Which Public, Whose Interest? The FCC, the Public Interest, and Low-Power Radio*

TABLE OF CONTENTS

* J.D. candidate 2002, University of San Diego School of Law; Ph.D. 1998 University of New Mexico; B.A. 1988 Columbia University.

Thanks to Teresa Boyd and Dean Daniel Rodríguez for reading earlier drafts of this Comment. Remaining flaws are, of course, my responsibility.

I. INTRODUCTION

Since early in the twentieth century, communication via radio waves has been an integral part of modern American society. At its base, radio communication is the conversion of some form of communication into electromagnetic signals that are cast broadly across a terrain where the signals can be received and reconverted into the original communication. Radio communications are used for mass media as well as technical and governmental purposes, and have had a profound effect on everyday life, the experience of space and time, and ultimately the modern sense of self and society.[1]

Broadcasters are able to communicate at a distance using technology that manipulates electromagnetic waves. Only a finite number of electromagnetic waves can carry usable signals. In effect, these scarce usable waves constitute an invisible slice of atmosphere that only a limited number of communicators can use at one time. Part II of this Comment describes the current technological practices that enable broadcasters to communicate using the electromagnetic spectrum.

Early in the history of radio communication in the United States, the government claimed dominion over the useful slice of spectrum and has since endeavored to administer this public property in "the public interest."[2] Not surprisingly, considering the pervasive presence and power of mass communications in modern society, analysis of the government's shifting conception and practice of the public interest, contained in Part III of this Comment, reveals different legal theories, significant court battles, and political values that shift over time.

In recent history, regulation of the airwaves in the public interest has been portrayed by legal scholars as a shift from government regulation to market regulation, which is generally viewed as the triumph of economic rationality.[3] But the idea that the history of the public interest

---

1. For analyses of the transformations of modern life and personhood associated with the development of mass communication, see KENNETH J. GERGEN, THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE (1991); DAVID HARVEY, THE CONDITION OF POSTMODERNITY (1990); Douglas Kellner, *Popular Culture and the Construction of Postmodern Identities*, *in* MODERNITY AND IDENTITY 141 (Scott Lash & Jonathan Friedman eds., 1992).

2. *See* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 606 (1997).

3. *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 207–10 (1982); Krasnow & Goodman, *supra* note 2, at 616, 629. *See generally* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING (1994) (describing the FCC's historical regulation of radio licenses as infringing on First Amendment rights and advocating a

standard is one of progressive enlightenment that has reached its end misconstrues the historical and continuing political struggles.

By the mid-1990s, government policy makers who had largely accepted the market regulation model over the previous two decades faced a new grassroots challenge. Across the country, unlicensed, low-power "pirate" or "micro" radio stations were proliferating.[4] Generally broadcasting one to ten watts of power and with ranges less than three miles,[5] most low-power stations were started by people who felt their interests, perspectives, and tastes were not represented by the available broadcast media.[6] Considering the public nature of the broadcast spectrum, the authorities found themselves in the awkward position of shutting down the most local of radio stations and confiscating their broadcast equipment.[7]

Faced with legal challenges[8] and, in 1998 alone, over 13,000 inquiries from people and groups interested in starting low-power stations, the government relented, and in January 2000, completed a process creating a new low-power FM (LPFM) service.[9] In the space of two years, the FCC had gone from raiding and shutting down microradio stations to inviting applications for low-power broadcast licenses. Such a dramatic shift in policy could only come about through a reinterpretation of the public interest standard. Part III of this Comment continues by analyzing

---

private property approach).

4. Plaintiff's Amended Complaint ¶ 56, Free Speech v. Reno, 200 F.3d 63 (2d Cir. 1999) (No. 98 Civ. 2680), *available at* http://artcon.rutgers.edu/papertiger/nyfma/str/lawsuit.html (last visited June 6, 2001) [hereinafter *Free Speech* Complaint], .

5. In 1978, National Public Radio successfully lobbied to clear the lower range of the FM broadcast band of low-power, noncommercial stations. Since then, the FCC has had no provisions for licensing low-power stations, effectively banning broadcasts under 100 watts from the American airwaves—at least legally. *See* GREG RUGGIERO, MICRORADIO & DEMOCRACY: (LOW) POWER TO THE PEOPLE 18 (1999).

6. *See Free Speech* Complaint, *supra* note 4, ¶ 56; Fatima Fofana, C*reating a Diversity of Voices: Local Expression Through a Low-Power Radio Service*, 7 COMMLAW CONSPECTUS 409, 415 (1999).

7. *Free Speech* Complaint, *supra* note 4, ¶ 57–60.

8. The FCC eventually won the suits that have come to court: the agency prevailed on procedural grounds in *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000). Constitutional issues were reached and decided in the FCC's favor in *Free Speech v. Reno*, 200 F.3d 63 (2d Cir. 1999). *See infra* Part III.D.

9. The initial proposal for a low-power service was contained in the Notice of Proposed Rule Making, 14 F.C.C.R. 2471 (1999) [hereinafter Proposed Rule Making]. The figure of 13,000 inquiries is contained in paragraph 11 of the Proposed Rule Making. The structure of the new LPFM service was announced in a Report and Order, 15 F.C.C.R. 2205 (2000) [hereinafter FCC's Low-Power Service].

the concept of the public interest that underlies the new LPFM service and locating this conception in the continuing history of the government regulation of the broadcast spectrum.

This Comment concludes by suggesting that the "public interest" is and should remain a public policy question, subject to democratic controls through national elections. Following that reasoning, courts should continue their historical practice of deferring to rationally based FCC conceptions as to what constitutes the public interest.

II. USING THE ELECTROMAGNETIC SPECTRUM: THE TECHNOLOGY OF RADIO BROADCASTING

The technology of radio broadcasting is based on the use and manipulation of electromagnetic radiation.[10] Theories of electromagnetic radiation were first developed in the middle of the nineteenth century.[11] After slightly over half a century of trial and error, experimenters had created reliable ways to transmit and receive radiation that had been converted into communication signals.[12] This "radio telephone" technology was to become the kernel for the new kind of information-based mass society in which we still live.

At a basic level, radio transmission consists of converting sounds into radiating energy that can be reconverted into the original sounds by a receiver.[13] A sound is a wave of vibrating atmospheric molecules bumping against adjacent molecules.[14] A sustained sound is a series of such waves, one after the other, occurring at intervals or frequencies that change when the sound changes.[15] A sound made into a microphone creates an electric sound signal that changes in voltage at the same rate or frequency as the original sound.[16] This stream of changing voltages coming from the microphone is the electric "translation" of the changing sound waves and is the communication signal that will be transmitted.[17]

---

10. *See Radio*, *in* COLUMBIA ENCYCLOPEDIA 2267 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993).

11. *See Electromagnetic Radiation*, *in* COLUMBIA ENCYCLOPEDIA, *supra* note 10, at 850.

12. *See Radio*, *supra* note 10, at 2267; THE ELECTRICAL ENGINEERING HANDBOOK 1513 (Richard C. Dorf ed., 2nd ed. 1997); Thomas H. White, *United States Early Radio History, Part I, available at* http://www.ipass.net/~whitetho/part1.htm (last visited Sept. 22, 2001).

13. *See* DAVID MACAULAY, THE WAY THINGS WORK 254–55 (1988); *Radio*, *supra* note 10, at 2267.

14. *See* SHANE CLOUDE, AN INTRODUCTION TO ELECTROMAGNETIC WAVE PROPAGATION AND ANTENNAS 4 (1995).

15. *See* MACAULAY, *supra* note 13, at 230; JIM SINCLAIR, HOW RADIO SIGNALS WORK 42 (1997).

16. MACAULAY, *supra* note 13, at 236, 254–55.

17. MACAULAY, *supra* note 13, at 236.

Before transmission, the weak and highly refined sound signal must be "attached" to a more powerful "carrier wave."[18] A carrier wave, or carrier signal, is a stream of electric current generated by an oscillator.[19] Some characteristic of this streaming carrier wave is modulated in accordance with the sound signal's stream of changing voltages; as the sound signal's stream of voltage changes, so the carrier signal is made to vary.[20] In this way, the sound signal is encoded into the carrier signal.[21]

This combined signal—a stream of changing voltages—is then applied to a transmitting antenna.[22] The signal causes electrons in the antenna to oscillate at the same varying rates as the signal.[23] All jiggling electrons produce waves of electromagnetic radiation; in a radio transmitting antenna, the electrons are oscillating at the specific rates of the signal, and thus are producing or "propagating" electromagnetic waves that pulse at the same rate as the signal.[24] Depending on the power output of the transmitter, the radio waves coming from the transmitting antenna travel some distance, dispersing along the way, until they are too weak to be received by normal radio equipment.[25] Before they dissipate, radio waves can be picked up by antennas attached to receivers where the sound to radiation process is reversed and the signal is converted to audible sound by a loudspeaker.[26]

Radio signals are sent and received on carrier waves.[27] Carrier waves are distinguished by the *frequency* of their waves—by how many waves are transmitted per second.[28] In order to hear two radio signals at the same location, they must be on carrier waves with different frequencies.[29]

---

18. *See id.*; SINCLAIR, *supra* note 15, at 21; *Radio*, *supra* note 10, 2268.
19. MACAULAY, *supra* note 13, at 254–55; *Radio*, *supra* note 10, at 2268.
20. SINCLAIR, *supra* note 15, at 7–8; *Modulation*, *in* COLUMBIA ENCYCLOPEDIA, *supra* note 10, at 1800.
21. In an AM (amplitude modulation) radio broadcast, the power or amplitude of the carrier wave is modulated. FM (frequency modulation) broadcasts modulate the frequency of the carrier wave. MACAULAY, *supra* note 13, at 254; SINCLAIR, *supra* note 15, at 45–47; *see Radio*, *supra* note 10, at 2268; *Modulation*, *supra* note 20, at 1800.
22. *Radio*, *supra* note 10, at 2268. "Antennas are metal or dielectric structures which are engineered to provide an efficient launch of electromagnetic waves into space." CLOUDE, *supra* note 14, at 41.
23. A*ntenna*, *in* COLUMBIA ENCYCLOPEDIA, *supra* note 10, at 114.
24. *Radio*, *supra* note 10, at 2268; MACAULAY, *supra* note 13, at 254.
25. SINCLAIR, *supra* note 15, at 38.
26. *Radio*, *supra* note 10, at 2268; MACAULAY, *supra* note 13, at 256.
27. MACAULAY, *supra* note 13, at 254.
28. *Id.*; *see* SINCLAIR, *supra* note 15, at 17.
29. *See* MACAULAY, *supra* note 13, at 255–56.

