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Broadcast License Auctions and the Demise of Public Interest Regulation

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# Broadcast License Auctions and the Demise of Public Interest Regulation

David Seth Zlotlow†

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# Broadcast License Auctions and the Demise of Public Interest Regulation

David Seth Zlotlow

*The use of auctions to distribute licenses to the electromagnetic spectrum has been heralded as a ground-breaking innovation in telecommunications regulation. Auctions address many of the problems associated with the comparative licensing approach that dominated broadcast license allocation throughout most of the last century. However, public discussion of broadcast auctions has yet to acknowledge that auctioning licenses poses the danger of fatally constraining the ability of the Federal Communications Commission (FCC) to enforce content-based public interest regulation. To enforce public interest regulation adequately, the FCC must be able to hold the ultimate sanction of license revocation over the heads of broadcasters. However, auctioned licenses would become property compensable under the Fifth Amendment, so FCC revocation of an auctioned license would effect a taking. The difficulties in regulating auctioned licensees would also affect regulation of incumbent broadcasters. Incumbent broadcasters would continue to be subject to the First Amendment restrictions that auctioned licensees presumably will not face. Such differing treatment would be vulnerable to equal protection challenges.*

*Admittedly, over the past twenty years, the FCC has shifted away from content-based regulation, raising the question of why it is problematic to institute an auction system that would remove the FCC's ability to reimpose such regulation. The ultimate impact of auctions is still critically important, however, both because the FCC continues to use content-based regulation for some areas of broadcasting and because future generations may wish to return to a regime of strong public interest regulation. Additionally, the government diminishes the legitimacy of the policy-making process where it abandons a major public policy through a process that does not acknowledge such a result.*

## INTRODUCTION

Using auctions to distribute broadcast licenses is one of the most exciting policy innovations in the history of broadcast regulation.

Theoretically, auctions address many of the problems associated with allocating access to the broadcast spectrum. Auctions allow licenses to be distributed based on a verifiable criterion—the highest bid at auction—rather than on vague notions of what would be in the public interest. Additionally, auctions allow the public to recover the value of the spectrum that was previously given away for free. The FCC has already embraced<sup>1</sup> competitive bidding in licensing wireless communications.<sup>2</sup> This Comment examines the propriety of bringing that same enthusiasm to the broadcast auctions the FCC has begun to hold.

My main argument is that the move to auctions will seriously constrain the FCC's ability to impose public interest regulation on all license holders—incumbent and auctioned licensees alike.<sup>3</sup> Broadcast regulation is marked by two key choices on the part of the government. The first involves regulating who gets access to the spectrum. The second involves regulating what content may be communicated through the spectrum. An important point of this Comment is that these two questions are intertwined. Changing the way licenses are distributed inevitably affects the manner in which the rights conveyed by those licenses can be exercised.

A second point of this Comment is that the dangers involved in deregulation of broadcast should not be surprising. There are several critical differences between broadcast and other areas where deregulation has proven to be at least moderately successful. Since the early 1980s, the FCC has steadily reduced the scope of public interest regulation.<sup>4</sup> Indeed, it is fair to say that the FCC has abandoned public interest regulation in most

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1. For evidence of this embrace, one need only look to the FCC's web page to see how many wireless auctions have been completed. See <http://wireless.fcc.gov/auctions> (last visited Mar. 1, 2004).

2. Wireless communication technologies include cell phones and pagers. For a more in-depth description of what constitutes wireless, see Fed. Communications Comm'n, Wireless FAQs, at <http://www.fcc.gov/egb/cellular.html> (last visited Feb. 2, 2004).

3. For the purposes of this Comment, I use the term "public interest regulation" to refer broadly to the myriad direct and indirect content regulations, as well as structural regulations, that the FCC has historically imposed on broadcasters. An example of direct content regulation is the prohibition of obscene and indecent broadcasting. An example of indirect regulation is the set of FCC rules on the mix of programming that television broadcasters provide. Over the past 50 years, there have been shifting requirements on a television station's programming mix. Broadcasters generally had to strike a certain balance of news, public interest, and educational programming to go along with the entertainment programs they presented. Structural regulations involve rules on who can own broadcast outlets. The FCC imposes limits on ownership in two senses. First, there are limits on how many television stations one company can own, both in a particular city and in the nation as a whole. Second, there are cross-ownership restrictions: if a company owns a newspaper, its ability to hold a broadcast license as well is limited. The intent of both of these sets of restrictions is to prevent overly concentrated media. The fear is that an overly concentrated media will not provide a diversity of content. For general information about the FCC regulatory system, see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* (1994).

4. HARVEY L. ZUCKMAN ET AL., *MODERN COMMUNICATION LAW* 1218 (Hornbook Series Student Ed. 1999) (discussing the 1990s as a general deregulatory period in the area of direct content regulation); *id.* at 1196-1213 (noting the general relaxation of structural regulations).

areas. Nevertheless, maintaining the FCC's ability to regulate based on content remains extremely important for two reasons.

First, in some instances the FCC continues to resort to traditional regulation. The most salient example is the regulation of indecent and obscene broadcasts. The controversy over Janet Jackson's appearance at the 2004 Super Bowl is the most high-profile instance of indecent broadcasting in recent years.<sup>5</sup> But even before the Super Bowl, there was a growing public outcry, and resultant Congressional activity, over how to reverse the FCC's increasingly lax enforcement of regulations against broadcasting obscenity.<sup>6</sup> Another area of enduring concern is children's programming. Given the amount of time the average child spends watching television, it is considered important that children spend this time watching programs that, ideally, contain some educational element and, at the very least, do not stunt or distort social and educational development.<sup>7</sup> As recently as 1990, dedication to children's programming has been affirmed as an important consideration in license renewal.<sup>8</sup> The FCC also still enforces various regulations dealing with politics. For example, section 315 of the Communications Act of 1934 mandates that "[i]f any licensee shall permit [a] . . . candidate for . . . public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."<sup>9</sup> As the 2003 California gubernatorial recall election demonstrated, the FCC regulations adopted pursuant to this statute still cast a long shadow over broadcasts during campaigns.<sup>10</sup> The entertainment value of covering Arnold Schwarzenegger's candidacy was often not fully explored by on-air comedians for fear of triggering the equal-time provision of the Communications Act.<sup>11</sup> Broadcasters throughout the country also refrained from airing Schwarzenegger's movies for fear of having to provide equal time for the 100-plus other candidates in the election.<sup>12</sup>

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5. Frank Ahrens and Lisa de Moraes, *FCC Is Investigating Super Bowl Show; Halftime Performance Faces Indecency Standards Test*, WASH. POST., Feb. 3, 2004, at A1.

6. See, e.g., Frank Ahrens, *Nasty Language on Live TV Renews Old Debate; FCC Takes Heat for Ruling on Adjectival Usage*, WASH. POST., Dec. 13, 2003, at A1.

7. Jane Tagney & Seymour Feschbach, *Children's Television-Viewing Frequency: Individual Differences and Demographic Correlates*, 14 PERSONALITY & SOC. PSYCHO. BULL. 145, 149 (1988) (noting that children spend between 28.3 to 31.2 hours per week watching television).

8. See Children's Television Act of 1990, 47 U.S.C. § 303a(b) (2002) (directing the FCC to issue rules limiting the amount of time that could be devoted to commercials during children's educational broadcasts).

9. 47 U.S.C. § 315 (2002).

10. See, e.g., Lisa de Moraes, *Late Night Shows Forced to Face Facts*, WASH. POST., Aug. 23, 2003, at C1; Paul Farhi, *FCC Rules "Howard Stern" Meets Standard of a News Show*, WASH. POST., Sept. 10, 2003, at C1.

11. de Moraes, *supra* note 10, at C1.

12. Sallie Hofmeister, *The Recall Campaign*, L.A. TIMES, Aug. 14, 2003, at C1.

Second, the ultimate effect of auctioning broadcast licenses is important because in the future there may be a renewed impetus to promulgate strong public interest regulation. Yet, as this Comment argues, the presence of auctioned licenses in the broadcast marketplace will severely limit future regulators' ability to impose this type of regulation. The present FCC does not have the right to entrench its policy preferences against the wishes of future generations.<sup>13</sup>

Legitimate governance demands an open discussion of the impact broadcast license auctions will have on the broadcast industry. Public interest regulation has formed the core of the FCC's responsibilities throughout the past century.<sup>14</sup> Such a historically important set of regulations should not meet their final demise via a mundane administrative alteration. The harm threatened is not merely theoretical. Recognition of the potential harm of broadcast auctions could seriously alter the auctions debate. As Congress's strong reaction<sup>15</sup> to the FCC's recent proposed relaxation of ownership restrictions<sup>16</sup> demonstrates, the future of broadcast content is a highly salient public issue. The failure of the FCC and the telecommunications regulatory community to recognize the link between auctions and the FCC's inability to impose public interest regulation means that the public will never recognize the irreversible path the FCC has begun to lead us down.

This Comment proceeds in four Parts. Part I explains the appeal of utilizing auctions as a means of allocating new broadcast licenses. The bulk of this section describes the failures of the old regulatory regime. Once these failures are understood, the appeal of auctions becomes apparent. Part II explains how the presence of auctioned licenses would make it difficult for the FCC to impose public interest regulation should interest in such policies be renewed. Because auctions will turn licenses into property compensable under the Fifth Amendment, the FCC's ability to condition the use of that property will be constrained. Part III places auctions in the context of the general trend towards deregulation in many regulated industries. Several important differences between broadcast and other industries suggest that broadcast should not be swept up in the wave of deregulation.

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13. For criticism of legislative entrenchment, see John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003). Administrative entrenchment of policy preferences is even more objectionable, since regulatory commissioners are not even directly accountable to voters.

14. ZUCKMAN, *supra* note 4, at 1161 ("The public interest standard is the 'touchstone of authority' for the Federal Communications Commission" (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940))).

15. See, e.g., Christopher Stern, *FCC Chairman's Star a Little Dimmer; Defeat on Capitol Hill Raises Questions About Powell's Political Savvy*, WASH. POST, July 25, 2003, at E1.

16. 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 67 FED. REG. 65,751 (proposed Oct. 28, 2002) (to be codified at 47 C.F.R. pt. 73).



Finally, Part IV considers some alternatives to auctions and explores possible middle ground, given both the danger and the appeal of auctioning broadcast licenses.

## I

### THE PROBLEMS OF THE TRADITIONAL APPROACH SPURRED INTEREST IN AUCTIONS

#### *A. The Failures of the Traditional Licensing Approach*

The arguments in favor of using broadcast license auctions largely respond to the weaknesses of the traditional approach, so it is helpful to briefly consider the problems that have historically beset the FCC's efforts at regulating broadcast. The traditional approach to license allocation involved what were called comparative license hearings. Where two or more would-be broadcasters applied for the same license, the FCC would hold a hearing to determine which applicant was more deserving of the license. During the hearing, the FCC would examine the relative strengths and weaknesses of the applicants to fulfill its statutory mandate of granting access to the spectrum based on the "public convenience, interest, or necessity."<sup>17</sup> While this approach has some intuitive appeal, in practice it was seriously flawed. Developing a workable definition of what was in the public interest when regulating content proved extremely difficult. The standard has been described as "either an empty concept or one that was infinitely manipulable."<sup>18</sup> Its vagueness posed several problems.

#### *1. The Public Interest Standard Created Indeterminacy*

The first problem with the traditional approach was that the statutory language of "public convenience, interest, or necessity" gave the FCC little guidance in choosing among competing license applicants. Imagine two hypothetical applicants competing for a new radio station. One applicant would broadcast classic rock music, the other classical music. How should the FCC gauge which would better serve the public interest in that particular market? It could survey the market and try to see where listener demands lie; if meeting listener demands is what the public interest calls for, then perhaps the results of such a survey would give the FCC a rational basis for choosing one applicant over the other. In this instance, since classic rock is generally more popular than classical music, it might make sense for the FCC to grant the license to the classic-rock applicant. But it is just as plausible to argue that there is a public interest in ensuring a

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17. 47 U.S.C. § 303 (2002).

