THE RATIONALITY OF U.S. REGULATION OF THE BROADCAST SPECTRUM*

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> [An] option that was totally overlooked in the early radio debates was for spectrum to be allocated, like paper, ink, and printing presses, by market mechanisms rather than by licensing. The policy makers in the 1920s and 1930s, wrongly it now appears, did not believe spectrum was abundant enough to be handled in that way.[1]

In his classic 1983 *Technologies of Freedom*, Ithiel de Sola Pool so elucidated the prevailing wisdom concerning broadcast licensure in the United States. While the key legal questions surrounding this institution involve important First Amendment questions (hence, Pool's scarcity analogy to paper, ink, and presses), economists and other policy analysts have often remarked on the more general incongruity in federal licensing: while spectrum is regulated on the "physical scarcity" premise, it is awarded to private users on a no-fee basis, thus conferring significant economic rents on private parties at substantial opportunity cost to the fisc. Moreover, Federal Communications Commission (FCC)[2] policies have openly sought, virtually throughout the agency's entire life span, to restrict broadcast licenses and competition for broadcasters (particularly cable television) to far below the quantity technically available.[3] The

* I am indebted to Peter Huber, Stanley Ornstein, Lucas A. Powe, Jr., Eric Rasmusen, and Matthew Spitzer as well as to seminar participants at George Mason University, California State University, Hayward, the Office of Policy and Plans at the FCC, the 1989 Public Choice Society Meetings, and the USC–UCLA Applied Microeconomics Workshop for comments on an earlier draft. Myungwhan Kim and Hong-Jin Kim supplied fine research assistance.

[1] Ithiel de Sola Pool, Technologies of Freedom 138 (1983).

[2] The FCC licenses all radio and television broadcasters in the United States and regulates some aspects of cable television. It succeeded the Federal Radio Commission in 1934, in legislation virtually identical to that creating the FRC in 1927.

[3] The pointed restriction of TV broadcasting licenses is described in Roger M. Noll *et al.*, Economic Aspects of Television Regulation (1973); Robert W. Crandall, The Economic

[*Journal of Law & Economics*, vol. XXXIII (April 1990)]

regulatory institutions appear to miss the point of scarcity entirely and have repeatedly been described as mistaken, accidental, and counterproductive: the historical product of policymakers who failed to understand the nature of property rights to airwaves.

This article seeks to revise such thinking about the "wrongheadedness" of U.S. regulatory policy toward the broadcast spectrum. Rather than stumbling into a legal structure under erroneous pretenses, a careful examination of the early radio broadcasting market and the legislative history of the Federal Radio Act of 1927 reveals that subsequent decision making under the "public interest, convenience, or necessity" licensing standard was a compromise designed to generate significant rents for each constituency influential in the process. Most fundamentally, the nature of rights in the "ether" was precisely understood; the regulatory approach adopted chose not to reject or ignore them but to maximize their rent values as dictated by rational self-interest.

This article is arranged as follows. First, the traditional interference rationale for licensing is outlined in Section I; this reasoning has served as the basis for important First Amendment law in the United States. Section II describes why this line of argument has been rejected by contemporary analysts of broadcast regulation, who have themselves set forth an "error theory" explaining the licensing and regulation of broadcasters. Sections III and IV explain the 1920s radio broadcasting market and the shock to that system in the 1926–27 "breakdown of the law" period. Section V details the 1926 *Oak Leaves* decision establishing private property rights to spectrum at common law. Sections VI, VII, and VIII discuss the legislative agendas of the major broadcasters, the regulators, and public interest advocates, respectively. Section IX interprets the Federal Radio Act of 1927 as an equilibrium solution for these competing interests, brought together by a rent-sharing arrangement created from the proceeds generated in the spectrum-assignment process. In concluding, Section X attempts to identify the source of analytical confusion as stemming from a focus on auctions, when vested rights in the ether were

Case for a Fourth Commercial Network, 12 Public Policy 513–36 (1974); Bruce M. Owen, Economics and Freedom of Expression (1975); Harry J. Levin, Fact and Fancy in Television Regulation (1980). The protectionist policy (for incumbent broadcasters) against cable entry is detailed in Stanley M. Besen, The Economics of the Cable TV "Consensus," 17 J. Law & Econ. 39–51 (1974); Glenn O. Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 U. Va. L. Rev. 169–262 (1978); Stanley M. Besen & Robert W. Crandall, The Deregulation of Cable Television, 44 L. & Contemp. Probs. 77–124 (1981); Thomas W. Hazlett, Cabling America: Economic Forces in a Political World, in Freedom in Broadcasting 208–23 (C. Veljanovski ed. 1989).

TABLE 1

ESTIMATED "LOST RENTS" FROM ZERO-PRICED TELEVISION SPECTRUM ALLOCATION (1975)

	No. of Stations	1975 License Rents (December 1985 $)	Capital Value of Rents (1985 $) at 5 Percent (Real Discount Rate + Risk Premium)
VHF	492	846,731,500	16,934,630,000
UHF	177	11,170,000	223,400,000

SOURCE.—Harry J. Levin, Fact and Fancy in Television Regulation (1980), at 114–15; and Economic Report of the President (1987), at 315.

quickly established de jure and de facto, thus biasing all future rent distribution schemes.

I. The Interference Rationale for Licensing

The first U.S. spectrum policy was to seize the entire band for government use: the Navy took it for military communication.[4] But private users demanded access for purposes of radio telegraphy, and were successful in persuading Congress to direct the secretary of commerce to license private radio operators in the Radio Act of 1912. The federal government was asserting ownership of the electromagnetic resource, but in a rather peculiar way: the secretary took no payment and issued no exclusive frequency rights. "Licensing" was but a zero-priced club admission to unlimited use of the band.

The electromagnetic spectrum was, fortunately, an abundant resource; these initial transmissions occurred on point-to-point bases, and congestion was not an issue. That changed soon after radio broadcasting became viable in 1920–21 (see Table 1). Hundreds of commercial stations began emitting into "the ether," bringing the zero-cost band to an end. The prevailing "ownership" rule became increasingly bizarre, a fact which was only to become evident in a federal court case in 1926 and a subsequent opinion of the U.S. attorney general shortly thereafter. These revealed that the secretary of commerce was legally unable to enforce frequency exclusivity; many radio stations roamed the spectrum at will, crossing into desired areas and frequencies without constraint. The market degenerated into "chaos," as the Supreme Court would observe in

[4] This was not a unique political response. In China, the northern warlords monopolized all radio communications in the 1912–27 epoch as "[t]hey considered radio to be military equipment" (Zhenzhi Guo, A Chronicle of Private Radio in Shanghai, 30 J. of Broadcasting & Elec. Media 379–92 (1986)).

NBC[5] and *Red Lion*[6]—but a chaos mandated precisely by the fact that there was little private in this "private sector."[7]

With the creation of the Federal Radio Commission on February 23, 1927, the government began to behave more like an actual owner. The commission was empowered to allocate exclusive, enforceable broadcasting rights; in this straightforward manner the interference problem was solved. But in an interesting twist, the commission chose to assign rights only on a short-term lease basis, according to the broadcaster's furtherance of "the public interest, convenience or necessity" (the phrase appears in sections 4, 9, 11, and 21 of the Radio Act of 1927). The government would retain ownership of the spectrum on the premise that frequencies were inalienable public property. Despite remarkable economic and technological changes in the intervening six decades, the current regulatory regime in broadcasting is essentially that created in the Federal Radio Act of 1927.

To subsequent analysts, the most curious aspect of this contractual setting was the failure of the U.S. government to set a monetary price for the rental use of the airwaves. Broadcasters were to compete vigorously for radio (and later television) broadcast frequencies, yet the competitors have not been allowed to bid in cash at the "auction." (Instead, the Federal Communications Commission has historically elected to hold "comparative hearings" to select between competing license applicants based on various criteria deemed important to the "public interest.") While licensees are empowered to use a scarce "public" resource, much as buyers of public lands, drillers for federally owned oil, miners of government-held mineral deposits, or purchasers of Army surplus, the public treasury fails to reap the rents associated with spectrum allocations. The trading of radio and television stations in the United States has allowed economists to estimate that taxpayers are sacrificing nearly $1 billion annually by pricing band use at zero (see Table 1), without even counting nonbroadcast uses of the spectrum.

The ironic nature of this "nonmarket" policy regime was articulated by the late Ithiel de Sola Pool.

> In fact, however, there is a market in spectrum. It is a market in tangible things because what is bought and sold is broadcasting stations. The government initially gives away licenses for free; these are then sold in a second hand market. What is excluded from market allocation is only the initial grant of a frequency by the government to its first "owner." . . . Under existing practice the original licensees make a windfall profit by selling the license to someone else. . . . If the market mechanism created for broadcasting had been pushed one level further back and the government had offered spectrum rights for lease or sale at a price reflecting market value, any windfall would have gone to the public, not to politically favored individuals.[8]

[5] National Broadcasting Co., Inc., v. United States, 319 U.S. 190 (1943).

[6] Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969).

[7] See Ronald Coase, The Federal Communications Commission, 2 J. Law & Econ. 1–40 (1959); Jora Minasian, The Political Economy of Broadcasting in the 1920s, 12 J. Law & Econ. 391–403 (1969).