If two FM stations are transmitted at the same carrier frequency they will interfere with each other and only one will be receivable at a given moment; generally the more powerful signal will capture the receiver.[30] In order to avoid interference, each radio signal needs a "definite width of spectrum" (a unique cluster of frequencies), called "occupied bandwidth" or "channel spacing," that no other station in the area will use.[31] Thus, "[t]he radio spectrum is a limited resource. . . . [T]here are only so many [frequencies] of [electromagnetic] spectrum space in existence that can be effectively used in a given region at a given time."[32] The limited spectrum space means that a limited number of radio signals can be received and a limited number of "voices" can be heard in a particular place.

Like all communication, radio broadcasting is a joint activity, requiring sender and receiver to use the proper equipment and be tuned to a particular frequency.[33] It is also an inherently public activity; once a signal is transmitted at a particular frequency, any unobstructed receiver within range that is tuned to that frequency will pick up the transmission.[34] A broadcaster can mask or distort a signal, but whatever signal she transmits is out there for any receiver within range to pick up. The inherently public nature of radio broadcasting is manifest in another characteristic: as energy or radiation, electromagnetic waves pass through air, trees, frame buildings, and even human bodies;[35] by their nature, radio transmissions physically occupy atmosphere, public space, and private space. In a sense, radio broadcasters create their own monsoon of electromagnetic waves in which everyone within range lives. Thus, the equipment to transmit radio signals can be owned, but the spaces through which the signals travel cannot.[36]

The inherently limited and public nature of radio broadcasting has become a central issue in how broadcasting is organized as a social practice. The remainder of this Comment will explore and compare three conceptual

---

30. SINCLAIR, *supra* note 15, at 48.

31. *Id*. at 18; *see* MACAULAY, *supra* note 13, at 254–56.

32. STAN GIBILISCO, HANDBOOK OF RADIO AND WIRELESS TECHNOLOGY 547–48 (1999). New technologies may be able to create and receive finer-frequency discriminations, which would make more signals usable, but with any technology, the number of useful frequencies will be finite.

33. *See, e.g*., MACAULAY, *supra* note 13, at 230–31, 256.

34. SINCLAIR, *supra* note 15, at 132.

35. *See* GIBILISCO, *supra* note 32, at 13–14.

36. Some writers have suggested that the right to broadcast at a particular frequency be subject to property ownership principles. *See, e.g*., R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959); Brian C. Fritts, Note, *Private Property, Economic Efficiency, and Spectrum Policy in the Wake of the C Block Auction*, 51 FED. COMM. L.J. 849, 852 (1999). This idea will be discussed *infra* Part III.C.

schemes designed to organize broadcasting in accord with its public nature and in the "public interest."

III. GOVERNMENT ADMINISTRATION OF THE ELECTROMAGNETIC SPECTRUM

A. Radio and the Idea of Government Regulation

Before the government could establish a regulatory regime for the electromagnetic spectrum, a new idea had to emerge: the idea that the spectrum could and should be controlled.

The earliest radio broadcasts consisted of experimenters sending series of short and long tones comprising Morse code messages.[37] Originally, military planners and large corporations adopted radio pioneer Guglielmo Marconi's vision that radio signals would be used as point-to-point communications that could be used to coordinate far flung activities, such as navigation at sea.[38] The fact that signals tended to spread from the direct line between a control center and the recipient was seen as a flaw in the technology that corporate engineers tried to eliminate.[39] The potential for "broadcasting" was initially realized by the many amateur radio experimenters who proliferated in the first decade of the twentieth century.[40] The growing numbers of amateurs sending signals caused concern among military and corporate planners who viewed the situation as one of "chaos" in which the potential usefulness of the new technology would be drowned out in millions of individual, more or less purposeless voices.[41]

In the wake of the sinking of the Titanic, for example, the military claimed rescue efforts had been hampered by the interference of radio amateurs.[42] A sudden concern with public safety at sea led to regulation by Congress in the Radio Act of 1912.[43] Scholar Thomas Streeter points out that while the 1912 Act is "[o]ften treated as a mere footnote in the

37. *See* White, *supra* note 12.
38. THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES 59–60, 68–74 (1996).
39. *Id.* at 61, 71.
40. *Id.* at 61, 64–65. The word "broadcasting" was originally an agricultural term for a manner of planting seed in which the seeds (like today's radio signals) were spread or cast broadly. *Broadcast*, *in* THE BARNHART DICTIONARY OF ETYMOLOGY 118–19 (Robert K. Barnhart ed., 1988).
41. STREETER, *supra* note 38, at 74.
42. KRATTENMAKER & POWE, *supra* note 3, at 5–6.
43. STREETER, *supra* note 38, at 77.

history of spectrum regulation, . . . [the Act] asserted several basic principles upon which U.S. regulation of the spectrum has been based ever since."[44] First, the Act "clearly asserted the principle of legally sanctioned limitations on spectrum access," legislating which parts of the spectrum would be used for what purposes.[45] The most useful portions of the spectrum were limited to and divided between the Navy and commercial operators, like the Marconi Company, which conducted radio communications for ships at sea.[46] Second, use of the spectrum to transmit signals was characterized "more as a privilege than a right."[47] Notably, the privilege was to be enforced by federal agencies, which, in the name of the public good, would issue licenses to broadcast radio signals.[48]

Within these arrangements, however, little regulatory power was provided by the Act. The Secretary of Commerce was given the duty of issuing broadcast licenses and assigning the frequencies at which licensees would operate, but there was no authority to deny applications.[49] After 1920, when businesses, churches, and community groups began to realize the communicative powers of broadcasting to audiences at regular times on a regular frequency, the growing numbers of broadcasters reprised the era of chaotic interference.[50] This time, the concern was not for ship safety, but that too many conflicting signals would render the broadcast spectrum virtually useless.[51] Commerce Secretary Herbert Hoover's attempts to regulate the growing "chaos" of interfering and floating stations by enforcing assigned frequencies and scheduling different licensees' broadcasts at different times were ruled by federal courts to be beyond the legislative mandate of the 1912 Act.[52]

---

44. *Id.* at 78.

45. *Id.*

46. *Id.* Amateurs were limited to shortwave frequencies, which were thought to be of little practical value. *See also* KRATTENMAKER & POWE, *supra* note 3, at 6.

47. STREETER, *supra* note 38, at 78.

48. *Id.* Fifty years later, this decision would come under attack by academics who advocated a property rights approach to spectrum allocation, but at the time there was little support for such an idea. *See* KRATTENMAKER & POWE, *supra* note 3, at 15. The property rights approach is discussed *infra* Part III.C.1.

49. Krasnow & Goodman, *supra* note 2, at 608.

50. *Id.*; KRATTENMAKER & POWE, *supra* note 3, at 9.

51. KRATTENMAKER & POWE, *supra* note 3, at 12.

52. *See id.* at 9, 11–12; *see also* Krasnow & Goodman, *supra* note 2, at 609 & nn. 15–16. The cases in which Hoover's power to regulate broadcast licenses under the 1912 Act was construed narrowly were *Hoover v. Intercity Radio Co*., 286 F. 1003 (D.C. Cir. 1923) (affirming Commerce Secretary's power to assign frequencies to and set the hours of use by license holders, but denying discretionary power to deny applications for licenses), *writ of error dismissed as moot*, 266 U.S. 636 (1924), and *United States v. Zenith Radio Corp*., 12 F.2d 614 (N.D. Ill. 1926) (holding that the Commerce Secretary's only power was to select the frequencies that licensees as a class could use; he had no authority to place restrictions on uses of the license).

In response to the threat of interference and the inability of the Secretary to control it, Hoover organized a series of annual Radio Conferences (1922–1925) in which the major players in broadcasting came together to discuss problems and propose a new framework.[53] Thomas Streeter points out that, "Hoover's decision to organize the conferences simply reflected the principle articulated by Woodrow Wilson several years before: 'the truth [is] that, in the new order, government and business must be associated.'"[54] At the end of the first Radio Conference, the conferees unanimously resolved that "it is the sense of the Conference that Radio Communication is a public utility and as such should be regulated and controlled by the Federal Government in the public interest."[55] This conception was balanced in the legislative proposal of the final Radio Conference, which suggested "[t]hat in order to insure [sic] financial stability to radio enterprises, capital now invested must receive reasonable protection."[56] This balancing bolsters Streeter's assertion that:

> In suggesting [that] the public good should be the dominant criteria [sic] in broadcasting, the conferences were not trying to remove it from private influence. The public interest was part of a legal and rhetorical strategy for organizing broadcasting's further development as a commercial, for-profit institution. The "public interest" was not thought of as in opposition to commercial organization. Rather, it was a criterion for use by knowledgeable experts to help make complicated decisions in the process of serving the larger business system.[57]

B. Spectrum Scarcity and the Public Interest

Eventually, with the commercial spectrum jammed with over 700 stations that changed frequencies and increased broadcasting power at will, Congress passed the Radio Act of 1927.[58] The Act implemented

53. KRATTENMAKER & POWE, *supra* note 3, at 9; STREETER, *supra* note 38, at 88.
54. STREETER, *supra* note 38, at 88.
55. *To Amend the Radio Act of 1912: Hearings on H.R. 11964 Before the House Comm. on the Merchant Marine and Fisheries*, 67th Cong. 32 (1923), *quoted in* KRATTENMAKER & POWE, *supra* note 3, at 9.
56. *Radio Control: Hearings on S. 1 and S. 1764 Before the Senate Comm. on Interstate Commerce,* 69th Cong. 42 (1926), *quoted in* STREETER, *supra* note 38, at 89. Streeter suggests that "[t]he aura of mysterious technical complexity that surrounded radio technology in the 1920s" played a role in tempering "potential discord concerning government intervention and corporate favoritism." *Id.* at 92.
57. *Id.* at 93–94.
58. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927).

many of the ideas of the Radio Conferences, including federal regulation of the broadcast spectrum in the "public interest."[59] Responding to the chaos of interfering signals created by the 1912 Act, the 1927 Act legislated the federal government's right to restrict access to the spectrum. Licenses to broadcast were free, but recipients were required to render public service in exchange for the privilege.[60] Another aspect of the 1927 Act that would only later become controversial was the declaration that there would be no private ownership of the spectrum, only a temporary grant of privilege (originally three years) to use the resource now deemed public.[61]

