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# PUBLIC INTEREST REGULATION IN THE DIGITAL AGE

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## INTRODUCTION

Since the dawn of radio, broadcasters have been regarded as “public trustees:” in return for a free, exclusive license to exploit a valuable public resource, the broadcaster becomes a public trustee, obligated to serve the interests of the community through its broadcasts.<sup>1</sup> Defining and enforcing this duty to the public is a fundamental part of broadcast regulation and has been subject to constant policy debates and First Amendment challenges.

The transition to digital television has reinvigorated the entire debate over the public interest obligations owed by television broadcasters. As FCC Commissioner Gloria Tristani put it: “The public interest standard—the bedrock obligation of those who broadcast over the public airwaves—has fallen into an unfortunate state of disrepair over the years. It’s time to put up the scaffolding and get the restoration underway.”<sup>2</sup> Former Chairman Reed Hundt similarly stressed the implications of digital television for the public interest debate: “Now, as the Commission considers various critical issues relating to the new spectrum set aside for digital broadcast television, we have a rare opportunity. We have a second chance to get television regulation right, to put real meaning into the public interest.”<sup>3</sup>

While these and other observers look to digital television as a reason to expand the public inter-

est obligations of broadcasters—to get *something* in return for the free use of public spectrum—others argue that digital television undermines the very constitutionality of public interest regulation. The notion that government should define or influence programming content “necessarily invites reference to First Amendment principles.”<sup>4</sup> Yet the courts have historically justified content-specific public interest regulation under the First Amendment by relying on the principle of “scarcity”—the idea that the electromagnetic spectrum is incapable of supporting every broadcaster who would like to use it:

A license permits broadcasting, but the licensee has no constitutional right . . . to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.<sup>5</sup>

Throughout the public interest debate triggered by the transition to digital television, broadcasters have argued that digital technology, particularly the potential for the transmission of more television programming, undermines the constitutional basis for public interest regulation. Particularly, Commissioner Harold Furchtgott-Roth warned:

The primary rationale for broadcasters’ public interest

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<sup>1</sup> See, e.g., STUART M. BENJAMIN ET AL., TELECOMMUNICATIONS LAW & POLICY 118 (3d ed. 2001) [hereinafter BENJAMIN ET AL.]; see also HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 115–226 (3d ed. 1999) [hereinafter ZUCKMAN ET AL.].

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<sup>2</sup> See *In re Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 F.C.C. Rcd. 21660 (1999) Separate Statement of Commissioner Gloria Tristani [hereinafter 1999 NOI].

<sup>3</sup> Reed Hundt, *A New Paradigm for Broadcast Regulation*, Address at the Conference for the Second Century of the University of Pittsburgh School of Law (Sept. 21, 1995), in 15 J.L. & COM. 527, 529 (1996) [hereinafter Hundt, *A New Paradigm*].

<sup>4</sup> *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 122 (1973).

<sup>5</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1967).

obligations has been the theory that broadcast spectrum is a peculiarly scarce resource. Absent spectrum scarcity, however, the justification for according broadcasters less First Amendment protection than persons engaged in other modes of communication becomes difficult to discern. . . . I believe that the Commission must review the empirical basis of "spectrum scarcity" . . . . Should we conclude . . . . that spectrum scarcity is no longer viable as a factual matter, then the instant effort to engage in additional regulation will be highly problematic in constitutional terms.<sup>6</sup>

This article responds to the concerns of Commissioners Hundt, Tristani, and Furchtgott-Roth and discusses both the policy and constitutional issues implicated by public interest regulation of digital television. The article proceeds in three parts. Part I reviews the *transition* to digital television, highlighting important congressional and administrative policy decisions. Part II discusses the *policy* debate over public interest regulation of digital television. Specifically, it addresses the popular sentiment that digital television presents an opportunity to redefine broadcasters' public interest obligations. This article then discusses the technical question of how public interest obligations will be applied to the multiple programming services that digital broadcasters are able to transmit and the specific capabilities of digital broadcast technologies that will influence public interest regulation. Part III analyzes the constitutional issues raised by digital television and the continued validity of the scarcity doctrine, as well as alternative constitutional foundations for public interest regulation.

The article concludes that public interest regulation is not in constitutional jeopardy as a result of the advent of digital technology. Broadcast licenses remain scarce, and the scarcity doctrine remains good law. The article also concludes, however, that digital television is not the milestone for public interest regulation that Commissioners Hundt and Tristani hope it to be. To a large degree, their arguments are driven by popular sentiment that digital television represents a substantial windfall for broadcasters and thus requires an

expansion of their duties to the public. As a result, advocates of greater public interest obligations have failed to ask whether and how the *technology* of digital television should impact broadcasters' duty to serve the public interest. Instead, both sides have simply repeated arguments from the public interest debates over analog television. As this article will show, despite the vast possibilities of digital television, there is little reason to alter the current public interest regulation regime.

## THE TRANSITION TO DIGITAL TELEVISION

For over sixty years, American television has been broadcast using essentially the same transmission standard. In 1941, the FCC officially adopted a technical standard proposed by the National Television System Committee, and issued its first commercial television licenses based on this standard, commonly referred to as "NTSC."<sup>7</sup> Subsequently, the Commission improved television technology in 1953 when it approved the NTSC color standard. The new color standard, however, was still receivable by older, black-and-white televisions, albeit without color.<sup>8</sup> Only a few minor improvements (most notably, the addition of stereo audio in 1986) were made in the ensuing half-century, none of which required the replacement of existing receivers.<sup>9</sup>

In 1987, fifty-eight broadcasting organizations and companies petitioned the FCC to initiate a proceeding to explore advanced television technologies and their possible impact on the television broadcasting service.<sup>10</sup> The broadcasters were nominally concerned that alternative media would deliver advanced television to the viewing public, thus placing over-the-air broadcasting at a severe disadvantage. New transmission systems were in fact already being developed for Direct Broadcast Satellite ("DBS") and other media.<sup>11</sup> A more immediate concern, however, was a pending proceeding to allot unused UHF spectrum for

<sup>6</sup> 1999 NOI, *supra* note 2, at 21655, Separate Statement of Commissioner Harold Furchtgott-Roth, concurring in part and dissenting in part.

<sup>7</sup> See *In re Advanced Television Sys. and Their Impact on the Existing Television Broad. Serv.*, *Notice of Inquiry*, 2 F.C.C. Rcd. 5125, ¶ 5 (1987) [hereinafter 1987 NOI].

<sup>8</sup> See *id.* ¶ 92.

<sup>9</sup> See *id.* ¶¶ 5, 92; *In re Advanced Television Sys. and Their Impact on the Existing Television Broad. Serv.*, *Fourth Report and Order*, 11 FCC Rcd. 17771, ¶ 41 (1996) [hereinaf-

ter *Fourth Report and Order*]; ADVISORY COMM. ON ADVANCED TELEVISION SERV., FED. COMMUNICATIONS COMM'N, *ATV SYSTEM RECOMMENDATION* § 3.2 (1993) [hereinafter 1993 REPORT].

<sup>10</sup> See 1987 NOI, *supra* note 7, ¶ 2.

<sup>11</sup> See ADVISORY COMM. ON ADVANCED TELEVISION SERV., FED. COMMUNICATIONS COMM'N, *ADVISORY COMMISSION FINAL REPORT AND RECOMMENDATION* §1 (1995); see also 1987 NOI, *supra* note 7, ¶ 2; see also 1993 REPORT, *supra* note 9, § 3.3.

use by two-way, or "land mobile," radio communications.<sup>12</sup> Suddenly faced with the prospect of losing valuable "beachfront property," broadcasters argued that UHF spectrum was not lying fallow, but instead was earmarked for future television services.

The FCC responded by dropping its land mobile deliberations<sup>13</sup> and initiating a proceeding to consider the technical and public policy issues of advanced television.<sup>14</sup> The Commission has since made a number of key decisions concerning the transition to digital broadcasting, but has yet to resolve the question of digital broadcasters' public interest obligations. Many of the FCC's early regulatory decisions, however, shape and drive the current debate over public interest regulation. This Part discusses the technology of digital television and explores the short history of digital broadcasting regulation, identifying the significant regulatory decisions that influence and shape the current debate over public interest obligations.<sup>15</sup>

#### A. A Few Words on Terminology

"Advanced television," or "ATV," broadly refers to television technologies developed to replace the current analog NTSC standard. "Digital television," or "DTV," refers to digitally transmitted television signals, and is not necessarily advanced TV. For example, several current services, such as

DBS, transmit digitally but then convert the signal to the NTSC analog standard for display on home televisions.<sup>16</sup> When the Commission opened its advanced television inquiry in 1987, it resolved to consider a variety of advanced systems, both digital and analog.<sup>17</sup> By 1993, however, the Advisory Committee had decided to focus exclusively on digital systems because of their greater capacity and quality.<sup>18</sup> For practical purposes, then, the FCC and the broadcasting industry use the terms ATV and DTV interchangeably to refer to advanced television.<sup>19</sup>

"High-definition television," or "HDTV" refers to a particular type of advanced television. Like ATV, HDTV for all practical purposes will be digital so as to take advantage of the capacity of digital technology, though it is technically capable of displaying analog transmissions.<sup>20</sup> HDTV offers approximately twice the vertical and horizontal resolution of current NTSC analog broadcasting, which is a picture quality approaching 35-millimeter film, and has sound quality approaching that of a compact disc.<sup>21</sup> HDTV stands in contrast with several other ATV systems, namely, extended-definition television ("EDTV"), which refers to any number of improvements on the NTSC standard short of HDTV, but which are all NTSC-compatible,<sup>22</sup> and standard-definition television ("SDTV"), which is a digital television system in which picture quality is approximately equivalent to the current NTSC television system.<sup>23</sup>

<sup>12</sup> See 1987 NOI, *supra* note 7, ¶¶ 41 n.29, 102; *In Re Advanced Television Sys. and Their Impact on the Existing Television Broad. Serv.*, *Tentative Decision and Further Notice of Inquiry*, 3 F.C.C. Rcd. 6520, ¶ 7 (1988) [hereinafter *Tentative Decision*]; see also JOEL BRINKLEY, *DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION* 7-10 (1997) [hereinafter *BRINKLEY*].

<sup>13</sup> See *In re Further Sharing of UHF Television Band by Private Land Mobile Radio Serv.*, *Order*, 2 F.C.C. Rcd. 6441, ¶ 8 (1987); *Tentative Decision*, *supra* note 12, ¶¶ 7, 96.

<sup>14</sup> See *Tentative Decision*, *supra* note 12, ¶ 8. The self-serving nature of broadcaster's HDTV claims did not go unnoticed at the time. But the initial suggestion of HDTV set off a nationalist firestorm in Washington because, at the time, the only working HDTV system was Japanese. HDTV at once offered the possibility of revitalizing the American consumer electronics industry or illustrating its complete inadequacy. See *BRINKLEY*, *supra* note 12, at 28-30, 36-46.

<sup>15</sup> There are really two stories about the history of digital television, one dealing with governmental policy decisions and their nominal explanations and another dealing with the actual political maneuvering that set the stage for these decisions. This Article tells the former story, primarily through records of the FCC's DTV proceedings. See generally *BRINKLEY*, *supra* note 12 (describing the second and far more entertain-

ing story about the history of digital television)

<sup>16</sup> *In re Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, *Fifth Report and Order*, 12 F.C.C. Rcd. 12809, ¶ 3 (1988) [hereinafter *Fifth Report and Order*].

<sup>17</sup> See 1987 NOI, *supra* note 7, ¶ 19.

<sup>18</sup> See 1993 REPORT, *supra* note 9, § 1.

<sup>19</sup> See *Fourth Report and Order*, *supra* note 9, ¶ 4 ("As the proceeding progressed, all-digital advanced television systems were developed and we began to refer to advanced television as digital television ("DTV") in recognition that, with the development of the technology, it was decided any ATV system was certain to be digital.")

<sup>20</sup> See *BRINKLEY*, *supra* note 12, at 121-23; see also 1993 REPORT, *supra* note 9, § 3.3.

<sup>21</sup> See *In re Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, *Notice of Proposed Rulemaking*, 6 F.C.C. Rcd. 7024, ¶ 1 n.1 (1991) [hereinafter *NPRM*].

<sup>22</sup> See *In re Advanced Television Sys. and Their Impact on the Existing Television Broad. Serv.*, *First Report and Order*, 5 F.C.C. Rcd. 5627, ¶ 1 n.2 (1990) [hereinafter *First Report and Order*].

<sup>23</sup> See *In re Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, *Fourth Further No-*

## B. The Public Interest in DTV: Pretty Pictures and the Future of the Broadcast Industry

The fundamental policy driving the transition to digital television is the determination that over-the-air broadcast of DTV is in the public interest. The Commission determined at the outset that the public would benefit from "programs with significantly improved video and audio quality."<sup>24</sup> But while other media, such as cable and DBS, were available to provide advanced television, the FCC decided early on to rely on over-the-air broadcast television to deliver ATV to American households.<sup>25</sup> The Commission based this decision on two predictions. First, broadcast television was in the best position to make the transition to ATV. For example, although cable reaches nearly two-thirds of American households and is available to all but five percent of them,<sup>26</sup> broadcast television has achieved even greater penetration, reaching nearly 99% of American households.<sup>27</sup> Second, in order to preserve the benefits of free, over-the-air television, broadcasters would

have to be allowed to offer ATV if they were to compete with alternative media:<sup>28</sup>

[W]e conclude that broadcast stations provide services unique in the array of entertainment and non-entertainment programs freely available to the American public. Unlike many other countries, the United States has a strong and independent system of privately-owned and operated broadcast stations that transmit local and regional news, information, and entertainment as well as national and international programs. Therefore, initiating an advanced television system within the existing framework of local broadcasting will uniquely benefit the public and may be necessary to preserve the benefits of the existing system. Also, we believe that the benefits of these new technological developments will be made available to the public in the quickest and most efficacious manner if existing broadcasters are permitted to implement ATV. We emphasize that this decision does not foreclose provision of ATV services by other means, both those that use spectrum and those that do not.<sup>29</sup>

From the beginning, then, the transition to digital television has been about more than better picture and audio. Hand in hand with the desire to improve America's television experience has

*tice of Proposed Rulemaking and Third Notice of Inquiry*, 10 F.C.C. Rcd. 10540, ¶ 4 n.4 (1995) [hereinafter Fourth NPRM].

<sup>24</sup> See Tentative Decision, *supra* note 12, ¶ 1. The FCC noted several deficiencies in the NTSC transmission standard. For one, there are "interlace/color defects" which detract from the picture. For example, the NTSC standard's interlaced scanning process causes "interline flicker," a flickering effect around the horizontal borders of objects on TV, and "line crawl," an illusion that a line is moving up or down the screen at a constant motion. See 1987 NOI, *supra* note 7, ¶¶ 9-10. "Cross color," where a detailed pattern (a striped shirt or a tweed jacket) appears as a bizarre color pattern, is caused by the mixture of high luminance and chrominance information by the NTSC signal, and "dot crawl," where a dot pattern appears to crawl up the edges of color areas, is caused by the leaking of color information into the luminance signal. See *id.* ¶¶ 15-16. More generally, NTSC suffers from several "quality defects" such as a loss of realism and depth because the display is narrowed to fit a square set and because of limits on the sharpness and brightness of the picture and an inability to exploit compact-disc quality audio. See *id.* ¶ 17 ("[P]sychophysical research has demonstrated that viewers obtain a greater sense of realism and involvement, as well as an illusion of depth, from a display widened to correspond more closely to the dimension of human field of vision as well as with sharper and brighter picture.").

<sup>25</sup> See Tentative Decision, *supra* note 12, ¶¶ 4, 38.

<sup>26</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997); ROBERT W. CRANDALL & HAROLD FURCHTGOFF-ROTH, *CABLE TV: REGULATION OR COMPETITION I* (1996).

<sup>27</sup> The Commission reasoned that:

[B]ecause over-the-air broadcasting reaches more than 98 percent of U.S. households, an ATV terrestrial broadcast system is the medium most likely to bring this technological advance to virtually all Americans. Consequently, it is the medium most likely to result in rapid

penetration of ATV receivers and, hence, to contribute to higher sales volumes and eventually lower costs for these receivers.

*In re Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.*, *Second Report and Order*, 7 F.C.C. Rcd. 3340, ¶ 4 (1992) [hereinafter Second Report and Order].

<sup>28</sup> The FCC's Advisory Committee found that "to remain competitive, broadcasters must have the opportunity to deliver HDTV-quality signals to their audiences, and that, therefore, efforts should be focused on establishing an HDTV standard for terrestrial broadcasting." Tentative Decision, *supra* note 12, ¶ 10; see also Fifth Report and Order, *supra* note 16, ¶ 3 ("Broadcasters have long recognized that they must make the switch to digital technology.").

<sup>29</sup> Tentative Decision, *supra* note 12, ¶ 39.

Our objective is not to launch a new and separate video service . . . . Rather, our goal is to encourage beneficial technical change in the existing terrestrial broadcast service by allowing broadcasters to assimilate ATV technology. Thus our intent is to preserve and improve the existing broadcast service and the benefits that this service delivers to the public. In addition, given the risks inherent in ATV, it appears to us that rapid development of ATV broadcasting can be realized best by assigning suitable additional spectrum to existing licensees and applicants because of the considerable resources and expertise that licensees already have invested in the broadcast television system, and the possibility that additional spectrum could be used only by them.

*Id.* ¶ 136.

"At least initially it is our view that nothing in the public interest standard of the Act requires or suggests that transition to an improved broadcast service must, or should, be accompanied by major changes in the industry's ownership structure." *Id.* ¶ 137.

been a concern for the competitiveness of free, broadcast television.

The Commission went further and chose to limit initial DTV applications to existing broadcasters.<sup>30</sup> The Commission based its decision on several reasons. First, existing broadcasters had “invested considerable resources and expertise” in the NTSC system and “represent[ed] a large pool of experienced talent.”<sup>31</sup> Second, the FCC believed that a change in the ownership structure of the broadcasting industry would increase the potential for disruption to the viewing public.<sup>32</sup> This decision was ratified by Congress in the Telecommunications Act of 1996 (“96 Act”).<sup>33</sup>

### C. Simulcasting and the Transition to DTV

The Commission decided early on that it would go to great lengths to ensure a seamless transition from NTSC to DTV, one that would cause as little disruption to viewers as possible.<sup>34</sup> As research progressed, however, it became evident that NTSC-compatible systems would never equal the picture quality and spectrum-efficiency of emerging non-NTSC technologies.<sup>35</sup> Accordingly, the Commission made a key decision in 1990 to aban-

don the pursuit of an NTSC-compatible system, requiring that broadcasters and viewers invest in entirely new equipment to facilitate the transition.<sup>36</sup>

As an alternative to backwards-compatibility with NTSC sets, the Commission provided for the gradual phasing-in of the new digital signal (and the simultaneous phasing-out of the NTSC signal). The FCC determined that broadcasters would “simulcast”—or simultaneous broadcast—NTSC and DTV signals on two different channels.<sup>37</sup> NTSC broadcasts would continue, and broadcasters would be given a second 6MHz channel to introduce DTV. The idea was that during the transition period, viewers would retain the ability to receive NTSC broadcasts while more DTV programming became available and more DTV receivers went on the market. At the end of the transition period—when DTV had become the prevalent medium—broadcasters would return the 6MHz channel used for NTSC, retaining the other channel only for DTV broadcasting.<sup>38</sup> This dual license regime was codified by Congress in the ‘96 Act.<sup>39</sup> Congress later set a December 31, 2006 deadline for the termination of NTSC broadcasts, but allowed the FCC to extend the

<sup>30</sup> See Tentative Decision, *supra* note 12, ¶ 4; see also NPRM, *supra* note 21, ¶¶ 5-6 (affirming the tentative decision in 1991); see also Second Report and Order, *supra* note 27, ¶ 4 (reaffirming the tentative decision in 1992).

<sup>31</sup> NPRM, *supra* note 21, ¶ 6. Broadcasters had helped to “create and support the Advanced Television Test Center, investing resources and developing expertise in this new technology.” Second Report and Order, *supra* note 27, ¶ 6.

<sup>32</sup> See NPRM, *supra* note 21, ¶ 6. Additionally, the Commission believed that restricting initial eligibility would facilitate licensing by avoiding the delay of comparative hearings required by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 329-30 (1945). See Fourth NPRM, *supra* note 23, ¶ 26.

<sup>33</sup> 47 U.S.C. § 336(a)(1) (Supp. V 1999). The FCC decided that once allotments for existing broadcasters were made, it would permit any qualified party to obtain a DTV license if technically feasible. See Second Report and Order, *supra* note 27, ¶ 7; NPRM, *supra* note 21, ¶ 10. In particular, low-power and small, minority-owned stations objected to their exclusion from initial DTV eligibility. See Fifth Report and Order, *supra* note 16, ¶ 15-16.

<sup>34</sup> See Tentative Decision, *supra* note 12, ¶ 4 (“We find that existing service to viewers utilizing NTSC receivers must be continued irrespective of the actual manner in which ATV services are delivered, at least during a transition period. This can be accomplished either by transmitting ATV signals that can be received directly by NTSC receivers or by simulcasting NTSC and incompatible ATV signals on separate channels.”); see also 1987 NOI, *supra* note 7, ¶¶ 83-88 (discussing transition policy options).

<sup>35</sup> See First Report and Order, *supra* note 22, ¶¶ 7, 9. The FCC earlier had “strong predisposition to require NTSC re-

ceiver compatibility.” Tentative Decision, *supra* note 12, ¶ 5. In addition to poorer video resolution, NTSC-compatible systems required the allocation of additional spectrum adjacent to the 6MHz licenses already issued. See First Report and Order, *supra* note 22, ¶ 9. There simply was not enough available spectrum to provide each broadcaster with augmentation spectrum contiguous to their current channel, and the cost of technologies to broadcast on noncontiguous spectrum were greater than those associated with using a separate DTV signal. See *id.* ¶ 10. On the other hand, advances in technology had produced proposals that would deliver HDTV programming with a 6MHz license. See *id.* ¶ 6; see also Tentative Decision, *supra* note 12, ¶ 82 (declining to consider non-NTSC-compatible systems that would require more than 6MHz). Although the FCC decided to provide an additional 6MHz channel for DTV, it ultimately planned to recover the spectrum used for the NTSC channel. See NPRM, *supra* note 21, ¶¶ 6, 13, 34-35; *infra* note 38.

<sup>36</sup> First Report and Order, *supra* note 22, ¶¶ 1, 9. Additionally, the FCC reasoned that “going from the existing NTSC system to an [DTV] system in one step will minimize the investment required of broadcasters, avoid the need for interim standards for transitional systems and the costs of requiring later systems to be compatible with those systems and speed [DTV] implementation.” *Id.* ¶ 8.

<sup>37</sup> See First Report and Order, *supra* note 22, ¶ 8 & n.1. The Commission reasoned that simulcasting would “minimiz[e] broadcaster and consumer reliance on the ATV channel as a separately programmed service.” Second Report and Order, *supra* note 27, ¶ 59.

<sup>38</sup> See NPRM, *supra* note 21, ¶¶ 6, 13, 34-35.

<sup>39</sup> See 47 U.S.C. § 336(c) (Supp. V 1999).

deadline if fewer than 85% of the station's viewers can receive the broadcaster's digital service either off-air or through satellite or cable television.<sup>40</sup> Under the statute, the returned spectrum will ultimately be auctioned, providing a financial incentive for the government to facilitate the transition to complete market penetration.<sup>41</sup>

#### D. Multicasting, Ancillary Use, and the Evolution of the Public Interest in DTV

As research on advanced television progressed, ATV began to promise a dramatically different media experience from NTSC broadcasts—far more than enhanced picture and audio quality. The Commission began to refer to digital television as “a quantum leap in the benefits that may be derived from television service.”<sup>42</sup> This is due in large part to the ability to “multicast,” or send multiple, simultaneous broadcast streams. Digital technology made it evident that multiple, high-resolution television signals could be broadcast within a 6MHz channel, with the possibility of ad-

ditional spectrum remaining available for other uses such as CD-quality audio signals, computer software distribution, interactive education materials, and “data casting”: broadcasting data such as telephone directories, sports statistics, stock market updates, and information concerning commercial products.<sup>43</sup>

Under the dual license arrangement discussed above, the FCC originally required that licensees should simulcast on their NTSC channel a certain amount of the programming provided on their ATV channel.<sup>44</sup> This decision was motivated by the FCC's concern for an uninterrupted transition to ATV; it did not want to immediately relegate NTSC viewers to inferior programming or postpone the surrender of one of the 6MHz licenses.<sup>45</sup> Because the ability of digital broadcasters to multicast could not be replicated on their NTSC channels, however, the simulcasting requirement became a restriction on DTV service.<sup>46</sup>

Accordingly, in 1997 the Commission reversed course and allowed broadcasters the discretion to offer programming on their ATV channel that dif-

<sup>40</sup> 47 U.S.C. § 309(j)(14) (Supp. V 1999). The FCC had earlier stated that it would set a firm deadline for broadcasters to surrender their NTSC spectrum. See Second Report and Order, *supra* note 27, ¶¶ 2, 50, 53 (“Although . . . there is a benefit to affording the public a choice between ATV and NTSC programming during the transition years, suggesting that such a choice will remain permanently available would undoubtedly inhibit the growth of ATV.”). The ‘96 Act expressly required the Commission to condition the grant of a digital license on the recovery of one 6MHz license from each licensee. See 47 U.S.C. § 309(c) (Supp. V 1999).

<sup>41</sup> See 47 U.S.C. § 309(c) (Supp. V 1999); see also 47 U.S.C. 309(j)(14); see also Second Report and Order, *supra* note 27, ¶ 66 (“The more swiftly ATV receiver penetration increases, the more rapidly we will be able to reclaim one 6 MHz channel.”); Fifth Report and Order, *supra* note 16, ¶ 6 (identifying as one of the Commission's two principle goals to “promote spectrum efficiency and rapid recovery of spectrum.”).

<sup>42</sup> Fourth NPRM, *supra* note 23, ¶ 11.

