention coverage and analysis.

## 2. Political Broadcasting

Consistent with congressional directives, the FCC requires broadcasters to provide “equal opportunities” (also known as “equal time”) to candidates for public office if their opponents buy commercial time or are provided airtime by a station.<sup>161</sup> This rule received attention in the days leading to the presidential election, when television station group owner Sinclair Broadcast Group ordered all sixty-two of its stations, many located in what were considered swing states (*e.g.*, Florida and Ohio), to air “Stolen Honor: Wounds that Never Heal,” a documentary produced by a Bush family friend that was widely denounced as blatant anti-Kerry propaganda.<sup>162</sup> Sinclair reversed its decision, and aired what was considered a more balanced program, only after the company lost stock value and advertising as a result of negative attention.<sup>163</sup>

In addition to the equal opportunities rule, broadcasters also must provide candidates for federal elective office “reasonable access”<sup>164</sup> to advertising slots and charge candidates the “lowest unit charge of the station” for the “same class and amount of time for the same period” during the forty-five days preceding a primary election and sixty days preceding a general or special election.<sup>165</sup>

Although broadcasters do not air much locally-oriented political programming, they do air and profit enormously from the large quantity of political advertising. In the 2000 election, broadcasters earned \$600 million in political ad revenues from candidates and political parties. In 1996, that figure was \$400

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160. See Ostrow, *supra* note 16.

161. See 47 U.S.C. § 315(a) (2000); FCC Broadcast Radio Services, 47 C.F.R. §73.1941 (2004).

162. See Paul Farhi, *Sinclair Stations to Air Anti-Kerry Documentary*, WASH. POSTL, Oct. 11, 2004, at A07.

163. See Marjorie Heins and Adam H. Morse, *A Question of Fair Air Play*, LEGAL TIMES, Nov. 15, 2004, at 68.

164. See FCC Broadcast Radio Services, 47 C.F.R. § 73.1944 (2004).

165. See *id.* § 73.1942.

million.<sup>166</sup> A number of advocates for regulatory reform have argued in favor of having Congress require commercial television broadcasters to provide free blocks of prime time for use by federal political candidates to introduce themselves and explain their positions.<sup>167</sup> The broadcast lobby defeated those efforts by invoking First Amendment concerns.<sup>168</sup>

### 3. Children's Educational Programming

The Children's Television Act of 1990 and the Commission's implementing regulations require that broadcasters serve the "educational and informational needs of children."<sup>169</sup> They also require that advertising on programming directed at children be limited to 12 minutes per hour during weekdays and 10.5 minutes during weekends.<sup>170</sup> In addition, the FCC encourages, but does not require, television broadcasters to air three hours of educational children's programming per week.<sup>171</sup>

Although the three-hour weekly children's educational programming guideline is the only quantified public interest "expectation" imposed upon broadcasters, here too the

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166. Jeff Cohen, *T.V. Industry Wields Power in D.C.*, BALTIMORE SUN, May 4, 1997 at 6F. Former Senator and presidential candidate Bill Bradley bemoaned the expense of political advertising by saying: "Today's Senate campaigns function as collection agencies for broadcasters. You simply transfer money from contributors to television stations." *Id.*

167. See, e.g., Comments of Alliance for Better Campaigns, et al., Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-390, at 1 (filed Mar. 27, 2000) ("A free time requirement would ensure that citizens have access to the information they need to choose their representatives while also furthering the broadcasters' longstanding, but oft-neglected, obligation to serve the public interest").

168. See, e.g., Comments of the Nat'l Assoc. of Broadcasters, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-390, at 20-30 (filed Apr. 25, 2000).

169. See Children's Television Act of 1990, 47 U.S.C. § 103(a)(2) (1994); FCC Broadcast Radio Services, 47 C.F.R. § 73.671(2004). In enacting the Children's Television Act, Congress noted that "market forces have not worked to increase the educational and information programming available to children." S. REP. NO. 101-227, at 9 (1989).

170. See 47 U.S.C. § 102(b); FCC Broadcast Radio Services, 47 C.F.R. § 73.670.

171. See Children's Television Order, *supra* note 18, at 10,721; 47 C.F.R. § 73.671 (2004). The Commission also adopted a more precise definition of what would qualify as children's educational and informational programming: "any television programming that furthers the educational and informational needs of children 16 years of age and under in any respect, including children's intellectual/cognitive or social/emotional needs." *Id.* at 10,698

broadcasters have emphasized profit over service. After the three-hour educational programming guideline was introduced in 1996, the *Wall Street Journal* reported that advertising agencies, which are always looking for ways to target children, viewed it as a “marketing bonanza.”<sup>172</sup> In fact, children represent one of the most hotly contested television audiences, considering that industry studies show that children can influence upwards of \$500 billion per year in family purchases.<sup>173</sup>

Although the FCC’s new children’s educational programming guidelines were a boon for advertisers, they have resulted in little programming benefit for children. In fact, the *New York Times* reported in 1997 that instead of creating new educational children’s programming, many broadcasters simply reclassified some of their existing Saturday morning children’s entertainment fare as educational programming.<sup>174</sup>

#### 4. Obscenity and Indecency

Relying on Congressional mandates and the public trustee doctrine, the FCC’s rules prohibit broadcasters from airing “obscene” programming, and require that “indecent” programming be restricted to between 10:00 p.m. and 6:00 a.m.<sup>175</sup> Indecency is defined as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.”<sup>176</sup>

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172. Sally Goll Beatty, *White House Pact on TV for Kids May Prove a Marketing Bonanza*, WALL ST. J., Aug. 2, 1996, at B10.

173. See Kim Campbell & Kent Davis-Packard, *How Kids Get to Say, I Want It*, CHRISTIAN SCIENCE MONITOR, Sept. 18, 2000, at 1; see also Gary Ruskin, *Why They Whine: How Corporations Prey on Our Children*, MOTHERING MAGAZINE, Nov.-Dec. 1999 (quoting Mike Searles, president of Kids-R-Us children’s stores, characterizing the children’s advertising philosophy as “if you own this child at an early age, you can own this child for years to come”), available at [http://www.mediaawareness.ca/english/resources/articles/advertising\\_marketing/corp\\_pray\\_child.cfm](http://www.mediaawareness.ca/english/resources/articles/advertising_marketing/corp_pray_child.cfm).

174. Lawrie Mifflin, *Can You Spell ‘Compliance,’ Boys and Girls? Networks Go Along, but Just Barely, With New Federal Rules on Children’s Shows*, N. Y. TIMES, Sept. 11, 1997, at C13.

175. See FCC Broadcast Radio Services, 47 C.F.R. § 73.3999 (2004); 47 U.S.C. § 303 (2000); see also *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (upholding the Constitutionality of the indecency restrictions).

176. *Action for Children’s Television*, 58 F.3d at 657.

Here too, the FCC has assumed a strikingly permissive enforcement attitude, only reverting to a more aggressive regulatory stance when subjected to public scrutiny. In an October 2003 decision, the FCC's enforcement bureau determined that NBC did not violate the rule when Bono, the lead singer of the Irish rock band U2, uttered "f---ing brilliant" during an acceptance speech at the 2003 Golden Globe Awards. The FCC determined that Bono's use and NBC's uncensored broadcast of the word was not indecent because it was "adjectival" and did not describe a sexual function.<sup>177</sup> After enduring weeks of ridicule in the print media and on the Internet, the FCC reversed its decision and ruled that the expletive indeed was indecent.<sup>178</sup> No such reversal was possible in the matter of the exposure of singer Janet Jackson's right breast at the end of her televised Super Bowl 2003 half-time performance. Although Jackson claimed the exposure was inadvertent and attributable to a "wardrobe malfunction," the incident – on one of the most watched programs of the year – generated a firestorm of public protest, and provided elected officials and political candidates entering an election year with an irresistible opportunity to speak in support of family values and decency on the airwaves.<sup>179</sup> Indeed, on September 22, 2004, the FCC proposed that Viacom, Inc., pay \$550,000 in fines for the Super Bowl stunt.<sup>180</sup>

##### 5. The "Huge Giveaway" - The Transition to Digital Television

The most controversial aspect of the 1996 Telecommunications Act involved its provisions concerning the national transition to digital television (DTV).<sup>181</sup> Since 1941,

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177. See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859, 19,861 (2003) (Memorandum Opinion and Order); see also Frank Ahrens, *FCC Chairman Seeks Reversal on Profanity*, WASH. POST, Jan. 14, 2004, at E1.

178. See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4978 (2004) (Memorandum Opinion and Order).

179. See Bill McConnell, *Get Ready to Rumble*, BROADCASTING AND CABLE MAGAZINE, July 5, 2004, at 3; Bill McConnell, *Set for a Showdown*, BROADCASTING AND CABLE MAGAZINE, July 26, 2004, at 24.

180. Press Release, FCC, FCC Proposes Statutory Maximum Fine of \$550,000 Against Viacom-Owned CBS Affiliates for Apparent Violation of Indecency Rules During Broadcast of Super Bowl Halftime Show (Sept. 22, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-252384A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-252384A1.doc).

181. DTV has become synonymous with "Advanced Television" or ATV,

the nation's broadcasters have reached their viewers by means of analog signals formatted according to a standard developed by the National Television System Committee (NTSC).<sup>182</sup> In response to broadcast industry concerns that the existing analog television system was becoming obsolete, the FCC issued a Notice of Inquiry in 1987.<sup>183</sup> Upon execution of the inquiry, the FCC identified a new advanced broadcasting standard known as "High Definition Television" (HDTV). High Definition Television is also referred to as Enhanced Digital Television or "EDTV," and both fall under the category of digital television technology, or "DTV"<sup>184</sup>

The FCC touted DTV as a "quantum leap" in broadcasting technology.<sup>185</sup> Whereas traditional television has limited capacity or "bandwidth" and is prone to signal attenuation due to terrain and harsh weather, DTV uses a digital signal, consisting of binary code that has tremendous capacity.<sup>186</sup> In the same amount of radio frequency spectrum allotted to one standard analog broadcast channel – 6 MHz – DTV can transmit a picture with resolution quality rivaling 35-millimeter film and sound quality equivalent to digital audio formats, such as compact discs and Internet mp3 song files.<sup>187</sup> Digital Television is also able to multicast and datacast within the same 6 MHz television "channel." Using compression technology, a broadcaster is able to multicast several "subchannels" along with its main station signal, with quality

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which initially referred to a number of television technologies, analog and digital, designed to take the place of analog television. For an excellent overview of the terminology and technology involved in the DTV transition, see Daniel P. Graham, *Public Interest Regulation in the Digital Age*, 1 COMM.LAW CONSP. 97, 99-100 (2003).

182. See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket No. 87-268, 2 F.C.C.R. 5125, para. 5 (1987) (Notice of Inquiry).

183. See *id.* at ¶ 2; see also FCC ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE, ADVISORY COMMITTEE FINAL REPORT AND RECOMMENDATION 2-3 (Nov. 28, 1995).

184. See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 3 F.C.C.R. 6520, 6520 n.1 (1988); Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C.R. 21,633, 21,634 para. 3 (1999).

185. Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 10 F.C.C.R. 10,540, 10,542 para. 11 (1995).

186. See Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, 6 F.C.C.R. 7024 (1991).

187. See *id.* at 7024 para. 1, n.1.

superior to that of traditional broadcasting.<sup>188</sup> For example, a broadcaster could simultaneously air a syndicated talk show on its main station channel and a children's cartoon program, an old movie, an "infomercial," and a stream of CD-quality music on four of its subchannels.<sup>189</sup>

Because the language of DTV is the same as that of personal computers and computing devices, DTV will allow the integration of new services. In addition to airing a main station signal and individual "subchannels," the DTV spectrum broadcasts data ("datacast"), such as information about advertised products, Internet links, sports and weather information, and stock market information.<sup>190</sup> The FCC characterized this capacity in its 1996 report:

Utilizing [HDTV], broadcasters can transmit three, four, five, or more such program streams simultaneously. [HDTV] allows for the broadcast of literally dozens of CD-quality audio signals. It permits the rapid delivery of large amounts of data; an entire edition of the local daily newspaper could be sent, for example, in less than two seconds. Other material, whether it be telephone directories, sports information, stock market updates, information requested concerning certain products featured in commercials, computer software distribution, interactive education materials, or virtually any other type of information access can also be provided. It allows broadcasters to send video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another.<sup>191</sup>

At the beginning of its DTV proceeding, the FCC proposed that broadcasters "be given the opportunity to implement [HDTV]"<sup>192</sup> in order to offer Americans "programs with

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188. See Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C. 21,633, 21,634 para. 3 (1999) ("DTV holds the promise of reinventing free, over-the-air television by offering broadcasters new and valuable business opportunities and providing consumers new and valuable services").

189. See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 11 F.C.C.R. 17,771, 17,774-75 para. 5 (1996).

190. *Id.*; see also Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 12 F.C.C.R. 12,809, 12,820-21 para. 29 (1997) (explaining that DTV broadcasters are able to offer non-broadcast "ancillary and supplementary" services by means of excess capacity in their DTV channel, such as pay-per-view programming, computer software distribution services, private data transmissions teletext services, "and any other services that do not interfere with the required free service"); NICHOLAS NEGROPONTE, BEING DIGITAL 52-53 (1995).

191. Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 11 F.C.C.R. 17,771, 17,774-75 para. 5 (1996).

192. Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 7 F.C.C.R. 3340, para. 4 (1992).

significantly improved video and audio quality.”<sup>193</sup> This requirement would have limited the ability of broadcasters to exploit the multicast and datacasting capabilities of their new digital channels. In response to industry lobbying, the FCC later withdrew the requirement for a minimum amount of high definition programming. Instead, the FCC declared that broadcasters would be required to air at least one free, over-the-air signal with “resolution . . . comparable to or better than that of today’s service.”<sup>194</sup> The FCC reasoned that allowing broadcasters the flexibility to multi- and datacast and offer priced ancillary and supplementary services would provide broadcasters “the opportunity to develop additional revenue streams from innovative digital services.”<sup>195</sup> The FCC concluded that this revenue “will help broadcast television . . . remain a strong presence in the video programming market that will, in turn, help support a free programming service.”<sup>196</sup> The concern was less about offering “pretty pictures” and more about encouraging broadcasters to optimize all technical capabilities of the new digital spectrum.<sup>197</sup> The FCC reached the following conclusion:

We do not know what consumers may demand and support. Since broadcasters have incentives to discover the preferences of consumers and adapt their service offerings accordingly, we believe it is prudent to leave the choice up to broadcasters so that they may respond to the demands of the marketplace. A requirement now could stifle innovation as it would rest on *a priori* assumptions as to what services viewers would prefer. Broadcasters can best stimulate consumers’ interest in digital services if able to offer the most attractive programs, whatever form those may take.... Further, allowing broadcasters flexibility as to the services they provide will allow them to offer a mix of services that can promote increased consumer acceptance of digital television, which, in turn, will increase broadcasters’ profits, which, in turn, will increase incentives to proceed faster with the transition.<sup>198</sup>

In exchange for greater freedom in the use of their new digital channels, the 1996 Act requires broadcasters to pay the federal government a fee of five percent of gross revenues

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193. Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 3 F.C.C.R. 6520, para. 1 (1988).

194. Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 12 F.C.C.R. 12,809, 12,820 para. 28 (1997).

195. *Id.* at para. 29.

196. *Id.*

197. *See* 12 F.C.C.R. at 12,826 para. 42.

198. *Id.*

received from their provision of any ancillary and supplementary services.<sup>199</sup>

#### 6. The High Price of “Free” Over-the-Air Television

Unlike the adoptions of the color image and stereo sound standards, which did not render older television sets obsolete, the transition to DTV will require all viewers to either purchase new digital television sets or a “set-top converter box.”<sup>200</sup> To facilitate the transition of American broadcasting from analog to digital format, the 1996 Telecom Act provided broadcasters with an additional 6 MHz “channel” of spectrum to use for DTV service. These new digital channels are “located” in a higher frequency band that allows broadcasters to transmit significantly more information in a 6 MHz-wide channel.

Television broadcasters were required to begin simulcasting fifty percent of the video programming on their standard analog signal on their DTV channel by April 1, 2003, seventy-five percent by April 1, 2004, and one hundred percent by April 1, 2005.<sup>201</sup> “Simulcasting” describes “the broadcast of one program over two channels to the same area at the same time.”<sup>202</sup>

The simulcasting requirements during the transition period were intended to encourage viewers to adopt DTV technology and phase out viewers’ dependence on the standard analog channel for programming not yet available on the DTV channel.<sup>203</sup> December 31, 2006 is currently the deadline for full DTV transition and termination of NTSC analog broadcasting.<sup>204</sup> However, Congress provided that the FCC could extend the deadline for individual stations.<sup>205</sup> To receive an extension, eighty-five percent of a station’s viewers must be unable to receive its digital signal either by means of a digital television set or a converter box or through a cable or satellite

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199. See 47 U.S.C. § 336(e) (2000); Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, 14 F.C.C.R. 3259, 3267 para. 20 (1998).

200. See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 5 F.C.C.R. 5627, para. 8, n.1 (1990).

201. See 47 C.F.R. §§ 73.624(f)(i)-(iii) (2004).

202. 5 F.C.C.R. at para. 8, n. 1.

203. See *id.*

204. See 47 U.S.C. § 309(j)(14)(A) (2000).

205. See *id.* § 309(j)(14)(B).

television provider.<sup>206</sup> On December 31, 2006, or when a broadcaster's digital signal has achieved eighty-five percent market penetration, whichever is later, broadcasters must surrender their former NTSC channels to the FCC, and the FCC will then auction the spectrum for non broadcast uses.<sup>207</sup> When the surrender of NTSC channels occur, it is possible that as many as fifteen percent of viewers will not have access to a DTV television, a set-top converter or a cable or DBS subscription. Therefore, they will have no access to "free" television broadcasts.

### 7. The Public Trustee Doctrine in the Digital Landscape

When the FCC initiated the transition from analog to digital television, it emphasized that "although many aspects of the business and technology of broadcasting may be different, broadcasters will remain trustees of the public's airwaves."<sup>208</sup> The FCC clarified that it limited the eligibility for DTV channels to existing broadcasters *because* broadcasters would continue to have an "obligation to serve the public interest."<sup>209</sup> It declared: "[w]e remain committed to enforcing our statutory mandate to ensure that broadcasters serve the public interest."<sup>210</sup>

Congress's decision to grant the additional 6 MHz channel to broadcasters for digital exploitation was hotly contested.<sup>211</sup> Many commentators insisted broadcasters should have paid fair market value for the new channels.<sup>212</sup> For example,

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206. *See id.* § 309(j)(14)(B).

207. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, para. 66 (1992) (stating "[t]he more swiftly ATV receiver penetration increases, the more rapidly we will be able to reclaim one 6 MHz channel").

208. Advanced Television Systems and Their Impact Upon the Existing Broadcast Service, 12 F.C.C.R. 12,809, 12,829-30 paras. 49, 50 (1997) ("As we authorize digital service . . . broadcaster licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast licensees. Broadcasters and the public are also on notice that the Commission may adopt new public interest rules for digital television.").

209. Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 10 F.C.C.R. 10,540, 10,545-56 para. 33 (1995).

210. *Id.* at 10,546 para. 34.

211. *See* Michael Calabrese, *The Great Airwaves Robbery*, New America Foundation Public Assets Program, Spectrum Series no. 2, Nov. 2001, p. 1; Taylor, *supra* note 21, at 20; Joel Brinkley, *FCC Approves 2d Channels for High-Definition Television*, N.Y. TIMES, Apr. 4, 1997, at D1; *see* Farhi, *supra* note 22, at F1.

212. *See* Neil Hickey, *What's at Stake in the Spectrum War? Only Billions*

conservative commentator William Safire, who is known for his defense of the free market, called Congress's grant of the new spectrum to television broadcasters for free, without any auction proceeding and without any additional public interest commitments from broadcasters, a "rip-off on a scale vaster than dreamed of by yesteryear's robber barons."<sup>213</sup> Congress required the FCC to auction licenses for a number of new digital, nonbroadcasting services, such as cellular and paging services, which generated \$20 billion dollars for the United States Treasury.<sup>214</sup>

Media and academic commentators estimated the value of the digital spectrum "handout" at between \$12.5 billion and \$365 billion.<sup>215</sup> Some commentators argued that giving broadcasters an additional 6 MHz for digital broadcasting was excessive<sup>216</sup> because a 6 MHz digital "channel" offers many times the bandwidth of a 6 MHz analog channel. Digital compression technology creates a broadband pipeline capable of

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*of Dollars and the Future of Television*, 35 COLUM. JOURNALISM REV. 39, 40 (1996). Another commentator called it the "lobbying coup of the decade." Taylor, *supra* note 21, at 20.

213. Taylor, *supra* note 21, at 20.

214. See Graham, *supra* note 181, at 97, 112 (citing Press Release, Federal Communications Commission, FCC Hits \$20 Billion Mark in Total Auction Revenues, *at* [http://ftp.fcc.gov/Bureaus/Wireless/News\\_Releases/nrwl6015.txt](http://ftp.fcc.gov/Bureaus/Wireless/News_Releases/nrwl6015.txt)).

215. See *The Third of a Trillion Giveaway*, CENTER FOR DIGITAL DEMOCRACY, Sept. 18, 2001, *at* [www.democraticmedia.org](http://www.democraticmedia.org) (last visited Nov. 27, 2004); Paul Farhi, *Broadcast Executives Say Dole Vented Anger at Them*, WASH. POST, Jan. 12, 1996, at F1; Romesh Ratnesar, *A Bandwidth Bonanza: How the Networks Plan to Make Even More from a \$70 Billion Handout*, TIME, Sept. 1, 1997, at 60; Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1728 (1997); Jacobson & Vaida, *supra* note 22, at 2560; Taylor, *supra* note 21, at 20.

216. See *e.g.*, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 F.C.C.R. 12,809, 12,813-14 para. 10 (1997) (citing comments by the Media Access Project, arguing the FCC should only allocate broadcasters enough spectrum to broadcast one high definition digital television signal which is considerably less than 6 MHz of spectrum allocated); see also Graham, *supra* note 181, at 111 (quoting the Office of Communication, Inc. of the United Church of Christ et. al.).

Now broadcasters want to build a new and improved business on more rent-free property while still holding their original allocation and not committing to the date they are going to give any of it back. This is a great deal for broadcasters. But is it a good deal for the public who will have to reinvest billions of dollars in television receivers in order to gain access to the new business, Advanced Television?