The essential question, then, is: Why does the FCC not simply divvy up the electromagnetic spectrum into noninterfering "parcels" and auction them to highest dollar bidders? This has been advocated repeatedly since at least the early 1950s,[9] could be easily accomplished technically,[10] and has been suggested as a politically advantageous solution to spectrum scarcity in that it captures for the public treasury any available rents associated with band use. As Congressman Henry Reuss noted in 1958, in defense of his (unsuccessful) bill to require certain applicants to bid dollars for spectrum space: "The airwaves are public domain, and under such circumstances a decision should be made in favor of the taxpayers, just as it is when the government takes bids for the logging franchise on public timberland."[11]

II. The Existing Economic Interpretation

Economists,[12] political scientists,[13] and lawyers[14] generally agree that the interference rationale for licensure in "the public interest" is nonsens-

[8] Pool, *supra* note 1, at 139–140. Of course the right to transfer a license is a limited one; the FCC must approve sales and can deny license renewal. This implies that ownership rights are traded for prices lower than what would obtain under fee simple, all else equal.

[9] Leo Herzel, "Public Interest" and the Market in Color Television Regulation, 18 U. Chi. L. Rev. 802–16 (1951).

[10] De Vany *et al.* describe a market for defining spectrum rights such that market bids would allocate competing uses of the band. This would promote social efficiency by driving marginal values for each frequency toward equality. Without any innovation in the legal system, however, assignments now made in comparative hearings could be auctioned to initial assignees. While pure market allocation of this subset of the spectrum would not represent as large an efficiency savings as a full auctioning of rights (its primary cost savings would be to eliminate significant rent-seeking activities), it is very useful to consider as a policy alternative because it abstracts from any real or imagined difficulties in trading private frequency rights across uses. See Arthur S. DeVany, Ross D. Eckert, Charles J. Mayers, Donald J. O'Hara, and Richard C. Scott, A Property System for Market Allocation in the Electromagnetic System: A Legal-Economic Engineering Study, 21 Stan. L. Rev. 1499–1561 (1969).

[11] Cited in Coase, *supra* note 7.

[12] See Herzel, *supra* note 9; Coase, *supra* note 7; Minasian, *supra* note 7; Bruce M. Owen, Differing Media, Differing Treatment? in Free but Regulated: Conflicting Traditions in

ical.[15] The interference problem is widely recognized as one of defining separate frequency "properties"; it is logically unconnected to the issue of who is to harvest those frequencies. To confuse the *definition* of spectrum rights with the *assignment* of spectrum rights is to believe that, to keep intruders out of (private) backyards, the government must own (or allocate) all the houses. It is a public policy non sequitur, as has recently been noted in an important District of Columbia circuit opinion.[16]

Indeed, even when the government assumes legal ownership of property, a renegade broadcaster could still interrupt an assigned frequency. The interference problem is solved by allowing the assigned user (that is, the effective owner) the right to punish such interloping. And that comes by virtue of his title to the frequency right, which could be awarded by lottery or sold on the open market just as easily as it is assigned by federal comparative hearings to a particular broadcaster on the grounds of "public interest, convenience, or necessity."[17]

The standard economic interpretation, then, has been based on what I shall call the "error theory" of federal licensing. It holds that government

Media Law 35–51 (Daniel L. Brenner & William L. Rivers eds. 1982) and Matthew Spitzer, Controlling the Content of Print and Broadcast, 58 S. Cal. L. Rev. 1349–1405 (1985).

[13] See Pool, *supra* note 1; and Edwin Diamond and Norman Sandler, The FCC and the Deregulation of Telecommunications Technology, in Telecommunications in Crisis 3–56 (1983).

[14] See Mark S. Fowler and Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207–57 (1982); Lawrence H. Winer, The Signal Cable Sends, Part I: Why Can't Cable Be More Like Broadcasting? 46 Md. L. Rev. 212–83 (1987).

[15] The interference rationale for regulation is based on the common pool problem with spectrum since without rights definition the resource tends to be squandered. The act of rights definition is one of entry barriers, in the sense of excluding nonowners from the use of resources. This act of property enforcement to eliminate the interference problem has given birth (in *NBC* and *Red Lion*) to the notion of "physical scarcity" of the airwaves, thus placing government regulation in a unique light. It is the interference problem, then, that motivates the "physical scarcity" rationale for government licensing and regulation; hence, the two notions tend to be employed interchangeably. By whatever name, this doctrine has lost credibility in the contemporary legal literature. "The 'scarcity' rationale for treating broadcasting differently from other media of mass communications for purposes of substantive regulation has worn so thin that continuing to refute it would be gratuitous." Daniel L. Polsby, Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion, 8 Sup. Ct. Rev. 223–62 (1981).

[16] Telecommunications Research Action Center and Media Access Project v. Federal Communications Commission, 801 F. 2d 517 (D.C. Cir. 1986).

[17] More easily, in fact. Comparative hearings consume large agency resources. Indeed, the FCC has, in recent years, pleaded for increased authority to assign frequency rights by lottery or auction primarily due to agency funding constraints. See Evan Kwerel & Alex D. Felker, Using Auctions to Select FCC Licensees (working paper, Office of Policy and Plans, FCC May 1985). The Congress has allowed the FCC to assign cellular phone spectrum rights by lottery in recent years but refuses to allow FCC auctions (or license fees).

frequency assignment, while logically uncompelling as a solution to the common property problem in spectrum allocation sans property rights, was a logical—if naive—response to a series of regulatory events that occurred in the early days of commercial radio broadcasting. This economic analysis was crafted largely in response to the "chaos theory" of the Supreme Court. "[B]efore 1927, the allocation [of radio broadcast] frequencies was left entirely to the private sector, and the result was chaos."[18] Ronald Coase, in his important 1959 article in this journal,[19] corrected this analysis by pointing out that chaos was not a product of the private sector, but the predictable consequence of ill-defined property rights.

At this stage, however, both sides of the debate accepted the two-stage (pre-1927, post-1927) analysis. The actual history of the marketplace turned out to be further truncated, though, as revealed by Jora Minasian.[20] Employing the basic property-rights approach developed by Coase, Minasian has established the current stylized history of the rights-assignment institution in broadcast spectrum, focusing on four distinct policy eras.

1920–23.—Radio broadcasting began in the United States in November 1920,[21] and developed very rapidly. By the end of 1922, there existed 576 broadcast stations (see Table 2). Each had received a federal license (zero priced) from the secretary of commerce, empowered to issue such by the Radio Act of 1912 (which, obviously, predated broadcasting and was designed for radio telegraphy). As excess demand for zero-priced broadcasting rights developed, Secretary Herbert Hoover (an engineer by training, and an enthusiastic booster of the emerging radio industry) pointedly withheld additional licenses on the grounds that interference would otherwise result. In a 1923 federal court case,[22] however, it was determined

[18] *Red Lion*, *supra* note 6, at 380. This reasoning piggybacked on Felix Frankfurter's 1943 *NBC* decision (*supra* note 5, at 212–13).

[19] So important analytically, in fact, that it led directly to the "discovery" of the Coase Theorem. George J. Stigler, Memoirs of an Unregulated Economist 75 (1988).

[20] Minasian *supra* note 7.

[21] Early voice broadcasting experiments ("radio telephony") had begun as early as 1908, and a San Jose, California, transmitter had broadcast phonograph music to receivers in San Francisco on an experimental basis in 1915 (Glenn A. Johnson, Secretary of Commerce Herbert C. Hoover: The First Regulator of American Broadcasting, 1921–28, 40–45 (unpublished Ph. D. dissertation, Univ. Iowa 1970)). But the first regularly scheduled and ongoing (to this day) broadcasts began on KDKA in Pittsburgh, November 2, 1920—announcing election returns in the Harding-Cox race (Gleason L. Archer, History of Radio to 1926, at 201–4 (1938). The station was owned by Westinghouse and began service in order to increase demand for radio receiving equipment.

[22] Hoover v. Intercity Radio Co., 286 Fed. 1003 (App. D.C. 1923).

TABLE 2

EARLY RADIO STATION DEVELOPMENT

Year	New Stations	Deletions	Increase	Decrease	Total
1921:					
September	3	...	3	...	3
October	1	...	1	...	4
November	1	...	1	...	5
December	23	...	23	...	28
1922:					
January	8	...	8	...	36
February	24	...	24	...	60
March	77	...	77	...	137
April	76	...	76	...	213
May	97	...	97	...	310
June	72	...	72	...	382
July	76	...	76	...	458
August	50	...	50	...	508
September	39	23	16	...	524
October	46	22	24	...	548
November	46	29	17	...	565
December	31	20	11	...	576
1923:					
January	28	34	...	6	570
February	24	13	11	...	581
March	30	29	1	...	582
April	21	14	7	...	589
May	27	25	2	...	591
June	32	50	...	18	573
July	19	25	...	6	567
August	7	11	...	4	563
September	15	16	...	1	562
October	22	14	8	...	570
November	12	33	...	21	549
December	12	34	...	22	527
1924:					
January	27	20	7	...	534
February	21	7	14	...	548
March	32	11	21	...	569
April	27	19	8	...	577
May	23	11	12	...	589
June	27	81	...	54	535
July	22	13	9	...	544
August	7	18	...	11	533

SOURCE.—Hiram L. Jome, Economics of the Radio Industry (1925), at 70.

that the secretary had no legal authority to withhold a license, on the grounds that Congress had not given him any standard on which to select among competing applicants. The Court, however, allowed the secretary to select times and wavelengths so as to minimize interference.