<sup>43</sup> Fifth Report and Order, *supra* note 16, ¶¶ 20, 27; Fourth Report and Order, *supra* note 9, ¶ 5 (footnotes omitted); Fourth NPRM, *supra* note 23, ¶¶ 4, 19, 23; BRINKLEY, *supra* note 12, at 207.

In addition to being able to broadcast one, and under some circumstances two, [HDTV] programs, [DTV] allows for multiple streams, or “multicasting,” of [SDTV] programming at a visual quality better than the current analog signal. Utilizing [DTV], broadcasters can transmit three, four, five, or more such program streams simultaneously. [DTV] allows for the broadcast of literally dozens of CD-quality audio signals. It permits the rapid delivery of large amounts of data; an entire edition of the local daily newspaper could be sent, for example, in less than two seconds. Other material, whether it be telephone directories, sports information, stock market

updates, information requested concerning certain products featured in commercials, computer software distribution, interactive education materials, or virtually any other type of information access can also be provided. It allows broadcasters to send, video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another. For example, a broadcaster could transmit a news program consisting of four separate, simultaneous SDTV program streams for local news, national news, weather and sports; then transmit an HDTV commercial with embedded data about the product; then transmit a motion picture in an HDTV format simultaneously with unrelated data.

Fourth Report and Order, *supra* note 9, ¶ 5 (footnotes omitted).

<sup>44</sup> See Second Report and Order, *supra* note 27, ¶¶ 2, 58 (tentatively deciding on 100% simulcasting).

<sup>45</sup> See NPRM, *supra* note 21, ¶ 45. The Commission, recognizing that “some number of consumers, unaware of the transition to digital television or unable to afford replacement equipment, may continue viewing analog television throughout the transition period,” feared a Hobson's choice “of either terminating analog service, causing such viewers to lose their only source of free broadcast service, or, alternatively, allowing analog broadcasting to continue, thereby depriving the broad general public of the benefits that we believe are to be found from the recovery of one of the channels.” See Fourth NPRM, *supra* note 23, ¶ 41. The Commission also believed that its ability to reclaim one of the 6MHz licenses would be threatened if the two channels carried separately programmed services. See Second Report and Order, *supra* note 27, ¶ 12.

<sup>46</sup> See Fourth NPRM, *supra* note 23, ¶¶ 37-39; Fifth Report and Order, *supra* note 16, ¶ 51.

ferred from that broadcast on their NTSC channel.<sup>47</sup> One of the main reasons for the change was the Commission's determination that the ability to offer multiple simultaneous programming services would make DTV far more attractive to consumers and would therefore expedite the transition from NTSC to DTV.<sup>48</sup>

The ability to multicast different services raised the possibility that DTV licenses might be used to broadcast non-television signals. In 1997, the Commission extended to DTV licensees its practice of allowing broadcasters to use a portion of their spectrum for ancillary or supplemental uses that do not interfere with the primary broadcast signal.<sup>49</sup> The FCC's hope was that allowing broadcasters to "experiment with innovative offerings and different service packages" would facilitate the transition to DTV, especially at the early stages when DTV penetration was low.<sup>50</sup> It also believed that ancillary revenues "would increase the ability of broadcasters to compete in an increasingly competitive marketplace."<sup>51</sup> To recoup some of the value of spectrum used for ancillary purposes, the FCC requires that broadcasters pay the government a fee of 5% of gross revenues received

from spectrum use additional to the free programming service.<sup>52</sup>

At the same time that the Commission opened new revenue-generating opportunities for digital broadcasters, it narrowed the scope of required services. Although the Commission had originally expected that broadcasters would "take full advantage of ATV technical capabilities,"<sup>53</sup> i.e., high-definition television, the FCC later decided only to require that licensees offer one "free digital video programming service the resolution of which is comparable to or better than that of today's service."<sup>54</sup> The Commission declined to impose a minimum amount of HDTV programming, but instead left this decision to the discretion of licensees.<sup>55</sup>

The decision not to mandate a certain amount of high definition broadcasting illustrates the evolution of the relationship between DTV and the public interest. In 1987, the Commission justified its inquiry into the future of television by finding that the public would benefit from "programs with significantly improved video and audio quality."<sup>56</sup> By 1997, however, the benefit to the public was not "pretty pictures," but the po-

<sup>47</sup> See Fifth Report and Order, *supra* note 16, ¶ 55.

<sup>48</sup> See *id.* (noting that "many consumers' decisions to invest in DTV receivers will depend on the programs, enhanced features, and services that are not available on the NTSC service"). The FCC, however, did not entirely abandon its simulcasting order. Simulcasting was still necessary in order to ensure that the final switch from NTSC to DTV did not result in the loss of NTSC programming to which the public was accustomed. See *id.* ¶ 56. Instead, it simply deferred its operation until later in the transition process, with the requirement phasing in gradually towards a 100% requirement by 2005, and only required stations to simulcast NTSC content on DTV channels, and not the other way around. See *id.* ¶¶ 51, 54.

<sup>49</sup> *Id.* ¶ 21. The Commission had explicit authority to allow ancillary use of DTV license under the '96 Act. See 47 U.S.C. § 336(a)(2) (Supp. V 1999). Moreover, the Commission believed that ancillary use furthered congressional intent "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Fifth Report and Order, *supra* note 16, ¶ 31 (quoting *publ.*, 110 Stat. at 56). The Commission had considered supplemental use of DTV spectrum before the ability to multicast became evident. In its 1988 Tentative Decision, the FCC expressed concern that the complexities of DTV would cause licensees to transition to DTV at varying paces and that spectrum would go unused while the transition proceeded: "Therefore we are considering allowing supplemental spectrum to be used for non-ATV purposes for some interim period." Tentative Decision, *supra* note 12, ¶ 152.

<sup>50</sup> Fifth Report and Order, *supra* note 16, ¶ 7. See *id.* ¶¶

6, 33 ("By permitting broadcasters to assemble packages of services that consumers desire, we will promote the swift acceptance of DTV and the penetration of DTV receivers and converters."); Fourth NPRM, *supra* note 23, ¶ 23; Third Report and Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 7 F.C.C.R. 6924, ¶ 77 (1992) [hereinafter Third Report and Order]. The Commission previously allowed ancillary use of a frequency to initiate the development of DBS. See United States Satellite Broad. Co., Inc., 1 F.C.C. Rcd. 977, 977 (1986).

<sup>51</sup> Fourth NPRM, *supra* note 23, ¶ 23; see Fifth Report and Order, *supra* note 16, ¶¶ 3, 5, 7, 29 (reasoning that ancillary use "will help broadcast television to remain a strong presence in the video programming market that will, in turn, help support a free programming service.")

<sup>52</sup> *In re Fees for Ancillary or Supplementary Use of Digital Television Spectrum*, MM Docket No. 97-247, *Report and Order* (adopted Nov. 19, 1998; released Nov. 19, 1998) [hereinafter Ancillary Use Order]. The '96 Act required the FCC to levy such a fee to recover some of the value that would have been received had ancillary services been licensed through auctions. 47 U.S.C. § 336(e)(2) (Supp. V 1999).

<sup>53</sup> Second Report and Order, *supra* note 27, ¶ 65.

<sup>54</sup> Fifth Report and Order, *supra* note 16, ¶ 28.

<sup>55</sup> See *id.* ¶ 41.

<sup>56</sup> See Tentative Decision, *supra* note 12, ¶ 1. The FCC's advanced television proceedings had begun to explore "new television technologies designed to improve significantly upon television picture." 1987 NOI, *supra* note 7, ¶ 1. Although the Commission had avoided a premature definition of ATV programming, see Third Report and Order, *supra* note 50, ¶ 76, improved video and audio continued to provide the basis for the FCC's early DTV decisions. For exam-

tential role that digital television would play in the nation's evolving information infrastructure.<sup>57</sup> During its deliberations on a DTV transmission standard, the FCC began to insist on compatibility with computer applications in order to ensure "seamless, interactive, user driven access to the widest range of information," particularly video-rich applications.<sup>58</sup> Additionally, because the government plans to auction off NTSC channels at the end of the transition, the FCC believes that the public has a monetary interest in the success of DTV.<sup>59</sup>

One theme has remained constant throughout the FCC's DTV proceedings. The Commission has held to the belief that DTV is necessary to enable broadcasters to compete in a converging information marketplace, and has viewed emerging capabilities such as multicasting and ancillary use

as additional means to this end.<sup>60</sup>

## PUBLIC INTEREST REGULATION IN THE DIGITAL AGE

The Telecommunications Act of 1996 expressly provides that DTV broadcasters will be subject to public interest obligations:

[N]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest.<sup>61</sup>

Prior to the '96 Act, the Commission's DTV proceedings "reflect[ed] the assumption that pub-

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ple, the FCC's decision to abandon proposals for an NTSC-compatible signal was based on the capabilities of HDTV. See First Report and Order, *supra* note 22, at ¶ 7-8; BRINKLEY, *supra* note 12, at 114-16. Moreover, in declining to reduce the bandwidth available to broadcasters, the FCC relied on the fact the full benefits of DTV, including HDTV, required a 6MHz license. See Fifth Report and Order, *supra* note 16, ¶ 12. Similarly, the Commission reasoned in 1992:

We are awarding broadcasters a second 6 MHz channel on an interim basis to permit them to make a transition to ATV. We see no reason to permit use of the second channel for non-ATV programs that differ from those broadcast on the associated NTSC channel. Thus, in the event we adopt a phased-in simulcast requirement, we would nonetheless expect programming on the ATV channel to take full advantage of the technical capabilities of the ATV mode.

Second Report and Order, *supra* note 27, ¶ 65.

<sup>57</sup> See Fourth NPRM, *supra* note 23, ¶ 18; Certainly broadcasters did not want to tie their hands with HDTV. They had realized from the beginning that enhanced picture alone would likely provide little or no additional revenue to offset the investment needed to upgrade equipment. See BRINKLEY, *supra* note 12, at 64-68, 204-09. The ability to offer subscription services, on the other hand, promised a variety of revenue streams. The disingenuity of avoiding re-allotment of UHF spectrum by preaching the virtue of HDTV while escaping any commitment to HDTV programming did not go unnoticed. See *id.* at 289-93, 308-11, 315-16. But political winds in Washington had shifted. Although the consumer electronics industry had invested millions of dollars in an HDTV system in the hopes of capturing the receiver market, the Internet had exploded across America and its future was anyone's guess. Moreover, Vice President Gore, along with newly appointed Chairman Reed Hundt, was far more concerned with integrating digital television into the National Information Infrastructure than he was in "pretty pictures." See *id.* at 288-89, 298-304, 327-28, 354-55.

We do not know what consumers may demand and support. Since broadcasters have incentives to discover the preferences of consumers and adapt their service offerings accordingly, we believe it is prudent to leave the

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choice up to broadcasters so that they may respond to the demands of the marketplace. A requirement now could stifle innovation as it would rest on a priori assumptions as to what services viewers would prefer. Broadcasters can best stimulate consumers' interest in digital services if able to offer the most attractive programs, whatever form those may take, and it is by attracting consumers to digital, away from analog, that the spectrum can be freed for additional uses. Further, allowing broadcasters flexibility as to the services they provide will allow them to offer a mix of services that can promote increased consumer acceptance of digital television, which, in turn, will increase broadcasters' profits, which, in turn, will increase incentives to proceed faster with the transition.

Fifth Report and Order, *supra* note 16, ¶ 42.

Although the transition to DTV proceeded without any commitment to HDTV, the lack of emphasis on HDTV created a backlash in Congress during deliberations on the '96 Act. Representatives were considerably less inclined to give broadcasters a second license for free, if that license was going to be used for subscription services. See BRINKLEY, *supra* note 12, at 321-24, 337-47. In the end, however, the political situation could not have been more favorable to broadcasters. Broadcasters made a number of public pledges to offer HDTV, ensuring that the second licenses were given, not sold. Yet Chairman Hundt's interest in innovative digital services ensured that none of these promises were reduced to an enforceable commitment. See *id.* at 345-47, 352-53, 359-66.

<sup>58</sup> See COMMITTEE ON APPLICATIONS AND TECHNOLOGY, TECHNOLOGY POLICY WORKING GROUP, ADVANCED DIGITAL VIDEO AND THE NATIONAL INFORMATION INFRASTRUCTURE: TECHNOLOGY POLICY WORKING GROUP PROJECT, February 15, 1995, available at <http://nii.nist.gov/pubs/adtv/adtv.html> (last modified Mar. 8, 1995); Fourth NPRM, *supra* note 23, ¶ 18 n.19 (citing an earlier version of the NIST report).

<sup>59</sup> See *supra* note 41 and accompanying text.

<sup>60</sup> See *supra* note 28 and accompanying text.

<sup>61</sup> 47 U.S.C. 336(d) (Supp. V 1999).



lic interest obligations would attach to ATV broadcasting. Indeed, that broadcasters 'have an obligation to serve the public interest' is one of our reasons for limiting initial eligibility for ATV channels to existing broadcasters."<sup>62</sup> Pursuant to the '96 Act, the Commission formally announced in 1997: "As we authorize digital service, however, broadcast licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast licensees. Broadcasters and the public are also on notice that the Commission may adopt new public interest rules for digital television."<sup>63</sup>

#### A. Broadcast and the Public Interest

Broadcasters are said to be "public trustees:" in return for a free, exclusive license to exploit a valuable public resource, the broadcaster undertakes an obligation to serve the interests of the community.<sup>64</sup> This duty to serve the public interest has been a fundamental part of broadcast regulation since the Hoover administration, although its logical and constitutional basis has remained elusive.<sup>65</sup> The public trustee regulatory model, currently codified at 47 U.S.C. § 301 *et seq.* (1994), is part of the compromise Congress fashioned be-

tween full, private ownership of the spectrum and a system of common carrier regulation.<sup>66</sup> This compromise is credited with fostering the development of the broadcast industry while at the same time preserving a measure of public control over a national resource.<sup>67</sup>

While not affirmatively obligating broadcasters to serve the public interest, Section 303 authorizes the Commission to perform certain regulatory functions "from time to time, as the public convenience, interest, or necessity requires." Moreover, under Sections 309 and 310, the grants, modifications, renewals, and transfers of licenses are subject to the FCC's determination that the "public interest, convenience, or necessity would be served" thereby.

Courts, commissioners, and commentators have adopted various definitions of "public interest" over the years. The Supreme Court has described the public interest standard as a "comparative and not an absolute standard when applied to broadcasting stations."<sup>68</sup> In *NBC v. United States*, 319 U.S. 190 (1943), the Court stated generally, "The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'"<sup>69</sup> At its most basic level, the obligation to

<sup>62</sup> Fourth NPRM, *supra* note 23, ¶ 33; *see also id.* ¶ 34 ("We remain committed to enforcing our statutory mandate to ensure that broadcasters serve the public interest.").

<sup>63</sup> Fifth Report and Order, *supra* note 16, ¶ 50; *see also id.* ¶ 48 ("In enacting [§ 336(d)], Congress clearly provided that broadcasters have public interest obligations on the program services they offer, regardless of whether they are offered using analog or digital technology."); *id.* ¶ 49 ("In the digital television era, although many aspects of the business and technology of broadcasting may be different, broadcasters will remain trustees of the public's airwaves.").

<sup>64</sup> *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1967) ("Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."); BENJAMIN ET AL., *supra* note 1, ch. 6; ZUCKMAN ET AL., *supra* note 1, at 115-226.

<sup>65</sup> Regulation based on the public trustee model was one of several Hoover Administration concepts that were found to violate the Radio Act of 1912, which was construed by the courts not to provide authority to regulate broadcasting beyond the initial license grant. *See Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (D.C. Cir. 1923); *see also NBC v. United States*, 319 U.S. 190, 210-15 (1943); BENJAMIN ET AL., *supra* note 1, at 1.11. Congress subsequently codified the public trustee model in the Radio Act of 1927. Pub. L. No. 69-632, 44 Stat. 1162. The 1927 Act was replaced by the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, which retained the public trustee model. Constitutional attacks on the public trustee model are discussed *infra*, Part III.

<sup>66</sup> Congress expressly retained government ownership of the airwaves:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

47 U.S.C. § 301 (1994).

Congress, however, declined to impose a common carrier regime on broadcast. Rather than require licensees to make their frequencies available to the public on a first-come, first-served basis, the public trustee model relies on broadcasters' editorial discretion in selecting content. *See, e.g.*, *Fed. Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]." (internal quotation omitted) (alteration in original)).

<sup>67</sup> *See* CHARTING THE DIGITAL BROADCAST FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS at 18-19 (1998) [hereinafter GORE REPORT].

<sup>68</sup> *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 n.2 (1940).

<sup>69</sup> *NBC*, 319 U.S. at 216 (quoting 47 U.S.C. § 303(g) (1994)).

serve the public interest concerns "the ability of the licensee to render the best practicable service to the community reached by his broadcasts."<sup>70</sup> To a large extent, the Court has deferred to the judgment of the Commission, noting that the public interest standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit," and "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."<sup>71</sup>

The FCC, in turn, has varied its approach to public interest regulation over the years.<sup>72</sup> For a time, the FCC mandated the methods by which broadcasters ascertained and addressed the needs and interests of their communities and imposed rigid standards for decency, programming format and advertising.<sup>73</sup> Over the last three decades, however, the Commission has deferred to viewer preferences, finding that "market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities."<sup>74</sup> The FCC believes that these incentives promote the public interest more effectively and efficiently than traditional command-and-control regulation.<sup>75</sup>

The '96 Act requires the FCC to renew broadcast licenses—its principal source of leverage—if

the broadcaster has served the public interest and committed no serious or abusive violations of the code or Commission rules.<sup>76</sup> Current FCC regulations require broadcasters to file a quarterly statement describing their programming dealing with community issues, which is evaluated by the Commission during renewal proceedings.<sup>77</sup> The Commission, however, no longer considers competing applications during renewal hearings,<sup>78</sup> and, as discussed above, the FCC has abandoned attempts to quantify the public interest standard. Moreover, the Commission has shifted its focus away from the individual licensee to the overall range of programming available to viewers: "It appears, therefore, that the failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations. In this respect, market demand is determining the appropriate mix of each licensee's programming."<sup>79</sup>

In addition to the broader public trustee model, Congress has imposed specific public interest obligations on broadcasters in six areas. First, the Children's Television Act of 1990 ("CTA") requires the Commission, when renewing licenses, to consider whether the licensee "has served the educational and informational needs of children through the licensee's overall programming."<sup>80</sup> Second, Congress imposes a number of obligations concerning political cam-

<sup>70</sup> *FCC v. Sanders Radio Station*, 309 U.S. 470, 475 (1940), *quoted in NBC*, 319 U.S. at 216.

<sup>71</sup> *Pottsville Broad. Co.*, 309 U.S. at 138.

<sup>72</sup> For a summary of current public interest regulations, see MASS MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION, THE PUBLIC AND BROADCASTING, available at [http://www.fcc.gov/Bureaus/Mass\\_Media/Factsheets/pubroad.pdf](http://www.fcc.gov/Bureaus/Mass_Media/Factsheets/pubroad.pdf) (last visited Sept. 27, 2002) [hereinafter MASS MEDIA BUREAU, THE PUBLIC AND BROADCASTING].

<sup>73</sup> The Commission listed specific categories of programming it believed served the public interest and required consultation with community leaders. See *Programming Inquiry*, 44 F.C.C. Rcd 2303, 2312 (1960) (en banc); ZUCKMAN ET AL., *supra* note 1, at 171-72.

<sup>74</sup> In its 1984 Report and Order on Television Deregulation, the FCC eliminated regulations concerning local, news, and public affairs programming, the methods by which broadcasters ascertained the needs and interests of their communities, record-keeping duties, and maximum commercials per hour. 98 F.C.C. 2d 1076, ¶ 2 (1984) [hereinafter *Deregulation Report*]; see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981); BENJAMIN ET AL., *supra* note 1, at 39-41; ZUCKMAN ET AL., *supra* note 1, at 119-21 (1999) ("The Commission assumed that the remote control is a better regulator of broadcaster behavior than the government.").

<sup>75</sup> For example, studies showed that consumer demand for local and informational programming led to airtime levels consistently higher than those set by the FCC. See *Deregulation Report*, *supra* note 74, ¶¶ 10-19. Accordingly, to the extent that programming exceeded regulatory standards, the cost of operating the regulatory regime yielded no benefit. *But see* Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 503, 514-22 (2000) (arguing that "[t]he economic ideal of 'consumer sovereignty' is ill-suited to the communications market") [hereinafter Sunstein].

<sup>76</sup> See 47 U.S.C. § 309(k) (Supp. V 1999).

<sup>77</sup> See 47 C.F.R. §§ 3526(a)(8) & (9) (2000); *Cowles Broadcasting, Inc.*, 86 F.C.C. 2d 993, ¶ 4 (1981), *aff'd sub nom. Cent. Florida Enter., Inc. v. FCC*, 683 F.2d 503, 503 (D.C.Cir.1982).

<sup>78</sup> See 47 U.S.C. § 309(k)(4) (Supp. V 1999); see also *In Re Implementation of Sections 204(a) and 204(c) of the Telecomm. Act of 1996 (Broad. License Renewal Procedures)*, *Order*, 11 F.C.C. Rcd. 6363, ¶ 3 (1996) (abolishing comparative hearings for renewal applicants).

<sup>79</sup> *Deregulation Report*, *supra* note 74, ¶ 22.

<sup>80</sup> 47 U.S.C. § 303b(a)(2) (1994). Pursuant to this authority, the FCC adopted a processing guideline under which licensees that air three hours per week of programming specifically designed to educate and inform children will be given staff level approval of their renewal applications, thereby avoiding the full Commission inquiry under the

paings, including the "equal time"<sup>81</sup> and "lowest unit charge"<sup>82</sup> rules. Third, Congress has made it a crime to broadcast "obscene" programming<sup>83</sup> and has restricted the broadcast of "indecent" programming to between ten o'clock at night and six o'clock in the morning.<sup>84</sup> Fourth, Congress has required that television manufacturers include a "V-chip" in all new television sets larger than thirteen inches.<sup>85</sup> The V-chip allows viewers to block out certain content by reading embedded, descriptive data transmitted along with the programming.<sup>86</sup> Fifth, broadcasters are subject to a number of consumer protection and public safety rules.<sup>87</sup> Finally, Congress has sought to enhance television access for the hearing and visually impaired through closed captioning and other technologies.<sup>88</sup>

To the extent that these specific obligations target market failures—or politically charged issues—they have resisted the trend towards deregulation. In enacting the CTA, for example, Congress found that market forces were not suffi-

cient to ensure that commercial stations would provide children's educational and information programming. Because over-the-air commercial broadcast stations earn their revenues from the sale of advertising time, the FCC has reasoned that broadcasters have little incentive to promote children's television where audiences are relatively small.<sup>89</sup> The disincentive is even greater for educational programs for children.<sup>90</sup> Similarly, Congress found that market forces may produce a "race to the bottom" with respect to indecency and violence.<sup>91</sup>

Not surprisingly, broadcasters have favored deregulation and continue to argue that the market is a far better judge of what the public is interested in than the FCC.<sup>92</sup> As one broadcasting association commented, "With the ever-increasing competition in the information marketplace, stations have even more incentive to provide such programming and locally-oriented service in the digital era."<sup>93</sup>

Critics of deregulation—the self-styled advo-

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CTA. See *In Re Policies and Rules Concerning Children's Television Programming, Report and Order*, 11 F.C.C.R. 10660, ¶¶ 4–5 (1996). The CTA also requires the FCC to regulate the amount of commercial advertising aired during children's programming. See § 102, 104 Stat. at 996-97 (codified as amended at 47 U.S.C. § 303a (1994)).

<sup>81</sup> See 47 U.S.C. § 315(a) (1994) (requiring broadcasters who give airtime to one candidate for public office to "afford equal opportunities to all other such candidates for that office . . .").

<sup>82</sup> See *id.* at § 315(b) (requiring that, for airtime during the forty-five days preceding a primary election and the sixty days preceding a general election, broadcaster may only charge candidates the "lowest unit charge of the station for the same class and amount of time for the same period").

<sup>83</sup> See 18 U.S.C. § 1464 (1994); see also 47 C.F.R. § 73.3999 (2000) (enforcing 18 U.S.C. § 1464).

<sup>84</sup> 47 U.S.C. § 303 (1994); see also *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding indecent programming restriction). Negative restrictions on speech such as limitations on the broadcast of indecent programming are analyzed under a different First Amendment framework than are other affirmative public interest obligations. See *infra* note 263.

<sup>85</sup> 47 U.S.C. § 303(x) (Supp. V 1999).

<sup>86</sup> See generally J.M. Balkin, *Media Filters, the V-chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1131 (1996) (discussing the legal and policy implications of filtering technology) [hereinafter Balkin].

<sup>87</sup> See, e.g., 15 U.S.C. § 1335 (1994) (prohibiting cigarette advertisements); 47 U.S.C. § 317 (1994) (mandating identification of persons paying for broadcast programming); 47 C.F.R. § 11.1 (2000) (Emergency Alert System); 47 C.F.R. § 73.1217 (2000) (prohibiting hoaxes). The CTA reaffirmed the Commission's responsibility to ensure that broadcasters do not engage in excessive or abusive advertising practices. See 47 U.S.C. §§ 303(a-b), 394 (requiring that the Commis-

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sion limit the permissible amount of commercial advertising aired during children's programming); 47 C.F.R. § 73.670 (2000) (limiting advertising on programs directed at children age 12 and under to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays). See *In re Public Interest Obligations of Television Broad. Licensees, Notice of Inquiry*, MM Dkt No. 99-360, at ¶ 12 (Mar. 27, 2000).

<sup>88</sup> See 47 U.S.C. § 613 (Supp. V 1999).

<sup>89</sup> See S. REP. NO. 101-227, at 5-9 (1989), reprinted in 1990 U.S.C.C.A.N. 1628, 1635; *In Re Policies and Rules Concerning Children's Television Programming, Report and Order*, 11 F.C.C. Rcd. 10,660, ¶¶ 14-24, 29-46 (1996).

