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Why Subsidize the Soapbox?
The McCain Free Airtime Proposal and the Future of Broadcasting

by John Samples and Adam D. Thierer

Executive Summary

Sen. John McCain (R-Ariz.) plans to introduce a free airtime bill in the 108th Congress. The proposed law requires broadcasters to devote airtime to political campaigns and to subsidize electoral advertising for candidates.

Supporters of the bill argue that it will reduce the need for campaign spending, which allegedly leads to several harms to the public interest. Yet recent research shows that increases in the costs of political advertising have not caused the overall rise in campaign spending. Proponents also claim that free airtime would improve election discourse, thereby better informing the American people prior to an election. Yet research also shows that the negative ads cited by proponents as a problem for democracy actually serve the public good by informing and mobilizing voters.

Advocates of "free" airtime defend their proposal against First Amendment challenges by arguing that the broadcast spectrum is a publicly owned, government-managed resource that can and should be used to further myriad political objectives. Because private broadcast companies do not technically own their spectrum but merely lease it from the federal government, they must satisfy certain "public interest" requirements—such as offering the public a certain amount of educational fare and informational programming. Because those public interest requirements are legally imposed on broadcasters, the argument goes, broadcasters can also be required to allocate more time or money for political advertising or campaign coverage in general.

That justification for government regulation of broadcasting cannot be sustained. The traditional arguments for regulation—scarcity, preventing signal interference, providing a public service—no longer hold up. The Federal Communications Commission itself is starting to recognize the decline of the broadcast regulation regime and acknowledge quasi-property rights in the spectrum. This trend is certain to continue, depriving the free airtime proposal of its legal and philosophical foundation.

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Introduction

The urge to regulate political speech did not end with the passage of the Bipartisan Campaign Reform Act in 2002. "Reform is a process," Sen. John McCain (R-Ariz.) now says. "It is not a one-time fight."[1] In the 108th Congress, this unending process will pick up again. Senator McCain along with co-sponsors Sens. Russell Feingold (D-Wisc.) and Richard Durbin (D-Ill.) plan to take the next step in "reform" by introducing the Political Campaign Broadcast Activity Improvements Act. The bill codifies the persistent efforts of many politicians and so-called "public interest" groups to force broadcasters to provide free airtime to political candidates and parties.

This paper examines McCain's proposal in two parts. The first takes the proposal on its own terms and contends that it would not advance the common good, largely because it relies on false assumptions about American elections. Even those observers who accept the traditional justification for broadcast regulation have good reason to reject McCain's free airtime proposal.

The second part of the paper shows the flaws in the traditional justifications for regulating the broadcast spectrum. The McCain measure rests upon and propagates the long-standing theory that the electromagnetic radio spectrum must be treated as a socialized resource, owned by the public and regulated at the whim of legislators and regulators. This need not be the case although it has been for almost 70 years. Spectrum property rights can allow for private management of the airwaves, including broadcast television and radio spectrum. Such rights are developing right now in embryonic form. Senator McCain, a long-time critic of the broadcast sector, should re-channel his energies toward forcing the broadcasters to compete for spectrum in a free market and demand that they return or sell much of the spectrum they have been given free of charge. The paper also raises serious constitutional concerns with the free airtime proposal, which will be addressed at greater length in a separate briefing paper.[2]

The False Assumptions Behind Free Airtime

The PCBAIA imposes two major requirements on broadcasters. It requires broadcasters to run 12 hours of "candidate-centered and issue-centered programming" in the six weeks prior to primary and general elections.[3] The bill outlines the required programming as follows: "Candidate-centered programming" refers to debates, interviews, candidates statements, and other news or public affairs formats that provide for a discussion of issues by candidates; it does not include paid political advertisements. "Issue-centered programming" refers to debates, interviews, and other formats that provide for a discussion of ballot measures in the forthcoming election. It does not include paid political ads.

The bill limits editorial control in two ways. First, broadcasters have no choice about the content of the 12 hours (half of which must be during prime time)[4] in the six weeks prior to an election; broadcasters must use the time for political programming. Second, the bill dictates the formats to be used in the required programming. The bill states that broadcasters will not be paid for the 12 hours. The mandate constitutes a tax the sum of which depends on the lost airtime's monetary value.

The bill would also "establish a voucher system for the purchase of commercial broadcast airtime for political advertisements, financed by an annual spectrum use fee on all broadcast license holders." The tax will be between .5 and 1 percent of gross revenues of broadcasters, and the expected overall cost of the program is $750 million for the 2004 election cycle, with subsequent adjustments for inflation. Most of the money will go to House and Senate candidates although about 13 percent will go to the political parties.[5] The bill also foresees vouchers for pres-

idential candidates in 2008. Candidates and the parties will use the vouchers to purchase political advertising from broadcasters who will then redeem the voucher for cash supplied by a Political Advertising Voucher Account administered by the Federal Communications Commission. Since the assets of this fund come from the taxes (or "spectrum use fee") extracted from the broadcasters, the voucher program essentially forces the owners of television and radio to subsidize political advertising.[6]

The Flawed Rationales behind PCBAIA

Advocates rarely say how free airtime might concretely serve the public interest. Paul Taylor, president of the Alliance for Better Campaigns and the leading proponent of the PCBAIA, has been an exception. He argues that free airtime will solve problems created by campaign spending and improve public discourse. Both rationales are dubious.

The Spending Argument

Campaign spending has risen over the past few decades. Taylor argues that the increase is due to the rising cost of campaign ads.[7] In his view, this situation leads to several public problems.

First, raising the money to pay for the cost of campaigning corrupts public officials by making them beholden to their contributors. In turn, that "corruption" makes voters cynical about politics and discourages voting, thereby raising the cost of reaching voters. Taylor also believes the increasing cost of campaigning reduces competition and political equality by tilting the electoral field toward wealthy or well-financed candidates: "When some candidates can speak with a megaphone and others only in a whisper, all depending on the size of their wallets, it offends the values of equal access and fair play we also prize in our democracy."[8] According to Taylor, mandating free airtime for candidates would reduce the power of moneyed interests, increase competition and equality, renew citizen trust in politics, and increase the flow of information to voters. Each of those conclusions is empirically wrong.[9]

Ads and Spending. Have increases in the costs of ads caused an increase in overall campaign spending? In a recent study, three political scientists from MIT and Yale University compared total campaign spending in very expensive markets (New York and Los Angeles) with total spending in very cheap media markets. They found that total spending in the expensive markets was "nearly identical" to spending in inexpensive markets. Their statistical analysis shows a very minor effect of rising TV costs on overall campaign spending over time; in fact, the authors note, they cannot rule out the possibility that the effect may be zero. They believe that costly TV advertising causes campaigns to opt for cheaper direct mail advertising instead. Consequently, total spending in expensive media markets is roughly identical to that in cheap media markets.[10]

This finding also contravenes Taylor's claims about equality and elections. Taylor believes the rising cost of campaigns creates greater electoral inequality since only the wealthy or well-financed can afford the higher rates. If the rising cost of TV advertising does not explain the increase in spending on campaigns, it cannot have caused the putative rise in electoral inequality.

Like many proponents of campaign finance restrictions, Paul Taylor believes campaign contributions corrupt policymaking and elections. In his view, TV costs cause corruption by increasing candidates' demand for money. Whatever the relation between spending and corruption, the Ansolabehere study shows that rising TV costs are not behind the rise in spending. Beyond that, Taylor is wrong about the influence of money. In a recent study three MIT professors surveyed 40 academic studies of the putative influence of money on legislative voting; they also conducted their own analysis of the factors affecting legislative roll call voting. They concluded:

TV costs are not behind the rise in spending.

> The evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. . . . Interest group contributions account for at most a small amount of the variation. In fact, after controlling adequately for legislator ideology, these contributions have no *detectable effects* on legislative behavior.[11]

Spending and Trust. For several decades, survey researchers have asked about public trust in the federal government. Since 1964, public trust has generally declined, with the lowest point coming in 1994. However, trust also increased in the early 1980s and the late 1990s. David Primo, a political scientist at the University of Rochester, examined the putative relationship between trust and campaign spending and found a correlation very near zero.[12] Since 1980, the United States has seen no relationship between average spending in House and Senate races and voting turnout.[13]

Taylor's arguments repeat the conventional and mistaken assumption that voting turnout has been declining steadily for the past four decades. Measured properly, the turnout of eligible voters dropped significantly in the presidential election of 1972 and the congressional election of 1974 compared to their counterparts in 1968 and 1970 and has never regained the heights reached in the 1950s and 1960s.[14] Since campaign spending has risen steadily over that period, it would not be strongly associated with the decline in turnout.[15]

Ads and Competition. The United States lacks electoral competition, especially in elections for the House of Representatives. Incumbents in the House have significant advantages and now enjoy a reelection rate of just over 98 percent.[16] Has the rising cost of TV ads hurt challengers and increased the advantages of incumbency?

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Stephen Ansolabehere and his colleagues looked at the relationship between television costs and various measures of electoral competition. They found "that TV advertising costs have little or no effect on electoral competition over the period 1968 to 1994." Their analysis also indicated that a rise in TV ad costs was associated with a decline in the vote shares of incumbents, contrary to Taylor's claim.[17] Finally, they found no relationship between TV costs and incumbents' probabilities of reelection.[18]

Quality of Discourse Arguments

Taylor recalls a time when the television networks devoted much quality coverage to national elections. He finds current coverage much worse by comparison; stories are shorter and less prominent and offer viewers "attack ads, sound-bites and synthetic spin." According to Taylor:

> Campaigns have lost both their novelty and lure as television events; today's audiences find them dull, grating, synthetic. The broadcasters have lost substantial slices of their audience, first to cable and more recently to the Internet. And politics has lost its pride of place, struggling to keep its head above water in a popular culture more consumed by money and entertainment.[19]

As a result, he concludes, even during close presidential elections, voters are not well-informed about the issues and the candidates. In the close election of 2000, for example: "Because so few people were interested, not many took the time to bone up on the issues. A nationwide survey taken two days before the election found that more than half of those polled could not answer basic questions about Bush's position on taxes, abortion and gun control, or Gore's position on Medicare prescription drug plans, Social Security, school vouchers and affirmative action."[20]

Not surprisingly, Taylor concludes that

"free" airtime would be the best remedy for our debased public discourse and public ignorance. By requiring broadcasters to provide "candidate and issue-centered" programming, mandated coverage "would open up the discourse of campaigns to something more nourishing than attack ads, soundbites and synthetic spin."[21]

Of course, it may instead be the case that the free airtime proposal merely subsidizes more of the same sort of political content Taylor laments. Moreover, Taylor's 'quality of discourse' argument is very subjective in nature; it could be argued that the electorate always found political campaigns "dull, grating, and synthetic."

