Keelhauling Pirates: How Ex Parte Seizure of Non-Interfering LPFM Does Not Further the FCC's "Public Interest"*

TABLE OF CONTENTS

* J.D. Candidate 2007, University of San Diego School of Law. B.A. 2000, Wake Forest University.

I would like to thank my faculty advisor, Professor Larry Alexander, for his encouragement and insight. I would also like to thank my Comment Editor, John Carter, for his practical advice. Finally, I greatly appreciate the support of my wife, Sarah Endemann, and the rest of my family and friends, for this undertaking would be impossible without their love and understanding.

I. INTRODUCTION: FREE RADIO SAN DIEGO

Free Radio San Diego (FRSD) broadcasted on 96.9 FM and served the San Diego area beginning in October 2002.[1] Locally owned and operated, FRSD's listeners preferred the station's diverse programming to heavy rotation, commercial-filled[2] corporate radio alternatives.[3] On the morning of July 21, 2005, station fans expected to hear FRSD founder and morning DJ "Bob Ugly"[4] talking local politics, playing commercial-free rock music, or rallying support for the upcoming "San Diego Day" picnic. Unfortunately, at 9:51 a.m., FRSD's signal abruptly cut out and never returned.[5] Listeners logging on to the FRSD Web site were similarly unable to listen to the show's streaming Internet simulcast. The station's service was silenced.

Free Radio San Diego's July 21 broadcast disruption came courtesy of an early morning, unannounced Federal Communications Commission (FCC) raid on FRSD headquarters. Armed with an in rem arrest warrant and accompanied by U.S. Marshals, FCC agents stormed FRSD's apartment broadcasting location, disassembled their antennae, and seized

1. Free Radio San Diego 96.9FM, About Free Radio San Diego 96.9FM (Aug. 4, 2004), http://www.pirate969.org/ (select *About FRSD*) (last visited Oct. 20, 2006).

2. Studies show that twelve to sixteen minutes of every hour are filled by commercials on most radio stations. Daniel J. Rapela, An Analysis of the Effects of Consolidation on the Radio Industry (Dec. 2, 1999) (unpublished thesis, Gannon University) *available at* http://mmstudio.gannon.edu/~gabriel/rapela.html (last visited Oct. 20, 2006).

3. Other San Diego stations playing similar mixes of pop, punk, and rock music include Rock 105.3 (KIOZ-FM) and Classic Rock 101 KGB (KGB FM). Clear Channel, http://www.clearchannel.com/Radio/StationSearch.aspx (search *San Diego*) (last visited June 21, 2006). Each of these stations is owned by Clear Channel Communications, a media conglomerate controlling nine stations in San Diego, *id.*, and over 1200 stations across the United States. Clear Channel Radio Sales, http://www.clearchannelradiosales.com/About.html (last visited June 21, 2006). Another alternative rock station, FM 94.9, is owned by Lincoln Financial Media, a large media company owning three radio stations in San Diego and over twenty media outlets in the United States. Lincoln Financial Media, http://www. lincolnfinancialmedia.com/ (last visited Sept. 22, 2006).

4. "Bob Ugly" is a pseudonym used to protect the identity of the station operator. *See, e.g.*, Free Radio San Diego 96.9FM, http://www.pirate969.org/ (select *FAQ*).

5. This Author, listening to 96.9 FM on the morning in question, noted the time the station ceased operating.

computers and transmitting equipment.[6] Despite open bandwidth and a loyal audience, FRSD did not possess an FCC license to broadcast on 96.9 MHz. Lacking a license, Bob Ugly, a so-called pirate radio broadcaster, operated against a regulatory backdrop allowing the FCC to seize and forfeit broadcasting equipment, imprison station managers, or both.[7] Coming on the heels of occasional FCC notices, Bob Ugly himself expected a formal confrontation with the FCC sooner or later.[8] But before he could confront the FCC in court, FRSD's broadcasting equipment was seized and forfeited to the United States Government.

At the heart of the FRSD seizure is a statute giving the United States ownership over the entire natural spectrum usable for radio transmission.[9] The surrounding regulatory framework provides that private parties wishing to transmit information over the spectrum must do so with the blessing of an FCC license.[10] Despite Bob Ugly's best efforts, he was unable to obtain the requisite license to broadcast.[11] Undaunted, he

---

6. Joe Hughes & Frank Green, *Agents Raid, Shut Down Unlicensed Free Radio*, SAN DIEGO UNION TRIB., July 22, 2005, at B1.

7. *See* 47 U.S.C. §§ 501-510 (2000).

8. Kelly Davis, *No License, No Problem: Pirate Radio Station Plans to Rebuild After Raid*, SAN DIEGO CITY BEAT, July 27, 2005, *available at* http://www.sdcitybeat.com/article.php?id=3391 (last visited Oct. 15, 2006). In an interview with San Diego City Beat a few weeks before the FCC raid took place, Bob Ugly commented that FRSD staged a benefit concert to raise money for replacement equipment "when [the FCC decides] to greet us with a battering ram." Scoop Stevens, *Locals Only: Notes from the Local Music Scene*, SAN DIEGO CITY BEAT, June 29, 2005, *available at* http://www.sdcitybeat.com/ article.php?id=3300 (last visited Oct. 15, 2006).

9. *See* 47 U.S.C. § 301 (2000).

10. *Id.* This power is based in the Commerce Clause, even though radio station signals often do not reach across state lines. *See* United States v. Ganley, 300 F. Supp. 2d 200, 202 (D. Me. 2004) (rejecting this federalism-based argument where the station's transmission was limited to one state). The Supreme Court has held that all radio signals are interstate by nature. Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650, 655 (1936). Given the Court's recent Commerce Clause analysis in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), further federalism attacks on § 301 are likely to be futile.

11. Bob Ugly has chronicled his efforts to obtain a low power license to broadcast in the San Diego area. *See* Free Radio San Diego 96.9FM, *supra* note 1. Using the FCC's Web-based "Channel Finder" and typing in the coordinates for FRSD's original Golden Hill broadcasting site, the Channel Finder returns information that the coordinates "cannot be used to apply for a low power broadcast station on *ANY* FM channel due to interference caused to authorized FM broadcast stations. As a result, an application for this site for a [Low Power FM] station cannot be accepted for processing." *Id.* Bob Ugly wryly notes that, despite the claim of potential interference, the FCC had no problem granting Global Radio, Inc. airtime on 96.9 MHz during the Super Bowl. *See id.*; *FCC Grants "Experimental FM Application" for Super Bowl*, 560 THE CGC COMMUNICATOR, Feb. 4, 2003, http://www.bext.com/CGC/2003/cgc560.htm.

found a slice of open radio spectrum and started broadcasting anyway. Although his broadcasts did not interfere with licensed broadcasters, Bob Ugly and those like him who do not, or cannot, receive a broadcasting license break federal law and risk having their equipment seized and forfeited to the United States without prior judicial notice.[12] Despite these risks, pirate radio operators perceive a need for community-oriented broadcasting and establish unlicensed stations in communities across the United States.[13] For FRSD, the local reaction thus far had been overwhelmingly positive: listener donations kept the station afloat, and the station had never received any complaints, official or otherwise, about interference or programming.[14] In establishing FRSD, Bob Ugly dreamed of providing his community with a locally oriented, commercial-free alternative to mainstream radio; he did not set out to chance a felony conviction and lose thousands of dollars worth of broadcasting equipment.[15]

As applied to non-interfering pirate broadcasters like FRSD, enforcing licensing requirements with ex parte forfeiture conflicts with current FCC regulatory theory and Supreme Court jurisprudence. Congress has authorized the FCC to use the Supplemental Rules of Civil Procedure, Admiralty, and Maritime Rules[16] to seize property of suspected pirate radio operators.[17] Succinctly, a one-sided[18] showing of probable cause that a radio operator transmits without a license[19] allows the government

---

12. Congress authorized the United States to broadly seize "[a]ny electronic, electromagnetic, radio-frequency, or similar device, or component thereof, used, sent, carried, manufactured, assembled, possessed, offered for sale, sold, or advertised with willful and knowing intent to violate section 301 or 302a of this title . . . ." 47 U.S.C. § 510.

13. Michael Aguilar, Note, *Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitiveness in Broadcasting*, 65 BROOK. L. REV. 1133, 1169 (1999).

14. Interview by KPBS Radio's Tom Fudge with Bob Ugly, Program Director and DJ at Free Radio San Diego, and Dennis Wharton, Senior VP of Corporate Communications for the National Association of Broadcasters, in San Diego, California. (July 28, 2005), *available at* http://stream.publicbroadcasting.net/production/mp3/kpbs/local-kpbs-478387.mp3 (last visited Oct. 22, 2006) [hereinafter Tom Fudge Interview].

15. *Id*.

16. The Supplemental Rules were originally promulgated to satisfy maritime liens. Due to the inherent exigencies involved, the Supplemental Rules provide less procedural due process than otherwise provided by normal civil forfeiture law. Gregory C. Buffalow, *The Annotated Rules B and C of the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure*, 33 J. MAR. L. & COM. 543, 543-44 (2002).

17. 47 U.S.C. § 510.

18. Black's Law Dictionary defines ex parte as: "Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested . . . ." BLACK'S LAW DICTIONARY 616 (8th ed. 2004).

19. FED. R. CIV. P. C(2) allows seizure for violations of federal statutes. Broadcasting without a license violates 47 U.S.C. § 301 (2000).

to silence the broadcast by seizing the offending property.[20] Although most courts disfavor no-notice seizures,[21] the FCC uses the Supplemental Rules to seize personal property without showing "exigent

20. Accordingly, the typical pirate radio raid does not seek to arrest pirate radio broadcasters. Rather, the seizure constitutes an important step in an in rem action designed to silence broadcasting through forfeiture of the instrumentalities alleged to violate the law. *See* 47 U.S.C. § 510. Notice is not required, and the government may obtain a writ of entry and arrest warrant upon a showing of probable cause. *See id.*; *see, e.g.*, United States v. One (1) 1966 Beechcraft Baron, No. N242BS, 788 F.2d 384, 387 (6th Cir. 1986) (describing the probable cause standard for governmental forfeitures). Typically, the government demonstrates probable cause by submitting a verified complaint accompanied by an engineer's affidavit alleging violations of 47 U.S.C. § 301, the statute requiring a license to broadcast. FED. R. CIV. P. C(4), (6); *see, e.g.*, United States v. Any & All Radio Station Transmission Equip., 218 F.3d 543, 547 (6th Cir. 2000) (establishing probable cause by filing a complaint accompanied by engineer Viglione's affidavit which alleged 47 U.S.C. § 301 violations); United States v. Any & All Radio Station Equip., 93 F. Supp. 2d 414, 418 (S.D.N.Y. 2000) (establishing violations through the "Loginow Affidavit"). These instances deal with establishing probable cause at trial. Technically, under the Supplemental Rules, the clerk of the court must issue a warrant in response to a verified complaint alleging a violation of a federal statute. FED. R. CIV. P. C(3)(a)(i). In practice, however, the government will usually use affidavits establishing probable cause and get the arrest warrant signed by a magistrate judge. The verified complaint is filed under seal and, unlike most civil forfeiture proceedings, exigent circumstances need not be shown. *Id.*

Armed with a writ of entry and in rem arrest warrant, U.S. Marshals and FCC agents raid the suspected broadcasting location and seize the equipment. Typically, these raids are carried out with minor disruption of the public peace. However, local opinion often runs with the pirate operators and against government interference in what the community views as a valuable public service. For example, sixty protesters contributed to a tense operation when the FCC raided Free Radio Santa Cruz and FCC vehicles had to be towed from the scene after their tires were slashed. Cathy Redfern, *Pirate Radio Station Unplugged*, SANTA CRUZ SENTINEL, Sept. 30, 2004, *available at* http://www.santacruzsentinel.com/archive/2004/September/30/local/stories/01local.htm (last visited Oct. 15, 2006).