1923–26.—The secretary continued, in practice, to ration scarce broadcasting licenses by selecting frequency, location, and wavelength assignments, and even by refusing (in defiance of the *Intercity* verdict) to process a continuing stream of broadcast license applicants. This allowed property rights questions to be solved at low cost, and the industry progressed smoothly until another unfavorable court decision for the Commerce Department. In April 1926, in *United States v. Zenith Radio Corp.*,[23] the Hoover licensing method was again found without force of law, and this time the court explicitly denied the department discretion over time and wavelength assignment, as well as over license issuance generally. Rather than appeal, Hoover turned to William Donovan, acting attorney general of the United States, for an interpretation of the law. Donovan sided with the *Zenith* decision (and against *Intercity*) in his July 8 opinion and declared the federal government without authority to define rights to spectrum.

July 8, 1926–February 22, 1927.—Faced with open entry into a scarce resource pool, a classic "tragedy of the commons" ensued. Stations had to be licensed by the secretary of commerce; once licensed, they were free to roam the dial, select their own transmitting location, choose their desired amplification level, and set their own hours. A breakdown of the rights allocation scheme resulted in a predictable (in theoretical hindsight) chaos; the *Red Lion* opinion's "cacophony of competing voices."[24]

February 23, 1927–present.—Given the anarchy of the airwaves, Congress finally sought to establish a system of excludable property rights in the electromagnetic spectrum by passing the Federal Radio Act. Yet it made a fatal analytical mistake: it confused the "chaos of the ether" with a private enterprise policy regime and solved the interference externality problem with an overdose of federal intervention—licensing by a "public interest" standard as determined by the Federal Radio Commission (born in the act, signed into law February 23, 1927). While simply defining and not assigning rights would have dealt with the externality problem in broadcasting (or assigning rights without prejudice, as in an auction or a lottery), Congress mistakenly squeezed two distinct activities into one.

The entrusting to federal regulators of power over the life and death of

[23] United States v. Zenith Radio Corp., 12 F. 2d 614 (N.D. Ill. 1926).

[24] *Supra* note 6, at 380.

American broadcasters slipped through Congress and remains public policy today, due to a fundamental misunderstanding. "It is difficult to avoid the conclusion that the widespread opposition to the use of the pricing system for the allocation of frequencies can be explained only by the fact that the possibility of using it has never been seriously faced."[25] And, in some detail, Minasian outlines this historical episode when chaos erupted and was ended:

> Neither a regulatory agency existed that had control over the use of radio frequencies, nor was there a private property exchange system in operation. Indeed, the latter by definition cannot exist where there are no private rights to be exchanged. . . . Yet, the chaotic conditions have served as the basis for choosing a system of central control over the use of radio frequency spectrum. Aside from the incorrect assessment of the problem, the radio frequency use provides us an opportunity to evaluate the outcome of governmental action in terms of the original goals for which solution was sought—the desire to control interference.[26]

This view now dominates the received wisdom on broadcast licensing. That understanding has been stated thus:

> The drafters of the Radio Act [1927] and the Communications Act [1934] probably never considered creating a property rights mechanism; indeed, had they thought about it, they would have assumed its impossibility. As late as 1958, CBS President Frank Stanton, the acknowledged intellectual of the industry, stated that he had never considered an auction system for allocation of broadcast rights. Just a year later, Chicago's Ronald Coase demonstrated in a path-breaking article that just such a system not only would work but was also the typical way of allocating resources. In fact, despite the naive belief that allocation by government is the only sensible way of doing things, a private market in broadcast licenses now flourishes.[27]

[25] Coase, *supra* note 7, at 24.

[26] Minasian, *supra* note 7, at 403.

[27] Lucas A. Powe, Jr., American Broadcasting and the First Amendment 201 (1987). Further elucidations of the error theory may be found in De Vany *et al.*, *supra* note 10, at 1499–1500; Pool, *supra* note 1, as seen above; Owen, *supra* note 12, at 36–37, 43; Harry J. Levin, The Invisible Resource 111–12 (1971); John Fountain, The Economics of Radio Spectrum Management: A Survey of the Literature, New Zealand Dep't of Trade & Ind., at Executive Summary (1988); Bruce M. Owen *et al.*, Television Economics 139 (1974); David Bazelon, The First Amendment and the "New Media"—New Directions in Regulating Telecommunications, in Free but Regulated: Conflicting Traditions in Media Law 52 (Brenner & Rivers eds. 1982); Daniel L. Brenner, "Commentary," in Brenner & Rivers eds., 60–64, at 60; and Ida Walters, "Freedom for Communications," in Instead of Regulation 93–134, 97 (Poole ed. 1982). One must venture into the communications field to find assertions that a private rights-based answer could not solve the interference problem. Melody writes that "[r]ights to use the spectrum are not susceptible to legal enforcement as are private property rights" (William H. Melody, Radio Spectrum Allocation: Role of the Market, 70 Am. Econ. Rev. 393 (1980)). But this is analytically incorrect, as is demonstrated by the current (and hence easily observable) regulatory regime under which private rights to spectrum are today leased at a zero price to private broadcasters by the government. Such rights would not be fundamentally different in any technical sense if identical claims to spectrum were deeded over to private interests outright. A similar confusion is embodied in Dallas Smythe, Facing Facts about the Broadcasting Business, 20 U. Chi. L. Rev. 96–106 (1952). Both Professors Melody and Smythe are (were) in communications departments to which these faulty analyses appear to be confirmed. (Also note, however, that Hugh C. Donahue, of the Ohio State University journalism department, makes no such error. See Hugh C. Donahue, The Battle to Control Broadcast News (1989).)

Under this interpretation of the policy solution to chaos in the ether postulated as a good-faith error, great confusion surrounded the technical problems of establishing rights to the airwaves, and the path mistakenly chosen led to inefficiency and antisocial economic transfers.[28] In economic terms, the error theory posits the solution to the common resource allocation problem as the only argument in policymakers' objective functions, with distribution questions so misunderstood as to be unanswerable in any reasonable way. Yet in building an explanation of broadcast regulation on the "absence of any serious attempt to establish by legislation a system of transferable property rights in the spectrum,"[29] the modern interpretation identifies not the error of the political marketplace in regulating broadcasters but its own examination of the evidence. The historical record makes it abundantly clear that the allocation problem in avoiding a "tragedy of the commons" in spectrum confused neither radio's first regulators nor its regulatees. Quite the contrary, the property rights regime chosen was selected primarily due to its distributional consequences.

III. A Market for the Ether

> One of our troubles in getting legislation [in 1923–26] was the very success of the voluntary system we had created. Members of the Congressional committees kept saying, "it is working well, so why bother?" A long period of delay ensued.[30]

The pricing mechanism was more than considered an allocation device in the early days of radio—it was, in effect. There existed a very lively

[28] These transfers were ill advised on equity grounds (creating excess profits for the regulated industry) and led to dynamic inefficiencies, as the industry (reacting to the exogenous imposition of a regulatory scheme) then lobbied for protectionist barriers. Regulators were tempted to dictate wasteful cross-subsidies: Posner's "taxation by regulation" (Richard A. Posner, Taxation by Regulation, 2 Bell J. of Econ. & Mgt. Sci. 22–50 (1971)).

[29] Owen, *supra* note 12, at 36.

[30] Herbert C. Hoover, The Memoirs of Herbert Hoover: The Cabinet and the Presidency 1920–1933, at 142 (1952).

market in broadcast properties, sold with frequency rights attached, early in the development of the industry (that is, pre-1927). For instance, in Senate testimony taken February 26–27, 1926, Senator Burton Wheeler engaged Judge Stephen Davis, solicitor general of the Commerce Department and the preeminent government expert on radio policy, in the following exchange concerning trafficking in broadcast licenses, with Senator Howell interrupting:

SENATOR WHEELER: I want to get that clear. Supposing I have a wave length and sell it to you, I do not sell you my permit. They have got to come to the department and get their permit or else the permit is not any good to me.

SENATOR HOWELL: Yes; but the practice is to transfer that permit with the apparatus.

SENATOR WHEELER: Of course, they are not bound to do that.

SENATOR HOWELL: No; they are not bound to, but that is the practice. . . .

MR. DAVIS: The practical situation is as the Senator says—the wave lengths to-day are taken and used and occupied. . . . The Senator is correct in saying that we have, as I said before the committee the other day, recognized transfers of that sort. In other words, we recognize the purchaser as stepping into the shoes of the licensee.[31]

Station licenses were known to be scarce, were commonly taken to confer exclusive rights, and were traded freely, often at prices reflecting considerable rents. Indeed, as the spectrum policy problem of this era (1923–26) was that the secretary of commerce had been ordered to issue licenses to all comers, the secretary still relied on market transactions to minimize broadcasting disruptions, à la the Coase Theorem. On January 8, 1926, Judge Davis answered Senator Smith:

SENATOR SMITH: Now, in those licenses, do you give the total control of that wave length to the licensee? . . . For instance, if I had a license to use a certain wave length, could I sublet it to others to use it for such time as I, or whoever had the principle use of it, might not be using it?

MR. DAVIS: That situation is worked out somewhat similar to this, Senator. For instance, take the situation here in Washington. We have two stations, WRC and WCAP. Both operate on a single wave length. In other words, we assign one wave length to both of those stations. Then, Senator, they for themselves work out their time division.

SENATOR SMITH: Yes; that is what I meant.