Content Constraint Concerns. The First Amendment states "Congress shall make no law . . . abridging the freedom of speech." It does not state "Congress shall make no law abridging the freedom of speech *unless the law improves the quality of political speech and information available to voters.*" Expecting the government to "improve" political debates through regulation runs against the liberal grain of the American political tradition. In a liberal democracy, the people are free to make, to hear, and to judge arguments about politics and policy. The government should keep its hands off the public debate; it should reflect rather than determine the wishes of the public. For the true liberal, history indicates that governments "improve" political speech by suppressing unpopular views or opinions threatening those who hold power.

Senator McCain might respond that his mandate for "candidate and issue centered programming" affects only the format and not the content of speech.[22] That is incorrect. In the 12 hours at issue, broadcasters are required to cover politics and elections as opposed to any other topics they might wish. The bill requires the content of the coverage to be issues and candidates in an election although the formats and timing remain in some measure up to the broadcasters. Of course, the bill does not overtly require favorable coverage for any party or political position. But as will be discussed later, the required broadcasting can be expected to favor incumbents.

Causality Problems with Public Ignorance Theory. History belies Paul Taylor's claim that poor television coverage leads to public ignorance of issues and candidates. The modern era of television coverage began in the 1950s, at about the same time that political scientists began analyzing voter choice through public opinion polling based on random sampling of the population. The leading studies of voting behavior in the 1950s concluded that Americans knew little about political candidates and issues and did not possess a coherent political ideology.[23] Not much has changed since then, as two scholars of public opinion note: "The good news is that in spite of concerns over the quality of education, the decline in newspaper readership, the rise of sound-bite journalism, the explosion in national political issues, and the waning commitment to civic engagement, citizens appear no less informed about politics today than they were half a century ago."[24]

At the same time, the authors note, more wealth and spending on public education have not increased citizen knowledge about and involvement in politics.[25] Before television came to dominate American elections, Americans knew and cared little about politics and policy. "Poor" TV coverage could not be the cause of their ignorance and disinterest.[26]

Attack Ads Are Valuable for Democracy

The argument for mandated broadcasting draws on distaste among elites for the tone of recent election campaigns. Among intellectuals, television runs a close second to campaign contributions as the pathogen causing public ills in the United States. Critics argue that campaigns defined by negative ads have "turned increasingly hostile and ugly." Attack ads, the argument continues, have "become the norm rather than the exception."[27] Taylor's longing for something "more nourishing" than attack ads fits this line of criticism. Yet almost all social science research shows that negative ads on the whole serve democratic values.

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The Case against Negative Ads. Some scholars believe negative ads reduce electoral turnout by disgusting voters who respond by staying home from the polls. Based on an experiment and a statistical analysis of a Senate race, a team of researchers at MIT concluded that negative ads drove down turnout by 4 to 5 percent.[28] Yet this conclusion has not escaped criticism. The experiment did not use actual campaign advertisements, thereby calling into question its relevance for the larger world. The team's statistical study of the Senate campaigns measured "negativity" by press reports on the tone of a campaign. If the press reported campaigns as more negative then they were, their conclusions would be off target. Finally, their findings have not been replicated by subsequent studies. Indeed, most scholars have found that negative ads improve democracy in theory and practice.

The Case for Negative Ads. A moment's reflection suggests several reasons why negative ads would boost turnout. Negative ads contain relevant information for a voter, and scholars have long known that more knowledgeable voters are more likely to participate. Negative information helps voters discriminate between candidates and thereby gives them a reason to go to the polls. Finally, negative messages may stir up voters, creating more enthusiasm and involvement in an election and, perhaps, a desire to learn more about the candidates.[29] As Paul Freedman of the University of Virginia and Kenneth Goldstein of the University of Wisconsin point out, "Criticism of an opponent—particularly strong criticism—sends a message that something of substance is at stake in the election, that its outcome matters, and that this is a choice voters should care about."[30]

So much for theory. What about real life? Does the data support the theory that negative ads stimulate participation? The conjecture that negative ads stimulate turnout at the polls has become the "emerging conventional wisdom" among scholars studying the question.[31] Four high-quality studies of the effects of negative ads have fostered this wisdom.

Fortunately, Richard Lau of Rutgers University and Lee Sigelman of George Washington University considered all studies of negative ads up to 1999 to provide some general conclusions. They performed a "meta-analysis" of 117 findings about negative ads drawn from 52 separate studies. Their work addressed three questions. Do citizens dislike negative ads? Are negative ads more effective than positive ads? Does negative advertising reduce electoral participation? Their statistical analysis of the research literature found

- No reliable statistical basis for concluding that negative ads are liked less than positive ones.
- No evidence that negative political advertisements are any more effective than positive political ads.
- Little evidence that widespread use of negative ads imperils electoral participation.

The authors conclude "participatory democracy may be on the wane in the United States, but the evidence reviewed here suggests that negative political advertising has relatively little to do with it."[32]

Two earlier studies also concluded such ads drive turnout up, not down.[33] The most recent and impressive study of negative ads concluded that positive ads had no effect on turnout, but "negative ads have a significant and substantial mobilizing effect."[34]

Overall, the evidence indicates that negative ads make it more likely that people will vote and that their vote will be better informed than in the absence of such advertising. Negative ads are valuable to American democracy, not a justification for government mandates on political discourse.

Anti-choice

Apart from improving political discourse, Paul Taylor's argument for free airtime assumes Americans should and would be interested in politics if they were not misled by broadcasters and the American system of cam-

paign finance. In fact, Americans in general have little interest in political issues or in participating in politics.[35] That is a choice they make, a choice that should be as respected as any other decision by an adult. It is not the job of policymakers to make Americans "better" by drawing them into politics and elections.

Paul Taylor and other supporters of the free airtime measure wrongly assume that spending on television during elections causes numerous social ills that would be cured by subsidized broadcasting. But neither their diagnosis nor their prescription would heal the American body politic. Even if one assumes broadcasting should be government controlled "in the public interest," the free airtime measure fails. Yet that fundamental assumption of "public interest regulation" also fails under scrutiny, as will be shown in the next section.

Why Regulate Broadcasting?

Imagine that PCBAIA were applied to newspapers in the United States. Editors would be required to devote a specified amount of column space to election campaigns, and news reporting on elections would have to assume a particular format and content. The owners of newspapers would be taxed to fund political ads for parties and candidates. Put this way, the "free" newsprint proposal would clearly violate the First Amendment to the Constitution.[36] Such a proposal might also be seen as a taking of private property for public use without just compensation in violation of the Fifth Amendment.

Advocates of "free" airtime defend their proposal against First Amendment challenges by arguing that the broadcast spectrum is a publicly owned, government-managed resource that can and should be utilized to further myriad political objectives. Because private broadcast companies do not technically own their spectrum but instead merely lease it from the federal government, as a condition of their FCC-issued license they must satisfy various "public interest" requirements, such as offering the public a certain amount of educational fare and informational programming among other things. Since these other public interest requirements may be legally imposed on broadcasters, the argument goes, broadcasters may also be required to allocate more time or money for political advertising or campaign coverage in general.[37]

While the public interest or "public trustee" theory of broadcast industry regulation continues to hold great sway with many policymakers and political activists, it has always been based on a fundamental misunderstanding of the way spectrum works and must be governed. Adherents to the public interest school of spectrum management assume that the spectrum's supposedly unique characteristics—scarcity and interference—mean it must be governed as a publicly owned asset. And once it is classified as a public asset, special requirements can be placed on its use.

Moreover, many public interest proponents—including, ironically, the broadcast industry itself—also claim that the broadcast spectrum is unique among spectrum applications because it has traditionally offered the public "free," over-the-air (OTA) programming that only required the purchase of receiving hardware (antenna, TV set, radio) to view or hear broadcast programming. Stated differently, because the broadcast spectrum offered a ubiquitous communications medium with the potential to reach so many citizens simultaneously, policymakers came to believe that unique regulatory requirements should be placed on this industry that would not have passed constitutional muster if applied to other mediums, such as newspapers or cable television.

These twin public interest rationales for centralized broadcast spectrum allocation and management have been repeatedly debunked by economists and legal scholars and even watered down over the decades by several court and FCC decisions. Nonetheless, in light

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of the fact that they continue to be used to justify measures such as the McCain free airtime bill, it is worth reiterating why the public interest theory of spectrum ownership and regulation is fatally flawed and on its way to the ash heap of history.

Electromagnetic Spectrum and Its Regulation

The electromagnetic spectrum is sometimes incorrectly referred to as the "airwaves," but, as Lawrence Gasman explains: "The term 'airwaves' is a misnomer. Air is not involved. Radio communications use not air, but electromagnetic radiation—oscillating electric and magnetic fields that move through space at the speed of light."[38] Whereas electromagnetic radiation occurs throughout nature (static electricity, rainbows, thunder, etc.), electromagnetic radio communication requires intentional human design and development. Humans shape and calibrate electromagnetic waves to form distinct communications signals and to transmit information over long distances without the aid of wires. We can collect these waves into a single channel to transmit distinct information (i.e., cellular phone conversations, satellite TV signals, radio or TV broadcasts).[39] This value-added process developed over the course of the late 19th and early 20th century through a variety of related scientific discoveries and laid the foundation for the modern broadcast industry.

The early history of the wireless radio spectrum saw unrestricted, unregulated experimentation by amateurs as well as military agencies. As both public and private use of the spectrum grew, however, government officials became concerned about what many labeled "chaos in the spectrum." In other words, policymakers feared that unregulated use of this new and important resource would degrade signal quality to a point where no one would be able to communicate effectively.