<sup>90</sup> See *id.* at ¶¶ 29-31.

<sup>91</sup> See Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1091 (1996) [hereinafter Hundt, *The Public's Airwaves*].

<sup>92</sup> See Comments of Belo, *In re Public Interest Obligations of TV Broadcast Licensees*, MM Dkt No. 99-360, at 6-7 (Mar 27, 2000); see also Comments of CBS Corp., *In Re Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, at 12 (Mar. 27, 2000) (citing local news, weather and disaster information as examples of broadcasters' commitment to the public interest); Comments filed in the Commission's Digital Public Interest inquiry can be accessed in PDF format on the FCC's website at [http://gullfoss2.fcc.gov/cgi-bin/ws.exe/prod/ecfs/comsrch\\_v2.htm](http://gullfoss2.fcc.gov/cgi-bin/ws.exe/prod/ecfs/comsrch_v2.htm). Of course, the broadcast industry likely realizes the difficulty enforcing vague standards as opposed to specific requirements. See Hundt, *The Public's Airwaves*, *supra* note 91, at 1095.

<sup>93</sup> See Comments of Belo, *In re Public Interest Obligations of TV Broadcast Licensees*, MM Dkt No. 99-360, at 3 (Mar 27, 2000); see also *id.* at 13 ("Thus, to compete and thrive in the ever-changing information marketplace, broadcasters must focus on their principle strength—the fact that they provide locally-oriented television and public interest services.").

cates of the public interest—complain that the Commission’s definition of the public interest includes too much of what broadcasters provide for profit. As former Chairman Hundt recently wrote, “The FCC essentially dismantled the public interest standard in the early 1980s by conflating the ‘public interest’ with anything sponsors will support.”<sup>94</sup> The former Chairman went further stating:

By providing news, sports, and entertainment for free, and by responding to market forces and providing programming that people want to watch and advertisers want to support, broadcasters undeniably serve the public. . . . But it is clear that Congress meant to require broadcasters to do more than what they would do anyway in order to compete in the video marketplace for audience and for advertising revenue. There would be no need for the Commission to determine whether a licensee is serving the public interest if all that means is that the broadcaster is in business competing against other broadcasters and other providers of video programming, such as cable operators and operators of satellite systems. Clearly, broadcasters are subject to distinct public interest obligations not imposed on other media.<sup>95</sup>

In the Commission’s Notice of Inquiry on the subject, Commissioner Tristani reasserted the argument that the public interest must mean something more than what sponsors will support:

The public interest standard must have some substantive meaning. It cannot simply be “whatever interests the public.” That is simply an attempt to deprive the term of any real meaning. It also assumes that Congress puts meaningless requirements in statutes. After all, if a broadcaster’s private interests always served the public interest, Congress didn’t have to say a word. Congress does not enact meaningless or unnecessary language - much less language that has been as scrutinized and debated over the years as much as the public interest standard.<sup>96</sup>

Advocates of greater public interest regulation thus insist that the Commission’s market-oriented definition of the public interest ignores a more crucial question: whether the broadcaster has really done anything *in return* for the license as opposed to exploiting the license for financial gain. Similarly, while the FCC’s global focus on the

overall range of programming available to viewers may be allocatively efficient. Insofar as it seeks to mandate no more programming than the public wishes to watch, critics argue that it ignores the individual obligations of each licensee as a public trustee, as well as the substantial benefit that the broadcaster receives in the form of a free license.

## B. Digital Television and the Future of Public Interest Regulation

The transition to digital television, along with the advent of spectrum auctions, has reinvigorated the entire debate over public interest obligations for over-the-air television broadcasters. To some advocates of increased public interest obligations, the advent of digital television presents a milestone at which to reassess the current regulatory regime. These advocates matter-of-factly reason, “[D]igital television broadcasting is a new service, requiring a new look at the ‘public interest, convenience, and necessity standard’ so firmly imbedded in broadcast policy.”<sup>97</sup>

To other advocates of increased obligations, the transition to DTV provides more than a mere *opportunity* to reassess public interest regulation; DTV is a *reason* to increase regulation. These advocates are driven by the popular sentiment that the transition to digital television has resulted in a substantial windfall for broadcasters, and that the duty to serve the public interest should be expanded as a result. On the one hand, the Balanced Budget Act of 1997 provides that broadcast licenses will be granted through auctions, but specifically exempts the digital television licenses granted to existing television broadcasters.<sup>98</sup> In the eyes of critics, television broadcasters continue to use their licenses free of charge while others are forced to pay.<sup>99</sup> On the other hand, the versatility of DTV now allows broadcasters to exploit a valuable national resource to generate

<sup>94</sup> Hundt, *The Public’s Airwaves*, *supra* note 92, at 1094.

<sup>95</sup> *Id.* at 1090.

<sup>96</sup> 1999 NOI, *supra* note 2, at ¶1. Separate Statement of Commissioner Gloria Tristani.

<sup>97</sup> Comments of People for Better TV, *In Re* Public Interest Obligations of TV Broadcast Licensees, MM Dkt No. 99-360, at 2 (Mar. 27, 2000).

<sup>98</sup> 47 U.S.C. § 309(j) (Supp. V 1999). The statute also exempts public safety radio services and noncommercial educational and public broadcast stations. *See id.* § 309(j)(2)(B).

<sup>99</sup> *See infra* notes 118-47 and accompanying text (discuss-

ing what has been called the “great giveaway”). While initial license assignment is done through comparative hearing, licensees are free to transfer their licenses to third parties for consideration, thereby creating a private market for broadcast licenses. *See* 47 U.S.C. § 310(a) (1994). The Commission must approve the transfer by finding that it will serve the public interest, but may not consider whether the public interest would be better served by another transferee. *See also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 604 (1981) (allowing Commission to rely on market forces to determine programming format).

substantial revenues in addition to advertising on one programming stream.<sup>100</sup>

Government policymakers have responded to the popular sentiment that public interest obligations should be reexamined as the conversion to DTV takes place. In 1997, President Clinton appointed an Advisory Committee to make recommendations on DTV's impact on public interest regulation.<sup>101</sup> In December 1998, the committee, known as the "Gore Committee" because of its duty to report to Vice President Gore, offered ten recommendations concerning specific public interest obligations that DTV broadcasters should assume in exchange for the free use of a new digital channel:

**1. Disclosure of Public Interest Activities by Broadcasters:** Digital broadcasters should be required to make enhanced disclosures of their public interest programming and activities on a quarterly basis, using standardized checkoff forms that reduce administrative burdens and can be easily understood by the public.

**2. Voluntary Standards of Conduct:** The National Association of Broadcasters, acting as the representative of the broadcasting industry, should draft an updated voluntary Code of Conduct to highlight and reinforce the public interest commitments of broadcasters.

**3. Minimum Public Interest Requirements:** The FCC should adopt a set of minimum public interest requirements for digital television broadcasters in the areas of community outreach, accountability, public service announcements, public affairs programming, and closed captioning.

**4. Improving Education Through Digital Broadcasting:** Congress should create a trust fund to ensure enhanced and permanent funding for public broadcasting to help it fulfill its potential in the digital television environment and remove it from the vicissitudes of the political process.

When spectrum now used for analog broadcasting is returned to the government, Congress should reserve the equivalent of 6 MHz of spectrum for each viewing community in order to establish channels devoted specifically to noncommercial educational programming. Congress should establish an orderly process for allocating the new channels as well as provide adequate funding from appropriate revenue sources. Broadcasters that choose to implement datacasting should transmit information on behalf of local schools, libraries, community-based nonprofit organizations, governmental bodies, and public safety institutions. This activity should count toward fulfillment of a digital broadcaster's public interest obligations.

**5. Multiplexing and the Public Interest:** Digital television broadcasters who choose to multiplex, and in doing so reap enhanced economic benefits, should have the flexibility to choose between paying a fee, providing a multicasted channel for public interest purposes, or making an in-kind contribution. Given the uncertainties of this still-hypothetical market, broadcasters

should have a 2-year moratorium on any fees or contributions to allow for experimentation and innovation. Small-market broadcasters should be given an opportunity to appeal to the FCC for additional time. The moratorium should begin after the market penetration for digital television reaches a stipulated threshold.

**6. Improving the Quality of Political Discourse:** If Congress undertakes comprehensive campaign finance reform, broadcasters should commit firmly to do their part to reform the role of television in campaigns. This could include repeal of the "lowest unit rate" requirement in exchange for free airtime, a broadcast bank to distribute money or vouchers for airtime, and shorter time periods of selling political airtime, among other changes. In addition, the television broadcasting industry should voluntarily provide 5 minutes each night for candidate-centered discourse in the 30 days before an election. Finally, blanket bans on the sale of airtime to all State and local political candidates should be prohibited.

**7. Disaster Warnings in the Digital Age:** Broadcasters should work with appropriate emergency communications specialists and manufacturers to determine the most effective means to transmit disaster warning information. The means chosen should be minimally intrusive on bandwidth and not result in undue additional burdens or costs on broadcasters. Appropriate regulatory authorities should also work with manufacturers of digital television sets to make sure that they are modified to handle these kinds of transmissions.

**8. Disability Access to Digital Programming:** Broadcasters should take full advantage of new digital closed captioning technologies to provide maximum choice and quality for Americans with disabilities, where doing so would not impose an undue burden on the broadcasters. These steps should include the gradual expansion of captioning on public service announcements, public affairs programming, and political programming; the allocation of sufficient audio bandwidth for the transmission and delivery of video description; disability access to ancillary and supplementary services; and collaboration between regulatory authorities and set manufacturers to ensure the most efficient, inexpensive, and innovative capabilities for disability access.

**9. Diversity in Broadcasting:** Diversity is an important value in broadcasting, whether it is in programming, political discourse, hiring, promotion, or business opportunities within the industry. The Advisory Committee recommends that broadcasters seize the opportunities inherent in digital television technology to substantially enhance the diversity available in the television marketplace. Serving diverse interests within a community is both good business and good public policy.

**10. New Approaches to Public Interest Obligations in the New Television Environment:** Although the Advisory Committee makes no consensus recommendation about entirely new models for fulfilling public interest obligations, it believes that the Administration, the Congress, and the FCC should explore alternative approaches that allow for greater flexibility and efficiency while affirmatively serving public needs and interests.<sup>102</sup>

<sup>100</sup> See *supra* note 43 and accompanying text.

<sup>101</sup> See GORE REPORT, *supra* note 67.

<sup>102</sup> *Id.* at xiii-xv.

Following its receipt of the Gore Report, the FCC issued a Notice of Inquiry on December 20, 1999 seeking comment on the subject.<sup>103</sup> Among other things, the FCC sought comments on: (1) whether “a licensee’s public interest obligations attach to the DTV channel as a whole, such that a licensee has discretion to fulfill them on one of its program streams, or to air some of its public interest programming on more than one of its program streams” or whether “the obligations attach to each program stream offered by the licensee”<sup>104</sup> as well as to ancillary and supplemental uses<sup>105</sup>; (2) proposals to increase the number of required hours of children’s programming or the amount of information regarding content transmitted under the voluntary ratings system;<sup>106</sup> (3) the Gore Committee’s recommendations regarding ascertainment studies and programming disclosure obligations;<sup>107</sup> (4) proposals to increase the amount of emergency and disaster information broadcasters should be required to transmit;<sup>108</sup> (5) whether the FCC should impose minimum public interest requirements for broadcasters as opposed to voluntary industry measures;<sup>109</sup> and (6) measures to enhance access to the media for persons with disabilities and to provide ancillary services to those individuals.<sup>110</sup>

Arguments for expanded public interest obligations, including those made by the Gore Commission and before the FCC, contain little consideration of whether and how the *technology* of digital television should impact broadcasters’ duty to serve the public interest. Instead, these argu-

ments perceive DTV as a milestone from which to reexamine the entire public interest debate. Besides the alleged windfall to have been bestowed on broadcasters, however, these arguments fail to explain why digital television requires a change in public interest regulation.

Commissioner Tristani, for example, appeared to simply take the Gore Committee’s queue: “This proceeding is long overdue. The public interest standard—the bedrock obligation of those who broadcast over the public airwaves—has fallen into an unfortunate state of disrepair over the years. It’s time to put up the scaffolding and get the restoration underway.”<sup>111</sup> Years earlier, Chairman Hundt characterized the issue as follows: “Now, as the Commission considers various critical issues relating to the new spectrum set aside for digital broadcast television, we have a rare opportunity. We have a second chance to get television regulation right, to put real meaning into the public interest.”<sup>112</sup>

Conversely, broadcasters resist any change in public interest regulation as a threat to an industry in its infancy, but do not address the very real differences in their broadcasting capabilities and revenue-generating opportunities. Broadcasters have taken advantage of the lack of concrete technological discussion and have rested in part on the argument that “the agency should resist calls to expand the public interest obligations of television broadcast licensees simply because they will be utilizing a new technology to provide broadcast service to the public.”<sup>113</sup> As CBS put it:

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tee’s recommendation that “television broadcasters provide five minutes each night between 5:00 p.m. and 11:35 p.m. . . for ‘candidate-centered discourse’ thirty days before an election.” *Id.* ¶ 37.

<sup>111</sup> *Id.*, Separate Statement of Commissioner Gloria Tristani.

<sup>112</sup> Hundt, *A New Paradigm*, *supra* note 3, at 529; *see also* Reed Hundt, *A New Paradigm for Digital Television* (Sept. 30, 1996), at <http://www.fcc.gov/Speeches/Hundt/spreh639.txt> (last visited Jan. 27, 2002).

[T]he answer to the question of how much public interest programming is enough requires, first, an estimate of the revenues necessary to sustain the economic success of digital TV, and second, a statement of what is missing in our broadcast media today. Little or no debate has occurred in Congress or in the FCC on the connection of either of these broad and terrifically important questions to digital TV.

*Id.*

<sup>113</sup> Comments of Belo, *In re* Public Interest Obligations of TV Broadcast Licensees, MM Dkt No. 99-360, at 3 (Mar. 27, 2000).

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<sup>103</sup> See 1999 NOI, *supra* note 2, at 21660.

<sup>104</sup> *Id.* ¶ 11.

<sup>105</sup> See *id.* ¶ 13.

<sup>106</sup> See *id.* ¶ 12.

<sup>107</sup> See *id.* ¶¶ 15-17.

<sup>108</sup> See *id.* ¶¶ 18-19.

<sup>109</sup> See *id.* ¶¶ 20-22.

<sup>110</sup> See *id.* ¶¶ 23-28. The FCC was especially interested in hearing comment on several of the Gore Committee’s proposals, particularly proposals that would enhance diversity by requiring, *inter alia*, that multiplexing be regulated “so that broadcasters can create new opportunities for minority entrepreneurship through channel-leasing arrangements, partnerships and other creative business arrangements,” that “out of the returned analog spectrum one new 6MHz channel for each viewing community be reserved for noncommercial purposes . . .,” and that “broadcasters voluntarily redouble . . . hiring and promotion policies that result in significant representation of minorities and women in the decision-making positions in the broadcast industry.” *Id.* ¶ 32. Finally, the FCC requested comment on the proposals—closely tied to the campaign finance reform movement—to increase candidate access to the media, specifically the Gore Commit-

Despite [broadcasters'] admirable record, some see the transition from analog to digital television as an occasion to impose. . . extensive and burdensome new government regulations. Although these proposals are advanced in the name of the "public interest," in many cases they are little more than recycled versions of the regulatory policies of another era, properly abandoned by the Commission as unnecessary years ago.<sup>114</sup>

Similarly, Commissioner Furchtgott-Roth argued that many of the recommendations "have no discernable nexus to the transition to digital technology," and that "special interests have seized on this opportunity to wring as many concessions as possible out of broadcasters."<sup>115</sup> Similarly, Commissioner Powell questioned "why the mere use of a digital medium rather than an analog one justifies new public interest obligations."<sup>116</sup>

Consequently, there is a stark disconnect between the realities of digital television and conclusions on how public interest obligations should be defined in the digital age. Simply put, the realities on which advocates rely do not always justify the conclusions they draw. Advocates of greater public interest obligations have generally recycled arguments that have been made for decades, reframing them in terms of the alleged "great giveaway"—that DTV is a lobbying coup for broadcasters. For their part, broadcasters have relied on existing public interest programming, claiming that existing obligations are too burdensome while insisting that they are already voluntarily surpassing those obligations.<sup>117</sup> Essentially, advocates reiterate their objections to the government's decision to subsidize over-the-air broadcast television, and over-the-air broadcasters reiterate their discomfort with any federal regulation at all. While this debate will likely continue as long as television is a part of American culture, a closer examination of emerging digital technology

reveals nothing about DTV itself that justifies a change in the current public interest regime.

### C. The Great Giveaway

Perhaps the most contentious point of debate over DTV policy is whether broadcasters have been substantially enriched at the public's expense or whether they are instead making a costly and precarious investment in the nation's information infrastructure.<sup>118</sup> Many commentators continue to criticize the initial policy decisions regarding DTV. Their objection is that Congress and the FCC have essentially given "a national resource to an affluent industry in return for abstract gains."<sup>119</sup> They challenge the government's failure to exact tangible public interest commitments, not only as a general matter with regard to both NTSC and DTV broadcasts, but more specifically in light of the greater ability of DTV broadcasters to exploit ancillary uses beyond the single required free programming service.

The public has allowed broadcasters to build a business on rent-free public property in return for the broadcasters' promise that they will provide a service that will benefit the public. Now broadcasters want to build a new and improved business on more rent-free property while still holding their original allocation and not committing to the date they are going to give any of it back. This is a great deal for broadcasters. But is it a good deal for the public who will have to reinvest billions of dollars in television receivers in order to gain access to the new business, Advanced Television? The public should get the best deal when deciding who gets to use this public property, how they get to use it, and how it should improve the service that the Commission holds paramount: free, over-the-air broadcasting.<sup>120</sup>

Consequently, pragmatic questions on how public interest obligations will differ for digital technology have been largely overshadowed by

<sup>114</sup> Comments of CBS, Corp., *In re* Public Interest Obligations of TV Broadcast Licensees, MM Dkt No. 99-360, at iii (Mar. 27, 2000).

<sup>115</sup> 1999 NOI, *supra* note 2, at 21652, Separate Statement of Commissioner Harold Furchgott-Roth, Concurring in Part and Dissenting in Part.

<sup>116</sup> *Id.*, Concurring Statement of Commissioner Michael K. Powell.

<sup>117</sup> See, e.g., Comments of Belo, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 1 (Mar. 27, 2000).

<sup>118</sup> See Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 938-43 (1997) (criticizing the '96 Act as a classic example of rent-seeking by the broadcast industry) [hereinafter Hazlett].

<sup>119</sup> BENTON FOUNDATION, THE TRANSITION TO DIGITAL TELEVISION, at <http://www.benton.org/Policy/TV/atv.html> (last modified Jan. 7, 1997).

<sup>120</sup> *Id.*; accord. Comments of the Office of Communication, Inc. of the United Church of Christ et. al., *In Re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 3-4 (Mar. 27, 2000); Comments of the Center for Media Education, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 4 (Mar. 27, 2000); Comments of Children Now, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 6 (Mar. 27, 2000); Reply Comments of the Benton Foundation, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 11 (Mar. 27, 2000).



demand in some quarters for a reassessment of public interest regulation of television.

### 1. *The Decision to Give Away*

As discussed above, the FCC decided as early as 1990 to pursue a dual license transition initially restricted to existing broadcasters.<sup>121</sup> Yet the merits of granting an additional free license to broadcasters were hotly debated in Congress's deliberations during passage of the '96 Act. This was primarily due to Congress's realization that spectrum auctions were capable of generating billions of dollars for the Treasury. Previously, the FCC held a hearing to determine which user would best serve the public and simply awarded the license to the victor.<sup>122</sup> However, between 1993 and 1996, after enactment of the 1993 Balanced Budget Act, the FCC raised over \$20 billion in auction revenues<sup>123</sup> and "auction fever" became a driving influence underlying the '96 Act.<sup>124</sup>

Accordingly, then-Senate Majority Leader Robert J. Dole (R-Kan.) called the idea of granting DTV licenses for free a "'giveaway' worth up to

\$70 billion to TV broadcasters."<sup>125</sup> Dole, along with Senators on both sides of the aisle, labeled the dual license plan "corporate welfare."<sup>126</sup> Activists, journalists, and commentators have called the DTV licensing regime the "lobbying coup of the decade"<sup>127</sup> and a "rip-off on a scale vaster than dreamed of by yesteryear's robber barons."<sup>128</sup>

Concerns that the transition to DTV would unjustly enrich broadcasters were heightened by the Commission's flexible policy over use of the DTV channels.<sup>129</sup> Digital compression techniques make it possible to broadcast multiple signals within the 6MHz channel, but Congress and the Commission have required only that broadcasters provide one free SDTV service.<sup>130</sup> Broadcasters need not offer improved picture and audio and can use the bulk of their spectrum for non-television pay or subscription services, giving them a significant revenue-generating resource.

Broadcasters have rejected the great giveaway argument as a "myth."<sup>131</sup> Their principle argument is that the additional 6MHz license is a merely a "loan" to facilitate the FCC's goal of a seamless transition from NTSC to digital while

<sup>121</sup> See *supra* note 36 and accompanying text.

<sup>122</sup> See *In re* Implementation of Section 309(j) of the Communications Act, *Notice of Proposed Rulemaking*, 12 F.C.C. Rcd. 22363, ¶ 2 (1998).

<sup>123</sup> See Press Release, Federal Communications Commission, FCC Hits \$20 Billion Mark in Total Auction Revenues, at [http://ftp.fcc.gov/Bureaus/Wireless/News\\_Releases/nrwl6015.txt](http://ftp.fcc.gov/Bureaus/Wireless/News_Releases/nrwl6015.txt) (last visited Jan. 28, 2002).

<sup>124</sup> See BRINKLEY, *supra* note 12, at 321-24, 337-47, 352-53, 359-64.

<sup>125</sup> Ted Hearn, *Spectrum Debate Splits GOP Leaders*, MULTICHANNEL NEWS, Jan. 22, 1996, at 1, available at 1996 WL 8833114 [hereinafter Hearn]. Estimates of the value of DTV spectrum have ranged from a minimum of \$12.5 billion to \$70 billion. See Edmund L. Andrews, *Digital TV, Dollars and Dissent*, N.Y. TIMES, Mar. 18, 1996, at D1 [hereinafter Andrews]; Romesh Ratnesar, *A Bandwidth Bonanza: How the Networks Plan to Make Even More from a \$ 70 Billion Handout*, TIME, Sept. 1, 1997, at 60; see also Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1728 (1997) (between \$20 to \$132 billion) [hereinafter Logan]; Paul Farhi, *Broadcast Executives Say Dole Vented Anger at Them*, WASH. POST, Jan. 12, 1996, at F1, available at 1996 WL 3058482 (\$40 billion) [hereinafter Farhi].

<sup>126</sup> See Hazlett, *supra* note 118, at 938-40 (quoting Senators John Kerry (D-Mass.), Russ Feingold (D-Wisc.), John McCain (R-Ariz.), and Fred Thompson (R-Tenn.)); Farhi, *supra* note 125, at F1 (quoting Sen. Dole). Dole favored a plan proposed by Sen. Larry Pressler (R-S.D.) to put the licenses up for auction, see *id.*, and held up passage of the Telecommunications Act in January 1996 until an agreement was reached not to award DTV licenses until Congress addressed spectrum reform. Hazlett, *supra* note 118, at 940. The pivotal

break for the '96 Act may very well have been Dole's decision to run for President. Shortly thereafter, the new Senate Majority Leader Trent Lott and House Speaker Newt Gingrich sent a letter to the FCC canceling the Dole agreement and instructing the Commission to proceed with the issuance of DTV licenses. See Hazlett, *supra* note 118, at 940; Paul Taylor, *Superhighway Robbery*, NEW REPUBLIC, May 5, 1997, at 20 [hereinafter Taylor].

<sup>127</sup> Taylor, *supra* note 126, at 20.

<sup>128</sup> Neil Hickey, *What's at Stake in the Spectrum War? Only Billions of Dollars and the Future of Television*, 35 COLUM. JOURNALISM REV. 39, 39 (1996) [hereinafter Hickey]; Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1703, 1739-40 (1999) (arguing that "[t]he failure to adhere to a market paradigm for allocating the spectrum is startling") [hereinafter Krent & Zeppos]; Taylor, *supra* note 126, at 20 (quoting National Association of Broadcasters President Edward O. Fritts as claiming that "no one has more sway with members of Congress than the local broadcaster").

<sup>129</sup> See Hickey, *supra* note 128, at 39 ("The very real and very tantalizing possibility suddenly surfaced that each of the more than 1,500 television stations in the country—commercial and public—could become six television stations, with mind-boggling potential for profit."); Sean Somerville, *Sinclair to Shun High Definition TV for Channels*, BALTIMORE SUN, Aug. 17, 1997, at 1D ("Why would I do HDTV when I can spend \$30 million and become a multichannel enterprise?").

<sup>130</sup> Fifth Report and Order, *supra* note 16, ¶ 28; *supra* note 49 and accompanying text.

<sup>131</sup> Comments of Belo, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 18 (Mar. 27, 2000).



broadcasters and viewers upgrade their equipment.<sup>132</sup> At the end of the transition period, broadcasters will return their NTSC channel, resulting in a spectrum “wash.”<sup>133</sup> Moreover, under the ‘96 Act the FCC requires that broadcasters pay the government a fee of 5% of gross revenues received from spectrum use additional to the free programming service.<sup>134</sup> Broadcasters argue that without the additional DTV channel and the ability to exploit ancillary uses, penetration of DTV receivers will be delayed and the switch to digital will necessarily cause a more abrupt displacement of viewers who rely on analog broadcast.<sup>135</sup>

Broadcasters also argue that the focus on spectrum overlooks the “immense financial burdens associated with transitioning to digital services.”<sup>136</sup> They claim that “[m]aking broadcasters pay ‘would wreak havoc on the broadcast industry’ and ‘kill off digital altogether before it even has a chance to get off the ground.’”<sup>137</sup> Robert C. Wright, the president of NBC, characterized proposals to auction DTV spectrum as a “tax on broadcasters, forcing them to pay the government to stay in business.”<sup>138</sup>

The financial costs of DTV broadcasting are primarily the fixed costs of transmission equipment, for which estimates range between \$1 million to \$30 million per station.<sup>139</sup> High-definition programming already exists in abundant supply—most movies and prime-time programs were re-

corded on 35mm film, a high-definition format.<sup>140</sup> Additionally, DTV is a guaranteed market: by the end of 2006, NTSC broadcasts will cease, and DTV will be the only broadcast format.<sup>141</sup> Finally, broadcasters’ estimates do not account for the revenue potential of multicasting.