18. KRATTENMAKER & POWE, *supra* note 3, 143. Indeed, it seems that the standard was *both* an empty concept and infinitely manipulable. Because it could mean all things to all people, it ultimately meant nothing.



diversity of content and in promoting content that holds cultural value. Under this approach, the classical station might be the appropriate choice. In the end, the public interest standard succumbed to this indeterminacy.<sup>19</sup>

## 2. *The Public Interest Standard's Indeterminacy Allowed for Political Favoritism*

The vagueness of the standard also opened the door to political favoritism and cronyism. It was very easy to allot licenses on the basis of naked political favoritism under a cloak of rational policymaking.<sup>20</sup> The ease with which favors could be doled out, coupled with the incredible value the licenses held, meant that the licensing process "historically suffered from the taint of insider dealing."<sup>21</sup> A stark example is that not one of the newspapers that supported Adlai Stevenson in 1952 was awarded a television license in a contested hearing at the FCC.<sup>22</sup> Lyndon Johnson was also reputedly involved in untoward activities involving favoritism at the FCC.<sup>23</sup> Political meddling was also alleged during the 2000 presidential cycle, during which candidate John McCain reportedly leaned on the FCC to act on behalf of campaign donors.<sup>24</sup> The indeterminacy of the public interest standard and the accompanying lack of transparent decision making facilitated such activity.

## 3. *The Hearing Process Was Expensive and Created Opportunism*

Another drawback of comparative license hearings was the cost.<sup>25</sup> The FCC had to redirect significant resources from other issues in telecommunications policy to administering this process, and private participants were forced to spend large amounts on the legal costs of a full-blown adjudication. The high costs of the system created the potential for strategic complaints by outside parties.<sup>26</sup>

This opportunism was manifested in two ways. Activists who sought to get their view on the airwaves could go to broadcasters and threaten a

19. See, e.g., Simon Geller, 102 F.C.C.2d 1443 (1985) (illustrating the difficulties of applying the two objectives of the FCC's public interest standard to competing stations, resulting in a reversal of a licensing decision after district court remand).

20. See, e.g., Richard E. Wiley, "Political" Influence at the FCC, 1988 DUKE L.J. 280.

21. Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 463 (2001).

22. KRATTENMAKER & POWE, *supra* note 3, at 148.

23. ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* 89-105 (1990).

24. John Mintz & Susan B. Glasser, *McCain Intervened with U.S. for 15 Campaign Contributors*, WASH. POST, Jan. 9, 2000, at A1.

25. See In the Matter of Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, 4 F.C.C.R. 4780, ¶ 46 (1989) [hereinafter "1989 Policies and Rules Formulation Report"].

26. See generally *id.*

so-called fairness doctrine complaint if their view on a theoretically newsworthy topic were not aired.<sup>27</sup> In response to this threat, a station could either refuse air time, risking high legal fees if its license renewal were contested, or give in to the demands of those whose views did not necessarily merit the privilege of air time.

A more troubling type of opportunism involved what can only be considered extortion. A party could approach a broadcaster and threaten to complain to the FCC about the broadcaster's failure to live up to its public interest obligation.<sup>28</sup> Because the public interest standard was so amorphous, it was usually possible to argue that a broadcaster had failed in some way to meet its obligation. The complaining party would offer to forbear from contesting the license renewal if it were given some concession unrelated to a viewpoint on a concrete public issue.<sup>29</sup> Sometimes these demands were made by public interest groups voicing legitimate concerns. For example, community groups might have extracted a promise from a television station to increase the diversity of its on-air talent. Challengers' motivations, however, were not always so public-spirited. Bad faith challenges imposed serious costs. Either the broadcaster had to agree to the concessions, or it had to pay the price during its renewal proceeding.<sup>30</sup> The situation became so common that the FCC issued a rule banning side payments among participants in competitive license hearings.<sup>31</sup>

#### 4. *The Fairness Doctrine Was Itself a Flawed Approach*

Equally troubling was that at the heart of this dysfunctional hearing process lay a doctrine that was itself inherently flawed. The fairness doctrine comprised two prongs that often pushed in opposite directions.<sup>32</sup> The first dictated that important news events must be covered. The second dictated that each side be given fair and equal treatment during that coverage. It was very difficult for the government to enforce the first prong, because

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27. See KRATTENMAKER & POWE, *supra* note 3, at 250-51 (describing the fairness doctrine generally and the way it relates to the licensing process). A fairness doctrine complaint involved a member of the public complaining to the FCC that a broadcaster failed to fulfill its fairness doctrine responsibilities. The fairness doctrine contained two prongs. The first prong dictated that broadcasters had a duty to cover controversial news events. *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985). The second prong dictated that where a controversial event was covered, both sides had to be afforded an opportunity to respond. *Id.* Compliance with the fairness doctrine was so important, it has been deemed the *sine qua non* for license renewal. KRATTENMAKER & POWE, *supra* note 3, at 237.

28. See KRATTENMAKER & POWE, *supra* note 3, at 250-51.

29. In the first type of opportunism, the complaining party was only trying to get its view heard. In the latter, the complaining party demanded some other kind of concession unrelated to a viewpoint on a concrete public issue.

30. 1989 Policies and Rules Formulation Report, *supra* note 25, ¶ 46.

31. *Id.*

32. This account of the tensions within the fairness doctrine is largely taken from KRATTENMAKER & POWE, *supra* note 3, at 244-62.

it was nearly impossible for the FCC staff to keep abreast of all issues of importance. The second prong made broadcasters disinclined to cover controversial issues because the competing sides would inevitably argue that they were not provided equal time.

Nevertheless, compliance with the fairness doctrine largely determined whether the FCC would renew a license. Naturally, then, a new applicant in a comparative hearing would do as much as possible to attack a broadcaster's record of compliance.<sup>33</sup> Defining a significant issue would have been extremely difficult if FCC staff or an intervener had claimed that a broadcaster had failed to cover a significant public issue. In an attempt to avoid being caught in a fight over whether or not it needed to give equal time, a station would simply avoid controversial issues.<sup>34</sup> These problems made the comparative hearing process all the more dysfunctional.<sup>35</sup>

##### 5. *The Public Received Little of the Licenses' Value*

Another shortcoming of the traditional licensing approach was that this system failed to capture the value of the licenses for the public. All of the profits a broadcaster earned were due to these licenses. Yet the government gave the licenses away for free.

Licensees earned money from the licenses in two senses. First, it was necessary for a broadcaster to hold a license in order to exist in the first place, so the broadcaster's profits were attributable to having been granted the license. Yet only in a very indirect way, through the regular income tax system, did the government share in the profits. Second, licensees profited from the free alienability of licenses. The ability to resell licenses made it possible for an initial licensee to use the license for a short time and then sell it. This phenomenon was problematic for two reasons. First, licensees were supposed to make their profits through operation of broadcasting businesses. Resale of a license as a commodity provided a broadcaster with a windfall unattributable to skillful operation of a broadcast concern.<sup>36</sup> Second, reselling licenses threatened to make the comparative licensing hearings useless. The initial licensee may have been able to make a good case for how it would have served the public interest, but since the purchasing entity gained the renewal expectancy held by the prior license

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33. *Id.*

34. *Id.* at 246.

35. This dysfunction led the FCC to abandon the fairness doctrine in *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987). The D.C. Circuit subsequently ratified this abandonment of the fairness doctrine in *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654 (D.C. Cir. 1989). However, problems with the licensing approach remained; for a discussion on this topic, see *infra* Part I.A.5.

36. See, e.g., *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 302 (D.C. Cir. 1967) (stating that "[l]icenses cannot be granted in the public interest to those who seek them for sale rather than service").

holder, there was no guarantee of any meaningful scrutiny of the ultimate broadcaster.

All of these problems made it clear that the comparative license hearing process was unworkable. This inescapable conclusion led the D.C. Circuit, in the 1993 case *Bechtel v. FCC*, to effectively bar the FCC from making further use of the comparative hearing process to allocate new broadcast licenses.<sup>37</sup> *Bechtel* ultimately stands for the proposition that the comparative licensing process is an untenable method of allocating access to the spectrum.

### *B. Why Auctions Seemed to Be the Answer*

By the time *Bechtel* was decided, it was clear that the government had to find a new way of allocating licenses. There seemed to be two options: lotteries or auctions. The lottery approach had been tried previously in the allocation of wireless licenses. That experiment had failed,<sup>38</sup> and the FCC seemingly had no desire to attempt it a second time.<sup>39</sup> This left auctions as the only viable alternative.

The notion of allocating access to the spectrum based on competitive bidding can be traced back to the 1950s,<sup>40</sup> but the proposal did not gain serious traction in academic circles until the 1980s. In 1985, the FCC itself issued a working paper suggesting that auctions might be an appropriate alternative to comparative licensing.<sup>41</sup> Auctions seemed like a good alternative for several reasons.<sup>42</sup> The most obvious benefit was that auctions

37. 10 F.3d 875 (D.C. Cir. 1993) (proscribing the FCC's continued use of integration of station ownership and management as a factor in comparative license hearings).

38. The major weakness of the wireless lotteries was that the FCC did not engage in any screening of license applicants—anyone could enter the lottery. The negative results were twofold. First, those who did win a license were typically unqualified to make use of the license. Instead, the winner would just sell off the license to an operator who could profitably use the license. The dreams of winning such a lottery jackpot created the second problem. Various application mills exploited the potential for this windfall by offering to enter the lottery on behalf of people who paid processing fees. Such mills often filed defective applications and failed to disclose the virtually nonexistent odds of winning a license. Owen M. Kendler, Comment, *Auction Theory Can Complement Competition Law: Preventing Collusion in Europe's 3G Spectrum Allocation*, 23 U. PA. J. INT'L ECON. L. 153, 158-59 (2002); William Kummel, Comment, *Spectrum Bids, Bets, and Budgets: Seeking an Optimal Allocation and Assignment Process for Domestic Commercial Electromagnetic Spectrum Products, Services, and Technology*, 48 FED. COMM. L.J. 511, 526 (1996).

39. Even if the FCC had wished to continue licensing by lottery, it would have been forbidden by congressional mandate. 47 U.S.C. 309(i) (2002).

40. Ronald Coase is generally credited with first proposing this idea. See R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959). It was actually first proposed in 1951 by Leo Herzel. Leo Herzel, "Public Interest" and the Market in Color Television Regulation, 18 U. CHI L. REV. 802 (1951).

41. EVAN KWEREL & ALEX D. FELKER, USING AUCTIONS TO SELECT FCC LICENSEES (Fed. Communications Comm'n Office of Plans & Policy, Working Paper No. 16, 1985).

42. STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 144-46 (2001) (suggesting criteria to use for analysis of the choice among auctions, lotteries, and comparative hearings; the following analysis is based on these criteria).

would allow the government to capture a significant amount of the value of broadcast licenses. Auctions would also avoid the problems associated with having to apply the public interest standard through comparative hearings. In addition, both the government and licensees would have much lower administrative costs. Auctions would severely reduce opportunities for political favoritism and for strategically contesting licenses. The licensing process would also be more efficient. The active aftermarket for licenses indicated that the comparative licensing process did not result in licenses going toward their best and highest uses. Auctions, by contrast, would allow licenses to go directly to those who valued them most. Finally, auctions would not force the FCC to justify what had become an irrational process that decreased the agency's legitimacy. By using a better process, the FCC might be able to regain some of the legitimacy it had lost through the comparative hearing process.<sup>43</sup>

### C. *The Current Status of Auctions*

#### 1. *The FCC's Legislative Mandate to Hold Broadcast License Auctions*

##### a. *Arguments That Licensing Auctions Are Mandatory*

In 1993, recognizing the strength of the arguments in favor of auctions, Congress passed legislation authorizing the FCC to begin auctioning spectrum licenses.<sup>44</sup> The initial authorization applied only to wireless licenses, but in 1997, Congress extended the auction authority to broadcast licenses.<sup>45</sup> The statutory language granting the authority seems to require the FCC to use competitive bidding:<sup>46</sup>

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.<sup>47</sup>

Contemporary commentary assumes that if the FCC is to grant new licenses, then, absent qualification under the noted exceptions, it must do so by using competitive bidding.<sup>48</sup> The FCC has taken a similar view.<sup>49</sup>

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43. For a general discussion of the merits of auctions in this context, see John McMillan, *Selling Spectrum Rights*, 8 J. ECON. PERSP. 145 (1994).

44. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 379-86.

45. 47 U.S.C. § 309(j) (2002).

46. The statute does contain a few exceptions, though they are not germane to this Comment. See *id.* § 309(j)(2).

47. *Id.* § 309(j)(1).

48. See, e.g., Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 8 (2002).

This belief is driven by the standard canon of statutory construction that imperative language (in this case, the word “shall”) prevents the exercise of discretion on the part of the party interpreting the statute. If this were the only possible interpretation, it would be useless to argue that the FCC’s use of auctions would be unwise. However, the language of section § 309(j)(1) allows for other interpretations.

*b. Arguments That Licensing Auctions Are Not Mandatory*

Other language in the statute suggests that licensing auctions are not mandatory. First, the statute specifically mentions an “initial license.” However, this term is not explicitly defined in the United States Code, so its definition is committed to the discretion of the FCC.<sup>50</sup> This means it is possible for the FCC to define “initial license” in such a way as to avoid conflicting with the apparent statutory command to hold auctions.

One plausible interpretation is that an “initial license” is a license for spectrum that has never been licensed before. The rationale would be that the word “initial” modifies “spectrum” and refers to the initial time a particular piece of the spectrum is licensed. This would be an alternative to the perhaps more intuitive idea that the phrase “initial license” refers to the first time a particular licensee gains access to a specific slice of spectrum, irrespective of whether that spectrum had previously been licensed to someone else. This alternate definition is relevant because in coming years, as a result of the digital television proceedings,<sup>51</sup> a large amount of

49. In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses Reexamination of the Policy Statement on Comparative Broadcast Hearings Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, 13 Communications Reg. (P & F) 279 ¶ 1 (1998).

50. Because the Code never defines this term, there would seemingly be no law to apply in reviewing an FCC definition of “initial license.” Where there is no law to apply, a decision is committed to agency discretion. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Alternatively, since Congress did not unambiguously address the issue, then according to the *Chevron* doctrine, any reasonable agency construction of the term is acceptable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The D.C. Circuit has already ruled that the FCC has the authority to define “initial license” for the purposes of 47 U.S.C. § 309(j)(1). *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970-71 (D.C. Cir. 1999). This view is also borne out by the FCC’s apparently routine case-by-case definition of “initial license.” *See, e.g., In the Matter of Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, 12 F.C.C.R. 10,943, 11,041 (1997). This case-by-case approach blunts the potential argument that Congress was impliedly adopting the FCC’s standard definition of the term “initial license,” since there is no standard definition of the term under a case-by-case approach.

51. Digital television transmission promises to provide clearer pictures and sharper sound. To facilitate the transition to digital transmission, a part of the Telecommunications Act of 1996, codified at 47 U.S.C. § 336, mandated that the FCC hand over 6 MHz (the bandwidth used for an analog broadcast station) to each incumbent broadcaster so that the broadcaster could simultaneously broadcast in digital and analog. This would give viewers a window of time in which they could replace their analog television sets with digital sets. At the end of the transition period, broadcasters would have to



spectrum will be reclaimed from incumbent television licensees. If a license given to a new licensee to use this reclaimed spectrum is deemed not to be an initial license, then the FCC has escaped from the seemingly imperative language of 309(j).

Another important facet of the language in 309(j) is the qualification that any auction must proceed under circumstances consistent with paragraph (6)(E) of that section, which provides that

[n]othing . . . in the use of competitive bidding, shall—be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings . . . .<sup>52</sup>

This language indicates that the FCC should utilize competitive bidding where there are mutually exclusive applications. But it also means that the FCC still has a public interest obligation to establish criteria to differentiate applicants so as to prevent mutual exclusivity. If the FCC could establish these criteria on a case-by-case basis, it could tailor them so as to preclude all but the best applicant in each case. This would always prevent mutual exclusivity and thus would never require an auction.

In fact, a case could be made that the FCC *must* tailor the threshold requirements in this manner. In accordance with § 309(j)(6)(E), the Commission must avoid mutual exclusivity where the public interest so dictates. Since not avoiding mutual exclusivity will probably lead to auctions, and, as I argue in Part II.B below, auctions would mean the end of public interest regulation, it must be in the public interest to tailor threshold requirements so as to avoid mutual exclusivity.<sup>53</sup>

The language in section 309(j)(2) provides a third statutory argument that weighs against mandated auctions. This section provides that “[t]he competitive bidding authority *granted* by this subsection shall not apply to licenses or construction permits issued by the Commission.”<sup>54</sup> This section directly follows the section that purportedly mandates auctions. It is curious that Congress would say that it had granted authority instead of indicating that the bidding was mandated, if the latter were its intended meaning. But this wording is not at all odd if Congress did not, in fact, mean to compel the FCC to do anything.

surrender their original analog spectrum. “The digital television proceedings” refers to the set of orders the FCC has promulgated in order to implement this statute. For criticism of this situation, see Paul Taylor, *Superhighway Robbery*, NEW REPUBLIC, May 5, 1997, at 20; see also Neil Hickey, *What’s at Stake in the Spectrum War? Only Billions of Dollars and the Future of Television*, COLUMBIA JOURNALISM REV. (July-Aug. 1996), available at <http://cjr.org/year/96/4/spectrum.asp> (last visited Mar. 16, 2003).

52. 47 U.S.C. § 309(j)(6)(E) (2002).

53. This, of course, assumes that public interest regulation actually is in the public interest.

54. 47 U.S.C. § 309(j)(2) (2002) (emphasis added).



Moreover, nothing in this statute affirmatively requires the FCC to begin licensing through auctions. Rather, the statute says only that *if* the FCC is to allocate new licenses, it must use auctions. If using auctions would mean the end of public interest regulation, then it might be better for the FCC simply not to issue any new licenses. Finally, even if there is no way for the FCC to avoid auctioning broadcast licenses, all of the arguments made below could just as easily be harnessed to support the proposition that Congress should amend 309(j) to forbid broadcast auctions or at least make them discretionary.

## 2. *The FCC's Activity*

Following the statutory grant of wireless auction authority to the FCC in 1993, the agency seized on the opportunity by actively engaging in auctions. The auctions were basically a success.<sup>55</sup> The only notable problem with them was that some winners were allowed to pay off their bids in installments. Some of these bidders subsequently experienced problems in making their payments,<sup>56</sup> and some even went bankrupt.<sup>57</sup>

The FCC has been somewhat slower to auction broadcast licenses. So far, the FCC has auctioned construction permits for new stations.<sup>58</sup> A construction permit is in many senses a prelude to a spectrum license. Such a permit allows the winning bidder to construct the facilities needed to broadcast commercially.<sup>59</sup> The permit holder then has three years in which to make the station operational.<sup>60</sup> At that point, the station actually files an application for a license.<sup>61</sup> The rest of this Comment will be devoted to explaining the undesirable results for public interest regulation once a significant number of broadcast outlets holding auctioned licenses begin operation.<sup>62</sup>

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55. Peter Cramton, *The Efficiency of the FCC Spectrum Auctions*, 41 J.L. & ECON. 727, 727-36 (1998) (discussing the success of wireless auctions); Unofficial News Release, Fed. Communications Comm'n, Wireless Bureau Chief Daniel Phythyon Hails Success of Market-Based Spectrum Policies, (Sept. 11, 1997), available at [http://www.fcc.gov/Bureaus/Wireless/News\\_Releases/1997/nrw17037.html](http://www.fcc.gov/Bureaus/Wireless/News_Releases/1997/nrw17037.html) (last visited Feb. 3, 2004).

56. *FCC v. NextWave Pers. Communications*, 537 U.S. 293, 296-97 (2003).

57. A legal question that has arisen is whether licenses are part of a bankruptcy estate or whether the FCC has the right to reacquire those licenses. This issue was heard by the Supreme Court in *NextWave*, 537 U.S. 293. However, the Supreme Court's involvement should not be taken as an indictment of auctions generally. Rather, it is merely reflective of the FCC's failing to account for the issue before it began auctions. These alternatives highlight the property status of auctioned licenses, which foreshadows the issue of takings, discussed in Part II.B, *infra*.

58. See Fed. Communications Comm'n, Auctions, <http://wireless.fcc.gov/auctions> (last visited Feb. 2, 2004).

59. 3 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 133 (Practitioners Series 1999).

60. 47 C.F.R. § 73.3598.

61. *Id.*

62. Because the negative consequences of auctions will result through litigation, the mere presence of broadcasters holding auctioned licenses will not necessarily lead to the results predicted

## II

AUCTIONS WILL PREVENT THE FCC FROM IMPOSING MEANINGFUL  
CONTENT-BASED REGULATION IN THE FUTURE*A. The FCC Should Consider the Propriety of Broadcast Auctions*

Attempts at deregulation in other industries demonstrate why policymakers should approach irreversible decisions with great care.<sup>63</sup> A clear example of this is California's energy crisis in 2000 and 2001. An initial step in the state's electricity deregulation was to force public utilities to divest their ownership in power plants.<sup>64</sup> Once ownership of power generation became widely dispersed, there was no meaningful locus of regulatory control.<sup>65</sup> For this reason, once deregulation went wrong, it became much more difficult for regulators to step in.

The move to auctions poses the potential for a similar one-way gate. Once licenses are granted, it will be difficult to revoke them. Since regulation must involve the threat of license revocation, the practical effect of their auctioning will be to make it much more difficult for the FCC to exert any public interest regulation over broadcast. These consequences counsel extreme caution in considering the means of allocating broadcast licenses in the future.

*B. Auctions Would Create Property Rights Which in Turn  
Raise Takings Issues**1. Takings Issues Did Not Hamper Traditional Public Interest Regulation*

Claims brought against the government charging a violation of the takings clause historically centered on the government's physical encroachment on private land.<sup>66</sup> However, beginning with *Pennsylvania Coal Co. v. Mahon*,<sup>67</sup> the Court has acknowledged that government regulation of private property can constrain the use of that property so severely as to constitute a taking. This is termed a regulatory taking.

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below. But as the number of such broadcasters increases, it becomes increasingly likely that problems leading to litigation will arise.

63. For the purposes of this Comment, I assume auctions can be deemed an instance of deregulation. At the very least, auctions have the functional result of precluding continued content regulation. See *infra* Part II.B.

64. See Richard D. Cudahy, *Electric Deregulation After California: Down But Not Out*, 54 ADMIN. L. REV. 333, 334-35, 342 (2002).

65. *Id.*

66. Robert H. Freilich et al., *The Supreme Court in Transition: Consensus Building or Ducking the Issues and Other Developments in Urban, State and Local Government*, 25 URB. LAW. 697, 733 (1993).

67. 260 U.S. 393, 415 (1922).

Regulatory takings claims come in two varieties. One kind, prohibition of use, arises in response to a new regulation that prevents a person from using his property in the way he previously had the right to use it. The second kind, loss of return, arises when existing terms of regulation change such that the return on regulated firms' capital and equipment will be reduced. Both claims are commonly raised to frustrate regulatory objectives.<sup>68</sup>

Broadcast licenses, however, do not clearly have the attributes of property.<sup>69</sup> This lack of strong property attributes may well be a hidden reason that the sometimes onerous public interest requirements were allowed to flourish for so long. The Fifth Amendment forbids the government from taking private property for public use without providing adequate compensation, but the weak rights created by broadcast licenses made it very difficult to make such a claim. Accordingly, what is typically a viable way of preventing regulation was not applicable to content regulation.