MR. DAVIS: In other words, we do not say to one, "You go until 12 o'clock to-night. . . ." But they get together and work out the time on this wave length, the fact being that they do not both go on the same wave length at the same time.

SENATOR WHEELER: Then suppose they do not agree, what do you do?

MR. DAVIS: We would have authority to enforce such a time division.

SENATOR WHEELER: How?

MR. DAVIS: Because, instead of giving—if it ever became necessary to do it, instead of giving full time to each of them, we would give them licenses which would allow them to operate only at certain limited times. That situation, however, has not arisen. In other words, the stations which are operating on one wave length have been able to get together and agree among themselves. And, obviously, that is what the department wanted them to do, rather than itself to attempt to dictate the times for operation. So that plan has worked out fairly.[32]

Not only do these passages indicate the philosophical disposition of the Commerce Department, more importantly, they illustrate that the price mechanism was the institutional tool used to allocate frequencies in the 1920s, it was understood by the regulators (who then explained it to the legislators) to be such, and it was accepted as socially efficient. Trades of spectrum rights were commonplace; the market was robust (indeed, the Washington radio band discussed above by Stephen Davis ended in Coasian optimality as WRC bought WCAP's air time).[33] It is clear that such chaos as potentially could exist was explicitly remedied by federal establishment of property rights, followed by market trading to assign such rights to their highest valued employments.

Property rights were no mystery in this market, nor, significantly, was the inherent conflict between market allocations and political discretion. Beginning in September 1921, when the Commerce Department first recognized radio broadcasting as a distinct license category, the department initially allowed just a single frequency (360 meters, or 833.3 kHz) to be used for broadcasting, necessitating complicated time-sharing arrangements. (What interference took place during this 1921–23 period was, in essence, an outcome of government control: over 500 broadcasters were "responsibly" bunching up all at the same point on the spectrum to which they had been directed by the Commerce Department, and operations were not always perfectly synchronized.) When this single channel became scarce, Hoover denied new licenses. The *Intercity* decision in February 1923, growing out of just such a denial, determined that the secretary had no authority to withhold a license but did have the legal right to set hours of operation and frequencies.

[31] Radio Control, Hearings before the Committee on Interstate Commerce, United States Senate, Sixty-Ninth Congress, First Session 118–19 (1926).

[32] *Id.* at 16.

[33] Erik Barnouw, A Tower in Babel 185–86 (1966).

The department quickly responded in the radio reallocation of 1923 by enlarging the band to accommodate about 70 channels (using ten kilocycles separation). These were assigned to existing stations, with larger broadcasting interests (such as AT&T and RCA) being granted clearer channels (and, hence, higher wattage assignments). The licenses of stations that failed to broadcast regularly were, conversely, revoked.[34] As these wavelengths became scarce, however, Hoover resorted first to time-sharing (that is, rights splitting) and then to a deliberately slow response time on new license applications. Secretary Hoover agreed to the request from broadcasters that "no further licenses could be issued," as Erik Barnouw writes, which "produced a new phenomenon. Though a channel could not now be obtained by applying, it apparently could by purchase. A traffic in licenses quickly developed. The Department of Commerce, far from discouraging it, furthered it by a policy it adopted."[35] That policy, of course, was to recognize the frequency allocation as a tradeable commodity. "Thus via the market place, channels were still available."[36]

This prompted a political backlash, as spectrum rents were being capitalized by private owners and, hence, being sacrificed by Congress. Whereas the *Chicago Tribune* would (in 1924) purchase one of forty local radio outlets (and its broadcast license) for $50,000, the Chicago Federation of Labor (CFL) chose to apply to the Commerce Department for a zero-priced license. In January 1926, the Department responded that all available frequencies were allocated, and "[t]he Secretary of Commerce has no right under existing law to select the individuals who should exercise the broadcasting privilege."[37] Morris Ernst of the American Civil Liberties Union testified in Congress in 1926 that the market price faced by the CFL was a healthy $250,000,[38] noting, "A brisk trade . . . had already developed in licenses, which were sold for exorbitant sums."[39]

[34] Philip T. Rosen, The Modern Stentors: Radio Broadcasting and the Federal Government 1920–1934, at 72–73 (1980). Both policies were efficient in the sense that the more commercially successful broadcasters would have bid the most for such rights (indeed, they were often doing just that) and awarding such rights to likely end users constituted a transactions cost minimizing allocation. See Harold Demsetz, When Does the Rule of Liability Matter? 1 J. of Legal Stud. 13–28 (1972).

[35] Barnouw, *supra* note 33, at 174.

[36] *Id.*

[37] *Id.* at 175.

[38] Apparently the largest such sale was in September 1926, when the highly successful radio station WEAF in New York City was sold by AT&T to RCA for $1 million, of which $200,000 was allocated to physical capital and $800,000 for its favorable clear channel frequency right. Barnouw, *supra* note 33, at 185–86.

[39] As Ernst's testimony was summarized by Pool, *supra* note 1, at 122.

Political outrage quickly followed. "Senator James Couzens of Michigan expressed shock over the situation. . . . The Commerce Department policy seemed to Senator Couzens to invite a private auctioning of channels to the highest bidders. 'Anyone that buys the apparatus controls the situation.' "[40] Both Senator Couzens's understanding, and his "shock," are key pieces of evidence in evaluating the error theory. It was the distribution of rights, not their socially inefficient lack of definition, that was driving the demand for legislative action.

IV. The "Breakdown of the Law"

The extent to which the businessmen, lawyers, and policymakers of the era understood that establishment of property rights in spectrum constituted the necessary and sufficient condition for the efficient functioning of the pricing system[41] is revealed by the anticipation of, and reaction to, the seminal policy regime switch embodied in *Zenith*. Hoover had been assigning frequencies on a "first-come–first-served" (or "priority-in-use") basis, either withholding licenses to latecomers or issuing them only on a time-sharing arrangement, and he was openly enforcing license transfer via sales of stations. As this was the case, the great calm prevailing in broadcasting prior to the *Zenith* decision (and the confirming opinion of the attorney general) was abundant proof that no "public interest" licensing standard was necessary to eliminate the externality problem. That the sole solution to interference lay in enforceable, excludable rights was a commonplace; Hoover was commended enthusiastically (indeed, fawningly) by the broadcast industry for enabling a smoothly functioning market, despite imposing no more than a noninterference rule for license issuance. It was not until the Radio Act of 1927 that any public interest standard was adopted, yet the market was thought to have worked well until July 8, 1926.

In fact, the federal court's overruling of Secretary Hoover's rights-definition rule, not the "free market," was then universally credited with creating anarchy in radio broadcasting. A typical press report explained the property rights dilemma rather succinctly, if colorfully, in December 1926:

> Until last July, order was maintained on the broadcasting highways by the Department of Commerce, which assigned a channel to each station on which it could

[40] Barnouw, *supra* note 33, at 175.

[41] Further allocational efficiences could, of course, be gained from allowing market trades between uses (as in selling marine band for radio broadcasting, for example). The question of global spectrum efficiency, while interesting (see De Vany *et al.*, *supra* note 10; Levin, *supra* note 3; Owen, *supra* note 12) is not the primary focus of this article, which concerns itself largely with the assignment of rights *within* the broadcasting band.

operate without bumping its neighbors. After the wave lengths were all assigned, the Department refused to create confusion by licensing more stations. Then court decisions and Attorney General's opinions denied the right of the Department to regulate in any respect, and threw open the radio door to everyone who wished to enter. The air was declared free—that is, free to the broadcasters; but it is not free to the listening public, who now have no liberty of choice in radio reception. They may be able to get a desired station, but they receive its programs only to the tune of disturbing squeals, whistles, or jumbled words from some unwelcome intruder. For as soon as the bars went down, the expected occurred. Since July, some seventy-five new stations have pushed their way into the crowded lanes, and a like number have added to the jumble by shifting wave lengths, all jostling each other and treading on the toes of the first comers, who, from the height of their respectability, style the intruders "pirates" and "wave jumpers." The disturbed public uses still stronger appellations.[42]

So widespread was this understanding of the allocational importance of private property rights without a public interest award standard that a *Yale Law Journal* article of 1929 wrote plainly that, "in 1926, after a second adverse decision to the effect that the Secretary of Commerce had no power under the Act of 1912 to restrict the time of operation or frequency of any station, there came a period of unregulated confusion generally known as 'the breakdown of the law.' "[43] Similarly, Frank Rowley noted that "Until April, 1926, the situation was fairly well in hand. There was some interference, due to the surplus of stations over the number of available channels, but in almost every case, station owners showed a willingness to cooperate in making beneficial adjustments. In April, however, the comparative security of the broadcasting situation was disturbed by a decision in the Federal District Court for Northern Illinois in the case of *United States v. Zenith Radio Corporation*."[44]

V. An Innocent Solution Preempted

As interference plagued much of the broadcast spectrum during the "breakdown" period, an end to radio interference was being crafted not only in Washington but also in the courts. If the common resource problem was clearly identified by contemporary analysts, so was its solution: "establishing legally the priority to an established wave length," as *Radio Broadcast* magazine then put it.[45] In the fall of 1926, a simple and compelling state court decision did just that.

[42] The Survival of the Loudest, Independent 623 (December 11, 1926).

[43] Federal Control of Radio Broadcasting, 29 Yale L. J. 247, footnote omitted (1929).