*Id.*

transmitting multiple, separate television signals and services on a 6 MHz channel.<sup>217</sup> Moreover, broadcasters are not required to utilize the new digital spectrum to transmit high definition signals. Instead, Congress and the FCC allowed broadcasters to use the spectrum according to marketplace demands, thereby allowing broadcasters to generate revenue from a spectrum that would otherwise be used to broadcast DTV.<sup>218</sup>

Broadcasters called the “rip off” argument a “myth.”<sup>219</sup> They argued because their analog channels would be returned after the digital transition period, the additional 6 MHz of spectrum was a “loan.”<sup>220</sup> Belo, an owner of 18 major market television stations across the country, argued the DTV transition imposes “immense financial burdens”<sup>221</sup> on broadcasters, because after the transition broadcasters “will be in the same position they were prior to the transition – they each will have one 6 MHz television channel.”<sup>222</sup> This industry argument ignores the rather obvious fact that comparing 6 MHz of digital spectrum with 6 MHz of analog spectrum is like comparing 6 square miles of Upstate New York farmland with 6 square miles of Midtown Manhattan real estate. The latter is significantly more lucrative and can accommodate many more profitable uses than the former. Broadcasters’ complaints about the financial burden of acquiring and maintaining new digital transmission equipment, estimated at between \$1 million to \$30 million per station,<sup>223</sup> overlook the significant profit-making benefits they will reap from the new digital capabilities of multicasting, datacasting and subscription services.

By codifying the DTV transition plan in the 1996 Telecom

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217. *Id.*

218. See Advanced Television Systems and Their Impact Upon the Existing Broadcast Service, 12 F.C.C.R. 12,809, 12,821 para. 29 (1997).

219. Comments of Belo, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, at iv (filed Mar. 27, 2000).

220. *Id.* at 18-19 (reasoning that “the second channels . . . are merely being loaned to broadcasters so that they may simulcast analog and digital programming while viewers upgrade to digital television sets. Without this approach, stations would be forced to switch to digital transmission overnight, leaving millions of viewers with dark and silent television sets the next day”).

221. *Id.* at iv (estimating the total cost of the DTV conversion at \$17 billion).

222. *Id.* at 19.

223. See Graham, *supra* note 181, at 113 (citing JOEL BRINKLEY, DEFINING TELEVISION: THE BATTLE FOR THE FUTURE OF TELEVISION 204 (1997)).

Act, Congress affirmed that broadcasters remain public trustees after the transition to DTV: “Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience and necessity.”<sup>224</sup> Accordingly, the FCC declared that “[b]roadcasters and the public are also on notice that the Commission may adopt new public interest rules for digital television.”<sup>225</sup>

#### 8. The Gore Commission

In 1997, conscious of public discord concerning the grant of digital spectrum to broadcasters, President Bill Clinton established the Presidents’ Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters,<sup>226</sup> popularly known as the “Gore Commission” because Vice President Gore supervised it.<sup>227</sup> The twenty-two-member commission represented “the commercial and noncommercial broadcasting industry, computer industries, producers, academic institutions, public interest organizations, and the advertising community.”<sup>228</sup> Its final report recognized that the conversion to digital television “invites a broad reassessment of established programming practices, competitive strategies, and regulatory requirements, including the public interest obligations, that have always been considered fundamental to broadcast television in this country.”<sup>229</sup> The Gore Commission called the public interest standard the “golden thread that has run through more than seven decades of broadcasting,”<sup>230</sup> and made ten recommendations for additional public interest obligations digital broadcasters should assume in exchange for

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224. 47 U.S.C. § 336(d) (2000) (“In the Commission’s review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest.”).

225. Advanced Television Systems and Their Impact Upon the Existing Broadcast Service, 12 F.C.C.R. 12,809, 12,830 para. 50 (1997).

226. 62 Fed. Reg. 12,065, 12,065 (Mar. 13, 1997).

227. *Id.*

228. *Id.*

229. FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCAST FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 3 (Dec. 18, 1998), available at [www.ntia.doc.gov/pubintadvcom/piacreport.pdf](http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf).

230. *Id.* at 2.

the benefit of the new digital channel. Most notable of these recommendations were mandatory public affairs programming requirements,<sup>231</sup> free airtime for political candidates to present and defend their positions,<sup>232</sup> the donation of datacasting services (such as voting and public hearings information, public safety and health announcements, and educational and local public affairs programming) to community and educational institutions,<sup>233</sup> and the creation of a public broadcasting “trust fund” to ensure the development of quality digital public programming, while providing permanent funding that would remove public broadcasting out of the political arena.<sup>234</sup>

#### 9. The FCC’s Notice of Inquiry on DTV Public Interest Obligations

On June 3, 1999, “People for Better TV,” a broad coalition of public interest organizations, medical and educational associations, and other groups filed a petition for rulemaking and notice of inquiry with the FCC.<sup>235</sup> The coalition asserted that “the advent of digital broadcasting requires the Commission to consider public interest obligations anew, and clarify whether existing guidelines apply.”<sup>236</sup> It urged the FCC to open a proceeding to “articulate a digital public interest standard that matches in scope and effectiveness the magnificent capability of the digital television technology . . . .”<sup>237</sup> Specifically, it requested that the Commission consider adopting all of the Gore Commission’s recommendations “as a starting point”<sup>238</sup> and that it reinstitute the public interest programming requirements enumerated in the 1960 Programming Policy Statement.<sup>239</sup>

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231. *Id.* at 48.

232. *Id.* at 59 (proposing that “the television broadcasting industry to provide 5 minutes each night for candidate-centered discourse in the 30 days before an election . . . . Stations would choose the candidate and races, Federal, State and local, in the election that deserved more attention”).

233. *Id.* at 52-54.

234. FINAL REPORT, *supra* note 229, at 50.

235. Petition by People for Better TV for Rulemaking and Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (filed June 3, 1999).

236. *Id.* at 7.

237. *Id.* at 22.

238. *Id.* at 17.

239. *Id.* at 17-18. It also requested that the Commission place special emphasis on services to the disabled and non-English speakers, public access opportunities to multicast subchannels, privacy protection and rate regulation

The FCC released a notice of inquiry on December 20, 1999.<sup>240</sup> Several months later, then-FCC Chairman William Kennard received a joint letter from Senators Byrd, Brownback, Lieberman, and McCain expressing their concern about the content of contemporary television broadcasting and urging the Commission to demand higher programming standards from broadcast licensees:<sup>241</sup>

[T]he time has come for the Commission to engage in a broad reexamination of the public interest standard, and the license renewal process, to determine if in fact the broadcasters are serving 'the public interest, convenience, and necessity,' and whether the standard of service we expect of broadcasters should be clarified.<sup>242</sup>

In addition to the Senators' letter, the FCC received comments from a variety of broadcasters and individuals and public sector organizations. Predictably, many of the public interest advocates agreed with, and added to, the initial demands presented by People for Better TV in its initial petition,<sup>243</sup> while the broadcast commentators argued

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for pay-per-view programming. *Id.* at 20.

240. See Public Interest Obligations of TV Broadcast Licensees, 15 F.C.C.R. 22,946 (1999) (Notice of Inquiry).

241. BILL KENNARD, REPORT TO CONGRESS ON THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS AS THEY TRANSITION TO DIGITAL TELEVISION (2001) (quoting a Letter from Hon. John McCain, Chairman (R-Ariz.), Senate Commerce Committee; Hon. Joe Lieberman (D-Conn.), Ranking Minority Member, Senate Governmental Affairs Committee; Hon. Robert C. Byrd (D-W. Va.), Ranking Minority Member, Senate Appropriations Committee; Hon. Sam Brownback (D-Kan.), Member, Senate Commerce Committee to William E. Kennard, Chairman, FCC (May 25, 2000) [hereinafter McCain letter]).

242. KENNARD, *supra* note 241. (quoting the McCain letter). Referring to the broadcast industry's continuing resistance to concrete and expanded public interest requirements, the Senators wrote:

The denials and excuses we routinely hear today from the industry raise serious questions about the commitment of many broadcasters to serving the public interest, as they are obligated to do by law. We must remember that broadcasters are trustees of a public resource worth billions of dollars, which they get access to for free, in return for a pledge to act as responsible stewards of the airwaves. The license they receive is a legally-binding contract, an especially important one given television's immense influence on our children and our culture. And much to our dismay, the evidence presented in this letter strongly suggests that many licensees, along with their network parents, are breaching this public trust, and harming rather than serving the public interest.

*Id.*

243. See, e.g., Comments of the Benton Found., Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (filed Mar. 27, 2000) (requesting that the FCC adopt clearer public interest requirements based on

vehemently against any change to the existing public interest requirements.<sup>244</sup> The National Association of Broadcasters (NAB), the largest national trade association for broadcasters, argued that the imposition of any new public interest requirements would be “premature” given that digital broadcasting is still in its infancy and has not had the time to develop.<sup>245</sup>

Four years later, the Notice of Inquiry proceeding is still pending. Its only tangible byproduct was a January 18, 2001 Report to Congress from then-FCC Chairman Bill Kennard “on the Public Interest Obligations of Television Broadcasters as They Transition to Digital Television.”<sup>246</sup> This unenforceable Report “attempts to distill a number of broad principles for broadcasters that, if followed, would go a long way toward

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a “Viewers’ Bill of Rights,” demanding more localism in programming, treatment of public affairs and children’s educational television, and balanced coverage of controversial issues in the community); Comments of The Alliance for Better Campaigns et al., Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (filed Mar. 27, 2000) (requesting that FCC require broadcasters to provide “more in-depth discussion of [political] campaign issues by providing free air time for candidates on their stations”); Reply Comments of United Church of Christ et al., Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (filed Apr. 25, 2000) (requesting adoption of “quantifiable public interest obligations for digital licensees”); Comments of Children Now, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (filed Mar. 24, 2000) (arguing, *inter alia*, for the modification of the current requirement for three hours of educational and informational children’s television by making the quantitative minimum a proportion of all programming aired on all multicast streams).

244. See Comments of CBS Corp., *supra* note 24 (“Although these proposals are advanced in the name of the ‘public interest,’ in many cases they are little more than recycled versions of the regulatory policies of another era, properly abandoned by the Commission as unnecessary years ago.”); Comments of Belo, *supra* note 219 (insisting that the FCC has no authority to promulgate additional public interest programming requirements and that any additional guidelines should be developed by broadcasters themselves and applied voluntarily).

245. Comments of Nat’l Assoc. of Broadcasters, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, at 3 (filed Mar. 27, 2000) (“Rather than prematurely adopting such rules, the Commission should at this time be more concerned with insuring a successful and expeditious digital transition.”) And Belo, a large station group owner, argued that the transition itself would provide adequate compensation to the American public: “When the DTV transition is complete, the public will receive very substantial benefits in the form of free over-the-air services with greatly improved signal quality (e.g., HDTV) and expanded programming choices (through SDTV multiplexing). In other words, the transition to DTV, in and of itself, serves the public interest.” Comments of Belo, *supra* note 219, at 19.

246. See KENNARD, *supra* note 241.

serving the public interest.”<sup>247</sup> The Report’s “principles” harkened back to the pre-1980s public interest requirements. They include broadcasters’ responsibility “to air programming responsive to the issues of concern to their communities,”<sup>248</sup> their interest in “air[ing] local public affairs programming daily in addition to news coverage,”<sup>249</sup> cognizant of the distinction between public affairs programming and news programming,<sup>250</sup> and the importance of “us[ing] good journalistic practices in covering local issues of public concern so as to present conflicting viewpoints and give persons attacked a reasonable right of reply.”<sup>251</sup>

## II. WHY THE BROADCAST PUBLIC TRUSTEE DOCTRINE FAILED

### A. FIRST AMENDMENT CONTRADICTIONS

Reflecting on the FCC’s tortuous history of interpreting and enforcing the 1934 Communications Act’s “public interest” standard, former FCC Commissioner Ervin Duggan remarked that “successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it.”<sup>252</sup> Critics of the standard have called it “vague to the point of vacuousness, providing neither guidance nor constraint on the regulatory agency’s action.”<sup>253</sup>

Although the FCC’s seven decades-old struggle to define the public interest standard can be attributed in part to the shifts in political winds and regulatory philosophies, as well as

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247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* (implicitly citing 47 C.F.R. § 73.1810(d)(1)(iii) (repealed 1984) (defining “news programming” as “dealing with current local, national and international events, including weather and stock reports, and commentary, analysis, or sports news when they are an integral part of a news program.”)).

251. *Id.*

252. Ervin S. Duggan, *Congressman Tauzin’s interesting idea*, BROADCASTING & CABLE, Oct. 20, 1997, at S18; see also Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 607 (1998) (“If the history of this elusive regulatory standard makes anything clear, it is the fact that just what constitutes service in the ‘public interest’ has encompassed different things at different times.”).

253. GLEN O. ROBINSON, *Title I, The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 at 3, 14 (Max D. Paglin ed., 1989).

the vagueness of its legislative origins, the fundamental cause of the FCC's difficulty and the doctrine's failure is its inherent tension with the First Amendment and the anti-censorship provision of the Communications Act of 1934. Although the Communications Act delegates to the FCC the authority to issue licenses for use of public spectrum "consistent with the public interest,"<sup>254</sup> it also has a strongly worded censorship prohibition:

Nothing in this [Act] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.<sup>255</sup>

In 1973, the Supreme Court acknowledged that Congress essentially required the FCC to "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act," while ensuring that broadcasters operate in the "public interest."<sup>256</sup>

At its essence then, this tension is one between two conflicting interpretations of the First Amendment. On the one hand, there is the perspective that the First Amendment is the notion of the "free marketplace of ideas" that must be protected from all government restriction and influence. In his dissent in the 1919 *Abrams v. United States* case,<sup>257</sup> Justice Oliver Wendell Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>258</sup> In other words, the unencumbered exchange of conflicting ideas comes closest to yielding truth and the common good.

A related but somewhat conflicting free speech theory is associated with James Madison, one of the Constitution's principal authors and a champion of the Bill of Rights. The Madisonian view of the First Amendment values free speech as a means to civil enfranchisement, political and economic equality, and democratic empowerment.<sup>259</sup> To Madison, the First Amendment was at the core of American democracy. It

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254. 47 U.S.C. § 302a(a) (2000).

255. § 326 (2000).

256. See *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973).

257. 250 U.S. 616 (1919).

258. *Id.* at 630 (Holmes, J., dissenting).

259. See THE FEDERALIST Nos. 10, 46 (James Madison).

was intended to create and perpetuate an educated, informed and empowered electorate and a responsive democratic government.<sup>260</sup>

In contrast to the Holmesian view, the Madisonian perspective was not principally interested in keeping the “marketplace of ideas” free from government interference, but was concerned with ensuring that all voices were present and heard in the marketplace.<sup>261</sup> Justice Louis Brandeis expressed a Madisonian view of the First Amendment in his opinion in *Whitney v. California*,<sup>262</sup> where he posited “the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”<sup>263</sup>

In addition, as Professor Cass Sunstein has observed, the Holmesian “free marketplace of ideas” perspective presumes that all viable ideas have access to the marketplace and to public consideration.<sup>264</sup> The Madisonian perspective does not so presume, and instead posits that government has a role in facilitating the availability of public fora in which individuals can meet to share their ideas in matters of democratic concern.

Madison’s conception of the First Amendment lies at the heart of the broadcast public trustee doctrine. The Gore Commission characterized the purpose of American broadcast regulation as realizing Madison’s ideal:

From the beginning, broadcast regulation in the public interest has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide. It has sought to cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.<sup>265</sup>

And FCC Commissioners continue to justify their actions by characterizing “free over-the-air television” as having a

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260. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, at xvii (1995).

261. *Id.* See also Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1132-37 (1996) (discussing the conflict between the Madisonian and Holmesian perspectives).

262. 274 U.S. 357 (1927) (Brandeis, J., concurring).

263. *Id.* at 375. For an excellent discussion of Justice Brandeis’s free speech views, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

264. See Sunstein, *supra* note 260.

265. See CHARTING THE DIGITAL BROADCASTING FUTURE, *supra* note 7, at 21.

“special and critical role in our communities and in the nation’s marketplace of ideas.”<sup>266</sup>

The Supreme Court has addressed the tension between the free speech rights of broadcasters and the interests of audience members and the government in a number of cases. In *FCC v. Pottsville Broadcasting Co.*, the Supreme Court called the public interest standard the “touchstone for the exercise of the Commission’s authority.”<sup>267</sup> While recognizing the standard as necessarily broad and imprecise, the Court characterized it “as concrete as the complicated factors for judgment in such a field of delegated authority permit”<sup>268</sup> and as “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”<sup>269</sup>

One month later, in *FCC v. Sanders Bros. Radio Station*,<sup>270</sup> the Supreme Court reaffirmed that “no person is to have anything in the nature of a property right as a result of the granting of a license.”<sup>271</sup> In holding that economic injury to an existing station is not an element the FCC must consider in evaluating an application for a new station, it declared that “it is not the purpose of the Act to protect a licensee against competition but to protect the public.”<sup>272</sup> The Court warned, however, that “[t]he Commission is given no supervisory control of the programs, of business management or of policy.”<sup>273</sup>

The Supreme Court addressed the first broad attack on the constitutionality of the public trustee doctrine in *National Broadcasting Co. v. United States*,<sup>274</sup> in which broadcasters challenged the constitutionality of the FCC’s “chain broadcasting” regulations, which had prohibited certain

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266. Reallocation and Service Rules for the 698-746 MHz Spectrum Band, 17 F.C.C.R. 1022, 1124 (2002) (Report and Order) (Separate Statement of Commissioner Michael J. Copps); *see also* Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, para. 179 (2003) (Report and Order and Notice of Proposed Rulemaking) (recognizing the relevance of television ownership limits in “protect[ing] the public’s First Amendment interest in a robust marketplace of ideas”).

267. 309 U.S. 134, 138 (1940).

268. *Id.*

269. *Id.*

270. 309 U.S. 470 (1940).

271. *Id.* at 475.

272. *Id.*

273. *Id.*

274. 319 U.S. 190 (1934).

practices between radio networks and their affiliate stations.<sup>275</sup> The networks argued that the FCC's authority was limited to that of a *signal interference traffic cop*, that the public interest standard was unconstitutionally vague, and that the regulations violated their free speech rights.<sup>276</sup> In upholding the regulations, the Court articulated a spirited defense of the public trustee doctrine and its resulting FCC public interest regulations. Writing for the majority, Justice Felix Frankfurter wrote:

The [1934 Communications] Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.<sup>277</sup>

Justice Frankfurter then went on to dispose of the networks' First Amendment argument by articulating what has become known as the "scarcity rationale":

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.<sup>278</sup>

The Court also ruled that the public interest standard was not unconstitutionally vague, but was sufficiently broad to prevent "stereotyp[ing] the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."<sup>279</sup>

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275. *Id.* at 193-94 (prohibited practices included exclusive affiliation and territorial exclusivity agreements and dual network operation).

276. *See id.* at 209.

277. *Id.* at 215-16.

278. *Id.* at 226.

The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices . . . is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. . . . Denial of a station license on that ground [public interest] . . . is not a denial of free speech.

*Id.* at 226-27.

279. *Id.* at 219.

### 1. Does Red Lion Still Roar?

Perhaps the strongest Supreme Court language in support of the public trustee doctrine is found in *Red Lion Broadcasting Co., Inc. v. FCC*<sup>280</sup> decision, where the Court upheld the constitutionality of the fairness doctrine and the related political editorializing and political attack rules. As noted above, the fairness doctrine required licensees to “cover vitally important controversial issues of interest in their communities” and “provide a reasonable opportunity for the presentation of contrasting viewpoints on those controversial issues of public importance that are covered.”<sup>281</sup>

In a unanimous decision, the Court upheld the FCC’s rules and declared that broadcasters enjoy limited First Amendment rights because of the scarcity of the public spectrum they are permitted to use as a means of reaching their audience.<sup>282</sup> Specifically, the Court stated that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>283</sup> The Court asserted that the purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”<sup>284</sup> The Court reasoned that this purpose, coupled with the scarcity rationale, made the First Amendment interests of audience members more important than those of broadcasters: “It is the right of the viewers and listeners, not the right of the broadcasters, which

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280. 395 U.S. 367 (1969).

281. Complaint of Syracuse Peace Council, *supra* note 118, at 5043 n.1; *see also* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, paras. 1-3 (1974). The related personal attack and political editorial rules required that when “an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group” in the course of covering an issue of public importance, or “[w]here a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates,” the broadcaster was required to provide the attacked or opposed parties a “reasonable opportunity” to respond on the air. *Red Lion*, 395 U.S. at 373-75 (citing 47 C.F.R §§ 73.123, 73.300, 73.598, 73.679 (repealed)).

282. *Red Lion*, 395 U.S. at 388.

283. *Id.*

284. *Id.* at 390.

is paramount.”<sup>285</sup>

The *Red Lion* articulation of the scarcity rationale has weathered withering criticism from scholars, regulators, judges, and broadcasters themselves.<sup>286</sup> Critics have attacked it by characterizing scarcity in different ways. Judge Robert Bork, for example, questioned the validity of the distinction between spectrum scarcity and the scarcity of other means of communication. In 1986, he wrote that the constitutional “line drawn between the print media and the broadcast media,” which is justified by the scarcity of broadcast spectrum, “is a distinction without a difference.”<sup>287</sup> He reasoned:

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism . . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.<sup>288</sup>

The conflict in Judge Bork’s reasoning is in how scarcity is interpreted. Broadcasters have interpreted scarcity as referring to the number and diversity of media sources available to viewers and listeners. In other words, they point to

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285. *Id.* In discussing the Constitutional foundations of broadcasters’ roles as public trustees, the Court wrote:

[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. 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 fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

*Id.* at 389.

286. See, e.g., THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 5-32 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 200-09 (1987); Fowler & Brenner, *supra* note 51, at 221-226 (Mark S. Fowler is the former FCC Chairman); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990); Logan, Jr., *supra* note 215 (author is an FCC Attorney); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1007-20 (1989). *But cf.*, Hundt, *supra* note 123, 542-43.

287. Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (footnotes omitted).