After seizure, the Rules mandate publication of notice and require parties claiming an interest in the property to file a statement of interest before filing an answer. FED. R. CIV. P. C(4), (6). Assuming that the pirate radio operator/claimant timely files his statement of interest and answer, new hurdles surface once he appears in court to contest the forfeiture. For example, some courts employing the primary jurisdiction doctrine refuse jurisdiction over a claimant's defenses if based on constitutional grounds. *See* United States v. Dunifer, 219 F.3d 1004, 1006-07 (9th Cir. 2000) (maintaining that these challenges can only be brought in a Court of Appeals following an FCC order). As explained in Part IV, the primary jurisdiction doctrine is a significant roadblock for pirate operators who wish to challenge the regulatory scheme. *See infra* text accompanying notes 157-59.

21. *See, e.g.*, United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 903-04 (2d. Cir. 1992) (noting the potential for government abuse of ex parte seizure, such as a "dry run" to test the strength of a potential criminal conviction).

circumstances" like interference complaints or safety hazards.[22] The practice warrants a critical look that considers the core regulatory functions of the FCC, a changed media landscape, and evolving Supreme Court jurisprudence.

Part II of this Comment describes how FCC regulatory policy has shifted from the "public trust" model to a privately driven approach. Ex parte seizure of non-interfering pirate radio equipment does not match current FCC regulatory theory and works against traditional "public interest" factors. Part III analyzes new FCC policy towards Low Power FM and suggests that the Supreme Court develop fresh precedent to keep pace. Part IV addresses Fourth Amendment concerns by exploring alternate enforcement methods and proposing more reasonable approaches to license enforcement. Finally, Part V analyzes the Due Process implications of ex parte seizures under the Supreme Court's *Mathews*[23] framework. Under Parts IV and V, the emergence of dual use technology has made ex parte seizure a riskier play from the government's perspective.

II. THE FCC'S REGULATORY PEDIGREE

A. Government Spectrum Ownership and Early Regulation

Radio first became popular in the early twentieth century as a safety feature for ships to communicate with each other.[24] After amateur operators began interfering with business and government use, Congress passed the Radio Act of 1912, the first serious attempt to regulate the airwaves and ensure that radio developed into a useful medium.[25] The

22. FED. R. CIV. P. C(3)(a)(i). If the seizure is challenged, courts will analyze the seizure under the Supreme Court's *Mathews* test. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). Most courts justify the seizure with an ex post determination that exigent circumstances did exist. *See infra* Part V.

23. *Matthews*, 424 U.S. at 334-35.

24. Gregory M. Prindle, Note, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 284 (2003). Even before the Radio Act of 1912, *infra* note 25, the Wireless Ship Act of 1910 forbade any steamer licensed or carrying more than fifty persons to leave port unless equipped with a radio and skilled operator. Nat'l Broad. Co. v. United States, 319 U.S. 190, 210 (1943).

25. Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed in 1932). Interestingly, the Act did not regulate radio stations operating entirely within the borders in one state, provided they did not interfere with interstate transmissions. *Id*. at 302. The Secretary's first years under the Act were quiet: problems of interference arose infrequently because few radio operators broadcasted on an open spectrum. *See Nat'l Broad. Co.*, 319 U.S. at 210. World War I, however, accelerated the development of radio and the new media spread rapidly across America. *Id.* at 210-11. By 1925, there were almost six hundred radio stations across America and 175 applications for new stations. *Id.* at 211.

Act accorded the Secretary of Commerce vague, undefined power to grant licenses regulating the frequencies, times, and locations of broadcasts.[26] As the usable spectrum[27] filled up, greater instances of interference sparked debate on which broadcaster had the right to be heard. In 1926, courts and judicial officers became concerned about the Secretary of Commerce's unbridled discretion to regulate these rights,[28] and the Act of 1912 was abandoned. Without any legislation regulating the broadcast spectrum, chaos ensued as broadcasters transmitted indiscriminately across frequencies.[29] Recognizing the great public value in radio, President Coolidge urgently recommended enactment of new legislation.[30] The goal was to develop the broadcast spectrum into a communication medium useful for public and private information transmission.

The Radio Act of 1927 created an administrative agency, the Federal Radio Commission (FRC), authorized to license and regulate radio in accordance with the "public interest, convenience, or necessity."[31] Most significantly, the 1927 Act made clear what the 1912 legislation assumed: the government owned the broadcast spectrum, private ownership was impossible, and use of the spectrum could occur only with the government's permission.[32] Permission took the form of a license,

26. *See* 37 Stat. at 34.

27. The laws of nature limit the amount of information one can transmit through the air. For a discussion of the technical and physical aspects of radio in layman's terms, see Arthur Martin, Comment, *Which Public, Whose Interest? The FCC, the Public Interest, and Low-Power Radio*, 38 SAN DIEGO L. REV. 1159, 1162-64 (2001).

28. Counterintuitively, the Secretary lacked the power to deny licenses. *See* Hoover v. Intercity Radio Co., 286 F. 1003, 1007 (D.C. Cir. 1923), However, with more prospective operators than available frequencies, the Secretary could control the power and operations of stations by ordering frequency sharing. *Nat'l Broad. Co*., 319 U.S. at 211. After a federal court cast doubt on the Secretary's nonreviewable discretion, Attorney General William Donovan denied the Secretary much of his presumed power of regulation. *See* United States v. Zenith Radio Corp., 12 F.2d 614, 618 (N.D. Ill. 1926). *See generally* 35 Op. Att'y Gen. 126, 129-32 (1926). Reviewing the enacting legislation, Donovan determined that Congress did not originally intend to delegate broad regulatory powers to the Secretary. *Id.* at 129.

29. *Nat'l Broad. Co*., 319 U.S. at 212. Almost two hundred new radio stations went on the air, and indiscriminate frequency use across limited bandwidth led to interference and unintelligible broadcasts. *See id.*

30. *Id.* (citing MESSAGE OF THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 69-483, at 10 (2d Sess. 1926)).

31. Radio Act of 1927, Pub. L. No. 632-69, §4, 1162 Stat. 1163-64 (1927) (codified at 47 U.S.C. §§ 307(a)-(d), 309(a), 310, 312).

32. THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 12 (1994). Krattenmaker and Powe also state "[w]hen the *Titanic* sank

granted for free, but for no more than three years.[33] Although the comprehensive Communications Act of 1934 replaced the FRC with the modern-day FCC, most of the administrative agency's regulatory functions and powers remained intact.[34] For consistency, this Comment will always refer to the FCC though earlier analysis might actually refer to the FRC.

B. "Scarcity" Justifies Government Ownership and Regulation

Once radio progressed past the developmental stage, two things became clear: (1) radio was a mass communications medium which could broadcast information ranging from military orders to baseball games over great distances;[35] and (2) the laws of nature limited the number of usable frequencies.[36] Two or more broadcasters transmitting on the same frequency created interference; that is, each message destructed the other and neither broadcaster could be heard intelligibly.[37] The term "scarcity" characterized this limitation and provided the historical basis for government ownership and regulation.[38] If the number of broadcasters exceeded the scarce number of usable frequencies, certain broadcasters needed a recognized right of transmission to ensure radio remained a reliable means of communication. After claiming absolute ownership over the broadcast spectrum, the government vested this right in some broadcasters by awarding a license.

The Supreme Court's *National Broadcasting Corporation*[39] (*NBC*) decision acknowledged the scarcity rationale's effects on the freedom of speech.[40] Because of scarcity, the specter of debilitating interference justified government ownership of a medium used almost exclusively to communicate information.[41] Although all mediums are scarce,[42] radio

---

[in 1912], the United States government seized control of the airwaves." *Id.* at 5. The authors discuss the interference caused by amateur radio operators spreading rumors that prevented emergency information from reaching other vessels. *Id.*

33. *Id.* at 12. Licenses are no longer free. If two people compete for a license, the FCC auctions the license to the highest bidder. *See* Federal Communications Commission, About Auctions, http://wireless.fcc.gov/auctions/default.htm?job=about auctions&page=1 (last visited Oct. 22, 2006).

34. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-615 (2000)).

35. KRATTENMAKER & POWE, *supra* note 32, at 5-7.

36. STAN GIBILISCO, HANDBOOK OF RADIO AND WIRELESS TECHNOLOGY 547-48 (1999).

37. THOMAS STREETER, SELLING THE AIR 74 (1996).

38. Nat'l Broad. Co. v. United States, 319 U.S. 190, 213 (1943).

39. *Id.* at 190.

40. *See id.* at 213.

41. Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 31-32 (2002). Benjamin sets up a number of

could not be efficiently exploited through private ownership because "ordinary individuals applying ordinary concepts could not understand how broadcasting operate[d] or control its consequences. . . ."[43] Because of the spectrum's unique qualities, utilizing this "government property" to transmit information carried concomitant restrictions on First Amendment rights.[44] For the sake of reliability, the FCC could impose licensing restrictions on otherwise legal speech if the speaker wanted to disseminate his message over a complicated and scarce government resource.

---

interesting hypotheticals which compare the regulation of radio spectrum to the regulation of newspapers. *Id.* at 26-31. To Benjamin, any radio regulation necessarily implicates the First Amendment because the radio spectrum is almost entirely used to communicate information. *Id.* at 31. The "spectrum" lacks an independent significance because it is only useful to send information from one point to another. *Id.* at 31-32; *cf.* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 610 (1997) (discussing the spectrum's independent value as a "public resource" to be managed by "public trustees" broadcasting for the good of the community) (citing The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees,11 FED. COMM. B.J. 5, 14 (1950)).

42. For example, one could not publish two newspapers on the same piece of paper without rendering both unreadable. *See* Benjamin, *supra* note 41, at 40 ("Lower courts and scholars—and even the FCC at one point—have forcefully contended that the scarcity affecting spectrum is no different from the scarcity affecting newsprint or printing presses."). For example, printing presses are not subject to licensing requirements which determine who can and cannot publish. *Id.* at 28. From a First Amendment standpoint, information on the printed page receives constitutional protection while the same information transmitted over an unlicensed frequency does not.

43. KRATTENMAKER & POWE, *supra* note 32, at 35.

44. *Nat'l Broad. Co.*, 319 U.S. at 226. Although Justice Frankfurter's First Amendment discussion involves one paragraph of a forty-page opinion, *id.*, the powerful language therein provides language necessary to rebuff freedom of speech arguments in pirate radio seizures. *See, e.g.*, U.S. v. Any & All Radio Station Transmission Equip., 218 F.3d 543, 549-50 (6th Cir. 2000) ("Because [pirate operator] Perez does not have a First Amendment right to broadcast his views on an unlicensed radio station, this argument does not present a defense to forfeiture."); U.S. v. Any & All Radio Station Transmission Equip., 93 F. Supp. 2d 414, 420-21 (S.D.N.Y. 2000) (similar). Justice Frankfurter stated that "[t]he right of free speech does not include . . . the right to use the facilities of radio without a license." *Nat'l Broad. Co.,* 319 U.S. at 227. Finding that Congress accepted the scarcity rationale when enacting the Radio Act of 1927, Justice Frankfurter conceded that if Congress authorized the Commission to choose among applicants based upon political, economic, or social views, the issue would be "wholly different." *Id.* at 226. Regardless, without a license providing First Amendment protection, any unlicensed broadcaster lost a formidable shield against government intrusion. *Cf.* FCC v. Pacifica Found., 438 U.S. 726 (1978). In *Pacifica*, the Supreme Court upheld the FCC's ability to prohibit *licensed* broadcasters from airing indecent language over radio. *See id.* at 748-51. Constitutional Law expert Professor Erwin Chemerinsky calls the result "troubling." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1000-01 (2d ed. 2002).