Responding to complaints from the U.S. Navy about interference with their signals, Congress ended the brief period of unrestricted experimentation in the radio spectrum by passing the Radio Act of 1912, which effectively nationalized the entire electromagnetic spectrum. The act granted the federal government the power to distribute licenses among users for specific spectrum services. The new licensing process gave military users the best parts of the spectrum, leaving private users crowded up in a small space with nearly useless channels. The Navy took control of the entire spectrum during World War I; thereafter, the Department of Commerce retained licensing power but could not charge for use of the license or restrict its use once granted.

Not surprisingly, spectrum users began applying for as much of the unpriced spectrum as they possibly could. This led to genuine interference, or "chaos," problems within the spectrum. Economist Jora R. Minasian noted in 1975 that this interference "was not due to any inherently particular technological characteristics of radio emissions, but to the fact that rights to use of the frequency spectrum, rights of radiation, were ill-defined."[40] Sixteen years before Minasian, Nobel economist Ronald H. Coase pointed to the same problem in a famous 1959 article on the FCC:

> The real cause of trouble was that no property rights were created in these scarce frequencies. A private-enterprise system cannot function properly unless property rights are created in resources, and, when this is done, someone wishing to use a resource has to pay the owner to obtain it. Chaos disappears; and so does the government except that a legal system to define property rights and to arbitrate disputes is, of course, necessary. But there is certainly no need for the kind of regulation which we now find in the American radio and television industry.[41]

Manhattan Institute economist Thomas Hazlett's pioneering work on the history of

spectrum regulation found that the chaos of 1921–23 "was, in essence, an outcome of government control: over 500 broadcasters were . . . bunched up all at the same point on the spectrum to which they had been directed by the Commerce Department, and operations were not always perfectly synchronized."[42] Minasian agreed: "No attempts were made prior to May 1923 to assign a separate channel to each station, or to provide geographic separation of the stations operating on the same channels, or to provide mutually exclusive times of operation. The wave lengths were assigned to all in a group. . . . This policy, coupled with a liberal policy for issuing licenses to amateurs, resulted in interference."[43]

To summarize, the Radio Act of 1912 and the administrative decisions that flowed from it had two main effects. First it encouraged military use of the spectrum at the expense of private broadcasters. Second, it failed to create a private marketplace in spectrum rights that could have solved the ensuing scarcity and interference problems. That failure led to demands by policymakers and industry officials for more legislative intervention. The regulatory framework for the electromagnetic spectrum grew out of government failure.

The Road Not Taken: Property Rights

Despite those impediments, Hazlett found that property rights in the spectrum were developing at this time.[44] While federal regulators, legislators, and industry officials were working to create a regulatory regime, some judges were taking steps to establish property rights. Hazlett points out that in one 1926 Illinois Circuit Court case, *Tribune Co. v. Oak Leaves Broadcasting Station*, "the classic interference problem was encountered, litigated, and overcome, using no more than existing common-law precedent."[45] Judge Francis S. Wilson adjudicated a dispute between two broadcasters who were "homesteading" and faced an interference dilemma. He argued that once an entity had established a presence within the spectrum to a given allocation, in effect, that user had a de facto property right in that allocation. By establishing this common law precedent to protect property rights in the spectrum, the decision effectively rendered the interference problem moot. Not everyone was pleased with this solution, however. Some observers from industry and government feared that property rights would preclude a comfortable, oligopolistic market setting (that is, a noncompetitive market where both the regulator and the regulated entities were satisfied with control of entry and comfortable market share, respectively).[46] In the 1920s, the incumbent broadcasters had worked with Secretary of Commerce Herbert Hoover to establish a "public interest" paradigm of federal regulation and control of the spectrum to replace the emerging common law, property rights-based paradigm. Despite past legislative failings and the emerging property rights regime, they argued that only federal regulation of the spectrum could eliminate the chaos that existed within the spectrum during that period.

The coalition eventually convinced Congress to pass the Radio Act of 1927, giving the federal government plenary regulatory authority over the allocation of the spectrum. The law created the Federal Radio Commission with the power to grant three-year licenses in exchange for certain public service requirements. The FRC could grant (and revoke) licenses "in the public interest, convenience, or necessity." The law did not specifically define "the public interest" in spectrum allocation.

As Hazlett notes, the FRC and the public interest paradigm pleased broadcasters: "It immediately grandfathered rights for major broadcasters, while eliminating marginal competitors and all new entry."[47] When the law passed, the *Harvard Business Review* concluded: "The point seems clear that the Federal Radio Commission has interpreted the concept of public interest so as to favor in actual practice one particular group. While talking in terms of the 'public interest, convenience, and necessity' the commission actually chose to further the ends of the commercial broadcasters."[48]

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The Return of Property Rights?

Unfortunately, little has changed since the *Harvard Business Review* printed those words in 1935. The FRC and its public interest powers became part of the FCC that was created by the Communications Act of 1934.[49] In the absence of spectrum markets and property rights, the FCC then developed haphazard, inflexible, and inefficient techniques to manage the spectrum resource in general and broadcast licensees in particular.

As this brief history makes clear, the American broadcast television industry has always been a creature of federal law and regulations. The industry continues to rely heavily on lawmakers and regulators for special favors and unique treatment. Correspondingly, policymakers continue to believe that this special historic relationship and the supposedly unique attributes or problems associated with the spectrum (scarcity and interference) justify ongoing federal oversight and control. Lawmakers have continued to argue that the broadcast spectrum should be treated as a nationalized public asset and that markets, property rights, contracts, and operational flexibility must be rejected in favor of central planning. "Perhaps the closest analogy to the U.S.'s current approach is that of GOSPLAN, the central planning agency in the former Soviet Union," argued Gerald R. Faulhaber and David J. Farber, the former chief economist and chief technologist of the FCC respectively.[50]

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But the FCC may be moving away from collective ownership and central planning. In June 2002, FCC Chairman Michael Powell established a Spectrum Policy Task Force to explore improvements in spectrum management and conduct the first comprehensive review of spectrum policy at the agency. The Task Force's report begins by acknowledging: "The time is ripe for spectrum policy reform. Increasing demand for spectrum-based services and devices is straining longstanding and outmoded spectrum policies."[51] The report notes that the FCC's traditional "command-and-control approach" to spectrum management is the primary cause of regulatory failure because that approach has imposed significant usage restrictions on spectrum use and users.[52] The Task Force goes on to recommend greater reliance on an exclusive use model of spectrum allocation and use—one in which spectrum holders would be granted clearly defined rights and have the right to use or sell their spectrum however they wished. This is really just a good old fashioned private property rights regime for spectrum allocation, even though the FCC does not call it that.[53] Oddly, the report gratuitously exempts the broadcast spectrum from these recommendations.[54]

Nonetheless, the FCC is changing the way it regulates the broadcast marketplace. Legal scholars Howard A. Shelanski and Peter W. Huber have argued that "although important changes remain to be made, the FCC has strengthened property interests on both the transmission and receiving ends of licensed frequencies and, through the administrative process, has eroded the importance of the statutory distinction between private ownership and public licensing."[55] That is, the FCC is treating broadcast spectrum licensees as if they have secure ownership and operational property rights in their spectrum. Since almost all broadcast spectrum licenses have traded hands for lavish sums at least once in the secondary marketplace, most companies have come to feel their ownership stake in the license goes beyond the mere sheet of paper on which the license is printed.

Other realities point to an emerging property rights regime. The FCC license renewal process has become little more than a rubber stamp that virtually guarantees that incumbents retain their broadcast license. The FCC is no longer allowed to consider whether another applicant might serve the public interest better than the incumbent because the Telecommunications Act of 1996 eliminated comparative renewal hearings for broadcasters. The government has increasingly recognized the rights incumbents had come to possess in their operating facilities, and by extension, in the spectrum over which they operated.[56]

Flawed Rationales for Spectrum Regulation

The FCC decisions reflect a weakening of the traditional justification for a command-and-control model of spectrum governance. Government control is supposedly necessary because the spectrum is a scarce resource riddled with the potential for interference at every juncture. But scarcity and interference are not valid reasons to reject property rights; rather, they are reasons property rights should be employed as an allocation mechanism. [57] Other rationales also fail to convince.

Scarcity

Proponents used spectrum scarcity to justify the broadcast licensing scheme enshrined in the Radio Act of 1927 and the Communications Act of 1934. Supreme Court decisions such as *NBC v. United States*[58] and *Red Lion Broadcasting Co. v. FCC*[59] then made the scarcity rationale sacrosanct and used it to fashion a two-tiered theory of First Amendment scrutiny. Print media, which were plentiful, received strict First Amendment protections, whereas electronic media are scarce and thus have far less protection from government regulation or censorship.

But even if the spectrum is scarce, that hardly makes the case for government control. Every natural resource is inherently scarce in some way and, thus, under this rationale should be subject to extensive government oversight.[60] For example, there is only so much coal, timber, or oil on the planet. While some resources are more abundant or scarce in nature than others, economists have traditionally agreed that property rights, pricing mechanisms, and free markets provide the most effective way to efficiently allocate resources. In fact, Benjamin M. Compaine, executive director of the Program on Information Resources Policy at Harvard University, notes that the government created a form of artificial scarcity within the spectrum by exempting it from market trading and the pricing system:

> It can be argued that the spectrum was scarce because demand exceeded supply. This is almost invariably the case when a good with value is given away for free. If a market price had been assigned to spectrum from the start (which in effect is done when licenses are bought and sold later on), then it would be no more or less scarce than are pencils, VCRs or Lexus automobiles. Moreover, it may have been put to better uses initially if those who obtained it had to pay for it.[61]

In other words, markets would have likely encouraged the maximum amount of spectrum use and innovation possible, thereby diminishing any inherent scarcities within the medium. Ironically, compared to physical resources, electromagnetic spectrum may actually be less scarce, since engineers have continued to find new ways to push out the boundaries of the usable spectrum and develop applications for spectrum frequencies that were previously believed uninhabitable.[62]

Government ownership and control exacerbate rather than solve the scarcity problem. Ithiel de Sola Pool explained this best in *Technologies of Freedom,* his classic 1983 study of technology and free speech: "The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity."[63]

And, practically speaking, even if scarcity was once a legitimate issue within the broadcast marketplace, it certainly is not today as the number of television and radio stations exceeds the number of daily newspapers in America.[64] "There simply exists no true scarcity of outlets for mass communication," argues Jonathan W. Emord, author of *Freedom, Technology, and the First Amendment.*[65] "It is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment."[66] What Emord

Government ownership and control exacerbate rather than solve the scarcity problem.

contended in 1991 is even more true today. "Scarcity is the last word that would come to mind in regard to the vast array of communications outlets available today," concluded *Chicago Tribune* columnist Steve Chapman.[67] In short, information and entertainment are commodities that are abundant and cannot be monopolized.