[44] Frank S. Rowley, Problems on the Law of Radio Communication, 1 U. Cin. L. Rev. 5, footnote omitted (1927). This explanation became official doctrine in the Federal Radio Commission's first annual report. See Federal Radio Commission, Annual Report 10 (1927).

[45] The Courts Aid in the Radio Tangle, Radio Broadcast 358 (February 1927).

In *Tribune Co. v. Oak Leaves Broadcasting Station*,[46] the classic interference problem was encountered, litigated, and overcome, using no more than existing common-law precedent. In the matter, radio station WGN was owned by the *Chicago Daily Tribune* (hence, "World's Greatest Newspaper") and had broadcast popular shows for some time in order to sell its newspapers; the evening's programming was listed in each day's edition.

Radio station WGN built up a good following broadcasting at 990 kilocycles. In September of 1926, that is, during the "breakdown of the law," another Chicago broadcaster moved to an adjacent wavelength, causing WGN to file a complaint in state court alleging that it was necessary to maintain at least a fifty-kilocycle separation on stations located within 100 miles of each other. The "wave jumper" was thus accused of injuring the plaintiff's lawfully acquired business property, consisting of the capitalized "good will" associated with its established broadcasting frequency.

It is interesting that the defendant did not get far in contesting the premise of the suit—that willful interference with WGN's broadcasts would constitute a tort.[47] Instead, it argued that 40 kilocycles was sufficient band width separation to prevent most interference, and what static remained was the product of listeners' substandard receiving equipment. Most pointedly, they did not argue that licensing was necessary to prevent interference which, it appears, would have been a nakedly spurious argument given the straightforward manner in which excludable rights to spectrum space were then understood.

Chancellor Francis S. Wilson decided the case wholly within the spirit of a property rights solution to a common resource problem. His landmark decision, the first to deal with vested private rights in "the ether," noted that the facts "disclose a situation new and novel in a court of equity"[48] but was still able to uncover substantial precedent. The decision found that "unless some regulatory measures are provided for by Congress or rights recognized by State courts, the situation will result in chaos and a great detriment to the advancement of an industry which is only in its infancy."[49] It went on to analogize the right in broadcast frequencies to other long-protected propertied interests.

[46] This 1926 Cook County, Illinois, Circuit Court decision is reprinted in Cong. Rec.–Senate 215–19 (December 10, 1926).

[47] The defendants did, in typical fashion, object to the suit on jurisdictional grounds, claiming that the federal Radio Act of 1912 preempted any state court authority and "that a wave length can not be made the subject of private control" (*Oak Leaves*, *supra* note 45, at 217).

[48] *Id.*

[49] *Id.* at 219.

While it is true that the case in question is novel in its newness, the situation is not devoid, however, of legal equitable support. The same answer [that no rights in air space exist] might be made, as was made in the beginning, that there was no property right, or could be, in a name or sign, but there has developed a long line of cases, both in the Federal and State courts, which has recognized under the law known as the law of unfair competition, the right to obtain . . . a property right therein, provided that by reason of their use, he has succeeded in building up a business and creating a good will which has become known to the public and to the trade and which has served as a designation of some particular output so that it has become generally recognized as the property of such person.[50]

Using the further analogy of riparian rights, it concluded "that a court of equity is compelled to recognize rights which have been acquired by reason of the outlay and expenditure of money and the investment of time. . . . We are of the further opinion that, under the circumstances in this case, priority of time creates a superiority in right. . . ."[51] Judge Wilson then issued an admonition to the respondents, pending a final hearing, for the "pirate" broadcaster to keep a distance of at least fifty kilocycles from the established WGN frequency. Owing to his fundamental understanding of radio law and the crucial nature of *Oak Leaves* to the policy outcome, I quote the magistrate's findings at length.

[S]o far as broadcasting stations are concerned, there has almost grown up a custom which recognizes the rights of the various broadcasters, particularly in that certain broadcasters use certain hours of the day, while the other broadcasters remain silent during that particular period of time. Again, in this particular locality, a certain night is set aside as silent night, when all local broadcasters cease broadcasting in order that radio receivers may be able to tune in on outside distant stations.

Wave lengths have been bought and sold and broadcasting stations have changed hands for a consideration. Broadcasting stations have contracted with each other so as to broadcast without conflicting and in this manner be able to present their different programs to the waiting public. The public itself has become educated to the use of its receiving sets so as to be able to obtain certain particular items of news, speeches, or programs over its own particular sets.

The theory of the bill in this case is based upon the proposition that by usage of a particular wave length for a considerable length of time and by reason of the expenditure of a considerable amount of money in developing its broadcasting station and by usage of a particular wave length educating the public to know that that particular wave length is the wave length of the complainant and by furnishing programs which have been attractive and thereby cause a great number of people to listen in to their particular programs that the said complainant has created and carved out for itself a particular right or easement in and to the use of said wave length which should be recognized in a court of equity and that outsiders should

[50] *Id.*

[51] *Id.*

not be allowed thereafter, except for good cause shown, to deprive them of that right and to make use of a field which had been built up by the complainant at a considerable cost in money and a considerable time in pioneering.[52]

It was on this homesteading principle that the judge found a common-law remedy to the potential "tragedy of the commons." Relying on established law, without resort to any "public interest" or other political selection criterion, the opinion granted a priority-in-use property-rights rule the force of law in radio broadcasting.[53] Private rights in the ether under common law were immediately recognized as a solution to the interference problem. As an injunction had been issued to restrain the Chicago interloper on October 9, 1926, and the "Decision of Judge Wilson on Defendants' Motion to Dissolve Temporary Injunction" was issued November 17, the radio industry applauded instantly. *Radio Broadcast* noted in its February, 1927, issue that the case was key in "establishing legally the priority to an established wavelength," and concluded that "it establishes a most acceptable precedent."[54] Other stations beleaguered by spectrum trespassers quickly moved to file similar claims in state courts. And legal experts were soon to comment, citing *Oak Leaves*, "The claim to 'Property Rights' may be either in the use of the physical apparatus or in the right to freedom from interference by subsequently established stations. . . . Indeed, unless one adopts the suggestion of 'the government ownership of the ether,' an admission of property rights seems inevitable."[55] (A clue as to the motivation of the 1927 Radio Act to which I shall return, is contained herein.)

It was clear that a system of excludable, transferable property rights in spectrum (1) was widely understood as necessary and desirable so as to efficiently solve the radio allocation problem and (2) could well be expected to come by way of common law, via the priority-in-use principle. A single trial court decision would in no definitive way answer the national property rights question, but the analysis—and its political implications—were clear.[56] This ignited legislative activity in Washington where,

[52] *Id.* at 217.

[53] What is most remarkable, perhaps, is that this common law precedent arrived at precisely the interference-separation rule adopted the following year by the Federal Radio Commission. "To improve radio reception in New York, Chicago, and other large cities, the Commission decided that a separation of 50 kilocycles is necessary between local stations. All allocations were made on that basis" (Federal Radio Commission, *supra* note 43, at 8).

[54] Radio Broadcast, *supra* note 45.

[55] Yale L. J., *supra* note 43, at 252–53.

[56] Stephen B. Davis, solicitor general of the Commerce Department, "contended that a ruling following up this decision in a higher court would protect businessmen against wavelength piracy" (Rosen, *supra* note 34, at 103 footnote omitted).

since 1923, three separate bills to establish a politically discretionary licensing process had died after passage by one house (and dozens more had been introduced since 1921). In the interim, chaos had come to broadcasting—but the state courts were moving toward a solution at common law. The opportunity to construct a federal regulatory system would have to be seized quickly. In the winter of 1927, it was.

VI. The Agenda of the Radio Broadcasting Interests

Secretary of Commerce Herbert Hoover had been advocating broadcasting legislation since the early 1920s.[57] The legislation he advocated had always included a "public interest" standard in awarding franchises by federal authority. This was consistent with Hoover's belief that "we can surely agree that no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose."[58]

Hoover sought radio legislation even as he conceded (boasted, actually) that the American broadcasting industry was progressing in dramatic fashion. In 1922, Hoover initiated a series of annual radio conferences, attended by major broadcasters and orchestrated by the Department of Commerce. By 1925, he was able to open the conference by remarking that they had "established principles upon which our country has led the world in the development of this service. . . . We have not only developed, in these conferences, traffic systems by which a vastly increasing number of messages are kept upon the air without destroying each other, but we have done much to establish the ethics of public service and the response of public confidence."[59]

Hoover was the political champion of major radio broadcasters.[60] In this 1925 conference, they outlined a policy agenda in which they advocated a "public interest" standard for licensing. Indeed, the newly formed National Association of Broadcasters presented their resolution (for the record, not for consideration) "that in any Congressional legislation . . . the test of the broadcasting privilege be based upon the needs of the public. . . . The basis should be convenience and necessity, combined with fitness and ability to serve, and due consideration should be given to existing stations and the services which they have established."[61]

[57] See, for example, Herbert C. Hoover, The Urgent need for Radio Legislation, 2 Radio Broadcast 211 (January 1923).

[58] Herbert C. Hoover, Opening Address, Fourth National Radio Conference Proceedings (1925), reprinted in Radio Control, *supra* note 31, at 50–68.

[59] *Id.* at 50.

[60] Hoover, however, was not entirely "captured" by industry interests, as will be seen below. He advanced both the incumbent broadcasters' agenda and a regulators' agenda—interests that most often intersected in Hoover's policy recommendations. He therefore played a large role in advancing either group's interests and will be discussed as multidimensional in the analysis herein.