Although critiques of the scarcity rationale date back at least forty-five years,[45] scarcity provided a sufficient justification for government spectrum ownership in 1927. Already an indispensable military intelligence tool,[46] the government then held the largest stake in developing reliable, orderly broadcasting as quickly as possible.[47] As thousands of amateur broadcasters drifted across various frequencies, embroiling the government in common law disputes for every frequency violation would have been costly and inefficient.[48] Since lay people, including judges,[49] had trouble understanding the mechanics of radio transmission,[50] applying common law property principles may not have produced consistent results.[51] Because radio

45. Krattenmaker credits economist Ronald Coase as the first to examine the scarcity rationale's holes. KRATTENMAKER & POWE, *supra* note 32, at 14. The scarcity rationale's critics argue that broadcasting's unique characteristics justify regulation only inasmuch to preserve the technical integrity of radio. Krattenmaker argues that any regulations, such as content regulations, falling outside technical regulations should be subject to First Amendment criticisms. *Id.* at 55. In other words, broadcasters should enjoy the same protections afforded to "publishers, street speakers, or performing artists." *Id.* The FCC's modern distancing from the scarcity doctrine to justify non-technical, content-based regulations appears to lend these arguments some weight. *See* Krasnow & Goodman, *supra* note 41, at 633 ("The FCC itself recognized by 1987 when it repealed the Fairness Doctrine that scarcity could no longer justify content regulation.").

46. *See* KRATTENMAKER & POWE, *supra* note 32, at 5-7.

47. *See id.*

48. Krattenmaker suggests that common law doctrines would have been inadequate because many state courts would be responsible for enforcing these doctrines. *See id.* at 17. This presents a problem because most broadcasting crosses state lines. *See id.* Also, common law would soon have to differentiate between new technologies. *Id.* at 16-17. *But see* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 149 (1990) (arguing that interference disputes were being adequately settled under the common law prior to government spectrum ownership). Although Hazlett makes a good point for the common law settling *private* disputes, interference with official military transmissions arguably has higher consequences. Reserving a guaranteed slice of spectrum for government use ensures that communiqués can always be heard in case of emergency or national security.

49. Justice Frankfurter wrote several of the early, important decisions upholding FCC regulations. *See, e.g.*, *Nat'l Broad. Co.*, 319 U.S. 190; FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940). His opinions set the tone for a broad mandate of regulatory power under the "public interest" standard, and his repeated references to the "rapid pace" of technical innovation characterize his great deference to FCC decisionmaking ability. *See* KRATTENMAKER & POWE, *supra* note 32, at 29-31.

50. KRATTENMAKER & POWE, *supra* note 32, at 30-31, 34.

51. *See supra* note 48. To this day, many credible arguments exist as to whether the radio spectrum is property unto itself, or nothing more than the information which it carries. Benjamin insists that since the spectrum is only usable to transmit information, the property/speech distinction collapses back into itself. *See* Benjamin, *supra* note 41, at 31-32. That is, the spectrum only exists insofar as people use it to transmit information. This has tremendous implications under First Amendment analysis, as purposefully keeping spectrum idle could be seen as stifling the flow of information otherwise transmissible on that spectrum. *See* STREETER, *supra* note 37, at 219-22 (discussing the difference between physical property constructions like streets and ethereal radio broadcasting); Benjamin, *supra* note 41, at 31-32. For a comprehensive

was a booming though poorly understood technology, initial government ownership was necessary to protect important government interests and add some semblance of order to the radio dial. Although imperfect, the scarcity rationale sufficiently justified spectrum ownership to ensure the new communication medium developed quickly and reliably.

C. Congress Appoints the FCC to Regulate in the "Public Interest"

Once scarcity justified government ownership, congressional mandates allowed the FCC to manage the new property extensively. Specifically, Congress broadly authorized the FCC to license and regulate broadcasters in accordance with the "public interest, convenience, or necessity."[52] Critics have likened the vague "public interest" standard to a "blank check" of administrative power.[53] Some even suggest the mandate violates the Nondelegation Doctrine.[54] However, like the scarcity doctrine, the public interest mandate must be understood against its historical backdrop. Early FCC public interest theory was similar to that underlying regulation of the nascent airline industry: to promote public appreciation, the government heavily regulated new technology at the expense of private interests.[55] Because broadcasting's technology was tough to grasp, an "expert commission" like the FCC needed broad discretion to oversee radio's formative years.[56] Like Congress, the Supreme Court also afforded the FCC much latitude in decisionmaking. Fears of congressional and judicial meddling permeated early Court decisions, and nearly all FCC regulations were upheld under the public interest

---

discussion of various property rights theories applied to the radio spectrum, see STREETER, *supra* note 37, at 219-55.

52. *See supra* note 31 and accompanying text. To date, Congress has directed or authorized the FCC to act in the public interest in nearly one hundred statutory provisions. *See* Randolph May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?*, 53 FED. COMM. L.J. 427 app. A (2001).

53. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 32, at 34.

54. *See generally* May, *supra* note 52.

55. For example, certain airlines were forced to fly unprofitable routes to ensure that cutthroat competition did not undermine the safety or economic stability of the industry. Heavy regulation was one way of assuring that the industry operated efficiently and with the greatest good for the greatest number of Americans, although at the price of subverting the free market. Asif Siddiqi, Air Transportation: Deregulation and Its Consequences, http://www.centennialofflight.gov/essay/Commercial_Aviation/Dereg/Tran8.htm (last visited Sept. 24, 2006).

56. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

standard.[57] Over the last seventy years, the FCC has come to define the public interest standard as the promotion of competition, diversity, and localism in the marketplace.[58]

Early FCC doctrine eschewed private interests[59] and treated the broadcast spectrum like a public utility.[60] Licenses to communicate over the scarce public spectrum were free; however, heavy regulation ensured privileged licensees would operate in a manner benefiting the listening public. When deciding which licenses should be renewed, the FCC looked anew at how listeners would benefit from fresh programming.[61] License incumbents received little protection; the fresh public interest determination did not account for "sunk costs" and the FCC would even award airtime to a competitor.[62]

The public trust theory, applied to radio regulation, was inherently democratic: using the spectrum to communicate advanced liberty by fostering an "uninhibited marketplace of ideas."[63] The FCC thought the marketplace was best served by a diverse range of programming reflecting local broadcasters. For example, fearing that network media consolidation[64] threatened the public interest, the FCC promulgated "Chain Broadcasting Regulations" in response to rising consolidation in station ownership.[65] These regulations promoted localism by, among other things, allowing

57. *See generally id.* at 145-46 (upholding FCC regulations against attack); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-27 (1943) (same).

58. KRATTENMAKER & POWE, *supra* note 32, at 43; Jill K. Howard, *Congress Errs in Deregulating Broadcast Ownership Caps*, 5 COMMLAW CONSPECTUS 269 (1997).

59. *See, e.g.*, KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931) (denying licensing when broadcasting was used primarily for private profit).

60. Krasnow & Goodman, *supra* note 41, at 610.

61. *See, e.g.*, Trinity Methodist Church v. Fed. Radio Comm'n, 62 F.2d 850, 851-52 (D.C. Cir. 1932) (holding the FRC's denial of relicensing proper because the incumbent licensee did not operate his station in the public interest).

62. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 473 (1940).

63. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); *cf.* Minneapolis Star v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) ("[A]n informed public is the essence of a working democracy.").

64. "Networks" were, and are, stations that engage in "chain broadcasting." As defined in § 3 of the Communications Act of 1934, chain broadcasting is the "simultaneous broadcasting of an identical program by two or more connected stations." Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 194 n.1 (1943). Examples of network media today include NBC, ABC, and CBS.

65. At the end of 1938, there were 660 commercial stations in the United States, of which 341 were affiliated exclusively with NBC. *Id.* at 197. Further, 102 stations were affiliated with the Columbia Broadcasting Company (CBS). *Id.* While consolidation brought wider services to more people, the Commission promulgating the Chain Broadcasting Regulations worried about the effect of consolidation on licensee's "statutory duty of determining which programs would best serve the needs of their community." *Id.* at 199.

local stations to affiliate with multiple networks,[66] limiting network ownership of stations,[67] and enhancing the local affiliate's ability to reject network programming.[68] If a large corporation wished to profit from a smaller affiliate, FCC regulations ensured a degree of local station autonomy to best serve local markets. The Supreme Court upheld these regulations in *NBC*,[69] agreeing that local programming was

66. *See id.* (discussing the FCC, *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060 (1941)). The Court stated that exclusive affiliation clauses deny station licensees the freedom to choose programs best suited to their needs and "in this matter the duty . . . to operate in the public interest is defeated." *Id.*

67. *See id.* at 206-07 (examining the *Report on Chain Broadcasting*'s finding that the "licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest").

68. The Supreme Court in *NBC* backed the *Report on Chain Broadcasting* and rejected the network practice of requiring local affiliates to object to network programming three weeks prior to broadcast. From the "skeletal information" provided to affiliates about such broadcasts, the station had no way of knowing whether the programming fit the "public interest" or contained offensive material. *See id.* at 204-05. Moreover, the local affiliate had the burden of proof showing a proposed replacement program better suited the public interest. *Id.*

69. *See generally Nat'l Broad. Co.*, 319 U.S. 190. Defending the Regulations' broad reach, the Court drew upon prior decisions to reiterate the FCC's power to control both the technical and substantive requirements of radio licensing. The *NBC* Court cited *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266 (1933), two earlier cases which emphasized and approved the broad congressional delegation to promote the "public interest, convenience, or necessity" by fighting "monopolistic domination of the broadcasting field." *Nat'l Broad. Co.*, 319 U.S. at 216-19. Also, "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio." *Id*. at 217. Justice Frankfurter then emphasized the dynamic and fluid nature of the broadcasting industry:

> [Overly specific Congressional regulations] would have stereotyped the powers of the [FCC] to specific details in regulating a field of enterprise the *dominant characteristic of which was the rapid pace of its unfolding*. And so Congress did what experience had taught it in similar attempts at regulation, even in *fields where the subject matter of regulation was far less fluid and dynamic than radio*. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

Id. at 219-20 (emphasis added). Justice Frankfurter also unhesitatingly affirmed the broad authority delegated to the FCC to regulate in the "public interest":

> True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of government control the public interest might be subordinated to monopolistic domination in the broadcasting field." In the context of the developing

a "vital part of community life."[70] Thus, the listening public's interest subordinated private profits, and heavy government regulation capped the growth potential of private broadcasters.

Analyzing the now defunct "fairness doctrine" illustrates how early public interest policies focused on the listening public's, rather than the broadcaster's, interest in diversity. The fairness doctrine required that radio and television licensees give adequate coverage to significant public issues by ensuring fair coverage that accurately presented conflicting views.[71] For example, if the *XYZ* Network sold Person *A* ten minutes of airtime in which Person *A* attacked Person *B*'s reputation, fairness required *XYZ* provide Person *B* with ten minutes to respond.[72] If Person *B* was unavailable or unable to afford ten minutes, *XYZ* needed to air *B*'s views at their own cost and initiative.[73] Because a license carried a corresponding "public trustee" responsibility, abiding by regulations like the fairness doctrine significantly intruded upon broadcasters' private rights to profit and freely select services.

Under the old public trust model, ex parte seizure of a non-interfering pirate broadcaster's equipment may have been appropriate. The first

---

> problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. . . . [A] comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," . . . by making "special regulations applicable to radio stations engaged in chain broadcasting."