Interference

Interference has been another recurring rationale for spectrum licensing in federal legislation and judicial decisions, but it is hardly a legitimate reason to reject markets and property rights.

The problem of interference simply does not make the case for government control.

Interference is not unique to the intangible ether. In fact, it may be a more serious problem within the realm of tangible property. Consider the case of two landowners who have adjoining parcels of land and a common stream that runs through their property. If Owner A disposes of a small amount of waste in the stream and it comes to rest on the property of Owner B downstream, has it "interfered" with or harmed B's property right? What if Owner A was prone to burn leaves or even garbage in his yard and the wind blew the smoke and smell across Owner B's property? What if A simply played loud music late at night that B could hear while he tried to sleep? These are hardly hypothetical examples. Property law books are replete with case studies of how such interference disputes have been resolved throughout the centuries. Why then has the United States relied on central planning instead of common law adjudication for governing the electromagnetic spectrum? The problem of interference simply does not make the case for government control, as Thomas Hazlett has pointed out:

> Economists, political scientists, and lawyers generally agree that the interference rationale for licensure in "the public interest" is nonsensical. The interference problem is widely recognized as one of defining separate frequency "properties"; it is logically unconnected to the issue of who is to harvest those frequencies. To confuse the definition of spectrum rights with the assignment of spectrum rights is to believe that, to keep intruders out of (private) backyards, the government must own (or allocate) all the houses.[68]

Thomas G. Krattenmaker and Lucas A. Powe, authors of *Regulating Broadcast Programming*, concur:

> Interference, like scarcity . . . is a bogeyman. All resources are subject to interference in the sense that their value will decline if everyone attempts to use them at once. This is why governments recognize property rights (which include the right to exclude others from using) in resources exchanged through the marketplace. Interference will . . . destroy the value of any resource, but usually the government does not choose to displace the market to prevent interference. Two people cannot comfortably sit at the same time in the same desk chair. Yet this fact has not led government to parcel out the right to sit in a chair. Rather, ownership of the chair is taken to confer authority to exclude others from sitting in it, no matter how eager they may be to do so.[69]

This led Krattenmaker and Powe to conclude: "To prevent chaos (interference) in broadcasting or publishing, then, requires not a commission, but a system of property rights."[70]

Public Service

Congress and the FCC have demanded much of broadcasters over the years, using public interest or "public service" rationales for broadcast regulation.[71] Yet if we look closely, we see that public service most often means political benefits for politicians.

For purposes of this paper, the most

important political benefit associated with public interest regulation is the political programming regulations contained in Sections 312 and 315 of the Communications Act. Section 312 allows the FCC to revoke a broadcast license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a noncommercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy." Section 315 demands that broadcasters afford equal opportunities for all candidates for a particular office to use their stations if they allow any candidate to do so. More important, Section 315(b), the so-called "lowest unit charge rule" demands that the rates broadcasters charge candidates for advertising time prior to elections "shall not exceed the lowest unit charge of the station for the same class and amount of time for the same period." In short, candidates for office get the cheapest price for broadcast advertising whatever the demand.

The existence of such regulations helps explain why politicians consistently seek to preserve and even expand the public interest rationale for broadcast industry regulation.

"Pervasiveness" Rationale

Some policymakers have argued that public interest regulation is warranted because of the pervasive or intrusive nature of broadcast media into the lives of the citizenry. "The broadcast media have established a uniquely pervasive presence in the lives of all Americans" which "is uniquely accessible to children, even to those too young to read," Justice John Paul Stevens noted in the Supreme Court's famous 5-4 decision in *FCC v. Pacifica Foundation*.[72] Justice Stevens' concerns about the pervasiveness of broadcasting and its accessibility by many children have been echoed by other legislators and regulators throughout the decades.

In reality, broadcasting is no more pervasive in our culture than any other medium, even when children are the taken into account. Books are available at libraries, newspapers and magazines can be thumbed through at newsstands, and cable and satellite can be turned on with the click of a controller just like broadcast television. The fact that children might read or view something offensive in a magazine or on cable TV has not justified unique regulatory treatment of those media.

Even if broadcasting were pervasive, that would hardly be a public problem. Newspapers, magazines, books, video tapes, DVDs, cable and satellite television, and the Internet all compete for the eyes and ears of consumers. As former FCC Chairman Mark S. Fowler and Daniel L. Brenner conclude, "There is every reason to believe that the marketplace, speaking through advertisers, critics, and self-selection by viewers, provides an adequate substitute for Commission involvement in protecting children and adults from television's 'captive' quality."[73] Broadcasters hardly intrude into the homes of Americans when families choose to voluntarily purchase televisions. As Krattenmaker and Powe argue, "Radios and televisions are not forced upon citizens, but in fact are considered to be among the most valued household purchases. Intruders they are not."[74]

"Public Forum" Rationale

Finally, some policymakers or interest groups contend that the broadcast medium is the equivalent of a "public square" or "public forum," which Congress and the FCC must regulate to ensure equal access by various groups and a robust dialog on the important civic issues of the day.[75]

Many different communications media could be considered a "vital town square," however. Moreover, town squares are generally decentralized and interactive, like the Internet, whereas broadcasting is much more centralized and top-down driven. Should the Net be regulated as a town square?[76] Finally, the town square analogy pretends that broadcasting must always be treated as a public asset and governed by a unique set of rules. But as the preceding sections have shown, the analogy is not accurate.[77]

Politicians consistently seek to preserve and even expand the public interest rationale for broadcast industry regulation.

Broadcasters receive substantial benefits from the public interest regulatory regime, since they essentially play by their own set of spectrum rules.

Why Public Interest Regulation Lives On

We have good reasons to reject the conventional wisdom on spectrum management. Yet the command-and-control methods live on in policy. Why? First, broadcasters have benefited from public interest regulation since they have been able to obtain special favors and economic benefits (or "rents" in economic parlance) from policymakers. Second, many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of broadcasting toward a more noble end. The PCBAIA continues this ignoble tradition of serving the interests of policymakers.

The Broadcast Industry Benefits from Public Interest Regulation

Broadcasters receive substantial benefits from the public interest regulatory regime, since they essentially play by their own set of spectrum rules. Although it could be argued that some of those rules impose a burden on the industry (such as free speech standards or demands for a certain amount of educational fare,[78] political programming, or local news, most broadcasters find those burdens acceptable in light of the substantial benefits they accrued from the public interest paradigm they operate under. "A broadcaster loves to be considered a public interest figure," argues former FCC General Counsel Henry Geller, since he or she can pretend to be carrying out a great civic duty while receiving generous favors from regulators.[79]

For example, employing public interest arguments, broadcasters have gained the right to require that cable and satellite providers carry their signals on demand without compensation. Such "must carry" mandates essentially give broadcasters a property right in a certain amount of the channel capacity provided by rivals.[80] Those carriage rights impose a substantial cost on cable and satellite operators that broadcasters would otherwise have to cover if not for various political, regulatory, and judicial battles they have won.[81]

In a broader sense, broadcasters have skillfully employed public interest arguments for decades to guarantee free access to their underlying spectrum. From its origins, the broadcast industry has not been forced to compete for the right to operate its stations but has instead been given free licenses from the FCC on the condition that the broadcaster serve the public interest with the forms of programming mentioned above. After winning one the FCC's "contests" for the right to hold such a license, broadcasters are only subjected to a rubber-stamp renewal hearing every few years. Meanwhile, a secondary market in broadcast licenses has developed in which licenses traded hands for exorbitant sums, none of which was remitted to the public that supposedly owned the underlying spectrum. Had the broadcasters that sold those licenses originally purchased them at an FCC auction, this would not have raised much concern. But critics argue that by selling a license, which they originally received at no charge, broadcasters have gained control of an incredibly valuable resource and betrayed the public trust in some loose sense.[82]

Worse yet, as part of the Telecom Act of 1996, broadcasters used public interest arguments to convince policymakers to "loan" them additional television licenses for the purposes of deploying digital television (DTV) to the public.[83] Although each broadcaster in America already has a six megahertz (MHz) spectrum allocation that is used to send over-the-air (OTA) analog TV signals, broadcasters argued that each would need an additional 6 MHz of high-quality spectrum to simulcast digital signals alongside analog broadcasts until Americans made the complete transition to DTV sets. Moreover, the broadcasters did not want to pay for that spectrum and claimed it was in the public interest for Congress to loan each station owner an additional 6 MHz to make the conversion. In theory, once the conversion to

DTV was complete, each broadcaster would return the old analog license to the FCC, which would rededicate or resell it.

Congress accepted this argument and granted the broadcast industry's wish despite vociferous protests from a variety of industry and consumer groups. They objected that the spectrum being loaned free of charge to broadcasters was valuable "beach-front quality" spectrum that could have been used for many competing applications and services. Other spectrum users were salivating at the prospect of bidding billions to obtain that same spectrum for other uses, but they didn't have the benefit of public interest or public trustee arguments on their side.

More scandalous still, the broadcasters will likely be allowed to keep both 6 MHz licenses for an extended period of time. Under a subtle but important change made by Congress in 1997, broadcasters will be allowed to continue to transmit analog signals on their old 6 MHz analog slice of spectrum until 2006 *or until 85 percent of Americans have made the migration to digital television* and then return the old spectrum to the FCC for auction. In other words, if the DTV conversion is not 85 percent complete by 2006—and there is almost no chance it will be since only a small percentage of Americans have DTV today—the broadcasters will be able to hold on to both the old analog and new digital licenses for the indefinite future.