Yet even the most conservative equipment estimates exceed the value of some smaller stations,<sup>142</sup> and DTV has yet to meet its “killer app”—the use that will make everyone purchase a DTV set and create a return on broadcasters’ investments. The broadcasters’ concerns have been at the heart of the FCC’s proceedings on DTV since its beginning. As discussed in Part II, the FCC determined that a dual licensing regime initially limited to existing broadcasters would bring about the most rapid transition to DTV and the earliest recovery of spectrum.<sup>143</sup> Existing broadcasters had invested heavily in digital research and were in the best position to begin digital broadcast.<sup>144</sup> Moreover, simulcasting would “minimiz[e] broadcaster and consumer reliance on the ATV channel as a separately programmed service,” ensuring that viewers would retain access to broadcast television until DTV penetration had reached comfortable levels.<sup>145</sup> Broadcaster’s arguments are also reflected in the FCC’s decision to allow ancillary use of DTV spectrum.<sup>146</sup> The FCC’s rationale was that ancillary revenues would facilitate the transition to DTV, especially at the

<sup>132</sup> See Hearn, *supra* note 125, at 1 (quoting House Commerce Committee chairman Rep. Thomas Bliley (R-Va.) in a speech to Virginia broadcasters).

<sup>133</sup> See *supra* note 38 and accompanying text.

<sup>134</sup> See Ancillary Use Order, *supra* note 52, ¶ 20.

<sup>135</sup> See Andrews, *supra* note 125, at D1.

<sup>136</sup> Comments of Belo, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at iv (Mar. 27, 2000).

<sup>137</sup> See Hearn, *supra* note 125, at 1 (quoting House Commerce Committee chairman Rep. Thomas Bliley (R-Va.) in a speech to Virginia broadcasters).

<sup>138</sup> See Andrews, *supra* note 125, at D1. Broadcasters aired 30-second commercials showing clips of popular shows such as “Seinfeld,” “Jeopardy,” and “60 Minutes” fading to black with an announcer saying, “Some people in Washington want to tax local TV broadcasters billions of dollars in order to balance the budget.” The commercials ended with the announcer urging viewers to call their representatives and tell them to vote against the “TV tax”: “Call now you still can.” Hickey, *supra* note 128, at 39; Taylor, *supra* note 126, at 20.

<sup>139</sup> See BRINKLEY, *supra* note 12, at 204.

<sup>140</sup> See *id.* at 201.

<sup>141</sup> See *supra* note 38 and accompanying text. Broadcasters would certainly respond to this argument by defining the market to include all video services, as they did at the outset

of the advanced television inquiry. See *supra* note 11 and accompanying text.

<sup>142</sup> See Comments of Belo, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 19-21 (Mar. 27, 2000).

<sup>143</sup> See *supra* notes 27, 37-41 and accompanying text.

<sup>144</sup> See Second Report and Order, *supra* note 27, ¶¶ 4, 6. The FCC decided that once allotments for existing broadcasters were made, it would permit any qualified party to obtain a DTV license if technically feasible. See *id.* ¶ 7.

<sup>145</sup> See *id.* ¶ 59; First Report and Order, *supra* note 22, ¶ 8.

<sup>146</sup> See *supra* note 49. Thus, contrary to those who argue that non-DTV supplemental use constitutes an addition windfall to broadcasters, it appears that such use has always been considered desirable insofar as it extracts as much beneficial use out of DTV licenses as possible. Moreover, for some time NTSC broadcasters have been allowed to “utilize the vertical blanking interval to distribute textual communications unrelated to their main programming.” Tentative Decision, *supra* note 12, ¶ 153 n.177; Third Report and Order, *supra* note 50, ¶ 77. Nevertheless, if the FCC’s primary concern was simply the provision of a free SDTV service, it could have reduced the bandwidth allocated to broadcasters or auctioned the spectrum to others reserving “must-carry” rights for broadcasters. See Fifth Report and Order, *supra* note 16, ¶ 10.

early stages when DTV penetration was low.<sup>147</sup>

## 2. *Misplaced Criticism*

The windfall to broadcasters, therefore, is not the additional 6MHz license, the initial exclusive eligibility for that license or the ability to multicast pay services. Instead, advocates of greater public interest obligations are really objecting to the fundamental assumptions behind the DTV regulatory regime and not the policy decisions of that regime. Harold J. Krent and Nicholas S. Zeppos captured the two salient criticisms: first, “[t]he public interest in ensuring rapid development of high definition television per se is elusive,” and second, “No sound reason exists to think that broadcasters lacked the incentive to develop high definition television if they thought it would be profitable.”<sup>148</sup> It would appear that the two rationales are mutually exclusive: if there is public demand for DTV, then government subsidy would seem unnecessary. Yet, if no market incentive exists, it would seem hard to explain why digital television is in the public interest.

The government offers three reasons why digital television is in the public interest. The first is that the public interest would benefit from better picture and sound quality in television. As one broadcasting association stated: “[W]hen the DTV transition is complete, the public will receive very substantial benefits in the form of free over-the-air services with greatly improved signal quality . . . and expanded programming choices . . . In other words, the transition to DTV, *in and of itself*, serves the public interest.”<sup>149</sup> Of course, non-broadcast video providers were already experimenting with digital services so it is not entirely clear why broadcast digital television, *in and of itself*, is necessary to satisfy the public interest in picture quality and programming choices.<sup>150</sup> Furthermore, current regulations only require that broadcasters provide one “free digital video programming service the resolution of which is comparable to or better

than that of today’s service.”<sup>151</sup> That service need not be interactive, and the remaining services offered by broadcasters may only be offered on a subscription basis or may not even be targeted to the public at all. Therefore, even assuming that the public interest demands better video resolution and CD-quality sound, it is terribly difficult to reconcile DTV regulation with this premise.

Picture and audio quality were early objectives of DTV policy. As research on advanced television progressed, the benefit to the public was not “pretty pictures,” but the potential role that digital television would play in the nation’s evolving information infrastructure.<sup>152</sup> The second public interest identified by the government, therefore, is that digital television will facilitate the development of new technologies and communications services.<sup>153</sup> Again, even accepting this premise, it offers at best a tenuous explanation of current policy. DTV regulations give broadcasters no particular incentive to direct their ancillary use to new services. DTV broadcasters have no greater economic incentive to innovate than if their licenses were auctioned; they simply avoid the sunk cost of a license. Since non-broadcast entities were already experimenting with digital services, the only conceivable advantage to pursuing innovation through television broadcasters is the development of new services somehow linked to free broadcast television.

The fundamental public interest in DTV is therefore something intrinsic to broadcast television. Throughout its DTV proceedings, the Commission articulated a third public interest in free, over-the-air television itself:

Unlike many other countries, the United States has a strong and independent system of privately-owned and operated broadcast stations that transmit local and regional news, information, and entertainment as well as national and international programs. Therefore, initiating an advanced television system within the existing framework of local broadcasting will uniquely benefit the public and may be necessary to preserve the benefits of the existing system.<sup>154</sup>

<sup>147</sup> See Fifth Report and Order, *supra* note 16, ¶¶ 7, 33.

<sup>148</sup> Krent & Zeppos, *supra* note 128, at 1740.

<sup>149</sup> Comments of Belo, *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 19 (Mar. 27, 2000).

<sup>150</sup> See *supra* note 11 and accompanying text.

<sup>151</sup> Fifth Report and Order, *supra* note 16, ¶ 28.

<sup>152</sup> See *supra* notes 57-58 and accompanying text.

<sup>153</sup> See Fifth Report and Order, *supra* note 16, ¶ 31 (quoting Telecommunications Act of 1996, Pub. L. No. 104-104,

pmb., 110 Stat. 56, 56).

<sup>154</sup> Tentative Decision, *supra* note 12, ¶ 39.

Our objective is not to launch a new and separate video service . . . Rather, our goal is to encourage beneficial technical change in the existing terrestrial broadcast service by allowing broadcasters to assimilate ATV technology. Thus our intent is to preserve and improve the existing broadcast service and the benefits that this service delivers to the public. In addition, given the risks inherent in ATV, it appears to us that rapid development of

The Supreme Court has recognized Congress's policy of preserving free-over-the-air television service in other contexts. In *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) (*Turner I*), the Court had "no difficulty" concluding that the government's interest in free, over-the-air local broadcast television is "important."<sup>155</sup> "[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' . . . The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene."<sup>156</sup> Indeed, the public interest in free, over-the-air local broadcast television undergirding the Cable Act's must-carry provisions is a driving force behind the Commission's deliberations on carriage requirements for digital broadcasters.<sup>157</sup>

Accepting that broadcast digital television is in the public interest, the government's subsequent

policy decisions fall into place. Krent and Zeppos's second criticism is that "[n]o sound reason exists to think that broadcasters lacked the incentive to develop high definition television if they thought it would be profitable."<sup>158</sup> In other words, if there is a public interest in broadcast DTV, there should be a public demand for DTV, and a regulated, subsidized transition is unnecessary.

During its proceedings, however, the FCC purported to identify several market failures that justify a forced, subsidized transition to DTV. First, a natural shift to digital television threatens to displace NTSC viewers, cutting them off from this public necessity. The Commission therefore determined that a dual licensing regime is necessary to ensure the smoothest possible transition to DTV.<sup>159</sup> The Commission further reasoned that ancillary services would draw viewers away from NTSC before they would otherwise do so for enhanced picture quality alone.<sup>160</sup> These policy de-

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ATV broadcasting can be realized best by assigning suitable additional spectrum to existing licensees and applicants because of the considerable resources and expertise that licensees already have invested in the broadcast television system, and the possibility that additional spectrum could be used only by them.

*Id.* ¶ 136.

"At least initially it is our view that nothing in the public interest standard of the Act requires or suggests that transition to an improved broadcast service must, or should, be accompanied by major changes in the industry's ownership structure." *Id.* ¶ 137.

<sup>155</sup> See *Turner I*, 512 U.S. at 663. The Majority agreed that the cable must-carry provisions at issue served three interrelated interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." See *id.* at 662.

*Turner I* subjected cable must-carry requirements to the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. The debate over whether the must-carry rules were "content-neutral" teased out the contours of the public interest in broadcast television. For practical purposes, whether the rules were content-neutral ultimately decided the case. Under *United States v. O'Brien*, 391 U.S. 367 (1968), a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377 (1968). Five members of the *Turner I* Court determined that the rules "distinguish between speakers in the television programming market . . . upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." *Turner I*,

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512 U.S. at 645. Justice O'Connor, along with Justices Scalia, Thomas, and Ginsburg, dissented from this determination, reasoning that "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content." *Id.* at 677 (O'Connor, J., concurring in part and dissenting in part). In the three-judge District Court opinion in *Turner I*, Judge Williams came to the opposite conclusion: "Congress rested its decision to promote [local broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.'" *Turner Broad. Sys. v. Fed. Communications Comm'n*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting) (quoting 1992 Cable Act, § 2(a)(11)).

<sup>156</sup> *Turner I*, 512 U.S. at 663 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-174 (1968)).

Likewise, assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . Finally, the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.

*Turner I*, 512 U.S. at 663-64.

<sup>157</sup> See *In re Carriage of Digital Television Broadcast Signals, First Report and Order*, 2001 FCC LEXIS 534, ¶¶ 3, 113 (Jan. 18, 2001) [hereinafter *Must Carry Order*].

<sup>158</sup> Krent & Zeppos, *supra* note 128, at 1740.

<sup>159</sup> See *supra* notes 37-41 and accompanying text.

<sup>160</sup> See *supra* notes 47-51 and accompanying text.

cisions were thus partly intended to prevent the dislocation of NTSC viewers.

A second market failure identified by the FCC is the "chicken and the egg" dilemma. Rep. Thomas Bliley (R-Va.), defending the '96 Act's codification of the dual licensing regime, stated: "It's a chicken-and-the-egg problem. Consumers won't buy advanced televisions, and manufacturers won't make them, until broadcasters offer up a digital signal. And no broadcaster will pay for digital spectrum—not to mention make the investment in digital equipment and transmitters—until the audience is there."<sup>161</sup> The Commission resolved this dilemma when it decided early on that DTV broadcasts would begin before viewer demand developed:

The availability of ATV programming to the public is likely to be a major factor driving ATV receiver penetration. Unless broadcast stations are transmitting ATV programs, such programming is unlikely to be available in sufficient quantity to stimulate receiver sales. We therefore believe that broadcast transmission is likely to be a precondition for substantial receiver penetration.<sup>162</sup>

Similarly, the decision to set a deadline for broadcasters to surrender NTSC spectrum was designed to overcome the incentive to delay transition to DTV created by equipment costs, the absence of demand and uncertainty over when DTV viewership would translate into additional advertising revenue.<sup>163</sup> Similarly, the FCC justified ancillary use partly to create market incentives, or "first-mover advantages,"<sup>164</sup> and its decision not to impose requirements beyond one, free digital

video service was designed to subsidize the DTV transition.<sup>165</sup>

While each of these rationales supports the existing DTV regime, a final market failure may be simply that the transition is too expensive and that a subsidy, in the form of a free license, is necessary to preserve advertiser-supported, over-the-air television from elimination by alternative digital video delivery systems. This premise, in turn, requires an additional assumption—that broadcasters would be unable to fund the transition to digital themselves.<sup>166</sup> To the extent that the FCC relies on a public interest in free, over-the-air television, it appears to have accepted this assumption. While the Commission has "long recognized that [broadcasters] must make the switch to digital technology,"<sup>167</sup> its DTV proceedings have always hinted that a government subsidy is necessary: "Unless digital television broadcasting is available quickly, other digital services may achieve levels of penetration that could preclude the success of over-the-air, digital television."<sup>168</sup> Perhaps the concern is simply that the FCC's transition plan may differ from what broadcasters would have done on their own, and that allowing free use of spectrum licenses will make up for the accelerated schedule. But the Commission's language suggests that what is truly at stake is "the ability of broadcasters to compete in an increasingly competitive marketplace."<sup>169</sup>

Past predictive judgments regarding the instability of the broadcast industry have been recog-

<sup>161</sup> Hearn, *supra* note 125, at 1.

I do not deny the "chicken and egg" dilemma posed by a new technology requiring new equipment to distribute new programming to new receivers. Success, however desirable, can be thwarted if each player—manufacturers, programmers, distributors, and consumers—waits for the others to go first. This is especially true if one of those players perceives the new technology as a substantial investment promising only the means to hold, not gain, market share.

Third Report and Order, *supra* note 50, Separate Statement of Commissioner Sherrie P. Marshall.

<sup>162</sup> Second Report and Order, *supra* note 27, ¶ 30 (footnote omitted) (declining to "allow receiver penetration levels to be a factor justifying a failure to construct an ATV station in a timely fashion or moving us to extend generally the application/construction time period"). The Commission noted that "[p]enetration of color television sets, for example, was limited until the three major networks began transmitting prime time programming in color." Fifth Report and Order, *supra* note 16, ¶¶ 55, 84 (noting that "many consumers' decisions to invest in DTV receivers will depend on the programs, enhanced features, and services that are not avail-

able on the NTSC service.").

<sup>163</sup> See Fifth Report and Order, *supra* note 16, ¶ 82.

<sup>164</sup> *Id.*; see *id.* ¶ 33 ("By permitting broadcasters to assemble packages of services that consumers desire, we will promote the swift acceptance of DTV and the penetration of DTV receivers and converters.").

<sup>165</sup> See *id.* ¶ 42 ("Further, allowing broadcasters flexibility as to the services they provide will allow them to offer a mix of services that can promote increased consumer acceptance of digital television, which, in turn, will increase broadcasters' profits, which, in turn, will increase incentives to proceed faster with the transition.").

<sup>166</sup> To my knowledge, no argument has been made that while broadcasters could finance the transition to DTV, a simulcast transition period would be too costly.

<sup>167</sup> Fifth Report and Order, *supra* note 16, ¶ 3; see also Comments of Belo, *In re* Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, at iv (March 24, 2000) (asserting that "digital conversion is necessary for broadcasters to remain competitive in the evolving multichannel marketplace.").

<sup>168</sup> Fifth Report and Order, *supra* note 16, ¶ 80.

<sup>169</sup> *Id.* ¶ 19; see also *id.* ¶¶ 3, 5, 7, 29.

nized by the Supreme Court—most notably in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).<sup>170</sup> *Turner II* upheld the must-carry provisions of the 1992 Cable Act after determining that substantial evidence supported Congress's forecasts regarding the ability of broadcasters to compete with cable operators' growing market power over local video programming markets.<sup>171</sup> The Court reasoned that it must be especially deferential to "congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change."<sup>172</sup> The need for similar must-carry rules—a subsidy by a different name—in the digital era is the subject of an ongoing proceeding on must-carry requirements for digital broadcasters.<sup>173</sup> The FCC has decided that non-carriage continues to threaten the viability of television broadcasters in the digital age and has ordered mandatory carriage of DTV signals at the end of the transition period.<sup>174</sup>

Certainly, citizens and academics owe no such "deference" to government policymakers. The point, however, is that the great giveaway argument does not so much challenge the decision to

continue to allow broadcasters to use a 6MHz channel of spectrum for free, but instead the decision that broadcast television, digital or not, is in the public interest and deserving of government subsidy. Once one accepts this premise, the government's subsequent policy decisions are entirely reasonable. The great giveaway argument is therefore little more than an attempt to refight a legislative and regulatory battle that was lost nearly a decade ago and is only incidentally related to digital television.

Whether one accepts that there is no objectionable windfall to broadcasters, the question still remains whether there is anything inherent in digital technology that requires adjustment of broadcasters' duty to serve the public interest. Moreover, assuming that digital licensees should bear increased public interest obligations because of their additional subsidization begs the question of what those obligations should be and how they should be imposed.

The responses to these questions have been utterly inadequate, particularly because the debate has been clouded by the sentiments outlined above. The remainder of this Part will attempt to fill the void. It first addresses the threshold ques-

<sup>170</sup> 520 U.S. 180 (1997).

<sup>171</sup> See *Turner II*, 520 U.S. at 195-213. Although the Court in *Turner I* held that the Cable Act's desire to preserving free, over-the-air broadcast television was an important government interest, it did not decide whether the record supported Congress's predictive judgment that the must-carry requirements actually furthered the government's asserted interests. See *Turner I*, 512 U.S. 622, 665-68 (1994) (noting "[t]he paucity of evidence indicating that broadcast television is in jeopardy . . ."). On appeal from remand, *Turner II* held that the nexus between the must carry provisions and the interest in preserving broadcast television survived First Amendment scrutiny. See *Turner II*, 520 U.S. at 213-24.

<sup>172</sup> *Id.*, at 195.

<sup>173</sup> See Must Carry Order, *supra* note 157, ¶ 1. The 1992 Cable Act requires that "[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations." 47 U.S.C. § 534(a) (1994). The Act instructed the FCC to establish any changes to this requirement, commonly called "must carry," made necessary by advanced television. See *id.* § 534(b)(4)(B). The FCC has concluded that once a television broadcaster returns its analog spectrum, its digital operations must be carried by local cable systems, and that current, digital-only broadcasters can immediately assert their must carry rights. See Must Carry Order, *supra* note 157, ¶ 1. The Commission has tentatively determined, however, that broadcasters currently simulcasting DTV and NTSC signals are not entitled to "dual carriage" of both signals and has deferred the question of which signal must be carried. See *id.* ¶ 3. The FCC determined that the Cable Act neither mandates nor precludes dual carriage, See *id.* ¶¶ 2, 14-16, but tentatively concluded that dual carriage

would unduly burden cable operators' First Amendment interests. See *id.* ¶ 3. The Commission has sought further comment on the issue, particularly on cable channel capacity, the ability of retransmission consent agreements to provide a market solution, and how carriage will influence DTV transition, as well as those raised by the Supreme Court in *Turner Broadcasting System v. FCC*. See *id.* ¶¶ 3, 112-15.

Under the Cable Act, cable operators are required to carry "the primary video, accompanying audio, and . . . closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material." 47 U.S.C. § 534(b)(3)(A). For a digital broadcaster, the "primary video" that is entitled to mandatory carriage includes a single programming stream and other program-related content. See Must Carry Order, *supra* note 158, ¶ 57. The broadcaster is entitled to choose which of its unrelated multicast signals will be carried under the Act. See *id.* The FCC has defined "program related" to include closed captioning, V-chip data, Nielsen ratings data, and channel mapping and tuning protocols, and to exclude ancillary or supplementary commercial services such as internet and e-commerce services. See *id.* ¶¶ 58, 61. The Commission issued a Further Notice of Proposed Rulemaking to further define the scope of "program-related." See *id.* ¶ 122.

<sup>174</sup> The Commission has sought further comment on whether dual carriage during the transition period would unduly burden cable operators' First Amendment interests, particularly the harm to broadcasters in the absence of must-carry during the transition period in light of *Turner II*. See *id.* ¶ 113.

tion of how public interest obligations will be applied to the multiple programming services that can be transmitted by digital broadcasters. Finally, it discusses specific capabilities of digital broadcasting that require a reassessment of the type of public interest obligations we expect from television broadcasters.

#### D. Multicasting and Public Interest Obligations

The '96 Act expressly provides that DTV broadcasters will be subject to public interest obligations.<sup>175</sup> As the FCC realized early on, however, "these public interest requirements were developed for the analog world, in which each broadcast licensee could do no more than send one signal over its single channel."<sup>176</sup> Digital television presents two conceptual obstacles to the current public interest regime. The first problem concerns the ability of digital broadcasters to multicast. Acknowledging that, at a minimum, the current NTSC obligations discussed in Section A will continue to apply to digital broadcasts, there is disagreement over the extent to which those obligations should attach beyond the single free, over-the-air television stream currently required of DTV licensees. As discussed below, this is essentially a legal issue, turning on the relevant portions of the '96 Act. Once these legal questions are resolved, a second, more difficult problem remains: whether or not to increase the quantitative or qualitative programming requirements designed to further the public interest.

##### 1. *Legal Multicasting Issues*

There is a strong argument directly from the

'96 Act that public interest obligations should attach to each stream the broadcaster offers. Section 336(d) states: "In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that *all* of its program services on the existing or advanced television spectrum are in the public interest."<sup>177</sup>

The statute also requires that the Commission "adopt regulations that allow the holders of [DTV] licenses to offer such ancillary or supplementary services on designated frequencies *as may be consistent with the public interest, convenience, and necessity.*"<sup>178</sup>

Despite the language "all of its program services," broadcasters argue that obligations should only apply to the required free television stream because the '96 Act was intended to facilitate broadcasters' ability to experiment with new public services.<sup>179</sup> They rely on the Preamble to the '96 Act, which indicates Congress's intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>180</sup> Broadcasters also cite Section 336(b)(3), which directs the Commission to "apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person."<sup>181</sup> Broadcasters argue that, under the statute, their ancillary services should be subject to the same regulatory treatment as comparable services offered by non-television licensees and should not be competitively disadvantaged by public interest obligations

<sup>175</sup> 47 U.S.C. § 336(d) ("Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.")

<sup>176</sup> Fourth NPRM, *supra* note 23, ¶ 9.

<sup>177</sup> 47 U.S.C. § 336 (d) (Supp. V 1999) (emphasis added).

<sup>178</sup> 47 U.S.C. § 336(a)(2) (Supp. V 1999) (emphasis added).

<sup>179</sup> See Comments of CBS, Corp., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 36-41 (Mar. 24, 2000). As a threshold matter, the Association of American Public Television Stations argued that § 336(d)'s reference to "program services," by definition, does not include "ancillary or supplementary services." Comments of Association of American Public Television Stations, *In Re* Public Interest Obligations of Television Broad. Licen-

sees, MM Dkt No. 99-360, at 19-20 (Mar. 24, 2000); Reply Comments of Hearst-Argyle Television, Inc., *In Re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 2-3 (Mar. 24, 2000). Section 336 uses the term "program services" only once, while "advanced television services" is used multiple times to refer to video programming. See 47 U.S.C. § 336(b)(2), (g)(1) (Supp. V 1999). Moreover, the term "programming" is qualified elsewhere in the '96 Act to distinguish between audio programming, video programming and other programming services. See 47 U.S.C. § 271(g) (Supp. V 1999). A more plausible reading, therefore, is that "advanced television services" and "ancillary or supplementary services" together comprise "program services."

<sup>180</sup> Telecommunications Act of 1996, Pmbl., 110 Stat. 56 (1996).

<sup>181</sup> 47 U.S.C. § 336(b)(3) (Supp. V 1999).

designed for television.<sup>182</sup> As a legal matter therefore, broadcasters argue that congressional intent precludes an interpretation of Section 336(d) that conflicts with the broader goal of quickly rolling out DTV and recovering analog spectrum, or that inhibits experimentation with new combinations of telecommunications services.