Id. at 218-19 (citations omitted). Throughout the opinion, Justice Frankfurter referenced and applied the evidentiary findings of the FCC's *Report on Chain Broadcasting* without reservation. *See generally id.* at 193-227.

Naturally, the Court's role is to faithfully interpret the laws, not to critique the policies thereof. *See id.* at 218 ("We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations."). Justice Frankfurter also withheld judgment on the Regulations' affects on furthering the public interest, commenting that if NBC thinks "that the regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea." *Id.* at 224. Citing *Board of Trade v. United States*, 314 U.S. 534, 548 (1942), Justice Frankfurter wrote "[w]e certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence . . . ." *Nat'l Broad. Co*., 319 U.S. at 224.

Justice Frankfurter concluded his *NBC* analysis with a ringing endorsement of the FCC: "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *Id.* at 225.

70. *Id.* at 203.

71. KRATTENMAKER & POWE, *supra* note 32, at 238-39.

72. *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377-86 (1969) (discussing the fairness doctrine's origins and reaffirming the FCC's authority to regulate pursuant to the doctrine).

73. *See id.* at 383.

fifty years of broadcasting were characterized by two things: (1) a heavy regulatory footprint; and (2) listener-oriented regulations favoring diversity and localism at the expense of private broadcaster profits. Because developing the complex industry required heavy government regulation, the public interest in the scheme's integrity would outweigh the private interest in unlicensed broadcasting. Policies like the fairness doctrine already placed significant restrictions on broadcasters' ability to operate without government intrusion. Moreover, the public counted on the regulatory scheme's ability to deliver diverse and local programming. Ex parte seizure of non-interfering pirate radio equipment would provide appropriate punishment for broadcasters posing as "public trustees" without official administrative approval. Because licenses carried significant responsibilities to advance listener interests, transmitting in defiance of articulated public interest standards would constitute a public harm punishable by the agency. As the next section illustrates, the FCC policy shift towards a marketplace theory significantly removes the government's presence in the broadcasting industry. Ex parte seizure of non-interfering pirate radio equipment may not be justified in a regulatory environment now premised on private interests.

D. Deregulation: The Government Takes a Less Active Role

In marked contrast to prior policy, current FCC regulation has shifted from a public trust model to a privately driven approach. Starting in the early 1980s, deregulation ceded greater power to private interests by relaxing radio ownership restrictions.[74] Congress approved the most

74. In 1984, the national ownership cap was raised to twelve AM stations and twelve FM stations nationally. *See* Prindle, *supra* note 24, at 295. The Telecommunications Act of 1996 relaxed local ownership rules and eliminated the national ownership cap altogether. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a), 110 Stat. 56, 110-11. The FCC assumed that the public interest in diversity would benefit through the efficiencies gained in consolidation.

> [P]olicies that may have been necessary in the early days of radio may not be necessary in an environment where thousands of licensees offer diverse sorts of programming and appeal to all manner of segmented audiences. . . .
>
> . . . .
>
> We believe that given conditions in the radio industry, it is time to heed that sentiment and to reduce the regulatory role played by Commission policies and rules, and to permit the discipline of the marketplace to play a more prominent role. It is our conclusion that the regulations that we are retaining and the functioning of the marketplace will result in service in the public interest that

significant deregulation through the Telecommunications Act of 1996,[75] and the FCC further relaxed ownership restrictions in 2003.[76] Besides

---

> is more adaptable to changes in consumer preferences and at less financial cost and with less regulatory burden.

In re Deregulation of Radio, Report and Order, 84 F.C.C.2d 968, 969, 1014 (1981).

75. *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending 47 U.S.C. § 151 (1934)).

76. Broadcast Ownership Rules, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73). The FCC justified its 2003 deregulation order on decreased scarcity, or increased amounts of diverse information available to the consumer. *See id*. at 46,291. Critics argue the rationale is problematic because the FCC assumes greater modes of media communication adequately substitute for those squeezed out of existing mediums:

> The FCC's assumption that non-broadcast media can serve as equal substitutes for traditional broadcast channels faces significant difficulty. Broadcasters occupy a unique place in our culture. Broadcast content is pervasive, popular, responsive and valuable. For these reasons, non-broadcast [for example, Internet] media are unlikely to fulfill the same needs for the viewing public.

Aaron Perzanowski, Note, Prometheus Radio Project v. FCC*: The Persistence of Scarcity*, 20 BERKELEY TECH. L.J. 743, 760 (2005).

Although consumers use new mediums like Internet, cable, and satellite services, scarcity still persists in the broadcast spectrum. Perzanowski argues scarcity persists because broadcast media remains an attractive and cheap source of entertainment and information. *Id*. at 760-61. For example, nearly every home and car in America has a radio, and the value of broadcast stations remains very high. "If Internet sites, for example, served as equal substitutes for broadcast stations, we should expect to see station owners abandoning their expensive broadcast enterprises and adopting a low cost Internet-only media strategy." *Id.*

Accepting the FCC's "decreased scarcity" rationale also raises different questions concerning the First Amendment and intrusiveness of FCC enforcement. One critic argues that, "where scarcity is not present, the government's regulatory authority correspondingly decreases." Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1490 (2004). Specifically, the FCC statute authorizing swift and intrusive ex parte civil forfeiture necessarily infers a high degree of scarcity. 47 U.S.C. § 510(b) (2000). For example, a pirate broadcaster interfering with a licensed radio station or air traffic controller illustrates radio's inherent limits and justifies a rapid remedy. One cannot argue this type of pirate broadcasting deserves First Amendment protection when public safety or the licensed rights of others are at risk.

If one accepts the FCC's premise that decreased scarcity permits decreased government involvement, a pirate radio operator posing no interference threat deserves different First Amendment analysis. Comparing *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974) with *Red Lion Broad Co. v. FCC*, 395 U.S. 367, 390 (1969) illustrates this point. In 1974, the *Tornillo* Court struck down a variation of *Red Lion*'s "fairness doctrine" as applied to print media. *Tornillo*, 418 U.S. at 258. Although the Court did not reference *Red Lion* or scarcity, *Tornillo* provided more First Amendment protection from government regulation to newspaper publishers than broadcasters. CHEMERINSKY, *supra* note 44, at 1130-31. Though not explicit in the Court's reasoning, it may be that broadcast media's comparatively greater scarcity warrants greater government intrusion than print media. *But see id.* (raising this contention and arguing that there are, in fact, more broadcasters than newspapers). Therefore, if the FCC finds less scarcity in broadcast media, reduced governmental intrusion in broadcast media should follow. This should apply across the board, from the front end of license application to the back end of licensing enforcement.

eliminating ownership restrictions, the FCC also rejected many content-based policies like the fairness doctrine.[77] Although the government maintained ownership over the broadcast spectrum, private parties could now broadcast with greater freedom from government intervention. The current licensing scheme also reflects free market motives: the FCC now auctions licenses to the highest bidder instead of awarding free licenses based on "public interest" considerations.[78]

Throughout the deregulation process, critics railed against deregulation's effects on the radio industry. Because deregulation is premised on sufficient competition within a marketplace, abrupt deregulation could result in large-scale consolidation and anti-competitive behavior which would harm traditional public interest goals like localism and diversity.[79] Although the radio industry has in fact experienced massive consolidation,[80] measurable gains in certain qualities of service have been recorded.[81]

FCC deregulation and the 1996/2003 legislation represented significant government withdrawals from many areas of the broadcast industry.

---

77. The FCC repealed the doctrine administratively, finding that the fairness doctrine chilled speech by acting as a "tax" on airing controversial issues. *In re* Complaint of Syracuse Peace Council, Memorandum Opinion and Order, 2 F.C.C.R. 5043 (1987). The D.C. Circuit found the repeal of the fairness doctrine was supported by the "public interest" mandate. Syracuse Peace Council v. FCC, 867 F.2d 654, 666-69 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

78. *See* Federal Communications Commission, *supra* note 33.

79. *See* Prindle, *supra* note 24, at 298; Howard, *supra* note 58, at 278 ("It is a presumptive leap of logic . . . to conclude that increased competition warrants complete abandonment of national ownership caps which have existed for over half a century.").

80. As predicted, the Telecommunications Act of 1996 resulted in large scale radio consolidation. While the number of radio stations increased by 5.4%, the number of owners decreased by 33.6%. George Williams & Scott Roberts, Radio Industry Review 2002: Trends in Ownership, Format, and Finance, FCC (Sept., 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc (last visited Oct. 20, 2006). Before the Act's passage, the two largest radio stations owned 115 stations. Today, they own over 1400. William Safire, *On Media Giantism*, N.Y. TIMES, Jan. 20, 2003, at A19. In most metropolitan markets, the two largest firms average 74% of the market's advertising revenue. Williams & Roberts, *supra.*

81. For example, larger companies now have more resources to extend to their news departments. Steve Knoll, *Radio Station Consolidation: Good News for Owners, But What About Listeners?*, N.Y. TIMES, Dec. 30, 1996, at D5. Theoretically, better news services better inform the listening public and further democracy. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) ("[A]n informed public is the essence of working democracy"). The Broadcast Ownership Rules also cite studies showing that consolidated stations better share resources and earn higher ratings. 68 Fed. Reg. 46,286; 46,313 (Aug. 5, 2003).

The deregulation, premised on marketplace theory, assumed that profit-minded competition would best fulfill the "public interest principles of competition, diversity, and localism."[82] The efficiencies gained by eliminating ownership caps were intended to allow network broadcasters to offer higher quality services to greater numbers of people.[83]

Marketplace theory tweaks the traditional meaning of *competition* in the public interest definition. Although the old public interest regulations promoted competition *within* the radio industry,[84] deregulation's stated goal was to make the radio industry more competitive with new information mediums.[85] For example, it was thought less regulated formats like Internet and satellite had been drawing audiences away from radio.[86] Instead of losing listeners with government structured programming, a privately driven market could better respond to audience tastes. Greater profits could make radio more attractive, and broadcasters could draw customers away from computer screens and satellite dishes.

Although the radio industry has become more competitive, traditional public interest goals like localism and diversity have suffered.[87] Massive radio consolidation with few or no new entrants into the industry implies that listeners receive information from fewer sources. These fewer sources are larger, national networks buying up competing broadcasters and replacing local services with economies of scale.[88] The resulting decreases in localism and diversity stand at odds with early FCC public interest policy as well as Supreme Court policy developed in support of early FCC regulation.[89] Most non-interfering pirate broadcasters fulfill

---

82. *See* Prindle, *supra* note 24, at 297.

83. *See, e.g.*, *id.* at 297-98.

84. For instance, the *NBC* Chain Broadcasting Regulations ensured that local and diverse voices serving radio's public interest would remain competitive with media conglomerates entering the broadcast industry. *See supra* text accompanying notes 74-94.

85. Previous regulations prevented broadcasters from keeping economic pace with non-broadcast competitors. While non-broadcast services like cable and satellite companies can earn revenue from advertising and subscriber fees, broadcasters depend solely on advertising. Broadcast Ownership Rules, 68 Fed. Reg. 46,286; 46,292 (Aug. 5, 2003).

86. *See, e.g.*, *id.* at 46293-94.

87. *See* Aguilar, *supra* note 13, at 1163-72; Prindle, *supra* note 24, at 302-19.

88. Unfettered by ownership caps, corporate media consolidation strove to cut costs and maximize subsidiary station profits. For example, eliminating local news and public affairs in favor of syndicated, mass produced services boosts profit margins while robbing communities of specific, localized broadcasts. *See* Howard, *supra* note 58, at 279-80 (*citing* Mark Gimein, *Groups Look to Cut Costs, Set the Pace*, MEDIAWEEK, Sept. 9, 1996, at MQ28.).