Moreover, the industry plainly saw Hoover as their man in Washington. After the 1924 Radio Conference, it was noted that "Almost everyone feels that Secretary Hoover has done an excellent job. And few groups feel that more strongly than the radio folk."[62] In 1925, the broadcasters went so far as to pass a resolution endorsing a blank check backing Hoover's regulatory efforts: "[T]he members of this conference express to the Secretary their appreciation of this opportunity for offering their suggestions and pledge their best efforts to help carry out the various provisions thereof . . . [and] the members assure him of their hearty approval and cooperation in any individual deviations from these provisions if, in his judgment, greater service may be rendered to the public thereby."[63]

It is apparent why the major broadcasters, unified behind Hoover, were agitating for federal regulation. In November 1925 (the date of the Radio Conference discussed above), the radio broadcast market was developing well, radio-set sales were brisk, programming was expanding, and interference from rival broadcasters was not an issue. What was at issue was the ability of the secretary of commerce to exclude new requests for spectrum space (that is, broadcasting licenses), as the *Intercity* case had cast a shadow over Hoover's discretion without a standard issued by Congress explicitly granting him such. The industry was fearful that new licenses would, in fact, be issued—if not voluntarily by Hoover, then mandated by the courts (as did happen with the *Zenith* decision in April 1926)—and, moreover, that spectrum rents would be further dissipated either through forced time-sharing agreements or by expansion of the available broadcasting spectrum, which had been done in the spectrum reallocations of 1923 and 1924. Indeed, the 1925 Radio Conference voted down a proposal to extend the radio band to include wavelengths between 1500 and 2000 kHz, thereby effectively increasing available frequencies by one-half.[64]

By imposing a standard whereby the secretary could exclude new licensees on the grounds of "public interest, convenience, or necessity," the desired federal imposition of property rights could be achieved constitu-

[61] Radio Control, *supra* note 31, at 59.

[62] What the Hoover Conference Did, Radio Broadcast 251 (December 1924).

[63] Radio Control, *supra* note 31, at 61.

[64] Rosen, *supra* note 34, at 80.

tionally,[65] and this would allow possibilities for enhanced rents via restriction of band width as well. As a magazine summed up the conclusions of the 1925 Radio Conference, "Radio has done a wonderful job of regulating itself. But there should be a limit upon the total number of broadcasting stations, and this limit can be fixed and maintained only by Federal authority."[66] This legislative goal was doggedly pursued by the industry throughout the period, which is to say, both before, during, and after the "breakdown of the law."

That agenda focused on "the non-issuance of additional broadcasting licenses, the freedom from further division of time with other broadcasters, [and] the maintenance of the present distribution of frequency channels," as the 1925 Radio Conference's resolution cited above put it. In the months preceding the February 23, 1927, passage of the Radio Act, this strategy was quite clear, and its influence in shaping the Act was understood by informed observers both within and without the industry. As Morris Ernst wrote, "the proposed legislation contains phrases such as 'public utility,' 'public necessity,' and 'public interest,' but the operation of the bill is for private profit and for stabilization of investment."[67]

This agenda was artfully accomplished. When the Federal Radio Commission (FRC) was born out of the Federal Radio Act of 1927, it immediately grandfathered rights for major broadcasters, while eliminating marginal competitors and all new entry. Indeed, the FRC restored order out of chaos by ordering stations to "return to their [original Commerce Department] assignments,"[68] thus revealing much about the previous rights regime and the privatization of airwave properties achieved in "the public interest."

Still, the industry was most concerned about how the FRC would deal with "such dangerous propositions as the pressure to extend the broadcast band . . . ; the fatuous claims of the more recently licensed stations to a place in the ether; and the uneconomic proposals to split time on the air rather than eliminate excess stations wholesale . . . ," as one trade journal forthrightly summarized.[69] (The article went on to advocate the "principle of priority" in wavelength allocation, their self-interested conception of

[65] As explained in Louis G. Caldwell, The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927, 1 Air Law Review 295–330 (1930). (Caldwell was formerly a general counsel of the Federal Radio Commission.)

[66] Ruling the Radio Waves, Outlook 463 (November 25, 1925).

[67] Morris Ernst, Who Shall Control the Air? 122 Nation 443, 444 (April 21, 1926). Notice, too, that Ernst's ACLU opposition to major broadcasters focused (correctly) on distributional issues, as the article's title makes plain.

[68] Rosen, *supra* note 34, at 125.

[69] Welcome to the Radio Commission, Radio Broadcast 555 (April 1927).

"public interest," and advocated reducing the number of broadcasting stations by "about four hundred"—or over *one-half*.)

Radio men were quickly assured that the newly appointed commission was politically sensitive to their needs and aspirations. Only two months after its inception they could be relieved that the commissioners had acted wisely. "Broadening of the band was disposed of with a finality which leaves little hope for the revival of that pernicious proposition; division of time was frowned upon as uneconomical . . . the commissioners were convinced that less stations was the only answer."[70]

Indeed, the second agenda item[71] dealt with by the Federal Radio Commission (on April 5, 1927) concerned possible enlargement of the "Broadcasting Frequency Band." The commission decided not to widen the band beyond 550–1500 kc, "[i]n view of the manifest inconvenience to the listening public which would result."[72]

The decision not to expand the broadcast spectrum serves as yet additional evidence for rejection of both the "chaos" and "error" theories of broadcast licensing. If regulators had made a good-faith, even if analytically unsophisticated, attempt to deal straightforwardly with overcrowding of the airwaves, their first step should have been to allow for an expansion of available broadcasting frequencies. Indeed, the European countries had devoted a larger portion of the electromagnetic band to radio despite a far smaller number of stations, a fact that was not missed by American commentators. Moreover, in 1927, radio broadcasters were allotted just one megahertz (MHz) of spectrum, when twenty-three MHz were in use, having been apportioned in an international radio conference that year,[73] and at least 60,000 kHz were known to be potentially available given then current technology.[74]

The radio industry's argument against broadening the band was that it was anticonsumer: it would "require" listeners to purchase new sets in order to receive new signals. The analysis is transparently false when

[70] Stabilizing the Broadcast Situation, Radio Broadcast 79 (June 1927).

[71] The first item, on March 29, 1927, was a perfunctory matter dealing with license extension for certain point-to-point radio operators. So band width broadening was the first substantive broadcasting issue taken up.

[72] Federal Radio Commission, *supra* note 44, at 13.

[73] Levin, *supra* note 27, at 20–21.

[74] That international conference specifically set aside several higher-frequency bands for radio broadcasting, including 6,000–6,150 kHz, 9,500–9,600 kHz, 15,100–15,350 kHz, and 21,450–21,550 kHz. Federal Radio Commission, Annual Report 233–34 (1928). Radio waves are now known to occupy at least 100,000 MHz of the electromagnetic spectrum. Christopher H. Sterling and John M. Kittross, Stay Tuned: A Concise History of American Broadcasting 506 (1978).

placed over the alternative: simple elimination of the marginal (interference-causing) broadcasters. Clearly, consumers would be better off having a choice between listening to an uncluttered one-MHz band on an existing radio and purchasing a broader-band receiver so as to enjoy enhanced program selection, than in being given only the first alternative. But that is precisely what was argued as a "proconsumer" response to "short-sighted would-be broadcasters and selfish set manufacturers."[75]

Similarly, time-sharing was viciously opposed by the industry for all the right (economically correct) reasons: it would dissipate rents of existing license holders. Their opposition had nothing whatever to do with any illusions concerning the relation between time-sharing and radio interference, or with poorer quality programming and productions. The Commerce Department had long assigned some licenses on a time-sharing basis, causing no great difficulty. As Rowley observed, stations commonly "by contract worked out a satisfactory and amicable schedule of hours."[76] (The one instance he cites in which a radio disagreement went to the courts concerned two nonprofit institutions, the Missouri State Marketing Commission and the Mormon Church.)[77] It was well known that efficient programmers would, if given a suboptimal level of air time, trade for the efficient allocation. A contemporary analyst noted that "the splitting of time on any one day being a disadvantage, the stations would tend to trade their time so as to minimize this difficulty."[78] This was alertly resisted by existing broadcasters, not missed due to ignorance.[79]

Given that the major radio stations wanted an end to time-sharing *and* a freezing of the spectrum at 550 kHz–1500 kHz, the question of expropriation arose: how could the band accommodate all those who had been broadcasting (many on shared frequencies)? The solution was to vest a trusted authority with discretionary authority, which could be legally upheld, in the licensing process. The "public interest, convenience or necessity" standard was chosen as the appropriate vehicle. It had been seen as such since 1922–23, when David Sarnoff, the young general manager of

[75] Radio Welcomes Government Control, Lit. Digest 21 (April 9, 1927).

[76] Rowley, *supra* note 44, at 22.

[77] Another dispute arose in the Cincinnati radio market in early 1925. Two stations were unable to reach agreement on a shared allocation and broadcast over one another's signal for weeks before Secretary Hoover settled the dispute. Barnouw, *supra* note 33, at 179.

[78] Carl Dreher, A New Plan to Regulate Radio Broadcasting, Radio Broadcast 59 (November 1926).