288. *Id.*

overall *numerical source* scarcity as opposed to the Supreme Court's notion of *allocational* or license scarcity. Those who argue that *Red Lion* is obsolete tend to make arguments based on *numerical source* scarcity – specifically, the notion that broadcast speech regulation is no longer constitutionally legitimate because citizens now have many nonbroadcast as well as broadcast “channels” through which to receive and express information. For example, in arguing against the imposition of any new public interest requirements, CBS stated that in light of high levels of subscribership to cable and DBS services with dozens, if not hundreds of channels; access to the Internet; the use of videotape; and DVD recorders and players, “spectrum scarcity is a wholly theoretical construct, bearing no relation to the reality of the modern media marketplace.”<sup>289</sup> The National Association of Broadcasters similarly argues that “[n]ot only has the number of broadcast facilities exploded” since *Red Lion* was decided, “but the vast increase in the number and variety of nonbroadcast outlets (including cable, Direct Broadcast Satellite and the Internet) makes the idea of ‘scarcity’ of media voices seem almost quaint.”<sup>290</sup>

These attacks on the scarcity principle misconstrue the meaning of scarcity as defined by the Supreme Court in *Red Lion*.<sup>291</sup> The *Red Lion* Court focused on *allocational* and not overall *numerical* scarcity. The notion that spectrum scarcity is no different than the scarcity of newsprint or ink or delivery trucks ignores the fact that broadcast spectrum is inherently scarce because “there [is] room for only a few”<sup>292</sup> broadcast licensees in each community and the demand for those licenses greatly outpace the supply of spectrum.<sup>293</sup> As the *Red Lion*

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289. Comments of CBS Corp., *supra* note 24, at 26.

290. Comments of Nat'l Ass'n of Broadcasters, *supra* note 245, at 12-13.

291. For an excellent analysis of the various permutations of the scarcity rationales advanced in broadcast regulation, see Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U L. REV. 990, 1007-20 (1989); *see also* Graham, *supra* note 181, at 129-34.

292. *Red Lion Broadcasting Co.*, 395 U.S. at 388.

293. Henry Geller addressed the broadcasters' arguments about the “explosion” of the number of broadcast stations since *Red Lion* was decided by writing:

The scarcity relied upon in *Red Lion* is that many more people want to broadcast than there are available frequencies or channels. That same scarcity indisputably exists today. *Red Lion* was a radio case, and in 1969 when it was decided, there were roughly 7,000 stations. It is ludicrous to argue that the public trustee scheme is constitutional at 7,000 but unconstitutional at 11,500 (the number of stations broadcasting today).

Court made clear, “only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had.”<sup>294</sup> The imbalance between overwhelming broadcast license demand and extremely limited supply is still in place today.

The use of broadcast spectrum is “rivalous,” meaning that its medium is of fixed capacity and prone to interference if speakers are not “channeled” and restricted in their activities. Newsprint, by contrast, is nonrivalous. Anyone wishing to be a newspaper publisher may be one. The same can be said with Internet content. Anyone who wishes to “webcast” a program or publish a document on the Internet may do so with a personal computer and an Internet connection. And although there are economic constraints to entry into newspaper and Internet publishing (*e.g.*, the cost of newsprint, ink, the PC, etc.), there are similar economic barriers to entry into broadcasting (*e.g.*, purchase of technical equipment, construction and powering of a transmitter, hiring of talent, etc.). The core distinction between broadcasting and other media is that the means by which broadcasters speak are publicly owned, whereas the media used by newspaper publishers, cable companies, and other competitors are not.<sup>295</sup> Moreover, the broadcast industry itself perpetuated the inherent scarcity of television licenses by successfully pressuring Congress to limit the eligibility for digital television broadcast licenses solely to existing analog broadcast licensees.<sup>296</sup>

In contesting the continuing validity of the *Red Lion* scarcity rationale, broadcasters have cited a footnote in the 1984 *FCC v. League of Women Voters of California*<sup>297</sup> decision, in which the Supreme Court invalidated section 399 of the Public Broadcasting Act, which prohibited the editorializing of any noncommercial (public) television station receiving federal Corporation for Public Broadcasting funds. Footnote eleven of the Court’s decision noted that “spectrum scarcity has come

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Geller, *supra* note 20.

294. *Red Lion Broadcasting Co.*, 395 U.S. at 388.

295. *See generally* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down Florida’s right of reply statute, requiring newspapers to allow a right of reply to political candidates it criticized, because it infringed upon the editors’ free speech and press rights).

296. *See* 47 U.S.C. § 336(a)(1) (2000).

297. 468 U.S. 364 (1984).

under increasing criticism in recent years.”<sup>298</sup> It acknowledged FCC Chairman Mark Fowler’s assertion that the advent of new technologies like cable and satellite television had rendered the scarcity rationale for broadcast regulation obsolete.<sup>299</sup> The Court concluded, however, that it was not ready to “reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.”<sup>300</sup>

Broadcasters have argued that this footnote represents a significant weakening of the scarcity rationale in the eyes of the Supreme Court.<sup>301</sup> They have noted that in the FCC’s 1987 *Syracuse Peace Council*<sup>302</sup> decision, where it repealed the fairness doctrine, a majority of the Commission, at the height of its deregulatory program, appeared to adopt a number of the arguments against the scarcity rationale by noting that “in recent years . . . there [has] been an explosive growth in both the number and types of outlets providing information to the public,” and that because of that growth, “the Supreme Court’s apparent concern that listeners and viewers have access to diverse sources of information has now been allayed.”<sup>303</sup> That characterization, broadcasters argue, is the “signal” the Supreme Court was waiting for to invalidate the scarcity rationale.

Despite broadcasters’ hopes that *Red Lion* had been declawed (or at least tamed), both the Supreme Court and Congress have continued to rely upon it. In enacting the Children’s Television Act of 1990,<sup>304</sup> the Cable Television Consumer Protection and Competition Act of 1992,<sup>305</sup> and the

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298. *Id.* at 376 n.11.

299. *Id.*

300. *Id.*

301. *See, e.g.*, Comments of CBS Corp., *supra* note 24, at 16 n.23; Comments of Nat’l Assoc. of Broadcasters, *supra* note 245, at 13 n.30.

302. Complaint of Syracuse Peace Council, *supra* note 118, at 5053.

303. *Id.* at 5053. *But see* Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 F.C.C.R. 19,973, 19,973 (2000) (“[W]e take this opportunity to make clear that much of the discussion in Syracuse Peace Council accompanying the Commission’s repeal of the fairness doctrine has been repudiated.” (footnotes omitted)).

304. *See* 47 U.S.C. § 303(a)-(b) (2000) (explaining that the Commission shall prescribe the nature of services rendered by license stations); S. REP. NO. 101-227, at 16 (1989) (describing how broadcasters serve as public trustees).

305. *See* 47 U.S.C. § 335(b) (2000) (requiring DBS operators to reserve four

Telecommunications Act of 1996, Congress utilized the *Red Lion* scarcity rationale and the public trustee doctrine, at times expressly and at other times impliedly.

Moreover, the Supreme Court repeatedly reaffirmed the *Red Lion* rationale as it addressed new controversies. In *FCC v. Pacifica Foundation*,<sup>306</sup> the Supreme Court affirmed the FCC's indecency policy as it applied to a New York radio station's airing of George Carlin's "Filthy Words" monologue.<sup>307</sup> In his opinion for the majority, Justice John Paul Stevens cited *Red Lion* stating that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."<sup>308</sup> Similarly, in *Turner Broadcasting System, Inc. v. FCC*,<sup>309</sup> the Court upheld the FCC's "must carry" rules, which require cable systems to carry the broadcast television stations in their service areas.<sup>310</sup> The Court reasoned that "must-carry" rules are constitutional, because cable systems are natural monopolies creating bottleneck conditions that prevent many cable subscribers from accessing their local television stations.<sup>311</sup> The Court refused to extend *Red Lion* to cable systems, reasoning that "[t]he broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium."<sup>312</sup>

More recently, the Court refused to apply the *Red Lion* principle to the Internet, reinforcing the particular scarcity of broadcast spectrum. Writing for the majority, Justice Stevens reasoned in *Reno v. ACLU*<sup>313</sup> that "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . [O]ur cases provide no basis for qualifying the level

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to seven percent of their channel capacity for noncommercial educational programming).

306. 438 U.S. 726 (1978), *reh'g denied*, 439 U.S. 883 (1978).

307. *See id.*

308. *Id.* at 748.

309. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

310. *See id.* at 636-61.

311. *See id.* at 649; H.R. CONF. REP. NO. 102-862, at 50 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1232; S. REP. NO. 102-92, at 1 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1133-34 (stating that "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace[.] . . . provide protection for consumers against monopoly rates and poor customer service, [and limit] the cable operators' and programmers' market power").

312. *Turner Broadcasting Sys., Inc.*, 512 U.S. at 638-39.

313. 521 U.S. 844 (1997).

of First Amendment scrutiny that should be applied to this medium.”<sup>314</sup>

Despite the prevailing constitutionality of the scarcity rationale and the public trustee doctrine it supports, the FCC has lacked the will to walk the First Amendment “tightrope.” Since the early 1980s, the FCC has generally abandoned any attempts at passing judgment on the subjective content of broadcaster speech. For example, in the case of the children’s educational television rules, which is the only one of the remaining public interest rules to have a quantitative requirement (of these three hours per week), the Commission ordinarily relies on the good faith judgment of broadcasters as to whether programming meets children’s educational and informational needs.<sup>315</sup> In essence, although the FCC putatively requires a three-hour children’s educational programming commitment, it defers to broadcasters’ “good faith” characterizations of what programming satisfies the Commission’s criterion.<sup>316</sup> Reed Hundt, FCC chairman in the

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314. *Id.* at 870 (ruling, in a 7-2 decision, that the Communications Decency Act of 1996 was an unconstitutional restriction of free speech). Moreover, in a December 2003 decision, the Court cited *Red Lion* in reasoning that the FCC’s rules requiring broadcast stations to maintain certain public records on programming and political advertising “seem likely to help the FCC determine whether broadcasters are carrying out their ‘obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance,’ and whether broadcasters are too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs.” *McConnell v. FEC*, 540 U.S. 93, 240-41 (2003). The Court rejected arguments that the provisions at issue in the Bipartisan Campaign Reform Act violated the First Amendment. *See id.* at 242-43. The Court also cited *Red Lion* as support for its statement that “the FCC’s regulatory authority is broad.” *Id.* at 237.

315. *See* Children’s Television Order, *supra* note 18, at 10,701.

316. In defending this deferential approach to children’s television regulation, former FCC Commissioner James Quello wrote about the difficulty of discerning between programming that satisfies public interest requirements from programming that does not:

Aside from the fact that this proposal is unconstitutional, as a practical matter, do you feel comfortable having the government decide what qualifies as educational television? I can just see a future Public Notice announcing that “The Commission will be meeting next Tuesday to discuss the educational merits of “Yogi Bear.” Also on the agenda, “Whether the television version of *Catcher in the Rye* is appropriate for kids.” You see my point – these are decisions you should be making – not the United States government.

James Quello, *The Push for More Government Is On, and This Time It’s About Government in Your Living Room*, available at <http://www.cni.org/Hforums/roundtable/1996-01/0083.html> (posted from James Quello’s website Jan. 15, 1996).

Clinton Administration, has vociferously supported the imposition of stricter public interest broadcasting requirements on television licensees, but has also articulated deep frustration with the doctrine and its inherent First Amendment tensions. In a 1995 speech, he said, “[e]ither our rules actually require something unknowable of broadcasters, in which case they should be rejected as constitutionally intolerable, or they actually require nothing of broadcasters, in which case they are a meaningless hoax on the American public.”<sup>317</sup>

In the current edition of the FCC’s *The Public and Broadcasting*,<sup>318</sup> its brochure on broadcasting regulation for the general public, the agency makes plain its abdication of content regulation and reliance on the judgment of individual broadcasters. Under the heading, “The FCC and Freedom of Speech,” the brochure states, “[t]he First Amendment and federal law generally prohibit us from censoring broadcast material and from interfering with freedom of expression in broadcasting. Individual radio and TV stations are responsible for selecting everything they broadcast and for determining how they can best serve their communities.”<sup>319</sup> Essentially, therefore, although the Supreme Court continues to uphold the *Red Lion* scarcity rationale against constitutional attack, the FCC has exerted a much more cautious and “hands off” approach to content regulation. It is no wonder, then, that the agency has never successfully elucidated and enforced the public interest standard.

#### B. THE FALLACY OF TELEVISION AS A “FREE MARKETPLACE OF IDEAS”

Considering its track record, there is little dispute that Congress’ reliance on the public trustee doctrine to promote a “marketplace of ideas” was misplaced. The “marketplace of ideas” metaphor, upon which the public trustee doctrine is rooted, commands that “public discussion is a political duty” and recognizes “that the greatest menace to freedom is an inert people.”<sup>320</sup> In discussing the importance of public deliberation

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317. Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 538 (1996).

318. FEDERAL COMMUNICATIONS COMMISSION, THE PUBLIC AND BROADCASTING, available at [http://www.fcc.gov/mb/audio/deedoc/public\\_and\\_broadcasting.html](http://www.fcc.gov/mb/audio/deedoc/public_and_broadcasting.html) (June 1999).

319. *Id.*

320. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J.,

in democratic self-government, Professor Alexander Meiklejohn observes that because citizens of a democracy are their own sovereigns, they must have access to “the unhindered flow of accurate information” and the fora in which to debate, in order to make the wisest decisions.<sup>321</sup> Commercial television, however, neither provides citizens with an “unhindered flow of accurate information,” nor a forum in which to deliberate.

The first reason why television is a poor conduit for engendering true democratic deliberation is that it is too passive. Inertia, not democratic participation, is what modern commercial television seems to best promote. Television, by design, is not interactive. The “vision” that it transmits is mediated and narrow.<sup>322</sup> Television can be isolating to viewers,<sup>323</sup> and it can distort the “reality” it claims to transmit. Few observers of American media and politics are unaware of the dissonance between televised and in-person performances. A recent and blatant example of the distorting nature of television is the so-called “scream speech” delivered by then-Democratic presidential candidate Howard Dean after his loss in the Iowa caucuses on January 19, 2004. The footage, aired repeatedly on broadcast and cable news programs, showed what appeared to be a shrieking Dean, prompting commentators to call his performance a “meltdown” and stark evidence of his lack of presidential temperament.<sup>324</sup> What television did not capture, however, was that inside of the ballroom, the crowd noise was so high that Dean’s voice could barely be heard.<sup>325</sup> Dean’s “meltdown” speech was aired repeatedly on every major television news program, but only one television reporter – Diane Sawyer, the co-host of ABC’s *Good Morning America* – explained that although Governor Dean’s animated, high-volume performance appeared

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concurring).

321. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 19 (1960).

322. See JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 24 (1978).

323. See *id.* at 168 (“Television isolates people from the environment, from each other, and from their own senses.”).

324. See, e.g., Al Kamen, *A Meltdown in History*, WASH. POST, Jan. 21, 2004, at A25; *A Sweet Effort to Get Young People to Vote*, L.A. TIMES, Jan. 28, 2004, at A17.

325. See Tim Graham, *Media-Powered Howard*, NAT’L REV. ONLINE, Jan. 30, 2004, at <http://www.nationalreview.com/comment/tgraham200401300919.asp> (last visited Nov. 27, 2004).

appropriate to those in the room with him, the televised version of the speech made him sound frenzied (he was using a handheld “unidirectional” microphone designed to mask the noise of the crowd in the room).<sup>326</sup> Videotapes from news crews using their own *omnidirectional* camera-mounted microphones demonstrated that Dean’s voice could barely be heard over the crowd’s noise.<sup>327</sup> The televised version of reality – the “scream” footage – became the reality of the Dean campaign, and the campaign failed to regain its footing.<sup>328</sup>

In addition to often distorting the “realities” it depicts, television is prone to presenting artificially narrow and structured perspectives on complex subjects. Far from presenting a diversity of conflicting ideas and philosophies, television presents whatever perspective producers think will attract the most viewers and, by extension, advertising. And although the fairness doctrine required broadcasters to present opposing views on controversial subjects of public importance, the doctrine has not been enforced since 1987.<sup>329</sup> The death of the fairness doctrine, in fact, has led to the birth of broadcast networks like News Corporation’s (*i.e.*, Rupert Murdoch’s) Fox Television Network, which is known for programming that is heavily slanted toward conservative and specifically Republican-party positions.<sup>330</sup>

### C. COMMODIFICATION OF VIEWERS

The public trustee doctrine has failed to create its intended “free marketplace of ideas” over the airwaves not only because of its inherent First Amendment contradictions, but also because of the core commercial nature of television. In fact, the only real marketplace commercial television promotes is that of

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326. *See id.*

327. *See id.*

328. *See* JOE TRIPPI, *THE REVOLUTION WILL NOT BE TELEVISED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING* 184-85 (2004).

329. *See* cases cited *supra* note 103; sources cited *supra* note 118.

330. *See* A.O. Scott, *Tallyho! Spin, Flag Waving and Shouting to Catch a Fox*, N.Y. TIMES, July 20, 2004, at E1 (reporting on success of “Outfoxed” documentary, distributed via Internet and DVD, which purports to document politically biased coverage on Fox News Channel and in news programming on the Fox Television Network); Chris Vognar, *Point of View Explored: ‘Outfoxed’ Documents Fox News Strategy on War Coverage*, DALLAS MORNING NEWS, July 23, 2004, at 7B.

viewers for advertisers.<sup>331</sup> Despite the seven decades of congressional and FCC rhetoric perpetuating the legal fiction of public trusteeship in broadcasting, broadcasters – most of them publicly traded entities – are, in fact, comprised of businesspeople accountable primarily to shareholders and advertisers.<sup>332</sup>

Although mythologized as fiduciaries of the ephemeral “public interest,” broadcasters in reality are required to operate as fiduciaries for their shareholders. And although the public interest standard in the 1934 Communications Act, as amended, remains vague and essentially unenforced, the law of corporate fiduciary duty is well-settled in requiring that public corporations pursue and sustain the highest returns possible on their shareholders’ investments and operate the corporation for the exclusive benefit of shareholders.<sup>333</sup> Actions by a broadcaster in the public interest, and that are above and beyond the perfunctory showing required to earn renewal of the station’s license, would likely be a violation of those fiduciary duties.<sup>334</sup> This service of two gods – the public interest and the bottom line – would not be problematic for broadcasters if the public interest and shareholder interests were the same.<sup>335</sup> But

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331. See Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 514 (2000) (characterizing “eyeballs as the commodity” in commercial television).

332. See generally Peter Marks, *Networks Cede Political Coverage to Cable*, N.Y. TIMES, Apr. 7, 2000, at A18. In reflecting on commercial television’s public trustee status, CBS News anchor Dan Rather said, “We have a public responsibility beyond delivering stockholder value. In some ways, we have abrogated that civic trust.” *Id.*

333. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (stating that a “business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”); Milton Friedman, *CAPITALISM AND FREEDOM* 133-36 (1982) (positing that it is impossible for a corporation to act generally in the public’s interest and still fulfill its fiduciary duties to shareholders).

334. Prof. Ronald J. Krotoszynski deftly makes this argument in *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2116 (1997) (stating that “[a]t most, an executive could pursue public interest objectives to the extent necessary to avoid placing the station’s license in jeopardy.”).

335. My colleague, Professor Shelby Green, notes, however, that the law does not require corporate directors to make business decisions on the basis of profit maximization alone, but permits them to take public trustee considerations into account in exercising their business judgment. See Shelby D. Green, *Defending the “Time Culture”: The Public and Private Interests of Media Corporations*, 43 FED. COMM. L.J. 391, 406-08 (1991) (citing Pennsylvania’s business corporation statute, 15 PA. CONS. STAT. ANN. §

they are not.

At the advent of broadcasting, many broadcast stations were operated as community-based, “mom-and-pop” businesses.<sup>336</sup> Today, most broadcast stations are merely profit centers within vast publicly traded conglomerates, whose primary mission is to sell advertising.<sup>337</sup> As economists Bruce M. Owen and Steven S. Wildman wrote in their book *Video Economics*, “[a]dvertising is central to broadcast networks because the economic forces favoring mass consumption of media messages are reinforced by the simultaneous production of audiences for sale to advertisers as a by-product.”<sup>338</sup>

Advertising is a very lucrative product. The annual pre-tax profit margins at some of the nation’s better run television stations can top fifty percent, leading industry analysts to describe owning a television station as “owning a money machine.”<sup>339</sup> Advertising time on commercial broadcast television increased by over twenty percent between 1991 and 2000,<sup>340</sup> with some thirty-minute programs in 2001 devoting a full nine minutes to commercial advertising.<sup>341</sup> The demand for television advertising time is so great, and the sale of such time so lucrative, that broadcasters have applied digital compression technology to shorten programming blocks in order to shoehorn additional commercials into highly rated fare.<sup>342</sup> In recent years, broadcasters have relied on “product placement” advertising, where advertisers pay for the conspicuous placement of their product in key scenes or the manipulation

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1721(c) (Purdon 1990), which was the first of many state corporations statutes authorizing directors to consider factors other than stockholder returns in making business decisions).

336. See Sallie Hofmeister, *Is Free TV Worth Saving in a 500-Channel World?*, L.A. TIMES, June 3, 2003, at A1.

337. See generally *id.*

338. See MINOW & LAMAY, *supra* note 2, at 19 (discussing the television marketplace and stating that “the sponsors and advertisers are its real public; the viewers are the ‘product’ it can ‘deliver’; and programs are merely the bait, the means to obtain the product.”); BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 151 (1992); Christine Y. Chen, *The Bad Boys of Radio*, FORTUNE, Mar. 3, 2003, at 119 (quoting Clear Channel CEO Lowry Mays as saying, “[w]e’re not in the business of providing well-researched music. We’re simply in the business of selling our customers products.”).

339. See Paul Taylor, *Too Little Time: How Broadcasters Betray the Public Interest They’re Supposed to Serve*, WASH. MONTHLY, Sept. 2000, at 8.

340. See *id.* at 10.

341. See Louis Chunovic, *TV Clutter Reaches All-Time High*, ELECTRONIC MEDIA, Mar. 11, 2002, at 1.

342. See MCCHESNEY, *supra* note 147, at 146.

and consumption of their products by key personalities.<sup>343</sup> Most recently, advertisers and television executives have managed to churn more advertising revenue from already heavily commercialized programming, and capture viewers who tend to “channel surf” or fast-forward through commercial blocks, by “digitally embedding” product trademarks and logos in televised scenes. For example, Major League Baseball broadcasts have featured digitally inserted product billboards behind home plate during baseball games (including the World Series), and CBS’s coverage of New Years Eve 2000 featured digitally inserted billboards, covering up real billboards for competitor NBC and other corporations.<sup>344</sup> In addition, program-length commercials, more commonly known as “infomercials,” have proliferated the television airwaves, generating \$14 billion via TV sales in 2001.<sup>345</sup>

Because advertising, not public interest programming, is the true currency of the broadcasting realm,<sup>346</sup> advertisers

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343. For example, the regular consumption of Coca-Cola® by actors on the Warner Brothers’ Network’s “Young American” series cost the soda company \$25 million. Coca-Cola paid the same sum for prominent product placement in the 2002 Fox “American Idol” series. See Dan Bronson, *Figured Out*, HOLLYWOOD REP., Apr. 28, 2003, [http://www.hollywoodreporter.com/thr/search/article\\_display.jsp?vnu\\_content\\_id=1875575](http://www.hollywoodreporter.com/thr/search/article_display.jsp?vnu_content_id=1875575) (subscription required, last visited Nov. 17, 2004).