A group station owner testifying before Congress admitted as much: "It's commodity trading to us. We don't know [our] community. We're short-term players." 142 CONG. REC. S6108 (daily ed. June 11, 1996) (alteration in original).

89. *See infra* Part III.

the traditional public interest in localism and diversity.[90] Ex parte seizure permanently deprives listeners of these benefits.

For an organization tasked with protecting radio diversity, a theory premised on removing barriers to maximize growth may not provide necessary safeguards to ensure variety.[91] Although tight control of the airwaves developed radio into a diverse source of information and entertainment, deregulation has consolidated media ownership and decreased diversity. While the FCC's approach to radio regulation has completely reversed course,[92] localism and diversity remain core goals.[93]

---

90. *Id.* The homogenization of music radio typifies the lack of diversity wrought by deregulation. As it becomes more difficult and expensive to introduce new product on the radio, the long-standing practice of *payola* has drawn more attention. *See* Press Release, Office of New York State Attorney General Eliot Spitzer, Sony Settles Payola Investigation (July 25, 2005), http://www.oag.state.ny.us/press/2005/jul/jul25a_05.html (last visited Sept. 27, 2006). For the music industry, deregulation is a vicious circle: as larger companies consolidate the airwaves, it becomes more expensive for diverse, non-mainstream artists to get exposure, and only larger recording studios can afford to secure airtime. Gradually, radio becomes a mouthpiece and profit generator among fewer and larger organizations. The incentive for diversity has been replaced by an incentive to play guaranteed profit generators. Judging by the growing popularity of niche satellite, Internet radio and podcasting, the public interest in new and diverse programming remains strong. For example, XM Satellite Radio provides over 150 commercial free radio formats. *See* XM Satellite Radio, Corporate Information, http://www.xmradio.com/corporate_info/corporate_information_main.html (last visited Sept. 27, 2006). Internet radio providers, like Yahoo!'s "Launchcast," provide similar services which also let users customize radio stations to play their favorite artists. The Internet service will also suggest new artists in the same genre as the user's preferred artists. Launchcast, http://www.launchcast. com (last visited Sept. 27, 2006). One can extrapolate this point beyond radio as an entertainment medium. An FCC report found that radio advertising rates have jumped over 90% since the 1996 deregulation. *See* Williams & Roberts, *supra* note 80. Not only can fewer large corporations afford to advertise their products, the rates have profound implications for grassroots public service organizations and local political figures who use radio to gather support. Current FCC deregulation fails this core diversity function, and stations fulfilling a diversity interest should not be priced out of the spectrum.

91. Indeed, such trust that large corporations will best serve the public interest seems increasingly dubious in light of the following quote from Clear Channel Communications CEO Lowry Mays: "If anyone said we were in the radio business, it wouldn't be someone from our company. We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers products." Alexander Lynch, *US: The Media Lobby*, CORPWATCH, Mar. 11, 2005, http://www.corpwatch.org/article.php?id=11947 (last visited Sept. 27, 2006).

92. FCC Chairman Michael Powell observed during the 2003 deregulation that "the market is my religion." William Safire, *On Media Giantism*, *supra* note 80, at A19.

93. William Kennard stressed the FCC's continuing commitments to localism and diversity when introducing the new LPFM regulations. *See* Aguilar, *supra* note 13, at 1168.

Emphasizing "public interest" through profit-driven private choice, current FCC rhetoric is also different from the original legislative intent.[94]

Absent a showing of interference, enforcing licensing requirements with ex parte seizure conflicts with a regulatory scheme premised on privately driven marketplace theory. Under the old public trust model, ex parte seizure may have been appropriate to preserve the regulatory scheme, further public confidence in radio development, and dissuade amateur pirates from stumbling on adjacent frequencies. Because FCC authority required broadcasters to meet goals and serve the listening public, operating in defiance of these responsibilities constituted a public harm in itself.[95] However, since the shift to marketplace theory, private interests have replaced government regulation in areas like licensing and programming.[96] In other words, private competition better serves listener

---

94. As a sponsor of the bill enacted as the Radio Act of 1927, Congressman White's comments reflect a communal approach to regulation:

> We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual . . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 n.5 (1969) (citing 67 CONG. REC. 5479). According to the District of Columbia Circuit in *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 F.2d 670, 672 (D.C. Cir. 1931):

> In its Second Annual Report (1928), p. 169, the commission cautioned broadcasters "who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature which are not only uninteresting, but also distasteful to the listening public." When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought.

95. *See KFKB Broad. Ass'n*, 47 F.2d at 672 (implying a paramount public right to a well-regulated spectrum).

96. For example, private competition drives the FCC's auctioning scheme. *See supra* note 79. The fairness doctrine has also been abandoned, meaning that private broadcasters no longer face a strict government-ordered programming requirement. *See supra* note 45. At the high water mark in 1960, an FCC Program Policy Statement identified fourteen major elements usually necessary to meet the public interest. Martin, *supra* note 27, at 1177 (citing FEDERAL COMMUNICATIONS COMMISSION, NETWORK PROGRAMMING INQUIRY: REPORT & STATEMENT OF POLICY, 25 FED. REG. 7291, 7295 (1960). Licenses would not be awarded unless an applicant's programming reflected the

interests than does a public trust regulatory scheme. There is no reason license enforcement should not follow suit. Without interference, there is no private harm. Everyone who wishes to be heard is heard. Indeed, using ex parte seizure to silence pirates cuts against the FCC's traditional *competition* component defining *public interest*. Theoretically, non-interfering pirate broadcasters should compete for market share and push other broadcasters to refine their services, thus advancing the industry as a whole.

Parties seeking ex parte enforcement in other privately regulated industries must meet a considerably higher bar. For example, a trademark owner wanting to seize counterfeit goods needs to establish irreparable harm and a likelihood of success on the merits.[97] In the absence of interference, the FCC would have a tough time meeting the "irreparable harm" prong. Before courts authorize ex parte seizure, requiring interference would demonstrate a private "harm" necessitating a powerful administrative remedy.

III. NEW REGULATORY PHILOSOPHIES REQUIRE NEW SUPREME COURT JURISPRUDENCE

A. The FCC and LPFM: On Again, Off Again

Lacking funds needed to acquire expensive licenses and high power equipment, non-interfering pirate radio operators usually operate "Low Power FM" (LPFM) stations. Typically, this means operating at less than 100 watts, or within a ten to twelve mile radius.[98] Practicality and ideology work in tandem: the low cost of operation and community-focused message provide economical, diverse alternatives to big market media.[99] LPFM affordability furthers diversity by allowing more people to access the broadcast spectrum. Due to LPFM's limited range, more broadcasters can operate locally without interference.

"tastes, needs, and desires of the community." *Id.* at 1178 (citing Krasnow & Goodman *supra* note 41, at 616).

97. Lucas G. Paglia & Mark A. Rush, *End Game: The Ex Parte Seizure Process and the Battle Against Bootleggers*, 4 VAND. J. ENT. L. & PRAC. 5, 8 (2002).

98. Aguilar, *supra* note 13, at 1133. One wholesale exception to FCC licensing requirements applies to stations operating with a field strength not exceeding 250 microvolts per meter at three meters. 47 C.F.R. § 15.239(b) (2005). This limits unlicensed radio broadcasts to a two-block radius, too weak for effective community broadcasting service. United States v. Dunifer, 219 F.3d 1004, 1005 n.2 (9th Cir. 2000).

99. *See* Dorothy Kidd, *Micro-Powered Radio*, WHOLE EARTH, Spring 2000, at 87.

Early FCC regulations permitting LPFM shared policies similar to those accompanying regulations restricting network ownership: listeners were best served by a variety of diverse, local voices.[100] The FCC made LPFM attractive to amateur operators by waiving certain laborious reporting and identification requirements. In 1978, however, the FCC revoked the ability to apply for a low power radio license.[101] In a policy shift presaging marketplace theory, the FCC determined that high power FM stations could use the radio channels more efficiently by "serv[ing] larger areas, and bring[ing] effective noncommercial educational radio service to many who . . . lack[ed] it."[102] Operating a radio station under 100 watts became illegal overnight, regardless of whether the station posed an interference threat. While the FCC suggested that low power radio stations (expensively)[103] increase wattage to obtain a commercial license, many low power radio operators kept broadcasting in defiance of FCC regulations.[104] Aside from a few grandfathered exceptions, this class of previously licensed broadcasters became pirate radio operators overnight. From an interference and safety perspective, nothing about LPFM broadcasts had changed except formal FCC approval.

Despite the FCC's considerable enforcement efforts,[105] the number of illegal LPFM operators increased[106] in relation to media consolidation.[107] In the years following the 1996 regulatory changes, the FCC shut down, on average, more than a dozen pirate radio operators each month.[108] Despite the risks, pirate radio operators continued broadcasting in response to deregulation's effects on localism and diversity.[109] The fact that LPFM stations' eclectic formats drew enthusiastic local audiences vindicated the traditional public interest diversity function.

---

100. *See generally* Ruggiero v. FCC, 317 F.3d 239 (D.C. Cir. 2003).

101. *See In re* Changes in the Rules Relating to Noncommercial Educ. FM Broad. Stations, 69 F.C.C.2d 240, 244-51 (1978).

102. *Id.* at 248.

103. Aguilar, *supra* note 13, at 1168 ("Launching a high powered radio station costs at least $100,000 in FCC licensing fees and engineering studies.").

104. *Ruggiero*, 317 F.3d at 241.

105. *See id.* The FCC has four options when dealing with an unlicensed broadcaster: (1) seek an injunction to stop the unlicensed broadcasting, 47 U.S.C. § 401(b) (2000); (2) issue a cease and desist order, 47 U.S.C. § 312(b) (2000); (3) impose a monetary forfeiture, 47 U.S.C. § 503(b) (2000); or (4) institute an in rem forfeiture, 47 U.S.C. § 510 (2000).

106. *Ruggiero*, 317 F.3d at 241-42.

107. *See* Tom Fudge Interview, *supra* note 14.

108. *Ruggiero*, 317 F.3d at 242 (citing *FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing on H.R. 3439 Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 85 (2000)).

109. Paul Riismandel, Radio with a Conscience: Community Radio in the Late '90s (1999), http://www.mediageek.org/rfc/Revue1.html (last visited Oct. 20, 2006).

The FCC finally acknowledged deregulation's adverse effects on localism and diversity by recognizing that LPFM broadcasters operated to fill a void. In 1999, after inviting public comment,[110] two new classes of LPFM stations were proposed.[111] Reconfirming LPFM's value, the FCC proposal emphasized public interest goals[112] and admitted deregulation's failure to properly support community broadcasting.[113] Offering current pirates amnesty, the pirate operator needed to certify that they stopped broadcasting within twenty-four hours of being told to do so by the FCC and no later than a deadline listed in the proposed rules.[114] This proposal provided a chance for pirate radio operators to legally preserve their commitments to localism and diversity.

Fearing legitimized competition, the National Association of Broadcasters (NAB) lobbied heavily against the FCC findings and proposed rules.[115] Congress quickly superseded the FCC by enacting the Radio Broadcast Preservation Act of 2000 (RBPA).[116] Essentially, this closed the door on current and former pirate radio broadcasters by "prohibiting any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of § 301[117] of the Communications Act of 1934."[118]

---

110. *In re* Creation of a Low Power Radio Serv., 14 F.C.C.R. 2471, ¶ 65 (1999).

111. *In re* Creation of a Low Power Radio Serv., 15 F.C.C.R. 2205, ¶ 11 (2000).

112. *Id.* at 2210-13.

113. Martin, *supra* note 27, at 1192 (citing *Creation of a Low Power Radio Serv.*, 15 F.C.C.R. at 2213.

114. *Creation of a Low Power Radio Serv.*, 15 F.C.C.R. at ¶¶ 53-54.