## 2. *Regulatory Taking: Prohibition of Use*

A good example of the first, more common, kind of regulatory taking can be drawn from the facts in *Lucas v. South Carolina Coastal Council*.<sup>70</sup> In this case, the petitioner had bought beachfront property for investment purposes, with the intention of building single-family residences.<sup>71</sup> After he purchased the land, the South Carolina legislature passed new environmental restrictions that effectively prohibited Lucas from ever erecting any permanent habitable structures on his land.<sup>72</sup> Without the ability to use the land for residential purposes, Lucas lost the nearly \$1 million he had paid for the land.<sup>73</sup> On these facts, the Supreme Court found that there had been a taking.

This sort of takings claim would not have been successful had it been made by a broadcaster against the FCC under the traditional broadcast regime. The claim would arise after the FCC had revoked a broadcaster's license for noncompliance with a regulation. In analyzing the situation, it is instructive to differentiate between two sets of property rights.

The first set of property rights involves the property rights in the license. A claim based on the property rights in the license would not be a regulatory takings claim, but would center on the actual revocation of the

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68. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995) (noting in particular the effect the regulatory takings doctrine has had on forestalling the enforcement of environmental protection statutes).

69. See *infra* Part II.B.4.a.

70. 505 U.S. 1003 (1992).

71. *Id.*

72. *Id.* at 1007.

73. *Id.* at 1008.

license. Since traditional licenses were not property, such a claim would be impossible to sustain.<sup>74</sup>

The second type of property right involves the rights in the broadcast equipment in which the broadcaster invests its capital. In making this type of argument, a broadcaster could analogize to the fact pattern of *Lucas*. Consider the situation in which a broadcaster had its license revoked for violation of a regulation passed after it purchased its broadcast equipment. As in *Lucas*, the broadcaster would have invested money in property on the assumption that it would be able to use that property in a certain way.<sup>75</sup> Because of a subsequent change in the regulatory background, the use of that property would have become severely constrained. In both circumstances, nothing would have impacted actual possession. After the changed regulations, *Lucas* still owned the property.<sup>76</sup> Likewise, after license revocation, a broadcaster would still own the broadcast equipment, it just would not be able to make use of that equipment legally without holding a license. In both cases, the underlying property would have lost all practical value because of regulatory changes.

But for several reasons, this analogy is inapt. While land is commonly subject to various zoning restrictions, the default assumption is that an owner is generally allowed free use. The same is not true of broadcast equipment. The decision to regulate spectrum in the Communications Act of 1934<sup>77</sup> means that nobody has ever had the right to use the broadcast equipment they own with absolute freedom. Blaming any particular content regulation for effecting a taking would be beside the point. Additionally, the Court has found that actors in a highly regulated field have no reasonable expectation that regulation will not be changed to their detriment, provided that the new regulation promotes the underlying legislation.<sup>78</sup> Accordingly, a reasonable broadcaster would recognize that it is operating in a highly unsettled regulatory environment in which the FCC can change content regulations according to prevailing political winds.<sup>79</sup>

Probably the most important distinction between the kind of taking in *Lucas* and the kind considered here is that broadcast equipment has salvageable value.<sup>80</sup> *Lucas* requires that all or substantially all of the

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74. For discussion of the property status of licenses, see Part II.B.4. The fact that traditional licenses were freely revocable would have frustrated any argument that broadcast licenses were property.

75. See *Lucas*, 505 U.S. at 1007-08.

76. See *id.*

77. 47 U.S.C. § 301 (2002).

78. *Lucas*, 505 U.S. at 1027-28; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

79. The field of small-time real estate development in which *Lucas* was involved is not similarly regulated, so he was more reasonable in believing that highly detrimental regulations would not be imposed on the land. See *Lucas*, 505 U.S. at 1028.

80. *Id.* at 1015.

underlying value be taken in order to effect a regulatory taking. Several cases with facts roughly analogous to a broadcast licensing situation show how difficult it is to overcome this “substantially all value” threshold.<sup>81</sup> In these cases, fishermen held licenses to fish particular areas using a particular type of net. When this method of fishing was later outlawed, the fishermen sued on a regulatory takings claim, arguing that the value of the special nets had been taken.<sup>82</sup> When the nets became unusable for fishing in a particular area, they had no more practical value. Courts, however, have rejected the takings claims out of hand.<sup>83</sup> The nets could be redeployed to other areas where the nets were still legal or sold to fishermen in those areas.<sup>84</sup> The case of a broadcaster that has had its license revoked is more similar to these cases than to *Lucas*. Broadcast equipment clearly has salvageable value, since it can be sold to another broadcaster who will abide by the FCC’s regulations. By contrast, in *Lucas*, no one else who bought the land would have been able to build houses on it either.

### 3. Regulatory Taking: Loss of Return

The second type of regulatory taking arises in highly regulated industries. In such industries, firms invest their capital in equipment that they will use to provide a needed public service. Government regulators reward those firms with a stable return on their investment through regulated rates. Where government action has led a firm to invest its money in such a way, government action that subsequently prevents the firm from recouping that investment constitutes a taking. What has been taken is the expected return on the capital that the firm invested in the facilities.<sup>85</sup> Such a taking has been analyzed in contractual terms: over time, both sides come to have settled expectations over how the regulatory regime will operate, and these expectations form a regulatory compact.<sup>86</sup> Some analysts have even gone so far as to argue that the regulatory compact forms a bona fide contract.<sup>87</sup> An instance of confiscatory ratemaking is a breach of that contract.<sup>88</sup> This

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81. See, e.g., *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722 (S.D. Ind. 1992); *Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997); *LaBauve v. La. Wildlife & Fisheries Comm’n*, 289 So. 2d 150 (La. 1974).

82. *Burns*, 800 F. Supp. at 725; *Lane*, 698 So. 2d at 263-64; *LaBauve*, 289 So. 2d at 153.

83. *Burns*, 800 F. Supp. at 726; *Lane*, 698 So. 2d at 264; *LaBauve*, 289 So. 2d at 153.

84. *Burns*, 800 F. Supp. at 726; *Lane*, 698 So. 2d at 264; *LaBauve*, 289 So. 2d at 153.

85. This type of takings argument can be traced to the 1898 case *Smyth v. Ames*, 169 U.S. 466 (1898).

86. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) (“The utility business represents a compact of sorts; a monopoly on service in a particular geographical area . . . is granted to the utility in exchange for a regime of intensive regulation.”).

87. See J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT* (1997).

88. See *id.*

breach of the contract, without the provision of compensation, in turn constitutes a violation of the Fifth Amendment.<sup>89</sup>

A broadcaster could not claim to rely on the set expectations created by historically allowed regulated rates. Instead of enjoying a stable, regulated rate of return, the broadcaster earns its return through advertising revenue. The advertising market, with the exception of political advertising, is wholly unregulated. Government therefore plays no part in determining what return a broadcaster will enjoy. Without being able to reference such expectations, a broadcaster cannot argue for a regulatory contract, since the terms of such a contract would never have been set.

#### 4. *Takings Issues for Auctioned Licenses Would Be Significantly Different*

##### a. *Auctioned Licenses Would Be Property Under the Fifth Amendment*

The shift to auctions as a method of allocating licenses would have the effect of turning licenses into property compensable under the Fifth Amendment. Property rights under the old regime were tenuous, because broadcasters held licenses subject to compliance with public interest requirements. But with auctions there is no such quid pro quo. These licenses have been directly purchased from the government. The main, and seemingly only, criterion for acquiring a license is payment of the highest price.<sup>90</sup> Since the licensee has paid for the privilege of being a broadcaster, it is difficult to see how the FCC could justify placing the additional burdens of the traditional regulatory regime upon new licensees.

Because the case law dealing with the property status of traditional licenses is sparse, it is difficult to tell whether payment alone would be enough to turn a license into Fifth Amendment property, or what additional factors would dictate whether an auctioned license would be property.<sup>91</sup> However, a surprisingly rich body of case law in another area that involves government licenses—taxicab medallions—may be useful.

There is a long history of takings claims brought against local regulatory agencies that oversee taxicab licensing.<sup>92</sup> This has forced courts to identify the attributes of licenses that turn licenses into property compensable under the Fifth Amendment.<sup>93</sup> A recent article analyzes this case law and develops a two-prong approach to evaluating the property status of

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89. U.S. CONST. amend. V; SIDAK & SPULBER, *supra* note 87.

90. Theoretically, the right to bid at an auction is subject to certain threshold requirements. 47 U.S.C. § 309(j)(1) (2002). But as a practical matter, such requirements can do very little to ensure that all bidding parties would actually serve the public interest.

91. Because the relevant statutory language was so clear that licenses were not private property, there has been very little analysis of what factors would determine whether a broadcast license might be property.

92. See Steve Oxenhandler, *Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest*, 27 TRANSP. L.J. 113, 127-28, nn.73-76 (2000).

93. *Id.* at 127.



such licenses.<sup>94</sup> This approach balances the nature of the regulatory system against an industry's reasonable expectations. The first prong of the analysis looks at the nature of the system—whether or not it creates property-like elements in licenses. The second prong considers whether the industry has a reasonable belief that the government has indeed created a compensable property interest. If there are property-like elements in licenses, and the industry has a reasonable belief the government has created a compensable property interest, then the licenses are property. If only one of the prongs is satisfied, the status of the licenses remains unclear.

The nature of the regulatory system is determined by scrutiny of the life cycle of a license at three stages—issuance, use, and revocation. Analyzing a license's issuance involves looking at whether the government limits the number of licenses available and at the criteria used to determine who is eligible to receive a license. If the government does not limit the number of licenses, then the licenses do not accrue any economic value, which weighs against a finding that the license has any property-like attributes. On the other hand, creating qualifications for license applicants creates an element of scarcity and adds value to the license, giving it a property-like attribute. Where the government imposes strict regulation on the ways a license may be used, the license becomes less like traditional property, because the owner of the license is not able to control its use. The final consideration is whether the license reverts to the government once a license-holder is no longer allowed to operate. If the license holder is not allowed to sell the license in the market, then it is clear that the government never intended the licensee to have ultimate dominion over, or property interests in, the license.

These considerations are to be balanced against an industry's reasonable expectations, which depend on whether, through action or inaction, the government has done anything to indicate that the license is property. In balancing these factors, the greatest weight should be given to the fate of the license on revocation. If the putative owner of the license loses all rights upon revocation, there is a presumption that the license was not property under the Fifth Amendment.

Applying this approach to auctioned broadcast licenses leads to the conclusion that such licenses should be considered compensable property under the takings clause. Under the second prong of the analysis, a holder of an auctioned license, admittedly, does not have a rock-solid expectation that the government has created a compensable property interest. However, it is not unreasonable for a license holder to consider the license property, given the FCC's history of lax enforcement of licensing requirements. It

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94. *Id.* at 152-58.



can be argued that, through its actions and inactions, the FCC has created de facto property rights in spectrum.<sup>95</sup>

Regardless, the potentially low reasonableness of this expectation is insignificant given the weight of the factors under the first prong. The first factor in the first prong looks to whether a license accrues value. Since broadcast licenses are auctioned for millions of dollars, they clearly hold value. This value is maintained by limiting the number of licenses.<sup>96</sup> Furthermore, by auctioning construction permits and issuing a slice of the spectrum only once a station is operational, the FCC functionally imposes restrictions on who may bid for a license. If construction permits are non-transferable, a mere broker would have no interest in bidding for such a permit, because that alone would never entitle him to actual spectrum.

The second factor under the first prong considers the restrictions on the use of the license. Over the past twenty years, the FCC has continuously loosened content restrictions<sup>97</sup> and general restrictions on market structure.<sup>98</sup> Accordingly, a broadcaster who bids on a license would reasonably expect not to face a particularly onerous set of regulations.

This brings the analysis to the most important factor: revocation. Under the historical broadcast regime, it was clear that licenses could be freely revoked “for gross misbehavior without compensation.”<sup>99</sup> Indeed, this has been identified as one of the reasons broadcast licenses were not considered property.<sup>100</sup> However, the Supreme Court made clear in *NextWave* that auctioned telecommunications licenses cannot be freely revoked.<sup>101</sup> Accordingly, the most important factor in the property analysis argues strongly in favor of a conclusion that auctioned broadcast licenses are property under the Fifth Amendment.