[79] As the above commentator, author of a column called "As the Broadcaster Sees it," saw it, "Half time on the air is worth much less than full-time." Carl Dreher, What Constitutes Fair Dealing in Radio Matters? Radio Broadcast 60 (May 1926).

the Radio Corporation of America,[80] argued (as over 550 radio broadcasters were sharing *one* frequency) that "the elimination of interference is most important and I believe that the well-organized station, charged with responsibility of disseminating information, instruction, and entertainment to the masses, should enjoy the greatest protection which it is possible for the government to provide."[81]

This plan to edge out competition from smaller broadcasters, on the grounds that the latter rendered poorer service to the public, worked perfectly; in Secretary Hoover's April 1923 reallocation plan, the major stations received favorable assignments, while numerous nonprofit stations emerged with severely truncated frequency rights. As Barnouw concluded, "The reallocation seemed to reflect a value judgment in which educational and religious interests were low on the scale."[82] And in the official rights allocation under the Federal Radio Commission in 1927–28, the agency chose to employ the market success standard of public interest—in essence, a simulated auction, with awardees keeping rents.

Since Congress had described the regulatory standard the bureaucrats should use in terms of public interest, convenience, and necessity, the FRC's first step toward establishing a national system involved defining these terms. Four radio conferences and seven years of control by the Department of Commerce had already begun the process. The commissioners agreed that the prevailing scarcity of channels required that those available be used economically, effectively, and as fully as possible. In practical terms, this meant that they favored the applicants with superior technical equipment, adequate financial resources, skilled personnel, and the ability to provide continuous service. According to this interpretation, established broadcasters with demonstrated ability best fulfilled the public interest standard. In most instances, priority and financial success guided the FRC in favoring one operator over another.[83]

When the dust had settled, the established broadcasters had gotten virtually all they could hope for from the new commission. As the *Harvard Business Review* was to comment in 1935, "[T]he point seems clear that the Federal Radio Commission has interpreted the concept of public

[80] Sarnoff was the quintessential advocate (and visionary) of broadcasting interests. He was the moving force behind RCA's radio sales, broadcasting interests, and creation of the National Broadcasting Company in 1926. He assumed the mantle of industry leadership very early in his, as well as in radio's, life. Eugene Lyons, David Sarnoff 117 (1966).

[81] David Sarnoff, Looking Ahead: The Papers of David Sarnoff 48 (1968). In a June 1938 letter he had posited the view that radio should "be distinctly regarded as a public service" (*id.* at 41).

[82] Barnouw, *supra* note 33, at 122.

[83] Rosen, *supra* note 34, at 133.

interest so as to favor in actual practice one particular group. While talking in terms of the public interest, convenience, and necessity the commission actually chose to further the ends of the commercial broadcasters. They form the substantive content of public interest as interpreted by the Commission."[84]

VII. The Agenda of the Regulators

Ironically, "chaos" was a necessary input to achieve this political result. It was clear that the "breakdown of the law" created the urgency Herbert Hoover had been unsuccessfully using as an argument for new legislation since at least 1922. He did not want to squander the moment (steadfastly forgoing the attempt at any enforcement of law) nor to promote some industry coordination post-*Zenith*; he appeared bent on using the confusing period as his contingency to obtain regulation. When Congress again failed in 1926 to enact any radio law, Hoover "refused to regulate radio transmission by common consent, although nearly all the broadcasters urged it. This, as one United States Senator observed, 'seemed almost like an invitation to the broadcasters to do their worst.' Certainly, it tended to fulfill the Secretary's gloomy prophecy about chaos."[85]

This inaction was not due to technical miscalculation: "Secretary Hoover understood the critical nature of the *Zenith* case. He, like McDonald [the Chicago broadcaster/defendant who had forced the case by broadcasting on an unassigned wavelength], utilized the ruling to pressure Congress for action."[86] Others, including Congressman Sol Bloom (D., N.Y.) and James C. Harboard, president of RCA, saw the situation in just the same light.[87] Chaos was strategically introduced into the political process, much in the spirit of the movement for municipal fire departments in the mid-nineteenth century, as described by Fred McChesney.[88]

By any nonstrategic standard, the regulatory reaction to market confusion was inexplicable. This lack of industry cooperation was grossly out of order for Hoover; state-corporate alliances were the hallmark of

[84] In Barnouw, *supra* note 33, at 219.

[85] Silas Bent, Radio Squatters, Independent 389 (October 2, 1926).

[86] Rosen, *supra* note 34, at 94.

[87] *Id.*

[88] Fred McChesney, Government Prohibitions on Volunteer Fire Fighting in Nineteenth Century America: A Property Rights Perspective, 15 J. of Legal Stud. 69–92 (1986). A general principle is that crisis tends to raise the demand for government controls, a hypothesis argued persuasively in Robert Higgs, Crisis and Leviathan (1987).

Hooverism,[89] and 1926 marked the first year since 1921 that a Radio Conference had *not* been called by the Secretary of Commerce (this when "chaos" haunted the airwaves). Such industry conferences had been a "ritual" for Hoover.[90] The *New York Times* specifically implored the Secretary likewise to arrange some stopgap industry arrangement during the "breakdown" period.[91]

But Hoover had stated that "he would welcome a test case"[92] and saw his *Zenith* "defeat" and the ensuing confusion, which he had predicted,[93] as a predicate to achieving his policy agenda. That he surprised the broadcasting industry by not appealing the verdict in *Zenith* is consistent with this,[94] despite the fact that *Intercity* had earlier determined that Hoover did have authority to enforce time and wavelength exclusivity.

It was at this point that a visible schism appears to have developed between Hoover and major radio broadcast interests. With the *Oak Leaves* verdict giving frequency users the hope of outright endowments, vesting the federal government with a public interest licensing standard was suddenly less important (although constricting band width remained a key policy goal). Hoover noted, of "radio men," that "many . . . were insisting on a right of permanent preemption of the channels through the air as private property."[95] Hoover challenged this view directly, arguing that the key legal aspects of radio were, first, its "immense importance," and second, "the urgency of placing the new channels of communication under public control."[96]

Finally, radio legislation really was urgent. Officials at the Department of Commerce's radio division were reported to "welcome the [*Zenith*] decision . . . for the reason that it will force Congress to give Mr. Hoover or somebody else the authority to prevent such interference."[97] Momentum for legislation gathered among the public, who were "being forcibly convinced of the undesirability of increasing the number of broadcasting

[89] See Ray L. Wilber and Arthur M. Hyde, The Hoover Policies (1937); Robert B. Horowitz, The Irony of Regulatory Reform: The Deregulation of American Telecommunications 116 (1989).

[90] Rosen, *supra* note 34, at 74.

[91] *Id.* at 102.

[92] Barnouw, *supra* note 33, at 1980.

[93] *Id.* at 95.

[94] *Id.* at 189.

[95] Hoover, *supra* note 30, at 139–40.

[96] *Id.* at 139.

[97] Air Piracy and Chaos, Lit. Digest 13 (May 1, 1926).

stations."[98] But vested rights were respected in *Oak Leaves*, and "wave jumpers" could, apparently, be enjoined in state courts. The solution to interference presented a challenge to policymakers: how could effective federal regulation take place once private rights to broadcasting spectrum were assigned at common law?

The Congress responded to *Oak Leaves* instantly. After years of debate and delay on a radio law, both houses jumped to pass a December 1926 resolution stating that no private rights to the ether would be recognized as valid, mandating that broadcasters immediately sign waivers relinquishing all rights, and disclaiming any vested interests. The power to require such was the interstate commerce clause, but the motive was that Congress was nervous that spectrum allocation would soon be a matter of private law. As a law review article published during the three months between *Oak Leaves* and the Radio Act commented, "The conclusion is unavoidable . . . that the license issued at present by the Department of Commerce amounts to nothing more than a perfunctory permission to broadcast. Therefore the issue of a second license to use a wave length already in use by a first licensee could have no effect on the permission of the first licensee to broadcast, the use or abuse of wave length being governed solely, at present, by common law principles."[99]

Should those common-law principles apportion the spectrum to private users, the "breakdown of the law" would be remedied, but the federal government's ability to control or even influence broadcasting would vanish. Compromise legislation was quickly hammered together; a bill creating an independent five-member regulatory commission was passed by both houses, endorsed by Hoover, and signed by President Coolidge.[100] The motive was apparent; having seen the creation of property rights in the first state court decision, "It is against such a conception that the

[98] The Wages of the "Wavelength" Pirate is Unpopularity, Radio Broadcast 474 (October 1926).

[99] Rowley, *supra* note 44, at 35.

[100] The nexus of licensing control was astutely seen to be a politically charged issue; hence, legislation had been held up for years in a contest between Congressman White, a House Republican from Maine wanting to vest the secretary of commerce with discretion in license awards, and Senator Dill, a Washington Democrat preferring to create an independent radio commission. (Both bills established a "public interest" standard for licensure, but no one was fooled as to the political leverage to be exercised therein.) Dill's legislation basically prevailed in the compromise, as the commission was established "temporarily," with the Department of Commerce regaining authority after one year (Rosen, *supra* note 34, at 84, 95–96, 104, 106). Due to annual extensions and the Communications Act of 1934, such authority has yet to revert to the Department of Commerce. As Senator Dill commented, however, this was not a surprise; he understood that any "temporary" commission would become permanent. Barnouw, *supra* note 33, at 199.