1. The FCC and the Electromagnetic Spectrum

The Radio Act of 1927 and the Communications Act of 1934 instituted a regime of public ownership of the airwaves, with the government granting temporary broadcasting privileges to operators who agreed to operate in the public interest.[62] The Federal Radio Commission (FRC) was created by the Radio Act of 1927; in 1934 the Communications Act replaced the FRC with the Federal Communications Commission (FCC).[63] The FCC was given a broader administrative scope than its predecessor agency, but in terms of radio regulation, the FCC took over the regulatory regime of the FRC.[64]

The FCC is the federal agency responsible for executing federal communication policies mandated by Congress.[65] As with other federal agencies, Congress's mandate to the FCC[66] is generally broad, and calls for the agency to develop more specific policies and rules within that mandate.[67]

With regard to the electromagnetic spectrum, the FCC has a three-

59. KRATTENMAKER & POWE, *supra* note 3, at 13.
60. *Id.*
61. *Id.* at 12.
62. *See id.* at 12–13; Krasnow & Goodman, *supra* note 2, at 610.
63. *See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1692 & n.17 (1997).
64. FREDERICK J. DAY & HUONG N. TRAN, REGULATION OF WIRELESS COMMUNICATIONS SYSTEMS 25 (1997).
65. 47 U.S.C. § 151 (1994 & Supp. IV 1999); *see* DAY & TRAN, *supra* note 64, at 25.
66. The FCC's mandate is inscribed in 47 U.S.C. §§ 151–613 (1994 & Supp. IV 1999).
67. The Communications Act gave the FCC "not niggardly but expansive powers." Nat'l Broad. Co., Inc. v. Fed. Communications Comm'n, 319 U.S. 190, 219 (1943). The FCC was created and received its grant of executive power in 47 U.S.C. § 151 (1994 & Supp. IV 1999). The agency's public interest mandates are contained in 47 U.S.C. §§ 303, 307, 309.

level responsibility.[68] The first, is spectrum allocation—deciding which portions of the electromagnetic spectrum will be used for which particular uses.[69] Thus, a certain range of spectrum is used for AM radio, another range for FM, another for shortwave, and so on.[70] Throughout the history of government regulation, most usable portions of the spectrum have been allocated to government, military, and space communications.[71] After spectrum allocation, the FCC must perform the task of band allotment—determining how many broadcast channels will be denoted within each portion of spectrum, and exactly where those channels will be.[72] Finally, the FCC engages in channel assignment—deciding which applicants will be allowed to use which channels and issuing the appropriate license.[73] In general, the FCC's mandate to regulate the electromagnetic spectrum consists of allocating spectrum, allotting bands, and licensing broadcasters' uses of particular channels as the public convenience, interest, or necessity requires.[74]

2. The Public Interest Is Not Personal Interest: The Case of the Goat Gland Doctor, 1930

In 1930, Dr. John R. Brinkley, of Milford, Kansas, was the owner of, and a regular on-air personality on, the most popular radio station in the United States.[75] A year later, an attorney for Brinkley was appearing before the D.C. Circuit Court of Appeals trying to get back the Doctor's broadcast license for radio station KFKB.[76] The previous year, the FRC had denied Brinkley's application for license renewal on the grounds that the public interest, convenience, and necessity would not be served if Brinkley was allowed to continue broadcasting.[77] This was one of the earliest decisions rendered by the FRC that used the agency's congressional mandate to regulate broadcasting "in the public interest" to deny a licensee's right to continue operating based on the licensee's

68. JOHN D. ZELEZNY, COMMUNICATIONS LAW 398 (2d ed. 1997).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 399.
74. *See* DAY & TRAN, *supra* note 64, at 25.
75. KRATTENMAKER & POWE, *supra* note 3, at 26.
76. *Id.* at 27.
77. KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 671 (D.C. Cir. 1931).

programming practices.[78]

What had Dr. Brinkley done to call forth the wrath of executive administrative power? Brinkley came to prominence as the "goat gland doctor," a semiquack who sought "to rejuvenate the male sex drive by implanting the gonads of a young Ozark goat in the patient's scrotum."[79] Later, Brinkley developed a catalogue of medical remedies, known to the public only by their numerical designations, which he prescribed for a variety of ailments.[80] Brinkley operated the Brinkley Hospital in Milford, the Brinkley Pharmaceutical Association, and KFKB "in a common interest."[81] The hospital paid KFKB $5000 to $7000 per month for on-air advertising;[82] the druggists in the Association paid an advertising fee to KFKB for every sale of Brinkley's concoctions.[83] Brinkley's daily "Medical Question Box" shows on KFKB, during which he read and answered letters from listeners describing their ailments, were the primary sales tool for the concoctions.[84] The District Court noted that in one 1930 broadcast of "Medical Question Box," "presumably representative of all, [Brinkley] prescribed for forty-four different patients and in all, save ten, he advised the procurement of from one to four of his own prescriptions."[85]

The FRC, apparently alerted by "organized medicine,"[86] found this all too much to take. In denying Brinkley's application for renewal of his broadcast license, the FRC found that:

> [T]he testimony in this case shows conclusively that the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee.[87]

Thus, despite the popularity of KFKB,[88] the FRC held that a person could not operate a broadcast radio station primarily as an adjunct to

---

78. *See* Krasnow & Goodman, *supra* note 2, at 613.
79. KRATTENMAKER & POWE, *supra* note 3, at 26.
80. *KFKB*, 47 F.2d at 671.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. KRATTENMAKER & POWE, *supra* note 3, at 27.
87. *KFKB*, 47 F.2d at 671 (quoting the FRC's "Facts and Grounds for Decision" issued in the Brinkley hearing).
88. The relative popularity of KFKB was due in significant part to its extensive broadcast range, spreading the Brinkley mix of fundamentalist theology and medical information from the Rockies to the Mississippi River. KRATTENMAKER & POWE, *supra* note 3, at 26.

some business enterprise. Using the valuable and scarce electromagnetic spectrum in such a self-interested manner was outside the public interest, and Dr. Brinkley was forced to get off the air.[89]

3. Maximum Power Is Not in the Public Interest: The Gary-Chicago Conflict, 1933

As commercial broadcasting became more widespread and profitable during the 1930s and 1940s, the FRC-FCC's regulatory regime, with specific regulations based ultimately on a less than fully explicit concept of the public interest, was tested in the federal courts. Big commercial broadcasters, who pleaded for public interest based regulation to mitigate the spectrum "chaos" of the 1920s,[90] and then came to dominate the best portions of the spectrum allocated for public uses under the regulations,[91] began to challenge FCC regulations in the courts.

In one early case, two Chicago stations challenged an FRC ruling that terminated their license in order to allow a Gary, Indiana, station to operate with less interference.[92] The FRC found that WJKS in Gary rendered excellent public service including broadcasts aimed at the many foreign ethnic groups populating Gary.[93] WJKS broadcast diverse programs for the Gary area's "Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch and Irish people."[94] The programs were "musical, educational and instructive in their nature and stress[ed] loyalty to the community and the Nation."[95] WJKS also regularly broadcast children's programming in cooperation with local schools and made time available to the local police, fraternal organizations, and area religious organizations, all free of charge.[96] The time-sharing Chicago stations, operating at the same frequency as WJKS, were WIBO and WPCC.[97] WIBO played "a large number of chain programs originating in the National Broadcasting network[,] . . . almost entirely commercial

89. *KFKB*, 47 F.2d at 672; *see also* KRATTENMAKER & POWE, *supra* note 3, at 27.
90. *See* Thomas W. Hazlett, *Is the "Public Interest" in the Public Interest?: The Broadcast License Bargain of 1927*, *in* TELECOMMUNICATIONS POLICY: HAVE REGULATORS DIALED THE WRONG NUMBER? 49, 49–50 (Donald L. Alexander ed., 1997).
91. *See* STREETER, *supra* note 38, at 98.
92. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co. (Station WIBO), 289 U.S. 266, 269 (1933) [hereinafter *Nelson Bros. II*].
93. *Id.* at 270–71.
94. *Id.* at 271 (quoting the FRC's finding of facts).
95. *Id*.
96. *Id.*
97. *Id.* at 269, 272.

in their nature," and simultaneously available on "many other stations located in the Chicago district."[98] WPCC was owned by the North Shore Church and, like many other Chicago area stations, broadcast religious programming and church information, mostly on Sundays.[99]

The FRC found that WJKS was subject to objectionable interference from the Chicago stations, while "[t]he deletion of Stations WIBO and WPCC would not deprive the persons within the service area of those stations of any type of programs not now received from other stations."[100] Furthermore, the FRC reasoned, allowing WJKS to increase its power and deleting the Chicago stations:

> [w]ould work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana which is now assigned less than its share of such facilities and a decrease in the radio broadcasting facilities of Illinois which is now assigned more than its share of such facilities.[101]

The FRC specifically stated that these actions would serve the public interest, convenience, and necessity.[102] The terminated radio stations appealed to the Court of Appeals for the District of Columbia, which reversed the FRC's order, holding that the Commission's decision was "arbitrary and capricious," and that the appellant Chicago stations were "'serving public interest, convenience, and necessity' certainly to as great an extent as [WJKS]."[103]

The Supreme Court then granted the FRC's writ of certiorari.[104] First, the Court recognized its own legal jurisdiction to inquire into the facts used by the Commission to determine whether it had acted within the limits of its authority.[105] Next, the Court acknowledged the power of Congress to regulate broadcasting under its interstate commerce power, stating that "[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities."[106] Congress delegated its regulatory authority to the FRC, which was mandated to license use of the spectrum in the public interest,

---

98. *Id.* at 272.
99. *Id.*
100. *Id.* at 271, 273.
101. *Id.* at 273.
102. *Id.*
103. Nelson Bros. Bond & Mortgage Co. (Station WIBO) v. Fed. Radio Comm'n, 62 F.2d 854, 857 (D.C. Cir. 1932) (quoting the Chief Examiner's findings from the FRC hearing on the application).
104. *Nelson Bros. II*, 289 U.S. at 269.
105. *Id.* at 277–78.
106. *Id.* at 279. The courts agreed with the government's view that since purely local, intrastate stations can interfere with interstate broadcasts, regulation of all stations is justified. *See* ZELEZNY, *supra* note 68, at 398.