To summarize, the second prong of this analysis, regarding the industry’s reasonable expectation, is relatively neutral. This neutrality is more than outweighed by the first prong, which looks at the nature of the regulatory system in question. The nature of the broadcast system strongly

95. Howard A. Shelanski & Peter W. Huber, *Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & ECON. 581, 592-95 (1998) (discussing the FCC’s many administrative decisions that have granted increasingly strong property interests to incumbent license holders).

96. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

97. ZUCKMAN, *supra* note 4, at 1218.

98. *Id.* at 1196-1213 (discussing the general structural regulations the FCC has historically imposed and noting the specific instances in which such oversight has been relaxed).

99. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 247 (1982).

100. *Id.* At first blush, however, it would seem that this insight is not too helpful in examining the status of auctioned licenses. Takings analysis is relevant to regulatory licenses only in connection with the determination of whether or not the regulator can revoke a license. But if the takings question itself cannot be answered without knowing whether the government can revoke the license freely, then the analysis becomes circular.

101. *NextWave* deals with the revocation of wireless licenses as opposed to broadcast licenses. There is no reason, however, to believe this difference alters the analysis presented here.

supports a conclusion that auctioned broadcast licenses are property, particularly since the FCC does not have the ability to revoke auctioned licenses freely.

*b. The Importance of FCC v. NextWave Personal Communications in the Takings Analysis*

As the only significant judicial opinion dealing with auctioned telecommunications licenses, *NextWave* is quite important for an analysis of the property status of auctioned licenses and deserves extended discussion. *NextWave* involved a company that held auctioned wireless licenses.<sup>102</sup> Like many winning bidders, *NextWave* was allowed to pay off its bid in installments.<sup>103</sup> Following the auction, *NextWave* encountered difficulty in securing financing for its operations.<sup>104</sup> Because of these difficulties, it fell behind on its payments and eventually filed for Chapter 11 bankruptcy.<sup>105</sup> Part of *NextWave*'s reorganization plan involved paying off its outstanding obligation to the FCC in one lump sum.<sup>106</sup> The FCC objected to this plan, claiming that the licenses had been canceled automatically when *NextWave* stopped making its installment payments.<sup>107</sup> The FCC subsequently reaucted *NextWave*'s spectrum at a significant profit.<sup>108</sup> The case turned on whether the FCC could unilaterally revoke *NextWave*'s license.

The gravamen of *NextWave*'s claim was that the FCC's actions violated section 525<sup>109</sup> of the Bankruptcy Code.<sup>110</sup> This section prohibits an agency from revoking a license solely because the licensee has declared bankruptcy.<sup>111</sup> *NextWave* argued that since its declaration of bankruptcy proximately caused the FCC to cancel the license, the Commission thereby

102. *FCC v. NextWave Pers. Communications Inc.*, 537 U.S. 293, 296 (2003).

103. *Id.* When Congress first authorized the FCC to utilize auctions, it directed the agency to consider implementing auction procedures that would "promot[e] economic opportunity and competition." 47 U.S.C. § 309(j)(3) (2002). To address these concerns, the FCC designated certain auctions as open only to small businesses and allowed these bidders to pay off their bids in installments. 47 C.F.R. §§ 24.709(a)(1), 24.711, 24.716 (2003). *NextWave* won spectrum from these auctions. *NextWave*, 537 U.S. at 296.

104. *See In the Matter of the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 12 F.C.C.R. 16436, 16442 (1997).

105. *See In re NextWave Pers. Communications, Inc.*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998).

106. *FCC v. NextWave Pers. Communications Inc.*, 537 U.S. 293, 298 (2003).

107. *Id.*

108. In the original auction, *NextWave* bid approximately \$4.8 billion. In the re-auction, the bids totaled more than \$15.8 billion. *FCC Loses Auction Appeal*, WASH. POST, Jan. 28, 2003, at E1.

109. 11 U.S.C. § 525 (2003).

110. *See Brief for NextWave Pers. Communications Inc. & NextWave Power Partners, Inc.*, 2001 U.S. Briefs 653, \*15-\*17 (2002 LEXIS), *NextWave* (Nos. 01-653, 01-657) [hereinafter "*NextWave Brief*"].

111. 11 U.S.C. § 525.

violated section 525.<sup>112</sup> To allow the FCC to escape from the terms of section 525 simply because it could proffer a plausible regulatory reason for revocation would make section 525 a nullity.<sup>113</sup> An agency could always concoct some additional reason for revocation.<sup>114</sup>

The FCC countered with the argument that the licenses had not been canceled solely because of NextWave's bankruptcy. Rather, the company's inability to pay marked a failure to live up to a regulatory obligation.<sup>115</sup> In this case, the auction was used as a proxy to determine who would most efficiently use the spectrum for the benefit of the public.<sup>116</sup> The ability to bid the highest price indicated that the bidder was presumptively in the best position to put that part of the spectrum to its best use.<sup>117</sup> Failure to pay the amount bid indicated that, in NextWave's case, having the high bid at auction was no longer an appropriate proxy for its ability to meet the public interest.<sup>118</sup> Allowing NextWave to hold onto the license, then, would undermine the purpose of having auctions in the first place.<sup>119</sup> Thus, the FCC argued that the license revocation had an entirely regulatory purpose.<sup>120</sup>

With only Justice Breyer in dissent, the Court sided with NextWave. It largely resolved the case through statutory construction, finding that the FCC was not exempt from section 525 of the Bankruptcy Code.<sup>121</sup> The Court did little to address the greater policy issues raised by prohibiting the FCC from reauctioining the licenses. Nevertheless, the Court's decision is relevant to an understanding of the property status of auctioned licenses, as well as the FCC's general regulatory powers over auctioned licenses. In granting auction authority to the FCC, Congress stated that the FCC's auction authority should not be construed so as to "diminish the authority of the Commission . . . to regulate or reclaim spectrum licenses."<sup>122</sup> Moreover, the 1934 Act establishes that the FCC is expected to be the "single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication."<sup>123</sup> These two statutes put together would make it clear that licensing decisions fall under the exclusive purview of the Commission. Yet, in seeming contradiction, the *NextWave*

112. *NextWave*, 537 U.S. at 298.

113. *NextWave* Brief, *supra* note 110, at \*25-\*26.

114. *Id.*

115. Brief for the Fed. Communications Comm'n, 2001 U.S. Briefs 653, \*22-\*25 (2002 LEXIS), *NextWave* (Nos. 01-653, 01-657).

116. *Id.*

117. *Id.* This reflects the assumption that the use that is of most benefit to the public is the one that is most profitable.

118. *Id.*

119. *Id.*

120. *Id.*

121. *NextWave*, 537 U.S. at 303-04.

122. 47 U.S.C. § 309(j)(6)(C) (2002).

123. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (internal quotations omitted).

Court has prohibited the FCC from removing a license from the hands of an entity the Commission has found to be no longer serving the public interest. Presumably, then, the Court has indirectly overruled its prior statement about the primacy of the FCC.<sup>124</sup> With no central locus of regulatory authority over licenses, it is hard to see how the FCC could ever confidently revoke a license.

Significantly, in *NextWave* the Court did not even give final say to a regulatory body. Instead, the ultimate disposition of the license was determined by the bankruptcy court, a body with expertise in a narrow area of commercial law.<sup>125</sup> The unique policy considerations, such as concern for diverse broadcast content, that should be evaluated in licensing decisions might no longer hold sway. In making this decision, the Court has sent a message that there is nothing special about spectrum granted through auctions. On the contrary, *NextWave* suggests that auctioned licenses should be treated no differently than anything else that comes under the aegis of bankruptcy law. This sort of attitude makes it all that much easier to take the next step and say the auctioned licenses can be deemed property under the Fifth Amendment.

With respect to broadcast, *NextWave* is particularly troubling because the regulatory requirement *NextWave* violated was so clear. There was nothing equivocal about its failure to make timely payments. Yet the FCC was still not allowed to revoke the license. This does not bode well for the FCC's ability to revoke a license for violations of the notoriously imprecise public interest broadcast standards. The FCC, the body with the greatest expertise in the matter, has traditionally had great difficulty in implementing public interest regulations.<sup>126</sup> These difficulties can only be expected to multiply should the FCC be required to make these decisions in conjunction with other regulatory and judicial bodies. Thus, although the Court resolved *NextWave* through statutory interpretation, the implications of the case run far deeper than simply giving guidance in interpreting the Bankruptcy Code.

### c. Takings Claims Could Focus Directly on the License

For broadcast regulation to be effective, the FCC must be able to hold the threat of license revocation over the heads of broadcasters.<sup>127</sup> However, if an auctioned license were indeed to become property under the Fifth Amendment, then such a threat would ring hollow—license revocation could be the basis for a takings claim based directly on the property rights

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124. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

125. *FCC v. NextWave Pers. Communications Inc.*, 537 U.S. 293, 297-99 (2003).

126. See *supra* Part I.

127. The FCC could simply try to fine broadcasters for noncompliance, but a broadcaster could refuse to pay the fines. Eventually, the FCC would be left with no choice but to revoke the license.

in the license. Focusing on revocation of the license itself would allow a complainant to escape from having to make a regulatory takings claim. The complainant would also no longer need to make arguments based on vague notions of investment-backed expectations. It would also no longer need to make arguments regarding the salvage value of the broadcast equipment, since that equipment would play absolutely no role in a license-focused takings claim. Because there is nothing left to salvage, the revocation is a pure physical taking. Under *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>128</sup> such a taking is per se impermissible.

### 5. *It Would Be Difficult to Provide Adequate Compensation*

A takings claim is based on an owner not receiving adequate compensation when government deprives a person of her property.<sup>129</sup> If the government were to exercise eminent domain by revoking an auctioned license and providing just compensation, there would no longer be a takings issue. However, for several reasons, it is not clear that this could be done in a satisfactory fashion in the context of broadcast license revocation. Just compensation in eminent domain cases is determined by reference to the fair market value at the time of the taking.<sup>130</sup> Having to pay such compensation creates two problems for the FCC. The first concerns acquiring the money to pay the compensation. The second concerns the determination of fair market value.

When the FCC conducts auctions, the money goes directly to the U.S. Treasury and is spent on all manner of programs as delineated by the federal budget.<sup>131</sup> The FCC only keeps those proceeds needed to pay the costs of running the auctions.<sup>132</sup> Thus, it is unclear how the FCC could access the millions of dollars needed to give just one refund. When the FCC is dumping billions of dollars into the Treasury, no political actor has reason to complain, since that money could potentially fund their desired projects. Should the FCC wish to reimpose significant public interest regulation in the future, the Commission would have to affirmatively lobby Congress to appropriate funds for a refund. By the time such lobbying would take place, any gratitude Congress might feel towards the FCC for generating billions of dollars from broadcast auctions would have long since faded. This would make it difficult for the FCC to succeed in its lobbying efforts. Any appreciation in the value of the licenses over time would only exacerbate this problem. The alternative approach of having the money go

128. 458 U.S. 419 (1982).

129. BLACK'S LAW DICTIONARY 1467 (7th ed. 1999). BLACK'S defines "Takings Clause" as "[t]he Fifth Amendment provision that prohibits the government from taking private property for public use without fairly compensating the owner." *Id.*

130. *United States v. Reynolds*, 397 U.S. 14, 15-17 (1970).

131. 47 U.S.C. § 309(j)(8)(A) (2002).

132. 47 U.S.C. § 309(j)(8)(B) (2002).

directly to the FCC hardly seems to be an improvement. It would make no sense to have the FCC just hold onto billions of dollars on the chance that refunds would be needed. This money could clearly be put to better use.