The cost of this misguided industrial policy is enormous. At the time of the initial giveaway, FCC estimates of the value of this spectrum ranged from $37 to $70 billion,[84] and some scholars put the figure at more than $100 billion. Senator McCain described this giveaway as "one of the great rip offs in American history." "They used to rob trains in the Old West, now we rob spectrum."[85]

And that is merely the cost of the lost auction revenues for the government. We have also lost unquantifiable opportunities for innovation and investment by other potential users of that same spectrum. While Americans wait for the rollout of DTV, countless other service providers are being denied the opportunity to employ that same spectrum for alternative uses that the public might actually demand today. They might, for example, use that spectrum to provide next generation cellular telephony and wireless broadband. [86]

Given those costs, should we continue to use so much spectrum to deliver broadcast signals over the air? Considering the fact that over 85 percent of American households now subscribe to cable or satellite video distribution systems[87]—both of which retransmit traditional broadcast signals to consumers anyway—why should so much valuable spectrum be dedicated to a high-bandwidth application like television broadcasting?

In fact, some spectrum scholars on both the political left and right have suggested that Congress consider "pulling the plug" on broadcasters entirely by demanding that they return their licenses to the federal government for redeployment.[88] Broadcast programming would then be delivered to homes via cable and satellite systems instead. And "even if ad-supported TV is determined to be a vital national interest, it is possible that there are more efficient ways of delivering it," notes Jim Snider of the New America Foundation:

> Let's assume that every American has a sacred right to continue receiving local ad-supported TV from the current crop of incumbent broadcasters. Currently, these broadcasters use the most valuable airwaves available on earth to distribute their programming. But the programming could also be delivered over the much less valuable spectrum than can be used with satellite TV delivery. Every American could be guaranteed their current free TV fare, just not over the same airwaves. This would appear to be a creative win-win because free TV is preserved while resources are used more efficiently. Yet broadcasters would be sure to oppose it because the current regulatory regime is even more favorable to themselves.[89]

The cost of this misguided industrial policy is enormous.

Political and legal obstacles notwithstanding, we should ask how long Americans will be forced to prop up the old system of OTA broadcasting. As noted, 85 percent of Americans subscribe to cable or satellite today. At what point would policymakers be willing to pull the plug on the old OTA broadcasting system? When 90 percent of the public opts for cable and satellite? Ninety-five percent? Ninety-nine percent? Stated differently, if only a very small percentage of Americans continued to receive their video programming through OTA broadcasts—say 1 to 5 percent—would that justify the continuation of a 70-year industrial policy that grants broadcasters special favors and treatment at the expense of others while preventing others from using a portion of this massive chunk of prime spectrum?

Ironically, Norm Ornstein, a resident scholar at the American Enterprise Institute and one of the chief architects of the free airtime proposal, makes this point succinctly: "Over-the-air broadcasting is a dinosaur. It's not going to last very long."[90] If that is true, why support additional public interest mandates like the free airtime requirement? Why not completely clear the broadcast band and rededicate it to alternative services the public legitimately demands? The quasi–property claims of broadcasters to spectrum will derail any effort by Congress or the FCC to confiscate and rededicate their spectrum to alternative uses. Yet policymakers can encourage broadcasters to vacate their spectrum.[91]

We should ask how long Americans will be forced to prop up the old system of OTA broadcasting.

If the broadcast spectrum could be sold for alternative uses it would have two important implications. First, the spectrum could be purchased by alternative owners who wish to deploy innovative new services that the public demands. Second, the substantial revenues generated by the sale of the OTA broadcast spectrum could be used to compensate the broadcasters for vacating the spectrum. Broadcasters should be given a substantial portion of the auction revenues—some would argue *all* of the revenues—to encourage them to go along with the plan.

If the government does keep a portion of the auction revenues, they should be used to fund a temporary universal service scheme for the remaining 1 to 5 percent of low-income households who rely on OTA broadcast signals. A small, means-tested, one-time voucher could be given to the neediest households who still rely on traditional analog OTA signals to purchase a converter box to receive signals from alternative sources in the future. While no American is entitled to free television services, the leading argument against ending OTA broadcast television will be that some households cannot afford cable or satellite. Using auction proceeds to help fund the consumer transition from OTA to alternative distribution channels would preemptively undercut such arguments.

If the entire OTA broadcast spectrum were sold off, it would likely fetch significant sums at auction. In a speech before the National Association of Broadcasters in March 2001, Tom Wolzien, senior media analyst for Bernstein Research, used recent cellular auction results to estimate the potential value of the roughly 400 megahertz of spectrum occupied by the broadcast sector. Wolzien concluded: "The theoretical value is an astounding $367 billion dollars—a third of a trillion dollars. To put this number in some sort of context, the entire television station industry is worth about $100 billion in enterprise value, around a third of the total theoretical value of the bandwidth the stations occupy."[92]

Broadcasters might still argue that the spectrum status quo will enable them to compete on even terms in the new video marketplace against the likes of cable and satellite service providers. In other words, because they will be able to use their spectrum capacity to multicast a broader array of programs and services to the public, it would be a mistake to force them to return any of it to the FCC. But this argument is also flawed, as Glen O. Robinson of the University of Virginia explains:

> When it comes to multicasting, conventional broadcasters are and will

> remain hopelessly out-channeled. The only way that conventional broadcasting can "compete" with true broadband media is with the aid of government mandates that incorporate that broadcasting into these competing systems [via must carry mandates on cable and satellite]. Unfortunately, Congress, the FCC, and the broadcast industry are still too much in thrall to the ideology of public interest to perceive the reality of public benefits and costs entailed in clinging to this outmoded form of electronic delivery. In the interest of preserving broadcasting—local terrestrial broadcasting—we will have to settle for a distinctly second-best arrangement of property rights for the radio spectrum for some time yet to come.[93]

Robinson concludes, therefore, that, "If one asks why television should be delivered by a broadcast medium, the only apparent answer is that for 70 years Congress and the FCC have believed that some special public interest inheres in this medium. As a result, broadcast spectrum rights will continue to be the premier example of inefficiency from an incompletely specified property right."[94]

In summary, by skillfully employing public interest rationales, the broadcast industry has been able to coax policymakers into granting them special favors at the expense of consumers and other industries. The HDTV transition gave the broadcast industry a new lease on life and helped it secure the rights to a significant swath of spectrum that could have been put to competing uses by other industries.[95]

Yet, as we have seen, the public interest rationale is weak. The costs of continuing OTA broadcasting are substantial, and broadcasters face competition from video providers. The broadcasters should be required to compete in a free spectrum marketplace if they want to remain players in this industry. Such a liberalization would also prevent policymakers from using the DTV transition as another opportunity to exact special favors or requirements of their own from broadcasters, including free airtime for candidates.

Policymakers Benefit from Public Interest Regulation

Many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of broadcasting toward a nobler end; a sort of noblesse oblige for the communications age. At times, their rhetoric takes on a fairy-tale quality as lawmakers and regulators speak of the public interest in reverential and fantastic terms, all the while deftly evading any attempt to define the term. For example, while recently testifying before the Senate Commerce Committee, FCC Commissioner Michael Copps paid homage to the public interest standard:

> At all times, I strive to maintain my commitment to the public interest. As public servants, we must put the public interest front and center. It is at the core of my own philosophy of government. More germanely, it permeates the statutes which the Commission implements. Indeed, the term "public interest" appears over 110 times in the Communications Act. The public interest is the prism through which we should always look as we make our decisions. My question to visitors to my office who are advocating for specific policy changes is always: how does what you want the Commission to do serve the public interest? It is my lodestar.[96]

Commissioner Copps' public interest "lodestar" is rhetorically pleasing but ultimately provides little practical guidance. Public interest proponents assume that their values or objectives—which, in their opinion, are consistent with the needs and desires of the public—will ultimately triumph within the

The broadcasters should be required to compete in a free spectrum marketplace if they want to remain players in this industry.

public policy arena. History shows, instead, that broadcasters have been able to extract and retain substantial ongoing rents from the regulatory process. The "public interest" rationale has merely cloaked the striving for private gain, at the beginning and throughout the history of broadcast regulation.[97]

If solid analysis of the origins of broadcast regulation yields skepticism about claims that regulation is in the "public interest," we might also wonder whether current proposals for mandated political broadcasts serve private agendas. They do. As we have seen, broadcasting regulation was a compromise that served the interests of its two major supporters, the commercial broadcasters and members of Congress. The broadcasters received for free the right to use part of the spectrum and were protected from competition through the licensing process. Politicians had limited, though real, power over the content on the airwaves.

McCain's PCBAIA bill is a threat aimed at returning control over broadcasting to incumbent politicians.

The coalition underlying broadcast regulation has come under strain in recent years. Labor unions, businesses, and interest groups began running hard-hitting television ads attacking incumbent members of Congress. These ads were lucrative for the broadcasters; taken together, campaigns spent at least $509 million on advertising in the 2000 election cycle.[98] Things looked different from Capitol Hill. The pain inflicted by the ads led to promises from powerful members like Rep. Clay Shaw (R-Fla.) to address the "problem" of soft money ads in the 107th Congress.[99] After some delay, Congress enacted the Bipartisan Campaign Reform Act of 2002, which included a ban on soft money contributions to the political parties and restrictions on the funding of the issue ads that so chagrined Shaw.[100] By presumably depriving the broadcasters of advertising revenue (as well as ridding themselves of troubling ads), Congress took the first step in sanctioning its erstwhile coalition partners for reneging on the implicit deal underlying broadcast regulation.

The next step in "reform" is "free" airtime. It is a much more radical step than BCRA since "free" airtime constitutes simple expropriation of property the broadcasters have controlled for some years. McCain's PCBAIA bill is a threat aimed at returning control over broadcasting to incumbent politicians.

If the bill passes, broadcasters will be required to devote 12 hours every cycle to election coverage. We should expect that coverage to favor those in power (i.e., members of Congress who passed the mandatory broadcast bill). After all, every broadcaster will be aware that incumbents will be watching the tone and content of the mandatory broadcast hours. Any negative coverage of a member of Congress will invite retribution.

A close look at the qualifications set to receive "free" airtime indicates how "vouchers" favor incumbents. In the House, a candidate must meet three conditions to receive the advertising subsidy:

1. Raise at least $25,000 in contributions from individuals, not counting any amount in excess of $250 received from any individual.
2. Agree not to spend more than $125,000 in personal or immediate family funds on the House campaign.
3. Face at least one opponent who has raised or spent at least $25,000 on the campaign.

The conditions for Senatorial candidates are similar, though the thresholds are higher, reflecting the larger "districts" they represent.

