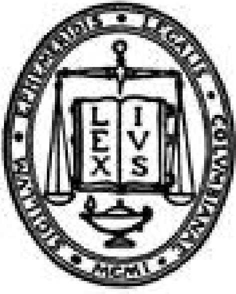

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PHYSICAL SCARCITY, RENT SEEKING, AND THE FIRST AMENDMENT

*Thomas W. Hazlett**

The disparate treatment of the print and electronic media under federal regulation has been a curiosity to lawyers and economists for decades. Now, dynamic technical change in telecommunications markets is credited with bringing a new tension to the underlying premises of the law, calling into question the "physical scarcity" doctrine, which has long been one of the foundations for federal regulation of broadcasting. Yet, the omnibus Telecommunications Act of 1996 glaringly failed either to promote competition in the broadcasting sector or to disturb the legal distinction between broadcasting and the traditional press. Indeed, the physical scarcity doctrine is still the law of the land—despite the explicit policy goal in the 1996 Act to end disparate treatment of rival media. Professor Hazlett argues that this legal anomaly is all the more striking in light of the physical scarcity doctrine's gaping illogical holes, its shaky legal foundation, and the growing abundance of modern wireless communications. After demonstrating that the First Amendment arguments that focus on these three factors are analytically incomplete, Professor Hazlett goes on to provide a richer explanatory model, which includes examination of the public choice dynamics driving the historical development of broadcasting law. In this model, Professor Hazlett reveals that the physical scarcity doctrine can be criticized even on its own terms, and that the ancillary doctrines that have arisen in support of this doctrine are merely outgrowths of classic regulatory capture. Professor Hazlett concludes that the First Amendment implications are stark: the "chilling effect" on broadcast speech, which the U.S. Supreme Court first feared and then dismissed as empirically inconsequential, is a vital—and lasting—component in the regulation of electronic communications.

I. THE 1996 TELECOMMUNICATIONS ACT: SPEECHLESS ON WIRELESS

> An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.
>
> Preamble to the Telecommunications Act of 1996[1]

Despite ambitious rhetoric regarding the scope of liberalization in telecommunications markets, the omnibus 1996 Telecommunications Act

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1. Pub. L. No. 104–104, 1996 U.S.C.C.A.N. (110 Stat.) 56, pmbl. (to be codified at scattered sections of 47 U.S.C.).

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did shockingly little to disturb age-old regulatory arrangements in radio and television broadcasting. Consider that the primary reforms in this sector involved the following:

- TV and radio licenses have been extended to eight years (from seven in radio, five in TV);
- Renewal of licenses has been made easier as the burden has shifted to the Federal Communications Commission (FCC) to show a "pattern of abuse" to justify non-renewal;
- Incentives for third parties to challenge license renewals have been reduced;
- Various ownership restrictions have been relaxed, particularly in radio markets;
- A violence-filtering "V-chip" has been mandated for television sets, and violence-labeling for TV shows;
- The FCC has been prohibited from awarding new licenses for Advanced Television to any applicants other than existing TV stations, and from charging money for such awards.[2]

These policy reform measures are so favorable to industry incumbents that, with the exception of the V-chip provision, they could well have been written by the National Association of Broadcasters. In essence, the legislation—called sweeping by many and dubbed "revolutionary" by the President[3]—took serious spectrum reform off the table. One half of the telecommunications world, traditionally partitioned into "wireline" and "wireless," has survived the first "major" rewrite of the 1934 Communications Act intact. Indeed, ever since the Radio Act of 1927 instituted "public interest" regulation, little has changed in how we allocate spectrum and assign licenses to private wireless service providers. Despite the announced goals of competition and deregulation, the recent legislation has, in fact, extended the problems with administrative control of spectrum.[4]

The means by which we regulate broadcasters have proven amazingly successful in terms of political survivorship. The current system, devised under the regime of President Calvin Coolidge and Secretary of Commerce Herbert Hoover, has continued virtually unamended through decades of technological progress, the invention and adaptation of television, political reform movements (including deregulation), and a "top-to-bottom" rewrite of telecommunications law. This implies a remarkable stability.

2. See generally Thomas G. Krattenmaker, The Telecommunications Act of 1996, 29 Conn. L. Rev. 123 (1996) (identifying the 1996 Telecommunications Act's chief reforms).

3. See Mike Mills, Ushering in a New Age in Communications: Clinton Signs "Revolutionary" Bill into Law at a Ceremony Packed with Symbolism, Wash. Post, Feb. 9, 1996, at C1.

4. As Thomas Krattenmaker observes: "The new Act does very little to reform broadcasting law and policy in helpful ways. Censorship is not repealed, but rather is extended. The horrors of spectrum allocation for television are not ameliorated, but compounded." Krattenmaker, supra note 2, at 157.

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Well over a generation ago, our current regulatory structure was properly condemned as anticompetitive. Since the publication of Nobel Laureate Ronald Coase's classic paper[5] on the FCC in 1959, many policy analysts have shown that the spectrum allocation and licensing procedures employed by the FCC unduly restrict competition in the broadcasting marketplace.[6] The legality of restricting broadcast entry—which immediately raises the spectre of limiting and policing speech—has likewise attracted severe criticism from legal scholars.[7] Yet the basic rules concocted in 1927 continue in force. The government issues FCC broadcasting licenses as special privileges, using this power to coerce certain types of speech or to engage in subtle but nonetheless potent forms of censorship. Where is the momentum for reform in broadcasting law?

This paper examines this question by investigating the so-called physical scarcity doctrine. This doctrine, established by the Supreme Court's 1943 *NBC* opinion,[8] posits that broadcasting frequencies constitute a distinctly finite natural resource that must be rationed in special ways.[9] The doctrine has been the primary rationale under which the Supreme Court has distinguished electronic communications from print and other forms of communication, permitting regulation of both speakers and speech in the former, but not the latter. Current critiques focus on the doctrine's economic and technological shortcomings. This paper dissects the doctrine with different tools, revealing that the doctrine owes its longevity to the compelling political coalition that spontaneously forms in each regulatory episode to support the underlying arrangement. This phenomenon results in a standard rent-seeking[10] outcome, in which pressure groups share gains from policies that lower overall social welfare—pre-

5. Ronald H. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959).

6. See, e.g., Roger Noll et al., Economic Aspects of Television Commercial Regulation 112–20 (1973); Douglas W. Webbink, How Not to Measure the Value of a Scarce Resource: The Land-Mobile Controversy, 23 Fed. Comm. Bar J. 202 (1969).

7. See, e.g., Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming 310 (1994) ("editorial control, because it is invariably content based, is an inherently impermissible government function"); David L. Bazelon, FCC Regulation of the Telecommunications Press, 24 Duke L.J. 213, 234–37 (1975) ("A government which can dictate what is 'fair' reporting can control information to the public in a manner which subverts self-government.").

8. See NBC v. United States, 319 U.S. 190, 227 (1943).

9. See Note, Cable Television and the First Amendment, 71 Colum. L. Rev. 1008, 1017–18 (1971).

10. The term "rent-seeking" is used here to refer to the rivalry to obtain resources yielding supracompetitive returns. It differs from profit-seeking in that the activities incurred do not increase consumer welfare. Classic rent-seeking is simply distributive; it determines who gains, and who loses—not what is available in the aggregate. Whenever rivals expend real resources to vie for rents, the process yields net social losses. See Richard A. Posner, The Social Costs of Monopoly and Regulation, 83 J. Pol. Econ. 807, 809–12 (1975) (discussing "the tendency of monopoly rents to be transformed into costs" and "its implications both for the measurement of the aggregate social costs of monopoly and for . . . other important issues relating to monopoly and public regulation").

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cisely the sort of politically profitable government influence over speech that the Constitution was designed to prohibit.

Part II of this Article provides an overview of the physical scarcity doctrine, its importance in First Amendment jurisprudence, and the principal critiques that have been levied against it. In Part III, I undertake a positive examination of the legal development of broadcasting law, showing that typically, the pre-1927 Radio Act wireless marketplace was not "chaotic," and access to radio spectrum was not lawless. Rather, I will show that the political momentum to enact "public interest" licensing arose from the efforts of industry leaders and political actors who—for self-interested reasons—desired to replace the rules that had previously governed orderly development of the broadcasting sector. In Part IV, I demonstrate that the physical scarcity doctrine is internally inconsistent, and cannot form any cogent rationale for public policy. Part V discusses the traditional First Amendment "values" derived from the physical scarcity analysis, tracing their roots to economically based arguments for protection advanced by rent-seeking constituencies. Part VI offers persuasive empirical evidence regarding the existence of a "chilling effect" associated with broadcast license regulation, the Supreme Court's suggested test for constitutionality of the physical scarcity doctrine. Part VII deals with the important debate over the issuance of new licenses for High Definition Television, an issue raised by the Senate Majority Leader as a primary target for legislative reform in the Telecommunications Act of 1996. Part VIII offers a concluding comment regarding the First Amendment implications of this state of affairs.

II. The Physical Scarcity Doctrine and the First Amendment—An Overview

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies . . . in a manner responsive to the public "convenience, interest, or necessity."[11]

The dichotomy between constitutional protections extended to the print media and those afforded the electronic media has received a great deal of attention in the legal, communications, and public policy literature.[12] First Amendment protection blankets print publishers, as vividly

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11. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–77 (1969) (citations omitted).

12. See, e.g., Ithiel de Sola Pool, Technologies of Freedom (1983); Lucas A. Powe, Jr., American Broadcasting and the First Amendment 197–212 (1987); David L. Bazelon, The First Amendment and the "New Media"—New Directions in Regulatory

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seen in *Tornillo*,[13] but has only scantily covered electronic publishers since *NBC*[14] and *Red Lion*.[15] An impressive regulatory structure for the electronic press has been erected around the legal interpretation found in this line of cases, with broadcasters licensed as "public trustees" by the FCC, and cable television operators franchised by local governments. In either situation, the character and performance of electronic publishers are explicitly taken into account in licensing and renewal decisions—an activity that seriously compromises the strictures against government discretion in regulation of the press.

United States law holds that broadcasting is fundamentally different from print in two ways. First, without government regulation of the broadcast band, no electronic speech would be possible; hence, the government in essence *creates* the entire category of broadcast speech[16] via regulation, giving it special authority to influence communication.[17] Second, the "physical scarcity" of the electromagnetic spectrum dictates that not all who wish to broadcast may do so; hence, the government must, in its simple custodial role, employ some discretion in selecting licensees.

Telecommunications, *in* Free But Regulated: Conflicting Traditions in Media Law 52, 52–64 (Daniel L. Brenner & William L. Rivers eds., 1982); Matthew L. Spitzer, Controlling the Content of Print and Broadcast, 58 S. Cal. L. Rev. 1349 (1985); Abbott B. Lipsky, Jr., Note, Reconciling *Red Lion* and *Tornillo*: A Consistent Theory of Media Regulation, 28 Stan. L. Rev., 563 (1976).

13. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (finding governmental "compulsion to publish that which 'reason' tells [newspapers] should not be 'published' is unconstitutional").

14. See NBC v. United States, 319 U.S. 190, 227 (1943) ("The standard [ ] provided [by Congress in the Communications Act of 1934] for the licensing of stations was 'the public interest, convenience, or necessity.' Denial of a station license on that ground . . . is not a denial of free speech.").

15. 395 U.S. at 400–01 (finding that FCC rulemaking to implement fairness doctrine, under which broadcaster required to provide free reply time to party attacked in a broadcast, did not violate First Amendment).

16. In the discussion to follow, we will consider only broadcasting. In a recent opinion, the U.S. Supreme Court delineated three distinct policy regimes under the First Amendment: print, cable, and broadcasting. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–39, 656 (1994). The decision made it clear, however, that the fundamental schism was created when broadcasting was split from print. See id. The original divergence of electronic media from traditional press outlets, therefore, appears to open each new media form to its own constitutional analysis.

17. This rationale actually predates the First Amendment analysis rendered by the Supreme Court in *NBC*. In a 1929 case in federal district court, it was found that regulation under the 1927 Radio Act did not violate the Fifth or Fourteenth Amendment rights of radio licensees for the following reason:

> The act in this respect is well within the regulatory power of Congress. The provisions of the act prescribed the only method by which order could be brought out of chaos and this form of interstate commerce saved from destruction. . . . Unregulated broadcasting would create a national nuisance, and the power of Congress extends to the adoption of all measures reasonably necessary for its prevention.

United States v. American Bond & Mortgage Co., 31 F.2d 448, 456 (N.D. Ill. 1929).