The second problem, which involves determining the market value of broadcast licenses, might be partially solved if the FCC were to reacquire the revoked license immediately. The price generated at auction would presumptively be adequate since it would be the going market price for that license.<sup>133</sup> However, holding an auction is likely to entail significant transaction costs and possible delays. In this case, it is unclear how the FCC should respond.<sup>134</sup>

A final requirement in an eminent domain case is that the property be taken for public use.<sup>135</sup> The public use claim is difficult to sustain in this context because the slice of spectrum associated with the revoked license will be reacquired and ultimately reused for the same purpose as before eminent domain was exercised. Additionally, this arrangement would give the government an incentive to revoke licenses when their value has gone up appreciably so that they could be resold at a higher price. This is exactly what it seems like the FCC did in *NextWave*.<sup>136</sup> Amici in *NextWave* pointed out that the changes in the FCC's litigating position throughout the case closely tracked the market value of the spectrum.<sup>137</sup> When the market value was below the original auction price, the FCC insisted on repayment.<sup>138</sup> As soon as the market value exceeded the original market price, the FCC revoked the licenses and reacquired them.<sup>139</sup> Even if the FCC was not actually motivated by these concerns, its legitimacy is undercut as long as it has an incentive to act in this way. Indeed, this is a significant argument against using auctions in the first place.

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133. This might also address the problem of raising money, since the auction proceeds could be paid to the former licensee.

134. Having the FCC pay out the presumptive value of the license to the former licensee before that money has been generated through an auction might also be problematic. It is unclear where that money would come from. Also, given the instability of the markets in which these licenses are put to use, it would be difficult to predict beforehand what the market will determine the value of the licenses to be. Alternatively, the FCC could force the former licensee to wait for compensation until the auction is held. Deprivation of the use of the license in the interim, however, would itself be a temporary taking that would require compensation.

135. 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 38-39 (Peter Newman ed. 1998) [hereinafter NEW PALGRAVE DICTIONARY] (discussing the public use doctrine, which mandates that property taken under eminent domain must be taken for public use).

136. See Brief of Amici Curiae Urban Comm.-North Carolina, Inc. et al., 2001 U.S. Briefs 653, \*2-\*4 (2002 LEXIS), *NextWave* (Nos. 01-653, 01-657).

137. *Id.*

138. *Id.*

139. *Id.*



6. *The Unconstitutional Conditions Doctrine Prevents the FCC From Auctioning Licenses Contingent on Compliance with Public Interest Regulation*

The statute authorizing auctions mandates that the use of competitive bidding not alter the FCC's responsibility and authority to regulate the spectrum in the public interest.<sup>140</sup> Accordingly, when the FCC issues auctioned licenses, it must condition the granting of such licenses on adherence to any regulations the Commission may put in place. If auctioned licenses are conditioned in this manner, any takings claim evaporates. The property interest held by the licensee would not include the unfettered right to broadcast whatever the license holder pleases, so revocation for non-compliance would not violate the licensee's property rights. However, the robustness of this conclusion rests on the false assumption that such conditions in the license are enforceable.

The unconstitutional conditions doctrine stands for the general proposition that the government is limited in the degree to which it can condition the distribution of a benefit on the relinquishment of a constitutional right.<sup>141</sup> As early as 1926, the Court stated that the government "may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."<sup>142</sup> In 1996, the Court reaffirmed this doctrine in two major cases.<sup>143</sup> If the doctrine were to apply to holders of auctioned licenses, it is evident that the FCC could not also impose content-based regulation on them. Otherwise, a broadcaster could start a completely new station only by accepting the FCC's content restrictions. This situation speaks of the coercion that the doctrine exists to prevent.

The unconstitutional conditions doctrine is subject to certain limitations. Its application has historically been limited to the right-privilege distinction which holds that while government may not condition rights, it can

140. See 47 U.S.C. § 309(j)(6) (2002).

141. For general discussion of the doctrine, see Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

142. *Frost v. R.R. Comm'n of Calif.*, 271 U.S. 583, 594 (1926).

143. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 715-17 (1996). The Court's opinion in *Rust v. Sullivan*, 500 U.S. 173 (1991), interpreted the doctrine in such a tortured way that some commentators have taken *Rust* as evidence of the demise of the doctrine itself. See, e.g., Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025, 1074 (2002); cf. Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1582-83 (1994) (acknowledging the prevalence of this view). The fact that *Umbehr* and *O'Hare* postdate *Rust* is important; the Court's embracing of the doctrine in these later cases shows that the doctrine is quite alive.



condition privileges on compliance with restrictions.<sup>144</sup> An early example of this distinction can be found in a case dealing with speech restrictions on police officers. In this case, the Massachusetts Supreme Judicial Court stated that “[t]he petitioner may have a . . . right to talk politics, but he has no constitutional right to be a policeman.”<sup>145</sup> This distinction is essential to the logic in *Red Lion Broadcasting Co. v. FCC*,<sup>146</sup> the case that has come to justify the constitutionality of public interest regulation. The reasoning in *Red Lion* starts with the proposition that broadcast licensees occupy the role of public trustee.<sup>147</sup> More people apply for licenses than there are licenses to be awarded.<sup>148</sup> Thus, licensees are able to communicate using public property, whereas rejected applicants are not. As such, holding a license is a privilege.<sup>149</sup> Under this reasoning, it might be argued that conditioning the use of the license does not necessarily violate the First Amendment.

But in the case of auctioned licenses, it is unclear what privilege could be used to invoke the right-privilege distinction. The FCC might argue that being allowed to participate in the auction in the first place is a privilege, but this claim is hard to sustain in light of the millions and even billions of dollars paid to the FCC for such a privilege, especially in light of the FCC’s unsavory activities in the *NextWave* litigation.<sup>150</sup> Because it is difficult to sustain the position that allowing qualified bidders to take part in the license auctions is a privilege, the right-privilege distinction does not limit the applicability of the unconstitutional conditions doctrine. Accordingly, forcing auction winners to give up their First Amendment rights in order to be allowed to exercise the rights inherent in their licenses runs afoul of the unconstitutional conditions doctrine.

### 7. *Difficulties in Regulating Holders of Auctioned Licenses Would Spill Over to Traditional Licensees*

So far, the analysis in this Part has primarily focused on the arguments auctioned licensees could make to avoid facing content regulation. It has ignored the issue of incumbent broadcasters. Regardless of what happens to auctioned licensees, it would seem that, since incumbents still hold their original licenses, they would continue to be subject to regulation. For the foreseeable future, the number of auctioned licensees likely will be

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144. ZUCKMAN, *supra* note 59, vol. 3 at 97.

145. *Id.* at 97 (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)).

146. 395 U.S. 367 (1969).

147. *Id.* at 387-394.

148. *Id.* at 388.

149. *Id.* at 394.

150. See discussion *supra* notes 136-39 and accompanying text.

negligible.<sup>151</sup> If this is the case, then it is of little systemic consequence whether a few broadcasters are free from public interest regulation. Such a system of “differential regulation”<sup>152</sup> might even be beneficial, since reduced regulatory constraints on new entrants would increase competition in broadcast, and new entry is certainly something the FCC would want to promote. However, such a dual system seems destined for failure for two reasons. First, it would be unworkable. Second, and more important, it would be constitutionally suspect.

The practical limitation on differential regulation is that it would be burdensome for the FCC to administer dual regulatory systems. Even if a dual system were established, it would be easy to sidestep. Assuming auctioned licenses were available, incumbent broadcasters could purchase new ones, sell their old ones, and switch frequencies accordingly. In this way, they would circumvent continued regulation.

Differential regulation also presents a more fundamental problem. Such a system might violate the equal protection component of the Fifth Amendment. Incumbent broadcasters could argue that it is unconstitutional to subject them to substantial First Amendment restrictions just because their licenses were initially granted under the old system. The distinction between broadcasters who hold auctioned licenses and those who hold freely granted licenses does not justify differential First Amendment restrictions, especially since many incumbents bought their licenses in the aftermarket and thus did not participate in either the traditional or auction system.<sup>153</sup> The FCC would have to explain why the imposition of First Amendment restrictions should turn on the identity of the party from whom the broadcaster purchased his license.

An equal protection claim of this type is supported by the Supreme Court’s pronouncement that “regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause.”<sup>154</sup> This general proposition is supported by two cases: *Carey v. Brown*<sup>155</sup> and *Police Department of Chicago v. Mosley*.<sup>156</sup> Both cases dealt with state statutes

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151. There are approximately 2,000 broadcast stations in the United States. See Fed. Communications Comm’n, Broadcast Station Totals, at <http://www.fcc.gov/mb/audio/totals/bt030930.html> (last visited Feb. 4, 2004). So far, the FCC has auctioned a handful of construction permits. See Fed. Communication Comm’n, Auctions, *supra* note 58. At this rate, it will be some time before auctioned licensees make up a significant proportion of the total broadcast outlets.

152. Throughout this section, I use the phrase “differential regulation” to refer to a system in which incumbent broadcasters face public interest regulation while holders of auctioned licenses do not.

153. Henry Geller & Tim Watts, *The Five Percent Solution: A Spectrum Fee to Replace the “Public Interest Obligations” of Broadcasters* (New America Foundation Public Assets Program Spectrum Series, Working Paper No. 3) (May 2002), available at <http://www.newamerica.net/index.cfm?pg=article&pubID=844> (last visited Feb. 6, 2004).

154. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 n.9 (1994).

155. 447 U.S. 455 (1980).

156. 408 U.S. 92 (1972).

that proscribed public picketing.<sup>157</sup> Each statute contained an exception for peaceful labor picketing.<sup>158</sup> In both cases, the crux of the plaintiffs' claims was that privileging labor picketers conferred upon them speech rights that the plaintiffs did not hold. The plaintiffs were thus denied equal treatment with respect to a constitutional right simply because of the content of their speech. In both cases, the Court agreed, stating in *Mosley* that the ordinance was unconstitutional "because it makes an impermissible distinction between labor picketing and other peaceful picketing."<sup>159</sup>

These cases are important in evaluating differential broadcast regulation for two reasons. First, they establish that differential treatment is vulnerable to an equal protection claim. This is important because under *Red Lion*, which established that incumbent broadcasters hold circumscribed speech rights,<sup>160</sup> an incumbent broadcaster would not get very far basing a challenge to regulation solely on the First Amendment. These cases are also important because they can be seen as establishing a limit on acceptable regulation. In *Brown* and *Mosley*, the differing regulatory constraints were driven by content. A person could escape from heightened regulation by changing the character of his expression. Differential regulation would go well beyond what was seen in *Brown* and *Mosley*; it would be based on a near-immutable characteristic of broadcasters, namely, the way they obtained their licenses. In this sense, differential regulation would be more objectionable than the regulations at issue in *Brown* and *Mosley*, since differential regulation would be inescapable.

The logic of *Brown* and *Mosley* would suggest that differential broadcast regulation violates equal protection. However, because these cases dealt with personal speech, while differential broadcast regulation would involve commercial speech, *Brown* and *Mosley* do not complete the picture. Unfortunately, in the realm of commercial speech, the Supreme Court has failed to state directly whether differing speech regulation of entities within the same class of media violates equal protection principles.<sup>161</sup> However, a related line of cases makes clear that discriminatory taxation of media, and specifically taxation that discriminates against particular members of the media, does run afoul of equal protection.<sup>162</sup>

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157. *Mosley*, 408 U.S. at 92-93; *Brown*, 447 U.S. at 457.

158. *Mosley*, 408 U.S. at 92-93; *Brown*, 447 U.S. at 457.

159. *Mosley*, 408 U.S. at 94.

160. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-87 (1969).

161. *See Leathers v. Medlock*, 499 U.S. 439 (1991) (holding that it did not violate the First Amendment for Arkansas to subject cable television to sales tax but exempt print media from tax); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (holding that a Louisiana law subjecting large newspapers to additional taxes was unconstitutional).