convenience, or necessity.[107]

As noted above, in the dispute between WIBO-WPCC and WJKS, the public interest determination encompassed an analysis of the equitable distribution of stations within a geographical area, as well as the kinds of programming available for people in the specific, affected communities.[108] Generally, as many communities as possible should be served in as particular ways as practicable.[109] The Gary station, which broadcast diverse community programming aimed at a wide section of the population, was being obstructed by the Chicago stations, which largely broadcast programming available on other area stations.[110] The FRC accordingly found that the public interest would be served by terminating the Chicago stations' licenses and allowing more power to the Gary station.[111] In analyzing the FRC's decision, the Court wrote that the public interest criterion:

> is not to be interpreted as setting up a standard so indefinite as to confer unlimited power . . . [but] is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities.[112]

In applying this criteria to the *Nelson Bros.* case, the Court wrote that the Commission:

> was entitled [but not required?] to consider the advantages enjoyed by the people of Illinois under the assignments to that State, the services rendered by the respective stations, the reasonable demands of the people of Indiana, and the special requirements of radio service at Gary. The Commission's findings show that all these matters were considered. . . . We are of the opinion that the Commission's findings of fact . . . support its decision, and an examination of the record leaves no room for doubt that these findings rest upon substantial evidence.[113]

So long as the FRC really does examine factors that are involved in determining the public interest (in this case, the distribution of stations and the populations served by those stations' programming) and makes reasonable findings of fact based thereon, the courts are not free to

107. *Nelson Bros. II*, 289 U.S. at 279.
108. *See supra* text accompanying notes 100–01.
109. *Nelson Bros. II*, 289 U.S. at 279–80.
110. *Id.* at 271–72.
111. *Id.* at 272–73.
112. *Id*. at 285.
113. *Id.* at 285–86.

second guess and proffer their own interpretations of how the public interest should be defined in particular cases—that would be a judicial infringement of executive authority.

4. The Networks' Interest Is Not the Public Interest: NBC v. U.S.*, 1943*

A broader challenge to federal authority to regulate broadcast licenses under the public interest standard came before the Supreme Court in the 1943 case, *National Broadcasting Co. v. United States*, in which national networks challenged the "chain broadcasting" rules crafted by the FCC.[114]

In 1941 the FCC completed a three-year investigatory process by promulgating rules that restricted the power of national networks of radio stations engaged in what was then called "chain broadcasting."[115] At the time, the three national networks, NBC (which operated two separate networks, the Red and the Blue), CBS, and the Mutual Broadcasting System were affiliated with 341 of the 660 commercial stations in the United States and controlled more than ninety-seven percent of the valuable night-time broadcasting power in the country.[116] The FCC's Report on Chain Broadcasting did not criticize centralization of stations per se, and recognized benefits of chain broadcasting, but nevertheless concluded that the contracts the networks were requiring their local affiliates to sign infringed, at least potentially, on the local stations' abilities to serve the public interest as their licenses required.[117]

The eight regulations proffered by the FCC were quite specific and somewhat startling to a reader in the year 2001.[118] For instance, the Commission considered the fact that networks were requiring affiliates to agree not to air programming from other networks.[119] The Commission found that "[a] licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable,"[120] and promulgated a regulation which read: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the

114. Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190 (1943) [hereinafter *NBC*].
115. *Id.* at 195.
116. *Id.* at 197–98.
117. *Id.* at 198.
118. *Id.* at 198–209 (describing each regulation).
119. *Id.* at 198–99.
120. *Id.* at 199 (quoting FCC, REPORT ON CHAIN BROADCASTING 52, 57 (1941)).

programs of any other network organization."[121] In approving this rule, the FCC decided that since licensees were granted the privilege of a spot on the spectrum in return for operating in the public interest, contractual relations that could hinder the ability of stations to respond to the public interest could be restricted.[122] The FCC used the same rationale to curtail the networks' affiliate agreements with regard to territorial exclusivity,[123] terms of affiliation binding for five years,[124] and the right to reject network programming.[125] These restrictions were not placed on the networks themselves, but on the affiliates—the recipients of licenses from the FCC.[126] Thus, the Rules on Chain Broadcasting expressed the Commission's policy determination that a broadcast licensee who was willing to enter into contracts that could restrict his ability to respond to the needs and interests of his local community (the public interest) was not deserving of the privilege of spectrum space.[127]

The networks went to court seeking to enjoin enforcement of the FCC regulations.[128] After the District Court granted the government's motion for summary judgment,[129] the Supreme Court agreed to review the decision.[130] The networks put forth several arguments that "called upon [the Court] to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority."[131]

After describing the challenged Chain Broadcasting Regulations, the decision, written by Justice Frankfurter, reviewed the history of governmental regulation of radio broadcasting.[132] The Court analyzed the years leading up to the Radio Act of 1927 as a developing chaos of too many radio stations doing whatever they wanted: "These new

121. *NBC*, 319 U.S. at 200 (quoting 47 C.F.R. § 3.101 (1941)).
122. *Id.* at 209.
123. *Id.* at 200 (discussing 47 C.F.R. § 3.102 (1941)).
124. *Id.* at 201 (discussing 47 C.F.R. § 3.103 (1941)).
125. *Id.* at 204 (discussing 47 C.F.R. § 3.105 (1941)).
126. *Id.* at 196.
127. *See id.* at 196–209.
128. *Id.* at 193.
129. Nat'l Broad. Co. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942) (holding that the question of the FCC's authority to issue Chain Broadcasting Rules was a matter of law rather than fact, and that the basis of the rules on the FCC's findings was neither arbitrary nor capricious, and thus those findings were binding on the court).
130. *NBC*, 319 U.S. at 193.
131. *Id.* at 209–10.
132. *Id.* at 209–14.

stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard."[133] The chaos was a natural consequence of "certain basic facts about radio as a means of communication[;] . . . the radio spectrum simply is not large enough to accommodate everybody."[134] This chaos, and the hope of development, led Congress to pass the Radio Act.[135] The Court's historical analysis concluded that federal regulation of radio broadcasting was "essential."[136]

Congress delegated its power to a federal agency (first the FRC, then the FCC) that was under a general mandate to regulate the broadcast spectrum in the public interest so as to "secure the maximum benefits of radio to all the people of the United States."[137] The Commission had the power to define the nature of the service to be rendered by licensed stations,[138] and make the legal regulations necessary to prevent interference between stations and to carry out the provisions of the Communications Act.[139] Thus, the Commission's power included, but was not limited to, technical considerations: "the Act does not restrict the Commission merely to supervision of the traffic [on the spectrum, but] puts upon the Commission the burden of determining the composition of that traffic."[140] So long as the government could make a cogent argument that a decision or regulation was reasonably calculated to advance the public interest, the ruling was entitled to a presumption of validity. Crucially, such rulings had to include denying the right to broadcast to some people; limiting the number of stations is how chaos would be avoided.[141] So long as these choices were based on which licensees would best serve the public interest, the FCC would be operating within its delegated power.

Furthermore, the Court denied that it had the authority to evaluate the Commission's decisions based on the Court's own conception of the public interest:

> Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be

133. *Id.* at 212.
134. *Id.* at 213.
135. *Id.*
136. *Id.*
137. *Id.* at 217.
138. 47 U.S.C. § 303(b) (1994).
139. *Id.* § 303(f) (1994 & Supp. IV 1999).
140. *NBC,* 319 U.S. at 215–16.
141. *Id.*

> furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.[142]

In determining whether the Commission's regulations fit these criteria, the Court reviewed each regulation, extensively quoting both the findings regarding network practices and the public interest rationales for each.[143] The Court concluded that these regulations were intended to advance the public interest, and were thus within the mandate of the Communications Act.[144] Finally, the Court held that since the FCC has to regulate broadcasting by granting a limited number of licenses, requiring some people to be shut out, the denial of a license based on a valid exercise of power does not violate the free speech provisions of the First Amendment.[145]

5. The FCC As Big Government: The 1960 Program Policy Statement

NBC came to stand for the proposition that since there was a limited amount of space on the spectrum, the government could restrict access to the spectrum based on its conception of which potential licensees would best serve the public interest.[146] The FCC's idea of the public interest during this period focused on providing programming designed to meet a variety of preferences found in the station's local community.[147] This could be characterized as a manifestation of the New Deal ideology that government should be actively involved in organizing aspects of social life that have widespread public effects.[148]

The fullest development of this conception in regard to broadcasting is found in a 1960 FCC Program Policy Statement, which identified fourteen "major elements usually necessary to meet the public interest."[149] In

142. *Id.* at 224.
143. *Id.* at 198–209.
144. *Id.*
145. *Id.* at 226–27. The First Amendment of the U.S. Constitution asserts that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.
146. *NBC,* 319 U.S. at 218.
147. *See, e.g.*, *Public Service Responsibility of Broadcast Licensees* (1946), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 132–216 (Frank. J. Kahn ed., 3d ed. 1978).
148. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 448–49 (2001).
149. Network Programming Inquiry: Report and Statement of Policy, 25 Fed. Reg.

order to determine "the tastes, needs and desires of the community," the FCC adopted "formal ascertainment requirements, which compelled applicants for broadcast licenses to detail the results of interviews conducted by the applicant with community 'leaders' in nineteen FCC specified categories ranging from agriculture to religion."[150] Although this kind of New Deal-style regulation made sense considering the FCC's mandate to make sure the spectrum is used in ways that serve the public interest, it is not surprising that such regulation would draw the ire of philosophical critics of government regulation.

C. The Marketplace Approach to the Public Interest

While the scarcity rationale undergirded the FCC's regulatory regime for three decades, some academics pressed alternative, business-oriented approaches.[151] Eventually, these views became part of the FCC's broadcast licensing policies.

1. The Economist's Constitutional Argument: The First Amendment and the Public Interest

By the early 1960s, Ronald Coase and other economists were voicing a sustained critique of the FCC's broadcast licensing practices, arguing that they were hindering the efficient, market-based use of scarce resources.[152] The goal of Coase's economic analysis is the conversion of license holders into property owners who will be free to use their property to seek economic advantage. The argument, however, begins with an attack on FCC regulation as an infringement of the First Amendment rights of broadcasters.[153]

With the approval of the courts, the FCC insisted that their regulations did not restrict speech, but only access to the spectrum; once a broadcaster met the requirements and was issued a license, the FCC was

---

7291, 7295 (July 29, 1960). The fourteen public interest elements identified in the report are:

> (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming.