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A. *The Economic Critique*

Since Coase's pathbreaking analysis,[18] many scholars have asserted that the physical scarcity doctrine crafted in *NBC* was logically false.[19] Simply because exclusive rights to spectrum are necessary for the efficient functioning of the broadcasting industry, it does not follow that government must either own or use its discretion to assign such rights.[20] Nor, certainly, does it call for government regulation of the content of programs broadcast. It would suffice that the time, place, and frequency coordinates of spectrum use be legally defined. Defining (and enforcing) such access rights, moreover, turns out to be nothing more than the property rights "traffic cop" function that government must undertake to deter anarchy in any market. Coase noted that the Court, by arguing that federal licensing of broadcasters was necessary to eliminate the interference threat endemic to common property,[21] mistakenly compacted two distinct functions—rights *definition* and rights *assignment*—into one.

The economics of this analysis are flawless. The argument's persuasiveness has attracted many efforts to fix this "mistake" in First Amendment law by showing that a *private* assignment mechanism is indeed workable for policing access to electromagnetic spectrum.[22] Regu-

18. See Coase, supra note 5 (arguing that a private property system for allocating broadcast rights would be more efficient than the regulatory model). An even earlier analysis with similar insights, however, appears in Comment, "Public Interest" and the Market in Color Television Regulation, 18 U. Chi. L. Rev. 802 (1951).

19. Lee C. Bollinger describes *Red Lion*'s reasoning (borrowed from *NBC*) as possessing "devastating—even embarrassing—deficienc[ies]," most notably "the simple-minded and erroneous assertion that public regulation is the only allocation scheme that can avoid chaos in broadcasting." Lee C. Bollinger, Images of a Free Press 88–90 (1991).

20. Coase wrote:

> The Supreme Court [in *NBC*] appears to have assumed that it was impossible to use the pricing mechanism when dealing with a resource which was in limited supply. This is not true. Despite all the efforts of art dealers, the number of Rembrandts existing at a given time is limited; yet such paintings are commonly disposed of by auction. But the works of dead painters are not unique in being in fixed supply. If we take a broad enough view, the supply of all factors of production is seen to be fixed (the amount of land, the size of the population, etc.).

Coase, supra note 5, at 20.

21. The interference threat will reliably occur wherever valuable rights are ill-defined due to either a lack of legal structure or excessively high enforcement costs. In some situations, alternatively, the private market may well handle the property rights enforcement problem as well as or better than government police powers. It appears that spectrum rights, like many other goods (copyrights, trade names, water rights, etc.) are expensive to enforce without state-supplied legal institutions. An interesting institutional fact, however, is that the FCC largely relies on licensees to self-police bands allocated for exclusive use, and uses private frequency coordinators to police bands allocated for non-exclusive licenses. See National Telecomm. and Info. Admin., U.S. Dep't of Commerce, U.S. Spectrum Management Policy: Agenda for the Future 43 (1991).

22. See Arthur S. DeVany et al., A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study, 21 Stan. L. Rev. 1499 (1969); Jora R. Minasian, Property Rights in Radiation: An Alternative Approach to Radio

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lation of content is not required to solve the technical commons problem in airwave usage.[23] Proponents of such regimes appear to believe that the analytical errors of earlier generations may now be corrected by implementing more logically appealing regulatory structures and by auctioning off FCC licenses.[24] Indeed, while Congress gave up its decades-long resistance to auctions in 1993, it authorized the FCC to sell only nonbroadcast licenses. The $20 billion in auction receipts thus far obtained starkly shows that there are no "technical" barriers to assigning broadcasting rights by the price system.[25]

B. *The Technological Critique*

The second line of criticism of prevailing law, which has gathered considerable support, suggests that the communications marketplace has clearly changed since the current regime was constructed (or even since *Red Lion*). According to this view, the technical ability to exploit the electromagnetic spectrum has vastly increased in recent decades, with cable, satellite, and wireless cable (to name just three new product delivery sources) adding dramatically to viewer choice. Any once-critical scarcity problem appears to have been surmounted.[26] Similarly, powerful new communications systems have led some to herald the triumph of technology over traditional regulatory approaches.[27] This view has been em-

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Frequency Allocation, 18 J.L. & Econ. 221 (1975); Richard W. Stevens, Anarchy in the Skip Zone: A Proposal for Market Allocation of High Frequency Spectrum, 41 Fed. Comm. L.J. 43 (1988).

23. Supreme Court Justice William O. Douglas nicely explained why the technical reasons given by the Court in *Red Leon* were logically insufficient to justify content controls:

> Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering with each other. The Commission has a duty to encourage a multitude of voices, but only in a limited way, *viz.*, by preventing monopolistic practices and by promoting technological developments that will open up new channels. But censorship or editing or the screening by Government of what licensees may broadcast goes against the grain of the First Amendment.

Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 157–58 (1973) (Douglas, J., concurring) (footnotes omitted).

24. See Peter Passell, Managing the Airwaves for Productivity and Profit, N.Y. Times, Mar. 9, 1995, at D2. Revealing the faulty logical underpinnings of a legal regime, however, may not be enough to alter it—stripping the Emperor of his clothes may annoy the King, but will fail to change public policy.

25. See Thomas W. Hazlett, Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years? 50–60 (July 27–29, 1996) (Paper presented at the Conference on the Law and Economics of Property Rights to Radio Spectrum, Marconi Conference Center, on file with the Columbia Law Review).

26. See Powe, supra note 12, at 200–09; Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 225 (1982); J. Gregory Sidak, Telecommunications in Jericho, 81 Cal. L. Rev. 1209, 1229–34 (1993) (book review).

27. Fiber optics seemed the rage in the early 1990s. Of late, however, wireless digital compression seems to have replaced fiber. See George Gilder, Think Waves, Not Wires, Forbes ASAP, June 5, 1995, at 124.

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braced by the Speaker of the House of Representatives, Newt Gingrich (R-Ga.), who has advocated abolition of the FCC on the theory that the new digital and spread spectrum technology makes the agency obsolete.[28] Media "convergence" also demonstrates the effect of technology on the cogency of the physical scarcity doctrine. Not only are the electronic press conduits becoming more abundant, but they are converging as well, becoming seamlessly integrated with those of print and other media. Thus, as technological change has accelerated, regulatory distinctions between media have become less precise, undermining the rationale for distinct treatment of broadcasting.

C. *A Public Choice Analysis*

While the Economic Critique forcefully refutes the logic of the physical scarcity doctrine, and the Technological Critique amasses impressive marketplace evidence for its view, neither explains key determinants of the current policy regime. Hence, they do not squarely join the public policy debate. Physical scarcity and its ancillary justifications for content regulation must be understood as ad hoc rationalizations of policies adopted to achieve specific distributional goals, not to correct a market failure (tragedy of the commons), as has been asserted previously in both case law and the scholarly literature. Congress did not advance broadcast licensing in the "public interest" to remedy "chaos" or "physical scarcity" problems—problems that would be placed center stage by the U.S. Supreme Court long after the advent of radio legislation. Instead, Congress was motivated to institute regulation of a new technology that it correctly identified as a powerful source of news and information that could dangerously challenge existing political interests.

Congress's motivation in establishing a broadcast licensing scheme was not to further unregulated and constitutionally protected speech, but rather to assert control over the content of the material that might be broadcast. Since then, the driving force in federal licensing has been rational tripartite maximization: legislators maximize political support by arbitrating a rent-seeking competition for valuable licenses and by gaining editorial influence over broadcast material; incumbent broadcasters maximize profits by obtaining both free licenses and the erection of barriers barring new entrants, realizing significant license rents; and "public interest" lobbyists maximize utility in a politicized assignment process that yields the highest returns on their human capital. Hence, a classic rent-seeking competition forged the licensing regime for broadcasting in the 1920s, and has steadfastly maintained it ever since, due to the dominating vector of political support associated with the scheme. In the pages that follow, I will demonstrate just how this occurred.

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28. See Jeff Nesbit, Gingrich's "Cabinet" Puts FCC on Hit Lists, Wash. Times, Jan. 13, 1995, at B6.

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III. The Genesis of Regulation

The support for this thesis begins with evidence suggesting that the historical rendition of the pre-regulation broadcasting market offered in both *NBC* and *Red Lion* was largely fanciful. A more accurate history of the early broadcasting period reveals that an orderly market was reshaped by political interests in order to yield a specified pattern of rents, and not to solve transmission interference problems.

In a previous paper, I presented detailed evidence indicating that major broadcasters, leaders in both the executive and legislative branches of the federal government, and, to a lesser extent, "public interest" advocates, combined politically to produce the Radio Act of 1927.[29] The motivating force behind the law was not the interference problem in broadcasting. That problem had been dealt with smoothly on a first-come, first-served exclusive rights rule, implemented by the U.S. Department of Commerce and in effect from 1920–1926. The real motivation behind the law was to address the more difficult question of "Who Should Control the Airwaves?"[30] The short story describing this episode proceeds as follows.

A. *Broadcasting Prior to the 1927 Radio Act: "Five Years of Orderly Development"*

Commercial radio broadcasting was launched in the United States on November 2, 1920, and began catching on as a business proposition in late 1921. By the end of 1922, there were over 550 broadcasters (see Figure 1), all confined to basically *one* frequency by the federal authorities. Separation by time and place, involving a difficult coordination of a new media, routinely kept transmissions from interfering with one another. Such divisions were supervised under the licensing function of the Commerce Department, often subject to agreements worked out voluntarily (sometimes entailing the exchange of money) between broadcasters. The assignment rule used by the Commerce Department was *priority-in-use,* a product of the regulatory authority invested in the Department by the Radio Act of 1912.[31] A new broadcaster could not interfere with an existing broadcaster, although time-sharing of a frequency was common.

29. See Thomas W. Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J.L. & Econ. 133, 152–71 (1990).

30. This is how the ACLU's Morris Ernst appropriately put the question. See Morris L. Ernst, Who Should Control the Airwaves?, 122 The Nation 443, 443 (1926).

31. Act of Aug. 13, 1912, ch. 287, 37 Stat. 302 (1912) (repealed 1927). The 1912 Radio Act was crafted prior to the advent of commercial broadcasting and was drawn with only point-to-point radio transmissions in mind. It has been seen by most commentators, including this one, see Hazlett, supra note 29, at 135, as mandating open access to the radio spectrum, and thus potentially leading to chaos. This is questionable. While two federal courts found that the Secretary of Commerce was obligated to issue radio licenses to any applicant who met the statutory qualifications, see Hoover v. Intercity Radio Co., 286 F. 1003, 1006 (D.C. Cir. 1923); United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926), the Act did allow the Secretary to issue licenses so as to "minimize

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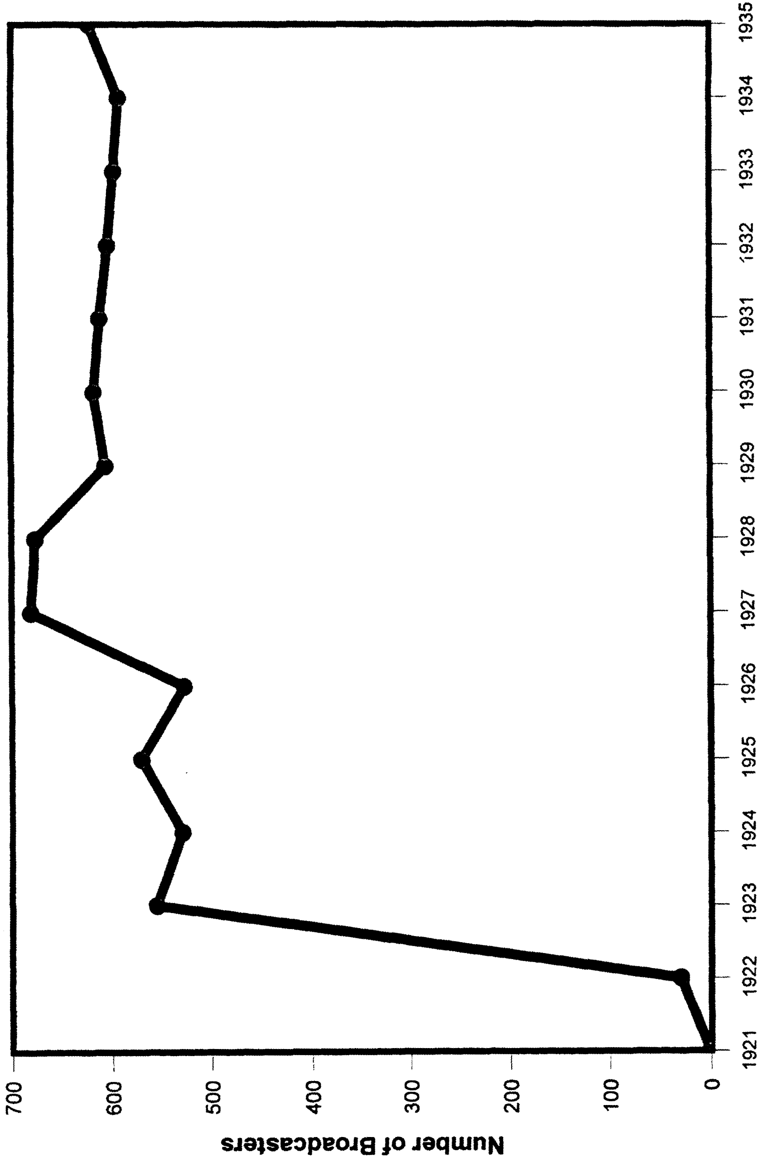

Figure 1. U.S. Radio Broadcasters
1921 - 1935

Source: U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the U.S., Part 2 (September 1975), p. 796.