162. The applicability of these cases could be questioned, because they involved imposing a new burden on the taxed entities. Under differential regulation, no new burden would be imposed. The reality of the situation, however, is rather different. Maintaining the status quo for incumbents while creating a new class of unrestricted broadcasters would change the dynamics of the broadcast

The earliest case dealing with differential taxation and equal protection is *Grosjean v. American Press Co.*<sup>163</sup> This case involved a Louisiana law that imposed a special tax on newspapers with large circulations.<sup>164</sup> The Court held the tax to be unconstitutional.<sup>165</sup> The Court's primary fear was that such differential treatment created a serious risk of government censorship.<sup>166</sup> Similarly, a system of differential broadcast regulation would pose a risk of privileging the voice of new broadcast entities. In two more recent cases dealing with similar statutes, the Court reaffirmed its holding in *Grosjean*. In both *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*<sup>167</sup> and *Arkansas Writers' Project, Inc. v. Ragland*,<sup>168</sup> the Court noted that it was particularly troublesome that only certain newspapers were subject to the tax burden.<sup>169</sup>

Despite these challenges, under existing case law the FCC could justify differential regulation by showing that "its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."<sup>170</sup> Two possible compelling interests come to mind. First, the FCC might argue that a differential system would aid new entrants and promote competition. However, in *Arkansas Writers' Project*, the Court concluded that a similar rationale did not pass muster.<sup>171</sup> Even if such a rationale were deemed compelling, there are other, more direct means of achieving this goal. For example, the FCC could give direct subsidies to new entrants. A second potentially compelling state interest would be the interest in ensuring that, in a world of auctioned licenses, public interest regulation survives. Theoretically, the equal protection problem could be resolved by subjecting auctioned license holders to regulation. This would lead to equal treatment. But as discussed in Part II.B.4 above, the unconstitutional conditions doctrine would forbid this approach. The only other alternative would be to stop regulating incumbent broadcasters. If this approach is

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marketplace. For example, an auctioned licensee could say whatever it wanted about an incumbent. Because the incumbent would still be subject to some public interest regulation, its ability to reply could be curtailed. The incumbent's difficulty in responding might have the result of legitimizing the statements of the new broadcaster, giving that broadcaster an unfair advantage. Having to face this competitive imbalance would effectively create a new burden for the incumbent. A second challenge to the applicability of these cases would be that they deal with taxation, which is only an indirect method of restricting speech. Since this is a milder curtailment of speech than direct regulation, any conclusions drawn from these cases can be comfortably applied to differential regulation.

163. 297 U.S. 233.

164. *Id.* at 240.

165. *Id.* at 251.

166. *Id.* at 245-50.

167. 460 U.S. 575 (1983).

168. 481 U.S. 221 (1987).

169. *See id.* at 229; *Minneapolis Star Tribune*, 460 U.S. at 591.

170. *Ark. Writers' Project*, 481 U.S. at 231.

171. *See id.* at 231-33 (implying that the encouragement of "fledgling" publishers is not a compelling interest).

necessary to avoid an equal protection violation, then the compelling state interest would be that the differential system is needed to maintain any semblance of public interest regulation.

There are some major problems with this argument. It rests on the assumption that there is still a compelling need for public interest regulation in the first place. Certainly, there are many possible policy arguments in favor of continued regulation.<sup>172</sup> But it would be difficult for the FCC to argue that those arguments amount to a compelling state interest, especially considering how tenuous the constitutionality of content regulation over broadcast is in the first place.<sup>173</sup> In defending itself against an equal protection challenge, the FCC would open the door to judicial reconsideration of many of the fundamental propositions that have historically sustained public interest regulation. In light of this danger, the FCC may strive to avoid

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172. One argument is that the news and public affairs programming that is encouraged by public interest regulation leads to better governance, which is a public good. Regulation serves to promote a product that would otherwise be inefficiently underconsumed. See CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 219-20 (1993); Lawrence Lessig, *The Censorships of Television* 11 (Mar. 8, 1999) (unpublished manuscript, available at <http://cyberlaw.stanford.edu/lessig/content/articles/works/tv.pdf>) (last visited May 11, 2004). Another argument in favor of maintaining a meaningful, free, over-the-air broadcast sector relates to the alternative. Many point to the ubiquity of cable television to argue that broadcast no longer holds relevance. The problem is that not everyone can afford cable. Those who cannot afford cable are already likely at the fringes of society. Because of television's unique social importance and its public good characteristics, as more and more television programming migrates to cable channels, those who cannot afford cable will be further cut off from society. Those who do not have discretionary income to afford cable, however, are those who most need exposure to public affairs programming, since they have the most to gain from changing public policies. What happened with televised sports provides a perfect example. In the past few years, more and more sports programming has drifted to cable. Athletics has traditionally been a unifying force in American culture. But without access to this force, those who do not have cable could be further cut off. While this may seem trivial to some, Congress has expressed concern over this issue. See *Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, § 26, 106 Stat. 1460, 1502-03 (1992). The FCC has also studied this issue at some length. See *Final Report in the Matter of Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992—Inquiry into Sports Programming Migration*, 9 F.C.C.R. 3440 (1994). A third argument in favor of continued content regulation is the somewhat postmodern argument that preferences for the consumption of television programming are not exogenous. See NEAL GABLER, *LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* (1998); KRATTENMAKER & POWE, *supra* note 3, at 314; SUNSTEIN, *supra*, at 220-21. People will tend to choose what they watch based on what they have watched before. The continued dominance of broadcast stations over cable demonstrates the tremendous inertia that incumbency brings to bear. Public interest regulation can free viewers from the trap of these constructed preferences and ensure that a truly diverse palette of choices is available. Public interest regulation is often criticized for being paternalistic, but if regulation truly can maximize dynamic preferences, then the very opposite would be true. SUNSTEIN, *supra*, at 221.

173. For a small sample of the commentary questioning *Red Lion's* continuing validity, see *Syracuse Peace Council v. FCC*, 867 F.2d 654, 684-85 (D.C. Cir. 1989) (Starr, J., concurring) (considering the role advances in technology have played in undermining the assumptions of *Red Lion*); LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 71, 88-90 (1991); S. Jenell Trigg, *The Federal Communications Commissions's Equal Opportunity Program and the Effect of Adarand Constructors, Inc. v. Pena*, 4 COMMLAW CONSPICUOUS 237, 240 (1996) (“[T]oday, *Red Lion* is under fire. The traditional ‘scarcity of voices’ doctrine that justified Government control of broadcasters for decades, may no longer be valid due to the extensive growth of alternative media.”).

litigating these issues. The surest way to avoid litigation would be never to enforce content regulations.

### III

#### CONSIDERING AUCTIONS IN THE CONTEXT OF THE GENERAL TREND TOWARD DEREGULATION

That auctions would be detrimental to the future of broadcast might seem incongruous with the general trend towards deregulation in many other industries. Indeed, this incongruity could call into question the validity of the conclusion to Part II. One might ask why deregulation, which has worked relatively well in other industries, would be so detrimental to broadcast. The goal of this Part is to argue that broadcast is so fundamentally different from other areas that have been deregulated that this apparent incongruity is justified. Most industries that have been deregulated were subject to classic New Deal economic regulation.<sup>174</sup> Broadcast regulation, on the other hand, cannot be comfortably categorized as economic in nature. For this reason, it is not surprising that deregulatory gestures in broadcast licensing could represent an unwelcome change.

##### *A. Comparing the Regulatory Regimes in Industries That Were Deregulated to Regulation in Broadcast*

Understanding why broadcast is different from other deregulated industries requires an analysis of the type of regulation that other industries were subject to prior to deregulation. As mentioned above, most deregulated industries were subject to classic economic regulation.<sup>175</sup> Economic regulation is primarily about overseeing the fundamental aspects of a market, including price and market entry.<sup>176</sup> The goal is to protect consumers from exercises of market power. This goal is concretely manifested by concern over natural monopolies.<sup>177</sup> The most common examples of natural monopolies are public utilities such as electricity, water, and telecommunications.<sup>178</sup> In the absence of regulation, nothing keeps natural monopolists from abusing their monopoly power. The government usually responds to these concerns by controlling nearly every aspect of the industry's economics. Most prominently, government controls the rates that monopolists can charge.<sup>179</sup> Other aspects of regulation include control over market entry and exit and allocation of particular geographical

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174. 3 NEW PALGRAVE DICTIONARY, *supra* note 135, at 213 ("It is for this type of regulation, often called economic regulation, that we have most often observed the process of regulation and deregulation in the US and other industrialized economies.").

175. *See id.*

176. *See* W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 297-300 (3d ed. 2000).

177. *See id.* at 337.

178. *See id.* at 361.

179. *See id.* at 298-99.



exit and allocation of particular geographical submarkets to different firms.<sup>180</sup>

From this description, it is clear that broadcast regulation was not economic regulation. Certainly, there are some characteristics of economic regulation in broadcast regulation. For example, licenses are a prerequisite to market entry, and they carry a clear geographical limitation.<sup>181</sup> Carving out such geographical submarkets is, as mentioned above, generally a feature of economic regulation. The FCC is clearly dictating the boundaries of the playing field that makes up the market. Indeed, the industry itself would probably not exist if regulation had not been imposed. However, the most important element of economic regulation is completely absent from broadcast regulation. Broadcast regulation never dealt with regulating the rates consumers pay. In the broadcast context, regulation had little to do with concern over market prices. Indeed, it is difficult to say exactly who the consumer is in broadcast and what price is being paid.<sup>182</sup>

A related difference is that economic regulation mostly deals with overseeing the relationship between producer and consumer.<sup>183</sup> Given the difficulty of identifying the consumer in broadcast, it is hard to conceptualize how broadcast regulation monitored that relationship. In the broadcast context, the purpose of licensing was to set up ground rules to allow for viable market competition. Thus, licensing was more about regulating the relationship among producers. Indeed, the need to regulate these relationships (because of the problem of interference<sup>184</sup>) caused the scarcity that justified public interest regulation in the first place.

Furthermore, economic regulation in most areas involved turning service providers into common carriers. Broadcast as we know it could never really be turned into a common carrier. Common carrier status is most appropriate in industries where the service can be commodified. To be

180. See *id* at 299-300.

181. A license delineates the geographic area in which a broadcaster may disseminate his signal. For listings of the geographic boundaries of the various types of licenses, see Fed. Communications Comm'n, Geographic Information Systems, at <http://wireless.fcc.gov/geographic> (last visited Feb. 6, 2004). Since the distance a signal can travel is a function of its strength, this geographic limitation is effected by limiting the strength with which a signal may be propagated.

182. The main difficulty is in determining whether it is the viewer or the advertiser who is the consumer. If the advertiser is the consumer, then virtually none of the regulation discussed so far would address the relationship between producer and consumer.

183. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1349 (1998).

184. The problem of interference is that if two broadcasters try to use the same part of the spectrum at the same time, their signals will effectively cancel each other out, creating static for the listener. The Supreme Court has described interference as causing a situation of "confusion and chaos. With everyone on the air, nobody [can] be heard." *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212 (1943).



commodified, the service that companies provide must be fungible.<sup>185</sup> Broadcast involves the communication of individual viewpoints, which are by definition not fungible. The issue of common carrier status is particularly helpful in understanding the difference between wireless auctions and broadcast auctions. Wireless auctions have resulted in more efficient use of the spectrum precisely because it is reasonable to turn telephone and pager service into a common carrier.<sup>186</sup>

In the taxonomy of regulation, the other major area is social regulation.<sup>187</sup> The primary economic rationale for social regulation is the correction of externalities.<sup>188</sup> An externality is an impact borne by someone who did not fully consent to it.<sup>189</sup> In a free market, people are not required to consider the overall costs of their actions upon society. Rather, they are only forced to consider the costs they bear directly. The purpose of social regulation is to correct for externalities by forcing firms to consider, and internalize, the costs of their actions. Along with these concerns, social regulation is also driven by other purely social values, such as concern for the environment or for creating a safer workplace.

As with economic regulation, there are elements of social regulation inherent in broadcast regulation. Social concerns clearly drove much of broadcast regulation; the FCC has consistently worried about the social value of broadcast content. There are also elements of externality correction evident in broadcast regulation. For example, a centerpiece of public interest regulation is that broadcast stations devote a certain amount of air time to news and public affairs programming. Such democracy-enhancing speech can be considered a public good.<sup>190</sup> Public goods are typically underprovided because of the positive externalities they create. By forcing an increase in the supply of such democratic speech, public interest regulation tried to account for this externality. A significant example of correcting for negative externalities involved the problem of signal interference that led to broadcast regulation in the first place. However, ameliorating the externality of interference was a prerequisite for the creation of the industry.