344. Michael McCarthy, *Ads Show Up in Unexpected Places: Line Between Reality, Marketing Gets Fuzzy*, USA TODAY, Mar. 23, 2001, at 1B. Broadcasters have begun digitally inserting products and logos in reruns of highly rated programs such as *Law & Order*. See Stuart Elliott, *Advertising: Reruns May Become a Testing Ground for Digital Insertion of Sponsor’s Products and Images*, N.Y. TIMES, May 23, 2001, at C6; David Goetzl, *TBS Tries Virtual Advertising: Network to Sell Product Placement Deals for Reruns of ‘Law & Order’*, ADVERTISING AGE, May 21, 2001, at 8.

345. See Michael Schneider, *‘Wild’ Infomercial Struts Its Stuff: ‘Girls Gone Wild’ Reinvents Frequently-Maligned Ad Format*, VARIETY, Dec. 9, 2002, at 32.

346. The Supreme Court acknowledged the centrality of advertising in requiring cable systems to carry local television stations on their basic service tiers in its 1994 *TurnerI* decision, where it reasoned:

By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue – or, in the case of noncommercial broadcasters, sufficient viewer contributions – to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation’s communication system, and to ensure that every individual with a television set can obtain access to free television programming.

*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 647 (1994).

wield extraordinary influence over broadcasters and their programming. Advertisers want the programs they sponsor to surround their commercials with non-controversial and upbeat programming that maximizes viewership and builds goodwill in their products.<sup>347</sup> They buy commercial time on the programs with the highest ratings, and avoid placing advertising on programs that take controversial social positions.<sup>348</sup>

Before tobacco companies were pressured by the Federal government to voluntarily cease television advertising in 1971, tobacco manufacturers used television as a primary means for promoting cigarette smoking.<sup>349</sup> Philip Morris's advertising agreement with CBS and Desilu Productions, the producers of the celebrated "I Love Lucy" comedy, is known as the first major deal involving product placement. The program's original opening sequence featured stick figures of Lucille Ball and Desi Arnaz climbing on a huge pack of Philip Morris cigarettes.<sup>350</sup> Desi Arnaz regularly appeared in scenes in a smoking jacket and storylines often featured both stars conspicuously smoking cigarettes. Brown & Williamson Tobacco Company, an original competitor to Philip Morris, instructed the television producers carrying its advertising that "[t]obacco products should not be used in a derogatory or harmful way. And no reference or gesture of disgust, dissatisfaction or distaste be made in connection with them."<sup>351</sup>

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347. For example, Procter & Gamble, a preeminent television advertiser whose Ivory soap and Tide detergent commercials airing during radio and television dramas beginning in the 1940s spurred the phenomenon of "soap operas," is credited for setting the precedent for insisting on strict content controls in the programming surrounding its commercials. *See generally*, ALECIA SWASY, *SOAP OPERA: THE INSIDE STORY OF PROCTER & GAMBLE* (1993).

348. *See, e.g.*, Green *supra* note 335, at 402 n.35 (providing examples of advertisers pulling commercials from socially controversial programming); Sunstein *supra* note 331, at 515.

349. In 1969, the FCC threatened to ban cigarette advertising on television and radio and the Federal Trade Commission (FTC) proposed new rules requiring television and radio tobacco advertising to feature prominent health warnings. *See* Clara Sue Ross, *Pushing Puffing Post-Posadas*, 56 U. CIN. L. REV. 1461, 1461 (1988). In reaction to those proposals, and especially the threat of broadcasting health warnings, the tobacco industry voluntarily acceded to a ban on radio and television advertising. *See id.* at 1461-62; H.R. REP. NO. 98-805 (1984) (addressing how to properly communicate the health consequences of smoking).

350. *See* Liz Doup, *Smoke Signals Stories*, S. FLA. SUN – SENTINEL, June 30, 2003, at 1D.

351. *See* BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 240 (2004).

Although television broadcasters rarely aired news or documentary programming concerning the deleterious health consequences of smoking before smoking advertising was barred from television in 1971, they were much more willing to air such programming once they were no longer dependent on tobacco advertising.<sup>352</sup>

Because advertising, not programming, is the commercial broadcasters' product, broadcasters make programming decisions primarily with an eye toward optimizing viewership and, correlatively, increasing the bottom line. It is little surprise, then, that public interest programming is scarce and typically relegated to the least desirable blocks in the broadcast schedule, if it is aired at all.

### 1. Consolidation of the Broadcast Industry

Another reason why television broadcasting has failed to create a free marketplace of ideas is that it is no longer a locally oriented medium. Localism in programming always has been a core component of the public trustee doctrine.<sup>353</sup> Congress and the FCC have repeatedly emphasized the importance of broadcast licensees serving their local communities.<sup>354</sup> They believed that locally oriented programming would promote political engagement, build communities, and protect local health and safety.<sup>355</sup> The original system of broadcast license grants to local broadcasting stations also served an important political function for the members of Congress who voted it into existence, creating jobs and a means of advertising for local constituents.<sup>356</sup> During the first fifty years of broadcast regulation, Congress and the FCC also valued diversity in station ownership, consistent with the

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352. *Id.* at 251.

353. For an excellent treatment of the nexus between the public trustee doctrine and localism and the effects of ownership concentration, see Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613 (2004).

354. See 47 U.S.C. § 307(b) (2000) (authorizing the FCC to issue licenses throughout "the several [s]tates and communities").

355. See Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286, 46,287-291 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) (discussing the importance of localism in station ownership rules).

356. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 533 (5th ed. 2002).

notion articulated in 1945 by Justice Hugo Black that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>357</sup>

The demise of local and national television station ownership caps, and the outright elimination of longstanding prohibitions on the common ownership of a television station and other media outlets in the same city have come with sweeping broadcast regulation.<sup>358</sup> As a result, commercial television broadcasting has become one of the most consolidated industries in the nation. Consolidation has resulted in a sharp reduction of locally oriented public interest programming,<sup>359</sup> as well as ownership of television stations by women and minorities.<sup>360</sup>

The five major American commercial television networks each are part of a multimedia conglomerate with integrated television, radio, cable, Internet, motion picture, and publishing properties.<sup>361</sup> Together, these corporations – Viacom, Inc.,

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357. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

358. See generally 47 C.F.R. § 73.3555 (2004) (discussing multiple ownership rules).

359. See generally William R. Davie & Jung-Sook Lee, *Television News Technology: Do More Sources Mean Less Diversity?*, J. BROADCASTING & ELECTRONIC MEDIA, 453 (1993); Petros Iosifides, *Diversity Versus Concentration in the Deregulated Mass Media*, 76 JOURNALISM & MASS COMM. Q., 152 (1999); Harvey J. Levin, *Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings*, 61 AM. ECON. REV. 81 (1971).

360. See generally FEDERAL COMMUNICATIONS COMMISSION, FEMALE/MINORITY BROADCAST OWNERSHIP DATA 2003, (providing a summary of data regarding female and minority ownership), at <http://www.fcc.gov/ownership/data.html> (last visited Oct. 8, 2004). At the same time, observers have complained about the stereotyping or outright absence of minorities in television news and entertainment programming. See, e.g., Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003); Greg Braxton, *NAACP Will Fight Network TV Lineups*, L.A. TIMES, July 12, 1999, at A1; Steve Johnson, *Getting Color on Television: African-Americans on TV: A History of Talent, Ambition and Frustration*, CHI. TRIB. TEMPO, Feb. 1, 2002, at 1.

361. For example, General Electric, Inc., through its affiliate, the National Broadcasting Company, Inc., delivers network television services, operates television stations, and provides cable, Internet and multimedia programming and distribution services. See GENERAL ELECTRIC, INC., SECURITIES AND EXCHANGE COMMISSION FORM 10-K: ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDING DECEMBER 31, 2003 (filed March 1, 2004) available at <http://www.sec.gov/Archives/edgar/data/40545/000004054504000013/frm10k.htm>.

General Electric Co., Walt Disney Co. (ABC), News Corp., and Time Warner, Inc. – earned \$255 billion in 2003 revenues.<sup>362</sup> The five corporations control seventy-five percent of all primetime viewing on broadcast *and* cable television.<sup>363</sup> Far from competing antagonistically, the five firms engage in extensive joint ventures across media.<sup>364</sup> For instance, “News Corporation shares a financial interest with its ‘competitors’ in sixty-three cable systems, magazines, recording companies, and satellite channels in the United States and abroad.”<sup>365</sup>

For large broadcast station group owners, acquiring additional stations has an immediate positive impact on the bottom line. The more viewers and wider geographic footprint a broadcaster can claim, the higher the rates it can charge for advertising.<sup>366</sup> With more stations in its portfolio, a group owner can economize on programming by re-airing the same content across the country and largely ignoring or giving short shrift to local viewing needs. For example, station group owner Sinclair Broadcasting, which owns sixty-two television stations across the country, implemented what it calls “Central Casting,” whereby one team of anchors, commentators and weathercasters broadcast one standard evening news broadcast to all sixty-two of Sinclair’s television stations.<sup>367</sup> Moreover, individual media conglomerates owning dozens of stations and integrated with multiple distribution channels (for example, television, radio, motion pictures, DVD sales, publishing, etc.), have tended to develop television programming that can be repackaged and reused in all of its media properties.<sup>368</sup> In 1990, the four major commercial broadcast networks (ABC,

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362. See Center for Public Integrity: Investigative Journalism in the Public Interest, *Media Tracker*, at <http://www.publicintegrity.org/telecom/industry.aspx?act=broadcast> (last visited Nov. 18, 2004).

363. See Tom Wolzien & Mark Mackenzie, *Returning Oligopoly of Media Content Threatens Cable’s Power*, WEEKLY NOTES (Bernstein Research, New York, N.Y.), Feb. 7, 2003, at 3.

364. See Ted Turner, *My Beef with Big Media*, WASH. MONTHLY, July/August 2004, at 30, 35 (“These big companies are not antagonistic; they do billions of dollars in business with each other. They don’t compete; they cooperate to inhibit competition.”).

365. Bagdikian, *supra* note 351, at 9. Similarly, Time Warner has twenty-two major joint ventures with other major media corporations. *Id.* at 31.

366. See Jacobson & Vaida, *supra* note 22, at 2562 (2003).

367. See Jim Rutenberg & Micheline Maynard, *TV News That Looks Local, Even If It’s Not*, N.Y. TIMES, June 2, 2003, at C1.

368. See BAGDIKIAN, *supra* note 351, at 3 (explaining that “owners prefer stories and programs that can be used everywhere and anywhere”).

CBS, Fox, and NBC) owned, in whole or in part, only 12.5 percent of the new programming they aired. In 2000, that figure was 56.3 percent, and in 2002 it was 77.5 percent.<sup>369</sup>

The life-and-death risks of media consolidation and ownership concentration were evidenced vividly in the radio industry in January 2002. Clear Channel Communications (Clear Channel) owns all six of the commercial radio stations in the Minot, North Dakota market.<sup>370</sup> Clear Channel dominates the national radio industry, owning 1,240 radio stations in 292 markets across the country.<sup>371</sup> It airs the same prerecorded programming across entire regions and eschews local programming altogether.<sup>372</sup> In early 2002, a hazardous chemical spill occurred in North Dakota.<sup>373</sup> Attempts by emergency response personnel to engage the local radio stations in broadcasting warnings to local residents were futile. All six of the stations were operated by remote control, and were airing prerecorded satellite feeds from Clear Channel headquarters in San Antonio, Texas.<sup>374</sup> Corporate consolidation has also resulted in programming decisions that some critics have contested as influenced inappropriately by corporate headquarters. After commentator Bob Costas referred to China's "problems with human rights" and "property rights disputes" during NBC Sports coverage of the 1996 Olympic Summer Games in Atlanta, Georgia, NBC issued a surprisingly humble apology to the Chinese government after it demanded one.<sup>375</sup> Critics questioned whether NBC would have been so contrite if its parent company, General Electric,

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369. See Turner, *supra* 364, at 32. Turner states that:

Today, the only way for media companies to survive is to own everything up and down the media chain – from broadcast and cable networks to the sitcoms, movies, and news broadcasts you see on those stations; to the production studios that make them; to the cable, satellite, and broadcast systems that bring the programs to your television set . . . Big media today wants to own the faucet, pipeline, water, and the reservoir. The rain clouds come next.

*Id.* at 33-34.

370. See Jennifer Lee, *On Minot, N.D., Radio, A Single Corporate Voice*, N.Y. TIMES, Mar. 31, 2003, at C7.

371. See generally MCCHESNEY, *supra* note 147, at 20; Katy Bachman, *Fighting Through the Static*, MEDIAWEEK, May 5, 2003, at 20, 20; Rutenberg & Maynard, *supra* note 367.

372. See Bachman, *supra* note 371, at 24.

373. See *id.* at 22.

374. See *id.*

375. See *NBC Apologizes to China*, N.Y. TIMES, Aug. 23, 1996, at B8.

were not actively investing hundreds of millions of dollars in the lighting, plastics and medical equipment markets in the Chinese mainland.<sup>376</sup>

Despite the manifestly negative impact of media ownership concentration on public interest programming, the FCC in late 2002 opened a rulemaking proceeding proposing the further relaxation of the ownership rules.<sup>377</sup> Especially controversial were the FCC's proposals to liberalize the local and national television station ownership caps and to eliminate the prohibition on the common ownership of a television station and newspaper in the same city.<sup>378</sup>

Although the major networks' news operations failed to give substantial coverage to the FCC's proposals,<sup>379</sup> public television stations aired extensive critical pieces on the controversy<sup>380</sup> and several activists launched grassroots campaigns to motivate citizens to protest the proposals.<sup>381</sup> Despite its limited airplay, the FCC's notice resulted in the filing of nearly 800,000 opposition comments in the form of e-mails and postcards,<sup>382</sup> 99.9 percent of which were opposed to

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376. See *id.*; Editorial, *A Gutless Apology*, AUGUSTA CHRON., Aug. 27, 1996, 4A. Similarly, in late 1998, ABC News planned to air an exposé on questionable hiring practices at Disney World. See Trudy Lieberman, *You Can't Report What You Don't Pursue*, COLUM. JOURNALISM REV., May/June 2000, at 44, 45. The resort allegedly had failed to perform criminal background checks on employees and had hired convicted pedophiles to work at its park. See *id.* Shortly before the segment was due to air, Disney chairman Michael Eisner, told National Public Radio that he thought it would be "inappropriate," stating, "ABC News knows that I would prefer them not to cover [Disney]." *Id.* Following that interview, ABC News pulled the Disney World exposé from its lineup. See generally *id.*

377. See generally Notice of Proposed Rule Making, 17 F.C.C.R. 18,503 (2002).

378. See 47 C.F.R. § 73.3555 (2003) (discussing multiple ownership rules).

379. See William Safire, *Big Media's Silence*, N.Y. TIMES, June 26, 2003, at A33 (explaining that "[m]ost network newscasts dutifully covered the scandalous story as briefly and coolly as possible, failing to disclose how much it meant to their parent companies, which were lobbying furiously for gobble-up rights.").

380. For example, Bill Moyers' *Now* covered the media consolidation issue extensively. See, e.g., NOW WITH BILL MOYERS, at <http://www.pbs.org/now/politics/mediaconsol.html> (last visited Oct. 10, 2004); [http://www.pbs.org/now/transcript/transcript\\_bmjfcc.html](http://www.pbs.org/now/transcript/transcript_bmjfcc.html) (last visited Oct. 10, 2004); <http://www.pbs.org/now/politics/bigmedia.html> (last visited Oct. 10, 2004).

381. See Eric Boehlert, *Congress to Big Media: Not So Fast*, SALON, July 23, 2003, available at <http://www.salon.com/news/feature/2003/07/23/fcc/print.html>.

382. See *id.*

increased media consolidation.<sup>383</sup> While some of these e-mails likely were duplicates, the response is still telling

On June 2, 2003, the FCC decided in a strict party-line vote to allow one company to own television stations that would reach a maximum of 45 percent of the national television audience, up from 35 percent.<sup>384</sup> It also weakened the newspaper-television cross-ownership rule and liberalized the cap on the common ownership of radio and television stations in the same market.<sup>385</sup>

Spurred by the unprecedented groundswell of interest in the FCC's decision, Senator John McCain (R-Ariz.), chairman of the Senate Commerce Committee, called a hearing on the FCC's decision a mere two days after it was released. At that hearing, FCC Chairman Michael K. Powell remarked that the preexisting media ownership restrictions were made obsolete by the existence today of hundreds of cable networks and the Internet.<sup>386</sup>

Congress and the courts heard the public's outcry against the FCC's Consolidation order. Both the Senate and the House of Representatives voted to block the Order, and restored the

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383. See *Media Ownership Rules and FCC Reauthorization: Hearing Before the Senate Committee on Commerce, Science and Transportation* (2003) (statement of Michael J. Copps, FCC Commissioner).

384. See *Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets*, Report and Order, 68 Fed. Reg. 46,286, 46,353 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

385. See *Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets*, 68 Fed. Reg. 46,286, 46,348-354 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

386. See *Media Ownership Rules: Hearing Before the Senate Committee on Commerce, Science and Transportation* (2003) (statement of Michael K. Powell, FCC Chairman) (stating, "Here is what we learned about the media marketplace. It is marked by abundance. For example, we found the number of outlets and the number of independent owners have risen dramatically over the course of the last 40 years."). Commissioner Michael J. Copps later explained:

I strongly dissented to this decision. I dissented on grounds of substance. I dissented on grounds of process. I dissented because I believe the Commission's actions empower America's new Media Elite with unacceptable levels of influence over the ideas and information upon which our society and our democracy so heavily depend.

*Media Ownership Rules and FCC Reauthorization: Hearing Before the Senate Committee on Commerce, Science and Transportation* (2003) (statement of Michael J. Copps, FCC Commissioner).

national audience-reach cap.<sup>387</sup> On June 24, 2004, the Court of Appeals for the Third Circuit invalidated the FCC's elimination of the ban on one entity's owning both a broadcast station and a newspaper in the same market, as well as its loosening of the caps on the common ownership of same-market television and radio stations.<sup>388</sup>

That Congress and the courts have reversed the broadcast industry's victory in getting the FCC to dilute the ownership restrictions was not so much an indication of the weakening political power of the industry, but a result of the broadcasters' internal disagreement about whether the caps should be liberalized. Viewing additional stations as an opportunity to extend their advertising reach, the networks and other large station group owners (like Gannett, Paxson and Tribune) lobbied intensively in favor of the loosened rules.<sup>389</sup> The smaller group owners and independent stations opposed the new rules, fearing an increase in the power and leverage of the networks.<sup>390</sup>

#### D. THE POLITICAL POWER AND INFLUENCE OF BROADCASTERS

Although the First Amendment and economic contradictions inherent in the public trust doctrine explain why the doctrine has been weak and difficult to enforce since its inception, they do not explain why Congress and the FCC have for so long done nothing to replace the public trustee model with a means to better compensate Americans for the broadcasters exploitation of public spectrum. Why is it, in other words, that instead of taking broadcasters to task, Congress and the FCC have essentially joined the broadcasters

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387. See Stephen Labaton, *FCC Media Rule Blocked in House in a 400-to-21 Vote: Move to Limit Reach of Networks Sets Up Face-Off with Bush*, N.Y. TIMES, July 24, 2003, at A1; Stephen Labaton, *Senators Take Steps to Reinstate Limits on Media Holdings*, N.Y. TIMES, June 20, 2003, at A1.

388. See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004). The Court held that the FCC failed to properly justify its new rules and, specifically, failed to properly account for the effect of further media consolidation on diversity and localism:

The Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets.

*Id.* at 435.

389. See generally *id.*

390. See generally *id.*

in espousing the value and importance of the public trustee doctrine while doing very little to articulate and enforce specific public interest programming standards?

The unique and overwhelming influence of the broadcasting industry has enabled it to perpetuate the public trusteeship for such a long period despite its obvious dysfunction. Understanding the nature and peculiarity of broadcasters' political power is important in reforming the extant regulatory regime.

### The "Captured" FCC

Independent regulatory agencies like the FCC<sup>391</sup> are required to act within the limits of the authority delegated to them by Congress, but are generally outside of the influence of the President and other executive branch officials.<sup>392</sup> Following the birth of the ubiquitous American administrative state<sup>393</sup> during the New Deal era<sup>394</sup> and the resulting dormancy of the

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391. Independent regulatory agencies are typically modeled after the first modern administrative agency, the Interstate Commerce Commission, which was created in 1887. See Marshall J. Breger & Gary Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1128 (2000); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1194-95 (1986).

392. See *Morrison v. Olson*, 487 U.S. 654, 691-96 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586-91 (1984) (examining the limited president power in nominating agency officials and otherwise influencing agency decision making).

393. For an excellent overview of the history of the American regulatory state, see Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, 'Agency Capture,' and Airline Security*, 10 AM. U.J. GENDER SOC. POL'Y & L. 381, 385 (2002); see also Rabin, *supra* note 391 (noting that the ICC was created to remedy perceived discriminatory practices among railroad companies).

394. Before the New Deal and its programs intended to stimulate the economy out of the Great Depression, agency power and influence were limited, as a result of narrow Congressional delegations of authority as well as restrictive court interpretations of agency authority. See A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 441-42 (1917); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1513 (1992). The New Deal spurred the creation of numerous agencies aimed at alleviating poverty and resulted in the birth of the ubiquitous American administrative state. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 32 (3d ed. 1999). In particular:

The banking system came under federal control, the 1933 and 1934 Securities Acts regulated stock exchanges and the sale of securities,

nondelegation doctrine,<sup>395</sup> the courts have deferred to Congress' judgment in delegating increasingly broad and general authority to expert agencies.<sup>396</sup> In 1989, Justice Blackmun noted in *Mistretta v. United States* that the Court's permissiveness in reviewing Congressional delegations of authority was "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."<sup>397</sup> It is no wonder that the FCC's expansive

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the National Industrial Recovery Act established a minimum wage and set maximum hours for workers and the National Labor Relations Board (NLRB) regulated the relations between labor unions and management.