115. Tom Fudge Interview, *supra* note 14. The NAB is the main lobby group of free, over-the-air radio and television broadcasters. The National Association of Broadcasters, About NAB, http://www.nab.org/about/ (last visited Sept. 24, 2006).

> According to the Center for Responsive Politics, in 2000 alone, the parent companies of the big five television and cable broadcasters (ABC, CBS, NBC, CNN and Fox) spent close to $27 million on lobbying firms. And that excludes the National Association of Broadcasters (NAB) which spent $5.7 million the same year. According to the Center for Public Integrity, from 1998 until 2003, when the Federal Communications Commission considered another round of "relaxing" ownership regulations, "the lobbying expenditures by the broadcast industry ha[d] risen 74 percent."

Alexander Lynch, *US: The Media Lobby*, *supra* note 91. For additional examples, Clear Channel spent only $12,000 on lobbying in 2001. By the time of the 2003 rule change, this had risen over 19,000% to $2.28 million. *Id.*

116. Radio Broadcast Preservation Act of 2000 (RBPA), Pub. L. No. 106-553, 114 Stat. 2762, § 632.

117. Section 301 provides for the ownership of radio channels by the United States government and requires a license for anyone wishing to transmit over the channels. 47 U.S.C. § 301 (2000).

That is, all low-power pirates were barred from obtaining a new LPFM license regardless of whether or when they had ceased to operate unlawfully.[119] Responding to Congress, the FCC duly modified the proposed rules to include the stringent requirements,[120] and the District of Columbia Court of Appeals has since upheld the limitation against attack.[121]

B. Non-Interfering LPFM Continues to Fulfill Supreme Court "Public Interest" Policy

While FCC policy shifted from public trust to marketplace theory, the Supreme Court steadfastly advocated a "marketplace of ideas" approach to spectrum regulation.[122] This marketplace of ideas doctrine embraced wide varieties of competing voices to further the listener's First Amendment interests.[123] Competing voices furthered democracy, where "truth [would] ultimately prevail."[124] Like early FCC regulations, the Court also valued local broadcasters' positive effects on the community.[125]

---

118. Radio Broadcast Preservation Act of 2000, § 632(a)(1)(B).

119. Ruggiero v. FCC, 317 F.3d 239, 243 (D.C. Cir. 2003).

120. *Id.*; *In re* Creation of Low Power Radio Serv., 15 F.C.C.R. 2205, 2230 (2000), *as amended by* 16 F.C.C.R. 8026, ¶¶ 10-11 (2001). The adopted regulations place heavy burdens on *non-pirate* operators, too. "[B]y requiring a separation of three channels between new LPFC stations and existing broadcasters, Congress and the FCC prevented the creation of LPFM stations in most major markets, where the station's small broadcasting range could reach the largest audiences." Perzanowski, *supra* note 76, at 762.

121. *See, e.g.*, *Ruggiero*, 317 F.3d 239.

122. In 1969, the Supreme Court in *Red Lion* best summarized this approach:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount*. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. *That right may not constitutionally be abridged either by Congress or by the FCC*.

Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (citations omitted) (emphasis added).

123. *Id.* at 390.

124. *See id.*

125. Throughout his *NBC* opinion, Justice Frankfurter carefully credited the *Report on Chain Broadcasting* rather than proposed any overt policy guidelines himself. However, he cited an earlier Supreme Court case stressing the public's interest in local broadcasting: "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)). This suggests that, at the time, the Supreme Court and FCC shared a commitment to localism best served by ownership regulation.

Because public trust regulations actively promoted variety,[126] early FCC policy promoted the Court's normative First Amendment view.

Although rooted in similar philosophies, the FCC's current marketplace theory conflicts with the Court's marketplace of ideas. Regulations emphasizing the public's listening interests have been replaced with free market philosophies emphasizing the broadcasters' profit potential. In doing so, the First Amendment analysis has shifted from listener to broadcaster.[127] As mentioned above, deregulation has resulted in media consolidation. The marketplace of ideas has shrunk as listeners receive information from fewer sources. While indicating less trust in the FCC's "public interest" role,[128] the Court still relies on the marketplace of ideas to promote freedom of expression.[129] Current FCC doctrine, which constricts the marketplace, may inhibit the Court's traditional First Amendment view of broadcast regulation.[130]

NBC still stands as the Court's definitive holding on licensing and the First Amendment. In *NBC*, the Court trusted the FCC to regulate broadcasting by emphasizing diversity over monopoly.[131] Placing paramount importance in the public's First Amendment "marketplace," the *NBC* Court separated the broadcaster's freedom of speech from the medium used for transmission. To wit, the networks' First Amendment arguments failed because "[t]he right of free speech does not include . . . the right to use the facilities of radio without a license."[132]

---

126. *See supra* notes 71-73.

127. The *NBC* Court upheld regulations from a broadcaster's First Amendment attack premised on an argument that the listener's First Amendment interests would suffer. *Nat'l Broad. Co.*, 319 U.S. at 225-27. Unlike *NBC*, courts increasingly require greater FCC justifications for actions appearing to infringe on broadcaster's First Amendment rights. *See, e.g.*, Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1047 (D.C. Cir. 2002). The *Fox Television* court called an FCC decision "arbitrary and capricious and contrary to law" because the FCC failed to give adequate reasons for its regulatory decisions. *Id.*

128. *Id.*

129. Recent Court majorities reference the "marketplace of ideas." *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 885 (1997). Although the *Reno* case deals with content-based Internet censuring, *id.* at 871-72, the core doctrine is consistent with *Red Lion*. That is, the public's First Amendment interest in the freedom of expression is furthered by an uninhibited exchange of ideas from a wide variety of viewpoints. *See id.* at 884-85.

130. *See* Benjamin, *supra* note 41, at 54-65 (discussing current confusion over which level of scrutiny to apply to broadcast regulations).

131. *See supra* note 69.

132. *Nat'l Broad. Co.*, 319 U.S. at 190, 227.

Although *NBC* precludes First Amendment challenges to ex parte seizure, the Court may want to reconsider *NBC* in light of recent developments. First, the Court reached the *NBC* decision under the old public trust model of FCC regulation. While the Court's First Amendment policy has remained constant, the regulatory policy has reversed. Since marketplace theory focused on private interests, radio's marketplace of ideas has shrunk. Non-interfering pirate radio furthers Court policy by adding diverse and local voices back to the marketplace of ideas. *NBC* should not deny First Amendment protection in an inapposite regulatory environment.

Second, Congress's refusal to follow FCC LPFM recommendations stands at odds with *NBC*'s "expert agency" deference.[133] In countering concerns over freedom of speech abridgments, the *NBC* Court placed much trust in the FCC's expert ability to regulate in the public interest.[134] The recent history surrounding the LPFM proposals indicated less faith from Congress. Despite technical findings dismissing LPFM interference effects,[135] Congress refused to accept regulations recognizing LPFM's benefits.[136] The FCC was then placed in the awkward position of enforcing technical policy contrary to published agency reports.[137] Alternatively, the legislative action might reflect anti-competitive, marketplace-shrinking lobbying efforts of large private broadcasters. Under either theory, the FCC may no longer be as uniquely competent or independent to regulate in the public interest. Because broadcasters use the spectrum primarily for sending and receiving information, the Court may want to take a more active role protecting the free exchange of ideas. Refining *NBC* would remove the FCC as sole First Amendment "gatekeeper" to the airwaves. For example, requiring a showing of interference before denying Constitutional protection would help ensure that diverse broadcasters are not arbitrarily or invidiously kept from competing for listeners.

---

133. *See id.* at 215-20 (giving the FCC wide authority to promulgate regulations ordering the "fluid and dynamic" industry of radio).

134. *See supra* note 69.

135. Press Release, Federal Communications Commission, FCC Lottery Today Determines Order for Accepting Applications for Low Power FM Radio Station Licenses (Mar. 27, 2000), 2000 WL 306359.

136. *See id.*; *cf.* Press Release, Federal Communications Commission, FCC Chairman Urges Broadcasters to Shift Focus from Fighting Against Low Power Radio to Fighting for Digital Opportunities (Apr. 11, 2000), 2000 WL 369665 (addressing the likely source of congressional opposition to LPFM).

137. *See, e.g.*, *In re* Creation of a Low Power Radio Serv., 15 F.C.C.R. 2205 (2000) (publishing findings and proposing rules ultimately overruled by Congress's passage of the RBPA); *In re* Creation of a Low Power Radio Serv., 14 F.C.C.R. 2471 (1999).

Some critics argue that keeping spectrum idle violates the First Amendment.[138] If one accepts this, non-interfering pirate broadcasters already have presumptive First Amendment rights. Although the argument blurs the line between speech and the spectrum,[139] these critics insist that the scarcity rationale only warrants broadcast restrictions that limit interference.[140] Today, much commentary centers around the scarcity rationale's continued viability[141] and level of "scrutiny"[142] FCC regulations should receive. Should courts refine *NBC* or acknowledge a First Amendment interest, ex parte seizure to silence non-interfering pirate broadcasters would probably not pass Constitutional muster. The next section turns to this analysis.

IV. THE FOURTH AMENDMENT AND REASONABLE ALTERNATIVES TO EX PARTE SEIZURE

A. The Denial of Fort Wayne *Protection*

The Fourth Amendment protects all citizens against unreasonable searches and seizures.[143] In *Fort Wayne Books, Inc. v. Indiana*[144] the Supreme Court recognized that ex parte seizures affecting First Amendment rights require greater scrutiny.[145] Specifically, mere probable cause to believe that a law has been broken is not enough to remove certain speech from the public domain.[146] By denying a First Amendment right,

138. *See generally* Benjamin, *supra* note 41 (arguing that FCC regulation should be limited to concerns about interference and stating that the scarcity rationale undercuts government restrictions on spectrum).

139. *Id.* at 32.

140. *Id*. at 65-77. Of course, "independent" First Amendment rationales can always limit broadcasting; for example, the Court has upheld regulations on *licensed* broadcasters that restrict obscenity and indecency. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

141. *See generally* Benjamin, *supra* note 41.

142. *Id.*

143. U.S. CONST. amend. IV.

144. 489 U.S. 46 (1989).

145. *See id.* at 63 (holding that "while the general rule under the Fourth Amendment is that any and all contraband . . . may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved."); Maryland v. Macon, 472 U.S. 463, 468 (1985) ("The First Amendment imposes special constraints on searches for and seizures of presumptively protected material and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances." (citation omitted) (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)).

146. *Fort Wayne Books*, 489 U.S. at 62-67.

NBC denies pirate operators heightened *Fort Wayne* protection against government intrusion.

Developed over obscenity seizures, the principles supporting the *Fort Wayne* doctrine are not broad enough to cover pirate radio seizures. *Fort Wayne* emphasized concerns about the subjective nature of obscenity determinations and prior restraint.[147] In other words, the fear of ex parte seizure chills the dissemination of protected speech. Courts have held the doctrine inapplicable to objective measures of unlicensed radio transmission.[148] Instead, courts relied on the regulatory backdrop denying licenses.[149] They rightly held that determining obscenity carries a higher risk of subjective bias than measuring radio transmissions violating an objective regulatory threshold.

Nonetheless, given recent lobbying concerns and the decrease in localism and diversity, courts may want to extend a *Fort Wayne*-like doctrine to non-interfering pirate broadcasters. To do so, one must argue that the public's interest for diversity and localism is akin to the private interest against prior restraint. Given the Court's views that both interests promote the freedom of expression and further liberty, a legitimate argument may exist on an abstract level.[150] Once protected, ex parte seizures may not satisfy the Fourth Amendment's "reasonableness" standard. At any rate, alternate enforcement methods better fit the FCC's current regulatory philosophy. Therefore, choosing ex parte seizure over other enforcement methods requires greater scrutiny to ensure reasonableness.