Id.

150. Krasnow & Goodman, *supra* note 2, at 616.

151. *See, e.g.*, Coase, *supra* note 36, at 14.

152. *Id.*

153. *See id.* at 7–12; *see also* Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. Rev. 990, 990–92 (1989) (critiquing government regulation of the spectrum as an unconstitutional infringement on free speech and proposing a private property system of spectrum ownership).

forbidden from practicing censorship by both the First Amendment and section 326 of the Communications Act.[154] On the other hand, if a broadcaster conducted his station in ways that were against the public interest, he could lose his license.[155] Is this a restriction on speech or a requirement for a privilege? The FCC justified the difference between broadcast and print media by pointing to the inherent scarcity of spectrum; in the words of Justice Frankfurter: "the radio spectrum simply is not large enough to accommodate everybody."[156]

As the economists are quick to point out, scarcity is not a distinguishing feature of the electromagnetic spectrum: "[l]and, labor, and capital are all scarce, but this, of itself, does not call for government regulation."[157] Advocates of an economic approach suggest that if spectrum regulation is correctly based on scarcity, "[a] Federal Paper Commission would then be necessary to decide how much paper would be available for (say) books and how much for (say) wallpaper. The Commission would further choose who was permitted to engage in book publishing."[158]

This argument avoids the reality of the situation. The point is not just that spectrum is scarce, but also that when it became apparent that spectrum was useful, the government, as the representative of civil society, claimed ownership. In other words, spectrum is scarce, and within the United States it is owned by the government of the United States.[159] Advocates of marketplace regulation acknowledge this ownership when they call for government auctions of the right to use the spectrum.[160] Given that the government owns the resource, the allocation of the resource is properly a public policy decision.

---

154. KRATTENMAKER & POWE, *supra* note 3, at 103.

155. See, for example, the case of Dr. Brinkley discussed *infra* Part III.B.2.

156. *NBC*, 319 U.S. at 213.

157. Coase, *supra* note 36, at 14; *see* Spitzer, *supra* note 153, at 1013–14. The same argument is made in KRATTENMAKER & POWE, *supra* note 3, at 204, accompanied by an economistic revision of the English language: "A 'nonscarce resource' is a contradiction in terms." *Id.* Nothing in the *American Heritage Dictionary* definition of "resource" indicates that scarcity is an inherent quality of resources. *See Resource*, *in* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1536 (3d ed. 1992).

158. KRATTENMAKER & POWE, *supra* note 3, at 18.

159. When this ownership was instituted, it was encouraged and accepted by the major commercial interests, which generally endorsed the basic idea promoted at Secretary of Commerce, Herbert Hoover's Radio Conferences: the establishment of government order was required to control the station interference that would keep the medium from being profitable. *See id.* at 8–10, 19; STREETER, *supra* note 38, at 88–89, 246–47.

160. *See, e.g.*, Fowler & Brenner, *supra* note 3, at 211–12.

The issue of whom to allow to use the publicly owned spectrum is fundamentally a question of programming practices, not infringements on freedom of speech. Many of the cases in which broadcasters alleged that the FCC infringed upon their free speech rights were fairness doctrine cases.[161] Basically, broadcasters claimed the freedom to keep other people off of the broadcasters' signals.[162] The argument was that if broadcasters have to let people on the air to respond to controversial opinions or even personal attacks, broadcasters would be reluctant to address controversial issues. In other words, broadcasters would address controversial issues only if they were free to express certain views and exclude others.[163] Thus, the fairness doctrine did not restrict speech; at most it restricted how much time could be given to one particular view to the detriment of a competing view. Such restrictions on one-sided debate were directly tied to the fact that a license to broadcast is not a personal mouthpiece, the way a newspaper can be.[164] A broadcaster can only acquire the privilege to use the public spectrum if he is willing to operate in the public interest as defined by the government as the representative of the public.

This does not seem particularly difficult to understand or justify as a public policy. Just as lessors can impose conditions on the use of their property by lessees, the public owners of the spectrum can require it be used in ways that are deemed advantageous to the public.

The economists' comparisons to other media can be turned around. Imagine that all the newsprint available in the United States could suddenly only be produced from certain trees grown on a mountain in Arizona that had been owned and managed by the government since taking the land from Mexico in 1846. Newsprint would thus be a public resource. A public policy is required to determine how to allocate the newsprint. There are at least two distinct possibilities.

First, the government could sell the newsprint to the highest bidder. This policy would directly serve the public interest by adding revenue to the treasury. Economic analysts would also argue that there would be "social benefit" when the paper is put to its "highest valued" use. In this sense, the "highest valued" use generally means that which is most

161. The FCC's "fairness doctrine," repealed in 1987, required radio and television licensees to (1) provide coverage of significant public issues and (2) ensure that the coverage accurately presents conflicting views on those issues. KRATTENMAKER & POWE, *supra* note 3, at 239.

162. *See, e.g.*, Meredith Corp. v. FCC, 809 F.2d 863, 866 (D.C. Cir. 1987).

163. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392–95 (1969). The First Amendment argument in *Red Lion* is discussed in KRATTENMAKER & POWE, *supra* note 3, at 166.

164. *See* KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931), discussed *supra* Part III.B.2.

profitable for the investors.

Alternatively, the government could divide up the newsprint among all the members of the public who wanted to use some of this valuable public resource. This policy would advance the public interest by allowing a fair say to all constituents. Of course, this would leave very little newsprint for each person who wants to use it, so the policy could be altered so that the newsprint is given to applicants who are willing to use it in such a way that a wide spectrum of perspectives make it into print. In other words, a printer could use the public resource to seek a profit so long as some of the resource was used to advance the public policy goal of facilitating access to a wide range of opinions and ideas.

These are both valid policies, and the decision which to implement should be a policy decision mediated by the political process. Significantly, though, the advocates of an economic approach to spectrum use have sometimes sought to short circuit such a policy debate by arguing that the fair-say allocation of spectrum is unconstitutional because it violates the right to free speech.[165] Thus, the field is purportedly left to the economic interpretation. A skeptical reader might see this argument as an attempt to remove the public (as reflected in an elected government) from a meaningful say in how public resources are used. The insistence that the use of a particular (or every) public resource should be determined by how much profit private investors can reap may be a plausible political perspective—a policy to seek to implement through political mobilization—but to insist that some natural or constitutional logic impels application of the "price mechanism" to public resources is antidemocratic polemic.

To summarize, the First Amendment argument against FCC regulation of broadcast licenses misconstrued the policy goal of ensuring a diversity of perspectives as a restriction on broadcaster's right to speak freely. A more appropriate approach would have been to make the policy argument that a marketplace system of regulation is in the public interest. Eventually, as described in the case of *WNCN Listeners Guild* discussed below,[166] that was exactly the view the FCC adopted.

165. *See, e.g.*, Coase, *supra* note 36, at 7–12.
166. *See infra* Part III.3.

2. A Court's View of the First Amendment and the Public Interest: Syracuse Peace Council v. FCC*, 1989*

The FCC decisions and court cases concerning television station WTVH brought all these issues into play and ultimately determined that the regulatory scheme was a matter of policy and not, at least as presented by the FCC, a constitutional question.[167] What became the Syracuse Peace Council litigation started with a ruling that station WTVH in Syracuse, New York, had violated the fairness doctrine when it broadcast editorial advertisements advocating the construction of a nuclear plant as a sound investment.[168] Since this was "a controversial issue of public importance," the FCC ruled that the fairness doctrine required that the station air contrasting viewpoints.[169] In the administrative proceeding, the Meredith Corporation, parent of WTVH, argued that the fairness doctrine violated its right to free speech.[170] But the FCC refused to consider this argument based on a 1985 internal study that determined that, while the fairness doctrine may violate the First Amendment by "chilling" broadcasters' speech, the constitutional issues were best left to Congress and the courts.[171]

Meredith appealed to the D.C. Circuit Court of Appeals, which ruled that the FCC's avoidance of the constitutional issues raised by Meredith was improper and remanded the issue for reconsideration.[172] On remand, the plaintiff, Syracuse Peace Council, sought to preempt the hearing of the constitutional issues because WTVH had since met the requirements of the fairness doctrine by airing contrasting views on the wisdom of constructing the power plant.[173] But the FCC, which had been inviting the courts and Congress to rule against the fairness doctrine, refused to dismiss the issue, citing the D.C. Circuit's opinion that the FCC had erred in avoiding the constitutional issue.[174]

This time around, the FCC, under the leadership of Reagan appointee and marketplace regulation advocate Mark Fowler, not only ruled that the fairness doctrine violated the First Amendment, it also determined that the fairness doctrine disserved the public interest, and then took the opportunity to repudiate the scarcity justification of government spectrum

---

167. *See* Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987); Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989); *In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043, 5043 (1987).
168. *In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5034, 5044 (1987).
169. *Id.*
170. *Id*.
171. *Id.* at 5043–44.
172. *Id.* at 5044–45.
173. *Id.* at 5045.
174. *Id.* at 5046.

regulation.[175]

Eventually, the D.C. Circuit upheld the FCC's ruling, but on narrow grounds that did not reach either the First Amendment argument or the rejection of the scarcity rationale.[176] Since the FCC determined that application of the fairness doctrine was not in the public interest, as it had discretion to do, it was not required to implement it.[177] The court in effect ruled that the FCC was required to regulate in the public interest, but left the determination of what constituted the public interest up to the agency and the political processes underlying it. In this way, the court concurred in the argument that the system of programming regulation is a policy question, not a constitutional one.

This new idea of the public interest advanced by the FCC in *Syracuse Peace Council* is not wholly distinct from its constitutional argument but, as the court noted,[178] the argument basically followed the public interest argument contained in the FCC's *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*.[179] There, the FCC found that the fairness doctrine, "as a matter of policy, disserves the public interest."[180]

In both the Fairness Doctrine report and *Syracuse Peace Council*, the FCC started by denying that the scarcity rationale remained apt in the context of broadcasting: "The Commission found in recent years that there had been an explosive growth in both the number and types of outlets providing information to the public. Hence, the Supreme Court's apparent concern that listeners and viewers have access to diverse sources of information has now been allayed."[181] This appears to be a misguided argument, however. The basis of programming regulation is that there is not enough spectrum for everyone who would like access to it. The addition of hundreds of cable channels or thousands of Internet sites does not change the fact that there is only so much spectrum available and consequently some would-be broadcasters must be kept

175. *Id.* at 5047–48.
176. Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989).
177. *Id*.; *see also* Logan, *supra* note 63, at 1703 & n.92.
178. *Syracuse Peace Council*, 867 F.2d at 656.
179. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1986) [hereinafter Fairness Doctrine Report].
180. *Id.* at 148.
181. *In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043, 5053 (1987).

off; this is the source of the need for regulation.