*Id.* (internal citations omitted). In response to the mushrooming agencies and their burgeoning authority, Congress enacted the Administrative Procedure Act in 1946 as a means of standardizing agency procedural safeguards. *See generally* 5 U.S.C. §§ 551-59 (2000). Administrative agencies increased in number, size and authority throughout the twentieth century, reaching another heyday in the 1960s and 1970s spurred in part by President Johnson's "Great Society" initiatives, *See* SAR A. LEVITAN, *THE GREAT SOCIETY'S POOR LAW: A NEW APPROACH TO POVERTY* 3-13 (1969); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 33-34 (3d ed. 1999) (detailing the creation between 1960 and 1980 of the Departments of Energy, Education and Housing and Urban Development, the Environmental Protection Agency, the Occupational Health and Safety Administration, and the Consumer Product Safety Commission, and the increase in authority and size of the Food and Drug Administration).

395. The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. As a result, the Supreme Court held that Congress cannot delegate its power to legislate to administrative agencies by means of statutes with vague or indeterminate standards. *See* *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (declaring the National Industrial Recovery Act (NIRA) void as an attempted delegation of legislative power to the President); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring the provision of NIRA concerning "codes of fair competition" an unconstitutionally vague delegation of authority).

396. *See* Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 427-30 (1989) (outlining the shift from comprehensive congressional policymaking to widespread delegation of authority to agencies).

397. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (upholding Congress's broad delegation of authority to the United States Sentencing Commission); *see also* *Loving v. United States*, 517 U.S. 748 (1996). Reviewing courts defer to agency interpretations of vague language in enabling statutes, even if those interpretations are abstract and questionable, so long as they are "reasonable." *See* *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

authority to regulate communications in furtherance of “the public interest,” therefore, has survived since the agency’s creation in 1934.<sup>398</sup>

As American administrative agencies increased in number, size, and authority, observers began to question the influence of the regulated entities on the work of the regulators. Agency “capture,” which has been referred to as a government “pathology,”<sup>399</sup> typically occurs when regulated entities, such as corporations and entire industries, “succeed, through lobbying or other influential devices, in replacing what would otherwise be the public-policy agenda of the agency with its own private and self-serving agenda.”<sup>400</sup> The result is “subsidizing private interests at the expense of public good.”<sup>401</sup>

The concept of capture was first articulated by Marver

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398. Although the courts have grown tolerant of Congress’ sweeping delegations of legislative authority, a number of scholars and other observers have expressed alarm at the constitutionality of “permit[ting] unelected administrators to define fundamental regulatory policies” when “agencies exist outside traditional conceptions of our tripartite national government.” Seidenfeld, *supra* note 394. Although these scholars posit that agencies may have too much unfettered authority, others contend that agencies empowered with broad delegations of rulemaking authority actually may further the democratic principle of deliberative decision making by involving regulated entities and interested citizens in the process of making law. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM* 92-126 (2d ed. 1979); Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L. J. 561, 588-99 (discussing the role of broadly empowered administrative agencies in “sound governance.”); James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV., 307, 307-09 (1976); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1279-80 (1984); Robert B. Reich, *Public Administration and Public Deliberations: An Interpretive Essay*, 94 YALE L. J. 1617, 1631-41 (1985) (discussing role of agencies in fomenting public discussion and involvement in administrative lawmaking); Seidenfeld, *supra* note 394, at 1515 (“[O]n the whole, civic republicanism is consistent with broad delegations of political decision making authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators.”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-87 (1975) (discussing the importance of delegation of political decisions to administrative agencies as means of achieving regulatory efficiency and avoiding political impasses); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

399. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

400. Niles, *supra* note 393, at 390.

401. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723 (1986).

Bernstein,<sup>402</sup> who observed that in an agency's "life cycle," the "early stages of the cycle are characterized by vigorous and independent regulation" but that in later stages "the agency often becomes closely identified with and dependent upon the industry it is charged with regulating."<sup>403</sup>

Capture theorists have posited that agency capture is a prevalent condition<sup>404</sup> of federal government because so many regulated industries have large lobbying operations in Washington, that give them the ability to monitor regulators' activities, participate actively in rulemaking and inquiry proceedings,<sup>405</sup> and seduce regulators by easing their workloads, by, for example, providing them extensive industry information that the regulators lack the resources and will to acquire objectively.<sup>406</sup> Professor Mark Seidenfeld explains that "[a] regulated entity frequently is a large corporation with resources to appeal agency decisions at every level."<sup>407</sup> He also observes that "regulated entities and special interest groups often contribute significantly to political campaigns."<sup>408</sup>

Capture theorists have also pointed to the infamous "golden revolving door," shuttling key staff between employment positions with the regulators and regulatees, as a condition for capture.<sup>409</sup> Professors Jerry Mashaw and David Harfst note that once an agency is captured by the industry it regulates, "the regulatory scheme is maintained in the interest of the regulated industry by bureaucrats who look to both

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402. See MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79-97 (1955).

403. Merrill, *supra* note 399, at 1060. Professor Richard Stewart described agency capture as the overrepresentation of client interests in the process of agency decision that results in persistent bias in favor of such interests. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682-83 (1975).

404. Professor Thomas W. Merrill writes that by the late 1960s, "agency capture had come to be regarded as something more akin to the universal condition of the administrative state." Merrill, *supra* note 399, at 1060.

405. Professor Mark C. Niles posits that the APA's requirements for notice-and-comment rulemakings and hearings in advance of certain agency actions, intended to foster transparency and deliberative democracy, afford multiple avenues for well-funded regulated entities to exert "hyper-influence" in agency dealings and ultimately "capture" the agency. See Niles, *supra* note 393, at 388-89.

406. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999).

407. *Id.*

408. *Id.*

409. Niles, *supra* note 393, at 399.

Congress and to the industry for their rewards.”<sup>410</sup> According to Mashaw and Harfst, these rewards include “social and business relations and the prospects of further career opportunities in the private sector.”<sup>411</sup>

Observers have identified a number of federal agencies that appear to have been captured by the entities they regulate. It has been argued, for example, that the FAA was captured by the airline industry,<sup>412</sup> the Nuclear Regulatory Commission by nuclear power companies,<sup>413</sup> the U.S. Department of Agriculture’s Food Safety and Inspection Service by meat and processed foods industries,<sup>414</sup> and the Bureau of Alcohol, Tobacco and Firearms by the National Rifle Association (NRA), the gun lobby.<sup>415</sup>

There is little doubt that the FCC has been “captured” by the broadcast industry. The broadcasters’ largest trade association, the National Association of Broadcasters (NAB), has been called a “lobbying juggernaut in Washington” with “legendary clout” that wins legislative and regulatory victories by “steamrolling the opposition.”<sup>416</sup> Senator John McCain (R-Ariz.), chairman of the Senate Commerce Committee, which oversees the FCC and other federal telecommunications agencies, has described the broadcast lobby as “one of the most powerful influences here in Washington”<sup>417</sup> comparing them to “locusts.”<sup>418</sup>

The NAB has annual revenues of \$56 million,<sup>419</sup> making it one of the richest trade lobbies in Washington. It spent over \$7

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410. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 16 (1990), *quoted in* Niles, *supra* note 393, at 395.

411. *Id.*

412. *See generally* Niles, *supra* note 393.

413. *See* Seidenfeld, *supra* note 406, at 464-65.

414. *See* Dion Casey, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL’Y 142, 142 (1998).

415. *See* Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000).

416. Jacobson & Vaida, *supra* note 22, at 2560.

417. Alicia Mundy, *Big John Takes Charge*, *MEDIAWEEK*, Dec. 16, 1996, at 17, 20.

418. *Id.* (speaking of the broadcasters’ reaction to “the first notice of the word auction.”); *see also* Dan Carney, *HDTV: Don’t Blame the FCC for Tuning Out*, *BUSINESSWEEK*, Feb. 5, 2001, at 52 (characterizing the broadcasting industry as “accustomed to getting its way in Washington.”).

419. *See* Jacobson & Vaida, *supra* note 22, at 2561 (noting that much of its revenues are generated by its annual convention in Las Vegas, attended by 90,000 industry participants).

million in Washington lobbying expenses in 2002.<sup>420</sup> Its contributions to federal political candidates are lavish.<sup>421</sup> At the height of the deliberations on the Telecommunications Act of 1996, when Congress was deciding whether broadcasters should pay for or agree to additional public interest obligations in exchange for their digital spectrum, the broadcast industry targeted the largest of its contributions to the chairmen of the Senate and House telecommunications subcommittees, Sen. Larry Pressler (R-S.D.) (receiving \$515,499) and Rep. Jack Fields (R-Tex.) (receiving \$221,228).<sup>422</sup> The fifty largest media firms spent \$111 million in lobbying in the four years after the 1996 Telecom Act.<sup>423</sup> In light of this generosity with political dollars, few doubt the veracity of NAB president Edward O. Fritts's boast that "no one has more sway with members of Congress than the local broadcaster."<sup>424</sup>

The NAB's generosity also extends to the FCC regulators themselves. In May 2003, the Center for Public Integrity released a report finding that between May 1995 and February 2003, the FCC officials had accepted nearly \$2.8 million in airfare, lodging and entertainment expenses. The vast majority of these funds were provided by the broadcast and telecommunications entities which are regulated by the FCC.<sup>425</sup>

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420. *See id.*

421. In the 2002 election cycle, radio and television stations (not including the networks and entities that own them) donated \$5,417,845 to federal campaigns and political parties. *See* Ctr. for Responsive Politics, *TV/Radio Stations: Long-Term Contribution Trends*, available at [www.opensecrets.org](http://www.opensecrets.org). Media conglomerate Viacom alone made \$1 million in donations to Congressional campaigns in 2002. Robert W. McChesney and John Nichols, *Media Democracy's Moment*, THE NATION, Feb. 6, 2003, at 16, 16 (reporting that media corporations contributed roughly \$75 million to congressional candidates between 1993 and 2000).

422. *See* Arthur E. Rowse, *A Lobby the Media Won't Touch; The Media Lobby Itself*, WASH. MONTHLY, May 1998, at 8, 11.

423. *See* MCCHESENEY, *supra* note 147, at 55 (citing the Center for Public Integrity).

424. Taylor, *supra* note 21, at 20.

425. *See* Bob Williams & Morgan Jindrich, Ctr. for Public Integrity, *On the Road Again – and Again: FCC Officials Rack Up \$2.8 Million Travel Tab With Industries They Regulate*, (May 22, 2003), at <http://www.publicintegrity.org/telecom/report.aspx?aid=15> *see also* Bob Herbert, *Editorial, Cozy With the FCC*, N. Y. TIMES, June 5, 2003, at A35. For its 2003 annual convention, the NAB paid \$26,309 to fly in, lodge and feed 17 FCC officials, including all five of the commissioners. *See* Bob Williams & John Dunbar, Ctr. for Public Integrity, *FCC Plans to Nix Industry-Paid Travel*, WELL CONNECTED, Sept. 2, 2003 (noting that FCC Chairman Michael Powell had initiated a review of the FCC's travel budgeting to "substantially

In 1999, Rep. Billy Tauzin (R-La.), then chairman of the House Commerce Committee, the committee that oversees the FCC, accepted an all-expense paid (\$18,910) trip to Paris, France for him and his wife, courtesy of Time Warner and Instinet.<sup>426</sup> Also notable is that Tauzin's daughter, Kimberly Tauzin, served as a key lobbyist at the NAB during the 1990s.<sup>427</sup>

The broadcast industry's largesse in providing free travel to its FCC regulators appears to have had the (intended) effect of giving industry lobbyists unusually unfettered, closed-door access to these policymakers. In advance of the FCC's controversial June 2, 2003 vote to relax or altogether eliminate certain longstanding media ownership caps, key FCC regulators met seventy-one times with broadcast industry lobbyists and senior executives in closed-door meetings to discuss the proposals.<sup>428</sup>

#### The "Captured" Congress

The term "agency capture" does not properly describe the extent of the broadcast industry's influence in Washington, considering that Congress itself is so beholden to broadcast interests that its link to broadcasters has been characterized as that of an "umbilical cord."<sup>429</sup> Perhaps the most compelling evidence of broadcasters' power on Capital Hill was their

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reduce" reliance on industry funding), at <http://www.publicintegrity.org/telecom/report.aspx?aid=62> .

426. Charles Lewis, *Media Money*, COLUM. JOURNALISM REV., Sept./Oct. 2000, at 20-22.

427. *Id.* at 22.

428. See Bob Williams, Ctr. for Public Integrity, *Behind Closed Doors: Top Broadcasters Met 71 Times with FCC Officials*, WELL CONNECTED, May 29, 2003, at <http://www.publicintegrity.org/telecom/report.aspx?aid=83&sid=200>.

429. See KRASNOW ET AL., *supra* note 44, at 89-90 (citing ROBERT MACNEIL, *THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS* 243 (1968)); see also BREYER, STEWART ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 533 (5<sup>th</sup> ed. 2002) (noting that from its inception the broadcast licensing regime "provided 'pork barrel' to local congressional districts; local television stations provided jobs for constituents and also provided a way for local merchants to advertise efficiently their local goods and services to local consumers"). Interestingly, the symbiotic relationship between politicians and the media is much older than broadcasting. Upon his assumption of the presidency in 1829, Andrew Jackson found "plush political appointments" for fifty-nine newspaper reporters assigned to cover Washington and earmarked \$25,000 annually to lavish upon the editor of the Washington daily newspaper. MCCHESENEY, *supra* note 147, at 28, (citing TIMOTHY E. COOK, *GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 26-32 (1998)).

reaction to then-Senator Bob Dole's insistence that broadcasters pay fair market value or accept more extensive public interest obligations in exchange for their new digital channels by means of a spectrum auction. Once Dole had recruited Senator John McCain (R-Ariz.) to his effort to make broadcasters pay,<sup>430</sup> the NAB launched a \$9.5 million advertising campaign, by means of what they called "public service announcements," urging viewers to tell their Members of Congress to save "free TV" and not impose a "tax on free television" that would force the cancellation of "your favorite shows."<sup>431</sup>

Facing a flurry of telephone calls, e-mail messages and letters from constituents alarmed by the NAB's ads, Dole accused the broadcasters of misleading their viewers and "bullying Congress."<sup>432</sup> Despite his anger, he backed off his insistence on auctions and resigned on June 11, 1996 to run for President – an endeavor in which it pays to have broadcasters on your side.<sup>433</sup> Shortly thereafter, Congress passed the 1996 Telecom Act incorporating the free giveaway of digital spectrum to broadcasters, and Trent Lott (R-Miss.), the new Senate Majority Leader, and House Speaker Newt Gingrich (R-Ga.) sent a letter to the FCC directing it to grant the new digital channels to broadcasters without engaging in an auction.<sup>434</sup> The NAB's success in killing the spectrum auction concept and obtaining the new spectrum for free was such a significant lobbying coup that the usually sober *National Journal* called it "spectacular[]." <sup>435</sup> Moreover, the DTV spectrum giveaway is but one of the NAB's legislative successes in recent years.<sup>436</sup>

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430. Mundy, *supra* note 417, at 20 (statement of Senator John McCain) ("I want to see taxpayers get value from this resource, which the spectrum is. It's not visible like most natural resources, like an oil resource, or public land, a gold mine you can see or touch. And I agree that there is certainly some legitimacy to the argument that broadcasters want to make this transition to [digital TV], and need time to change over. But to get this absolutely free? . . . No way.") (alteration in original).

431. Rowse, *supra* note 422, at 9.

432. *Id.* Senator McCain agreed, calling the NAB's ads "an absolutely false scare tactic." Taylor, *supra* note 21, at 21.

433. See Mundy *supra* note 417, at 20 ("Logic says that in an election, you don't go ticking off broadcasters if you can avoid it.").

434. Rowse *supra* note 422, at 9; Taylor *supra* note 21 at 20.

435. Jacobson & Vaida, *supra* note 22, at 2561.

436. *Id.*

In recent years, the NAB has helped torpedo FCC efforts to encourage

The core of the influence that the broadcast industry holds over Congress is not money nor lobbying muscle, but exposure. Most Americans get their news from television.<sup>437</sup> As most news programs cover at least some federal political stories, elected officials are keenly interested in getting favorable exposure on their constituents' local television stations. It is in their best political interests, therefore, to avoid offending the very broadcasters who report on their successes and failures in Washington, as well as their personal lives, to the voters and donors back home.<sup>438</sup> This is particularly true given an elected official's awareness that these broadcasters also have the power *not* to report on them at all.<sup>439</sup>

The nourishment in the umbilical cord connecting broadcasters and Congress, however, flows in both directions. The broadcast lobby often lobbies Congress in order to persuade

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low-power FM radio. It has stymied attempts to provide free or deeply discounted airtime to politicians. It has worked to allow greater consolidation within the radio industry. It has maintained local broadcasters' guaranteed placement on cable and satellite TV systems. And it has worked to kill new taxes or user fees on broadcasting.

*Id.*

437. See Sallie Hofmeister, *Is Free TV Worth Saving in a 500 Channel World?*, L.A. TIMES, June 3, 2003, at A1.

438. Jacobson & Vaida, *supra* note 22, at 2562 (statement of former Congressman Henson Moore (R-La.))("Obviously, the broadcasters report the news, so I think most people in elective politics listen to them."); see also, KRASNOW ET AL., *supra* note 44, at 90 ("Broadcasters control a very important commodity to politicians – electronic media exposure.") As commentator Paul Taylor put it, broadcasters "hold the ticket to every congressman's heart – access to the six o'clock news." Taylor, *supra* note 21, at 21. Broadcasters "live in a world where image is a fragile commodity, where paranoia is a survival tool and where it's taken as a given that if the station manager, the news director and the anchorman think you're a helluva guy, that's a very good thing." *Id.*

439. But it's not just what broadcasters can say about elected officials that gives them power; it's also what they do not say. Congressman Barney Frank (D-MA) notes:

We know they have enormous discretion over what goes on the air each night and what doesn't. It's not that members of Congress fear out-and-out retribution. It's more subtle. They worry that the station might decide to just ignore the shit out of them. Now I happen to be at the stage in my career where if they never say another word about me, a blessing on their head. But, for a lot of members, it can have a chilling effect.

Taylor, *supra* note 21 at 21; see also Rowse, *supra* note 422, at 11 ("When you consider how reliant politicians are on the media for both access and campaign donations, it's hardly surprising that, when it comes to personal contacts, nobody has a greater ability to open doors than newspaper publishers and broadcasters.").

prominent members to do the broadcasters' bidding at the FCC. Because the FCC is an independent regulatory agency outside of the protective layers of the executive branch, it is especially susceptible to congressional influence.<sup>440</sup> Former FCC Commissioner Glen Robinson described it this way: "The chief purpose for lobbying Congress today is not so much to obtain legislation but rather to gain Congressional leverage to pressure the agency to take some particular action."<sup>441</sup>

Another contributor to the broadcast industry's political influence is its selective coverage of itself. The broadcast industry avoids drawing attention to its own dealings in Washington. After the industry's controversial but stealthy success in pressuring Congress to give it digital spectrum for free, Senator McCain remarked: "What troubles me is that the voters never got a clear picture of this giveaway on television. 'The Fleecing of America,' 'It's Your Money,' – where were they?"<sup>442</sup>

No national television networks covered the "great spectrum giveaway" in their network news programs.<sup>443</sup> Their

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440. KRASNOW ET AL., *supra* note 44, at 88-89. Newton Minow, FCC Chairman in the Kennedy Administration, recounts that shortly after his confirmation, House Speaker Sam Rayburn put his arm around him and warned, "Just remember one thing, son. Your agency is an arm of the Congress; you belong to us. Remember that and you'll be all right." *Id.* at 89 (citing Newton N. Minow, *Politics and the Regulatory Agencies*, 68 COLUM. L. REV. 383, 384. (1968) (book review)).

441. KRASNOW ET AL., *supra* note 44, at 89-90 (quoting Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 69 VA. L. REV. 169, 175 (1978)). An unnamed FCC official called broadcast lobbyists "downright arrogant" when they demand specific favors from the Commission. Instead of presenting their arguments dispassionately, "they come in with the attitude: '[i]f you don't do what we want, we'll kill you on the Hill.'" Rowse, *supra* note 422, at 11; *see also* KRASNOW ET AL., *supra* note 44, at 90 (noting the "tense mutual interdependence" of Congress and broadcast lobbyists (quoting ROBERT MACNEIL, *THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS* 243 (1968))).

442. William Safire, Editorial, *Broadcast Industry Abuses Power as it Seeks to Protect Itself*, SEATTLE POST-INTELLIGENCER, July 24, 1997, at A14. Former FCC Chairman Reed Hundt agreed:

It's bad enough that broadcasters are being given both digital and analog channels in perpetuity, without paying money or in-kind. Worse is that there have been no major televised discussions of the issues. The number one missing piece in the puzzle is, why wasn't this story about TV covered on TV?

William Safire, *Broadcast Lobby Triumphs*, N. Y. TIMES, July 23, 1997, at A21.

443. Rowse, *supra* note 422, at 9 ("[T]he fact that congressional leaders could hand out such a treasure trove of public property without causing an

stunning lobbying achievement went largely without any public scrutiny.<sup>444</sup> Newspapers largely failed to fill the silence, possibly because of their own significant interests in commercial television stations and the profit making potential they stood to gain as a result of the giveaway.<sup>445</sup> Lack of coverage minimizes public outrage over favorable treatment for broadcasters, and keeps the public unaware and unmotivated to demand reform from their legislators in Washington.<sup>446</sup>

Finally, as with other “captured” agencies, the FCC is legendary in Washington politicolegal circles for its “golden

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uproar was due not so much to expert lobbying as to thin news coverage.”); see also Jeff Cohen, *TV Industry Wields Power in DC*, THE BALTIMORE SUN, May 4, 1997 at 6F (characterizing the digital spectrum giveaway as “a rip-off that never got mentioned on any of the nightly network news segments”). Cohen, director of media watchdog group, FAIR, says: “with vast influence over Congress – and confidence that its clout will be ignored by network reporters – the TV lobby is one of the key obstacles to political reform in our country. It’s a mark of television’s power that this obstacle remains so shrouded.” *Id.*

444. See e.g., Neil Hickey, *What’s at Stake in the Spectrum War? Only Billions of Dollars and the Future of Television*, COLUM. JOURNALISM REV., July/Aug. 1996, at 39, 40.

A somnolent press...has failed ignominiously to report the story, either because most journalists simply don’t know about it, or don’t understand its importance, or think it’s too complex to convey or, in the case of TV people, are loath to roil the waters and inflame the public’s passions on an issue in whose outcome TV networks and stations have a huge monetary interest.