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185. Whitney Cunningham, Note, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L.J. 141, 160 n.129 (1992) ("Commodification is the process of reducing all goods and services to quantifiable value."). For services to be reducible to quantifiable values, they must essentially be interchangeable, so that they can be compared along similar lines.

186. Such services merely involve the transportation of data from one point to another. They do not involve the mass broadcast of ideas from one to many.

187. Broadly speaking, the three areas of regulation are antitrust, economic regulation, and social regulation. See VISCUSI ET AL., *supra* note 176, at xix-xxv (discussing the organization of the book and how it tracks this three-part taxonomy). For the purposes of this paper I will consider antitrust part of economic regulation.

188. *Id.* at 687-722 (discussing the concept as it applies to environmental regulation).

189. BLACK'S LAW DICTIONARY 604 (7th ed. 1999). BLACK'S defines an "externality" as "[a] social or monetary consequence or side effect of one's economic activity, causing another to benefit without paying or to suffer without compensation."

190. See SUNSTEIN, *supra* note 172, at 219-20; Lessig, *supra* note 172, at 11.

Social regulation typically involves perfecting problems in extant markets. It does not provide for the viability of an industry but rather makes the continued existence of that industry less damaging to the rest of the world.

In some sense, broadcast regulation is a hybrid of economic and social regulation. This characterization makes it akin to local telephone regulation. Telephone service, as a public utility, would be considered a paradigmatic example of economic regulation. Yet a hallmark of local telephone regulation has been a commitment to “universal service,” a phrase used to describe the extensive degree of cross-subsidization that occurs between urban and rural phone customers.<sup>191</sup> Since the cost per customer of phone service is inversely related to population density, forcing rural customers to bear their true cost of service could make price prohibitive.<sup>192</sup> Yet cutting a whole segment of society off from communications has been deemed unacceptable. There is no obvious economic justification for this aspect of an area of regulation that is considered clearly economic.<sup>193</sup> Indeed, this approach is largely driven by equitable concerns. Broadcast regulation is similarly driven by mixed goals of equity and efficiency. In the taxonomy of regulation, it occupies a unique niche. As a result, it would be unreasonable to expect deregulation automatically to have the same positive impact on broadcast that it has had on other industries.

### *B. Comparing the Goals of Different Forms of Deregulation*

A second means of comparing broadcast to other industries that have been deregulated is to analyze the problems that deregulation was supposed to fix. Deregulation in general has been driven by the pursuit of economic efficiency.<sup>194</sup> This seems consistent with the goals of regulation itself, which originally was justified partly by reference to economic concerns. Auctions, on the other hand, were never justified on the basis of the economic notion of efficiency. Rather, auctions were justified by a desire to create a more administrable process and to capture some of the value of broadcast licenses. Using the power of markets to generate efficiency was simply not a motivation. Indeed, many assumptions of free market economics are inapplicable to broadcast regulation. Markets are driven by profit. In the broadcast context, this implies that only those programs that deliver large numbers of viewers and thus generate large revenues from advertisers should be broadcast. This clearly conflicts with the well-established goal of providing diverse programming. Of course, the

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191. BENJAMIN ET AL., *supra* note 42, at 619.

192. *Id.*

193. *Id.* at 618.

194. Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 329 (1990) (“The case for deregulation has been that direct regulation typically suppressed competition, or at least severely distorted it, and that competition, freed of such direct restraints, is a far preferable system of economic control.”).

forced consumption of diverse programs can be deemed paternalistic. But because auctions, and broadcast regulation generally, are motivated primarily by noneconomic concerns, undermining some consumer autonomy is not especially troubling.

In the end, the concerns that prompted auctions do not justify a wholesale revamping of the broadcast regulatory system in the same way that concerns for economic efficiency drove other forms of deregulation. This is unsurprising, since there are such strong elements of social regulation inherent in broadcast regulation. In the past twenty years, social regulation has not been as strongly influenced by efficiency arguments as has economic regulation, because the underlying social values are not wrapped up in efficiency.<sup>195</sup> Before social deregulation occurs, it makes sense to ask whether society's underlying values have changed. Arguably, those values have changed, at least to some degree. This gradual shift may explain the relaxation of some public interest regulation. However, the values underlying broadcast regulation have not changed so dramatically that a complete abandonment of public interest regulation is justified.

#### IV

##### CONCLUSION: ARE THERE REASONABLE ALTERNATIVES TO AUCTIONS?

If auctions offer an inappropriate solution to problems in broadcast regulation, then the best course for future regulation is unclear. The regulatory failure arguments against the comparative licensing approach certainly have merit. A full return to comparative licensing is neither desirable nor, as long as *Bechtel* is still good law, feasible. Any alternative system would also need to address the shortcomings of comparative licensing. Further, the ideal system would capture some of the value of broadcast licenses, create an administrable process, and ensure that broadcast content serves the public interest. It must also vindicate the public interest in a way that does not infringe broadcasters' First Amendment rights.

One option is a royalty scheme. Under such a plan, the government would charge broadcasters royalties for use of the airwaves. The money collected could then be used to fund public interest programming.<sup>196</sup> A royalty scheme would support the public interest without infringing upon the rights of broadcasters. It would also capture for the public coffers some of the value of licenses. One problem with auctions is that they make it very difficult for smaller groups to gain access to the spectrum because of the

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195. An exception to this might be drawn from the use of tradable permits in environmental regulation. For a brief discussion of market approaches to environmental regulation, see VISCUSI ET AL., *supra* note 176, at 705-09.

196. See, e.g., Geller & Watts, *supra* note 153 (suggesting that such a royalty scheme be created in lieu of continued public interest regulation).

huge upfront expense of actually winning an auction.<sup>197</sup> Basing the royalty on profitability would create no such barrier to entry. Each broadcaster would be “taxed” based on its ability to pay.<sup>198</sup>

Another advantage of a royalty scheme relative to auctions would be that a royalty system would require no clairvoyance. At auctions, rational bidders must calculate the net present value that a license will hold in their hands. It is problematic if the auction price converges too far from the license’s actual value. If the true value of the license is below what the bidder paid, then the license will not generate the expected returns, and the licensee will have a harder time funding public interest programming. On the other hand, if the auction price is well below market value, then the public will have lost out, and the broadcaster would have received a windfall from the FCC.

A third benefit is that royalty payments would not be paid to the government in a lump sum. Designing any revenue-raising scheme must take into account the political realities of how money is appropriated by the federal government. The promise of large lump-sum payments could encourage Congress to spend the money on projects before the auctions are even held. A steady, more modest stream of royalty income could temper Congress’s voracious spending habits.

There are at least three drawbacks to a royalty approach. First, it would again place a government body in the position of having to decide which programming serves the public interest. Organizations like the Public Broadcasting Service and the National Endowment for the Arts (NEA) are frequently criticized for elitism or worse<sup>199</sup> because they involve public, or quasi-public, officials determining the value of art and the best means of promoting the nation’s cultural health. The firestorm surrounding these organizations is nothing compared to what might unfold if government were to begin making these kinds of decisions on a large scale. At least in traditional public interest regulation, government was never directly responsible for decisions regarding program content. A second problem is that basing the royalty rate on a broadcaster’s profitability poses the danger of turning broadcast into an industry regulated on a cost-of-service standard.<sup>200</sup> Such a move would be an unwelcome step backwards in

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197. Concern over this issue prompted several members of Congress to draft a bill ensuring that women- and minority-owned businesses would have access to the auctions. See Communication Opportunity Act of 1994, H.R. 4642, 103d Cong. (1994).

198. Perhaps this “taxation” system could be progressive such that more profitable companies would have to pay a higher percentage in royalties.

199. This issue is perhaps best typified by congressional concern over the NEA’s funding of controversial artists. See, e.g., 135 Cong. Rec. S12,191, 12,210-12,214 (1989).

200. Industries facing economic regulation were traditionally regulated based on their cost of service. Regulators would set the allowable rates based on the cost of service plus a reasonable profit level. See VISCUSI ET AL., *supra* note 176, at 361-94.

regulatory policy.<sup>201</sup> A third problem is that the royalty proposal does not provide any guidelines for the allocation of new spectrum.

A second alternative to auctions would be to lease spectrum.<sup>202</sup> Leasing could be combined with the royalty scheme by tying lease payment to profitability. This approach would have two advantages over auctions. Shorter license terms would create more spectrum flexibility. At the end of each lease, the FCC would be free to reevaluate how that spectrum should be used. Incumbents would become less entrenched and have less of a chance to rent seek in hopes of maintaining the status quo.<sup>203</sup> An even bigger advantage of leasing is that fixed terms would make absolutely clear that licensees hold nothing more than a leasehold interest. This limited property right would severely hamper the ability of a licensee to make a takings claim.

Leasing, however, still does not solve the problem of how to distribute new licenses. There would be more potential lessees than licenses. Perhaps the initial allocation of licenses could be set by auction. Potential lessees would have to purchase at auction the right to become a tenant on the government's airwaves. The problem of initial allocation might alternatively be solved by instituting a scaled-down version of comparative hearings. *Bechtel* did not completely proscribe the use of some form of comparative hearings.<sup>204</sup> In fact, the FCC proposed scaled-down comparative hearings in the low-power FM proceedings in 2000.<sup>205</sup> This approach would allow the FCC to maintain more direct control over broadcasters. However, reinstituting any kind of comparative hearings would create the danger of an eventual regression back to a full comparative licensing system. Once the process gets started, bureaucratic inertia may make it hard to keep the system in check.

A final idea might be to follow the model of the Digital TV proceedings,<sup>206</sup> in which the FCC gave away new spectrum to aid in the development of digital television. Analogously, new broadcast spectrum might be given to innovative stations devoted to public interest programming. In the long run, however, it is not clear how successful this approach would be.

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201. Among other things, basing royalties on profitability could encourage unwise use of spectrum, since the risks of a failed venture are less intense under a royalty system than under an auction system.

202. See Comments of the New America Foundation, et al., *In the Matter of Spectrum Policy Task Force Seeks Public Comment on Task Force Report*, at 22 (Jan. 27, 2002), available at [http://www.newamerica.com/Download\\_Docs/pdfs/Pub\\_File\\_1122\\_1.pdf](http://www.newamerica.com/Download_Docs/pdfs/Pub_File_1122_1.pdf) (last visited Mar. 6, 2004).

203. 3 NEW PALGRAVE DICTIONARY, *supra* note 135, at 315 ("Rent seeking is the socially costly pursuit of wealth transfers . . .").

204. *Bechtel* only proscribed the FCC's continued use of integration of station ownership and management as a factor in comparative licensing hearings. *Bechtel v. FCC*, 10 F.3d 875, 877-78 (D.C. Cir. 1993).

205. Creation of Low Power Radio Serv., 15 F.C.C.R. 2205 (2000).

206. See generally *In re Advanced Television Sys.*, 12 F.C.C.R. 12,809 (1997).

After all, this is basically how broadcast spectrum was initially allocated. This system would also require monitoring whether stations were really operating in the public interest. If not, then the FCC would probably give the license to a more appropriate licensee. The similarities between this system and comparative licensing do not bode well for the feasibility of this proposal.

Ultimately, these alternatives might never be seriously considered by policymakers. The large number of completed wireless auctions coupled with many scheduled broadcast auctions makes it clear that the auction approach is well entrenched at this point.<sup>207</sup> Moreover, the FCC seemingly has no interest in saving public interest regulation. The agency has clearly been rolling back the stringency of public interest regulation for the past twenty years.<sup>208</sup> So the ultimate consequences of an auction system might just be viewed as the culmination of an inevitable process of deregulation. The problem is that the final blow to public interest regulation should not be struck *sub rosa*. If auctions are tantamount to the end of public interest regulation, then the debate surrounding auctions needs to acknowledge that result explicitly. Concern for the public interest on the airwaves may be dead, but concern for the public's interest in fully-informed policy debate certainly is not.

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207. See, e.g., Fed. Communications Comm'n, Auctions, *supra* note 58.

208. See, e.g., Am. Tel. & Tel. Co. 96 F.C.C.2d 76 (1984); Deregulation of Radio, 84 F.C.C.2d 968 (1981).