Broadcasters further argue that Congress did not intend obligations to apply to ancillary services because the '96 Act expressly provides for a service fee that, "to the extent feasible, equals but does not exceed" the lost auction value of the spectrum.<sup>183</sup> Pursuant to the statute, the FCC requires that broadcasters pay the government a fee of 5% of gross revenues received from ancillary uses of DTV spectrum.<sup>184</sup> According to broadcasters, there is nothing in the statute to suggest that Congress intended to require double payment for the license, in the form of public interest obligations *and* ancillary use fees.<sup>185</sup>

Each of these concerns was at the heart of the FCC's decision to allow ancillary use in the first place, which explicitly referenced the preamble to the '96 Act.<sup>186</sup> The FCC's rationale was that ancillary revenues would facilitate the transition to DTV, especially at the early stages when DTV penetration was low.<sup>187</sup> The FCC also believed that ancillary revenues "would increase the ability of broadcasters to compete in an increasingly competitive marketplace."<sup>188</sup>

But while the argument against extending public interest obligations beyond the required free programming service may be compelling from a policy standpoint, it is by no means legally conclusive. As an initial matter, the statute is clear that regulations concerning ancillary use, including fees, must still "be consistent with the public interest, convenience, and necessity."<sup>189</sup> Moreover, the analogous services provision is only one com-

ponent of a broader regulatory authority over ancillary services. That authority also includes a separate command to "prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity."<sup>190</sup>

Finally, the fact that Congress sought to recover the auction value of DTV spectrum used for ancillary services does not preclude the attachment of public interest obligations.<sup>191</sup> For one, the fact that the fee is exacted as a percentage of gross revenues means that, to the extent that broadcasters are required to direct extra spectrum away from feeable services and towards the public, their fee will decrease.<sup>192</sup> At any rate, nothing in the statute or the FCC's Ancillary Use Order suggests that the "value" sought to be recovered was the value of the spectrum without public interest obligations. Instead, the value recovered through ancillary fees could just as well be discounted by the separate and additional requirement that all services on DTV spectrum serve the public interest. The '96 Act seeks to recover "the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this Act."<sup>193</sup> Section 309(j) does not prohibit the imposition of public interest obligations on the license auctioned or the consideration of the public interest in determining eligibility.<sup>194</sup>

## 2. Multicasting Policy

The more difficult issues are the policy implications of extending public interest requirements, originally designed for analog television, to digital broadcasts. As a practical matter, it is difficult to imagine how requirements such as the mandatory three hours of children's programming would translate to non-video services. The real policy

<sup>182</sup> See, e.g., Reply Comments of the National Association of Broadcasters, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360 (Mar. 24, 2000); Comments of the Association of Local Television Stations, *In Re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 17 (Mar. 24, 2000). *But see infra* text accompanying note 218 (discussing competitive advantages of broadcasters in the broadband market).

<sup>183</sup> 47 U.S.C. § 336(e) (Supp. V 1999).

<sup>184</sup> Ancillary Use Order, *supra* note 52, ¶ 20.

<sup>185</sup> See Comments of CBS, Corp., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 40 (Mar. 24, 2000); Reply Comments of National Ass'n of Broadcasters, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 5 (Mar. 24, 2000)

(arguing against such "double taxation").

<sup>186</sup> See *supra* note 49.

<sup>187</sup> See Fifth Report and Order, *supra* note 16, ¶¶ 7, 33.

<sup>188</sup> *Id.* ¶ 19; see also *id.* ¶¶ 3, 5, 7, 29.

<sup>189</sup> 47 U.S.C. § 336(a)(2) (Supp. V 1999).

<sup>190</sup> 47 U.S.C. § 336(b)(5) (Supp. V 1999).

<sup>191</sup> See Ancillary Use Order, *supra* note 52, ¶ 2 (describing the authority to proscribe regulations in the public interest as an addition to the requirement that the Commission set a fee and apply regulations imposed on analogous services).

<sup>192</sup> See *id.* ¶ 13.

<sup>193</sup> 47 U.S.C. § 336(e)(2)(B) (Supp. V 1999).

<sup>194</sup> See 47 U.S.C. §§ 309(j)(3) (Supp. V 1999).



questions are therefore: (1) whether current regulations will apply to additional television services beyond the single required service; and (2) whether public interest obligations should attach to non-television services.

As to digital television services, the main policy argument made by advocates of increased regulation is that imposing public interest obligations on each programming stream "would prevent broadcasters from segregating certain programming streams, e.g., local affairs, programming for minorities, political discourse, or children's programming, from other more economically profitable ones, and placing those types of programs on channels with less desirable features."<sup>195</sup> This reasoning does not really take into account the various goals and features of different obligations. On one hand, the purpose of captioning services, "provid[ing] persons with hearing disabilities with the same opportunities to share the benefits provided by television programming that is available to others,"<sup>196</sup> would be defeated if captions were provided on only one of the programming streams offered to the public. The same reasoning applies to video description; unless these obligations are imposed on each free, over-the-air television stream, digital television will develop to the exclusion of those with hearing and sight disabilities.

With children's television, on the other hand, one of the main goals of advocates and recent regulation has been to require children's programming during "core" viewing hours.<sup>197</sup> Because of the value of these time slots, broadcasters have

strongly opposed restrictions on the content that can be provided.<sup>198</sup> Moreover, even children's television advocates acknowledge that quantity of programming rarely translates into quality.<sup>199</sup> Allowing broadcasters to provide programming that is most attractive to advertisers while simultaneously providing children's educational television on another programming stream would offer the best of both worlds, the availability of children's educational television during prime-time as well as the ability of broadcasters to offer programming that maximizes prime-time's revenue potential.<sup>200</sup>

As to non-television services, advocates of greater public interest obligations have argued that broadcasters who multiplex ancillary services should be required to provide datacasting services to local schools and libraries.<sup>201</sup> This argument, however, is predicated on the great giveaway assumption—that ancillary use is an unjust windfall to broadcasters, and some additional public interest obligations should be imposed to compensate for this otherwise self-interested exploitation of spectrum. To the contrary, insofar as ancillary use facilitates the transition to DTV, it has always been considered to serve the public interest in and of itself.<sup>202</sup>

The appropriate policy question regarding public interest obligations for non-television services is whether they will interfere with the primary purpose of ancillary use—to facilitate transition. At this moment, it is not clear how broadcasters will configure their services to maximize the potential of their DTV licenses.<sup>203</sup> Many of the af-

<sup>195</sup> Comments of People for Better TV, *In Re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 13 (Mar. 24, 2000).

<sup>196</sup> *In re* Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecomm. Act of 1996 Video Programming Accessibility, *Report and Order*, 13 F.C.C.R. 3272, 3277, ¶ 7 (1997).

<sup>197</sup> See *In re* Policies and Rules Concerning Children's Television Programming Revision of Programming Policies for Television Broad. Stations, 11 F.C.C.R. 10660, ¶¶ 99-104 (1996).

<sup>198</sup> See *id.* ¶¶ 29-32.

<sup>199</sup> See Comments of Children Now, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 2-3 (Mar. 24, 2000); Comments of People for Better TV, *In Re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 12 (Mar 27, 2000).

<sup>200</sup> See, e.g., Comments of the Center for Media Education et al., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 7-8 (Mar. 27, 2000) (suggesting that it would be better to devote an entire chan-

nel to public interest programming, or to at least air additional hours on one channel proportional to the total hours of multicast programming, rather than impose existing obligations on each stream).

<sup>201</sup> The Gore Committee recommended that such services could be used to "transmit course-related materials, such as lesson plans and teacher and student guides, as part of instructional video programming. Schools, libraries, and other educational institutions could use datacasting as a large "digital pipe" to deliver computer-based educational materials during off-peak hours." GORE REPORT, *supra* note 67, at 53. The Commission believes that such services would likely be relatively inexpensive.

<sup>202</sup> See *supra* notes 187-89 and accompanying text.

<sup>203</sup> A survey conducted by the Harris Corporation, a provider of broadcast and radio equipment, found that as recently as December 1997, 44 percent of broadcasters were not sure exactly what they would do with DTV programming. Some 33 percent said they planned to offer multicasting; another 23 percent said they definitely would offer high-definition television. For those broadcasters who will use high-defi-



firmative datacasting obligations demanded by public interest advocates may turn out to be cash cows for broadcasters, while others may serve no public interest whatsoever. In either case, it would be at best premature, and at worst counterproductive, to impose such obligations on broadcasters before DTV penetration is achieved. Besides the specific opportunities addressed below, the Commission should wait to determine, at the end of the transition period, whether market failures exist that prevent broadcasters from offering datacasting services that further the public interest.

#### E. The Impact of Digital Technology on Specific Public Interest Obligations

The second area of confusion concerning DTV public interest regulation is whether the technology of digital television mandates greater or lesser obligations than have been imposed on NTSC broadcasters. To a large degree, the Gore Report and other calls for increased obligations appear to regard digital television as a milestone from which to reexamine and re-conceive our approach to public interest regulation. As such, many of their recommendations are normative expositions on what broadcasters should do, rather than descriptions of how digital technology will affect what broadcasters already do.<sup>204</sup> This perspective is

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tion television, most plan to do so during primetime, but not during other times of the day. Of the broadcasters who plan to multicast, 50 percent predicted they would offer news and regular network programming; 47 percent said they planned to transmit information services; and 26 percent planned to air local news and public affairs. Two of the more significant findings of the Harris survey were that broadcasters will move to local digital program origination *faster* than generally anticipated and that they expect to offer more locally produced news with DTV.

See GORE REPORT, *supra* note 67, at 10.

<sup>204</sup> See, e.g., Comments of the Benton Foundation, *In re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 1 (Mar. 27, 2000) ("Digital technologies do not reduce the needs for public interest obligations: to the contrary, the radical transformation of television broadcasting made possible by digital technology makes a NPRM outlining the public interest obligations of broadcasters even more urgent."). Benton's argument for a "Viewers' Bill of Rights," however, has nothing to do with digital technology, but is premised on its concerns that (1) broadcasters are not providing local public affairs programming and market incentives do not effectively encourage such programming; (2) broadcasters do not provide quality local television news; and (3) the public is unaware of broadcaster's public interest obligations. See *id.* at 2-5.

<sup>205</sup> See, e.g., Comments of the Office of Communication,

strongly influenced by the belief that broadcasters have received more of a valuable public resource and, therefore, should be required to return more to the public.<sup>205</sup>

For example, the Gore Committee's first recommendation, concerning disclosure requirements, has no basis in digital technology whatsoever. Insofar as it suggests that broadcasters should compile more information about their public interest activities and distribute that information more widely, it questions policy decisions the FCC made regarding ascertainment requirements two decades ago.<sup>206</sup> Whether these policy decisions were correct may be a legitimate inquiry, but there is nothing particular about digital technology that makes the issue more compelling.

Similarly, the Gore Committee's recommendation that public interest regulations set minimum amounts of programming has no intrinsic relationship to digital technology. Many advocates of greater public interest regulation argue for clearer, more specific rules regarding broadcaster obligations; for example, minimum hours per day of children's television or maximum commercials per hour.<sup>207</sup> Whether public interest obligations should be quantified or should remain amorphous is one of the most pervasive issues in broadcasting regulation and exists entirely independent of digital television.<sup>208</sup> Indeed, by conceding that it could not reach a consensus on what those min-

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Inc. of the United Church of Christ et al., *In re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 3-4 (Mar 27, 2000) ("With all the capabilities and additional sources of revenue inherent in DTV, there is only one clear beneficiary of the transition to digital at the moment: the DTV broadcasters themselves. The Commission must adopt public interest obligations now to insure that the public, as well as the broadcasters, will benefit from the transition to digital television.").

<sup>206</sup> See *supra* notes 73-75 and accompanying text.

<sup>207</sup> See e.g., Hundt, *The Public's Airwaves*, *supra* note 91, at 1098-99; Comments of the Benton Foundation, *In re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 12 (Mar 27, 2000).

<sup>208</sup> See Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 GEO. WASH. L. REV. 686, 696 (1998) (Book Review) [hereinafter Rubin] ("Although broadcasters readily acknowledge their obligation to serve the public interest through their programming, they still balk at any attempt to quantify what, exactly, it is that they should provide."). Broadcasters contradict themselves when they rely on positive predictions that minimum standards are unnecessary because economic forces will voluntarily allow them to fulfill the statute's public interest requirements, thereby "paying" for the free license, while relying on negative predictions that substantial requirements will threaten their economic viability. See Comments of CBS Corp. *In re Public In-*

imum standards ought to be,<sup>209</sup> the Gore Committee actually supports FCC policy that such standards are unfeasible.<sup>210</sup>

Other recommendations are explicitly motivated by non-digital concerns or are entirely exhortative. The Gore Committee recommended that broadcasters adopt an updated voluntary Code of Conduct to reinforce their public interest commitments, and drafted a "Model Voluntary Code of Conduct for Digital Television Broadcasters."<sup>211</sup> The only apparent link between the model code and DTV is the Gore Committee's belief that public interest objectives are "especially important" in light of innovations in communication technology.<sup>212</sup> Instead, the recommendation stems from the Gore Committee's determination that a collective agreement would not offend anti-trust laws that had doomed earlier industry codes.<sup>213</sup> Likewise, many of the Gore Committee's recommendations regarding political broadcasting have far more to do with campaign finance reform than with digital television.<sup>214</sup>

Yet while the Gore Report fails to reconcile many of its suggestions with emerging digital realities, other recommendations do raise uniquely digital issues. Obviously, digital technology offers

the potential for high-resolution, interactive public interest programming, but this observation alone provides no useful metric by which to set public interest obligations. This is especially so during the transition period, where it remains to be seen whether entertainment television will take advantage of DTV's interactive depth and picture quality or simply use the volume capacity to offer more SDTV choices or ancillary services.<sup>215</sup> Accordingly, demands that existing requirements exploit DTV's possibilities or expand in proportion to the number of video streams offered are premature in advance of any indication of how broadcasters will configure their digital channels.<sup>216</sup>

Similarly, advocates have suggested that DTV broadcasters provide broadband Internet access to local schools, libraries and other public institutions.<sup>217</sup> "Indeed, broadcasters are favored with several inherent competitive advantages, including currently deployed network, wireless distribution, ubiquity in the local market, cost-effectiveness in scale and the ability to support IP multicasting . . ." <sup>218</sup> The Gore Committee also recommended that broadcasters be encouraged to offer datacasting services to public institutions to fulfill

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terest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at iv (Mar 27 2000) ("In sum, broadcasters have made and continue to make significant contributions to the public interest in a wide variety of ways. The most creative and meaningful of these have had nothing to do with—and could not have been required by—any government rule."); Comments of Belo, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No 99-360, at 13 (Mar 27, 2000) ("Moreover, there is not evidence to suggest that the imposition of additional regulatory burdens will have any appreciable impact on television stations' present incentives to address viewers' news and information needs.").

<sup>209</sup> See GORE REPORT, *supra* note 67, at 47-48.

<sup>210</sup> Children's educational programming remains the only exception to the Commission's policy against minimum programming requirements. See *supra* note 80.

<sup>211</sup> GORE REPORT, *supra* note 67, at 106-14.

<sup>212</sup> See *id.* at 106.

<sup>213</sup> See *id.* at 117-21, 123-26.

<sup>214</sup> See also Comments of the Alliance for Better Campaigns et al., *In re* Public Interest Obligations of Television Broad. Licensees, MM Docket No. 99-360, at 3-4 (Mar. 27, 2000) (arguing for the adoption of a free air time requirement for political candidates); Petition of Common Cause et al., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360 (Oct. 21, 1993) (urging the FCC to "adopt a policy requiring broadcast licenses, during a short specified period before a general election, to devote a reasonable amount of time during the broadcast day to appearances where the candidate uses the station facilities as an 'electronic soapbox.'"); Comments of the Radio-Television

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News Directors Association, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 5-11 (Mar. 27, 2000) (arguing against mandatory air-time as a purposeless affront to journalistic freedom).

<sup>215</sup> See *supra* note 43 and accompanying text.

<sup>216</sup> See Comments of People for Better TV, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 11-12 (Mar 27, 2000); Comments of Children Now, *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 34-36 (Mar 27, 2000). Should DTV simply become a multi-channel video service, for instance, analogies to cable and DBS regulation are inevitable. The United Church of Christ argued that broadcasters should be subject to rules that require cable operators to make channels available for public, educational, and government access, see 47 U.S.C. § 531 (1994), and lease by unaffiliated programmers, see 47 U.S.C § 532 (b)(1) (1994). See Comments of the Office of Communication, Inc. of the United Church of Christ et al., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 31 (Mar 27, 2000). Moreover, these regulations have been upheld without applying the deferential First Amendment standard applied to broadcast. See Time Warner Entm't Co. v. Fed. Communications Comm'n, 93 F.3d 957 (D.C.Cir.1996).

<sup>217</sup> See Comments of the Center for Media Education et al., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 8-9 (Mar. 27, 2000).

<sup>218</sup> Richard V. Ducey, *Internet + DTV = UN-TV*, at <http://www.nab.org/research/topic.asp#DIGITAL> (last visited Jan 20, 2002).

their public interest obligations.<sup>219</sup> Of course, the amount of spectrum available for Internet and datacasting depends on how broadcasters allocate their channels among different services, so the benefit of Internet and datacasting obligations relative to other combinations remains to be seen. Like the potential for interactive children's television, broadcaster's datacasting potential cannot be overlooked and must hover in the background as broadcasters roll out—or fail to roll out—their DTV programming.

Instead, any immediate alterations to broadcasters' public interest obligations must identify present, salient features of digital television that merit a change. Perhaps the most obvious example is the potential for enhanced closed-captioning. The '96 Act required the FCC to ensure that broadcast television "is fully accessible through the provision of closed captions."<sup>220</sup> The Act particularly commanded the Commission to study the use of "video descriptions," verbal descriptions of video content to make television available to persons with visual impairments.<sup>221</sup> The ability to provide subtitles, video descriptions, and translations improves vastly with digital technology, as the amount of bandwidth available for such services increases.<sup>222</sup>

Digital television also presents substantial opportunities to further develop and implement filtering technologies. The ability to provide the

embedded data on program content that facilitates filtering improves exponentially with digital compression technology.<sup>223</sup> Digital broadcasters will be able to broadcast substantially more content information than the current, voluntary ratings system; information that, in turn, can be read by filters like the V-chip to block out certain content. Accordingly, while broadcasters generally reject disclosure requirements as a resurrected obligation that has nothing to do with digital technology,<sup>224</sup> more disclosure may be especially necessary in the near-digital future.

At a minimum, additional disclosure would augment current filtering technology. But the expected convergence of broadcast and the Internet also allows for increasingly interactive advertising.<sup>225</sup> Furthermore, it allows for the collection, not only of programming choices, but the success of past advertising at generating interest.<sup>226</sup> Digital television thus raises many of the same issues regarding privacy, access to information, and advertising to children that were reflected in the CTA and that are of increasing concern with the Internet.<sup>227</sup> For example, in passing the CTA, Congress determined that "special safeguards are appropriate to protect children from over commercialization on television."<sup>228</sup> As a result, the CTA limits advertising in children's programming to 12 minutes per hour on weekdays and 10.5

<sup>219</sup> Datacasting could transmit course-related materials, such as lesson plans and teacher and student guides, as part of instructional video programming. Schools, libraries, and other educational institutions could use datacasting as a large "digital pipe" to deliver computer-based educational materials during off-peak hours. Public television stations are already developing innovative applications of datacasting for use in conjunction with their video programming as well as in entirely new instructional applications. See GORE REPORT, *supra* note 67, at 52-54.

<sup>220</sup> 47 U.S.C. § 613(b) (1994 & Supp. V 1999).

<sup>221</sup> See 47 U.S.C. § 613(f) (1994 & Supp. V 1999).

<sup>222</sup> See GORE REPORT, *supra* note 67, at 61-62; Comments of the Benton Foundation, *In Re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 11 (Mar. 27, 2000).

<sup>223</sup> See Balkin, *supra* note 86, at 1174; see also 47 U.S.C. § 303(x) (1994 & Supp. V 1999) (requiring the Commission to amend its filtering rules to account for advances in video technology).

<sup>224</sup> See Comments of CBS Corp., *In re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 41-42 (Mar 27, 2000).

<sup>225</sup> See Comments of the Center for Media Education et al., *In re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 12-18 (Mar 27, 2000) (urging the FCC to update children's advertising rules and pro-

hibit links to advertising or sales on web sites or online services that are accessible during children's programming); Comments of the Consumer Federation of America at 4-5, 17-19, filed as Appendix C-2 to the Comments of People for Better TV, *In re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360 (Mar. 27, 2000).

<sup>226</sup> See Comments of the Benton Foundation, *In Re Public Interest Obligations of Television Broad. Licensees*, MM Dkt No. 99-360, at 12 (Mar 27, 2000) ("Licensees that provide interactive services should be prohibited from collecting personal information from children under 13 without the prior parental consent.").

<sup>227</sup> See *supra* note 80 (discussing the CTA); Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-06 (1994 & Supp V 1999); Leslie Millir, *Children's Crusade Advocates Work Behind the Scenes to Fight the "Powerful Forces" of Marketers Who Target Kids' Privacy in New Media*, USA TODAY, Mar. 10, 1999, at 4D.

<sup>228</sup> Children's Television Act of 1990, 47 U.S.C. § 101 (1994); see also S. REP. NO. 101-227, at 22 (1989) (discussing "separation of programming and commercial material or host-selling, tie-ins, and other practices which unfairly take advantage of the inability of children to distinguish between programming and commercial content"); Action for Children's Television v. FCC, 821 F.2d 741, 743 (D.C. Cir. 1987) (discussing the history of the Commission's regulation of broadcast advertising).

minutes per hour on weekends.<sup>229</sup>

Similarly, the Children's Online Privacy Protection Act of 1998 ("COPPA") "prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet."<sup>230</sup> The COPPA requires, with certain limited exceptions, that operators of websites directed to children and operators who knowingly collect personal information from children must: (1) provide parents notice of their information practices; (2) obtain "verifiable parental consent" before collecting, using, or disclosing personal information of children; (3) allow parents to review any personal information collected from their children and prevent the further use of that information; (4) limit collection through online games, prizes, or other activities to information that is reasonably necessary for the activity; and 5) establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of the personal information collected.<sup>231</sup> Advertising and privacy, therefore, are areas where a prophylactic rule may be necessary to prevent identified dangers. Existing regulations applicable to television and the Internet should be temporarily engrafted on all services offered by DTV broadcasters, even before it becomes clear what services will be offered and which will be targeted at children.<sup>232</sup> Moreover, the Commission should closely observe broadcasters' marketing, sales, and advertising practices to determine whether the general public needs the protections currently afforded to children.

The Gore Committee also recommended that broadcasters develop more effective means to transmit disaster warning information.<sup>233</sup> The Emergency Alert System ("EAS") is currently de-

signed to relay emergency messages, typically from the National Weather Service, through commercial broadcasting AM, FM, and television stations.<sup>234</sup> Because the EAS typically interrupts station programming, a relatively small percentage of severe weather warnings issued by the National Weather Service reach citizens.<sup>235</sup> Moreover, an effective warning delivery system needs to reach only those people at risk, because the broadcast of warnings to viewers to whom those warnings do not apply causes viewers to generally ignore all warnings.<sup>236</sup> Digital television allows warning information to be broadcast to select households, in multiple languages, and without interrupting programming for those not a risk, thereby reducing the tendency of warnings to be ignored.<sup>237</sup>

Although most of the Gore Committee's recommendations regarding political broadcasting appear completely unrelated to DTV, digital technology can be used to circumvent the "equal time" rule, which requires broadcasters who give airtime to one candidate for public office to "afford equal opportunities to all other such candidates for that office."<sup>238</sup> Whereas with analog television, the potential for discrimination among candidates is generally limited to time slots,<sup>239</sup> with DTV, a broadcaster who grants access to one programming stream might attempt to limit the access of other candidates to different streams with different audiences.<sup>240</sup> The same concerns apply to application of 47 U.S.C. Section 312(a)(7) (1994), which gives candidates for federal office an affirmative right to purchase reasonable amounts of broadcasting time.<sup>241</sup> In the digital era, reasonableness will have to account for the ability of broadcasters to transmit multiple programming streams, with varying features and target audiences.<sup>242</sup>

<sup>229</sup> See 47 U.S.C. § 303a(b) (1994).

<sup>230</sup> Children's Online Privacy Protection Rule, 16 C.F.R. § 312.1 (2001).

<sup>231</sup> See 15 U.S.C. § 6502(b) (1994 & Supp. V 1999).

<sup>232</sup> See Comments of the Center for Media Education et al., *In re* Public Interest Obligations of Television Broad. Licensees, MM Dkt No. 99-360, at 12-18 (Mar 27, 2000).

<sup>233</sup> See GORE REPORT, *supra* note 67, at 60.

<sup>234</sup> See 47 C.F.R. § 11.1 (2000).

<sup>235</sup> See WORKING GROUP ON NATURAL DISASTER INFO. SYS., NAT'L SCI. & TECH. COUNCIL, EFFECTIVE DISASTER WARNINGS 6 (2000).

<sup>236</sup> See *id.* at 6-7.

<sup>237</sup> See *id.* at 7; Comments of the Community Technology Policy Council at 12, MM Docket No. 99-360 (stressing the need for multilingual emergency warning messages).

<sup>238</sup> 47 U.S.C. § 315(a) (1994).

<sup>239</sup> See *Becker v. Fed. Communications Comm'n*, 95 F.3d 75, 84 (D.C. Cir. 1996).

<sup>240</sup> See Comments of the Office of Communication, Inc. of the United Church of Christ et al., *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 34-36 (Mar. 27, 2000).

<sup>241</sup> See *CBS, Inc. v Fed. Communications Comm'n*, 453 U.S. 367, 386-90 (1981). Allowing federal candidates free access satisfies this obligation. *In re* Request of Robert J. Luelen Concerning Equal Opportunities Pursuant to Section 315, 46 F.C.C.2d 260, 260 (1974).

<sup>242</sup> See Comments of the Office of Communication, Inc. of the United Church of Christ ET. AL. *In re* Public Interest Obligations of TV Broad. Licensees, MM Docket No. 99-360, at 36-37 (Mar. 27, 2000).

A final salient feature of DTV is its potential for noncommercial-educational television, including public television.<sup>243</sup> The fact that the government stands to generate increased revenue from broadcasters who multiplex ancillary services allows for greater ability to fund independent public television. Moreover, when the NTSC licenses are turned in at the end of the transition period, substantial bandwidth will become available for additional public channels, which in turn could employ multicasting to create self-sustaining, independent, non-advertiser based television.