*Id.*

445. The Washington Post owns six television stations, the New York Times eight television stations and Gannett, the publisher of USA Today and 92 other newspapers across the country, owns 20 television stations. Rowse, *supra* note 422, at 9. A study involving 100 newspapers discovered that “every one whose owners got little TV revenue editorialized against the spectrum ‘giveaway,’ whereas every one with high TV revenues editorialized in favor of giving broadcasters free use of spectrum.” *Id.* (quoting James H. Snider & Benjamin I. Page, *The Political Power of TV Broadcasters: Covert Bias and Anticipated Reactions*, (1997), available at [http://www.newamerica.net/Download\\_Docs/pdfs/Pub\\_File\\_1237\\_1.pdf](http://www.newamerica.net/Download_Docs/pdfs/Pub_File_1237_1.pdf)).

446. In fact, a Lake Snell Perry & Associates poll commissioned by the Benton Foundation in 1998 found that most Americans (71%) were unaware that broadcasters do not pay for their use of broadcast spectrum, and that most (56%) believed that broadcasters paid from hundreds of thousands to millions of dollars for their broadcast licenses. Comments of the Benton Found., Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, at 4-5 (filed Mar. 27, 2000) (quoting data from Lake, Snell, Perry & Associates, *Television in the Digital Age: A Report to the Project on Media Ownership and the Benton Foundation*, December 1998.) The poll found that most Americans surveyed (79%) favored a proposal to require digital broadcasters to pay 5% of their revenues to a fund subsidizing public television, and that 80% supported the imposition of specific, quantified public interest obligations in exchange for use of the spectrum. *Id.* at 5.

revolving door.”<sup>447</sup> For example, the two premier communications law practices in Washington, are headed by two former FCC Chairmen, Charles D. Ferris<sup>448</sup> and Richard Wiley.<sup>449</sup> And there are numerous recent examples of prominent attorneys who left senior policymaking positions at the FCC for senior lobbyist jobs representing industry players before their former FCC colleagues.<sup>450</sup>

### III. REDEMPTION: PAST PROPOSALS FOR REFORM AND A NEW IDEA

#### A. PAST PROPOSALS FOR REFORM

The dysfunction and obsolescence of the public trustee doctrine has elicited a great number of proposals for reform aimed at having television broadcasters finally “pay their debt” to the American people. As detailed above, Senator Bob Dole led a number of his colleagues in demanding the replacement of the public trustee doctrine with the requirement that

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447. See Niles, *supra* note 393, at 399.

448. FCC chairman between 1977 and 1981, now a name partner at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, and with whom I worked at Mintz Levin between 1994 and 1996.

449. FCC general counsel, commissioner and chairman between 1970 and 1977; founding partner of Wiley, Rein & Fielding.

450. On December 15, 2003, Marsha J. MacBride, former FCC chief of staff under chairman Michael Powell started her position as the executive vice president for legal and regulatory affairs at the NAB. Ted Hearn, *MacBride Joins NAB's Legal Staff*, MULTICHANNEL NEWS, Dec. 15, 2003, at 24 (“In her new role, MacBride will steer the NAB’s lobbying efforts at the FCC, essentially seeking favorable regulatory rulings from old colleagues for thousands of radio and television stations.”). In late 2002, longtime telecommunications lawyer and lobbyist Nancy Victory left her firm to become President Bush’s senior communications policy advisor as Administrator of the National Telecommunications and Information Administration (NTIA). Following her appointment, industry lobbyists threw a lavish, \$480 per person, party to celebrate her appointment. Ten days later, she pressured the FCC to side with the lobbyists in a spectrum dispute. *Lobbyists Held Party for Bush Telecommunications Official*, N.Y. TIMES, Jan. 21, 2003, at A19; Editorial, *Cozying Up*, WASH. POST, Jan. 23, 2003, at A20. On September 15, 2002, Dorothy Attwood, former chief of the FCC’s Wireline Competition Bureau, left her FCC job to become the senior vice president for federal regulatory strategy for SBC Communications, “helping the telecom giant work to reshape the rules she helped draft.” *Phone Booth Revolving Door*, MULTINATIONAL MONITOR, Mar. 1, 2003, at 7. Gene Kimmelman of the Consumers Union remarked, “to actually set foot in the place that soon after you leave a top policy role, it’s just stunning. She’s just symptomatic of the whole captured-agency problem.” *Id.* at 8.

commercial broadcasters pay fair market value for their digital channels.<sup>451</sup> Their arguments could not, however, withstand the formidable political influence of the broadcast lobby, and the 1996 Telecom Act passed with the free digital license “give-away” provisions intact.

Others have argued that in light of the lucrative opportunities provided broadcasters by means of the DTV transition, the FCC should demand more public interest “quid” for the digital spectrum “quo.” For example, the proposals of the Gore Commission and a number of advocacy organizations participating in the FCC’s proceedings on the digital TV public interest obligations, such as the Media Access Project, advocated more quantifiable and specific public interest obligations. They urged the FCC to require broadcasters to use the expansive capacity and capabilities of their new digital channels to air a minimum amount of public affairs, educational and children’s television.<sup>452</sup> They also suggested that the FCC require that broadcasters play a central role in campaign finance reform by providing free airtime to political candidates in advance of elections.<sup>453</sup>

In April 2004, a coalition of media watchdog organizations petitioned the FCC to adopt new “public interest processing guidelines,” to be enforced during the review of broadcast station license renewal applications.<sup>454</sup> The coalition’s proposed guidelines include a minimum of three hours per week on the broadcaster’s primary digital programming signal

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451. See *supra* notes 430-435 and accompanying text.

452. See, e.g., Comments of the Media Access Project, Public Interest Obligations of TV Broadcast Licenses, MM Docket No. 99-360 (filed Mar. 27, 2000); Comments of Benton Found., Public Interest Obligations of TV Broadcast Licenses, MM Docket No. 99-360 (filed Mar. 27, 2000)..

453. See, e.g., Media Access Project, *Promoting Civic Discourse and Protecting Free Speech in Broadcast Media*, (2004), at [www.mediaaccess.org/programs/civildisc](http://www.mediaaccess.org/programs/civildisc).

454. See ALLIANCE FOR BETTER CAMPAIGNS, BENTON FOUND., CTR. FOR CREATIVE VOICES IN MEDIA, CTR. FOR DIGITAL DEMOCRACY, COMMON CAUSE, INST. FOR PUB. REPRESENTATION OF GEORGETOWN UNIV. LAW CTR., MEDIA ACCESS PROJECT, NEW AM. FOUND., & OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, PUBLIC INTEREST OBLIGATIONS PROPOSED PROCESSING GUIDELINES (April 7, 2004 ) (petition submitted to the Federal Communications Committee), available at [www.ourairwaves.org/docs/index.php?DocID=56](http://www.ourairwaves.org/docs/index.php?DocID=56). The coalition proposes that broadcast license renewal applicants whose applications document compliance with all of the proposed guidelines “will receive staff level approval” within the FCC, whereas failure to comply with the guidelines would result in referral of the application to the full Commission for review. *Id.* at 2.

of “local civic or electoral affairs programming” that is “designed to provide the public with information about local issues.”<sup>455</sup>

To the extent that various proposals, old and new, for increased public interest programming are valiant attempts to revive the public trustee doctrine, they deserve serious Congressional and FCC consideration. Unfortunately, as demonstrated above, the chances for Congress and the FCC to adopt heightened public interest requirements are remote at best. Even if new, strict public interest guidelines were adopted, their enforcement would still be in the hands of an agency unwilling to enforce judgments about the nature and purpose of broadcast content.

More extreme proposals to replace our current regime with one more akin to the British model – in which the state provides significant programming and operating subsidies to government-controlled broadcasters, financed by “license” fees for radio and television receivers<sup>456</sup> – have not received any substantial attention since the NAB succeeded at quashing such proposals during the initial regulatory debates of the late 1920s and early 1930s.<sup>457</sup> The BBC model itself has withered under persistent attacks by British commentators who characterize it as paternalistic and elitist.<sup>458</sup> British media critic Ien Ang claimed that to the BBC governors, “public service broadcasting” was nothing but “enlightened cultural dictatorship, in which a single set of standards and tastes was

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455. “Local civic programming includes broadcasts of interviews with or statements by elected or appointed officials and relevant experts on issues of importance to the community, government meetings, legislative sessions, conferences featuring elected officials, and substantive discussions of civic issues of interest to local communities or groups.” *Id.* at 2. In addition, the proposed guidelines include a requirement that broadcasters who are affiliates of a national network (*i.e.*, ABC, CBS, NBC, Fox, UPN and WB) must transmit “independently produced programming,” defined as programming produced “by an entity not owned or controlled by an owner of a national television network,” for at least 25 percent of the primary channel’s prime time schedule. *Id.* at 4. The proposal also includes reporting requirements. *Id.*

456. For an excellent description of the British model see STARR, *supra* note 34, at 340-41.

457. MCCHESENEY, *supra* note 147 at 40-41.

458. See, *e.g.*, WILLIAM F. BAKER AND GEORGE DESSART, *DOWN THE TUBE: AN INSIDE ACCOUNT OF THE FAILURE OF AMERICAN TELEVISION* 46 (1998) (quoting a Labour Member of Parliament as dismissing the BBC as “run very largely by people who do not know the working class point of view, do not understand the working class point of view, but are seeking evidently to mould the working class.”)

imposed on the entire national audience.”<sup>459</sup>

Henry Geller, a highly respected television industry analyst and former FCC General Counsel, proposed the more moderate idea of an annual “spectrum usage fee” of up to three percent of a broadcast licensee’s gross advertising revenues, that the government would use to increase funding for the Corporation for Public Broadcasting (CPB), the entity chartered by Congress in 1967 to administer and fund public television programming.<sup>460</sup> The CPB would utilize the cross-subsidy to fund more and better quality public affairs, educational and cultural fare on public television stations.<sup>461</sup>

Geller’s idea is compelling in light of the persistent underfunding of American public television stations,<sup>462</sup> the difficulties public broadcasters had in upgrading their facilities to the digital format,<sup>463</sup> and because public broadcasters – as not-for-profit organizations – generally do not have the same profit making pressures as their commercial brethren. Instead, they tend to have organizational missions that are more aligned with the public interest aspirations of the public trustee doctrine.

Although the Geller proposal would be a significant improvement on the *status quo*, a number of important concerns counsel against its adoption. First, it would not

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459. IEN ANG, DESPERATELY SEEKING THE AUDIENCE 109 (1991) (“What [BBC Chief] Reith strived for was the creation of a common national culture: the BBC’s self-conception was that of a ‘national church’ to whose authority all citizens must be subjected.”). Interestingly, American novelist and philosopher Ayn Rand criticized the American broadcasting regulation model as suffering from a similar elitism as that afflicting the BBC. She called the public interest standard “the intellectual knife of collectivism’s sacrificial guillotine.... a blank check on totalitarian power over the broadcasting industry, granted to whatever bureaucrats happened to be appointed to the [Federal Communications] Commission.” AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 126 (1967).

460. Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 362-66 (1998).

461. See HENRY GELLER & TIM WATTS, THE FIVE PERCENT SOLUTION: A SPECTRUM FEE TO REPLACE THE ‘PUBLIC INTEREST OBLIGATIONS’ OF BROADCASTERS (New Am. Found. Spectrum Series Working Paper #3, 2002), available at [http://www.newamerica.net/Download\\_Docs/pdfs/Pub\\_File\\_844\\_1.PDF](http://www.newamerica.net/Download_Docs/pdfs/Pub_File_844_1.PDF).

462. See generally Monroe E. Price, *Public Broadcasting and the Crisis of Corporate Governance*, 17 CARDOZO ARTS & ENT. L.J. 417 (1999).

463. See Geneva Collins, *Public TV Seeks ‘Flexibility’ In Money-Making Uses of DTV*, CURRENT, Feb. 22, 1999, available at [www.current.org/dtv/dtv903a.html](http://www.current.org/dtv/dtv903a.html).

counter the possibility that Congress would simply use the commercial-to-public television cross-subsidy as an excuse to reduce federal funding for the Corporation for Public Broadcasting, resulting in little or no net increase in funding for public television. This is an especially realistic possibility considering that certain members of Congress continue to insist that Congress cease funding public television.<sup>464</sup> Second, it still would not guarantee the provision of locally oriented, responsive public interest programming to the American public. The FCC would be no less restrained by the First Amendment in prescribing the quantity and characteristics of public interest programming on public television stations as it is in requiring such content from commercial licensees.

In addition, although public broadcasters have a better track record in providing public interest programming, critics have bemoaned the structure of the American public television industry as too beholden to Congressional whims, political appointees at the CPB and other government funding sources. Public television producer and industry expert Roger P. Smith, in fact, complains that “[o]ur state television acts in the interest of and selectively promulgates ideas that contribute to the perceived interest of a cadre of occupants of elective office.”<sup>465</sup> The Geller proposal, if implemented, may help alleviate the chilling Congressional influence on public television broadcasters, but it may also exacerbate the problem by allowing public television broadcasters to rely more on publicly administered funds and less on the contributions of their viewers.<sup>466</sup> Moreover, public broadcasting, like the BBC,

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464. See, e.g., Karen Everhart Bedford, *What to Kill First? The Right nominates CPB — to Save Tax Money and "Privatize the Left"*, CURRENT, Jan. 16, 1995, available at <http://www.current.org/mo501.html>.

465. ROGER P. SMITH, *THE OTHER FACE OF PUBLIC TV: CENSORING THE AMERICAN DREAM 9* (2002). He writes:

All the programs you watch on public TV must meet the approval of gatekeepers in the United States Congress and the Executive Branch of the Federal Government. . . . Billed as ‘yours’ on its station breaks, public TV is yours the way a Stealth bomber is yours. . . it’s paid for largely with your tax money and made in your name according to the decisions of a few dozen men whose inclinations have led them to pursue public office as your representatives.

*Id.*

466. On the other hand, public television’s dependence on the generosity of viewers and corporate donors has resulted in what some have described as a vulnerability to commercial exploitation and control. See, e.g., Susan E. Linn and Alvin F. Poussaint, *The Trouble with Teletubbies: The Commercialization of PBS*, THE AMERICAN PROSPECT, May-June 1999, at 18, available at

has endured criticism for being culturally elitist and exclusive in its programming decisions.<sup>467</sup>

Finally, public television stations – like their commercial counterparts – are permitted to use the expansive capacity in their new digital channel for ancillary profit making uses, including leasing spectrum to paging companies, pay-per-view enterprises and other services.<sup>468</sup> These new opportunities may help remedy the longstanding challenges public broadcasters have faced and that Geller addresses in his proposal.

#### B. PAYING THE OVERDUE DEBT: BROADCASTERS AS DIGITAL DIVIDE BRIDGE BUILDERS

This article presents a novel approach to fixing the persistent problem of the public trustee doctrine. Congress and the FCC should require commercial television broadcasters to assume an important role in making broadband<sup>469</sup> Internet access available to more Americans, particularly those who do not currently have such access because they cannot afford it or because it is not offered in their communities. Under this approach, broadcasters would not only be required to continue satisfying their minimal and constructively unenforced public interest programming requirements (for example, political broadcasting and children's educational television) but would also be required to help bridge the "digital divide" with a

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<http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4581>.

467. See, e.g., Editorial, *Public Television and 'Elitism'*, N.Y. TIMES, Jan. 26, 1995 at A20 (acknowledging and rejecting as "myth" public television's reputation in some circles as an "elitist" enterprise).

468. See Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees: Before the Fed. Communications Comm., 14 F.C.C.R. 3259 (2001) (Report and Order).

469. "Broadband" simply means a connection to the Internet allowing for much higher speed – and therefore capacity – for information to be delivered to the customer's computer. Whereas a broadband Internet connection's speed is approximately 2 megabits per second (mbps), a "narrowband" Internet connection has a maximum speed of 56 kilobits per second (kbps). See Enrico C. Soriano, et al., *A Look at Key Issues Currently Shaping Broadband Deployment and Regulation*, 21 COMPUTER & INTERNET L. 1, 1 n.6 (July 2004); see also Fed. Communications Comm., *Broadband*, at [www.fcc.gov/broadband](http://www.fcc.gov/broadband) (last modified Mar. 3, 2003). In practical terms, a broadband Internet connection can be as much as 100 times faster (and more capacious) than narrowband, allowing for the transmission of near-television quality video and audio programming, and the quick downloading of documents and other files. Fed. Communications Comm., *Broadband*, at [www.fcc.gov/broadband](http://www.fcc.gov/broadband) (last modified Mar. 3, 2003).

relatively small portion of the significant profits they realize in exploiting public spectrum.

First articulated in the mid-1990s, the “digital divide” refers to the disparity in access to computers, the Internet and other high technology by, primarily, the poor, people of color, the undereducated, and the aged.<sup>470</sup> Although Internet access of any kind (narrowband as well as broadband) has become more widespread across socioeconomic strata throughout the last five years, persistent gaps remain. A study completed in August 2003 found that although Internet access rates had improved for most Americans, Internet access among African-Americans (51%) still significantly trailed that of whites (64%).<sup>471</sup> Another study completed in April 2003 by the Pew Internet and American Life Project found that although race remains a determinant of Internet access, the fundamental predictive factor is that of household income.<sup>472</sup> In light of the relatively high cost of home PCs and monthly Internet Service Provider (ISP) subscriptions for even basic dial-up (narrowband) access,<sup>473</sup> a household income above \$50,000

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470. In discussing the “digital divide,” President Bill Clinton said: “There is a growing digital divide between those who have access to the digital economy and the Internet and those who don’t, and the divide exists along the lines of education, income, region, and race.” John Schwartz, *U.S. Cities Race Gap In Use of Internet: Clinton Bemoans ‘Digital Divide’*, WASH. POST, July 9, 1999, at A1.

471. PEW INTERNET & AM. LIFE PROJECT, AMERICA’S ONLINE PURSUITS: THE CHANGING PICTURE OF WHO’S ONLINE AND WHAT THEY DO 5 (Dec. 22, 2003), available at [http://www.pewinternet.org/pdfs/PIP\\_Online\\_Pursuits\\_Final.PDF](http://www.pewinternet.org/pdfs/PIP_Online_Pursuits_Final.PDF). In October 2000, the Department of Commerce released a report concluding that white (46.1%) and Asian American/Pacific Islander (56.8%) households had Internet access at a level more than double that of African-American (23.5%) and Latino (23.6%) households. U.S. DEP’T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION: A REPORT ON AMERICANS’ ACCESS TO TECHNOLOGY TOOLS, 12 (October 2000), available at <http://search.ntia.doc.gov/pdf/fttn00.pdf>. This report was the fourth in a series of annual reports. Among households earning \$75,000 and above annually, Internet access was at 77.7%, whereas only 12.7% of households with annual earnings of less than \$15,000 per year had Internet access. *Id.* at 8.

472. AMANDA LENHART, PEW INTERNET AND AM. LIFE PROJECT, THE EVER-SHIFTING INTERNET POPULATION: A NEW LOOK AT INTERNET ACCESS AND THE DIGITAL DIVIDE 5 (Apr. 16, 2003) (“Independent of all other factors, having an income above \$50,000 annually predicts internet use.”), available at [www.pewinternet.org/reports/toc.asp?Report=88](http://www.pewinternet.org/reports/toc.asp?Report=88).

473. In a December 2004 article, Consumer Reports estimated the cost of an Internet-ready personal computer with the bare requirements for acceptable Internet access as falling between \$500 and \$700. *Ratings: Desktop Computers*, CONSUMER REPORTS, December 2004, at

annually is most predictive of Internet access.<sup>474</sup> That study also noted that educational level and age were significant determinants as well, with less educated and older Americans less able, or less willing, to access the Internet.<sup>475</sup>

Not all policymakers agree that the “digital divide” merits concern. FCC Chairman Michael Powell, for example, dismissed the “so called digital divide” as “a Mercedes divide,” chiding: “I’d like to have one; I can’t afford one . . . .”<sup>476</sup> Although some dispute the severity and longevity of the digital divide, there is general consensus among lawmakers, educators, the telecommunications industry and its critics that the digital divide continues to exist.<sup>477</sup>

None other than President George Bush has spoken in support of government initiatives seeking to expand access to broadband Internet service. In a June 24, 2004 speech at the Department of Commerce, he set a goal to make broadband Internet access universally available in the United States by 2007.<sup>478</sup> Citing that the United States ranks tenth in the world in terms of per capita access to broadband Internet services, President Bush noted that “[t]he spread of broadband will not only help industry, it’ll help the quality of life of our citizens.”<sup>479</sup> He noted that to achieve universal access,

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[http://www.consumerreports.org/main/content/display\\_report.jsp?FOLDER%3C%3Efolder\\_id=516851&ASSORTMENT%3C%3East\\_id=333133&bmUID=1101003920336](http://www.consumerreports.org/main/content/display_report.jsp?FOLDER%3C%3Efolder_id=516851&ASSORTMENT%3C%3East_id=333133&bmUID=1101003920336). A monthly subscription to a narrowband, dial-up ISP (such as AOL and MSN) is approximately \$20.00. *Broadband Internet: Worth the Switch?*, CONSUMER REPORTS, September 2002, at [http://www.consumerreports.org/main/content/display\\_report.jsp?FOLDER%3C%3Efolder\\_id=334697&ASSORTMENT%3C%3East\\_id=333133&bmUID=1101004274458](http://www.consumerreports.org/main/content/display_report.jsp?FOLDER%3C%3Efolder_id=334697&ASSORTMENT%3C%3East_id=333133&bmUID=1101004274458). By contrast, broadband connections cost approximately \$35 to \$40 per month, if available at all in a customer’s service area, and are typically provided by standard telephone companies using upgraded Digital Subscriber Line (DSL) wiring or cable television companies using cable modems. See generally BROADBAND REPORTS.COM, [www.broadbandreports.com](http://www.broadbandreports.com).

474. Lenhart, *supra* note 472, at 5.

475. *Id.* at 8-9.

476. Stephen Labaton, *New FCC Chief Would Curb Agency Reach*, N.Y. TIMES, Feb. 7, 2001, at C1.

477. See President George Bush, Speech to U.S. Dept. of Commerce (June 24, 2004) *transcript available at* <http://www.multied.com/elections/2004/2004mainelec/Bushspeeches/Technology.html>. [hereinafter Bush Broadband Speech]; Allen S. Hammond, *The Digital Divide in the New Millennium*, 20 CARDOZO ARTS & ENT. L.J. 135, 135-36 (2002).