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The Department of Commerce expanded the AM broadcasting band in 1923 and again in 1924, establishing a range from 550 Kilocycles to 1500 Kilocycles, virtually the current U.S. AM dial. Preferential assignments were made to the most established broadcasters with the largest audiences, an extension of *priority-in-use* principles. Overall, the radio listening audience grew rapidly, and the quantity of radios sold increased steadily. Retailers proclaimed the 1924 holiday season, "Radio Christmas."

Property rights were secure enough, in fact, that transferability was respected, and stations sold for significant premia, reflecting the value of their broadcasting rights. Interference between radio broadcasters did, occasionally, appear, but when it did the law was available to provide a remedy. This can be seen in the rather sensational telegram sent to the Secretary of Commerce by the always provocative Reverend Aimee Semple McPherson, a Los Angeles broadcaster whose signal had drifted into taboo airspace:

> TO SECRETARY OF COMMERCE HERBERT HOOVER:
>
> PLEASE ORDER YOUR MINIONS OF SATAN TO LEAVE MY STATION ALONE. STOP. YOU CANNOT EXPECT THE ALMIGHTY TO ABIDE BY YOUR WAVE LENGTH NONSENSE. STOP. WHEN I OFFER MY PRAYERS TO HIM I MUST FIT INTO HIS RECEPTION. STOP. OPEN THE STATION AT ONCE. STOP.
>
> AIMEE SEMPLE MCPHERSON[32]

The historical account of the early radio broadcasting market, given by the Court in *NBC* and repeated in *Red Lion*[33] as the basis for broadcasting's unique regulatory treatment, is cast into serious doubt by the simple evidence in Figure 2, showing radio set sales, and households with radio sets, monotonically increasing year-by-year until 1926. Under the Court's pre-1927 "chaos" version, the predicted radio set sales profile would exhibit a significant upwards kink upon establishment of an orderly mar-

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interference." § 4, 37 Stat. at 304. This authority was the basis for the 1921–1926 procedures followed by Commerce Department in employing priority-in-use. Conditioning new licenses such that entrants either coordinate shared frequency use with incumbents or limit access to virgin spectrum space was a policy entirely consistent with open access *and* minimizing interference.

32. William B. Ray, The Ups and Downs of Radio TV Regulation 126 (1990).

33. See supra text accompanying note 11.

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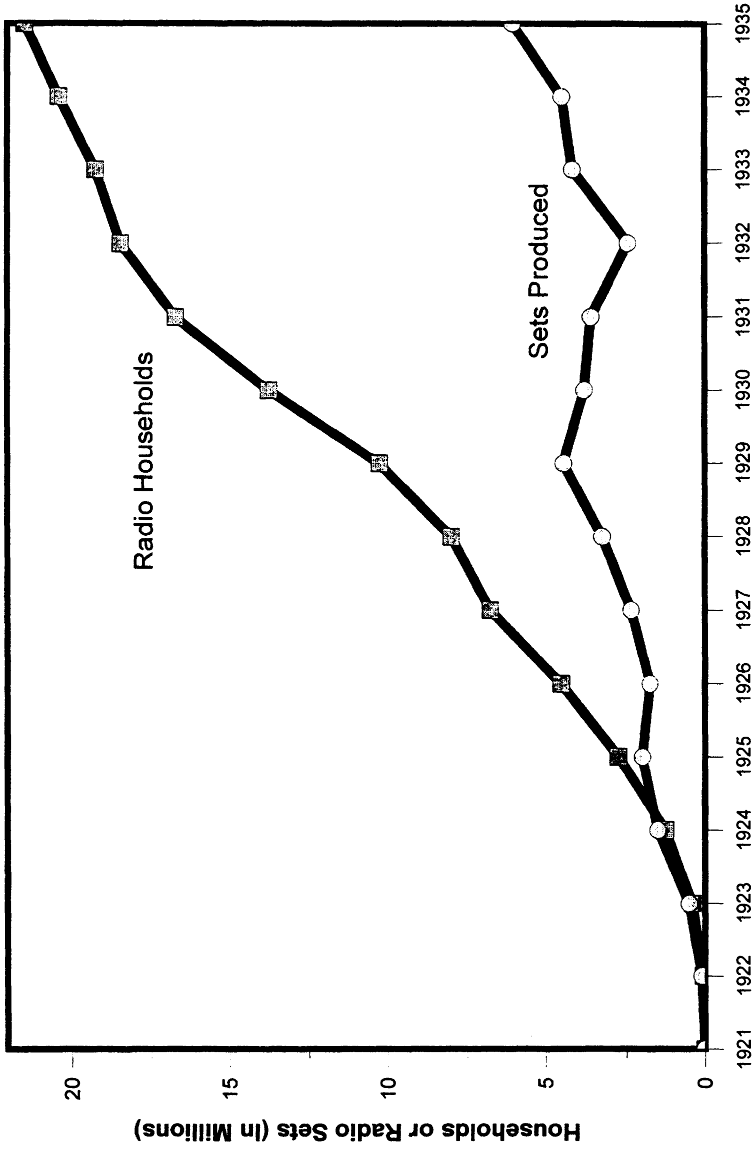

Figure 2. U.S. Radio Households and Sets Produced
1921 - 1935

Source: U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the U.S., Part 2 (September 1975), p. 796.

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ket,[34] i.e. in 1927 (the year in which the Radio Act was signed into law).[35] Instead, radio sales rose steadily throughout the early radio years, with a downturn in 1926–1927.[36] This can clearly be explained by the creation of de facto property rights by the Department of Commerce on a priority-in-use basis, and the interruption of that system from July 1926 to February 1927, a time frame then commonly referred to as the period of the "'breakdown of the law.'"[37]

This period was brought on by a "wave-jumping" case invited by Secretary of Commerce Herbert Hoover, in which a federal district court ruled that the Secretary had neither the legal right to deny a broadcasting license, *nor* the ability to set place or hours of operation restrictions.[38] Contrarily, an earlier verdict had allowed the Secretary to set wavelength assignments so as to minimize interference.[39] On July 8, 1926, the Acting Attorney General of the United States, William Donovan, issued an opinion stating that the later decision was the correct interpretation of the law, and the following day the Commerce Department issued a statement declaring its allocations to be legally unenforceable. The decision by Hoover effectively abandoned the property rights system which had efficaciously solved the potential "commons" problem in radio. Chaos en-

34. Precisely the same empirical test for discerning airwave chaos was employed by Congressman E.L. Davis (D-Tenn.), who in 1928 argued that federal regulators had shorted Southern consumers with respect to radio assignments:

> As a matter of fact, the people in the southern zone have manifested a remarkable interest in purchasing as many receiving sets as they have, in view of the intolerable conditions under which they have suffered. If accorded proper treatment, there will be a large and immediate increase in the purchase of receiving sets in the third zone. I have a letter from a radio dealer in my State, stating that radio reception is so bad that he does not sell one-fourth as many sets as he did a year or so ago; that the people are trying to sell their sets.

E.L. Davis, Will the Davis Amendment Bring Better Radio? Pro, 7 Cong. Dig. 268 (1928). Note that the worsening airwave conditions cited are said to occur following the alleged (pre-1927 Radio Act) period of chaos.

35. See Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

36. The orderly development of the U.S. radio market is apparent not only in a time series examination of technology diffusion, but also in a cross-sectional analysis. Citing the "[g]overnment-controlled monopoly" prevailing for "any system of communications" in England, long-time journalist French Strother wrote in 1926 that the result was that "the per capita consumption of radio apparatus in Great Britain is incomparably less than in the United States." French Strother, Is There a Monopoly in Radio?, 9 Radio Broadcast 471, 473 (1926).

37. Louis G. Caldwell, Clearing the Ether's Traffic Jams, Nation's Business, Nov. 1929, at 33, 34. Louis G. Caldwell, the first General Counsel of the Federal Radio Commission, summarized the history of radio regulation in a 1929 article: "Looking at broadcasting alone, the first period might be described as 'before the deluge,' the second as 'after the deluge.' The deluge was 'the breakdown of the law,' lasting from July 9, 1926, to February 23, 1927." Id. at 34.

38. See United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926).

39. See Hoover v. Intercity Radio Co., 286 F. 1003, 1007 (D.C. Cir. 1923).

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sued from the ruling, as was predictable not only in hindsight,[40] but also as promised by Hoover and a host of contemporary commentators.[41]

Rather than "confusing" federal licensing under a public trusteeship standard with the necessary and *sufficient* enforcement of exclusive rights to spectrum, there was widespread understanding of the source chaos at the time of the 1927 Act. To wit, the official government explanation contained in the first annual report of the Federal Radio Commission:

> We have had about six years of radio broadcasting. It was in 1921 that the first station (KDKA) started operating,[42] and soon other stations followed. From 1922 to the middle of 1926 radio grew and grew in popularity, sales mounted, and a great new industry was in the making. Then something happened.
>
> In July, 1926, just 10 months ago, the Attorney General of the United States rendered his famous opinion that the Secretary of Commerce, under the radio law of 1912, was without power to control the broadcasting situation or to assign wave lengths. Thus, *after five years of orderly development*, control was off. Beginning with August, 1926, anarchy reigned in the ether.
>
> As the result many stations jumped without restraint to new wave lengths which suited them better, regardless of the interference which they might thus be causing to other stations. Proper separation between established stations was destroyed by other stations coming in and camping in the middle of any open spaces they could find, each interloper thus impairing reception of three stations—his own and two others.[43]

The solution created by the new Commission was to order established broadcasters to return to previously held assignments (i.e., pre-breakdown), and to expropriate new entrants.[44] Two proposals to expand the number of broadcast frequencies so as to accommodate all then-existing broadcasters were instantly, and emphatically, rejected by the Federal Radio Commission. One policy offered would have accommodated additional radio broadcasts by enlarging the commercial broadcasting band from 1500 Kilocycles to 2000 Kilocycles; the other by reducing channel separations from 10 Kilocycles to 7 Kilocycles. Radio broadcast interests bitterly opposed either solution to excess demand for spectrum access, and the idea of eliminating interference via supply expansion was dropped with finality.[45] The result was a classic regulatory

40. See Coase, supra note 5, at 5.

41. See Hazlett, supra note 29, at 139–42.

42. Actually, KDKA began broadcasting in 1920. It was not licensed as a radio broadcaster, however, until the creation of such a Commerce Department license category in September 1921.

43. 1927 Fed. Radio Comm'n Ann. Rep. 10–11 (emphasis added) (quoting Commissioner O.H. Caldwell, of New York, Speech (June 11, 1927)).

44. See Hazlett, supra note 29, at 35 ("specific interest win in the legislative process because of their representation within the political process").

45. The Federal Radio Commission noted that "[u]nited opposition to widening the broadcasting band in order to accommodate more stations was expressed at the hearings

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capture, creating significant industry rents that were shared with political constituencies in proportion to their effective influence over policy.[46]

B. *The Demand for Political Control in the 1920s Radio Debate: Entering the "Twilight Zone"*

Numerous scholars, finding the *Red Lion* physical scarcity logic uncompelling, have argued that the Court's deferential attitude towards regulatory authority sprang from the view that the electronic media are just not like the hard-news media of print journalism.[47] Whatever the understanding of jurists who later delineated the applicable constitutional law, this description of congressional intent in crafting licensing legislation is easily revealed to be false. Indeed, the political demand for regulation of radio from nonindustry sources arose precisely because radio was instantly identified as a powerful medium of expression.[48] This fact adds a different gloss on the modern interpretation, which implies that analytical error (confusion over property rights), and ignorance as to future market events (i.e., abundance replacing scarcity), were the major components fueling the demand for licensing of the electronic press.