The Gore Committee recommended that Congress allocate many of the resources created by DTV "to ensure enhanced and permanent funding for public broadcasting to help it fulfill its potential in the digital television environment and remove it from the vicissitudes of the political process."<sup>244</sup> One specific proposal of the Gore Committee that received support from broadcasters during the comment period is that "Congress should reserve the equivalent of 6 MHz of spectrum for each viewing community in order to establish channels devoted specifically to noncommercial-educational programming."<sup>245</sup> The Gore Committee also recommended that Congress establish a trust fund for auction and ancillary use receipts that would be reserved specifically for digital public broadcasting.<sup>246</sup> In addition to Congressional funding, public digital broadcasters have the potential to exploit their licenses for ancillary use, thereby subsidizing their video programming themselves.<sup>247</sup>

Moreover, the Gore Committee recommended

<sup>243</sup> See Mass Media Bureau, *The Public and Broadcasting*, *supra* note 72, at 2.

<sup>244</sup> GORE REPORT, *supra* note 67, at 49.

<sup>245</sup> *Id.* at 49-54; see also Comments of the Association of American Public Television Stations, *In re Public Interest Obligations of TV Broad. Licensees*, MM Docket No. 99-360, at 22-24 (Mar. 27, 2000); Reply Comments of Hearst-Argyle Television, Inc., *In re Public Interest Obligations of TV Broad. Licensees*, MM Docket No. 99-360, at 29-30 (Mar. 27, 2000). Because the '96 Act appears to require that returned bandwidth be auctioned, see 47 U.S.C. § 309(j) (1994, Supp. V 1999), it is not clear that the FCC currently has the authority to turn it over to public broadcasters.

<sup>246</sup> See GORE REPORT, *supra* note 67, at 50.

<sup>247</sup> See Comments of Association of America's Public Television Stations, *In Re Public Interest Obligations of TV Broad. Licensees*, MM Docket No. 99-360, at 20-22 (Mar. 27, 2000).

<sup>248</sup> See GORE REPORT, *supra* note 67, at 52, 54-55; see also Comments of the Center for Media Education et al., *In re Public Interest Obligations of TV Broad. Licensees*, MM

that commercial broadcasters have the flexibility to choose between paying a fee on ancillary revenues as required under the '96 Act and providing a multicasted channel for public interest purposes or making an in-kind contribution.<sup>248</sup> Under the first alternative, broadcasters would dedicate a portion of bandwidth beyond the required SDTV signal to public interest activities. Under the second alternative, broadcasters would provide in-kind contributions, such as studio time and technical assistance to organizations producing public interest programming. Neither option would count against the specific statutory obligations that apply to the required free television service and that may be applied to other services offered by the broadcaster.<sup>249</sup>

Aside from these limited examples, there is little about digital television technology that influences the debate over what sort of content specific public interest obligations broadcasters should be required to fulfill. Even accepting that digital licensees should return more to the public to compensate for the greater value of a digital license, digital technology itself says very little about how that payment should be made (beyond, perhaps, that public interest content should be high definition or interactive) and even less about whether the FCC or the market should define content. Instead, arguments over public interest obligations inevitably devolve into the debate over whether market forces fail to effectuate consumer preferences and whether any such failure should be remedied through regulation.

Docket No. 99-360, at 20-22 (Mar. 27, 2000) (suggesting that broadcasters be given the option of paying a "certain, appreciable percentage of their gross revenues" to local public television stations or a fund such as the National Endowment for Children's Programming).

<sup>249</sup> See GORE REPORT, *supra* note 67, at 55. Others have recommended a regime that offers broadcasters the choice whether to "play or pay"—either complying with public interest requirements or paying someone else to put public interest programming on the air. Sunstein, *supra* note 75, at 538. If broadcasters choose either alternative, they will still be adding to the amount of DTV programming on the air. Instead, so the argument goes, a play or pay approach would maximize the amount of quality public interest content on the air, allowing broadcasters, rather than the government, to decide on the most effective, least expensive method of achieving the desired amount of content. Sunstein, *supra* note 75, at 539. Any payment as a substitute for public interest obligations would be in addition to ancillary use fees exacted by the Commission. See *supra* notes 192-95 and accompanying text.

## F. Summary

The shape of the public trustee model in the near-digital future will bear a striking resemblance to the current public interest regime and will be fundamentally different from what public interest advocates argue for. In large part, this is because the current debate over public interest regulation is only nominally connected to the transition to digital television. For the most part, the public interest debate surrounding digital television has simply inherited the decades-old argument over whether and how the FCC should define “the public interest, convenience, or necessity,” and whether and how it should regulate programming content according to that definition. Each side’s perspective on this issue is completely detached from emerging digital technologies. Instead, the arguments on both sides have simply been recycled from the past.

The nominal connection to digital television is the “great giveaway” debate over whether the transition to DTV is an unnecessary windfall to broadcasters. But this debate itself is disconnected from DTV policy. Instead, it really concerns the merits of the government’s determination that digital television serves the public interest and not the approach that Congress and the Commission have chosen to implement the DTV transition.

Beyond this controversy, DTV has served merely as a milestone from which to re-advance policies long since rejected or abandoned. Whether this is a debate that needs to be reheard is beyond the scope of this article. But, as this Part has shown, preoccupations with previously made arguments have generated little consideration of whether and how the *technology* of digital television should impact broadcasters’ duty to serve the public interest. A closer examination of these issues reveals that, aside from a handful of salient features, a hasty decision to expand public interest obligations will likely conflict with other policy objectives, particularly market penetration of DTV receivers and a smooth and timely transition to all-digital television.

Nevertheless, digital television has the capacity to immediately affect our approach to public tele-

vision. Indeed, the debate over public interest regulations triggered by DTV shows the general futility of simply “demanding more” from broadcasters. Such demands require a government agency to make difficult qualitative judgments regarding programming content without providing any metric to guide its deliberation. The fact that advocates themselves cannot articulate the programming content that will serve the public interest raises grave doubts that the FCC ever will.

In 1961, then Chairman Newton N. Minow described commercial television as a “vast wasteland.”<sup>250</sup> Addressing a conference of the National Association of Broadcasters, he scolded the television industry for failing to meet their obligations as public trustees: “Gentlemen, your trust accounting with your beneficiaries is overdue. Never have so few owed so much to so many.”<sup>251</sup> Minnow argued that commercial television had become “‘a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence and cartoons,’ laced with ‘commercials—many screaming, cajoling, and offending.’”<sup>252</sup>

Public interest advocates are entirely correct that little has changed. Ironically, the “vast wasteland” of 1960s television is now considered the golden era of broadcasting. At the same time, public television has successfully provided programming that consistently surpasses the public interest standard applied to commercial broadcasting. Accordingly, a better approach to public interest regulation in general would be to extract resources from commercial use of the spectrum that can be channeled to public broadcasting. Chairman Hundt suggested as much when he said, “The only coherent alternative to requiring broadcasters to live up to specific public interest obligations would be to require them to pay for their spectrum and to use the proceeds to fund children’s educational television and campaign advertising.”<sup>253</sup> As this Part has shown, digital television’s greatest potential to further the public

<sup>250</sup> Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2101 (1997) (quoting Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961)) [hereinafter Minow].

<sup>251</sup> *Id.* at 2102 (quoting Minow, *supra* note 250).

<sup>252</sup> *Id.* at 2101-2102 (quoting Minow, *supra* note 250).

<sup>253</sup> Hundt, *The Public’s Airwaves*, *supra* note 91, at 1096-97.

interest may be the new and innovative ways to reinforce and expand the services provided by non-commercial-educational television.

#### DIGITAL PUBLIC INTEREST REGULATION AND THE FIRST AMENDMENT

As the Supreme Court has noted, "the 'public interest' standard necessarily invites reference to First Amendment principles."<sup>254</sup> Rather than streamline or clarify the contours of public interest regulation, however, the First Amendment imposes yet another layer of complexity on broadcast regulation.<sup>255</sup> Accordingly, analysis of the impact of digital television on public interest regulation demands an assessment of the continuing validity of constitutional doctrines erected to justify the public interest regime.

Since the inception of the public trustee model, the relevant statute imposing public interest obligations has also prohibited the FCC from engaging in censorship.<sup>256</sup> Nevertheless, the Supreme Court accepted early on that "the [1934] Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."<sup>257</sup> By adopting a licensing as opposed to a common carriage regime, those unable to obtain licenses have no rights with regard to the spectrum beyond the statutory demand that licensees serve the public interest.<sup>258</sup> Content-specific public interest regulation has therefore been defended from First Amendment attack on the ground of scarcity—the idea that, whether because of the physical attributes of the electromagnetic spectrum, or the decision to employ a licensing regime itself, the spectrum is incapable of supporting every broadcaster who would like to use it.

[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom

licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.<sup>259</sup>

Broadcasters have argued that the emerging potential for innumerable video outlets, as a result of DTV, undermines the constitutional basis for public interest regulation. While not affirmatively challenging the Commission's authority to impose content-based public interest regulations, broadcasters have advised that advances in technology should "give the Commission pause as it considers adopting an extensive new regulatory scheme for digital television—a medium [that] has a multichannel capacity which would make the relevance of the scarcity doctrine to its regulation all the more tenuous."<sup>260</sup> Commissioner Furchtgott-Roth stated at the outset of the inquiry:

The primary rationale for broadcasters' public interest obligations has been the theory that broadcast spectrum is a peculiarly scarce resource. Absent spectrum scarcity, however, the justification for according broadcasters less First Amendment protection than persons engaged in other modes of communication becomes difficult to discern. . . . I believe that the Commission must review the empirical basis of "spectrum scarcity" . . . . Should we conclude . . . that spectrum scarcity is no longer viable as a factual matter, then the instant effort to engage in additional regulation will be highly problematic in constitutional terms.<sup>261</sup>

The remainder of this article will respond to the constitutional arguments raised by broadcasters and attempt to calm Commissioner Furchtgott-Roth's concerns over the continuing legitimacy of content-based, public interest regulation. This Part will first discuss the scarcity doc-

<sup>254</sup> *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973).

<sup>255</sup> See ZUCKMAN ET AL., *supra* note 1, at 118.

<sup>256</sup> See 47 U.S.C. § 326 (1994).

<sup>257</sup> *Nat'l Broad. Co., v. United States*, 319 U.S. 190, 215-16 (1943).

<sup>258</sup> In *CBS, Inc. v. Democratic Nat'l Comm.*, the Court explained that Congress "rejected the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." 412 U.S. 94, 105-08 (1973); see also *Sanders Radio Station*, 309 U.S. at 474.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accord-

ingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.

*Id.*

<sup>259</sup> *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 389 (1967).

<sup>260</sup> Comments of CBS Corp., *In re Public Interest Obligations of TV Broad. Licensees*, MM Docket No. 99-360, at 18 (Mar. 27, 2000).

<sup>261</sup> 1999 NOI, *supra* note 2, Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part.



trine and its continued validity in the context of digital broadcasting. It will then identify alternative constitutional foundations for imposing on broadcasters' speech that may compensate for the perceived shortcomings of the scarcity doctrine. As illustrated by Congress's clear mandate that digital broadcasters are required to serve the public interest,<sup>262</sup> reports of the demise of public interest regulation are greatly exaggerated.

#### A. Scarcity

The Supreme Court has justified its distinct First Amendment approach to the regulation of broadcasting on the grounds that broadcast frequencies (or at least broadcast licenses) are a scarce resource.<sup>263</sup> Multiple signals broadcast at the same time on the same frequency will interfere with each other, preventing reception.<sup>264</sup> Consequently, use of the spectrum must be allocated, both to specific users as well as specific

users.<sup>265</sup> Because of these physical limitations, there are more individuals who want to broadcast than there are frequencies available.<sup>266</sup> In *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), the Supreme Court upheld a requirement that radio and television stations give reply time to people who were the subject of a personal attack or political editorial aired by the station.<sup>267</sup> The Court stated, "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."<sup>268</sup>

The scarcity rationale stands in stark contrast to First Amendment jurisprudence applied to other media.<sup>269</sup> In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court recognized that economic forces faced by newspapers had "place[d] in a few hands the power to inform the American people and shape public

<sup>262</sup> See 47 U.S.C. 336(d) (Supp. V 1999).

<sup>263</sup> In *FCC v. Pacifica Foundation*, 438 U.S. 736 (1978), the Supreme Court provided a distinct, two-pronged rationale for negative restrictions prohibiting the broadcast of indecent speech. First, the Court relied on the "uniquely pervasive presence" of broadcast media. *Id.* at 748. "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* Second, the Court in *Pacifica* reasoned that broadcast is "uniquely accessible to children" such that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household'" justify restrictions on indecent programming. *Id.* at 749-50 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968)). Commentators have argued that *Pacifica's* logic applies to violent programming as well. See Hundt, *The Public's Airwaves*, *supra* note 91, at 1097.

Over the years, courts have tended to rely on broadcast's accessibility to children rather than protecting adults from unexpected program content. See *Reno v. ACLU*, 521 U.S. 844, 866-67 (1997); *Action for Children's Television v. Fed. Communications Comm'n*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding indecent programming restriction based on government's interests in supporting parental supervision of children and in children's well-being, but declining to address whether the government's interest in protecting adults' privacy would support the restriction). Partly, this is because the characterization of broadcast as an invasion of privacy rests on a factual judgment regarding how likely it is that an adult might be unexpectedly offended and how easy it is to protect themselves.

It is not clear that *Pacifica* would justify imposing affirmative public interest obligations on broadcasters. For one, *Pacifica* dealt with language that "surely lie[s] at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743. Moreover, while not relying on scarcity, *Pacifica* was clearly

predicated on the determination that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* (contrasting the treatment of broadcasting under *Red Lion* and newspapers under *Tornillo*). As one commentator has noted, "*Pacifica* consequently cannot fill the shoes of the scarcity rationale in providing a broader justification for regulating broadcast speech under the First Amendment." Logan, *supra* note 125, at 1706.

<sup>264</sup> *Nat'l Broad. Co.*, 319 U.S. at 213 (stating that "[t]here is a fixed natural limitation upon the number of stations that can operate without interfering with one another").

<sup>265</sup> See *id.* at 213 ("Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile."); BENJAMIN ET AL., *supra* note 1, at 1.26-29, 2.1-2; see also *Red Lion*, 395 U.S. at 376 ("Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.").

<sup>266</sup> *Red Lion*, 395 U.S. at 388-89 ("It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum."); see *id.* at 396-97 ("Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.").

<sup>267</sup> See *id.* at 369.

<sup>268</sup> *Id.* at 388.

<sup>269</sup> See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); *Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems.").



opinion.”<sup>270</sup> Nevertheless, the Court rejected the argument that “the claim of newspapers to be surrogates for the public carries with it a concomitant fiduciary obligation to account for that stewardship” and struck down a statute mandating a right of reply for those criticized by a newspaper as an impermissible intrusion upon the publisher’s editorial freedom.<sup>271</sup>

Application of the scarcity rationale to broadcast regulations has received vehement criticism since *Red Lion*.<sup>272</sup> Nevertheless, the scarcity principle continues to be good law, insofar as it has not been overruled and continues to be cited by the Supreme Court.<sup>273</sup> Courts, however, have been careful to limit the application of the scarcity principle beyond traditional broadcast television and have suggested on several occasions that the rationale should be rethought entirely.<sup>274</sup> Digital Television therefore presents two First Amendment questions. First, should the scarcity principle be applied to DTV in the same way it has been applied to traditional NTSC broadcasting? Further, would the rationale require extension or translation or does it simply carry over to digital broadcast? Second, and more fundamentally, will DTV become the straw that breaks the camel’s back and brings about the demise of the scarcity doctrine entirely?

#### B. Allocational v. Numerical Scarcity and the Application of *Red Lion* in the Digital Age

Application of the scarcity doctrine depends on how one identifies the referent to the adjective

“scarce.” The FCC has noted two possible perspectives from which scarcity can be measured: numerical and allocational scarcity. Numerical scarcity focuses on the number of broadcast outlets available to the public, while allocational scarcity focuses on the number of individuals who want to broadcast relative to the number of available frequencies.<sup>275</sup> Adherents to the scarcity doctrine tend to focus on allocational scarcity and the necessarily finite number of broadcast speakers,<sup>276</sup> while opponents focus on numerical scarcity and the growing number of video outlets, both broadcast and non-broadcast.<sup>277</sup>

The Supreme Court’s cases are ambiguous on the precise definition of scarcity, appearing to count both the number of speakers and the number of channels. *Red Lion* itself discussed both perspectives. The Court seemed concerned with speakers when it stated, “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>278</sup> Yet, *Red Lion* also focused on outlets: “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”<sup>279</sup>

In *Turner I*, an eight-member majority declined to apply *Red Lion*’s less demanding First Amendment scrutiny to cable television operators.<sup>280</sup> The Court focused on the vast number of viewing choices offered by cable:

Indeed, given the rapid advances in fiber optics and

<sup>270</sup> *Tornillo*, 418 U.S. at 250.

<sup>271</sup> *Id.* at 251. “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.” *Id.* at 256; see also *Riley v. Nat’l Fed’n. of the Blind*, 487 U.S. 781, 791 (1988) (striking down regulations on personal charitable solicitation and stating that “government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government”); *Turner I*, 512 U.S. at 641 (“[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”).

<sup>272</sup> See *infra* notes 323-28 and accompanying text.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> See *In re Syracuse Peace Council*, 2 FCC Rcd. 5043, 5054, enforced 867 F.2d 654, 682-84 (D.C. Cir. 1989) (Starr, J., concurring). Allocational scarcity has also been referred to as economic scarcity in the sense that it describes the relation-

ship between the demand for spectrum rights and the supply of broadcast licenses. See Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1016 (1989) [hereinafter Spitzer].

<sup>276</sup> See, e.g., Reply Comments of the Benton Foundation, *In Re Public Interest Obligations of TV Broad. Licensees*, MM Docket No. 99-360, at 5 (Mar. 27, 2000).

<sup>277</sup> See, e.g., Comments of CBS, *In re Public Interest Obligations of TV Broad. Licensees*, MM Docket No. 99-360, at 19-21 (Mar. 27, 2000).

<sup>278</sup> *Red Lion*, 395 U.S. at 388.

<sup>279</sup> *Id.* at 390.

<sup>280</sup> See *Turner I*, 512 U.S. at 637-39 (The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.”); see also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (“Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.”).

digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.<sup>281</sup>

In declining to extend *Red Lion* to cable, the Court in *Turner I* stated: "The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium."<sup>282</sup> Although *Turner I* refers to speakers, it clearly was counting channels, for cable is often considered a natural monopoly such that, by its nature, there will only be one cable service provider.<sup>283</sup>

Similarly, the unique characteristics of the Internet allowed Justice Stevens to refer to speakers and outlets simultaneously in *Reno v. ACLU*, 521 U.S. 844 (1997), where the Court decided not to extend *Red Lion* to the Internet. Justice Stevens wrote:

[T]he Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as

human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.<sup>284</sup>

The uncertainty surrounding the application of the scarcity principle to new media is illustrated by the D.C. Circuit's opinions in *Time Warner Entertainment Company v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).<sup>285</sup> Among other things, *Time Warner* concerned a requirement that Direct Broadcast Satellite ("DBS") operators reserve four to seven percent of their channel capacity for noncommercial educational and informational programming.<sup>286</sup> The government argued that DBS regulations were entitled to the less demanding First Amendment scrutiny applied to the broadcast medium.<sup>287</sup> A three-judge panel agreed, reasoning that "[b]ecause the United States has only a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited."<sup>288</sup> Consequently, the set-aside provision "should be analyzed under the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media."<sup>289</sup>

Five judges voted to re-hear the case en banc, however, believing "there were fatal defects in the panel's legal theory for upholding" the set aside provisions.<sup>290</sup> In an opinion dissenting from the denial of rehearing, the judges argued that *Red Lion* should not be extended to DBS, because "DBS is not subject to anything remotely approaching the 'scarcity' that the Court found in conventional broadcast in 1969 and used to justify a peculiarly relaxed First Amendment regime for

<sup>281</sup> *Turner I*, 512 U.S. at 639.

<sup>282</sup> *Id.* at 638-39.

<sup>283</sup> Instead, the Court appears to characterize the cable service provider as a common carrier, available to all who wish to broadcast their programming across the cable network. See *id.* ("given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium"). But cable service providers are not common carriers and, beyond certain statutory obligations, retain discretion over what programming they will offer.

<sup>284</sup> *Reno*, 521 U.S. at 870.

<sup>285</sup> *Time Warner*, 93 F.3d 957 (D.C. Cir. 1996), *reh'g denied*, 105 F.3d 723 (D.C. Cir. 1997), *cert. denied*, 121 S. Ct. 1167 (2001).

<sup>286</sup> See 47 U.S.C. § 335(b)(1) (1994); *Time Warner*, 93 F.3d at 976. "A direct broadcast satellite ('DBS') service utilizes satellites to retransmit signals from the Earth to small, inexpensive terminals. It operates on a specified band of the radio frequency spectrum. The FCC prescribes the manner in which parts of that spectrum are made available for DBS systems." See *Time Warner*, 93 F.3d at 973 (citing 47 C.F.R.

§ 100).

<sup>287</sup> Interestingly, the government had not raised at trial the argument that "that DBS systems are analogous to broadcast television and therefore subject to no more than heightened scrutiny." *Time Warner*, 93 F.3d. at 974-75. In fact, a District Court for the District of Columbia had struck down the set-aside provisions finding that, under a more rigorous standard of First Amendment review, "[t]here is absolutely no evidence in the record upon which the Court could conclude that regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest." *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8 (D.D.C. 1993).

<sup>288</sup> See *Time Warner*, 93 F.3d at 975.

<sup>289</sup> See *id.*

<sup>290</sup> See *Time Warner Entm't Co. v. Fed. Communications Comm'n*, 105 F.3d 723, 724 (1997). A motion for rehearing will only be granted if a majority of the judges of the court in regular active service vote in favor of rehearing. With the D.C. Circuit split 5-5 (two judges did not participate), rehearing was denied, and the three-judge panel decision was left standing.

such broadcast.”<sup>291</sup>

The original three judge panel in *Time Warner* seems to have construed *Turner I* to require a counting of speakers.<sup>292</sup> Judge Williams, urging the en banc court to rehear the case, insisted that the relevant perspective was channels and argued that “[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting.”<sup>293</sup> Judge Williams construed *Turner I* to distinguish cable from broadcast on the basis of the number of channels available in each medium,<sup>294</sup> stating:

*Turner*, to be sure, appears in part to ground its distinction between cable and broadcast on technological characteristics independent of sheer numbers. “If two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another’s signals, so that neither could be heard at all.” But this can hardly be controlling. Alleviation of interference does not necessitate government content management; it requires, as do most problems of efficient use of resources, a system for allocation and protection of exclusive property rights. . . . Accordingly, it seems to me more reasonable to understand *Red Lion* as limited to cases where the number of channels is genuinely low.<sup>295</sup>

This problem with the scarcity rationale is acutely visible in the torturous journey of the FCC’s fairness doctrine, which required broadcasters “to cover vitally important controversial issues of interest in their communities” and to “provide a reasonable opportunity for the presenta-

tion of contrasting viewpoints” on those issues.<sup>296</sup> The Supreme Court upheld the fairness doctrine in its 1969 *Red Lion* decision.<sup>297</sup> In 1987, however, the Commission repealed the fairness doctrine on two grounds. First, it found that “the dramatic growth in the number of both radio stations and television stations has in fact increased the amount of information, as well as the diversity of viewpoints, available to the public.”<sup>298</sup> No longer necessary to ensure diversity, the FCC concluded that the doctrine’s “intrusive means of interfering with broadcasters’ editorial discretion [could] no longer be characterized as narrowly tailored to meet a substantial government interest.”<sup>299</sup> Second, the Commission found that, “instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the doctrine was to ‘overall lessen. . . the flow of diverse viewpoints to the public.’”<sup>300</sup>

In its decision, the FCC discussed the two alternate conceptions of the scarcity rationale, and concluded that neither justified a different First Amendment standard for the broadcast medium.<sup>301</sup> In addition to determining that numerical scarcity did not exist, the FCC questioned whether numerical scarcity was ever the proper perspective:

As stated above, we no longer believe that there is scarcity in the number of broadcast outlets available to the

<sup>291</sup> See *id.* at 724 (Williams, J., dissenting).

<sup>292</sup> See *Time Warner*, 93 F.3d at 975 (D.C. Cir. 1996) (“Because the United States has only a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited.”).

<sup>293</sup> See *Time Warner*, 105 F.3d at 724 (Williams, J., dissenting); *id.* at 725 (“Thus, even in its nascent state, DBS provides a given market with four times as many channels as cable, which (even without predicted increases in compression) offers about 10 times as many channels as broadcast. Accordingly, *Red Lion*’s factual predicate—scarcity of channels—is absent here.”).

<sup>294</sup> Williams dismissed the observation that *Red Lion* has been retained despite increases in the number of broadcast channels. See *id.* at 724 (“While this number of channels is greater than those available in 1969 when *Red Lion* was decided, it pales in comparison to cable or DBS.” (citation omitted)).

<sup>295</sup> *Id.* at 725-26; see also *supra* text accompanying notes 323-28 (discussing the apparent disconnect between the concept of scarcity and a regulatory regime beyond channel allocation).

<sup>296</sup> *Syracuse Peace Council*, 2 FCC Rcd. 5043, ¶ 1 n. 2 (1987). The FCC concluded in a 1985 inquiry that new media outlets ensured public access to a multitude of viewpoints without federal regulation, that the fairness doctrine therefore unnecessarily interfered with the journalistic freedom of broadcasters, and that the doctrine actually inhibited the

presentation of controversial issues of public importance. See *Fairness Report*, 102 FCC 2d 145, ¶ 5 (1985). The FCC did not immediately abrogate the doctrine, however, because of uncertainty over whether the fairness doctrine was mandated by the Communications Act. See *id.* In 1986, the D.C. Circuit held that the fairness doctrine was authorized by the Act’s public interest standard but not required, setting the stage for the Commission’s decision in *Syracuse Peace Council*. See *Telecomm. Research & Action Ctr. v. Fed. Communications Comm’n*, 801 F.2d 501, 517-18 (D.C. Cir. 1986).

<sup>297</sup> *Red Lion*, 395 U.S. at 367.