478. See Editorial, *Broadband Penetration*, BALT. SUN, April 28, 2004, at 18A.

479. See Bush Broadband Speech, *supra* note 477.

broadband Internet service must be deployed to the areas of the country where it is still unavailable, and it must be made more affordable.<sup>480</sup> The campaign staff of the 2004 Democratic Presidential candidate, John Kerry, released a statement making a similar commitment to broadband Internet access.<sup>481</sup> Unfortunately, as noted by a number of observers, both the President and Senator Kerry failed to support their rhetoric with tangible proposals to reach the goal of universal service by 2007.<sup>482</sup>

### 1. The Internet as the True “Free Marketplace of Ideas”

Having broadcasters subsidize access to the Internet for those poor or underserved households may help achieve, finally, the unmet aspirations of American broadcast regulation “to cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.”<sup>483</sup> With the Internet, Congress and broadcasters for the first time have the opportunity to help create the “free marketplace of ideas” envisioned by Justice Holmes, where ideas are traded and truth distilled without the encroachment and influence of government. The Internet is the quintessential, egalitarian public forum. Anyone *with access to it* can speak and be heard as well as hear (or read) the ideas of others, all with almost no government interference.<sup>484</sup> Writer Declan McCullagh suggests that individuals should “[t]hink of the Internet as an unlimited expanse of public park, where soapboxes are available for free

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480. *Id.*

481. See *Political Disconnect: Bush, Kerry Tout Broadband for All, But Critics Say Neither Has Concrete Plan for Achieving Critical Goal*, ROCKY MOUNTAIN NEWS, Apr. 26, 2004, at 1B

482. See *id.* The Kerry campaign suggested using public money to subsidize access to underserved areas as well as a tax credit for those providers who serve those areas. *Id.* In his speech before the Commerce Department, the President stated that a ban on taxing broadband access should help make it more affordable. Bush Broadband Speech, *supra* note 477.

483. From the beginning, broadcast regulation in the public interest has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide. See CHARTING THE DIGITAL BROADCASTING FUTURE, *supra* note 7, at 21.

484. LAWRENCE LESSIG, CODE 24 (1999) (citing Tom Steinert-Threlkeld, *Of Governance and Technology*, INTER@CTIVE WEEKONLINE, October 5, 1998 (“Some things never change about governing the Web. Most prominent is its innate ability to resist governance in almost any form”)) available at <http://web.archive.org/web/19990922122310/www.zdnet.com/intweek/stories/news/0,4164,357750,00.html>.

to anyone who wants one.”<sup>485</sup> The problem, of course, is that McCullagh is half right. He is right that once one has access to the Internet’s “public park,” one can climb on a soapbox and speak at no additional expense. The problem, however, is that the park’s admission price is too steep for many Americans, and the park’s entrance gates are too far away for others. While the advent of the Internet has lowered barriers among those who have access to it, it has exacerbated divisions between those who can afford the Internet – and the new digital era’s marketplace of ideas – and those who cannot.

Notwithstanding barriers to access, the Internet has already proven itself to be a more useful tool for democratic interaction and deliberation than television. Whereas television broadcasting is by definition passive, the Internet is fundamentally interactive and participatory.<sup>486</sup> Whereas television provides narrow, homogenized content designed primarily to attract the greatest number of viewers (and advertising dollars), the Internet offers an almost limitless array of information streams and opportunities for active engagement. The Internet has become America’s expansive public forum where diverse people meet, exchange ideas, trade goods and engage in many of the other activities traditionally performed in the “town square.” As Justice Kennedy noted in 1996, “[m]inds are not changed in the streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”<sup>487</sup> In 2004, those words are especially descriptive of the Internet.

The Internet holds promise for the Madisonian view that political equality among all citizens is achieved only when all

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485. Declan McCullagh, Democracy Online Project, Testimony before Democracy Online Task Force (May 22, 2000), *available at* <http://www.mccullagh.org/speeches/democracyonline.052200.html>.

486. Lloyd Morrisett, the cofounder of the Children’s Television Workshop, acknowledges that “[b]roadcasting, as a technology, does not naturally stimulate discussion among the people who receive the broadcast. Networked computers offer quite a different model.” Lloyd Morrisett, *Technologies of Freedom?*, in DEMOCRACY AND NEW MEDIA 28 (Henry Jenkins & David Thorburn, eds., 2003). Media theorist George Gilder agrees. At the 1997 Camden Conference on Telecommunications, he posited that the Internet is “inherently” democratic whereas television is inherently undemocratic. Doug Schuler, *Reports of the Close Relationship between Democracy and the Internet May Have Been Exaggerated*, in DEMOCRACY AND NEW MEDIA 72.

487. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 801-03 (1996) (Kennedy, J., concurring in part, dissenting in part).

citizens have the ability to participate in democratic deliberation and debate.<sup>488</sup> The Internet provides us with a relatively unrestricted and broad exchange of information. It already is facilitating what Justice Holmes's described as a "free trade in ideas"<sup>489</sup> and the sort of "public discussion" that Justice Brandeis termed "a political duty."<sup>490</sup> Internet access, particularly by means of a broadband connection, allows users to watch Congressional floor debate and committee hearings and a panoply of public affairs programming, such as panel discussions on political campaigns and the war effort,<sup>491</sup> gives users free access to hundreds of newspapers from around the United States and the world<sup>492</sup> and access to federal and state agency filing, regulations, and open rulemaking proceedings (many of which accept comments from the public through the respective agency's website).<sup>493</sup> Congress and the executive branch, virtually all federal agencies, and many state and local governments have significant presences on the Internet, with web sites that provide citizens access to information involving important entitlement and public safety programs and the ability to file comments, complaints or concerns electronically with government agencies and elected representatives.

Users can use the Internet to engage in political activism through advocacy sites aligned with their interests, and can view issue-specific programming and engage in pertinent "chats" on those sites.<sup>494</sup> Users can obtain in-depth information

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488. It also is consistent with Article 19 of the Universal Declaration of Human Rights, which echoes the Madisonian perspective: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference or to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 19 (1948) *available at* <http://www.un.org/Overview/rights.html>.

489. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

490. *Whitney v. California*, 274 U.S. 357, 375 (1927). Justice Brandeis warned that "the greatest menace to freedom is an inert people." *Id.*

491. *See, e.g.*, [www.cspan.org](http://www.cspan.org) (C-SPAN's extensive video streaming and archived video feeds).

492. *See, e.g.*, [www.nytimes.com](http://www.nytimes.com) (N.Y. TIMES website); [www.washingtonpost.com](http://www.washingtonpost.com) (WASH. POST website); [www.timesonline.co.uk](http://www.timesonline.co.uk) (LONDON TIMES website).

493. *See, e.g.*, [www.hhs.gov](http://www.hhs.gov) (Department of Health and Human Services); [www.dol.gov](http://www.dol.gov) (Department of Labor website).

494. *See, e.g.*, [www.hrc.org](http://www.hrc.org) (Human Rights Campaign website); [www.nrlc.org](http://www.nrlc.org) (National Right to Life Committee website); [www.naral.org](http://www.naral.org) (National Abortion Rights Action League website); [www.nrdc.org](http://www.nrdc.org) (Natural

about political candidates through their campaign websites, and also can see what kind of campaign contributions the candidates are receiving and from whom.<sup>495</sup> Users could peruse thousands of “blogs” or “web logs,” which are websites maintained by individual writers and commentators on political,<sup>496</sup> legal,<sup>497</sup> cultural<sup>498</sup> or other issues, or they could create their own “blog” and express their own views, including expressions of political dissent.<sup>499</sup>

A.J. Liebling said that “freedom of the press is guaranteed only to those who own one.”<sup>500</sup> Today, access to the Internet is tantamount to owning one’s own “press.” Indeed, bloggers and their blogs are changing the face and definition of the modern press.<sup>501</sup> Matt Drudge, the publisher of the online “Drudge Report,” is credited with breaking the story about President William J. Clinton’s affair with Monica Lewinsky, scooping all of the mainstream press in the process.<sup>502</sup> Professor Lawrence Lessig, a “blogger” himself,<sup>503</sup> wrote that the Internet, and especially blogging and other interactive activity, has “turn[ed]

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Resources Defense Council website); [www.nra.org](http://www.nra.org) (National Rifle Association website).

495. See, e.g., [www.fec.gov](http://www.fec.gov) (Federal Elections Commission website).

496. See, e.g., [www.andrewsullivan.com](http://www.andrewsullivan.com) (renowned blog of conservative political writer and commentator Andrew Sullivan); [www.dailykos.com](http://www.dailykos.com) (popular liberal political blog authored by Markos Moulitsas Zuniga). The “Daily Kos” site typically receives 4 million unique visits per month. See Marlon Manuel, *Boston E-Party*, ATLANTA J.-CONST., July 25, 2004, at 1E. It has been credited with raising tens of thousands of dollars in a matter of days for key Congressional races. See Farhad Manjoo, *At The Speed of Blog*, SALON.COM, July 23, 2004, at [www.salon.com/tech/feature/2004/07/23/blog\\_money/index\\_np.html](http://www.salon.com/tech/feature/2004/07/23/blog_money/index_np.html).

497. See, e.g., [www.volokh.com](http://www.volokh.com) (“The Volokh Conspiracy,” blog launched by law professor Eugene Volokh).

498. See, e.g., [www.artsjournal.com/blogs/](http://www.artsjournal.com/blogs/).

499. Although access to the great majority of blogs is free, a number of bloggers ask for donations and some of the more popular writers receive significant contributions in response, in some cases significantly higher sums than average salaries for reporters at major daily newspapers and television stations. See Kathy Kiely, *Freewheeling ‘Bloggers’ Are Rewriting the Rules of Journalism*, USA TODAY, December 30, 2003, at 1A (noting that in 2002, Andrew Sullivan, a popular blogger, ran a “pledge drive” on his blog and claims to have raised nearly \$100,000).

500. A.J. LIEBLING, *THE PRESS* 32 (2d rev. ed., 1975).

501. See, e.g., David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 471-72 (2002) (noting that the Internet is necessitating new interpretations of traditional notions associated with the freedom of the press.)

502. See Kiely, *supra* note 499, at 1A.

503. See <http://www.lessig.org/blog/>.

the audience into the speaker.”<sup>504</sup>

The Internet enables people to meet who otherwise would not likely have crossed paths, both by means of “chat rooms” as well as by directing users to in-person, community meetings with likeminded people.<sup>505</sup> It also has allowed socio-politically oppressed and isolated minorities to find one another and build mutually supportive communities through online fora.<sup>506</sup>

The Internet’s effect on the American political process has been transformative, and promises to further revolutionize the way citizens, political candidates and elected officials engage in policy debates and conduct electoral politics. Joe Trippi, campaign director for former Vermont Governor Howard Dean’s campaign for the 2004 Democratic nomination, calls the Internet “the last hope for democracy”<sup>507</sup> and credits it with enabling the Dean campaign to amass 600,000 supporters and a \$60 million campaign fund with little by way of traditional television and radio advertising.<sup>508</sup> Trippi posits that the Internet “reversed some of the more insidious aspects of television” by “making people *talk to each other again*.”<sup>509</sup> Gen. Wesley Clark, another candidate for the 2004 Democratic

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504. *Quoted in* TRIPPI, *supra* note 328, at 144. “A well-structured blog inspires both reading and writing. And by getting the audience to type, candidates get the audience committed. Engagement replaces reception, which in turn leads to real space action.” *Id.*

505. *See, e.g.,* [www.meetup.com](http://www.meetup.com) (allows users to organize and attend affinity meetings in their communities).

506. *See, e.g.,* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003) (documenting how the Internet serves as an important tool for gay men and lesbians for political and community organizing, socializing, and for isolated individuals living in hostile surroundings, the creation of “a virtual community that constitutes an emotional lifeline”); *see also* Gallaudet University, *Deaf Internet Resources*, (listing extensive Deaf community online resources, including discussion groups, advocacy organizations, and assistive resources) *available at* <http://pr.gallaudet.edu/dir/> (last visited Nov. 5, 2004).

507. TRIPPI, *supra* note 328, at 4.

508. *Id.* at xvii-xix. Trippi characterizes the Dean campaign as, “the opening salvo in a revolution, the sound of hundreds of thousands of Americans turning off their televisions and embracing the only form of technology that has allowed them to be involved again, to gain control of a process that alienated them decades ago.” *Id.*

509. *Id.* at 54 (emphasis in original). David Winston, one of the creators of the successful conservative “townhall.com” website, sponsored by the Heritage Foundation, writes that “[w]ith the advent of the Internet, digital technology changed fundamentally from computing to communications.” David Winston, *Digital Democracy and the New Age of Reason*, in *DEMOCRACY AND NEW MEDIA*, *supra* note 485, at 135.

nomination, announced his candidacy only after being “drafted” by a web-based “Draft Clark” campaign.<sup>510</sup> The candidate that defeated both Clark and Dean to become the Democratic nominee for president, Senator John F. Kerry (D-Mass.), used the Internet to disseminate detailed issue papers, organize volunteers, disseminate campaign propaganda, including campaign video and advertisements, and, most notably, raise \$57 million online before his July 29, 2004, deadline for raising private contributions.<sup>511</sup>

State and local electoral campaigns, which tend to get scant coverage on commercial television stations, also have turned to the Internet to disseminate campaign messages and attract and interact with donors and voters. For example, after purchasing the least paid television and radio advertising of any of his opponents, Jesse Ventura surprised the nation by winning the 1999 Minnesota gubernatorial race, a victory credited to his campaign’s strategic use of the Internet and enlistment of “netizens” to fundraise and solicit votes on the web.<sup>512</sup>

As noted earlier, Matt Drudge’s website broke the Clinton-Lewinsky story. In reaction to the ensuing political firestorm and the Congressional impeachment proceedings against then-President Clinton, two concerned citizens launched a web site, [www.MoveOn.org](http://www.MoveOn.org),<sup>513</sup> which organized a grassroots effort to

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510. *Id.*

511. Paula Dwyer, *The Amazing Money Machine*, BUSINESSWEEK, August 2, 2004, Kerry’s campaign raised \$5.2 million through its website ([www.johnkerry.com](http://www.johnkerry.com)) on July 30, 2004 alone. Glen Johnson, *Money Belt Tightens on Kerry*, BOSTON GLOBE, July 30, 2004, A17. *available at* [http://www.boston.com/news/politics/conventions/articles/2004/07/30/money\\_belt\\_tightens\\_on\\_kerry\\_1091167467](http://www.boston.com/news/politics/conventions/articles/2004/07/30/money_belt_tightens_on_kerry_1091167467).

512. See Henry Jenkins & David Thorburn, *The Digital Revolution, the Informed Citizen, and the Culture of Democracy*, in DEMOCRACY AND NEW MEDIA, *supra* note 485, at 3. Jenkins and Thorburn also point to the “Nader Traders” web-based program in the 2000 presidential election, where voters in predominantly democratic states like New York and Massachusetts were able to “swap votes” with Nader supporters in states, like Florida, where then-candidate George W. Bush either was in the lead or in a competitive race with Vice President Al Gore. A total of 15,000 vote swaps were effectuated, with 1,400 Nader supporters in Florida voting for Gore pursuant to a “swap.” *Id.* at 4. The vote-swapping plan elicited controversy, with some critics calling it the “Napsterization” of the American political system. *Id.*

513. See [MoveOn.org](http://www.moveon.org/about/), *What is MoveOn all About?*, at <http://www.moveon.org/about/> (last visited Nov. 27, 2004). MoveOn.org describes itself as “a catalyst for a new kind of grassroots involvement, supporting busy but concerned citizens in finding their political voice.” Its identity statement includes the following:

oppose the impeachment proceedings and pressure Congress to “move on” to more important business.<sup>514</sup> Within weeks of its launch, the site had 450,000 registered users.<sup>515</sup> After the House of Representatives voted to impeach, the MoveOn.org organizers solicited contributions of money and volunteer hours to for candidates in 2000 running against those members of Congress who voted in favor of impeachment. The site raised \$13,000,000 and 700,000 volunteer hours in short order.<sup>516</sup> The political establishment not only took notice. It has been emulating MoveOn.org’s success, with many political candidates and special interest groups militating grassroots activists and raising significant sums of money from their highly interactive websites.<sup>517</sup>

Internet political discussion boards and blogs also are credited for drawing attention to stories initially ignored by the broadcast media. It was the Internet that publicized the questionable remarks of then-Senate Majority Leader Trent Lott (R-Miss.) at a birthday party for Republican Senator Strom Thurmond (R-S.C.).<sup>518</sup> While lauding Senator Thurmond’s career, Lott lamented that the nation would have been better off if his segregationist presidential campaign had prevailed in 1948.<sup>519</sup> The mainstream media ignored the story for days until the Internet protests grew so heated that television network news programs and major newspapers finally led with the story, leading to Lott’s resignation from the position.<sup>520</sup> The Internet also has transcended the dysfunction

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With a system that today revolves around big money and big media, most citizens are left out. When it becomes clear that our “representatives” don’t represent the public, the foundations of democracy are in peril....Our nationwide network of more than 2,000,000 online activists is one of the most effective and responsive outlets for democratic participation available today.

*Id.*; see also Gary Wolf, *Weapons of Mass Mobilization*, WIRED, Sept. 2004, at 131 (detailing the political mobilizing and fundraising power of MoveOn.org).

514. See Roger Hurwitz, *Who Needs Politics? Who Needs People? The Ironies of Democracy in Cyberspace*, in DEMOCRACY AND NEW MEDIA, *supra* note 485, at 109.

515. *Id.*

516. *Id.*

517. See Samantha M. Shapiro, *The Dean Machine Marches On*, WIRED, Sept. 2004, at 139.

518. See, e.g., Marlon Manuel, *Boston E-Party*, ATLANTA J.-CONST., July 25, 2004, at 1E; Aman Batheja, *Web Journals Gaining Readers and Influence*, FORT-WORTH STAR TELEGRAM, July 27, 2004.

519. *Id.*

520. See *Conventioneering.com*, NEW YORK TIMES, July 15, 2004, at A22.

of a mainstream media that will not shed light on its own questionable dealings with Congress and the FCC. It was also MoveOn.org's Internet activism that generated most of the 750,000 complaints to Congress opposing the FCC's June 2003 decision to allow for more consolidation of the television industry.<sup>521</sup> MoveOn.org generated a petition with 170,000 "virtual" signatures urging the FCC to reverse its decision.<sup>522</sup>

In addition to engaging in political activism and community affairs, those with Internet access in their homes can use the web to send e-mail, pursue an education,<sup>523</sup> peruse employment ads and apply for work, control financial affairs by means of online banking and investment sites, shop, and

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521. See Frank Ahrens, *FCC Plan to Alter Media Rules Spurs Growing Debate*, WASH. POST, May 28, 2003, at A1; David D. Kirkpatrick, *Media Deregulation Foes Make Murdoch Their Lightning Rod*, N.Y. TIMES, May 29, 2003, at C6.

522. See Ahrens, *supra* note 521.

523. Educators have touted "Internet literacy" as an important educational tool, and one that must be incorporated into modern curricula. See Jessica L. Malman, *Connecting Students to 'The Net: Guiding Principles from State Constitutions*, 7 GEO. J. POVER' LAW & POLY 53, 57-59 (2000). But cf. ALLIANCE FOR CHILDREN, *FOOLS GOLD: A CRITICAL LOOK AT COMPUTERS IN CHILDHOOD* (Colleen Cordes & Edward Miller eds., 2001) (challenging the notion that computers are good for children by citing excessive computer dependence as the cause of children's musculoskeletal and vision problems; obesity; emotional, social and creative underdevelopment; and plagiarism), available at [http://www.allianceforchildhood.net/projects/computers/computers\\_reports\\_fools\\_gold\\_contents.htm](http://www.allianceforchildhood.net/projects/computers/computers_reports_fools_gold_contents.htm). Politicians also have recognized the value of the Internet in education and to children (and to themselves). President Bill Clinton touted the importance of connecting elementary and high schools to the Internet in his 1997 State of the Union Address, saying:

[W]e must bring the power of the information age into all our schools. [I challenge] America to connect every classroom and library to the Internet by the year 2000, so that, for the first time in our history, children in the most isolated rural towns, the most comfortable suburbs, the poorest inner-city schools, will have the same access to the same universe of knowledge.

President's Address Before a Joint Session of the Congress on the State of the Union, 33 WKLY. COMP. PRES. DOC. 136, 139 (Feb. 4, 1997). President Clinton also touted the Internet as an equalizer, "bringing down barriers of race and gender, of income and age." Commencement Address at the Massachusetts Institute of Technology in Cambridge, Massachusetts, 34 WKLY. COMP. PRES. DOC. 1050 (June 5, 1998), reprinted in President Clinton, *Digital Divide, Remarks by the President at Massachusetts Institute of Technology 1998 Commencement*, TECH L. J. (June 5, 1998), available at <http://www.techlawjournal.com/agencies/slc/80605clin.htm>.

Clinton stated that "until every student has the skills to tap the enormous resources of the Internet, . . . America will miss the full promise of the Information Age." *Id.*

perform research on any topic. More importantly, the Internet has become a national resource for political engagement and debate, and access to all levels of government.

Despite its impressive track record in bolstering democratic activities, by no means is the Internet a panacea for all that ails American democracy. To the contrary, the migration of so much of American civic, cultural and commercial life to the Internet has ushered in a new set of concerns. Professor Cass Sunstein warns that although the Internet offers the interactivity and virtually limitless choice of content that that television lacks, its ability to narrowcast very specialized content risks fragmenting and polarizing our society.<sup>524</sup> Sunstein observes that the Internet enables users to create a virtual “Neighborhood Me,” in which all of the information and people they are exposed to are filtered to ensure a commonality of viewpoint and experience.<sup>525</sup> A deliberative democracy functions best, however, when and where citizens are exposed to people different from themselves, in terms of ideas, experiences, backgrounds and outlooks. He observes that, “[u]nplanned, unanticipated encounters are central to democracy itself.”<sup>526</sup> These surprise, sometimes unwanted encounters with previously unknown and different people and opinions often broaden people’s perspectives and change minds.<sup>527</sup> The danger of not having Internet “street corners” where we encounter and assimilate difference, is that our society will become so polarized and segmented that extremist forces, untempered and uninformed by the exposure to adversarial forces, would flourish.<sup>528</sup>

Critics also note that the Internet has become just as or even more commercialized than television, with access to many

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524. CASS SUNSTEIN, REPUBLIC.COM 8-9, 71-73 (2001).

525. *See id.* at 236.

526. *See id.* at 8. “The role of street corners is one of exposing us to the unknown . . . confronting different ideas.” *Id.* at 15. Professor Sunstein’s warning finds ample support in the counsel of some of the best known democratic theorists. John Stuart Mill, for example, wrote that:

It is hardly possible to overstate the value, in the present state of human improvement, of placing human beings in contact with other persons dissimilar to those with which they are familiar. Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.

John Stuart Mill, 3 PRINCIPLES OF POLITICAL ECONOMY 594 (1848).