Significantly, the D.C. Circuit Court ignored the FCC's argument that scarcity is no longer an issue. Instead, the court focused on the FCC's assertion that: "In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists."[182] By basing its decision to abandon the fairness doctrine on its interpretation of the public interest, "the Commission is exercising both its Congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy."[183] This is as far as the court would allow itself to go: "it is an elementary canon that American courts are not to 'pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.'"[184] In other words, since the FCC made a reasoned policy decision as to what constitutes the public interest, there was no need to address any constitutional issue.[185]

The decision in *Syracuse Peace Council* is squarely in the tradition of court opinions regarding the FCC's programming regulations schemes: so long as it is based on a reasonable argument, the FCC is free to construe the public interest as it sees fit. This makes sense. The public interest should be determined by public policy, and when new administrations are elected, they should be able to implement their conception of such policies, so long as they do not inhibit future administrations from doing the same.

3. The Entertainment Marketplace as the Public Interest: FCC v. WNCN Listeners Guild*, 1981*

In fact, the FCC had been promoting market regulation as the public interest for several years before the *Syracuse Peace Council* litigation raised any constitutional issues. This policy was vetted by the Supreme Court in *FCC v. WNCN Listeners Guild*, in which citizens groups challenged the FCC's authority to approve radio stations' format changes

182. *Id.* at 5052.

183. *Syracuse Peace Council*, 867 F.2d at 658.

184. *Id*. at 657 (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

185. One can feel some sympathy for the FCC: first the court admonishes the Commission not to ignore the Meredith Corporation's constitutional arguments, then it says that such consideration was unnecessary. But this reversal only came about because the FCC reversed itself with regard to the WTVH issue and included a public policy determination along with its constitutional analysis.

without a hearing.[186]

In 1976, the FCC issued a policy statement that found that requiring a review hearing for every license renewal involving a station that changes format against the wishes of some listeners was not in the public interest.[187] The Commission asserted that the task of deciding whether a particular format change did or did not serve the public was too difficult,[188] and that such review "inevitably deprives the public of the best efforts of the broadcast industry."[189] The policy statement further asserted that "the marketplace is the best way to allocate entertainment formats in radio."[190] The Commission:

> recognize[d] that the market for radio advertisers is not a completely faithful mirror of the listening preferences of the public at large. But we are not required to measure any system of allocation against the standard of perfection; we find on the basis of the record before us that [format allocation by market forces] is the best available means of producing the diversity to which the public is entitled.[191]

Strangely, a few paragraphs later, the Commission disputed the idea that diversity should be the goal of policy, citing a professor who "has demonstrated that maximization of format diversity will not necessarily lead to increased listener satisfaction."[192] In any case, the FCC had

---

186. FCC v. WNCN Listeners Guild, 450 U.S. 582, 585–86 (1981).

187. *In re* Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858 (1976) (policy statement), *reconsideration denied*, 66 F.C.C.2d 78 (1977).

188. *Id.* at 862–64.

189. *Id.* at 865.

190. *Id.* at 863.

191. *Id.*

192. *Id.* at 864. Exactly how the professor, Bruce Owen of Stanford University, "demonstrated" this assertion is not clear from the text of the policy statement, but the FCC accepted his argument as "clearly point[ing] to the conclusion" that the public interest is not served by reviewing format changes:

> Professor Owen shows that efforts to maximize format diversity through regulatory fiat could very well result in a *diminution* of consumer welfare: a format protected under the *WEFM* rationale [that format changes that leave a community without a particular entertainment format require an FCC hearing if there is a significant amount of public protest against the change] may be of lesser value than the format which the broadcaster proposes to substitute. There is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format. It is impossible to determine whether consumers would be better off with an entirely new format without reference to the actual preferences of real people. In these circumstances, there is no reason to believe that government mandated

begun interpreting the public interest in entertainment formats as best achieved by allocation through market forces. According to this view, if the people licensed to broadcast on the electromagnetic spectrum were allowed to use that privilege to maximize profits, the public would get what they want—the "public interest."[193]

A coalition of citizen groups petitioned the court of appeals for review of the new policy,[194] and an *en banc* panel of the D.C. Circuit sided with the petitioners, ruling that the no-review policy was contrary to the Communications Act and the court's earlier decisions.[195]

But the Supreme Court disagreed, finding that:

> [D]iversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act. The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals . . . . The Commission's position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion.[196]

The Court seemed to stop short of the Commission's faith in the market, but it found a balancing of public and private interests that resulted in the same policy. Ultimately, the Court did find that using the market to allocate entertainment formats was an arguably reasonable approach to promoting the public interest; therefore, the court of appeals had

---

> restrictions on format changes would promote the welfare of the listening public. Indeed, in view of the administrative costs involved in such a program of regulation, and in view of the chilling effect such regulations would doubtlessly have on program innovation, there is every reason to believe that government supervision of formats would be injurious to the public interest. The record in this proceeding clearly points to the conclusion that such a program of regulation would not be compatible with our statutory duty to promote the public convenience, interest and necessity, and we so find.

Id. Part of the problem with this "demonstration" is the fact that, under the WEFM rationale, the hearing requirement is only triggered if some listeners have protested a proposed format change, protests that obviously qualify as an "empirical" expression of "the actual preferences of real people." *Id*. Perhaps a larger number of listeners prefer format B (e.g., rock and roll) to format A (e.g., classical), but if other stations are already broadcasting format B, the addition of another rock station and the elimination of the only classical station will not significantly increase listener satisfaction with the available format choices. However, a switch to a more popular format probably will enable a station owner to charge more for advertising.

193. *Id.* at 863–64.

194. Petitioners included the Office of Communications of the United Church of Christ, the Action Alliance of Senior Citizens of Greater Philadelphia, the WNCN Listeners Guild, and Classical Music Supporters, Inc. *See In re* Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 66 F.C.C.2d 78, 78 n.1 (1977).

195. WNCN Listeners Guild v. FCC, 610 F.2d 838, 841–42 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

196. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981).

overstepped its authority in denying the FCC discretion to implement the policy.[197]

As probusiness administrations and Congresses during the 1980s and 1990s emphasized marketplace regulation of broadcast licenses, resulting in passage of the 1996 Telecommunications (Telecom) Act, the industry has been significantly transformed.[198] The most notable change has been in the area of station ownership requirements. Ultimately, the Telecom Act removed restrictions on national ownership and relaxed restrictions on local ownership; now one owner can own up to half of the radio stations in a particular community.[199] A commentator summarized these trends:

> Beginning in 1985, the Federal Communications Commission (FCC) relaxed radio ownership limits to increase competition and diversity in the radio industry. These effects have been even more dramatic with the Telecom Act, where the radio industry has experienced tremendous consolidation and the number of radio station owners has dropped significantly. The number of radio station owners has declined 11.7%; whereas the number of radio outlets has dropped 2.5%. [200]

Thus, whatever the intent of the legislators, the increasing consolidation or centralization of radio station ownership has had at least two notable effects: "less localism and diminished diversity."[201] In other words, the radio signals currently broadcast within a particular community are less a reflection or expression of that specific community and more a loudspeaker of a national corporate culture.[202] This is a foreseeable effect of the marketplace regulation that Congress and the FCC came to define as the public interest.

---

197. *Id.* at 603–04.

198. *See* Sarah Elizabeth Leeper, Comment, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 474 (2000).

199. *See* PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996, at 69 (1999).

200. Leeper, *supra* note 198, at 475–76.

201. Fofana, *supra* note 6, at 410.

202. This is exactly the kind of development that conservatives in the original sense of the word would deplore; many people who call themselves conservatives today seem driven more by a zealous faith in "the market" than by a concern with maintaining traditional values and communities. *See, e.g.*, Robert Kuttner, *When Free Markets Threaten Family Values*, BUS. WK., May 17, 1999, at 23 ("Free markets, taken to an extreme, can be unhealthy for traditional values.").

D. Low-Power FM Service and the Public Interest

In the midst of the media mergers that have come to encompass radio broadcasting over the last fifteen years, popular dissent arose in the form of low-power "pirate" or "micro" radio stations.[203] Legend has the modern low-power radio movement beginning in 1987 in the John Hay Homes housing project in Springfield, Illinois, when Mbanna Kantako began broadcasting Black Liberation Radio.[204] Like Black Liberation Radio, low-power stations were usually started by people who felt their interests, perspectives, and tastes were not represented by the available broadcast media; most low-power stations broadcast some combination of community news, commentary, or entertainment programming.[205]

When a low-power station came to the FCC's attention, inspectors would seek to locate the station and shut it down; enforcement actions included cease and desist orders, administrative hearings, forfeitures of equipment and money, and sometimes court proceedings.[206] In 1993, the FCC sought a forfeiture from microradio activist Stephen Dunifer and his station Free Radio Berkeley.[207] With the help of members of the National Lawyers Guild's Committee for Democratic Communications,

---

203. *See* Brief for Mbanna Kantako, at 1–6, *available at* http://www.alankorn.com/briefs/microradio_mbanna.html (last visited Nov. 16, 2001) (brief not filed). *See generally* Fofana, *supra* note 6, at 416 (describing the appropriateness of low-power radio as a way to bring diverse voices to radio broadcasting); Leeper, *supra* note 198, at 474 (explaining "[t]he mass consolidation of the radio industry [as] a result of two recent developments: the enactment of the Telecommunications Act of 1996 . . . and the use of the 1992 Merger Guidelines by federal antitrust enforcement agencies").