Once a House candidate has qualified, he or she will receive $3 in broadcast vouchers for every $1 they could receive in individual contributions during the election cycle, not counting any amount in excess of $250 received from any individual. The ceiling on the subsidy is $375,000. Once again, the rules for Senate candidates are similar, though the subsidy is proportional to the size of the state.[101]

The first condition means a House candidate must raise $25,000 in small donations to qualify; for example, a Senate candidate in a large state like California must raise more than $1.25 million in small donations to qualify. Once qualified, the subsidy itself depends on

raising small donations. The ability to raise money in small donations depends on experience and political organization. Incumbents have both, challengers generally have no existing fundraising mechanism. Although the "free" airtime seems favorable to the small donor, in practice it will favor incumbents who have the organizational ability to raise small donations.[102]

The second condition improves the chances of incumbents faced with self-financing challengers. Self-financiers must pay for their own advertising, while the incumbent forces the broadcasters to pay for his or her ads. Improving the position of incumbents relative to self-financing challengers was also a goal of BCRA.[103]

Note also that 87 percent of the voucher fund goes to individual candidates, with the balance going to political parties. This bias against the parties is not surprising: political parties often support challengers to incumbents.[104] Overwhelmingly the candidates receiving free airtime will be incumbent officeholders.

If this bill is so favorable to incumbents, why has Rep. Billy Tauzin, the chairman of the House Energy and Commerce committee, judged it "dead on arrival" at Capitol Hill?[105] Tauzin's judgment may be a prediction about the lobbying influence of the broadcasting industry, or he may be indicating that the bill is not yet sweet enough for the taste of incumbents. The bill does hold some small possibility that rare challengers with sufficient organizational resources will receive some vouchers. The bill might find a congressional majority if the qualifications for receiving subsidies were made more stringent and thus more favorable to incumbents. That change might well happen during the legislative process. After all, Senator McCain's proposal is the opening bid, not the final word, on free airtime.

McCain's bill may not need to pass in order to accomplish its aims. The purpose of the free airtime bill may be to threaten the broadcasters with spectrum expropriation as a way to get them to "voluntarily" refuse to run the attack ads that have so troubled members of Congress. In the 2002 election, several TV stations refused to run certain ads, citing the risk of lawsuits.[106] It might well occur to more than a few broadcasters that refusing such ads (or forcing the ads to be "more civil") would be a good way to avoid McCain's attempt to expropriate their property.

Finally, we should keep in mind that the PCBAIA is a hidden form of taxpayer financing of political campaigns. Americans do not favor funding political campaigns, and Congress would be unlikely to use general tax revenues to purchase ads for candidates and parties.[107] One way around that constraint might be to force an unpopular group to fund the ads. The "voucher" system in the bill apparently seeks to force the owners of broadcasting companies to pay for election advertising. The broadcasters in turn might raise the cost of all advertising to make up for the lost revenues mandated by the PCBAIA. When the price of ads rise, however, candidates tend turn to direct mail.[108] This "substitution effect" may mean that the cost of the mandate will be partially absorbed by the broadcasters. Some of that cost, however, will be passed along in higher ad rates and in turn to consumers. Consumers, shareholders, and advertisers—the public—will indeed fund the PCBAIA's mandates. For that reason, the ironically named "free" airtime should be seen as public financing of campaign ads.

Conclusion: Who Should Define "The Public Interest" Anyway?

Although the broadcast industry and politicians have their own self-interested motivations for propping up a public interest regulatory regime, a closer inspection shows that consumers or the viewing public have very little to say about that regime and have not benefited from Washington-led, top-down interpretations of what supposedly lies in "the public interest."

Paul Taylor and Norman Ornstein argue: "If [the public] did decide to examine the relationship between broadcasters and the

The ironically named "free" airtime should be seen as public financing of campaign ads.

Broadcast commercial television in America *does* reflect what the public really wants to see and hear.

public interest, they would find a fascinating history with at best a mixed record when matching the *intent of policymakers* and the reality of broadcasting."[109] In that statement, they are essentially making the best argument against their own proposal by noting that the public interest has been primarily based on what policymakers—legislators in Congress and regulators at the FCC—believed was truly in the public's best interest. Taylor and Ornstein, like so many before them, imagine that a politically defined public interest standard represents a suitable proxy for what the public really desires. But is that really the case?

"In democracies, there is no universal 'public interest.' Rather, there are numerous and changing 'interested publics,'" argues Benjamin Compaine of MIT's Internet and Telecoms Convergence Consortium.[110] The viewing public is likely to have a broad array of interests and desires that cannot be adequately gauged by what five FCC commissioners believe to be in the public interest. Forty years ago, Ronald Coase argued: "The phrase [public interest] . . . lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation."[111] And that is still true today. The public interest standard is not really a "standard" at all since it has no fixed meaning; the definition of the phrase has shifted with the political winds to suit the whims of those in power at any given time.[112]

While the public has very little say in the politically defined public interest standard, they have made clear what they demand in the actual video programming marketplace. Broadcast commercial television in America *does* reflect what the public really wants to see and hear. Broadcasters know their audience, even though some cultural elitists might not want to acknowledge that fact. Television is probably the most thoroughly surveyed and studied communications and entertainment medium that has ever existed. Viewers are being offered the programming they genuinely desire.

What public interest supporters are perhaps afraid to answer is: Does the public really want to watch more campaign commercials and politically oriented programming and debates, or would they rather tune into a rerun of *American Idol*, *West Wing*, *ER*, or *Survivor*? Given the choice, many if not most viewers will opt for what many public interest supporters would consider to be low-brow entertainment offerings over the supposedly culturally enriching programming that policymakers seek to mandate. Supporters of public interest broadcasting will bemoan the lack of civic spirit and claim that this represents the end of democracy as we know it.

Table 1
Opinions about Airtime Spent on Political Advertising

Airtime Spent on Political Advertising	February 2000 New Hampshire Primary	March 2000 Super Tuesday Primaries	October 2002 General Primary
About the right amount of time	50	39	40
Too much time	37	46	43
Too little time	6	7	15
No answer	7	7	2

Source: Wirthlin Worldwide polls on behalf of the Nationa Association of Broadcasters and the Radio–Television News Directors Association.

Yet, the choice may be a rational reaction by a citizenry that is simply tired of cliché-ridden political advertising or campaign debates that feature a tiresome series of pre-packaged one-liners and sound bites. "The notion that Americans are starving for more exposure to politics is cockeyed," argues *Boston Globe* columnist Jeff Jacoby. "Americans have never been less interested in campaigns and elections. The more they see and hear of political candidates, the more their interest wanes. And yet some people are convinced Americans would be better off if only there were more politics on TV."[113]

Three public opinion polls recently asked voters: "How do you feel about the amount of time broadcast TV and radio stations spend reporting on political campaigns, debates, and the issues? Is it too little time, too much time, or about the right time?" As Table 1 reveals, voters overwhelmingly responded that broadcasters provided "about the right amount" or "too much" campaign coverage during both election cycles. On average, 42 percent of voters thought broadcasters provided "too much" campaign coverage; only 9 percent thought there was "too little" coverage. Given such results, it would be difficult for supporters of the PCBAIA to claim that the public was clamoring for more political advertising of election coverage.

In conclusion, given the clear preferences of the public, the case for mandated airtime for political campaigns makes even less sense. Moreover, spectrum is no scarcer than any other resource on Earth, and broadcast spectrum is only scarce in that the government has artificially limited market opportunities through rigid regulatory policies. In an age of abundant information choices and a growing variety of communications media, special treatment of the broadcasting industry is no longer warranted. Finally, the so-called public interest obligations imposed on broadcasters in return for their zero-cost access to the spectrum resource have been an elegant fairy tale; the obligations have done little to benefit the public but have offered broadcasters and politicians significant benefits.

Notes

1. Quoted in "McCain-Feingold, RIP," *Wall Street Journal,* December 4, 2002, p. A18.

2. See Laurence Winer, "The Constitutional Case against Free Airtime," Cato Institute Policy Analysis, forthcoming.

3. This discussion of the Political Campaign Broadcast Activity Improvements Act depends on the summary of the bill found at Alliance for Better Campaigns, "Free Airtime Campaign," http://bettercampaigns.org/docs/index.php?DocID=36.

4. The bill summary says of the 12 hours, "Half these segments must air between 5 p.m. and 11:35 p.m., and no segment that airs between midnight to 6 a.m. will count toward meeting this requirement." Ibid.

5. Minor parties "qualify for a proportionate share of party vouchers once they field candidates in at least 22 U.S. House races or 5 U.S. Senate races, and once these candidates have been certified as eligible to receive candidate vouchers. Once a 'minor party' fields candidates in at least 218 House races or 17 U.S. Senate races and those candidates meet qualifications to receive vouchers, the party is entitled to receive a full major party share of vouchers in that election cycle." "Free Airtime Campaign," In 2002, one minor party, the Greens, would have qualified a "proportionate share" while another, the Libertarian Party, would have qualified for a "full party share." Another "major minor" party, the Reform Party, would have not qualified for any subsidy.

6. As is now the case, the broadcasters would have limited editorial control over the content of these ads. However, managers of television stations have become more cautious about defamation of character in political spots leading them to pull some ads in the 2002 election. See Amy Gardner, "TV Stations Referee Campaign Ad," *Charlotte News Observer,* October 10, 2002.

7. Such arguments have been advanced for some time. For a survey of those arguments, see Frank Sorauf, *Money in American Elections* (Glenview, Ill.: Scott, Foresman, 1988), pp. 341–44.

8. Paul Taylor, "The Case for Free Air Time," p. 2, http://freeairtime.org/reports/display.php?PageID=82.

9. Ibid.

10. Stephen Ansolabehere, Alan S. Gerber, and

James M. Snyder Jr., "Does TV Advertising Explain the Rise of Campaign Spending? A Study of Campaign Spending and Broadcast Advertising Price in U.S. House Elections in the 1990s and the 1970s," October 2001, pp. 13–21, http://econ-www.mit. edu/faculty/snyder/ papers.htm.

11. Stephen Ansolabehere, John de Figueiredo, and James M. Snyder Jr., "Why Is There So Little Money in U.S. Politics?" *Journal of Economic Perspectives* 17 (Winter 2003):115–117. Emphasis added.