The common assertion in the contemporary legal literature that radio regulation was established before it was realized how important and influential electronic communications would become suggests that the tension between public interest regulation and free speech was not initially appreciated. "First [A]mendment issues raised by the original proposals for government control may not have come to the fore because the potential importance of broadcasting as a speech medium was not fully recognized at the time."[49] Another modern commentator writes: "At the outset, radio was perceived primarily not as a medium for speech, but as a device to aid ships at sea. . . . No substantial body of thought conceived of radio or television in their infancy, as a new form of newspaper."[50]

Senator Clarence C. Dill (D-Wash.), the author of both the 1927 Radio Act and the 1934 Communications Act, expressed the reverse viewpoint, however, by acknowledging that the courts would have to deal with First Amendment conflicts embedded within his legislation. While both the 1927 and 1934 Acts have clauses prohibiting censorship, they appear to require censorship in their licensing provisions. Wrote Dill:

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by representatives of the radio art, science, and industry. . . . Stout opposition was registered also against reducing the frequency separation between channels from 10 to 7 kilocycles . . . ." 1927 Fed. Radio Comm'n Ann. Rep. at 3.

46. See Thomas W. Gilligan et al., Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887, 32 J.L. & Econ. 35, 39–45 (1989).

47. See, e.g., Pool, supra note 12, at 142; Powe, supra note 12, at 39–45.

48. See, e.g., James C. Young, Is the Radio Newspaper Next?, 7 Radio Broadcast 576, 576 (1925). ("The future of the press lies in the air. Radio represents the one channel of news expansion not already developed to the full.").

49. Lipsky, supra note 12, at 566 n.12.

50. Monroe E. Price, Congress, Free Speech, and Cable Legislation: An Introduction, 8 Cardozo Arts & Ent. L.J. 225, 230 (1990).

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> The provision which forbids the Commission to censor radio programs does not prevent the Commission from determining whether or not a station's programs are in the public interest. The extent of the 'twilight zone' between censorship and the refusal to renew a station license because of the service rendered, is undetermined.[51]

Moreover, Dill was crystal clear as to why government regulation was necessary:

> Congress has good reason for this jealousy as to the control of radio. Nobody can even imagine what the use of radio may some day mean to the human family. When Marconi first sent radio signals across the English channel and even after he sent them across the Atlantic, the most fantastic imagination could not foresee the marvelous programs of music encircling the earth or literally all of the peoples of the world being able to listen to the speech of a king or a president. Nor can any one even now dream of the possibilities of television . . . .[52]

This was the state of the debate in the 1920s: a hot public discussion over an emerging market of immense, if unpredictable, social import. RCA's David Sarnoff touted the new medium as "the bar at which great causes will be pleaded for the verdict of public opinion."[53] According to one recent historical account,

> radio was seen as a new kind of public forum. It would provide for the nation what the New England Town Meeting provided the small isolated communities of early America. Radio had the advantage over the newspaper, moreover, because it reached the illiterate as well as the literate, the comic strip readers as well as the readers of the editorial page.[54]

And so the debate over regulatory response to the new media, rather than underestimating the influence of radio, was driven by respect for its immense significance: "many people of the 1920s believed that control of the airwaves had political consequences for the future of democracy."[55]

C. *The Immediate Rise of Radio Censorship*

The birth of commercial broadcasting had an instant involvement with politics, as Westinghouse initiated the first continuous broadcasting station, KDKA in Pittsburgh, to transmit presidential election returns on November 2, 1920. Similarly, the party conventions of 1924 were

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51. Clarence C. Dill, Radio Law 93 (1938) (citation omitted).

52. Id. at 127.

53. David Sarnoff, Uncensored and Uncontrolled, 119 The Nation 90, 90 (1924).

54. Mary S. Mander, The Public Debate About Broadcasting in the Twenties: An Interpretive History, 28 J. Broadcasting 167, 183–84 (1984) (citations omitted).

55. Id. at 184.

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landmarks for broadcasters, who eagerly exploited the high profile news events to build radio audiences across the country. Concern instantly arose over the political ramifications of specific radio programs, and was expressed on both sides of the market: political actors were quick to intimidate, and radio producers were quick to self-regulate.[56]

Revealingly, radio coverage of the 1924 Democratic Convention proved controversial, as the Party distrusted radio reporters to provide sufficiently favorable news to the public.[57] It is interesting that the Republicans were not similarly nervous; their Party controlled the licensing process and had more subtle means of control at its disposal. Moreover, the incumbent party had proven its influence when earlier that year it cowed a New York radio station from airing a speech critical of Secretary of State Charles Evans Hughes, who had previously delivered a major policy address on the station.[58]

Censorship involved specific issues and stances taken by radio personalities, including the advocacy of property rights in water,[59] birth control,[60] and evolution.[61] Stations were encouraged by the political explosiveness of controversial programming to stick to safer fare, such as music.[62] American Telephone & Telegraph specifically eschewed programming its own broadcast stations, preferring to operate on a common carrier basis, so as to forego anticipated problems with the authorities. As a regulated utility, executives believed that the corporate exposure to penalties, in the form of denied rate increases and the like, was significant, and sought to remove themselves from any such liability that "editorial troubles" might create.[63]

The creation of the first radio network, the National Broadcasting Company (NBC), is noteworthy for the very politic manner in which it organized itself. While newspapers of the era were openly partisan, radio network organizer David Sarnoff methodically composed an advisory board of prominent citizens representing a wide spectrum of opinion. Although Sarnoff had explicitly declared that the new medium should enjoy the same legal status as newspapers—"[t]he same principles that

56. Numerous instances of censorship appear in the historical accounts of Eric Barnouw, Ithiel de Sola Pool, and Philip Rosen. See Eric Barnouw, A Tower in Babel 87, 102, 139–41, 197–98 (1966); Pool, supra note 12, at 119–29 (recounting, among other examples of censorship, a Newark radio station that cut off speakers in mid-sentence if their material—including that related to birth control, prostitution, and cigarettes—"was deemed unfit for human ears") (quoted material at 119); Philip T. Rosen, The Modern Stentors: Radio Broadcasters and the Federal Government, 1920–1934, 138–42 (1980).

57. Democratic censorship efforts are detailed in Barnouw, supra note 56, at 149–50.

58. See id. at 139–40.

59. See Pool, supra note 12, at 120.

60. See id. at 119.

61. An early congressional measure to outlaw the advocacy of the theory of evolution (on radio) was voted down. See Barnouw, supra note 56, at 197.

62. See id. at 141.

63. Id. at 186.

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apply to the freedom of the press should be made to apply" to radio[64]—the careful political balancing by NBC advisors was an attempt to preempt anticipated calls for censorship. Indeed, the choice for chairman of the Radio Corporation of America was itself largely motivated by the need for political connections to preempt government control.[65]

D. *Herbert Hoover as Political Entrepreneur*

The political slant of the Department of Commerce during the early days of radio was obvious, although the limitations that priority-in-use rules placed on regulatory discretion were apparent as well. The ability of the Department to use its rights-enforcement apparatus to influence program content was truncated by the lack of statutory authority for any such action.

The political influence of radio was obvious to Secretary Hoover, who (it is now safe to say) had his eyes set on higher political office, and who saw clearly that even the slightest ability to monitor the performance of radio broadcasters would be a capital asset. Indeed, cynical comments were made in the trade and popular press during the middle 1920s, associating Hoover's interest in radio with his presidential ambitions. Without question, Hoover sought to establish political control over radio in the Department of Commerce early on in the Harding Administration (wresting it away from the Navy Department and other governmental interests after a rough political skirmish), and immediately embarked on a legislative campaign (via his ally, Congressman White of Maine) to procure a mandate to regulate broadcasting according to the "public interest."

An accomplished engineer and political operative, Herbert Hoover comprehended the subtleties of the emerging radio market. He always considered it a great organ of the press. As his Memoirs summed up: "I was early impressed with three things [concerning radio]: first, the immense importance of the spoken radio; second, the urgency of placing the new channels of communication under public control; and, third, the difficulty of devising such control in a new art."[66]

Also pronounced was Hoover's belief that the outbreak of airwave chaos during the "breakdown" period was a welcome opportunity for achieving greater regulatory discretion over radio licenses.[67] While making precisely the same paeans to free speech that were customary then and now, Hoover revealed the driving force for such control—not for

64. Sarnoff, supra note 53, at 90.

65. In January 1923, the firm specifically searched for an individual whose mainstream politics (and "Americanism") were unassailable, settling on General Harbord, a super-patriot who was formerly General Pershing's Chief of Staff. See Barnouw, supra note 56, at 124.

66. Herbert Hoover, The Memoirs of Herbert Hoover: The Cabinet and the Presidency, 1920–1933, at 139 (1951).

67. See Hazlett, supra note 29, at 158.

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perfunctory traffic cop functions (which, in any event, had worked in the pre-breakdown period without a "public interest" licensing standard), but to exercise influence over what was said and who was to be allowed to say it:

> It seems to me we have in this development of governmental relations two distinct problems. First, is a question of traffic control. This must be a Federal responsibility.... This is an administrative job, and for good administration must lie in a single responsibility.
>
> The second question is the determination of who shall use the traffic channels and under what conditions. This is a very large discretionary or a semijudicial function which should not devolve entirely upon any single official and is, I believe, a matter in which each local community should have a large voice—should in some fashion participate in a determination of who should use the channels available for broadcasting in that locality.[68]

E. *The Partisan Battle Over the Licensing Authority Established in the Radio Act*

The intensity with which rival factions fought to establish control over the licensing authority reflects the early recognition by policymakers that broadcasting would be extremely influential. "Between 1921 and 1927, more than fifteen bills had been introduced in both houses to 'regulate radio communications' and several more to amend the 1912 act to meet the new situation; but these died in committees, most often without hearings."[69] By mid-1926, however, both legislative bodies had passed bills. The House version, drafted by Hoover's Commerce Department, allowed the Secretary to employ a "public interest" standard in selecting licensees. The Senate held out for an independent regulatory commission whose members would require Senate confirmation, a strategy quite similar to that pursued in crafting the Interstate Commerce Act.[70] While Hoover argued for his plan on the grounds of governmental efficiency—Coolidge and Hoover attacked the creation of new independent agencies as a wasteful proliferation of government—this claim fooled no one in Congress. Instead, Hoover was attacked by Representative E.L. Davis who accused him of attempting a bureaucratic power grab.

This argument proved persuasive to Hoover's Republican opponents in the Senate who, suspecting that the Secretary of Commerce would stra-

68. Radio Control: Hearings on S.1 and S.1754 Before the Senate Comm. on Interstate Commerce, 69th Cong. 57 (1926) (statement of Herbert Hoover, Secretary of Commerce).

69. Carl J. Friedrich & Evelyn Sternberg, Congress and the Control of Radio-Broadcasting, I, 37 Am. Pol. Sci. Rev. 797, 799 (1943).

70. See generally Gilligan et al., supra note 46, at 46, 48, 52 (describing the legislative disagreement over an appropriate enforcement mechanism for the Interstate Commerce Act, and ultimate agreement on a commission).

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tegically use such power to run for President, backed the Dill bill's independent agency approach. This finally received the endorsement of Congressman White, thus breaking the legislative deadlock in January 1927. Hence, the Federal Radio Commission was born out of legislative squabbling directly caused by the politically important nature of radio. In fact, the agency was specifically removed from the Department of Commerce out of fear that Hoover would use his leverage over radio broadcasters to gain favorable treatment from the Commission in the upcoming 1928 presidential campaign.[71]

F. *Senator Dill's Explanation of the 1927 Radio Act*

The regulatory path chosen by Congress in the 1927 Radio Act, and repeated in the 1934 Communications Act,[72] specifically overruled private property rights to radio spectrum, which were then emerging not only de facto (according to the rights definition and enforcement rules used by the Department of Commerce) but de jure. The key concern of Congress in legislating the system of radio licensing regulation we have today was, in fact, to prevent the courts from applying common law principles that would grant radio broadcasters legally enforceable property rights. This was certainly the view of Senator C.C. Dill.

Dill expressed this perspective in a book he wrote, upon retiring from the U.S. Senate, in which he clearly laid out the rationale for radio regulation.[73] First, he noted that traditional common law forms were capable of coordinating the marketplace. Second, he stressed congressional concern that these legal forms were already establishing property rights to radio frequencies. Third, Congress acted in order to nip this development in the bud. Fourth, Congress was motivated by a desire to control this highly influential medium of expression.[74]

Dill believed that the original radio station broadcasters were protected in their frequency assignments by a "long established principle of law that if a citizen openly and adversely possesses and uses property for a long period of time without opposition, or without contest, he acquires title by adverse possession."[75] Dill called this "property by right of user."[76] He described how these rights were being asserted by radio broadcasters and recognized in an important common law decision

71. See Rosen, supra note 56, at 10–11, 84, 95–96.

72. The law governing broadcast licensing was crafted in the Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934), which was repeated virtually verbatim in the Communications Act of 1934, 47 U.S.C. § 301 (1994). Prior to the passage of these laws, telephony had been regulated by the Interstate Commerce Commission. See Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539, 544 (1910) (repealed 1913).