B. Alternative Enforcement Choices and Obstacles Posed by Each One

Given alternative methods of enforcement, ex parte seizures of non-interfering broadcasting equipment may not be considered reasonable. Unlike an operator interfering with licensed transmissions, a non-interfering broadcaster poses no immediate threat to the safety or interests of others. The only people affected by the broadcast are voluntary listeners. Without any immediate harm, the FCC could utilize three

147. *Macon*, 472 U.S. at 470.

148. U.S. v. Any & All Radio Station Equip., 93 F. Supp. 2d 414, 421-22 (S.D.N.Y. 2000).

149. *See* United States v. Dunifer, 997 F. Supp. 1235, 1240 (N.D. Cal. 1998) (giving the FCC wide latitude in determining the constitutionality of their own licensing scheme).

150. For the public's interest in localism and diversity furthering democracy, see *supra* Part III.B. For holdings that discuss prior restraint's negative affects on liberty, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (collecting cases).

additional safeguards. Although less intrusive, none of the alternatives completely mitigate deregulation's effects on diversity and localism.

The first and least intrusive method is a "cease and desist" order.[151] Although the FCC generally provides warning of possible ex parte seizures,[152] this notice does not follow the procedures for issuing a cease and desist order.[153] Challenging cease and desist orders, however, involves practical difficulties: regardless of where pirate operators broadcast, cease and desist orders can only be appealed to the United States Court of Appeals for the District of Columbia.[154]

An injunction against station operation provides another less intrusive enforcement option.[155] In fact, the FCC occasionally seeks an injunction against pirate radio operators rather than an ex parte seizure.[156] At the very least, an injunctive hearing brings both parties before a district court to argue the merits of the injunction. However, obstacles like the "primary jurisdiction doctrine" await pirate operators challenging the FCC's basis for injunctive relief. Specifically, the primary jurisdiction doctrine prevents pirate operators from raising First Amendment arguments in district courts[157] until they exhaust administrative remedies.[158]

---

151. 47 U.S.C. § 312(b) (2000) reads, in pertinent part: "Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter [that is, a provision requiring license to operate] . . . or (3) has violated or failed to observe any rule or regulation . . . the Commission may order such person to cease and desist from such action."

152. *See, e.g.*, United States v. Any & All Radio Station Transmission Equip., 218 F.3d 543, 548 (6th Cir. 2000); Tom Fudge Interview, *supra* note 14.

153. The cease and desist statute, 47 U.S.C. § 503(b) (2000), must follow 47 U.S.C. § 312(e) (2000). Section 312(e) references U.S.C. § 558(c) (2000) (addressing license revocation) and extends its safeguards and opportunities to be heard to those receiving cease and desist orders. The FCC notice, on the other hand, simply warns against unlicensed broadcasting and informs the recipient about possible fines and seizure. Importantly, the FCC notice provides a ten-day window for challenging the determination while a true cease and desist order must provide thirty days under 47 U.S.C. § 312(c) (2000) before the issuance of such an order.

154. 47 U.S.C. § 402(b)(7) (2000).

155. 47 U.S.C. § 401(b) (2000).

156. *See, e.g.*, United States v. Neset, 235 F.3d 415, 416 (8th Cir. 2000) (affirming an order granting an FCC request for injunctive relief); United States v. Dunifer, 219 F.3d 1004, 1009 (9th Cir. 2000) (affirming a District Court injunction against a radio operator and denying that the District Court had authority to hear the operator's affirmative defenses); Prayze FM v. FCC, 214 F.3d 245, 253 (2d Cir. 2000) (affirming a District Court injunction against a radio operator).

157. *Dunifer*, 219 F.3d at 1006. *But see* United States v. Any & All Radio Station Transmission Equip., 204 F.3d 658 (6th Cir. 2000) [hereinafter *Maquina Musical*]. The

While constantly evolving FCC policy affects the marketplace of ideas, the primary jurisdiction doctrine insulates the scheme from regular First Amendment challenges. For example, when the FCC pursues injunctive relief against a pirate broadcaster, they pick the time and place to bring an action. Defendant operators will usually not deny their unlicensed broadcasts; rather, they argue against the regulatory abridgment of First Amendment rights.[159] Shielded from constitutional arguments, the district court generally grants the injunction and silences the pirate broadcaster. As employed, the primary jurisdiction doctrine discriminates against smaller broadcasters. When courts do analyze First Amendment arguments, they are presented from large private companies able to afford exhausting the administrative process. Thus, the primary jurisdiction argument may chill regulatory challenges from local and diverse points of view.

Levying forfeiture fines against unlicensed broadcasters may be the best enforcement option for today's regulatory environment.[160] Given marketplace theory and license auctioning, fining unlicensed broadcasters may maximize revenue from the broadcast spectrum.

Forfeiture fines may also indirectly refine Supreme Court broadcast jurisprudence. Like most FCC enforcement appeals, the Court of Appeals for the District of Columbia retains sole jurisdiction for broadcasters to contest levied fines.[161] However, some courts do not employ the primary jurisdiction doctrine[162] when the FCC uses local district courts to enforce fines.[163] In other words, operators defending against a court-ordered fine may have standing to raise constitutional arguments. If the primary jurisdiction doctrine does not apply, actions enforcing forfeiture fines would probably prompt regular First Amendment challenges from pirate operators. Diverse, local broadcasters contesting fines would have more

---

Macquina Musical case presumes proper district court jurisdiction over constitutional arguments. However, courts now generally agree that constitutional defenses are precluded at the district court level on the basis of standing. For an excellent discussion of the evolving primary jurisdiction argument in injunction and in rem forfeiture cases, see *Prayze FM,* 214 F.3d at 250-51, and *Neset*, 235 F.3d at 418-20.

158. Like cease and desist orders, exhausting administrative remedies is burdensome because it involves appealing license denials in the Court of Appeals for the District of Columbia. 47 U.S.C. § 402(b) (2000).

159. *See, e.g.*, *Dunifer*, 219 F.3d at 1005 (arguing that denial of low power FM licenses abridged freedom of speech).

160. 47 U.S.C. § 503(b) (2000). For most unlicensed broadcasters who have not applied for licenses, the fine accumulates at $10,000 per day with a cap at $75,000. 47 U.S.C. § 503(b)(2)(C) (2000).

161. 47 U.S.C. § 503(b)(3)(A) incorporates 47 U.S.C. § 402(a) (2000).

162. *See* Action for Children's Television v. FCC, 59 F.3d 1249 (D.C. Cir. 1995).

163. The FCC can *enforce* forfeitures through local district courts, which highlights discrepancies between FCC and pirate broadcaster ability to utilize local judicial resources. 47 U.S.C. § 504(a) (2000).

opportunities to make inroads against the *NBC* ruling. However, because pirate broadcasters are modest in nature and because doing so might risk repeatedly defending on constitutional grounds, the FCC rarely uses monetary forfeiture as an enforcement tool.[164]

C. Ex Parte Seizure: Using the Most Intrusive Enforcement Method for Non-Interfering Pirate Radio Is Unreasonable and Overbroad

Although each enforcement mechanism places unique burdens on non-interfering pirate broadcasters, the alternatives are probably more reasonable than ex parte seizure under the Fourth Amendment. The enforcement statute broadly authorizes seizure of "[a]ny electronic, electromagnetic, radio frequency, or similar device, or component thereof . . . ."[165] However, the Supreme Court has held that regulations interfering with the First Amendment must be "narrowly drawn" to serve those interests.[166] This holding is important considering that streaming webcasts often accompany over-the-air pirate broadcasts.

Applying the First Amendment to today's new media formats, the authority to seize "any and all" electronic equipment is overbroad. For example, FRSD streamed its live broadcast over the Internet in addition to over the airwaves. When the FCC and U.S. Marshals seized "any and all" electronic equipment, they seized computers engaged in the dual use of broadcasting and webcasting. Lacking equipment, FRSD has not yet returned to the Internet.[167] Because of the enforcement statute's overinclusiveness, the FCC silenced protected Internet speech in addition to enforcing broadcast regulations. The statute could be narrowly drawn by authorizing the seizure of equipment used *only* in broadcasting, such as antennae or amplifiers. Alternatively, the statute might be justified under exigent circumstances should it apply only upon a showing of interference.

Ex parte forfeitures involve the greatest intrusions and provide the least protections for those whose property is at stake. Since many pirate

---

164. *But see, e.g.*, Grid Radio v. FCC, 278 F.3d 1314, 1317 (D.C. Cir. 2002) (imposing a monetary forfeiture, among other remedies). *Grid Radio* is one of the few published cases to reflect an FCC forfeiture fine.

165. 47 U.S.C. § 510(a) (2000).

166. *See, e.g.*, Schaumburg v. Citizens for Better Env't, 444 U.S. 620, 637 (1980).

167. Though FRSD's homepage at http://www.pirate969.org had not been offering streaming broadcasts as recently as October 2, 2005, that service is now available. (last visited Oct. 27, 2006).

radio stations operate from residences,[168] courts should also consider the historically important "sanctity of the home"[169] when approving the appropriateness of ex parte seizures. The three additional congressional remedies provide less intrusive, albeit imperfect, means to pursue operators broadcasting without a license. Should pirate broadcasters claim an additional First Amendment interest in webcasting, the ex parte seizure statute is not drawn narrowly enough to protect the freedom of speech. Therefore, in the absence of interference, the FCC should pursue less intrusive means to enforce licensing regulations.

V. PLEADING THE FIFTH: EX PARTE SEIZURES OF NON-INTERFERING PIRATE RADIO EQUIPMENT UNDER CURRENT SUPREME COURT DOCTRINE

A. Ex Parte Seizures of Non-Interfering Pirate Radio Conflict With the Supreme Court's Mathews *Test*

Most courts analyze a pirate radio operator's Fifth Amendment Due Process concerns under the Supreme Court's *Mathews*[170] framework.[171] In *Mathews*, the Court emphasized the importance of predeprivation hearings and constructed a framework to analyze the constitutional sufficiency of prejudgment seizures.[172] Specifically, courts are to consider three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest in the procedures, including the administrative burdens that the additional procedural requirement would entail.[173] The growing popularity of dual use webcasting equipment adds a twist to the first two factors and weighs against ex parte seizure for non-interfering pirate radio broadcasters.

---

168. FRSD broadcasted first from a house, and then from an apartment. Tom Fudge Interview, *supra* note 14.

169. The Supreme Court has stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ." United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).

170. Mathews v. Eldridge, 424 U.S. 319 (1976).

171. *See, e.g.*, United States v. Any & All Radio Station Equip., 93 F. Supp. 2d 414, 422-24 (S.D.N.Y. 2000). Technically, the ex parte enforcement statute, through the Supplemental Rules, authorizes a court clerk to issue an arrest warrant for seizing property without a showing of exigent circumstances: "When the United States files a complaint demanding a forfeiture for violation of a federal statute [like 47 U.S.C. § 301], the clerk must promptly issue a summons and a warrant for the arrest of the . . . property *without requiring a certification of exigent circumstances*. . . ." FED. R. CIV. P. C(3)(a)(i) (emphasis added).

172. *Mathews*, 424 U.S. at 333-35.

173. *Id.*

The private interest affected by ex parte seizure is substantial. Technically, two private interests may exist: a free speech interest and a property interest in radio equipment. Courts typically dispose of the free speech interest by relying on *NBC*'s denial of First Amendment protection to those broadcasting without a license.[174] However, presumptively protecting non-interfering broadcasts would turn the private interest into a constitutional right.[175] Additionally, dual use equipment, such as computers, can be used to disseminate legal speech over the Internet.[176] In the presence of dual use technology, the private First Amendment interest becomes greater.