12. David Primo, "Public Opinion and Campaign Finance: A Skeptical Look at Senator McCain's Claims," Cato Briefing Paper no. 60, January 31, 2001.

13. The correlation coefficient is .0072. Data on average House and Senate spending taken from Vital Statistics on Congress, www.cfinst.org/studies/vital/3-5.htm (for the Senate), http://www.cfinst.org/studies/vital/3-2.htm (for the House). The source for turnout data is Michael McDonald of George Mason University, http://elections.gmu.edu/voter_turnout.htm.

14. See Michael MacDonald and Samuel Popkin, "The Myth of the Vanishing Voter," *American Political Science Review* 95, no. 4 (2001): 963–74.

15. Paul Taylor points out that Congress did successfully impose limits on campaign spending on "communications media" for the 1972 election (they were later struck down in *Buckley v. Valeo*). The 1972 election saw a 5 percent drop in eligible voter turnout compared to 1968. See Taylor, Appendix 1, p. 26.

16. In the 2002 mid-term elections, 98.4 percent of House incumbents who ran were reelected. In the 48 open seats at stake, 14 losing candidates received more than 45 percent of the total vote. Another 11 losers received between 40 and 45 percent of the total vote. Even in open seats only about half of the races could be called mildly competitive. (Author's calculations based on data drawn from election results posted on CNN.com and MSNBC.com).

17. This finding, however, was statistically indistinguishable from zero. Ansolabehere, Gerber, and Snyder, p. 22.

18. Ibid.

19. Taylor, p. 10.

20. Ibid., p. 11.

21. Ibid., p. 13.

22. Supporters of the proposal summarize "candidate- and issue-centered programming" in this way: "Within these guidelines, stations will retain complete editorial control over the segments that make up the two hours per week of programming. Stations will decide, for example, the placement and duration of each segment, the number of segments, and the mix of local, state and federal races covered in the segments," http://bettercampaigns.org/docs/index.php?DocID=36.

23. Two classic studies are Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald E. Stokes, *The American Voter* (New York: Wiley and Sons, 1960), and Philip E. Converse, "The Nature of Belief Systems in Mass Publics" in *Ideology and Discontent*, ed. David Apter (New York: Free Press, 1964).

24. Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* (New Haven, Conn.: Yale University Press, 1996), p. 133. Emphasis added.

25. Ibid.

26. Political scientists have long known that it is rational to be both ignorant and apathetic about elections. The costs of voting (gaining information, going to the polls) vastly outweigh the benefits (which are dependent on one's vote making a difference, which almost never happens). See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957), chapter 13.

27. Stephen Ansolabehere, Shanto Iyengar, Adam Simon, and Nicholas Valentino, "Does Attack Advertising Demobilize the Electorate?" *American Political Science Review* 88 (December 1994): 829.

28. Ibid., p. 833. See also Stephen Ansolabehere and Shanto Iyengar, *Going Negative: How Political Advertisements Shrink and Polarize the Electorate* (New York: Free Press, 1995), p. 111, and Stephen D. Ansolabehere, Shanto Iyengar, and Adam Simon, "Replicating Experiments Using Aggregate and Survey Data: The Case of Negative Advertising and Turnout," *American Political Science Review* 93, no. 4 (December 1999): 901–9.

29. Steven E. Finkel and John G. Geer, "A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising" A*merican Journal of Political Science* 42 (April 1998): 577.

30. Paul Freedman and Ken Goldstein, "Measuring Media Exposure and the Effects of Negative Campaign Ads," *American Journal of Political Science* 4 (1999): 1190.

31. Ken Goldstein and Paul Freedman, "Campaign Advertising and Voter Turnout: New Evidence for a

Stimulation Effect," *Journal of Politics* 64 (August 2002): 722.

32. Richard Lau, Lee Sigelman, Caroline Heldman, and Paul Babbit, "The Effects of Negative Political Advertisements: A Meta-Analytic Assessment," *American Political Science Review* 93 (December 1999): 856–58. See also Gene V. Glass, "Primary, Secondary, and Meta-analysis of Research," *Educational Researcher* 5 (1976): 3. "Meta-analysis refers to the analysis of analyses . . . the statistical analysis of a large collection of analysis results from individual studies for the purpose of integrating the findings."

33. See Freedman and Goldstein, pp. 1198–2000, and Finkel and Geer, p. 587.

34. Goldstein and Freedman, pp. 733–34.

35. John R. Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: Americans' Beliefs about How Government Should Work* (New York: Cambridge University Press, 2002), Parts I and II.

36. That fact has been recognized for many years. A proposal to regulate newspapers in the way broadcasters have been regulated "would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press." See Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2 (October 1959): p. 7.

37. See Taylor, Appendix 1.

38. Lawrence Gasman, *Telecompetition: The Free Market Road to the Information Highway* (Washington: Cato Institute, 1994), p. 67. See also Howard A. Shelanski and Peter W. Huber, "Administrative Creation of Property Rights to Radio Spectrum," *Journal of Law and Economics* 41 (October 1998): 584. "There is no such thing as 'spectrum' out there, any more than there was 'ether' to be bottled up by the Commission or anyone else. 'Spectrum' is composed entirely of the engineering characteristics of transmitters and receivers. Those characteristics are defined, in turn, by power, sensitivity, and modulation parameters in a fuzzy and permeable zone of space."

39. For an excellent introduction to radio spectrum engineering basics, see Marshall Brain, "How the Radio Spectrum Works," www/howstuffworks.com/radio-spectrum.htm, and "How Television Works," www.howstuffworks.com/tv.htm.

40. Jora R. Minasian, "Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation," *Journal of Law and Economics* 18, no. 1 (April 1975): 221.

41. Coase, p. 14.

42. Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," *Journal of Law and Economics* 33 (April 1990): 145.

43. Jora R. Minasian, "The Political Economy of Broadcasting in the 1920's," *Journal of Law and Economics* 12, no. 2 (October 1969): 394.

44. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," pp. 133–75.

45. Ibid., p. 149.

46. That should not be surprising. See Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (Cambridge, Mass.: The MIT Press, 1971), p. 46. "Responsible for the continued provision and improvement of service, [the regulatory commission] comes increasingly and understandably to identify the interest of the public with that of the existing companies on whom it must rely to deliver goods." Kahn goes on to note: "When a commission is responsible for the performance of an industry, it is under never completely escapable pressure to protect the health of the companies it regulates, to assure a desirable performance by relying on those monopolistic chosen instruments and its own controls rather than on the unplanned and unplannable forces of competition."

47. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," p. 154.

48. Quoted in ibid., p. 157–58.

49. Many decades later the National Telecom-munications and Information Administration assumed responsibility for the management and allocation of all spectrum utilized by the federal government.

50. Gerald R. Faulhaber and David J. Farber, "Spectrum Management: Property Rights, Markets, and the Commons," AEI-Brookings Joint Center for Regulatory Studies Working Paper no. 02-12, December 2002, p. 6. See also Lawrence J. White, "Spectrum for Sale," *Milken Institute Review*, 2nd Quarter, 2001, p. 31: "Unfortunately, spectrum use is mired in layers of federal regulation, whose consequences sometimes make the former Soviet Union's Ministry of Agriculture and Pencil Erasers look like a paragon of efficiency and good sense."

51. Federal Communications Commission, *Spectrum Policy Task Force Report*, ET Docket No. 02-135, November 2002, p. 11, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf

52. Ibid., p. 3.

53. See Adam D. Thierer, "Three Cheers for the FCC Spectrum Task Force Report," Cato Institute *TechKnowledge* no. 44, November 21, 2002, www.cato.org/tech/tk/021121-tk.html

54. The task force probably felt that such a recommendation was too politically impractical at this juncture given the public interest ethos that still surrounds discussion of broadcast industry regulation.

55. Shelanski and Huber, p. 581.

56. Moreover, Congress and the FCC came to realize that there were sound public interest reasons to rubber stamp license renewal for incumbents. As T. Barton Carter, Juliet Lushbough Dee, and Harvey L. Zuckman note, "There is a significant public interest component in stability because unless licensees can be reasonably assured that their heavy investment will not be rendered valueless at the end of the license term; they might not make a long-term investment in public service programming. Rather, they will operate the station solely to maximize short-term profit." T. Barton Carter, Juliet Lushbough Dee, and Harvey L. Zuckman, *Mass Communications Law* (St. Paul, Minn.: West Group, 2000), p. 450.

57. As Ayn Rand argued, "If you want to make a 'limited' resource available to the whole people, make it private property and throw it on a free, open market." Ayn Rand, " The Property Status of the Airwaves," *Capitalism: The Unknown Ideal* (Signet: New York, 1964), p. 124.

58. *NBC v. United States,* 319 U.S. 190 (1943).

59. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

60. See *Telecommunication Research and Action Center v. FCC,* 801 F.2d 501, 508 (D.C. Cir. 1986). In overturning the FCC's "Fairness Doctrine" then-Judge Robert Bork argued that, "All economic goods are scarce . . . 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 characteristic leads to analytical confusion."

61. Benjamin M. Compaine, "Distinguishing between Concentration and Competition," in ed. Benjamin M. Compaine and Douglas Gomery, *Who Owns the Media? Competition and Concentration in the Mass Media Industry* (Mahwah, N.J.: Lawrence Erlbaum Associations, 2000), p. 557.

62. "Frequencies are divisible (or expandable) in ways that [physical goods] are not. The spectrum can be mined more intensively, using less separation between frequencies with more (or higher quality) broadcast transmitters and better receivers, or more extensively, deploying more sophisticated sending and receiving equipment so as to exploit progressively higher and lower wavelengths." Thomas W. Hazlett, "Physical Scarcity, Rent Seeking, and the First Amendment," *Columbia Law Review* 97, no. 4 (May 1997): 926, www.aei.org/ra/rahazl7.pdf.

63. Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, Mass: Harvard University Press, 1983), p. 141. "Clearly it was policy, not physics, that led to the scarcity of frequencies. Those who believed otherwise fell into a simple error in economics," Pool concluded.

64. See William T. Mayton, "The Illegitimacy of the Public Interest Standard at the FCC," *Emory Law Journal* 38 (1989): 719.

65. Jonathan W. Emord, *Freedom, Technology, and the First Amendment* (San Francisco: Pacific Research Institute for Public Policy, 1991), p. 282.