73. See Dill, supra note 51, at 77–80.

74. See id.

75. Id. at 78.

76. Id. This is analogous to priority-in-use. Other terms expressing similar common law principles included squatter's sovereignty, right of first appropriation, pioneering rights, and homesteaded rights.

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granting a private property right to a radio broadcaster who wished to protect its airspace from interference.[77] Congressional intent behind the Radio Act of 1927 is described in a section of Dill's book entitled, "Why Congress Became Aroused on Subject":

> The development of these claims of vested rights in radio frequencies had caused many members of Congress to fear that this one and only remaining public domain in the form of free radio communication might soon be lost unless Congress protected it by legislation. It caused renewed demand for the assertion of full sovereignty over radio by Congress.[78]

The response of Congress to the burgeoning legal reality of private (or vested) rights to frequencies was to legislate away any such propertied interests, first in a resolution, passed in December 1926, that all broadcasters must waive any and all vested rights, and then in the Radio Act, passed two months later, which likewise included a mandated waiver of licensee property rights. As detailed in a law review article some years later:

> [The] proposed radio legislation in the nineteen twenties required a licensee to sign a waiver indicating that "there shall be no vested property right in the license issued for such station or in the frequencies or wave lengths authorized to be used thereon." . . .
>
> . . . .
>
> . . . The Commission, fearful that licensees would assert property interests in their coverage to the listening public, has inserted elaborate provisions in application forms precluding the assertion of any such right.[79]

The concern over vested rights in radio frequencies was widespread. In noting that Congress explicitly rejected an amendment that would have paid existing radio broadcasters monetary compensation for frequencies taken away under enactment of "public interest" licensing, Dill notes that the measure (and its rejection) "shows that the purpose of Congress from the beginning of consideration of legislation concerning broadcasting was to prevent private ownership of wave lengths or vested rights of any kind in the use of radio transmitting apparatus."[80]

The system of regulation adopted was to encourage private investment capital as an expedient means of economic development, but to maintain federal oversight of both property rights (the traffic cop function) and broadcast content (the censorship function). Dill's book sums up the result under the section, "The Alpha and Omega of Radio Law":

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77. See Tribune Co. v. Oak Leaves Broad. Station, Inc. (Cir. Ct., Cook County, Ill. 1926), reprinted in 68 Cong. Rec. 216 (1926).

78. Dill, supra note 51, at 80.

79. Paul M. Segal & Harry P. Warner, "Ownership" of Broadcasting "Frequencies": A Review, 19 Rocky Mtn. L. Rev. 111, 113, 121 (1947) (citation omitted).

80. Dill, supra note 51, at 81.

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> Instead of establishing government owned and government operated radio stations as most other great nations have done, Congress has adopted a policy of permitting private individuals to own and operate radio stations. But Congress provided that these privately owned and privately operated radio stations should be subject to a system of government regulation. Congress desired to secure the use of private funds and, most of all, the benefit of individual initiative for the more rapid development of the radio art, but all of this development to be kept under government control. The means and method of administering and enforcing this system of government control is the radio license.[81]

IV. The Vacuity of "Physical Scarcity"

While the view has developed that the physical scarcity doctrine in *NBC* and *Red Lion* is an analytical error, the conventional wisdom ascribes the confusion to a technological sophistication of electronic communications media that appeared relatively obscure to older jurists.[82] Yet, it is difficult to regard the physical scarcity doctrine as meaning anything at all. There is the economic argument of Coase, well-taken, that scarcity pervades all economic goods, and that, for example, while the number of Renoir paintings may be finite, the market routinely auctions them off. Conversely, airwaves cannot be thought of as physically scarce in this manner, because frequencies are divisible (or expandable) in ways that works of art are not. The spectrum can be mined more intensively, using less separation between frequencies with more (or higher quality) broadcast transmitters and better receivers, or more extensively, deploying more sophisticated sending and receiving equipment so as to exploit progressively higher or lower wavelengths.[83]

Since the very early days of radio communications, capacity has been seen as a systematic trade-off between bandwidth and technology. As a paper written to commemorate the centennial of Guglielmo Marconi's invention (or discovery) of wireless radio details:

> One of the very first questions asked of young Marconi about his nascent technology was whether it would ever be possible to operate more than one transmitter at a time. Marconi's key British patent No. 7,777 was a milestone as it taught the use of resonant

81. Id. at 127.

82. See Pool, supra note 12, at 141–42; Powe, supra note 12, at 44 ("The justices deciding the case in 1969 were all raised during the era of the crystal set; many were born before the invention of the vacuum tube.").

83. See Bruce M. Owen, Different Media, Differing Treatment?, *in* Free but Regulated: Conflicting Traditions in Media Law 35, 39 (Daniel L. Brenner & William L. Rivers eds., 1982).

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> tuning to permit multiple transmitters to simultaneously occupy the radio spectrum.[84]

Of course, advances in the state of the art brings progressively more radio spectrum into productive use: today there is "over 30,000 times more spectrum at our disposal than in Marconi's day."[85] While this relationship between man-made tools and the radio spectrum resource can clearly be seen over time, it is true at any moment in time as well. The number of frequencies assigned for use by various parties always involves cognition of the relevant range of possibilities—a range that is limited by economic cost, not by fixed physical proportions. This was seen and acknowledged explicitly by informed commentators at just the moment that the Radio Act of 1927 was being crafted. As an article in *Science* summarized the broadcasting situation:

> We have at the present time only 89 wave lengths and Canada uses five of these, leaving the United States 84. . . .
>
> Increasing the number of wave lengths is possible, but would involve difficulties, [W.D. Terrell, chief of the Department of Commerce's Radio Division] explained. Radio receiving apparatus is now made to cover the broadcasting band from 200 meters to 545. . . .
>
> If broadcasting stations were allotted wave lengths outside the present range radio apparatus would have to be altered to permit reception.[86]

The idea of a fixed number of frequencies to be awarded to a fixed number of speakers simply begs the question of unit definition, as well as the question regarding how much of the spectrum is to be used for radio broadcasting.[87] Reduced to its simplest form, the proponent of "physical scarcity" must be asked to name the number of *technically* available frequencies. Any number less than infinity can be increased by further subdivision of time, power, or bandwidth coordinates.[88]

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84. Paul Baran, Is the UHF Frequency Shortage a Self Made Problem? 1 (June 23, 1995) (Paper given to the Marconi Centennial Symposium, Bologna, Italy, on file with the Columbia Law Review).

85. Id.

86. Science Service, Science News, Science, Dec. 17, 1926, at x, xiv.

87. The *Red Lion* opinion itself expressed awareness of the inherently arbitrary definition of physical scarcity. As the court pointed out the possibility of time restrictions for broadcasting on any given frequency:

> Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.

Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390–91 (1969). The same, obviously, is true with respect to geographical and frequency divisions.

88. Of course, the cellular architecture now used to deliver various wireless services makes the power/bandwidth tradeoffs ever more visible. Cellular systems "create" additional communications capacity by reusing frequencies cell to cell. (This is made possible by powering transmissions at sufficiently low levels as to allow nearby cells interference-free reception.) By continued cell splitting, such a system adds capacity as

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Decisionmakers in the early days of radio could not have been unaware of such considerations; indeed, the first substantive Federal Radio Commission ruling in 1927 (as noted above) rejected two suggestions to increase the number of available frequencies, one by increasing the radio band, the other by reducing bandwidth per assigned license. The range of possibilities was explicitly discussed and, while anticompetitive arguments put forth by radio broadcasters were persuasive beyond their social value,[89] the rules adopted were justified not on grounds of physical scarcity (which would have been incomprehensible) but on distributional (fairness) or economic efficiency criteria. In fact, the regulation of radio waves began with a clear recognition that new station assignments could be created by altering the bandwidth, frequency, power, location, and time coordinates. This understanding is fundamentally at odds with the notion that radio spectrum constitutes a fixed, or "physically scarce," resource.

Yet, an even more fundamental way of addressing physical scarcity could be advanced. Suppose one just cannot grasp the notion that intensive and extensive margins exist for further exploitation over all ranges in radio, or that power and time coordinates can be adjusted to create additional frequency "slots." Physical scarcity is still inexplicable.

This can be deduced from the consideration of cable delivery of radio waves. We are today familiar with cable television transmission of video signals over coaxial copper wires. Such cables are just "spectrum in a tube," as they have been dubbed by engineers.[90] Whatever limits in bandwidth are thought to exist in the airwaves cannot lead to a *physical* scarcity constraint due to the *physical* possibility of delivering precisely the same (non-interfering) signals over a wire between any two points served via wireless. Furthermore, this is not a miracle solution provided by modern technology: U.S. consumers were receiving radio service via cable as

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dictated by costs and demand. Interestingly, cellular proposals began to appear in telephone system proposals as long ago as the late 1940s. See George Calhoun, Digital Cellular Radio 39 (1988).

89. The primary argument advanced by commercial broadcasting interests was that consumers would be hurt by any enlargement of the AM band because it would render existing equipment obsolete. In fact, enlargement of the AM band would have allowed all existing radios to access interference-free broadcasts, and allowed purchasers of new sets to have the choice of selecting a model delivering a broader range of stations. Simply truncating station competition and limiting consumer choice to the existing band, was unambiguously inferior for consumers. But it was trumpeted by broadcasters and repeated in the public debate by non-industry sources.

90. Fiber optic cables used today are "just high-frequency radio (red-colored light) in a glass conduit." Howard Shelanski & Peter Huber, The Attributes and Administrative Creation of Property Rights in Spectrum 4 n.8 (Sept. 1996) (Paper presented at the Conference on the Law and Economics of Property Rights to Radio Spectrum, Marconi Conference Center, on file with the Columbia Law Review).

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early as 1923,[91] and AT&T first considered transmitting radio signals in 1919 not via airwaves, but by wire.[92]

The ability to substitute wired frequencies for wireless spectrum space should be self-evident today, when consumers and businesses choose daily between the rival forms of communications transmissions—for example, when deciding whether to use a TV antenna or satellite dish versus a cable TV hook-up, or placing a telephone call via a landline versus a cellphone (or cordless phone). Stated bluntly, the *technical* possibility of creating additional frequency space via wires renders the physical scarcity doctrine meaningless. This conclusion is legally inescapable in that the federal courts have rejected the physical scarcity doctrine for cable television transmission. Cables are not finite like the airwaves, goes the logic. Yet, they can deliver precisely the same range of frequencies, and function as technical substitutes. Since "physical scarcity" denies the relevance of the economic (i.e., cost-based) approach to scarcity, the fact that one medium is more efficient in a given context is beside the point. The ability to replicate a "physically scarce" technology with "non-physically scarce" conduits leaves the former concept an empty box.

Ironically, the absolute lack of content in the physical scarcity *concept* has helped to enable the physical scarcity *doctrine* to live a long and healthy life. The criticism that the doctrine has repeatedly invoked inevitably focuses on the relative lack of scarcity—indeed, a relative abundance—which the electronic media increasingly exhibit when compared to the traditional print press. This line of attack became acute when, in 1974, *Tornillo* established that the *Miami Herald* newspaper was entitled to sweeping First Amendment protections regardless of its market dominance or political influence. This came only five years after the *Red Lion* verdict put the Supreme Court on record as justifying FCC rules requiring (unpaid) right-of-reply over a tiny, daytime-only radio station.

The emptiness of physical scarcity as a concept, however, has rendered empirical challenge moot. It specifies something distinct from *economic* scarcity, the only sense in which we might meaningfully discuss scarcity, and simply asserts a state of nature. Since this assertion itself lacks substance, empirical falsification becomes quite impossible. This has led to apparent frustrations on the part of many expert commentators. The late Ithiel de Sola Pool observed that the *Red Lion* Court's finding that "scarcity is not entirely a thing of the past" compelled the Court to characterize "scarcity as a continuing objective fact."[93] This was curious to Pool, in that, "[b]y the time of [*Red Lion*] it was technically possible to provide as many channels on cable television as consumers would pay for. With cable, the limitations on spectrum are gone."[94] Yet, in that physical

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91. See Barnouw, supra note 56, at 154.
92. See id. at 106.
93. Pool, supra note 12, at 142.
94. Id. As noted above, the availability of cable actually preceded the 1927 Radio Act. See supra text accompanying notes 91–92.