<sup>298</sup> *Syracuse Peace Council*, 2 FCC Rcd. ¶ 57.

<sup>299</sup> *Id.* Although *Red Lion* did not require regulations to be narrowly tailored to meet a substantial government interest, later cases articulated this standard. See *League of Women Voters*, 468 U.S. at 378-79 (explaining that “[i]n *Red Lion*, for example, we upheld the FCC’s ‘fairness doctrine’ . . . because the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in this limited medium.”).

<sup>300</sup> *Syracuse Peace Council*, 2 FCC Rcd. ¶ 59 (quoting *Fairness Report*, 102 FCC 2d at 171). In *Red Lion*, the Court stated “if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.” *Red Lion*, 395 U.S. at 393.

<sup>301</sup> See *Syracuse Peace Council*, 2 FCC Rcd. ¶¶ 76-80.

public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters—and indeed the rights of the public to receive information unencumbered by government intrusion—can depend on the number of information outlets in particular markets. Surely, a requirement of multiple media outlets could not have formed the basis for the framers of the First Amendment to proscribe government interference with the editorial process.<sup>302</sup>

Instead, the FCC believed that allocational scarcity was the more plausible definition.<sup>303</sup> Rather than question the factual validity of allocational scarcity, however, the FCC attacked the logic by which this type of scrutiny is used to justify lesser First Amendment protection for the broadcast medium.<sup>304</sup> The Commission reasoned that allocational scarcity was nothing more than an excess of demand for licenses over the available supply, a characteristic of all markets:

All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. . . [W]hatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.<sup>305</sup>

On appeal, the D.C. Circuit upheld the Commission's decision as a matter of policy, but declined to determine whether the fairness doctrine was unconstitutional.<sup>306</sup>

With the constitutional question left open, the FCC reversed course in 1999, relying on allocational scarcity to justify the retention of public in-

terest rules originally adopted to effectuate the fairness doctrine.<sup>307</sup> When broadcasters demanded that the rules fall along with the fairness doctrine, the FCC split 2-2 on whether to repeal the rules.<sup>308</sup> In voting to retain the rules, Commissioners Ness and Tristani made clear that "the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts."<sup>309</sup>

The fundamental error of the Commission's decision in the portion of *Syracuse Peace Council* that has been repudiated was its confusion of the rationale underlying the fairness doctrine with the basis for public interest regulation of the broadcast spectrum. . . . The standard of *Red Lion*, however, was not based on the absolute number of media outlets, but on the fact that the spectrum is a public resource and there are substantially more individuals who want to broadcast than there are frequencies to allocate. As both the U.S. Supreme Court and the D.C. Circuit have explained, [a] licensed broadcaster is 'granted the free and exclusive use of a valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . [T]he long-standing basis for the regulation of broadcasting is that the radio spectrum simply is not large enough to accommodate everybody. Under our Nation's system for allocating spectrum, some are granted the exclusive use of a portion of this public domain, even though others would use it if they could. That is why it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.'<sup>310</sup>

Commissioners Ness and Tristani's distinction be-

<sup>302</sup> *Id.* ¶ 74.

<sup>303</sup> *Id.*

Because only a limited number of persons can utilize broadcast frequencies at any particular point in time, spectrum scarcity is said to be present when the number of persons desiring to disseminate information on broadcast frequencies exceeds the number of available frequencies. Consequently, these frequencies, like all scarce resources, must be allocated among those who wish to use them.

*Id.* ¶ 75.

<sup>304</sup> *See id.* ¶ 76.

<sup>305</sup> *Id.* ¶ 78; *see infra* note 323 (describing this criticism of the scarcity rationale).

<sup>306</sup> *See Syracuse Peace Council v. Fed. Communications Comm'n*, 867 F.2d 654, 659-60 (D.C. Cir. 1989) ("Happily the Commission's opinion is not written in exclusively constitutional terms. First, its intermediate conclusions, if accepted, compel a finding that the doctrine fails to serve the public interest. . . [T]he FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment.").

<sup>307</sup> Two such rules were: (1) the personal attack rule, which guarantees a right to reply to individuals who are attacked in the course of a discussion of controversial issues; and (2) the political editorial rule, which gives political candidates the right to reply to editorials opposing them or favoring their opponents. *See Radio-Television News Dir.*

*Ass'n v. Fed. Communications Comm'n (RTNDA)*, 184 F.3d 872, 876-77 (D.C. Cir. 1999).

<sup>308</sup> *See id.* at 878. Chairman Kennard recused himself from the proceeding, leaving four commissioners to vote on repeal. The D.C. Circuit rejected broadcasters' argument that "the demise of the fairness doctrine necessarily lead[s] to the demise of the two rules." *Id.* at 879 ("A broad rule can be flawed for reasons that do not affect its narrower adjuncts. . . . In short, while the challenged rules do not necessarily persist after the fairness doctrine, they need not share its fate.").

<sup>309</sup> *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C. Rcd. 19973, ¶ 17 (2000). Although the Commission based its decision in *Syracuse Peace Council* largely on its view that the standard of *Red Lion Broadcasting Co. v. FCC* should be abandoned, the D.C. Circuit did not affirm on that basis. Subsequently, in enacting the Children's Television Act of 1990 (CTA), Congress made clear that broadcasters should be subject to public interest obligations reviewed under the *Red Lion* standard, and Congress's views on that matter are entitled to "great weight." The Commission agreed that *Red Lion* sets the appropriate standard of review, as it made clear in its Order implementing the CTA, which expressly repudiated the dicta from *Syracuse Peace Council*.

*Id.* (footnotes omitted).

<sup>310</sup> *Id.* ¶ 19 (internal quotations and footnotes omitted).

tween the rationale for lesser First Amendment scrutiny of broadcast regulation on the one hand, and the justification for the fairness doctrine on the other, echoes comments made by Judge Starr in his concurring opinion in the appeal of *Syracuse Peace Council*:

There is, to be sure, language in *Red Lion* with respect to the scarcity of the broadcast spectrum and the consequent tendency toward unrequited demand for frequencies. Under *Red Lion*, however, that sort of scarcity seems to constitute a necessary (rather than sufficient) condition of the fairness doctrine's legitimacy. That is, allocational scarcity accounts for the fundamental difference in First Amendment treatment of print and broadcast media. However, spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory. In short, petitioners conflate the Supreme Court's choice of a standard for evaluating broadcast regulation with the Court's application of its chosen standard to the interests assertedly advanced by a particular regulatory regime.<sup>311</sup>

As explained by Judge Starr, the deferential standard of constitutional review premised on allocational scarcity does not give the government a free hand to regulate the broadcast medium as it sees fit. Proceeding on the basis of this more relaxed First Amendment scrutiny, *Red Lion* specifically upheld the fairness doctrine on the grounds that alleviated the problem of numerical scarcity—it furthered the public's interest in "suitable access to social, political, esthetic, moral, and other ideas and experiences" by "present[ing] those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."<sup>312</sup>

Although Judge Starr's account is by far the most precise distinction to be drawn by the judiciary, given the conflicting language discussed above, there is no clear answer as to which formulation of the scarcity rationale continues to guide the Supreme Court. As a result, whether *Red*

*Lion*'s scarcity principle will be extended to digital television will be strongly influenced by whether scarcity is approached from an allocational or numerical perspective—whether scarcity is characterized by the number of speakers using the DTV medium or the number of video outlets added by DTV.

From an allocational perspective, the transition to DTV has certainly not expanded the limited number of speakers on the airwaves. Instead, Congress and the FCC have simply increased the amount of spectrum already owned by the broadcast industry by granting existing broadcasters, and only existing broadcasters, a second channel.<sup>313</sup> Digital television has therefore temporarily exacerbated the condition of allocational scarcity observed in *Red Lion*. Moreover, Congress's December 31, 2006 deadline for the surrender of NTSC spectrum can be extended by the FCC if fewer than 85% of the station's viewers can receive the broadcaster's digital service.<sup>314</sup> Although the recovery of spectrum has become a primary concern of the Commission in the transition to DTV, it is far from clear when this target will be achieved.<sup>315</sup>

In his concurring statement in the Notice of Inquiry regarding DTV public interest obligations, Commissioner Powell attempted to focus the debate on numerical scarcity:

[A]s we undertake this inquiry we have a solemn obligation to evaluate honestly the extent to which scarcity can still justify greater intrusion on broadcaster's First Amendment rights. It is ironic . . . that as we enter the digital age of abundance and tout its myriad of opportunities for more information through more outlets, we simultaneously propose greater public interest obligations that infringe upon speech, justified on the crumbling foundation of scarcity.<sup>316</sup>

Yet even from a numerical perspective, DTV only has the potential to increase the number of televi-

<sup>311</sup> *Syracuse Peace Council*, 867 F.2d at 682-83 (D.C. Cir. 1989) (Starr, J., concurring). Unlike the majority of the panel in *Syracuse Peace Council*, see *supra* note 306 and accompanying text, Judge Starr found the constitutional question inextricably related to policy question.

<sup>312</sup> *Red Lion*, 395 U.S. at 389-390; *Syracuse Peace Council*, 867 F.2d at 683-84 (Starr, J., concurring).

<sup>313</sup> See *supra* notes 30-32, 37-38 and accompanying text (discussing the dual-licensing regime). The expected convergence of television with the Internet may make it technologically feasible to allow everyone to use the broadcast medium, thus removing DTV from the facts of *Red Lion* and placing it under the facts of *Reno*.

<sup>314</sup> See *supra* note 40 and accompanying text.

<sup>315</sup> See *supra* note 42; see also Julie Macedo, *Meet the Televi-*

*sion of Tomorrow. Don't Expect to Own It Anytime Soon*, 6 UCLA ENT. L. REV. 283, 283 (1999).

<sup>316</sup> 1999 NOI, *supra* note 2, Concurring Statement of Commissioner Michael K. Powell; see also *In re Repeal or Modification of the Personal Attack and Political Editorial Rules, Order and Request to Update Record*, 15 F.C.C. Rcd. 19,973, 19,996 (2000) (Commissioner Powell, dissenting) (making an identical argument); Richard L. Weber, *Note, Riding on a Diamond in the Sky: The DBS Set-Aside Provisions of the 1992 Cable Act*, 40 WM. & MARY L. REV. 1795, 1833-34 (1999) ("Both the scarcity and free television theories underlying public interest become almost entirely untenable when examining the transition from the traditional NTSC television broadcast signal to the HDTV signal.").

sion outlets available to the public.<sup>317</sup> Broadcasters are only required to provide one "free digital video programming service the resolution of which is comparable to or better than that of today's service."<sup>318</sup> How broadcasters use the rest of the bandwidth on their 6MHz license remains to be seen. A 1997 poll of broadcasters revealed that only thirty-three percent planned to multicast and only half of those planned to broadcast multiple television services.<sup>319</sup> Accordingly, whether one adopts an allocational or a numerical perspective to scarcity, digital television does not alter the factual basis on which *Red Lion* was decided. In the end, like the arguments of public interest advocates for increased obligations, broadcasters do not actually connect their First Amendment critique of public interest regulation with the technology of digital television but essentially argue that DTV is a milestone from which to reexamine the constitutional foundation of *Red Lion*.

### C. Alternatives to Scarcity - Quid Pro Quo

Criticism aside, *Red Lion's* scarcity principle has been reaffirmed in every case in which it has been implicated.<sup>320</sup> Congress appeared to indicate recent support for *Red Lion's* rationale for public interest regulation when it enacted the CTA.<sup>321</sup> *Red Lion's* scarcity principle therefore continues to be good law. Yet the Court has suggested that it

might be willing to reexamine the principle.<sup>322</sup> The most pervasive judicial criticism of the principle has been the disconnect between reality of allocational scarcity and content-specific public interest regulation.

Judges and commentators have argued that scarcity is not a unique characteristic of the spectrum, but an attribute of every resource.

It is certainly true that broadcast frequencies are scarce [in the sense that demand would exceed supply if they were being offered free] but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks computers and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.<sup>323</sup>

More to the point, even assuming that scarcity justifies licensing broadcasters and regulating their transmission to prevent interference, it is not clear why scarcity justifies content-specific restrictions on broadcast speech. "Alleviation of interference does not necessitate government content management; it requires, as do most problems of efficient use of resources, a system for allocation and protection of exclusive property rights."<sup>324</sup>

While refusing to extend *Red Lion* to cable, the

<sup>317</sup> Whether the current number of media outlets undermines the continuing validity of *Red Lion* is beyond the scope of this article. Of course, the Court has not directly addressed the constitutional validity of public interest regulation in since the prevalence of cable, DBS, and DIRECT TV. Were it to approach *Red Lion* from a numerical perspective, then, the Court may very well discard the scarcity rationale irrespective of DTV.

<sup>318</sup> Fifth Report and Order, *supra* note 16, ¶ 28.

<sup>319</sup> See GORE REPORT, *supra* note 67, at 10.

<sup>320</sup> See *Turner I*, 512 U.S. at 638-39; *League of Women Voters*, 468 U.S. at 376; *CBS*, 453 U.S. at 395; *Pacifica*, 438 U.S. at 748; *FCC v. Nat' Citizens Comm. for Broad.*, 436 U.S. 775, 799-800 (1978); *Democratic Nat'l Comm.*, 412 U.S. at 101-02.

<sup>321</sup> See S. REP. NO. 227, 101st Cong., 10-11 (1989) (enacted); Policies and Rules Concerning Children's Television Programming, 11 F.C.C. Rcd. 10,660, ¶ 147 (1996).

<sup>322</sup> In *FCC v. League of Women Voters*, the Supreme Court appeared to invite an administrative challenge to the scarcity doctrine:

Critics [of the scarcity doctrine] charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far

that some revision of the system of broadcast regulation may be required.

468 U.S. at 376 n.11 (1984) (citation omitted). In *Syracuse Peace Council*, the FCC responded, "We believe that the 1985 *Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*." *Syracuse Peace Council*, 2 F.C.C. Rcd. at 5053. As discussed above, however, the constitutional questions in *Syracuse Peace Council* were not reached on appeal to the D.C. Circuit. See *supra* note 306.

<sup>323</sup> *Telecomm. Research & Action Ctr.*, 801 F.2d at 508 (D.C. Cir. 1986); accord *Syracuse Peace Council*, 2 FCC Rcd. at 5055.

<sup>324</sup> *Time Warner*, 105 F.3d at 725-26 (Williams, J., dissenting); accord *Telecomm. Research & Action Ctr.*, 801 F.2d at 509. Well before *Red Lion*, the Supreme Court recognized that "the ['34] Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." *NBC*, 319 U.S. at 215-16. As in *Red Lion*, *NBC* apparently concluded that public interest regulation is a logical and inevitable extension of the statute's licensing regime. *Id.* at 226 ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.").

*Red Lion* implied that viewers have a First Amendment

eight-member majority in *Turner I* declined to question the continuing validity of the scarcity doctrine.<sup>325</sup> The Court, however, expressed some discomfort with the principle when it stated, “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”<sup>326</sup> *Turner I* clearly recognized the disconnect between scarcity and public interest regulation. While the Court accepted that “[t]he scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters,” it appeared to hedge when it continued, “the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.”<sup>327</sup> More recently in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,

518 U.S. 727, Justice Thomas, along with Chief Justice Rehnquist and Justice Scalia, noted that the Court’s First Amendment distinctions between media were “dubious from their infancy.”<sup>328</sup>

Criticism of this perceived logical gap in the scarcity principle has generated a number of proposed alternative rationales.<sup>329</sup> One possible response is that *Red Lion* never relied solely on allocational scarcity to justify regulation beyond licensing, but instead implicitly recognized a separate, intermediate step. Matthew L. Spitzer and Charles W. Logan have explored a “quid pro quo” argument that content-specific public interest regulation is the consideration the government receives for the exclusive use of a portion of the electromagnetic spectrum.<sup>330</sup> Rather than relying on the fact of scarcity as a justification for content regulation, this argument relies on the government’s control of the spectrum and the Court’s forum analysis jurisprudence to justify public interest regulation. Scarcity thus describes the physical condition of the electromagnetic spectrum necessitating licensing, as well as the condition of

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right to content that serves the public interest:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

*Red Lion*, 395 U.S. at 389-90. Justice White, the author of *Red Lion*, later disavowed this reading in *Fed. Communications Comm’n v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1980).

<sup>325</sup> *Turner I*, 512 U.S. at 638-39 (“[W]e have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium . . .”).

<sup>326</sup> *Id.* at 637 (emphasis added) (citations omitted).

<sup>327</sup> *Id.* at 637-38 (emphasis added).

<sup>328</sup> *Denver Area Educational Telecomm.*, 518 U.S. at 813 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>329</sup> See, e.g., Spitzer, *supra* note 275 (discussing industry structure, accessibility, and government property rationales); see generally Ronald J. Krotoszynski, Jr., *Comment: Into the Woods: Broadcasters, Bureaucrats, and Children’s Television Programming*, 45 DUKE L.J. 1193 (1996) (analyzing broadcast regulation as regulation of commercial speech). Interestingly, the Gore Committee, heavily influenced by one of its mem-

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bers, Professor Cass Sunstein, focused on the primacy of deliberative democracy among the goals of the First Amendment. The Gore Committee argued that public interest regulation “has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide. It has sought to cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.” GORE REPORT, *supra* note 67, at 21. The Committee’s report gives great weight to Sunstein’s “Madisonian” notion that the First Amendment is not offended by regulation that seeks to “cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.” *Id.*; Cass R. Sunstein, *Selling Children*, NEW REPUBLIC, Aug. 21, 1995, at 38 (reviewing NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* (1995)).

On this view of the First Amendment, there is no tension between constitutionalism and democracy, or between individual rights and majority rule, properly understood; robust rights of free expression are a precondition for both democracy and majority rule, properly understood. In this way, private autonomy is in no tension with, but is on the contrary inextricably intertwined with, the notion of popular sovereignty.

Sunstein, *supra* note 75, at 524.

<sup>330</sup> See Logan, *supra* note 125, at 1730-34; Spitzer, *supra* note 275, at 1028-41; see also BENJAMIN ET AL., *supra* note 1, at 6.11. But see Robert Corn-Revere, *Regulation and the Social Compact*, in RATIONALES & RATIONALIZATIONS 43-45 (Robert Corn-Revere ed. 1997).



the spectrum under the government's licensing regime. More important is Congress's decision to dedicate the limited spectrum available or allocated to television broadcasting to the service of an evolving notion of "the public interest, convenience, and necessity." "Scarcity" merely describes the limited amount of spectrum available and/or allocated to this purpose. The government's ability to restrict the use of government property reconciles public interest regulation with the First Amendment.

Indeed, hints of this argument appear throughout the Court's First Amendment analysis of broadcast regulation. *Red Lion* itself can be read to support a quid pro quo rationale:

A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary . . . .<sup>331</sup>

The Court in *Red Lion* expressly characterized public interest obligations as a condition attached to the license.

To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.<sup>332</sup>

In rejecting the argument that scarcity no longer existed because of technological advances, *Red Lion* clearly identified the broadcast license as a substantial government subsidy:

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new oppor-

tunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government.<sup>333</sup>

Former Chief Justice Burger subsequently stated in *CBS, Inc. v. FCC*: "A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'"<sup>334</sup> Burger was actually quoting an earlier opinion he had written while on the D.C. Circuit: "[A] broadcast license is a public trust subject to termination for breach of duty."<sup>335</sup>

In his dissent from denial of rehearing in *Time Warner*, Judge Williams suggested that the DBS set-asides might be saved "as a condition legitimately attached to a government grant."<sup>336</sup> He argued that "[i]f the [set aside provisions] can be sustained at all, . . . it would only be on the theory that the government is entitled to more leeway in setting the terms on which it supplies 'property' to private parties for speech purposes (or for purposes that include speech)."<sup>337</sup>

In summary, allocational scarcity does justify a more relaxed First Amendment standard for the broadcast medium, albeit in three steps rather than one. First, because the number of speakers who can use a given frequency is limited, some sort of regulation is required to prevent interference.<sup>338</sup> Second, for various policy reasons, the government has chosen a licensing regime as opposed to either a private property or common carrier regime as the best mechanism to allocate use of the spectrum.<sup>339</sup> Third, the government has

<sup>331</sup> *Red Lion*, 395 U.S. at 389.

<sup>332</sup> *Id.* at 394.

<sup>333</sup> *Id.* at 400.

<sup>334</sup> *CBS*, 453 U.S. at 395 (1981) (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966) (opinion of Burger, C.J.)).

<sup>335</sup> *Office of Communication of the United Church of Christ*, 359 F.2d at 1003.

<sup>336</sup> See *Time Warner*, 105 F.3d at 726 (Williams, J., dissenting).

<sup>337</sup> See *id.* at 724 (Williams, J., dissenting) (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

<sup>338</sup> See *NBC*, 319 U.S. at 215-16.

<sup>339</sup> See *supra* notes 66-67 and accompanying text (discussing the choice of a licensing regime). Commentators have long debated the merits of administrative regulation as opposed to relying on traditional common law property rights. See Ronald H. Coase, *Testimony Before the FCC* (en banc),

*Study of Radio and T.V. Broadcasting*, No. 12782, vol. 4, at 895 (1995), reprinted in BENJAMIN ET AL., *supra* note 1, at 2.3; Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & ECON. 133 (1990) [hereinafter Hazlett, *Rationality*]; Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Indeed, several authors have argued that the quid pro quo regime has achieved permanence precisely because it inures to the benefit of broadcasters. See Hazlett, *supra* note 118, at 943 ("[P]laying the quid pro quo game against policymakers (government and public interest) remains a steal, even accounting for the potential expense of additional public interest obligations."); Hazlett, *Rationality*, *supra* note 339 (arguing that public interest regulation serves to camouflage a system of broadcaster rents in the form of entry barriers against competition and political power over a pervasive social medium); Rubin, *supra* note 208, at 692.



demanded various forms of consideration in exchange for the issuance of spectrum licenses, in some cases money, in other cases a commitment to air certain amounts of programming in the public interest.

#### D. Spectrum As Government Property

The premises of the *quid pro quo* rationale have been subjected to several criticisms. For one, commentators have challenged the premise that the spectrum is a government-owned good with which it can bargain. The spectrum, so one argument goes, exists only by virtue of electromagnetic radiation.<sup>340</sup> This energy, which is produced by a privately owned transmitter, is sent through space that is not susceptible to ownership.<sup>341</sup> As the dissenters in *Time Warner* noted:

There is, perhaps, good reason [to hesitate] to give great weight to the government's property interest in the spectrum. First, unallocated spectrum is government property only in the special sense that it simply has not been allocated to any real "owner" in any way. Thus it is more like unappropriated water in the western states, which belongs, effectively, to no one. Indeed, the common law courts had treated spectrum in this manner before the advent of full federal regulation.<sup>342</sup>

To the extent that this argument undermines the entire broadcast licensing regime, it seems unlikely to succeed. The Court has long recognized

that spectrum rights are part of the "public domain,"<sup>343</sup> and as such, are subject to disposition by the government.

Indeed, Congress expressly retained government ownership of the airwaves when it adopted a licensing regime:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.<sup>344</sup>

Of course, the law has never known a single, integrated definition of "property." Rather, it has recognized individual "sticks" in the bundle of rights that make up property ownership.<sup>345</sup> The Government's allocation and licensing regime determines how spectrum will be used and who will be excluded from that use, traditionally the most important stick in the bundle.<sup>346</sup> Similarly, the advent of spectrum auctions makes ownership, and consequently the *quid pro quo* rationale, even more compelling.<sup>347</sup> Outside of the Commission's public interest inquiry, it appears beyond argument that the government may auction frequencies to the highest bidder, granting licenses in exchange for consideration.<sup>348</sup>

Perhaps the government's interest in spectrum

<sup>340</sup> Most notable of these critics is former Commissioner Glen Robinson. See Glen O. Robinson, Symposium, *Spectrum Property Law* 101, 41 J.L. & ECON. 609 (1998) [hereinafter Robinson, *Spectrum Property Law*]; accord Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 911-12 (1998) [hereinafter Robinson, *Electronic First Amendment*]. But while Commissioner Robinson argues for greater recognition of the property rights of licensees, in part on the grounds that the licensee "produces" the electromagnetic radiation that creates the phenomenon of spectrum, he fails to note that the government exercises or limits many of the powers that he believes illustrates the licensee's ownership of spectrum. See Robinson, *Spectrum Property Law*, supra at 610 (discussing the right to exclude, transfer, and use).

<sup>341</sup> See, e.g., Comments of CBS Corp., *In re Public Interest Obligations of TV Broadcast Licensees*, MM Dkt No. 99-360, at 27-29 (Mar 27, 2000); Reply Comments of NAB, *In re Public Interest Obligations of TV Broadcast Licensees*, MM Dkt No. 99-360, at 28 (Mar 27, 2000).

<sup>342</sup> See *Time Warner*, 105 F.3d at 727 (Williams, J., dissenting).

<sup>343</sup> *CBS*, 453 U.S. at 395.

<sup>344</sup> 47 U.S.C. § 301 (1994); accord *Democratic Nat'l Comm.*, 412 U.S. at 173-75.

<sup>345</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

<sup>346</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)

(describing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (quoting *Kaiser Aetna*, 444 U.S. at 176). Therefore there is no consequence in Commissioner Robinson's argument that references to government ownership of spectrum are "simply another way of articulating the scarcity argument—the notion being that because the frequencies were scarce, their use had to be licensed and the licensing power was tantamount to public ownership." Robinson, *Electronic First Amendment*, supra note 343, at 911-12.

<sup>347</sup> Some might respond that auctions are simply a temporarily efficient method of distributing licenses, or an instrument of taxation, and not an exercise of "ownership" rights. See Robinson, *Spectrum Property Law*, supra note 343, at 619-620.