204. *See* Brief for Mbanna Kantako, *supra* note 203, at 1–6. According to the brief:

> Until Kantako's station went on the air, no Black owned or Black run stations existed in Springfield. As a result, WTRA/Black Liberation Radio began broadcasting community information and music unavailable anywhere else in Springfield. In a given week, Kantako broadcasts the voices of anywhere from 20 to 50 persons from the community. This programming has included interviews with authors, scholars and activists around the country concerned about black genocide; lots of politically conscious rap and reggae music (no sexist or materialistic stuff); discussions and commentary (from a critical perspective) on local and national events effecting the Black community; interviews with victims of police misconduct and abuse; criticism of the NAACP and Urban League for being co-opted and irrelevant to current conditions in Black America; anti-drug messages recognizing the drug plague as a method of social control of Black men; severe criticism of U.S. domination of people of color around the world; rebroadcasting of speeches by Malcolm X, Minister Louis Farrakhan, Stokley Carmichael, Huey Newton, Angela Davis, and other Black activists.

Id.

205. *See Free Speech* Complaint, *supra* note 4; *see also* Fofana, *supra* note 6, at 409.

206. *Free Speech* Complaint, *supra* note 4, §§ 47–48, 57–60.

207. United States v. Dunifer, 219 F.3d 1004, 1005 (9th Cir. 2000); *see also* RUGGIERO, *supra* note 5, at 24–27.

Dunifer argued that he was practicing free speech using the public airwaves, and that the FCC's broadcast licensing scheme was unconstitutional.[208] When the FCC rejected Dunifer's constitutional, statutory, and evidentiary arguments against the forfeiture, Dunifer filed an Application for Review of the Forfeiture with the FCC.[209] Rather than consider these arguments in its own administrative proceeding, the FCC filed suit seeking to enjoin Dunifer from engaging in unlicensed radio broadcasting.[210]

Now, as a defendant in federal court, Dunifer again pressed his constitutional challenge to the FCC's right to keep noninterfering signals off of the broadcast spectrum. Eventually, after a journey back to the FCC, then back to the northern district of California, then finally to the Ninth Circuit Court of Appeals, Dunifer's argument was dismissed on procedural grounds: the district court lacked jurisdiction to consider the constitutionality of FCC licensing regulations until the defendant had exhausted internal FCC procedures, including applying for a license to broadcast.[211]

When Dunifer's defensive argument was dismissed and Free Radio Berkeley was enjoined from further broadcasts, low-power broadcasters in New York City filed a suit against Attorney General Janet Reno and the FCC, again asserting a constitutional right to broadcast non-interfering radio signals.[212] Specifically, the plaintiffs

> claim[ed] a First Amendment right to speak over the electromagnetic spectrum dedicated to radio broadcasting—an electronic public forum of virtually unlimited character—subject only to reasonable time, place and manner regulations that are even-handedly applied to all broadcasters, full-power and low-power alike. Plaintiffs maintain that the present regulatory scheme for radio broadcasting, . . . on its face and as applied to microradio stations, violates their right to freedom of speech under the First Amendment to the United States Constitution.[213]

In effect, the *Free Speech* plaintiffs were arguing that the FCC could not allow some broadcasters access to the spectrum, while denying access to others who were not interfering with anyone else. Notably,

208. See *Free Speech* Complaint, *supra* note 4, §§ 84–99, for a similar argument.
209. D*unifer*, 219 F.3d at 1005.
210. *Id.* at 1005.
211. *Id*. at 1008. *See* Michael J. Aguilar, Note, *Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitiveness in Broadcasting*, 65 BROOK. L. REV. 1133, 1155–56 (1999).
212. *Free Speech* Complaint, *supra* note 4, at introduction.
213. *Id.*

this argument is distinct from the free speech arguments advanced by the marketplace regulation advocates and to some extent adopted by the FCC.[214] Those arguments focused on the "restrictive" requirement that broadcasters provide access to the spectrum for people with contrasting viewpoints on controversial issues.[215] The *Free Speech* plaintiffs, on the other hand, were arguing that the current regulatory regime:

> authorizes the FCC to grant broadcast licenses to use exclusively assigned frequencies (either in a given region or on a nationwide basis) to a relatively few broadcast radio stations which are collectively owned by even fewer media companies, thus effectively allowing a select group of favored speakers to monopolize and therefore limit speech in the electronic public forum dedicated to radio broadcasting[.][216]

The *Free Speech* plaintiffs' complaint hinged on the argument that the broadcast spectrum constitutes a "public forum," a contention supported by the comments of then-FCC Chairman William Kennard.[217] If the spectrum is a public forum, allowing access to a privileged few would violate the First Amendment. However, the District Court for the Southern District of New York ruled, and the Court of Appeals for the Second Circuit agreed, that the FCC's allocation of space on the broadcast spectrum was not subject to public forum analysis.[218] Ironically, the second circuit decision cited the 1943 *NBC* decision for the proposition that "radio has 'unique characteristic[s]' that prevent its being made available to all who might seek to broadcast, [and therefore] the 'right of free speech does not include . . . the right to use the facilities of radio without a license.'"[219] Thus, the scarcity rationale the FCC had rejected in its pursuit of a marketplace conception of the public interest reappears to justify the FCC's restrictions against noninterfering, low-power broadcasters.

Ironically, before the courts of appeals decided *Free Speech* and *Dunifer*, the FCC issued a *Notice of Proposed Rulemaking* for licensing low-power stations.[220] In January 2000, following a public comments period, the FCC announced the structure of a new low-power FM (LPFM) service and set up a schedule for receiving applications from potential broadcasters.[221]

In the *Proposed Rule Making* in re *Creation of Low-power radio*

---

214. *See infra* Part III.C.1.
215. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 3, at 237–75; *see also In re* Syracuse Peace Council, 2 F.C.C.R. 5043, 5043–44.
216. *Free Speech* Complaint, *supra* note 4, at introduction.
217. *See id.* § 36.
218. Free Speech v. Reno, 200 F.3d 63, 64 (2d Cir. 1999).
219. *Id.*
220. Proposed Rule Making, *supra* note 9, at 2471.
221. FCC's Low-Power Service, *supra* note 9, at 2205.

Service, the FCC stated that, "our goals are to address unmet needs for community-oriented radio broadcasting, foster opportunities for new radio broadcast ownership, and promote additional diversity in radio voices and program services."[222] The FCC expressed the hope that a new low-power radio service would "provide new entrants the ability to add their voices to the existing mix of political, social, and entertainment programming, and could address special interests shared by residents of geographically compact areas."[223] In effect, the FCC was acknowledging that the consolidation of radio station ownership that followed from the institution of the marketplace conception of the public interest was not meeting the needs of all communities and was not fostering sufficient diversity in the "voices" on radio.[224]

The following year, when the rules for the new service were announced, the Commission stated its belief that:

> [T]he LPFM service authorized in this proceeding will provide opportunities for new voices to be heard and will ensure that we fulfill our statutory obligation to authorize facilities in a manner that best serves the public interest. . . . Our goal in creating a new LPFM service is to create a class of radio stations designed to serve very localized communities or underrepresented groups.[225]

Throughout the nontechnical portion of the report, public interest goals are emphasized. The LPFM service is designed to "focus[] on local needs;"[226] "encourag[e] diverse voices on the nation's airwaves and creat[e] opportunities for new entrants in broadcasting;"[227] "allow local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests;"[228] "foster a program service responsive to the needs and interests of small local community groups, particularly specialized community needs that have not been well served by commercial

222. Proposed Rule Making, *supra* note 9, at 2471.
223. *Id.* at 2476.
224. *Id.* at 2476, 2534(a) (Joint Statement of Chairman William E. Kennard and Commissioner Gloria Tristani); *see also* Fofana, *supra* note 6, at 415–16. The *New York Times* reported that, "William E. Kennard, the F.C.C. chairman, has said that adding hundreds of low-power radio stations is one of his top priorities—a key way to counteract the increasing consolidation of the industry into the hands of a relatively few big profit-minded broadcasters." David Leonhardt, *Religious Groups at Odds with G.O.P. on Radio Licenses*, N.Y. TIMES, July 11, 2000, at A1.
225. FCC's Low-Power Service, *supra* note 9, at 2206.
226. *Id.* at 2210.
227. *Id.* at 2212.
228. *Id.* at 2213.

broadcast stations;"[229] and "assign licenses . . . in a manner that is most likely to place them in the hands of local community groups that are in the best position to serve local community needs."[230]

In pursuit of these goals, the LPFM service was set up as a noncommercial educational service.[231] The report concluded that the need for *local* service is best filled by noncommerical broadcasters: "[c]ommerical broadcast stations, by their very nature, have commercial incentives to maximize audience size in order to improve their ratings and thereby increase their advertising revenues. We are concerned that these commercial incentives could frustrate achievement of our goal in establishing this service."[232] The FCC also promulgated rules restricting ownership of LPFM stations. "In order to further our diversity goals and foster local, community-based service, we will not allow any broadcaster or other media entity subject to our ownership rules to control or to hold an attributable ownership interest in an LPFM station . . . ."[233]

Having found locally based, community-oriented programming comprising a variety of voices to be an aspect of the public interest, the FCC has determined that that aspect of the public interest is not served by the marketplace regulation of the broadcast spectrum. In order to ensure that local communities have a place on the airwaves, the government must carve out small zones of nonprofit territory. The Commission seems to conclude that the local diversity aspect of the public interest runs contrary to the "very nature" of commercial stations,[234] while being inherent in a low-power, noncommercial educational service. Thus, since LPFM stations inherently promote the public interest, operators are not required to meet the same public interest requirements as commercial broadcasters.

> Every broadcast licensee is required to operate its station in the public interest. Given the nature of the LPFM service, however, we conclude that certain obligations imposed on full-power radio licensees would be unnecessary if applied to LPFM licensees. We expect that the local nature of this service, coupled with the eligibility and selection criteria we are adopting, will ensure that LPFM licensees will meet the needs and interests of their communities. Thus, . . . we will not adopt a rule requiring LPFM licensees to provide programming responsive to community issues or to maintain a list of issues addressed or specific programs aired.[235]

---

229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 2215–16.
234. *Id.* at 2213.
235. *Id.* at 2270. However, like all broadcasters, LFPM operators will be required to follow the Political Programming Rules and "allow legally qualified candidates for federal office reasonable access to their facilities, but because LPFM stations are noncommercial educational facilities, they must provide such access on a free basis." *Id.*

Whether LPFM stations fulfill the FCC's faith in their inherent ability to serve local communities with diverse voices remains to be seen.[236] What is clear is that the FCC has carved out an explicit "local" aspect of the public interest within the currently dominant marketplace conception. The broadcast industry's intense resistance to and lobbying against the new LPFM service suggests that the incoherence of these two public interests is indeed significant and quite likely the source of a continuing political struggle.[237]

---

at 2273.