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scarcity admits to no coherent definition, the "objective" facts of the marketplace will not overcome the unique property alleged for spectrum. There is, in short, no way to disprove a logical cipher. This forms the impressive legal contribution of the doctrine. In Pool's apt description: "The notion that nature itself inexorably required the selective licensing of broadcasters has persisted to the present. It is the core of the 1969 [*Red Lion*] decision."[95]

V. The "Rights of the Listener" and "Diversity of Expression"

> As a matter of history it should be stated that at each of the four National Radio Conferences called, and presided over, by President Hoover when Secretary of Commerce, emphasized the interest of the listening public as the paramount consideration in the regulation of broadcasting.[96]

The origins of radio regulation provide interesting vintages for the development of two doctrines used to buttress the physical scarcity analysis and to justify government regulation of broadcast speech. These spring from the following idea: As new technology takes us beyond the traditional forms of communication known to the Founding Fathers, the First Amendment's harshly libertarian stricture, "Congress shall make no law . . . abridging the freedom of speech, or of the press," must be replaced by affirmative governmental obligations to advance the *underlying values* of free speech and press. Rather than delimiting the sphere of state action in regard to the broadcast press, the Constitution actually calls for the governmental promotion of, (1) the *rights of listeners,* which should overrule those of speakers;[97] and, (2) a *diversity of voices,* such that various viewpoints may be heard.[98]

Revealingly, this line of argument was actually concocted by Herbert Hoover and the broadcasting interests as early as 1922. Beginning with the first of the annual Radio Conferences sponsored by the Department of Commerce, the major broadcasters adopted yearly resolutions requesting federal licensing according to "public interest, convenience or necessity." From the first, this proposed regime was justified by Hoover, Sarnoff, and the Conference resolutions as demanded by the rights of the listening public.[99]

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95. Pool, supra note 12, at 142.

96. Louis G. Caldwell, The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927, 1 Air L. Rev. 295, 324 (1930). Caldwell was the first General Counsel of the Federal Radio Commission. The National Radio Conferences were dominated by the major commercial radio broadcasting companies.

97. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390.

98. "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969).

99. See Barnouw, supra note 56, at 95; Hazlett, supra note 29, at 152–53, 157.

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Senator Dill thought this quite significant, and noted in his book that "the broadcasters themselves suggested the inclusion of the words 'public interest' in the law as a basis for granting licenses."[100] Dill was quite correct, in that the objective of broadcasters in lobbying for licensing legislation was to exclude new entrants while maintaining existing frequency rights. While the industry already believed it possessed vested interests in airwave access under existing common law, the same legal principles by which they had established tenure could be utilized to expand broadcasting via homesteading of new frequency bands by entrants. It was correctly augured that the public interest standard would create a constitutional basis for legally denying such entry.

But the switch to a new property rights regime entailed some risk: existing licensees, under a new (public interest) standard, might lose standing. Here is where the "rights of the listeners" became doubly important: the justification for grandfathering existing licensees was that they delivered important service to the public. Hence, the language of the Fourth National Radio Conference, convened by Hoover's Department of Commerce and dominated by commercial broadcasting interests: "'That public interest as represented by service to the listener shall be the basis for the broadcasting privilege.'"[101]

A three-sided coalition lobbied for the 1927 Radio Act, with each seeking government benefits (i.e., rents) in self-interested fashion. The bargain executed under the public interest standard gave major broadcasters de facto property rights, which they could have obtained (at a litigation cost) at common law, *and* barriers to new entry, which they could not have. Broadcast regulators, including Congress and the Executive Branch, became vested in a regulatory oversight role that allowed them to exercise some jurisdiction over valuable license assignments and some influence over program content—a position they were not surprisingly eager to seize. Most interesting, perhaps, is that advocates for "the public interest" (non-profit broadcasters such as universities, churches, municipalities, labor unions, as well as the American Civil Liberties Union) were also vocal supporters of the licensing scheme.

We now know the ironic end of the story. Non-profit broadcasting licenses were largely extinguished by the Federal Radio Commission by the early 1930s.[102] With the advantage of hindsight, we can deduce either an agency problem existing between the constituents of such non-profit groups and their appointed lobbyists, or a serious case of miscalculation. The former is the more plausible: because non-profit lobbyists rationally perceive federal licensing as an institution affording them a higher return on their human capital, such agents will strongly favor pub-

100. Dill, supra note 51, at 89.

101. Id. (quoting National Assoc. of Broadcasters, Resolutions of Fourth National Radio Conference (1925)).

102. See Robert W. McChesney, Telecommunications, Mass Media, and Democracy 30–37, 254–55 (1994).

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lic trusteeship for self-interested reasons. In this sense, the failure of such regulation to achieve its ostensible goals will only raise the demand for non-profit group advocates.[103]

Whatever the source for the enthusiasm of public interest advocates for federal regulation of content, it was abundant, and it appears to have overwhelmed competing concerns, such as a fear of government censorship. Indeed, the single most outspoken public interest advocate on this issue, Morris Ernst of the ACLU, adamantly endorsed far-reaching state monitoring of broadcast speech:

> All records of broadcasting stations should be kept on forms prescribed by the Department [of Commerce] and open periodically to the public. Such records should include programs which have been broadcast itemized in accordance with types of broadcasting such as jazz, opera . . . speeches, etc., ... The public and the Department, in possession of such facts, may more wisely come to a determination as to whether or not the particular station should have its license renewed or revoked on the sole basis of public benefit.[104]

The notion that government control should be asserted on behalf of the public was soon supported by the argument that a "diversity of voices" was a goal of public interest licensing. That the standard was vague, and that it would require vigorous government monitoring to achieve, was certainly appreciated by Morris Ernst. Yet, just as clearly, public interest spokespersons such as Ernst would stand to gain by a policy that allowed their public interest "currency" to help purchase broadcast rights in the rights "auction." This calculus recognizes the essential fact that the public trusteeship approach substitutes political discretion for market allocation, the latter being the alternative wherein rights are assigned via a competitive bidding process.

Similarly, the "rights of the listeners" argument has been popular among diametrically conflicting political interests because it effectively transfers decisionmaking over outputs into the regulatory process.[105] Listeners and viewers are served in the economic marketplace by private sellers, and in the political marketplace by democratic officeholders and government regulators. To argue for the "rights of listeners," however, is to beg the question of *how* such rights are to be exercised, i.e., via voluntary patronage (private market) or political representation (government regu-

103. Another factor leading one to this conclusion is that public interest group advocates enjoy loose monitoring by principals—i.e., the citizenry at large. The primary mechanisms for monitoring corporate executives extant in capital markets are notably absent in the non-profit sector.

104. Morris L. Ernst, Radio Censorship and the "Listening Millions," 122 The Nation 473, 474 (1926).

105. For instance, both leading conservative organizations, such as the National Rifle Association and Accuracy in Media, and leading liberal activists, such as Ralph Nader, favored the retention of the Fairness Doctrine. See Thomas W. Hazlett, The Fairness Doctrine and the First Amendment, Pub. Interest, summer 1989, at 103, 114 & 115 n.7.

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lation). Hence, as applied, the argument confuses listeners' rights proper with government regulatory jurisdiction. It collapses an agency relationship into the right itself. Here, the FCC's agency relationship with listeners and viewers is imposed on the market on the pretext that such principals have the right to control content. Yet, they do not end up with any such rights—regulators do. This insight, while perhaps subtle to outside analysts, has apparently been straightforward to petitioners for government discretion (always properly vested) since Hoover's initial arguments on the subject in the early 1920s.

VI. *Red Lion* and the "Chilling Effect"

A. *The "Chilling Effect" of* Red Lion *Itself: Law Imitates Life*

Perhaps the most compelling test of the chilling effect is embodied within the real-world dynamics of the *Red Lion* case itself. Due to an extraordinary book by a former president of CBS News, Fred Friendly,[106] published some six years after the Supreme Court rendered its decision, the evidence now at our disposal is a good deal richer than the record that was available to the Court.

The facts that the Court heard were as follows. On November 25, 1964, WGCB, a radio station in Red Lion, Pennsylvania, owned by Reverend John Norris, aired a fifteen-minute commentary by the evangelist, Reverend Billy James Hargis. Hargis's "Christian Crusade" program was heard on about 200 radio stations nationally, with the time being purchased with funds donated by supporters. This particular spot on the Red Lion AM outlet cost Hargis's organization $7.50. In it, Hargis took two minutes to discuss one Fred Cook, author of *Goldwater—Extremist on the Right.* Hargis claimed that Cook was a leftist writer who was employed by *The Nation*, and had been fired by *The New York World Telegram* for a breech of journalistic ethics. Hargis denounced both the author and the book as untruthful.[107]

Cook, appealing to an FCC regulation ancillary to the Fairness Doctrine, demanded that the station afford him equal time to respond to this personal attack. Norris invited Cook to spend $7.50 for a fifteen-minute spot, the same bargain he had afforded Hargis. Cook declined the offer, electing to press his claim for free time with the Commission. Ultimately, Cook prevailed at the FCC, and at the United States Supreme Court, winning the decision there 8–0.[108]

What the Court did not know was this: the entire challenge to Norris's editorial policy was part and parcel of a campaign to *create* a chil-

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106. See Fred W. Friendly, The Good Guys, the Bad Guys, and the First Amendment (1975).

107. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 371 & n.2 (1969).

108. See id. at 367. William O. Douglas was recused due to medical problems. He later wrote that had he sat for the case, he would have dissented. See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973) (Douglas, J., concurring).

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ling effect via the licensing system. The political machinations began at the beginning, when Cook's Goldwater volume was published with an undisclosed subsidy from the Democratic National Committee (DNC). That much was straightforward politics—and an exercise in First Amendment protected speech—but then the regulatory gamesmanship kicked in. The WGCB broadcast was not heard by Fred Cook, but was monitored by an extensive operation established by the DNC for the purpose of filing Fairness Doctrine-type challenges against right-wing broadcasters. This group of DNC-annointed (and funded) media monitors had been instituted after President John F. Kennedy's bitter experience with conservative radio shows during the 1962 campaign to gain passage of the Nuclear Test Ban Treaty.[109]

It is likely that the DNC knew more about the impact of public interest licensing than did the Supreme Court. Wayne Phillips, a housing official in the Kennedy-Johnson Administration, was chosen to head the radio watchdog effort. In his words: "'Even more important than the free radio time was the effectiveness of this operation in inhibiting the political activity of these right-wing broadcasts. . . .'"[110] One Phillips assistant was Martin Firestone, a former FCC lawyer, who wrote in a memo that the DNC's efforts were paying dividends in that they "'may have inhibited the stations in their broadcast of more radical and politically partisan programs.'"[111] According to Firestone, it was not the large broadcaster or mainstream viewpoint that was at risk of being hurt by the economic disincentives created by the Fairness Doctrine. Indeed, he attributed the source of the DNC campaign's success as follows:

> The right-wingers operate on a strictly cash basis and it is for this reason that they are carried by so many small stations. Were our efforts to be continued on a year-round basis, we would find that many of these stations would consider the broadcasts of these programs bothersome and burdensome (especially if they are ultimately required to give us free time) and would start dropping the programs from their broadcast schedule.[112]

The strategy of the campaign was not subtle: tax anti-government speech. As Bill Ruder, an assistant secretary of commerce in the Kennedy Administration and another operative in the scheme, later testified: "'Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.'"[113] That this tax was dutifully levied first by the Commission, and then approved by the Supreme Court, graphically illustrates the possibility that neither the regulatory system nor the judicial

109. See Friendly, supra note 106, at 34–39.
110. Id. at 41 (quoting Wayne Phillips).
111. Id. at 41–42 (quoting Martin Firestone).
112. Id. at 42 (quoting Martin Firestone).
113. Powe, supra note 12, at 115 (quoting Bill Ruder).

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system will prove effective in discovering and countering outright political censorship.

B. *The Supreme Court's "Chill" Test*

The Supreme Court has recognized the possibility that government regulation of the electronic press may discourage controversial speech, and that such an outcome would lead to grave constitutional concern. That, the Court noted in *Red Lion*, would be the result where enforcement of content controls led to a "chilling effect," prompting licensees to avoid broadcasting dissenting or unpopular speech due to regulatory disincentives. In dealing with the broadcaster's contention that government enforcement of the Fairness Doctrine would tend to silence certain speakers, the Court responded that such a possibility was indeed "a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled."[114]

Yet the concern was put to rest in *Red Lion* both logically and empirically. First, the Court noted that in the event that broadcasters were deterred from airing controversial speech, the FCC could simply mandate licensees to air more of such programming. Second, the Court found no evidence as to the existence of a "chilling effect."[115] Indeed, the Court found just the opposite, quoting Frank Stanton, President of the Columbia Broadcasting System, in his November 21, 1968 speech to the Sigma Delta Chi National Convention: "[W]e are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to

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114. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969). The Supreme Court has reaffirmed this test in FCC v. League of Women Voters, 468 U.S. 364, 378 n.12 (1984): "[W]ere it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]." In 1985, the FCC produced just such a showing, which led the Commission to abolish the doctrine in 1987. See In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 147 (1985).