<sup>348</sup> To my knowledge, no individual or entity has challenged the Commission's licensing authority, through comparative hearings or competitive bidding, on the basis that the government does not "own" the spectrum. Instead, cases interpreting § 309(j) proceed on the assumption that Congress properly delegated this proprietary authority to the FCC. See, e.g., *Nat'l Pub. Radio, Inc. v. Fed. Communications Comm'n*, 254 F.3d 226, 227-28 (D.C. Cir. 2001); *Fresno Mobile Radio, Inc. v. Fed. Communications Comm'n*, 165 F.3d 965, 970 (D.C. Cir. 1999); *DIRECTV, Inc. v. Fed. Communications Comm'n*, 110 F.3d 816, 822 (D.C. Cir. 1997); *Mobile Comm. Corp. of Am. v. Fed. Communications Comm'n*, 77

is better analogized to the power of eminent domain.<sup>349</sup> Regardless, whether spectrum is property that can be owned is something of a red herring. Accepting the Commission's authority to auction, the fact remains that Congress has continued to allow broadcasters to use their spectrum for free, thereby conferring upon them a benefit. Public interest obligations can thus be seen as an alternative form of consideration.<sup>350</sup> Whether one refers to the "quid" as property, subsidy, or otherwise, it is a thing of value, and the corresponding "quo" is currently lacking.<sup>351</sup>

### E. Unconstitutional Conditions

A second criticism of the quid pro quo theory is the argument that the government may not bargain for the surrender of a constitutional right. In *Syracuse Peace Council*, the FCC argued that "there is nothing inherent in the utilization of the licensing method of allocation that justifies the government acting in a manner that would be proscribed under a traditional First Amendment analysis."<sup>352</sup> This conclusion was based on the premise that speech restrictions are "unconstitu-

tional conditions' in that the government may not condition the receipt of a public benefit on the relinquishment of a constitutional right."<sup>353</sup>

In contexts other than broadcasting, for example, the courts have indicated that where licensing is permissible, the First Amendment prohibits the government from regulating the content of fully protected speech.<sup>354</sup> Analogizing to the newspaper industry, Judge Bork argued that content regulation of broadcasting could not be premised on the government's licensing function:

Neither is content regulation explained by the fact that broadcasters face the problem of interference, so that the government must define usable frequencies and protect those frequencies from encroachment. This governmental definition of frequencies is another instance of a universal fact that does not offer an explanatory principle for differing treatment. A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, would justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.<sup>355</sup>

The analogy is not entirely accurate as a matter of fact. While government provides a number of

F.3d 1399, 1402-03 (D.C. Cir. 1996). *But see* Fed. Communications Comm'n v. Nextwave Personal Comm., Inc., 200 F.3d 43, 50-51 (2d Cir. 1999) (per curiam).

<sup>349</sup> See *Time Warner*, 105 F.3d at 727 (Williams, J., dissenting); Robinson, *Electronic First Amendment*, *supra* note 343, at 912; Howard A. Shelanski and Peter W. Huber, Symposium, *Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & ECON. 581, 582 (1998).

<sup>350</sup> Not surprisingly, auctions have generated a policy debate over whether the nation's public interest needs would be better served by charging broadcasters the market price of their spectrum, using the proceeds to fund public interest programming itself. See generally HENRY GELLER & DONNA LAMPERT, CHARGING FOR SPECTRUM USE (1989); Ronald Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997); Logan, *supra* note 125, at 1727.

<sup>351</sup> Nor is the ability of the government to place conditions on that benefit impaired. The government can create limited public fora, restricting the use of tangible property as well as more metaphysical fora. See *infra* notes 375-77.

<sup>352</sup> *Syracuse Peace Council*, 2 F.C.C. Rcd. at 5055.

<sup>353</sup> *Id.*

There are those who argue that the acceptance by broadcasters of government's ability to regulate the content of their speech is simply a fair exchange for their ability to use the airwaves free of charge. To the extent, however, that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis, we reject that argument.

*Id.*

Even as the FCC concluded that the fairness doctrine was

an unconstitutional condition in *Syracuse Peace Council*, it maintained that the public interest standard in general was a permissible condition imposed on broadcast licenses: "The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act." *Id.* Moreover, the FCC's recent move away from *Syracuse Peace Council* suggests that at least two Commissioners view content-specific public interest obligations as permissible conditions: "As both the U.S. Supreme Court and the D.C. Circuit have explained, [a] licensed broadcaster is 'granted the free and exclusive use of a valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.' Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 F.C.C. Rcd. 19973, ¶ 18 (2000) (internal quotations and footnotes omitted).

<sup>354</sup> See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972); *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293-95; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). One of the most definitive statements in this area was made in *Perry v. Sinderman*, 408 U.S. 592 (1972): Although no one has a constitutional right to receive a government benefit, government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry*, 408 U.S. at 597.

<sup>355</sup> *Telecomm. Research & Action Ctr.*, 801 F.2d at 509.

benefits enjoyed by all speakers, from public commons and rights of way to the enforcement of property rights, broadcasters enjoy a unique, enormously valuable subsidy that is not provided to the general public—the “fruit of a preferred position conferred by the Government.”<sup>356</sup> Moreover, as a legal matter, the unconstitutional conditions doctrine is far from absolute; to some degree it has always competed with doctrines justifying various “strings” attached to ubiquitous government affiliations and benefits.<sup>357</sup> The Court has upheld speech restrictions imposed as conditions on government benefits where the state can provide “appropriate reasons.”<sup>358</sup>

One particular justification for speech-restrictive conditions is where the government opens public property for expressive use by certain groups, or for discussion of certain subjects, without being opened for all expressive activity. The Supreme Court has applied a categorical analysis to speech restrictions on government property, which can be seen as specific application of the doctrine of unconstitutional conditions.<sup>359</sup> In each category, the government may impose content-neutral time, place, and manner restrictions that are “narrowly tailored to achieve a significant state interest and leave open ample alternative channels of communication.”<sup>360</sup> The level of scrutiny applied to content-based restrictions varies with each category, but the basic inquiry is

“whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.”<sup>361</sup>

The first two categories of government property are the traditional public forum and the designated public forum. The traditional public forum is one that has “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>362</sup> Designated public fora consist of property that the government “has opened for use by the public as a place for expressive activity.”<sup>363</sup> Traditional and designated public fora are distinguished only by their history of expressive use, and speech restrictions in both fora are “subject to the highest scrutiny” and “survive only if they are narrowly drawn to achieve a compelling state interest.”<sup>364</sup> The government may thus not prohibit speech outright in these fora, and content-based restrictions must withstand strict scrutiny.

The third category encompasses all other public property.<sup>365</sup> This category includes property that is not a forum at all, *i.e.*, property that has not been opened for expressive activity.<sup>366</sup> Speech restrictions in nonpublic fora “need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagree-

<sup>356</sup> *Red Lion*, 395 U.S. at 400 (1967). Although broadcasters argue that a functioning market for licenses exists by virtue of the transferability of the license, *see supra* note 99; Comments of CBS, Inc., *In re* Public Interest Obligations of TV Broadcast Licensees, MM Dkt No. 99-360, at 24 (Mar 27, 2000) (citing *Syracuse Peace Council*, 2 F.C.C. Rcd. at 5055). This argument completely ignores the absence of an initial payment to the public for the use of spectrum. Given current estimates of what this value might be, *see supra* note 125, it is far from clear that any initial auction price would simply represent a sunk cost or would otherwise not affect the aftermarket for licenses.

<sup>357</sup> *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 7-2 to 7-11 (2000) [hereinafter SMOLLA].

<sup>358</sup> *Elrod v. Burns*, 427 U.S. 347, 361-63 (1976); *See Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (per curiam).

<sup>359</sup> *See* SMOLLA, *supra* note 357, at 7-2 to 7-3, 8-2; Logan, *supra* note 125, at 1734-35. Early cases treated the government like any other property owner and allowed it the right to exclude whomever it wished. *See Davis v. Massachusetts*, 167 U.S. 43, 48 (1897). Subsequent opinions backed away from this approach, although the Court continues to recognize that “the government need not permit all forms of speech on property that it owns and controls.” *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee* (“ISKC”), 505 U.S. 672, 678 (1992).

<sup>360</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460

U.S. 37, 45 (1983). The Court has said that time, place, or manner regulations “‘must be narrowly tailored to serve the government’s legitimate, content-neutral interests, but . . . need not be the least restrictive or least intrusive means of doing so.’” Instead, the regulation will survive if “the means chosen are not substantially broader than necessary to achieve the government’s interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 800 (1989).

<sup>361</sup> *Grayned*, 408 U.S. at 116.

<sup>362</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Although Roberts’s opinion did not gain a majority of the Court, it has been endorsed in several opinions. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 481 (1988). A traditional public forum is property that has as “a principal purpose . . . the free exchange of ideas.” *ISKC*, 505 U.S. at 679 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

<sup>363</sup> *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>364</sup> *ISKC*, 505 U.S. at 678; *Perry Educ. Ass’n*, 460 U.S. at 45-46 (“Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

<sup>365</sup> *See Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

<sup>366</sup> *Id.*

ment with the speaker's view."<sup>367</sup> More importantly, the government can open a nonpublic forum for expressive use by certain groups, or for discussion of certain subjects, without creating a designated public forum.<sup>368</sup> The Court has referred to these fora as "limited" public fora, but has distinguished them from designated public fora.<sup>369</sup>

The question is one of government intent: "To create a [designated public forum], the government must intend to make the property 'generally available,' to a class of speakers. . . . A designated public forum is not created when the government allows *selective access for individual speakers rather than general access for a class of speakers.*"<sup>370</sup> When it opens a limited forum, government "must respect the lawful boundaries it has itself set," and "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'"<sup>371</sup> Moreover, the government may not "discriminate against speech on the basis of its viewpoint."<sup>372</sup>

Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have ob-

served a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.<sup>373</sup>

Commentators have argued that forum analysis offers a more precise framework within which to view broadcast regulation.<sup>374</sup> The Court has recognized that forums often exist "more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."<sup>375</sup> Specifically, the Court has extended its forum analysis to cases involving government subsidies as opposed to the use of government property. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court reasoned, "When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. The same is true when the government establishes a subsidy for specified ends."<sup>376</sup> Notably, Justice Stevens recently described *Red Lion* for the proposition that "reasonable restraints may be placed on access to certain well-regulated fora."<sup>377</sup>

<sup>367</sup> *ISKC*, 505 U.S. at 679.

<sup>368</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995); *Perry Educ. Ass'n*, 460 U.S. at 45; see also *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976); SMOLLA, *supra* note 357, at 8.

<sup>369</sup> The Court has also used the term "limited" public fora to refer to a subset of designated public fora that is entitled to higher scrutiny. See *ISKC*, 505 U.S. at 678-79; SMOLLA, *supra* note 357, at 8. This statement may simply recognize that a designated public forum may be limited to a specific class of speakers but must be made generally available to speakers within the class. See *Arkansas Educ. Television Comm'n*, 523 U.S. at 679.

<sup>370</sup> *Arkansas Educ. Television Comm'n*, 523 U.S. at 679. (emphasis added). "Designated public fora . . . are created by purposeful governmental action. 'The government does not create a [designated] public forum by inaction or by permitting *limited discourse*, but only by intentionally opening a nontraditional public forum for public discourse.'" *Id.* at 677.

<sup>371</sup> *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius*, 473 U.S. at 804-06).

<sup>372</sup> *Rosenberger*, 515 U.S. at 829; See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993).

<sup>373</sup> *Rosenberger*, 515 U.S. at 829-30; See *Perry Educ. Ass'n*, 460 U.S. at 46. Of course, content-discrimination necessarily discriminates against the viewpoint that the restricted content is unobjectionable. Cf. *Rosenberger*, 515 U.S. at 830-31 ("As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be

acknowledged, the distinction is not a precise one.").

<sup>374</sup> See, e.g., Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 21 (1996) (arguing that "government may impose reasonable, viewpoint-neutral restrictions on a private party's use of public resources" such as broadcast spectrum); Logan, *supra* note 125, at 1709-16; Spitzer, *supra* note 275, at 1007-20. But see Robert M. O'Neil, *Broadcasting as a Public Forum*, in RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed. 1997). In *Arkansas Educational Television Commission*, the Court warned, "Having first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting." 523 U.S. at 672-73 (1998). The Court in that case was concerned, not with whether Congress had created a public forum in licensing broadcasters, but whether an Arkansas public television station had created a public forum by hosting a presidential debate. See *id.* at 673 ("Congress has rejected the argument that 'broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.'" (quoting *Democratic Nat'l Comm.*, 412 U.S. at 105). Consequently, the Court's cases rejecting a general right of access to a licensee's channel are only tangentially relevant to the proposition that the spectrum allocated to television can be analyzed under forum analysis.

<sup>375</sup> *Rosenberger*, 515 U.S. at 830 (student activities fund); accord *Cornelius*, 473 U.S. at 790 (Combined Federal Campaign charity fundraiser).

<sup>376</sup> *Legal Services Corp.*, 531 U.S. at 543-544.

<sup>377</sup> *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 771 n.1 (Stevens, J., concurring) (describing *Red Lion* in a parenthetical as "approving access requirement limited to

The broadcast medium is arguably a limited public forum. The decision to adopt a licensing regime over common carrier regulation or a system of private property rights precludes the broadcast medium from being characterized as a designated public forum; a finite number of speakers are given the exclusive right to speak on particular frequencies.<sup>378</sup> Because the government has provided for “selective access for individual speakers rather than general access for a class of speakers,” broadcast spectrum cannot fairly be characterized as a designated public forum.<sup>379</sup> The government has done “no more

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‘matters of great public concern’); *Democratic Nat’l Comm.*, 412 U.S. at 194-95 (Brennan, J. Dissenting):

Here, of course, there can be no doubt that the broadcast frequencies allotted to the various radio and television licensees constitute appropriate “forums” for the discussion of controversial issues of public importance. Indeed, unlike the streets, parks, public libraries, and other “forums” that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated specifically to communication. And, since the expression of ideas—whether political, commercial, musical, or otherwise—is the exclusive purpose of the broadcast spectrum, it seems clear that the adoption of a limited scheme of editorial advertising would in no sense divert that spectrum from its intended use.

<sup>378</sup> See *supra* notes 64-66 and accompanying text; *Free Speech v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam) (finding that the radio spectrum is not a public forum the regulation of which warrants strict scrutiny and holding that the broadcast licensing scheme embodied in the Communications Act of 1934, 47 U.S.C. §§ 301-339, is not unconstitutional). The trial court in *Free Speech*, in an unpublished decision, found that even if radio spectrum were subject to public forum analysis, the spectrum would constitute a nonpublic forum in which regulation is reviewed for reasonableness so long as it is viewpoint neutral and determined that the broadcast licensing scheme is in fact both viewpoint neutral and reasonable. *Id.*

<sup>379</sup> *Arkansas Educ. Television Comm’n*, 523 U.S. at 679. “Designated public fora, in contrast, are created by purposeful governmental action. ‘The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional public forum for public discourse.’” *Id.* at 677. *But See ISKC*, 505 U.S. at 678 (“Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”).

<sup>380</sup> *Arkansas Educ. Television Comm’n*, 523 U.S. at 679-80 (quoting *Cornelius*, 473 U.S. at 804).

<sup>381</sup> Judge Williams, in his dissent from denial of rehearing en banc in *Time Warner*, suggested that the Supreme Court’s opinion in *Rust v. Sullivan* might support government authority to impose conditions on broadcast licenses. *See Time Warner*, 105 F.3d at 724 (Williams, J., dissenting) (citing *Rust*, 500 U.S. at 193). *Rust*, however, suggests an even more deferential approach to speech restrictions than those

than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission,’ [through an application for a license and subsequent renewal] to use it.”<sup>380</sup>

Consequently, the broadcast medium may be regulated on the basis of content if the regulation reasonably preserves the purposes of the limited forum, but regulations based on viewpoint are presumed impermissible when directed against speech otherwise within the forum’s limitations.<sup>381</sup> A speech restriction in a limited public forum “need only be reasonable; it need not be

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applicable to non-public fora. In *Rust*, the Supreme Court upheld a statute that prohibited funds under Title X of the Public Health Service Act from being spent on programs where abortion is a method of family planning, as well as federal regulations that prohibited Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. *See Rust*, 500 U.S. at 178-81.

The government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Id.* at 193.

*Rust* distinguished *Perry* “because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.” *Id.* at 196.

The essential characteristic of *Rust*, however, is that it dealt with the government as a speaker—as a participant in the marketplace of ideas—and the restrictions at issue in that case were upheld because they were designed to preserve the government’s message from dilution by the private parties used to transmit it. *See Legal Services Corp.*, 531 U.S. at 540-43, 547-548; *Rosenberger*, 515 U.S. at 833. The Court later insisted that “It does not follow. . .that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Id.* at 834.

Unlike the subsidy in *Rust*, broadcast licenses are “designed to facilitate private speech, not to promote a governmental message.” *Legal Services Corp.*, 531 U.S. at 542. The public trustee model is premised on the editorial discretion of broadcasters and has always forbidden the government to engage in censorship. *See, e.g., Arkansas Educ. Television Comm’n*, 523 U.S. at 673-74; *Democratic Nat’l Comm.*, 412 U.S. 130-31 (1973); *cf. Rosenberger*, 515 U.S. at 834-35. In *Legal Services Corp.*, the Court noted that a strong indicator that government is involved in regulating private speech as opposed to its own message is when it “seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.” *Legal Services Corp.*, 531 U.S. at 543. The Court, in that case, specifically referred to the accepted usage of broadcast frequencies for private speech when it noted that government could not use that “fo-

the most reasonable or the only reasonable limitation."<sup>382</sup> Here, the Supreme Court's First Amendment jurisprudence regarding the broadcast medium falls into place. Application of the First Amendment to the broadcast medium has jealously guarded against viewpoint discrimination to secure the "public's interest in receiving a wide variety of ideas and views through the medium of broadcasting."<sup>383</sup> The Court has ensured that broadcasters are "entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties].'"<sup>384</sup>

Instead, the Court has implicitly recognized that public interest regulation reasonably preserves the purpose Congress has assigned to this property—an evolving notion of "the public interest, convenience, or necessity." The cases upholding public interest regulation based on the scar-

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rum in an unconventional way to suppress speech inherent in the nature of the medium." *Id.* (citing *League of Women Voters*, 468 U.S. at 296-97 and *Arkansas Educ. Television Comm'n*, 523 U.S. at 676).

Moreover, *Rust's* distinction between conditions on a grant and conditions on a grantee make an analogy to broadcast tenuous. *Rust* emphasized that "[t]he regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities." *Rust*, 500 U.S. at 196-97. The Court expressly distinguished "unconstitutional conditions" cases such as *League of Women Voters*, which struck down a ban on editorializing that applied to any station receiving money from the Corporation for Public Broadcasting (CPB). *League of Women Voters*, 468 U.S. at 366. Under the law at issue in *League of Woman Voters*:

[a] noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing. . . The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.

*League of Women Voters*, 468 U.S. at 400.

Accordingly, *League of Woman Voters* concerned "a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," *Rust*, 500 U.S. at 196-97, whereas in *Rust*, neither the law nor the regulations "force[d] the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196; see also *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983) (upholding a law granting tax deductions for contributions made to veterans' groups engaged in lobbying, while denying that favorable status to other charities which pursued lobbying efforts, in part on the basis that the other organizations could segregate their lobbying activities by creating a separate, non-exempt affiliate to pursue its lobbying efforts). Unlike the ability to provide abortion counseling or to engage in lobbying activities, the ability to speak over the airwaves exists solely by virtue of the

city doctrine necessarily affirmed the nexus between public interest requirements and the "interest of the listening public in 'the larger and more effective use of radio.'"<sup>385</sup> This nexus is more than the reasonableness demanded of speech restriction in limited public fora; the Court has required that content-based broadcast regulations be "narrowly tailored to serve a substantial government interest."<sup>386</sup> The basic licensing requirement, "the ability of the licensee to render the best practicable service to the community reached by his broadcasts," is the primary element of the public interest.<sup>387</sup> Specific obligations are also reasonably related to the purpose of broadcast. Closed captioning, political access, and children's television requirements increase public access to television that meets the informational and educational needs of society. Restrictions on indecent

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broadcast license. Thus, any restriction on the license is necessarily a restriction on the speaker. *But see ZUCKMAN ET AL.*, *supra* note 1, at 101 (noting that the distinction between condition and recipient may be "more semantic than real," because the Title X funded programs had to be both physically and financially separate from abortion related activities, resulting in the situation, identical to *League of Woman Voters*, where the recipient could not use its facilities to engage in private speech that clashed with the government restriction).

That the reasoning in *Rust* cannot be extended to broadcast is not for want of trying. Then-Justice Rehnquist, the author of *Rust*, dissented from *League of Woman Voters* because he believed that "Congress has rationally concluded that the bulk of taxpayers . . . would prefer not to see the management of local educational stations promulgate its own private views on the air at taxpayer expense. Accordingly Congress simply has decided not to subsidize stations which engage in that activity." *League of Women Voters*, 468 U.S. at 405 (Rehnquist, J., dissenting); see also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) ("The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule have any significant coercive effect.").

<sup>382</sup> *ISKC*, 505 U.S. at 683.

<sup>383</sup> *League of Women Voters*, 468 U.S. at 382.

<sup>384</sup> *Id.* at 378 (*CBS*, 453 U.S. at 395) (quoting *Democratic Nat'l Comm.*, 412 U.S. at 110).

<sup>385</sup> *NBC*, 319 U.S. at 216; accord *League of Women Voters*, 468 U.S. at 378-80 (discussing the relationship between restrictions upheld by the court and the public interest); see also *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 771 n.1 (Stevens, J., concurring) (describing *Red Lion* in a parenthetical as "approving access requirement limited to 'matters of great public concern'"); Logan, *supra* note 125, at 1739 (noting that this relationship comports with the concept of "germaneness" in the Court's unconstitutional conditions cases).

<sup>386</sup> *League of Women Voters*, 468 U.S. at 380.

<sup>387</sup> *NBC*, 319 U.S. at 216 (quoting *Sanders Radio Station*, 309 U.S. at 475).

broadcasting and advertisements, as well as requirements that broadcasters implement filtering technology, are reasonably designed to prevent the broadcast forum from use beyond Congressional intent. Finally—and most importantly—the existence of numerous alternative video outlets such as cable and DBS, rather than undermining the constitutional basis of broadcast regulation, militate in favor of its reasonableness by leaving open a number of other forums in which a speaker may exercise his or her First Amendment rights.<sup>388</sup>

Characterizing the broadcast medium as a limited public forum bridges the apparent gap between allocational scarcity and content-specific public interest regulation. Rather than justifying regulation in and of itself, allocational scarcity simply describes a unique and valuable resource at the government's disposal. The government, in turn, has dedicated a portion of that resource to the provision of mass media services to the nation. The public trustee model defines the outer boundaries of the licensee's invitation to enter the broadcast forum and fulfill Congress's objectives. Access to the forum is predicated on the licensee's promise to serve the "public interest, convenience, or necessity."<sup>389</sup>

#### F. Summary

Contrary to the concerns of broadcasters and Commissioners Powell and Furchtgott-Roth, public interest regulation is not in constitutional jeopardy as a result of digital technology. Broadcast licenses remain scarce, and the scarcity doctrine remains good law. Instead, Congress and the FCC have simply increased the amount of spectrum already owned by the broadcast industry. Moreover, even from a numerical perspective, DTV only has the potential to increase the number of television outlets available to the public. Whether broadcasters provide more than the one required video service remains to be seen. Accordingly, whether one adopts an allocational or a numerical perspective of the scarcity doctrine, digital television does not alter the factual basis upon which *Red Lion* was decided.

Even if the Court were to disavow the scarcity doctrine, its public forum jurisprudence will provide an adequate foundation on which to sustain the existing public interest regulatory regime as a "quid pro quo" for the grant of a broadcast license. Moreover, given language supporting a quid pro quo rationale, and to the extent that scarcity alone never really justified regulation beyond the allocation of broadcast frequencies, the Court could comfortably argue that the "quid pro quo" model has been an implicit element of the scarcity doctrine since its inception.

#### CONCLUSION

Despite the impassioned arguments of public interest advocates and broadcasters, public interest regulation in the near-digital future will bear striking resemblance to the regulatory regime developed for analog television. This is because the current debate over public interest regulation is only nominally connected to the transition to digital television. For the most part, the controversy surrounding the public interest standard in a DTV-world has simply inherited the decades-old arguments over (1) whether public interest obligations infringe on broadcasters' First Amendment rights, (2) how the FCC should define "the public interest, convenience, or necessity," and (3) whether and how the Commission should regulate programming content according to that definition. Each side's perspective on these issues is completely detached from emerging digital technologies. Instead, the arguments on both sides have simply been recycled from past public interest controversies.

For advocates of increased public interest obligations, the nominal connection to digital television is the "great giveaway" debate over whether the transition to DTV is an unnecessary windfall to broadcasters. But this debate itself is disconnected from DTV policy. Instead, it really concerns the merits of the government's determination that digital television serves the public interest and not the approach that Congress and the Commission have chosen to implement the DTV transition.

<sup>388</sup> See *ISKC*, 505 U.S. at 684-85 (noting that a regulation prohibiting solicitation inside an airport terminal did not prohibit solicitation on the sidewalks outside the terminals: "In turn we think it would be odd to conclude that the Port

Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled.").

<sup>389</sup> 47 U.S.C. § 309(a) (1994).



For opponents of governmental definitions of the “public interest, convenience, and necessity,” the nominal connection to digital television is the undermining of the scarcity principle on which the constitutionality of public interest regulation rests. Yet broadcast licenses remain scarce—indeed, they have been further consolidated under the broadcast industry’s control—and the scarcity doctrine remains good law. Instead, whether *Red Lion* should be reconsidered is a question that goes to the logic of that decision in the first place and is entirely distinct from digital television.

Whether these are debates that need to be reheard is beyond the scope of this article. But, as

this article has shown, that debate has little to do with DTV and has generated little consideration of whether and how the *technology* of digital television should impact broadcasters’ duty to serve the public interest. A closer examination of these issues reveals that the constitutional foundation of public interest regulation remains as sure (or as shaky) as it ever was, but that aside from a handful of salient features, a hasty decision to expand public interest obligations will likely conflict with other policy objectives, particularly market penetration of DTV receivers and a smooth and timely transition to all-digital television.