236. The *New York Times* estimates that of the approximately 750 applicants for LPFM licenses in the first ten states from which applications were accepted, 47% were churches and other religious groups, while 18% came from community groups. Leonhardt, *supra* note 224, at C8. Perhaps perceiving a competitive threat, the National Religious Broadcasters Association joined the National Association of Broadcasters (NAB) and National Public Radio (NPR) in opposing LPFM. Leonhardt, *supra* note 224, at C8. One LPFM applicant, Sanford Kravette, pastor of the Christian Fellowship of New England, in Center Conway, N.H., told the *Boston Globe* that he would like to use an LPFM license "to read the Gospel of John, verse by verse, and then help people relate it to everyday life." D.C. Denison, *Public Radio, FM Upstarts Tangling over Licenses: Low-Power Outlets Say Issue Is Competition*, BOSTON GLOBE, Dec. 26, 2000, at C1. Pastor Kravette's idea may be a legitimate use of public spectrum, but if the Center Conway area, like many in the United States, already gets New Testament-oriented programming from one or more existing full-power stations, then granting an LPFM license to the Christian Fellowship of New England is probably not the best way to add diversity to the voices on the local airwaves. If there is no New Testament programming in the area, Pastor Kravette would be an ideal LPFM licensee.

237. Not surprisingly, the commercial broadcasters have reversed course and returned to their 1920s evocation of the interference-scarcity rationale to protect their control of the spectrum and resist the possibility of less regulated, locally based competition. In an attempt to derail the LPFM service, the NAB not only lobbied Congress, but also filed suit in the D.C. Circuit Court of Appeals. In its brief for the court, the NAB made three arguments:

> First, when the FCC adopted the LPFM rules, it reversed its long-standing policy that low-power services are an inefficient use of spectrum, and it provided no explanation of that reversal. Second, according to NAB, the commission disregarded evidence showing that the implementation of LPFM would cause substantial interference to existing FM service. Third, the commission has insisted that the benefits of LPFM would outweigh any costs, but it has failed to undertake a proper cost/benefit analysis.

Harry Martin, *FCC Update: NAB Files Brief on LPFM Issues*, BE RADIO, Sept. 30, 2000, 2000 WL 7260614. For a plea that the NAB drop their opposition to LPFM, see William E. Kennard, Remarks Before the National Association of Broadcasters (Apr. 11, 2000), 2000 WL 369665 (F.C.C.).

In the 2000 Congress, Senator Gregg of New Hampshire introduced Senate Bill 2068, the "Radio Broadcasting Preservation Act," which would have completely banned a low-power service; Senator Grams of Minnesota offered Senate Bill 3020, a "reasonable compromise" measure cheered by the NAB and NPR, which would allow a severely curtailed LPFM. *Bill to Cut Back LPFM Introduced in Senate*, PUB. BROADCASTING

IV. CONCLUSION

The broadcast spectrum is a public resource that is to be administered and used in the public interest. The public nature of this valuable resource calls for policy and decision making that is as close as possible to the democratic processes that reflects the will of the public. For this reason, the role of the judiciary is appropriately limited. Courts have properly refrained from interposing specific ideas of the public interest when called upon to render decisions regarding FCC policies.

The public interest should be defined through public policy determinations vetted through political processes that are subject to democratic controls. Courts should continue to find ways to let the FCC operate without the imposition of specific meanings on the idea of the public interest. That being said, there is one way the courts should be prepared to put an appropriate brake on the FCC's power to define the public interest: courts should take a long-term view and protect public resources for future generations that have no power over legislators in the present. In other words, if the FCC decided it was in the public interest to sell

---

REP., Sept. 22, 2000, *available at* 2000 WL 8774518 [hereinafter *Bill to Cut Back LPFM*]; *see* Radio Broadcasting Preservation Act of 2000, S. 2068, 106th Cong. (2000), WL 1999 CONG US S 2068; Radio Broadcasting Preservation Act of 2000, S. 3020, 106th Cong. (2000), WL 1999 CONG US S 3020. In December 2000, the language of Senate Bill 3020 was "included virtually word-for-word" in a budget bill for the Departments of Commerce, Justice, State, and the Judiciary. *LPFM Rollback Included in Commerce-Justice Bill*, PUB. BROADCASTING REP., Nov. 3, 2000, *available at* 2000 WL 8774551 [hereinafter *LPFM Rollback*]; Press Release, The White House, Statement by the President (Dec. 27, 2000), LEXIS-NEXIS, News Group File, All [hereinafter Statement by the President]. President Clinton reluctantly signed the bill into law, writing that:

> [T]his bill greatly restricts low-power FM radio broadcast. Low-power radio stations are an important tool in fostering diversity on the airwaves through community-based programming. I am deeply disappointed that Congress chose to restrict the voice of our nation's churches, schools, civic organizations and community groups. I commend the FCC for giving a voice to the voiceless and I urge the Commission to go forward in licensing as many stations as possible consistent with the limitations imposed by Congress.

Statement by the President, *supra*.

The limitations imposed by Congress included restricting LPFM stations from frequencies within third adjacent channel separation from incumbent broadcasters. *See Bill to Cut Back LPFM*, *supra*; *LPFM Rollback*, *supra*. After detailed study and analysis, the FCC intended to restrict LPFM stations from second adjacent channels of existing stations. *See* FCC's Low-Power Service, *supra* note 9, at 2235–46. The budget bill's restriction of third adjacent channels has the effect of limiting LPFM stations to the least populated parts of the country and has resulted in the FCC issuing half as many licenses as originally intended to applicants from the first twenty states from which applications were accepted. *See* Kevin Diaz, *Low-Power FM Radio Stations Dealt Blow in Congress' Budget: Modest Plan Ran Into Major Static*, STAR TRIB. (Minneapolis, Minn.), Dec. 22, 2000, at A15; Stephen Labaton, *255 Licenses Are Awarded for Low-Power FM Radio*, N.Y. TIMES, Dec. 22, 2000, at C5.

permanent property rights to the electromagnetic spectrum, courts should intervene to forestall the deprivation of the opportunity to use irreplaceable public resources to later "publics" in ways that they determine to be in their interest.

So long as there is not enough spectrum to allow everyone who so desires to broadcast a signal, broadcast spectrum is scarce. The FCC should not use its discretion to do away with the scarcity rationale. Pointing to the proliferation of cable television channels and Internet websites is not a legitimate argument for lessening the public interest standards in broadcast licensing. The scarcity of space on the spectrum should continue to play a central role in determining the public interest in broadcast licenses.

Congress is the institution designed to reflect the will of the national public most directly. The advocates of LPFM should be certain that members of Congress understand the FCC's rationale for an LPFM service, specifically that the public interest in the broadcast spectrum includes the facilitation and availability of diverse local voices and perspectives. Advocates should encourage members of Congress to show resolve in the face of the resistance to an LPFM service being exerted by the National Association of Broadcasters (NAB) and National Public Radio.

Unfortunately, members of Congress have shown a willingness to serve as the transmitters of the incumbent broadcasters' distortions of the reality of LPFM.[238] Rather than defer to the technical expertise of the FCC's engineering studies,[239] which determined that second adjacent channel protection was sufficient to protect the signals of existing broadcasters, Congress passed a year-end budget bill that adopted the NAB's position that current broadcast stations required third adjacent channel protection (a bigger cluster of competition-free frequencies) and that more study was needed before LPFM stations could be licensed in

238. *See Bill to Cut Back LPFM*, *supra* note 237.

239. *See* FCC's Low-Power Service, *supra* note 9, at 2235–46. The FCC's study included an analysis of the interference study submitted by the NAB and concluded that the signal to noise ratio criteria employed in the NAB study were not appropriate and were based on a level of noninterference higher than currently required for full-power broadcasters. *Id.* at 2243. In addition, the NAB tests included more of the lowest quality radio receivers than other studies. *Id.* at 2246. Even accepting the NAB's worst-case scenario assumptions, the FCC found that "the area where such [lowest-quality] receivers could potentially experience degradation from interference is small, generally 1 km or less from an LPFM antenna site." *Id.* at 2245.

third adjacent channels.[240] This effectively cut in half the number of available LPFM licenses.[241] Perhaps it is not surprising that members of Congress would side with a powerful trade association representing the interests of big media corporations over the interests of the many diverse applicants for LPFM licenses.[242] So long as members of Congress must rely on private contributions to finance election campaigns, interests with money to donate have the upper hand over more popular, less-moneyed constituencies. The battle over the third adjacent channels could be a proving ground for the power of a grassroots movement to force corporate interests to accept the public's right to access public resources as producers rather than as consumers.

Those members of Congress who believe that the public interest in the broadcast spectrum includes the availability of diverse, local perspectives should consider requiring the FCC to recognize spectrum scarcity as a relevant factor in determining the public interest in broadcast licenses. More broadly, Congress members should actively solicit the opinions of their constituents regarding use of the electromagnetic spectrum. What value do constituents place on using the spectrum: mass media driven by the entertainment marketplace; a public forum of local voices and participation; some combination of both; or something else altogether? In other words, how would an informed public want to use this public property? In a democracy, that decision should constitute the public interest.

ARTHUR MARTIN

240. *LPFM Rollback*, *supra* note 237.

241. *See* Labaton, *supra* note 237, at C5; Diaz, *supra* note 237, at A15. Proceeding under Congress's restrictions, the FCC had issued one hundred construction permits for LPFM stations as of August 2001; as many as five hundred more may be issued around the country. *See* Bill McConnell, *FCC's Sound Choice: Streamlining Procedures Is Priority for New Radio Chief*, BROADCASTING & CABLE, Aug. 13, 2001, at 42. Given the one to three mile radius of an LPFM signal and Congress's exclusion of stations from urban areas, these six hundred LPFM stations will reach a tiny percentage of the public.

242. In introducing legislation that would reverse the budget language restricting LPFM, Senator John McCain noted that during the previous Congress, "special interest forces opposed to low-power FM radio, most notably the National Association of Broadcasters and National Public Radio, mounted a successful behind-the-scenes campaign to kill low-power FM radio without a single debate on the Senate floor." Press Release, Senator John McCain, McCain Introduces Low-power radio Bill (Feb. 27, 2001), LEXIS-NEXIS, News Group File, All.