115. Arguments about the disincentives provided by government-mandated right-to-reply rules had carried the day in *Tornillo*, where the Supreme Court held a newspaper free to publish—or not publish—a response to its attack on a political candidate. But no such luck for the electronic publisher:

> Identical arguments with respect to the costs and adverse incentives imposed by access obligations were made in Red Lion Broadcasting Co. v. FCC, but there the Court relied on the FCC's finding that blunted coverage of controversial issues arising out of enforcement of the fairness doctrine was "at best speculative," noting: "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues."

Lipsky, supra note 12, at 570 n.32 (citations omitted). The writer goes on to observe that, "The response is circular, since it assumes the FCC's power over content that was at issue in the case." Id.

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allow that judgment and enterprise to be affected by official intimidation."[116]

This standard of proof could be called into question. It appears that while Mr. Stanton gave moving public speeches on the matter of "official intimidation," he held substantially different private views. In fascinating internal White House memoranda made public during the Watergate investigation, Nixon Administration attorney Charles W. Colson prepared a September 25, 1970 report for Herb Klein and H.R. Haldeman detailing the pointed meetings he had held with the "three network chief executives"[117] concerning the Administration's views on news reporting. Among the highlights are the following observations by Colson:

> The networks are terribly nervous over the uncertain state of the law . . . . They are also apprehensive about us. Although they tried to disguise this, it was obvious. The harder I pressed them (CBS and NBC) the more accommodating, cordial and almost apologetic they became. Stanton for all his bluster is the most insecure of all.
>
> To my surprise CBS did not deny that the news had been slanted against us. Paley merely said that every Administration has felt the same way and that we have been slower in coming to them to complain than our predecessors. He, however, ordered Stanton in my presence to review the analysis with me and if the news has not been balanced to see that the situation is immediately corrected. (Paley is in complete control of CBS—Stanton is almost obsequious in Paley's presence.)
>
> I had to break every meeting. The networks badly want to have these kinds of discussions which they said they had had with other Administrations but never with ours. They told me any time we had a complaint about slanted coverage for me to call them directly. Paley said that he would like to come down to Washington and spend time with me anytime that I wanted. In short, they are very much afraid of us and are trying hard to prove they are "good guys."
>
> The only ornament on Goodman's desk was the Nixon Inaugural Medal. Hagerty said in Goldenson's presence that ABC is "with us." This all adds up to the fact that they are damned nervous and scared and we should continue to take a very tough line, face to face, and in other ways.
>
> I will review with Stanton and Goodman the substantiation of my assertion to them that their news coverage has been slanted.

116. *Red Lion*, 395 U.S. at 393 n.19 (quoting Frank Stanton, keynote address at Sigma Delta Chi National Convention (Nov. 21, 1968)).

117. David L. Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213, 244 (quoting report by Charles W. Colson). That a high ranking White House official journeyed to New York to engage in extended (and unreported) conversations with all three broadcast network heads on the chosen topic of media bias might itself have been material evidence in the Supreme Court's analysis in *Red Lion*.

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> We will go over it point by point. This will, perhaps, make them even more cautious.[118]

These passages colorfully indicate two things. First, they reveal the essential dynamic involved in federal licensing of broadcasting facilities. The nervousness of licensees is economically predictable, and is here demonstrated in the behavior of both regulators and regulatees. The second implication is that Frank Stanton, whose public comments were taken as evidence by the Supreme Court, provides stunning and compelling support for the "chilling effect" in his reported private behavior.[119] Not only had Stanton been a stalwart ally of President Lyndon Johnson, helping him secure CBS affiliations for his radio and television properties,[120] but he proved adept at accommodating the not infrequent requests for government accommodation on items of broadcast content. In the one empirical test chosen by the Court—the beliefs of CBS President Frank Stanton on the relationship between broadcasters and the state—the "chilling effect" is found to be alive and frigid.

C. *Radio Deregulation and Quantitative Evidence of the Chilling Effect*

More systematic evidence on the chilling effect can be gleaned from radio market data observed since the FCC issued its "Deregulation of Radio" rulemaking in January 1981 and abolished the Fairness Doctrine,[121] for both radio and television, in August 1987. Since the Commission largely maintained its radio rules to force the provision of

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118. Id.

119. Daniel Schorr reports on Nixon Administration attempts to censor network news coverage. See Daniel Schorr, Clearing the Air 35-47 (1977). While his account generally supports the view conveyed by Colson's memos (in some cases citing actual programming altered in response to Administration threats, see id. at 39-47), he suggests some measure of bravado in them, as well. See id. at 44. The value of these memos as evidence must be viewed relative to the Stanton speech cited in *Red Lion*. See *Red Lion*, 395 U.S. at 393 n.19.

120.
> The network executive who did most to aid the LBJ cause was Frank Stanton, a Ph.D. from Ohio State University who became president of CBS and one of broadcasting's most adroit operators.
>
> . . . .
>
> . . . [W]henever there was a business matter to be discussed between CBS and the LBJ stations, Johnson would summon the appropriate CBS personnel to the White House to discuss it. Once he called Stanton in New York to complain that CBS was charging one of his TV stations too much for a syndicated program. Stanton told his staff to furnish the program to the station free.

William B. Ray, FCC: The Ups and Downs of Radio-TV Regulation 36-37, 41 (1990).

121. The Fairness Doctrine was a two-pronged obligation formally imposed on radio and TV licenses in 1949. (There had been "fairness" considerations as part of the "public interest" test for broadcasting dating as far back as 1929.) The first prong was an affirmative obligation for a broadcast licensee to air coverage of important public issues. The second was a responsibility to air such coverage from balanced perspectives. See Syracuse Peace Council, Memorandum Opinion and Order, 2 FCC Rcd. 5043, 5043 n.2 (1987); In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 146 (1985).

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"nonentertainment" program services,[122] which it saw as fulfilling its role to protect the interests of listeners by providing for a diversity of expression, the marketplace experience after either round of deregulation is instructive: Did the quantity, or proportion, of informational programming fulfilling the FCC's self-stated objective rise or fall in the wake of deregulation?

As shown in a forthcoming paper, the diversity of radio station formats expanded in both the AM and FM radio markets after the controls in each market were relaxed.[123] As measured by a concentration ratio index, the concentration of formats declines most pointedly after 1987—the year the Fairness Doctrine was abolished. Moreover, the supply of informational programming formats (news, talk, news/talk, and public affairs) explodes both absolutely, and as a proportion of all formats after 1987 (see Figure 3).[124] In percentage terms, informational formats rose from about 7 percent of AM formats in 1994, to nearly 30 percent in 1995. This market reaction is entirely consistent with the mirror image of a "chilling effect." Faced with less disincentive in the airing of potentially controversial speech[125] when the Fairness Doctrine is revoked, station owners appear to have elected to air substantially more informational programming.

VII. TV License Auctions and the 1996 Telecommunications Act

While the 1996 Telecommunications Act took a pass on even the slightest liberalization of the spectrum allocation policy crafted in 1927, the Act was not speechless on wireless out of simple neglect. The omission was sufficiently flagrant to have resulted in a hot public debate, provoked by none other than the then-Senate Majority Leader, Robert J. Dole (R-Kan.).[126] After a bipartisan group of Senators (including Democrats John Kerry of Massachusetts and Russ Feingold of Wisconsin, and Republicans John McCain of Arizona and Fred Thompson of

122. Information—news and public affairs programming—was actually labeled as "nonentertainment" fare by the Commission. See In re Deregulation of Radio, 84 F.C.C.2d 968, 975 (1981) (report and order).

123. See Thomas W. Hazlett & David W. Sosa, Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting, 3 Mich. Telecomm. & Tech. L. Rev. <http://www.law.umich.edu/mttlr/> (forthcoming 1997) (manuscript at 15–17, on file with the Columbia Law Review) (also available at <http://www.cato.org./pubs/pas/pa-270.html>).

124. This shows nonmusic formats as a percentage of total AM radio station formats (music, the residual category, is not shown). FM, while more devoted to music programming, shows similar trends. See Thomas W. Hazlett & David W. Sosa, Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market, 26 J. Legal Stud. 279, 294 (1997).

125. Airing controversial material subjects the broadcast licensee to costly requests for "free" equal time, litigation, and/or license renewal difficulties—a situation that can be avoided by music programming.

126. See Ted Hearn, Spectrum Debate Splits GOP Leaders, Multichannel News, Jan. 22, 1996, at 1.

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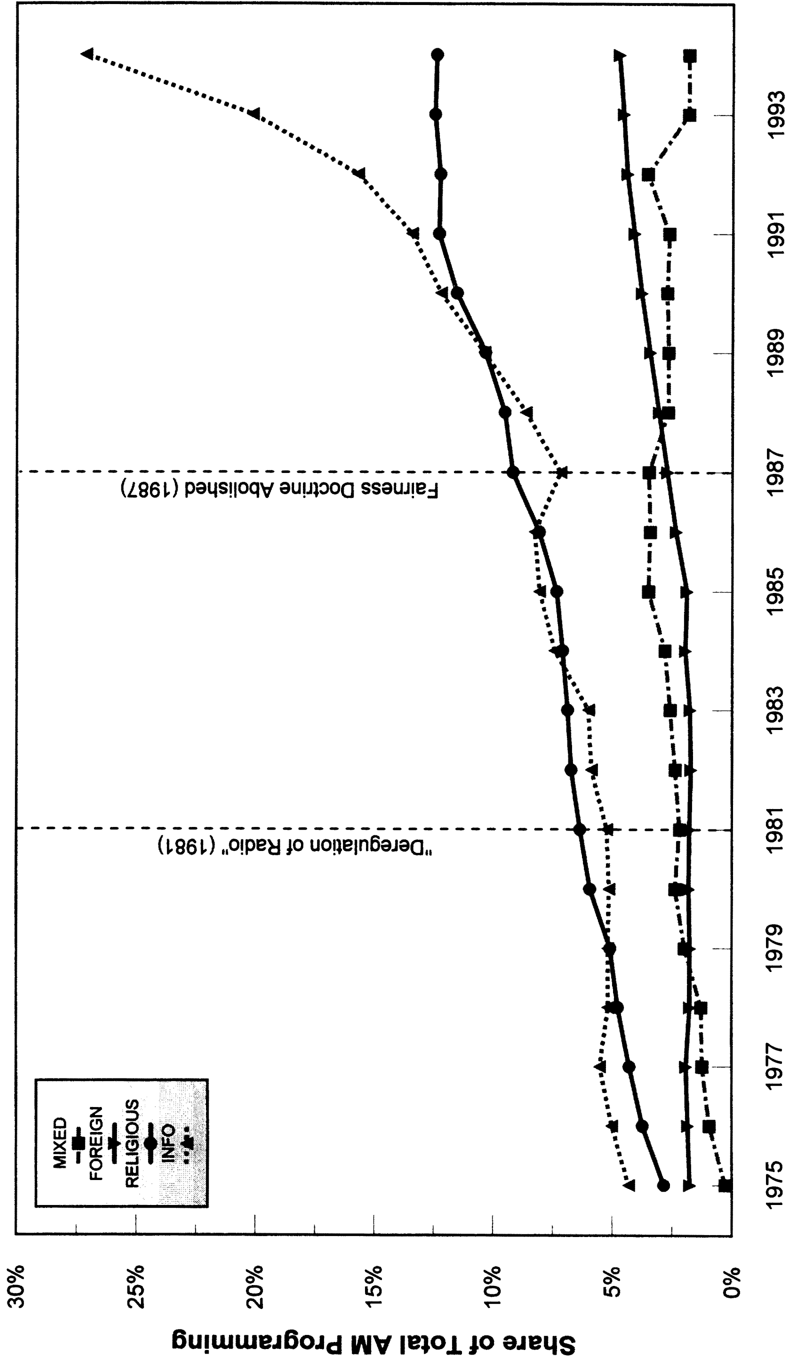

Figure 3. Selected AM Formats
1975-1994

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Tennessee[127]) protested the "corporate welfare" of the "license giveaway" to broadcasters for High Definition television (HDTV) licenses[128] (an FCC proposal that the Act codified), Senator Dole held up passage of the Telecommunications Act in January 1996 until the issue could be resolved. This sent shock waves through both Congress and the telecommunications sector, as a legislative compromise several years in the making was put at risk.[129] It was only upon a bargain worked out with the FCC that Senator Dole relented, allowing the Telecommunications Act to move forward. (It was signed into law on February 8, 1996.) The deal was that the FCC would not award any new HDTV licenses until Congress had sufficient time to legislate spectrum reform.[130]

That understanding held until only a few days after Senator Dole departed the Senate on June 11, 1996. Broadcast interests were then able to persuade the Republican leadership to send the FCC a letter canceling the Dole agreement.[131] Indeed, the letter—under the signature of House Speaker Newt Gingrich and the new Senate Majority Leader Trent Lott—instructed the Commission to issue licenses (without charge) in an expeditious manner, and to refrain from implementing any plans allowing other wireless users (other than incumbent TV licensees) to access any part of the spectrum band reserved (since 1952) for television.[132] This letter, which brought rebuke only from Congressman Barney Frank (D-Mass.),[133] implied total victory for the status quo.