66. Ibid., p. 284.

67. Steve Chapman, "You *Will* Watch the Debates," *Chicago Tribune,* October 15, 2000, p. 19.

68. Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," pp. 137–38.

69. Thomas G. Krattenmaker and Lucas A. Powe, *Regulating Broadcast Programming* (London: MIT Press, 1994), p. 54.

70. Ibid., p. 207.

71. An excellent summary of those public interest requirements can be found in Matthew L. Spitzer, "The Constitutionality of Licensing Broadcasters," *New York University Law Review* 64 (November 1989): 997–1006. The major public interest regulations included: (1) the "Fairness Doctrine," (2) Indecency Rules, (3) children's television requirements, and (4) personal attack and political editorializing rules.

72. *FCC v. Pacifica Foundation,* 438 U.S. 726, 748–49.

73. Mark S. Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," *Texas Law Review* 60, no. 2 (February 1982): 229.

74. Krattenmaker and Powe, p. 220.

75. See Paul Taylor and Norman Ornstein, "A Broadcast Spectrum Fee for Campaign Finance Reform," New America Foundation, Spectrum Series Working Paper no. 4, June 2002, p. 2: "In the land of free speech, we have permitted a system of 'paid

speech' to take hold during political campaigns on the closest thing we have to a public square—our broadcast airwaves."

76. Ironically, some scholars have recently recommended that the Internet be regulated as a public forum or a commons. See Cass Sunstein, *Republic.com* (Princeton, N.J.: Princeton University Press, 2001).

77. See Robert M. O'Neil, "Broadcasting as a Public Forum," *Rationales and Rationalizations*, ed. Robert Corn-Revere (Washington: The Media Institute, 1997), p. 125: "It seems obvious that a radio or television station, or a cable system or computer bulletin board, bears little resemblance to a park or a street or a civic auditorium. Yet the very fact that broadcast facilities provide vital channels of communications has served to keep the public forum analogy alive in the minds of some observers."

78. See Adam D. Thierer, "Who Will Mind the Children? The Regulation of Children's Programming in the Information Age," in *Speaking Freely, The Public Interest in Unfettered Speech* (Washington: The Media Institute, 1995), pp. 47–66.

79. Henry Geller, "Broadcasting and the Public Trustee Notion: A Failed Promise," *Harvard Journal of Law and Public Policy* 10, no. 1 (Winter 1987): p. 90.

80. See Roger Pilon, "A Modest Proposal on 'Must-Carry,' the 1992 Cable Act, and Regulation Generally: Go Back to Basics," *Hastings Communi-cations and Entertainment Law Journal* 17, no. 1 (Fall 1994): 59.

81. See Thomas W. Hazlett, "Digitizing 'Must-Carry' under *Turner Broadcasting v. FCC," Supreme Court Economic Review* 8 (2000): 154, www.manhattan-institute.org/hazlett/rahazl1. pdf.

82. See, for example, Michael Calabrese, "Battle over the Airwaves: Principles for Spectrum Policy Reform," New America Foundation Working Paper, October 2001, pp. 4–7.

83. For additional background see Adam Thierer, "The Digital TV Transition: The Fairy Tale Continues," Cato Institute *TechKnowledge* no. 26, November 9, 2001, www.cato.org/tech/tk/011109-tk.html.

84. Letter from Robert M. Pepper, chief, Federal Communications Commission Office of Plans and Policy, to Sen. Joseph Liberman, September 6, 1995.

85. Quoted in Christopher Stern, "Broadcasters' Promise of a Digital TV Age Has Not Been Met," *Washington Post*, December 17, 2000, p. H1.

86. Adam Thierer, "The HDTV Fiasco Gets Worse: TV Set and Cable Mandates on the Way," Cato Institute *TechKnowledge* no. 39, August 5, 2002, www.cato.org/tech/tk/020805-tk.html. Nonetheless, policymakers, egged on by the broadcast lobby, continue to go to great extremes to try to make the transition work. For example, in August 2002, the FCC mandated that television set manufacturers include digital tuners in all their new sets by 2006 to help speed the transition along even though it will add over $200 to the cost of each new television. Likewise, Congress was rumored to be considering legislation mandating that cable companies carry all local digital TV broadcast signals on their systems in addition to older analog channels. Under such "dual must-carry" rules, cable operators would be forced to dedicate even more of their capacity to the retransmission of OTA broadcast signals, which would leave even less room for other cable channels or even Internet access.

87. See Federal Communications Commission, *Ninth Annual Report on Competition in Video Markets*, December 31, 2002, p. 75, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.pdf.

88. See, for example, Thomas W. Hazlett, "The U.S. Digital T.V. Transition: Time to Toss the Negroponte Switch," AEI-Brookings Joint Center for Regulatory Studies, Working Paper 01-15, November 2001; and J. H. Snider, "The Myth of 'Free' TV," New America Foundation, Spectrum Series Working Paper no. 5, June 2002.

89. Snider, p. 26.

90. Quoted in Neil Hickey, "TV's Big Stick," *Columbia Journalism Review*, September/October 2002, p. 53.

91. An interesting incentive plan was recently revealed by two spectrum experts at the FCC. In a new working paper entitled, "A Proposal for a Rapid Transition to Market Allocation of Spectrum," an ingenious scheme to expedite the transition to a spectrum free market was outlined by Evan Kwerel and John Williams of the FCC's Office of Plans and Policy. Kwerel and Williams, who have done pioneering work on spectrum policy at the FCC, propose to exhaustively auction off not only untapped or underutilized spectrum, but also the large swaths of spectrum currently controlled by incumbent licensees. Incumbent holders of spectrum would be given the right to accept the bid price for their spectrum at auction or retain that spectrum and gain full flexibility to use it however they wanted in the future. If incumbent spectrum holders were able to see how much their spectrum could fetch on the open market, many of them might opt to sell off their bandwidth to others who value it more highly. While the OPP report specifically exempted the broadcasters from its recommendations, that judgment was probably based more on practical political concerns than sound economic or engineering con-

siderations. There is no reason that this plan could not apply to the broadcasters as well.

92. Thomas Wolzien, "Whose Broadband Is It Anyway?" Speech at the National Association of Broadcasters Futures Summit, March 25, 2001.

93. Glen O. Robinson, "Spectrum Property Law 191," *Journal of Law and Economics* 41 (October 1998): 623–24.

94. Ibid., p. 623.

95. See Joel Brinkley, *Defining Vision: How Broadcasters Lured the Government into Inciting a Revolution in Television* (San Diego, Calif.: Harcourt Brace, 1997).

96. Statement of Michael J. Copps before the Senate Committee on Commerce, Science, and Transportation, January 14, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A4.doc.

97. Thomas W. Hazlett, "Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?" *Journal of Law and Economics* 41 (October 1998): 540–41: "As a factual matter, empirical research long ago established that the public interest outputs that regulators claimed to be the objective of the licensing system were not, in reality, produced by the comparative hearing process. Harvey Levin found that 'FCC licensing policies appear to bolster industry rents and profits rather than channel them into diversity and merit service generally.'"

98. Candice J. Nelson, "Spending in the 2000 Elections" in *Financing the 2000 Election*, ed. David B. Magleby (Washington: Brookings Institution Press, 2002), p. 33. The study cited suggests that the $509 estimate is low.

99. Juliet Eilperin, "Feeling the Sting of 'Soft Money;' Some in House GOP Rethink Position on Campaign Reform," *Washington Post*, October 14, 2000, p. A11:

> Throughout nearly 20 years in Congress, Rep. E. Clay Shaw Jr. (R-Fla.) had never been a huge fan of overhauling the campaign finance system. But after being pummeled this fall with ads financed by unlimited contributions to labor unions and the Democratic Party, Shaw is having second thoughts. "After you've been a victim of soft money, you realize the magnitude of the problem," Shaw said recently. "I'm determined to address this problem when we come back. It's really ripping at the fabric of our nation's political structure."

100. Bipartisan Campaign Reform Act of 2002, 2 USC 431, Title 1 and Title II.

101. Alliance for Better Campaigns, "Free Airtime Campaign," http://bettercampaigns.org/docs/index.php?DocID=36.

102. Thomas Gais, *Improper Influence: Campaign Finance Law, Political Interest Groups and the Problem of Equality* (Ann Arbor, Mich.: University of Michigan Press, 1996).

103. Bipartisan Campaign Reform Act of 2002, 2 USC 431, Title III, Sec. 304, which loosens contribution limits for candidates facing a self-funded opponent.

104. "For congressional elections, the national parties invest their resources in the most competitive races to maximize their chances of holding on to the seats they already control and to win more seats." See Diana Dwyer and Robin Kolodny, "National Political Parties after BCRA" in *Life after Reform: When the Bipartisan Campaign Reform Act Meets Politics* (Lanham, Md.: Rowman and Littlefield, 2003), ed. Michael Malbin, forthcoming.

105. Paige Albiniak, "Free Ads for Pols? Chances Appear Slim for Planned McCain-Feingold TV Bill," *Broadcasting and Cable*, June 17, 2002, p. 16.

106. Gardner.

107. William Mayer, "Public Attitudes on Campaign Finance," in *A User's Guide to Campaign Finance Reform*, ed. Gerald C. Lubenow (Lanham, Md: Rowman and Littlefield, 2001), pp. 59–61.

108. Ansolabehere, Gerber, and Snyder, pp. 13–21.

109. Taylor and Ornstein, p. 4 [emphasis added].

110. Benjamin M. Compaine, "The Myths of Encroaching Global Media Ownership," Paper presented at the Association for Education in Journalism and Mass Communication Convention, August 2001, www1.primushost.com/~bcompain/ WOTM/media_myths.htm.

111. Coase, pp. 8–9. Even Taylor and Ornstein admit that, "neither in the 1927 [Radio] Act nor in the 1934 [Communications] Act, nor subsequently, did Congress define clearly what actions by broadcasters would represent managing their stations in the public interest," p. 6.

112. Adam D. Thierer, "Is the Public Served by the Public Interest Standard?" *The Freeman* 46, no. 9 (September 1996): 618–20.

113. Jeff Jacoby, "More Politics on TV? No Thanks," *Boston Globe*, January 31, 2000, p. A17. See also Chapman, p. 19.

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