A private property interest necessarily attaches to expensive electronic equipment. Even if unlicensed broadcasting falls outside First Amendment protection, broadcasting equipment itself is not inherently unlawful. For example, if a court granted an injunction against a pirate operator, the operator could legally sell his transmitter to a licensed individual. Moreover, dual use equipment, such as computers, may be seized although the involvement in pirate radio may be minimal. Arguably, a strong property interest exists in equipment which either could be legally used should the owner take steps to get a license or sold to a broadcaster licensed to use it.

The second *Matthews* factor, the risk of erroneous deprivation, cuts decidedly against pirate broadcasters. Specifically, the risk of erroneously seizing broadcasting equipment is low. The FCC maintains sophisticated tracking equipment and broadcasters typically admit to broadcasting without a license.[177] However, as dual use technology becomes more widespread, pre-seizure hearings could provide additional safeguards

174. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943) (holding that "[t]he right of free speech does not include, however, the right to use the facilities of radio without a license."); *see also Any & All Radio Station Equip.*, 93 F. Supp. 2d at 422 (denying that claimants had any First Amendment interest in broadcasting without a license).

175. Courts emphasize the importance of First Amendment rights in the due process context. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) ("Freedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause . . . ."); Grove Press Inc. v. City of Philadelphia, 418 F.2d 82, 90 (3d Cir. 1969) (holding that procedure inhibiting expression as the result of an ex parte hearing violates the Due Process Clause).

176. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004) (striking down a law regulating content on the Internet).

177. *See, e.g.*, United States v. Any & All Radio Station Transmission Equip., 218 F.3d 543, 550 (6th Cir. 2000); *Any & All Radio Station Equip*, 93 F. Supp. 2d at 418 (denying any violation of the licensing statute).

over ex parte forfeitures. For example, when the FCC conducts a prejudgment raid on a structure that includes dual use equipment, the risk of seizing electronic equipment unrelated to broadcasting increases. A pirate operator broadcasting simultaneously over the air and Internet could benefit from a pre-seizure hearing by identifying the use of his webcasting equipment. Pursuing an injunction against a pirate broadcaster would have the same effect. Faced with an order to stop broadcasting, the operator may prefer to stop radio transmission rather than risk additional "cyber-silence" through seizure of dual-use equipment.

The third and most contested factor concerns the government's interest in obtaining an ex parte seizure. The Supreme Court in *Fuentes v. Shevin*[178] required exigent circumstances to justify the government's ex parte seizures, and courts look examine three factors to decide whether exigent circumstances exist:[179] (1) whether seizure is necessary to secure an important governmental or public interest; (2) the necessity of very prompt action; and (3) whether a government official initiates the seizure by applying the standards of a narrowly drawn statute.[180]

The first *Fuentes* factor cuts for and against the government. Although the government has always had a great interest in furthering the utility of radio, marketplace theory has replaced many regulations with private choice.[181] As such, the public interest in prejudgment seizure is less clear. If one accepts the idea that non-interfering pirate broadcasters fulfill core values of diversity and localism,[182] public interest requires a preseizure hearing to ensure a neutral party determines the seizure's necessity. Additionally, an ex parte seizure may not be "necessary" considering other enforcement options.[183] Insulating a non-interfering pirate operator with presumptive First Amendment protection further weakens the government interest in silencing broadcasters. As Part II suggests, government withdrawal from spectrum regulation should correspondingly decrease the intrusiveness of license enforcement.

In the absence of interference, very prompt action is rarely necessary to pursue unlicensed broadcasters. For example, FRSD operated for over two years without complaint before the FCC executed an in rem seizure.[184] Another station operating without interference, Free Radio

178. 407 U.S. 67 (1972).

179. *See, e.g.*, *Any & All Radio Station Equip.*, 93 F. Supp. 2d at 423-24 (citing *Fuentes*, 407 U.S. at 92; United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 903 (2d. Cir. 1992)).

180. *Fuentes*, 407 U.S. at 91.

181. *See supra* Part III.B.

182. *See supra* note 122.

183. The FCC has three options besides ex parte civil forfeiture to deal with an unlicensed broadcaster. *See supra* note 105 and accompanying text.

184. Free Radio San Diego 96.9FM, *supra* note 1.

Santa Cruz, operated for almost ten years before the FCC initiated an ex parte seizure.[185] In the case of FRSD, the FCC knew about the station for months, including the broadcasting location.[186] Because the unlicensed broadcasting did not create any immediate harm, rapid enforcement was not forthcoming. In other words, exigent circumstances requiring fast, intrusive remedies did not exist. A showing of interference would justify an ex parte seizure and vindicate the public interest in receiving intelligible, licensed broadcasts.[187] However, lacking interference, the need for very prompt action falls away. The remaining enforcement options still provide enough "teeth" to preserve the integrity of the FCC's regulatory mandate.

The FCC enforcement statute broadly authorizing seizure of any and all electronic equipment[188] has been eclipsed by marketplace theory and dual use technology.[189] A broad statute might have been a suitable punishment for enforcing heavy responsibilities under the public trust model. However, non-interfering pirate broadcasters pose no immediate threats to the private parties driving the current regulatory scheme.[190] The concerns about dual use technology addressed in Part IV apply equally here.

A statute limiting seizure to "broadcasting equipment" upon a "showing of interference" would probably satisfy *Fuentes*'s "narrowly drawn" requirement. This would ensure that only operators committing immediate private harms created exigencies justifying prejudgment seizure. Although the public interest factor favors both parties, the interests of a non-interfering pirate operator trump governmental interests regarding necessity of prompt action and a narrowly drawn statute. Therefore, exigent circumstances generally do not exist in ex parte seizures of non-interfering

185. Interview by Juan Gonzalez & Amy Goodman with George Cadman & Vinny Lombardo, in Santa Cruz, California (Sept. 30, 2004), *available at* http://www.democracynow.org/article.pl?sid=04/09/30/1411235#transcript (last visited Oct. 22, 2006).

186. Tom Fudge Interview, *supra* note 14.

187. *See* United States v. Any & All Radio Station Equip., 93 F. Supp. 2d 414, 424 (S.D.N.Y. 2000).

188. *See* 47 U.S.C. § 510(a) (2000).

189. *But see Any & All Radio Station Equip.*, 93 F. Supp. 2d at 424 (holding that the licensing statute, 47 U.S.C. § 301, is narrowly drawn enough to initiate a seizure). This Author respectfully disagrees. While § 301 holds that operators may not broadcast without a license, 47 U.S.C. § 510(a) is the statute authorizing ex parte seizures. It is argued that the FCC applies this statute when effectuating a seizure.

190. The only threat to private parties is competition, a goal that FCC policy traditionally promotes.

radio equipment. And in the absence of exigent circumstances, courts generally disfavor ex parte seizures.[191]

B. Traditional Government Justification of Ex parte Seizures Is Flawed

Typically, the government argues the adequacy of ex parte pirate radio seizures by pointing to the forfeiture in *Calero-Toledo v. Pearson Yacht Leasing Co.*[192] In *Calero-Toledo*, a drug smuggling case, the government seized a yacht prior to judicial determination of forfeiture.[193] Central to the Court's analysis was the fact that a yacht was the sort of property that could be removed to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given.[194] However, the concerns underlying drug cases are inapplicable to that of non-interfering pirate radio seizures.[195] Whereas the government has reason to fear drug smuggling instruments fleeing jurisdiction, individual pirate radio stations only exist and thrive in the immediate area. Because most pirate broadcasters operate low power stations, fleeing the jurisdiction would mean fleeing their supporting audience. Although seizing the instrumentalities of the drug trade provides immediate benefits to the public interest,[196] the only people affected by non-interfering pirate radio are those voluntarily listening to the broadcast. No immediate public interest is furthered by

---

191. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 53-55 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event.'" (quoting Fuentes v. Shevin, 407 U.S. 67, 82 (1972))). The Court continued its analysis by describing the lack of protection an ex parte seizure leaves the owner of property. *Id.* at 55.

192. 416 U.S. 663 (1974).

193. *Id.* at 664.

194. *James Daniel Good Real Property*, 510 U.S. at 52 (citing *Calero-Toledo*, 416 U.S. at 679).

195. *Calero-Toledo*, 416 U.S. at 679.

> Thus, for example, due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food; from a bank failure; or from misbranded drugs.
>
> The considerations that justified postponement of notice and hearing in [the aforementioned situations] are present here. . . . [S]eizure under the . . . statutes serves significant governmental purposes: Seizure . . . foster[s] the public interest in preventing continued illicit use of the property . . . .

Id. (citations omitted). Unlike non-interfering pirate radio, each of the mentioned items can cause immediate public harm.

196. For example, taking a drug boat into custody theoretically reduces the amount of drugs coming into a community. This increases the community's well-being, regardless if they were pro-drug or anti-drug, through lower crime and greater resources available for other projects. On the other hand, ex parte pirate radio seizures do not provide any offsetting benefits, other than a vague respect for FCC enforcement measures. Ex parte seizures directly harm the listening audience, however, by depriving them of a source of local and diverse broadcasters.

seizing non-interfering broadcasting equipment. Indeed, silencing pirate broadcasts through ex parte seizure may contradict the FCC's public interest mandate.[197]

VI. CONCLUSION

Today, the radio industry has developed from a little-understood novelty to a multibillion dollar industry. Radios are in our homes, cars, clocks, and showers. Many of us listen to the daily news on the drive to work and blast music on the ride home. No matter where and when we listen, we depend on radio as a free source of information and entertainment. As the regulating body, the FCC enjoys significant influence on what comes out of the little box with knobs.

While early FCC policy commanded choice over efficiency, marketplace theory promotes an opposite incentive. Pirate operators and their audiences argue that the policy shift harms the public's interest in local and diverse programming. The strength of this argument lies in the pirate-public relationship: despite substantial personal risk, pirate stations continue to operate with strong public support. And without any private harm, they argue, the only "harm" in unlicensed broadcasting is competition. Ex parte seizure disproportionately affects the smallest and most diverse voices on the spectrum; perhaps, these voices need the *most* protection today.

The effects of marketplace theory are at odds with the traditional Supreme Court approach to broadcast regulation. The Court should either refine *NBC*'s holding or reaffirm the central tenets under arguments reflecting the realities of the current regulatory scheme. Relaxing the primary jurisdiction doctrine would also promote more discussion on how the changed environment affects the way we use radio to further the First Amendment.

Ex parte seizure is a powerful tool used to remedy great public harms and immediate private harms. Given alternative enforcement methods, less intrusive remedies can still maintain the spectrum's integrity. Additionally, non-interfering pirate radio does not pose the inherent exigencies that warrant ex parte relief.

Finally, the emergence of dual use technology poses a problem with which courts have not yet dealt. As we have seen, webcasting may

197. *See supra* Part III.

significantly alter the balance of interests under *Mathews*. Ex parte seizure is an enforcement remedy which may hurt more than it helps.

VII. AFTERWORD

As this Comment neared completion, the Author regularly checked the FRSD Web site for updates on the station's response to the FCC seizure. As an indication of how strongly the community valued FRSD's service, listener donations allowed the station to resume unlicensed, interference-free broadcasting within three months of the ex parte raid. On November 21, 2005, Bob Ugly reaffirmed his own commitment by posting the following on FRSD's Web site: "on a personal note to the San Diego FCC, we roll much deeper than you. Take our [expletive] again, and we'll only clown you even harder when we come back."[198]

BUCK ENDEMANN

198. Free Radio San Diego 96.9FM, http://www.pirate969.org/modules.php?name=News&file=article&sid=43 (November 22, 2005, 21:06:27 PST).