The debate over HDTV within the context of the 1996 Telecommunications Act vividly illustrates the strength of the political equilibrium in broadcast regulation. Since FCC auctions were initiated in 1994 for *non*broadcast licenses, over $20 billion has been raised in federal

127. See Office of U.S. Senator John McCain, Press Release, McCain-Feingold-Thompson-Kerry Corporate Welfare Amendment Could Save Up to $60 Billion, Oct. 24, 1995, at 1,3 (on file with the Columbia Law Review) (listing broadcasting spectrum sixth on list entitled "Dirty Dozen Corporate Pork Chops," and claiming that the government would raise an additional $35 billion if it auctioned off all electro-magnetic spectrum rights).

128. See Paul Farhi, Broadcast Executives Say Dole Vented Anger at Them, Wash. Post, Jan. 12, 1996, at F1.

129. See Ted Hearn, B'Casters Make White House Pitch, Multichannel News, Jan. 15, 1996, at 1, 1.

130. See Ted Hearn, Clinton Will Sign It, Multichannel News, Feb. 5, 1996, at 1, 1.

131. See Joel Brinkley, Congress Asks F.C.C. to Begin Lending Channels for Digital TV Broadcasts, N.Y. Times, June 24, 1996, at D6.

132. Commission Chairman Reed Hundt had proposed an auction of FCC licenses allocating the spectrum space reserved for UHF channels 60–69, frequencies which were virtually unused and which were not needed even to accommodate the award of additional HDTV licenses. See Jeffrey Silva, TV Spectrum Could Convert to Wireless, Radio Comm. Rep., July 8, 1996, available in LEXIS, News Library, US File.

133. See Letter from Barney Frank, Congressman, United States House of Representatives, to the Honorable Reed Hundt, Chairman, FCC 1 (June 26, 1996) (on file with the Columbia Law Review). See also Thomas W. Hazlett, Industrial Policy for Couch Potatoes, Wall St. J., Aug. 7, 1996, at A12.

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receipts.[134] Licenses for HDTV service were estimated to be worth a minimum of $12.5 billion.[135] With the federal deficit figuring centrally in the political debate between the Republican Congress and the Democratic Administration, the old regime of free licenses for radio and TV broadcasters—now receiving a special legal exemption not afforded other wireless licensees—was a striking public policy curiosity. Articles appeared in many respected outlets condemning the "great airwave robbery,"[136] and the Senate Majority Leader held up important legislation to force action on the issue.

And nothing happened. Well, not precisely nothing. The broadcasters, true enough, have received free licenses, and new competition to TV broadcasters will not be allowed to settle in the vast stretches of the 402 Megahertz of spectrum allocated to broadcast TV (67 channels of 6 Megahertz per TV signal) where greater communications are easily possible (often by the adoption of new technologies, including digital transmission modes).[137] The change visible to the naked eye is in the ratcheting up of "public interest" obligations on broadcasters. As Thomas G. Krattenmaker observes of the Act: "I think it is downright shameful to pretend to enact a pro-competition policy, while continuing to preserve the worst features of our old spectrum allocation policies . . . ."[138] But continuation of that "old policy" enables broadcasters and prominent policymakers (both public and private) to create and distribute rents in a manner benefitting each key constituency. Hence, the Act's protection of TV licensees from auctions was accompanied by the V-chip plan, a legislative accomplishment sure to generate continued demand for the policy advocates who promote it. While the broadcasters had sternly threatened to take this mandate to court as a violation of their First Amendment rights, top broadcast executives capitulated almost instantaneously on the issue, negotiating surrender in the Oval Office only three

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134. Auction receipt information is available on the FCC's web page. See FCC Wireless Telecommunications Bureau Auctions Home Page, Summary Charts, Total Revenue (visited Mar. 27, 1997) <http://www.fcc.gov/wtb/auctions/summary/revenue.gif>.

135. See Edmund L. Andrews, Digital TV, Dollars and Dissent, N.Y. Times, Mar. 18, 1996, at D1.

136. Mark Lewyn, The Great Airwave Robbery, Wired, Mar. 1996, at 115; see also Edmund L. Andrews, Airwaves Plan Is Called Give-away to Broadcasters, N.Y. Times, Oct. 28, 1995, at 9; Ralph Kinney Bennett, The Great Airwaves Giveaway, Reader's Digest, June 1996, at 147; GOP Giveaway, Wall St. J., Sept. 12, 1995, at A26; Neil Hickey, What's at Stake in the Spectrum War?, Colum. Journalism Rev., 39, July/Aug. 1996, at 39.

137. Paul Baran writes:

> In reality, the major spectrum hog is analog broadcast TV transmission. In the US . . . a spectrum analyzer will find much of the allocated VHF and UHF TV spectrum unused, even in big cities. The UHF television band is punctured with vast empty holes called taboo channels. . . . We should never forget that any transmission capacity not used is wasted forever, like water over the dam.

Baran, supra note 84, at 3.

138. Krattenmaker, supra note 2, at 172.

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weeks after the passage of the Act.[139] Release of the TV labeling plan soon after the November 1996 elections—not incidental timing—generated still more front-page controversy for public policy entrepreneurs to trade on.[140]

Beyond the Telecommunications Act, the political landscape in 1996 was dotted with broadcaster pledges to advance the "public interest"—each ceding some discretion over the content of broadcast speech to regulators. Each was also a featured photo-op in Campaign '96; indeed, Republicans and Democrats fought to take credit for "standing up to" the broadcast industry.[141] Rupert Murdoch, chairman of the Fox TV network, was the first to devote free television time to presidential candidates, and was soon joined by the three larger networks.[142] A highly publicized deal, brokered by the FCC, imposed a first-ever "quantitative" standard for educational programming over commercial broadcast TV stations—three hours per week.[143] Overall, a thinly disguised quid pro quo motivated broadcasters to remember that discretion is the better part of valor. Broadcasters were seen "'tripping all over themselves to give up their First Amendment rights,'" as one high-level FCC official put it, to avoid the prospect of license assignment by competitive bidding.[144]

We can now evaluate the substance of the "physical scarcity" rationale for broadcast content regulation with crystal clarity. There cannot possibly be confusion at the FCC, Congress, or the Supreme Court, regarding the technical issues involved: wireless licenses are now routinely

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139. See Jane Hall, Hollywood Warily Joining Clinton's TV Ratings Push, L.A. Times, Feb. 28, 1996, at A1.

140. See, e.g., Roger Fillion, TV Industry Unveils Controversial Ratings System, Reuters N. Am. Wire, Dec. 19, 1996 available in LEXIS, News Library, US File; TV Ratings Opponents to Continue Fight Against Industry Plan at FCC, Comm. Daily, Dec. 23, 1996, at 3.

141. When broadcast industry executives met with officials to negotiate surrender on the V-chip, for instance, the issue provided such a golden opportunity to score political points that they had to take care to balance their visits. One TV executive noted, "'We need to have some kind of agreement to announce . . . to show that we're responding to the concerns of the president and the public. But we can't cut off Gingrich and other Republicans by giving President Clinton the only "photo-op" on the issue of children and television in a presidential election year.'" Hall, supra note 139, at A1. A White House policymaker was upset by the competition, saying, "'Newt smells credit available and he's trying to steal some of it.' . . . 'It baffles me how he can claim credit for people responding to the president's challenge to do something he has opposed for years.'" Id. The article was careful to note that it was vitally important not to offend key members of Congress who would "be voting on a proposal to auction airwaves spectrum space for billions of dollars." Id.

142. See Eliza Newlin Carney, Not Ready for Prime Time, Nat'l J., June 8, 1996, at 1284, 1284.

143. See, e.g., Clinton Gives TV for Kids a Boost, S.F. Chron., July 30, 1996, at A1. The article garnered the front-page headline. It should be noted that the "quantitative" standard of three hours per week of educational programming can be met through various alternative contributions to the "public interest."

144. See Thomas W. Hazlett, The 'Public Interest' Fraud, Wall St. J., May 6, 1996, at A14.

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auctioned by the FCC for nonbroadcast services. The technical uniqueness alleged for broadcasting has not required personal communications services providers, paging companies, microwave or satellite TV licensees—all winning bidders at FCC auctions—to be selected according to "public interest, convenience, or necessity." There is nothing "physical" about the use of airwaves that requires broadcast licenses to be regulated differently than newspapers or magazines—or wireless service providers.

Indeed, the opportunity to regulate broadcast speech has now, ever so smoothly and naturally in the era of FCC auctions, slipped into a naked rationale for differential treatment of the broadcast press. The problem with auctioning broadcast licenses is that it would remove the subtle political influences that the "license giveaway" makes possible. It would push TV and radio license assignment into an "arms-length" transaction, where any obligations of the winning competitive bidder would need to be objectively stated in the terms of the license put up for sale. This is not where the Congress (Republican or Democratic), the Administration (Republican or Democratic), nor public interest groups (which are still committed to the process of publicly attempting to extract concessions from broadcasters), nor certainly the broadcasters themselves choose to be. Market prices set in a license auction are just too high for broadcasters—playing the quid pro quo game against policymakers (government and public interest) remains a steal, even accounting for the potential expense of additional public interest obligations. The intense anti-auction campaign waged by broadcaster trade groups in 1995 and 1996 is striking evidence of the industry's revealed policy preference,[145] particularly when coupled with the industry's eagerness to deal on the V-chip, "kidvid" and free time for political candidates.

VIII. Conclusion

> The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[146]
>
> Ever since the first regularly scheduled public radio-broadcast in 1920, Congress has played a unique and central [role] in the control of radio-broadcasting.[147]

The interests of the regulated industry, broadcasting, are served by erecting entry barriers against competition. That mission has been ac-

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145. "Some people in Washington want to tax local TV broadcasters billions of dollars in order to balance the budget," the announcer continues. Each of the tiny images flickers to darkness in turn until only empty, black screens remain. Telephone your elected representatives, the disembodied voice advises, and tell them to vote against the "TV tax. Call now—while you still can." Those scare commercials, produced by the National Association of Broadcasters, aired thousands of times a week on TV stations all across the U.S. . . . .

Neil Hickey, supra note 136, at 39.

146. Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 633 (1975).

147. Friedrich & Sternberg, supra note 69, at 797.

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complished via the public interest standard. As is customary, recipients of license rents agree to an implied regulatory contract, what in broadcasting is called "public trusteeship." In agreeing to submit to various aspects of content control, including licensing itself, broadcasters are allowed to realize rents.

Regulators and public interest advocates have benefitted from a system that allows political decisionmakers to overrule consumer choices in an unregulated marketplace. By being in the loop on licensing decisions, such players are automatically in the loop on content decisions, thus achieving proximity to political clout as well as important status within the regulated (broadcasting) industry itself. That this creates First Amendment problems is virtually self-evident.[148] But the fact that the courts have remained deferential to such regulatory discretion being imposed on electronic speech is a tribute to the effectiveness of the political coalition vested in the physical scarcity doctrine.

What is most clear is that the demand to regulate broadcasting in the United States has not been driven by any technical necessities, policymakers' misunderstandings, or the naiveté of experts. Rather than a passive governmental response to market failure, as hypothesized in *Red Lion*, the motive to regulate broadcasting has been, since its earliest days, driven by the rents available to licensees on the one side, and the gains available to political actors from influence over a medium of pervasive social importance on the other.

This brings us to the very heart of the First Amendment question in electronic communications. To borrow Charles Fried's phrase, "primacy of politics" was asserted.[149] What we are led to conclude is that the demand to regulate electronic communications has arisen for reasons having nothing to do with physical scarcity—a concept that fails to survive even the most cursory logical scrutiny. Nor can it be attributed to any alleged confusion of early radio industry regulators concerning property rights, as radio's earliest regulators were demonstrably facile with rules to "minimize interference" using traditional—and available—legal institutions. Nor, lastly, was there any doubt as to the reason radio was especially important: it was seen as a dramatically influential medium of expression. Hence, the demand to allocate and license radio spectrum administratively has arisen from the very quarters against which the Founders crafted a First Amendment to protect us: an alliance of private publishers and government agents creating and distributing monopoly rights in an industry of supreme importance to democratic life.

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148. That censorship was unavoidable under the 1927 Act—despite both the First Amendment and a section of the act banning it—was instantly grasped: "In spite of the prohibition of § 29 it would seem that the licensing authority cannot avoid some measure of censorship through the very issuance or denial of a license." Current Legislation—The Radio Act of 1927, 27 Colum. L. Rev. 726, 732 (1927).

149. Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 253 (1992).

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