527. SUNSTEIN, *supra* note 524 at 35.

528. *Id.* at 8.

websites restricted only to those who pay for subscriptions.<sup>529</sup> Professor Lawrence Lessig has written extensively about how software code – the Internet’s infrastructure – has the power to restrict access to fora that should be open to all. He warns that “[t]he world we are entering...is not a world where freedom is ensured.”<sup>530</sup>

Moreover, the Internet can be a dangerous place, both for children as well as vulnerable adults. Websites abound depicting pornography and violence, advocating hate against minorities, and victimizing visitors with fraudulent commercial schemes.<sup>531</sup>

Professors Lessig and Sunstein’s and others’ concerns about the Internet are valid. To be clear, the Internet is not a *panacea* for democracy. Much of the Internet already is highly commercialized, and depending on its evolution, the Internet possibly could become more isolating and factionalizing, and more overrun with content that is pornographic or hate-inciting. What is also clear, however, is that democracy itself is not a cure-all for what ails society. To the contrary, our traditional town squares often were loud, dirty and chaotic spaces, often dominated by commerce, and at times polluted by crime, hate-speech and peddlers of pornography and fraud. In essence, although far from perfect, the Internet’s benefits far outweigh its dangers.

## 2. Existing Models for Interindustry Cross-Subsidies

Federal communications regulation has relied on universal access cross-subsidies, such as the television-to-Internet access subsidy proposed here, since the inception of the telephone. Alexander Graham Bell, the telephone’s inventor, himself expressed the importance of universal service and the notion

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529. Douglas Schuler, *supra* note 486, at 70 (noting an estimated 90 percent of all Internet web pages are for financial gain). “The future infrastructure will likely focus on entertainment and that which brings in the most revenue – sex, violence, special effects – and devote little attention to services that educate, inspire, or help bring communities together.” *Id.*; see also, SUNSTEIN, *supra* note 524, at 18.

530. Lawrence Lessig, The Laws of Cyberspace (presented at the Taiwan Net ’98 conference, in Taipei, March, 1998), available at [http://www.lessig.org/content/articles/works/laws\\_cyberspace.pdf](http://www.lessig.org/content/articles/works/laws_cyberspace.pdf).

531. See, e.g., Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 364-70 (1996) (documenting constitutional and other legal challenges involving pornography and violence on the Internet); Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. INT’L L.J. 157 (2003).

that “a telephone in every house would be considered indispensable.”<sup>532</sup>

Section 1 of the Communications Act of 1934 states that the purpose of American telecommunications policy is “to make available, so far as possible, to all people of the United States . . . a rapid, efficient, nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges.”<sup>533</sup> Initially, the FCC interpreted the 1934 Act’s universal service provision as requiring monopolist telephone companies to offset the additional expense of providing service to remote, rural and low-income customers by charging higher rates of corporate and residential customers in dense areas.<sup>534</sup> Over time, the FCC permitted telephone companies to subsidize less-profitable residential service with higher business rates, and local service with long distance rates.<sup>535</sup>

Today, telecommunications providers are federally subsidized by means of a Universal Service Fund (USF) to provide “Lifeline Assistance” and “Link-Up America” discounts on initial telephone connections and monthly rates for low-income households.<sup>536</sup> The USF is administered by the quasi-governmental Universal Service Administrative Company (USAC).

USAC also administers the “E-Rate” program, enacted as Section 254 of the 1996 Telecom Act.<sup>537</sup> One of the most recent

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532. ROBERT W. GARNET, *THE TELEPHONE ENTERPRISE: THE EVOLUTION OF THE BELL SYSTEM’S HORIZONTAL STRUCTURE, 1876-1909*, at 12 (1985). Universal service programs have their origin in the United States Postal Service (USPS). At the inception of the postal service, Congress opted to forgo authorizing postal service only to those routes that were self-supporting and instead funded the construction of post roads connecting the courthouses of all county seats in the nation. In seeking to serve the entire nation, the USPS essentially subsidized newer, money-losing routes with revenues from those that were urban and already well-traveled. *See* STARR, *supra* note 34, at 88; *see also* RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 49 (1995).

533. 47 U.S.C. § 151 (2000).

534. Christine M. Mason, *Universal Service in the Schools: One Step Too Far?*, 50 FED. COMM. L.J. 237, 239 (1997) (citing Barry D. Fraser, *Telecommunications Competition Arrives: Is Universal Service Out of Order?*, 15 CAL. REG. L. REP. 1, 4 (1995)); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 21 n. 125 (1996).

535. Mason, *supra* note 534, at 239; *see also* Livia Solange West, *Deregulating Telecommunications: The Conflict Between Competition and Universal Service*, 9 DEPAUL BUS. L.J. 159, 165-66 (1996).

536. Mason, *supra* note 534, at 239-40.

537. 47 U.S.C. § 254 (2000).

iterations of a universal service cross-subsidy in American telecommunications regulation, E-Rate requires “[e]very telecommunications carrier that provides interstate telecommunications services,” (primarily regional and long distance telephone companies) to subsidize a new universal service fund intended to provide deeply discounted Internet access, and other Internet-oriented telecommunications services, to elementary and high schools and libraries.<sup>538</sup> At a hearing before the Senate Commerce Committee in October 2003, FCC Chairman Michael Powell reported that as a result of the E-rate program, “[n]inety-nine percent of America’s schools are connected to the Internet.”<sup>539</sup>

Although it has been broadly perceived to be a success, the E-Rate program has also had its critics, some arguing that the placement of computers in a school building has not translated into an improvement of students’ technological literacy as compared to access to the Internet at home.<sup>540</sup>

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538. *Id.* § 254(d), (h). The 1996 Act specifically directs the FCC to empanel a Federal-State Joint Board (Joint Board) to propose the various mechanisms necessary to collect and distribute the subsidy. § 254(a)(1). The Joint Board released a report on November 8, 1996, recommending that eligible schools and libraries receive discounts on Internet and telephone access, and internal connections, of between 20 and 90 percent, subject to an annual cap of \$2.25 billion. Federal-State Joint Bd. on Universal Serv., Recommended Decision, 12 F.C.C. R. 87, at ¶ 440 (1996) (Recommended Decision). The FCC adopted the Joint Board’s recommendations, with minor modifications, on May 8, 1997. Federal-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776 (1997) (Report and Order).

539. Michael K. Powell, FCC Chairman, Statement before Senate Committee on Commerce, Science and Transportation (Oct. 30, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-24057A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-24057A1.pdf).

540. Randy Bell, an education professor at the University of Virginia notes: One of the big myths out there is that students have good access to computers and high technology. That’s not really true. Most computers are in labs, not classrooms. So even if a teacher has the inclination and ability to do creative things with computers, he or he doesn’t have good access.

Kristen Loschert, *Are You Ready? High Tech Teaching*, NEA TODAY, Apr. 1, 2003, at 10.

The National Education Association notes that only one-third of teachers characterize themselves as “well-prepared” or “very well-prepared” to integrate the Internet and computers into instruction. *Id.* The NEA estimates that the average American elementary school student has little if any access to computers in his or her classroom, and typically develops computer literacy at home if his or her home is equipped with a computer and the Internet. *Id.* Many of those children with no Internet access at home have no access to the Internet at all.

### 3. Options for Structuring a TV-to-Internet Cross-Subsidy

Specific details on how a television-to-Internet cross-subsidy should be configured would require extensive planning and negotiation among the FCC, television licensees and the trustees of the cross-subsidy funds, similar to the significant amount of planning invested in devising the E-Rate program. One obvious and streamlined option, however, would be to have the television cross-subsidy administered coextensively with the existing E-Rate and telephone Lifeline assistance programs already administered by the USAC. Contributions could be assessed on a sliding scale, so as to not overburden small broadcast licensees, and could, for example, take the form of a three percent to five percent “tax” on each licensee’s annual advertising revenue.<sup>541</sup> The USAC would then transmit the subsidies to residential Internet Service Providers (ISPs) for the funding of discounted rates for customers meeting certain income guidelines (similar to the Lifeline telephone program). Moreover, should President Bush’s proposal for a greatly increased government commitment to expand broadband Internet access to low income and underserved communities be implemented, a television cross-subsidy could be incorporated into that program. Cross-subsidy proceeds could also be directed to programs being instituted now to expand broadband access to areas of the country that cannot access broadband Internet because of the need for upgraded infrastructure (*i.e.*, high capacity coaxial or fiber optic cabling).

A television-Internet cross-subsidy could also contribute to recent proposals for an Internet “information commons,” such as the “Digital Opportunity Investment Trust” proposed by Lawrence K. Grossman and Newton Minow, which would “[support] innovative and experimental ideas and techniques to enhance learning; broaden knowledge; encourage an informed citizenry and self-government; make available to all Americans the best of the nation’s arts, humanities, and culture; and teach the skills and disciplines needed in this information-based economy.”<sup>542</sup>

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541. This is similar to the public broadcasting cross-subsidy proposed by Henry Geller. See Henry Geller, *supra* note 460, at 364-365.

542. NEWTON MINOW & LAWRENCE GROSSMAN, A DIGITAL GIFT TO THE NATION: FULFILLING THE PROMISE OF THE DIGITAL AND INFORMATION AGE 5 (2001); see also The Digital Promise Project, *Creating the Digital Opportunity Investment Trust: A Proposal to Transform Learning and Training for the 21st Century*, Report to Congress, (Oct. 2003), available at [www.digitalpromise.org](http://www.digitalpromise.org).

Public funding for expanded Internet access for the poor and underserved, as well as funding for initiatives such as the “information commons,” would be especially appropriate under the First Amendment’s public forum doctrine. The public forum doctrine provides that the government has an obligation to make public places available to the citizenry for purposes of self-expression and deliberation.<sup>543</sup> Free speech and democratic deliberation among citizens from different walks of life and with diverging and conflicting opinions normally do not take place in private homes, but in the streets, sidewalks and town squares connecting those homes.

The effect of the public forum doctrine has been to subsidize speech in public places by providing the public with those fora in which speech can flourish.<sup>544</sup> Justice Roberts in *Hague v. CIO*,<sup>545</sup> notes that “[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.”<sup>546</sup>

As discussed above, it was this very interest in subsidizing a public forum for a “marketplace of ideas” that motivated Congress in 1934 to conceive of the public trustee doctrine in the first place. Congress provides a constructive subsidy to broadcasters in not requiring them to pay for the public spectrum they utilize as their medium in exchange for their service to the public interest and the democratic needs of the polity in particular.

As our traditional public fora are supplanted by Internet facsimiles such as discussion boards, chat rooms, web logs, and other interactive services, the open availability and fair regulation of those fora become critical to the preservation of our First Amendment values.<sup>547</sup> A television-to-Internet cross-subsidy, therefore, not only should support expanded access to

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543. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 399 (1990) (crediting *Hague* with elucidating the public forum doctrine); Harry Kalven, Jr., *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1, 12.

544. Balkin, *supra* note 543, at 402-03.

545. 307 U.S. 496 (1939).

546. *Id.* at 515.

547. See SUNSTEIN, *supra* note 524. For an excellent treatment on the application of the public forum doctrine to Internet spaces, see Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J. LAW & TECH. 149 (1998).

broadband service by underserved and low income households, but it also should help underwrite government efforts to create “virtual” sidewalks and street corners that are open and free and not restricted by the corporate content controls and other restraints identified by Professors Lessig and Sunstein.

#### 4. The Viability of a Television-to-Internet Cross-Subsidy

After decades of attempts to reform the public trustee doctrine have stalled or failed in the face of its First Amendment, political and economic complexities, a reasonable inquiry would be why and how a proposal to require broadcasters to subsidize Internet access would be viable and achievable. What makes this proposal viable is that it avoids or counteracts some of the principal complications and resistors to reform of the existing public trustee regime.

First, an Internet cross-subsidy avoids the First Amendment complications that have frustrated repeated attempts by public interest-minded FCC officials, members of Congress and public interest organizations to impose tangible public interest broadcasting requirements on commercial television licensees. As in the case of other telecommunications cross-subsidies, such as the 1996 Telecom Act’s E-rate program, the payment of an Internet access subsidy would not implicate the broadcasters’ First Amendment rights.

Second, much of the infrastructure for such a cross-subsidy is already in place within the Universal Service Administrative Company (USAC), the government agency responsible for collecting and distributing already existing and successful telephone and Internet cross-subsidies.

Third, the manifest grassroots organizing power of the Internet itself may help a television-to-Internet cross-subsidy overcome the significant political power historically exerted by the *troika* of Congress, the FCC, and the broadcast lobby, against previous reform proposals. Militated by Internet-powered public interest organizations and supportive elected officials, the same “netizens” who have demonstrated such political muscle over the last several years may direct enough attention and political pressure to get this proposal adopted by Congress.

Fourth, expanding the reach and scope of the Internet is in the broadcasters’ best interests. Before the transition to the digital television format, TV stations’ analog signals were incompatible with the language of the Internet. Now as players

in the digital media market, television broadcasters, both individual local stations and national networks, are uniquely positioned to exploit the reach and flexibility of the Internet. Many already have established expansive and lucrative services on the web, offering some of the digitally formatted content they air on their second DTV channels by means of websites.<sup>548</sup> The future promises even more increasing convergence between television and other digital media.<sup>549</sup> In much the same way that the quest for high ratings drives broadcasters' efforts in maximizing the range of their transmitter antennae and in gaining signal carriage on area cable systems, so too do broadcasters seek the most attention to their Internet websites. The broadcasters' commercial interests in expanding the universe of potential "eyeballs" over the airwaves should translate readily into cyberspace.

Finally, as commercial broadcasters continue to exploit their new digital spectrum as well as lucrative opportunities on the Internet, the disparity between the permissive regulatory regime overseeing broadcasters, which constructively subsidizes broadcasters in exchange for their public trusteeship of the nation's airwaves, and the restrictive regulation imposed upon other digital telecommunications regulatees, will become increasingly stark and untenable. The DTV transition, in fact, privileged broadcasters with a significant advantage over their new competitors in the digital industry. In 1993, Congress instructed the FCC to auction nonbroadcast initial licenses for a variety of services, including paging, cellular, PCS and direct broadcast satellite.<sup>550</sup> Auctions for these services began in July 1994 and by 1996 had generated \$20 billion in revenue for the

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548. Innovative products now in development to exploit the new merged TV/PC/Internet environment include interactive advertising, gaming, movies on demand, and information on demand (for example, the ability to browse player statistics while watching a sporting event). Andrew F. Hamm, *Next Virtual Game Center: Your TV Set*, SAN JOSE BUS. J., Jan. 6, 2004, available at [www.msnbc.msn.com/id/3890273/](http://www.msnbc.msn.com/id/3890273/). Television executives are especially interested in the ability to exploit interactivity in advertising, providing consumers with additional information, including an immediate purchase option, during commercial breaks. One executive called interactivity "the holy grail of advertising." *Id.* (quoting John Roberts, vice president of interactive TV for the Game Show Network).

549. Ira Magaziner predicts: "The Internet will be on television. Broadcast television will be on personal computers. Telephone calls will be able to be made from both of them." Ira Magaziner, *Democracy and Cyberspace: First Principles*, in DEMOCRACY AND NEW MEDIA, *supra* note 485, at 113, 118.

550. 47 U.S.C. § 309(j) (2000).

U.S. Treasury.<sup>551</sup> The licensees for new PCS services alone paid in excess of \$12 billion for their licenses,<sup>552</sup> which remain subject to certain public interest and renewal requirements.<sup>553</sup> Digital broadcasters will compete with these new licensees in an increasing array of fora without facing the burden of the high debt loads taken on by the non-broadcast licensees when they acquired their spectrum licenses.<sup>554</sup> This disparity in treatment raises troubling regulatory consistency issues and may constitute a violation of constitutional equal protection guarantees.<sup>555</sup>

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551. FCC Press Release, FCC Hits \$20 Billion Mark in Total Auction Revenues, (Apr. 5, 1996), *at* [www.fcc.gov/Bureaus/Wireless/News\\_Releases/1996/nrwl6015.txt](http://www.fcc.gov/Bureaus/Wireless/News_Releases/1996/nrwl6015.txt).

552. See Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 529, 536 (1998).

553. See 47 U.S.C. § 309(j)(4)-(5) (2000) (requiring FCC to promulgate technical, construction and renewal requirements for auctioned licenses, consistent with “public interest, convenience and necessity”).

554. In addition to empowering the FCC to license nonbroadcast spectrum, existing digital broadcasters will eventually compete with newly licensed analog broadcasters. In its Balanced Budget Act of 1997, Congress authorized the Commission to auction licenses for new commercial analog television and commercial radio stations. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (Aug. 5, 1997) (codified at 47 U.S.C. § 309(j)). The FCC initiated a rulemaking proceeding and implemented a new broadcast license auctioning mechanism in late 1998, and has begun auctioning new broadcast licenses. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite Resolution of Cases, 13 F.C.C.R. 15,920, ¶ 3 (1998) (First Report and Order) [hereinafter Broadcast Auction Order]; 47 U.S.C. § 309(j)(2)(B) (2000) (exempting “initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses”). Television broadcasters already licensed in 1997 and converting to digital transmission were exempted from the spectrum auctions and will continue to use their spectrum for free. § 309(j)(2)(B).

555. U.S. Const. amend. V. The equal protection clause of the Fourteenth Amendment prohibits any state from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. The Fifth Amendment does not contain a similar equal protection clause, but the Supreme Court held in 1954 that such a clause could be inferred. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Supreme Court has said that the equal protection guarantee requires federal and state governments and their delegates to treat similarly situated persons and corporate entities similarly. *Compare with* *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (interpreting the equal protection clause as requiring that “all persons similarly situated should

## CONCLUSION

Few observers other than the broadcasters themselves disagree with the conclusion that after seven decades of existence, the public trusteeship model in television regulation has failed to achieve its intended purpose of enhancing our democracy with expansive public interest programming and a “free marketplace of ideas” on the public’s airwaves. Congress viewed its free provision of radio frequency spectrum to broadcasters in a manner reminiscent of its 1862 allocation of federal lands to higher education institutions – the so-called “land grant” colleges.<sup>556</sup> Those public lands were designated for use in the public’s interest, specifically the education of an informed citizenry, and they indeed have been utilized in satisfaction of that intent. By contrast, television licensees have exploited the public spectrum entrusted to them not for the primary benefit of their viewing public, but for the interests of their advertisers and shareholders. In reality, television broadcasters are much more analogous to mining companies that exploit federal lands for great private profit. The difference, however, is that the miners pay significant rents to the United States Treasury for the privilege of mining public resources, whereas television broadcasters, cloaked in the mythology of public trustees, do not.<sup>557</sup>

The result of this fundamental dysfunction of the broadcast public trustee doctrine has been the continued shortchanging of the American public and the unfair subsidization of television licensees who now compete in a digital environment against other FCC licensees who paid significant sums of money for their spectrum licenses. Although public interest advocates and the public itself have proposed a variety of reforms

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be treated alike.”).

556. See Morrill Act of July 2, 1862, ch. 130, § 1, 12 Stat. 503 (introduced by Justin Smith Morrill of Vermont). The 1862 “Morrill Act” granted federal land to each state, resulting in the creation of such prominent institutions as Rutgers University, Pennsylvania State University, and the Universities of Vermont, Minnesota, and Wisconsin. *Id.*

557. Professor Ronald Krotoszynski, Jr., put it this way:

Giving commercial broadcasters licenses to use the public’s airwaves with the admonition that they must use the resource in the public interest is not much different from handing the national forests over to Georgia Pacific, Weyerhaeuser, and other paper companies and telling them to use the forests in the public interest.

Krotoszynski, *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Regulation Must Fail*, 95 MICH. L. REV. 2101, 2109 (1997) (reviewing MINOW & LAMAY, *supra* note 2).

involving new public interest programming requirements, Congress and the FCC have failed to implement those reforms for the reasons detailed above. At its essence, Congress's construction of the public trustee doctrine is premised on irreconcilable contradictions that doomed it from the start.

First, Congress depends on the FCC to elucidate and enforce the public trustee doctrine, but then prohibits the FCC from censoring broadcast speech or otherwise "interfer[ing] with the right of free speech by means of radio communication."<sup>558</sup> Although the Supreme Court in *Red Lion* and its progeny has interpreted the public trustee doctrine as limiting the free speech rights of broadcasters, the FCC has opted against "walking the tightrope" between permissible and impermissible content regulation to elucidate and enforce public interest programming requirements.

Second, there is little doubt, given the evidence presented above, that the agency's reticence to apply stricter public interest requirements is exacerbated by the unique political influence of the broadcasters themselves. With Members of Congress beholden to broadcasters for positive coverage immediately before and between elections, it is not surprising that the broadcast lobby has become one of the most obvious "textbook" examples of an industry "capturing" its regulators, and in this case, the Congress itself. That the American public has not become more aware of the collusion between the broadcast industry and lawmakers itself is evidence of broadcasters' power to set the national agenda and direct focus away from their own dealings.

Third, Congress erred in expecting commercial broadcasters both to operate as public trustees in serving local public interest viewing needs and to run competitive commercial enterprises that optimize revenue for owners and shareholders. Time has taught that broadcasters cannot serve the two gods of public interest programming and the maximization of advertising revenue.

Fourth, the expectation that television would serve as a "free marketplace of ideas" proved to be illusory. By definition, television offers a narrow and finite point of focus to a broad audience that cannot interact with it or with one another.

These contradictions not only conspired to doom the public trustee doctrine from its inception, but they also have

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558. Communications Act of 1934, 47 U.S.C. § 326 (2000).

frustrated attempts to incorporate reforms in the broadcast regulatory regime. For example, demands for quantified and strict public interest programming requirements have failed consistently in the face of the broadcasters' appeals to the First Amendment, reinforced by their political influence. Similarly, appeals to broadcasters themselves to voluntarily assume more public interest obligations also have failed, in light of the commercial pressures they face to air programming that attracts the biggest viewership and, consequently, the highest advertising revenue.

The proposal to require commercial television broadcasters to subsidize broadband Internet access in underserved and underprivileged communities may be the most viable and effective option for reform because it circumvents many of the obstacles that have blocked past reform efforts. For example, it does not implicate the broadcasters' free speech rights. It may militate the Internet's own grassroots political influence to counterbalance the broadcasters' lobbying muscle. It is consistent with the public trustee doctrine's purpose to have broadcast licensees promote a "free marketplace of ideas." And it is consistent with the broadcasters' own interests, considering that the DTV transition has made them digital players themselves with significant and burgeoning presences on the web. Maximizing access to and participation in the Internet "marketplace" may – at long last – satisfy both the broadcasters' commercial interests as well as the interests of the American viewing public.