Radio Act is particularly directed."[101] A principal interest of the law, reinforced by the subsequent behavior of the FRC and FCC, has been to preempt such a solution to the interference problem. "[T]he proposed radio legislation in the nineteen twenties required a licensee to sign a waiver indicating that 'there shall be no vested property right in the license issued for such station or in the frequencies or wave lengths authorized to be used thereon.' . . . The Commission, fearful that licensees would assert property interests in their coverage to the listening public, has inserted elaborate provisions in application forms precluding the assertion of any such right."[102]

Whereas Hoover pushed for federal control primarily as an advocate of industry interests, Congress appeared more broadly based in its political concerns. Debate indicated that monopoly, the locus of licensing authority, and the geographical distribution of radio stations dominated the discussion. Regarding the latter, the first law amending the Radio Act (the Davis Amendment of 1928), ordered the FRC to allocate an "equitable" number of broadcast licenses to each of the nation's five zones (one commissioner was appointed from each zone, according to the 1927 act), on the claim that the South was being cheated out of its fair share of radio stations.[103] Congress was leery of the power of the radio broadcasters as "the press": they inserted an equal-time rule for all political candidates in the 1927 act. The new commission was also empowered to issue "special regulations applicable to radio stations involved in chain broadcasting" (sec. 4 [h]), to compel stations "to keep such records of programs . . . as it may deem desirable" (sec. 4[i]), and to prohibit "any alien or representative of alien" from owning a license to broadcast (sec. 12). The debate, the legislation, and subsequent legislative reaction to the commission all make it plain that lawmakers were primarily concerned about nonefficiency issues. "The 1927 Act was a quantum leap in regulation. Congress did not content itself with curbing interference among users of the spectrum, but instead included in the new Act provisions relating to programming, licensing and renewal, and many other aspects of broadcasting not related to electronic interference. Those provisions were incorporated seven years later into the Communications Act of 1934."[104]

[101] Carl Zollman, Radio Act of 1927, Marq. L. Rev. 121, 124 (1927).

[102] Paul M. Segal and Harry P. Warner, Ownership of Broadcasting Frequencies: A Review, 19 Rocky Mt. L. Rev. 111, 113, 121 (1947).

[103] This provoked a very bitter response in radio-dense New York; see Emmanuel Cellar, Will the Davis Amendment Bring Better Radio?: Con, 7 Cong. Digest 268–69 (October 1928).

[104] Anne P. Jones and Harry W. Quinlan, Broadcasting Regulation: A Very Brief History, 37 Fed. Comm. L. J. 107, footnotes omitted (1985).

The fact was that the policy debate was led by men who clearly understood—and articulated—that interference was not the problem, interference was the opportunity. The efficiency issues were demarcated from political-distributional questions both in their words and their actions. In 1925, Herbert Hoover explicitly separated the respective issues of rights-definition and political control over licensees thus:

> It seems to me we have in this development of governmental relations two distinct problems. First, is a question of traffic control. This must be a Federal responsibility. From an interference point of view every word broadcasted is an interstate word. Therefore radio is a 100 percent interstate question, and there is not an individual who has the most rudimentary knowledge of the art who does not realize that there must be a traffic policeman in the ether, or all service will be lost in complete chaos of interference. This is an administrative job, and for good administration must lie in a single responsibility.
>
> The second question is the determination of who shall use the traffic channels and under what conditions. This is a very large discretionary or a semijudicial function which should not devolve entirely upon any single official and is, I believe, a matter in which each local community should have a large voice—should in some fashion participate in a determination of who should use the channels available for broadcasting in that locality.[105]

Senator C. C. Dill authored the bill that finally gained passage in 1927. He was equally unconfused as to the purpose of federal licensing. "Of one thing I am absolutely certain," he declared. "Uncle Sam should not only police this 'new beat'; he should see to it that no one uses it who does not promise to be good and well-behaved."[106] In the event any misunderstanding had arisen that placed interference control as the primary aim of the federal legislation, Dill was pointedly direct. "There is much agitation and much resentment to-day over the chaos in the air, but that does not concern me so seriously as the problems of the future. Chaos in the air will be righted as a matter of business. The pressing need for legislation is found in the fact that the Government must provide for the protection of the public interest as the numerous and urgent demands for the use of the air develop. That is the crux of the situation."[107]

Dill's concerns were devoted to monopoly and political fairness over the airwaves, both derived from his belief that radio broadcasting would become an important, powerful medium of expression. Instead, therefore, of rushing to protect this sector from regulation under the shield of the First Amendment, Dill saw his alternative priority clearly. "The one

[105] Hoover, *supra* note 57, at 57.
[106] C. C. Dill, A Traffic Cop for the Air, 75 Rev. of Revs. 181 (February 1927).
[107] *Id.* at 183–84.

> principle regarding radio that must be adhered to, as basic and fundamental, is that the Government must always retain complete and absolute control of the right to use the air."[108]

Senator Dill's only rival as a congressional authority on radio legislation was Representative W. H. White, Jr., who had been introducing pro-Hoover measures since 1921, and who authored the competing radio bill (but who endorsed Dill's compromise measure before its passage). Shortly after the Radio Act of 1927, the congressman explained the need for regulation as follows:

> [S]ome of us have . . . believed that in the absence of legislation by Congress it was inevitable that the courts of the country sooner or later would determine, as they have determined, that priority in point of time in the use of a wavelength established a priority of right.
>
> This is the situation that confronted us, and the necessity of dealing with this situation and of conferring an authority of regulation to minimize interference which now sadly impairs broadcasting has been the compulsion back of the effort to get legislation.
>
> This bill gives to the commission, and thereafter to the Secretary of Commerce, subject to appeal to the commission, the power to issue licenses if the public interest or the public convenience or public necessity will be served thereby.
>
> This is a rule asserted for the first time, and it is offered as an advance over the present right of the individual to demand a license whether he will render service to the public thereunder or not. It is one of the great advantages of the legislation. The bill gives to the Federal Government the power to determine the wavelength which every station shall use.[109]

This rich passage from the last of our trio of Radio Act prime movers demonstrates the salient points. It glides from the interference problem to the pressing need for legislation, despite implicitly revealing that such a goal had been sought for years, when the fear was not interference, but the assertion of private rights to spectrum. It focuses on the importance of the introduction of a public interest standard for broadcast licensing; it was well known that, while interference was but a recent phenomenon, the public trusteeship model of licensing had not been the old solution. But it would become the new solution, and therein lay "one of the great advantages of this legislation."

VIII. The Agenda of the "Public"

There existed nonbroadcaster, nongovernmental interests that shaped the debate creating the federal regulatory system in radio spectrum rights.

[108] *Id.* at 184.
[109] William H. White, Unscrambling the Ether, 42 Lit. Digest 7 (March 5, 1927).

While it is doubtful that these constituencies carried decisive political weight,[110] it is instructive to examine the manner in which they sought to make their respective cases.

The major interests can here be summarized as belonging to two loosely organized constituencies: nonprofit broadcasters and listeners' associations. The former consisted of such disparate groups as the American Civil Liberties Union (whose counsel, Morris Ernst, was a frequent contributor to the radio regulation discussion in congressional hearings and in the popular press), the Chicago Federation of Labor (which had been attempting to gain a broadcast license by assignment rather than purchase, as noted above), populist political movements (which voiced fear of the "radio trust" and monopolization of the airwaves through such spokesmen as Progressive Montana Senator Burton K. Wheeler), an impressive list of institutions of higher learning (which had entered radio broadcasting very early, with 151 colleges and universities being granted Department of Commerce radio licenses as of the end of 1924[111]), and certain municipalities (for example, New York, which had established WMCA as a city-run broadcast outlet largely to gain goodwill for incumbent officeholders[112]).

The theme uniting such groups was that the "public interest" standard adopted for licensure should be interpreted to give substantial weight to nonprofit criteria, creating a license auction in which their particular resources, or "currency," would go the furthest. Hence, the ACLU argued that nonprofit institutions should be given special consideration so as to promote cultural and political diversity.[113] Most compelling were the arguments of the universities, which, presumably, were equipped with a comparative advantage in the manufacture of "public interest" rationales for favorable treatment.[114] When the House and Senate were stalled over competing bills (the White bill favoring Commerce Department control and the Senate version establishing an independent commission), the Association of College and University Broadcasting Stations "tried to profit

[110] The best evidence is derived by following Federal Radio Commission decision making after 1927. Virtually none of the substantive outcomes ostensibly sought by such interests were realized, including (most significantly) licensing of nonprofit radio stations. "[T]he number of operating educational standard broadcast stations dropped steadily from 98 in 1927 (approximately 13 percent of all stations) to 43 in 1933 (about 7 percent)." Sterling and Kittross, *supra* note 73, at 111.

[111] Barnouw, *supra* note 33, at 173.

[112] *Id.* at 109.

[113] See Ernst, *supra* note 66, and Morris Ernst, Radio Censorship and the "Listening Millions," 122 *Nation*, April 28, 1926, at 473–75.

[114] Rosen, *supra* note 34, at 164, 170, 175.

from the deadlock . . . [by seeking] preferential treatment in the assignment of wavelengths and the division of time."[115] While Representative White rejected this on the grounds that it would open the door to similar demands from "labor organizations, amateurs, religious bodies and all manner of groups and interests,"[116] Senator Dill was more attentive. His Senate measure was amended to include special protection for educational broadcasters from commercial station rivalry. This was the legislation that eventually became the Radio Act of 1927, despite RCA and NAB support (representing major commercial broadcasters) for the White bill.

The listeners' groups generally supported Secretary Hoover's efforts at establishing de facto property rights and providing for orderly industry development. While the listeners and broadcasters could well have split over the issue of broadcast spectrum expansion (pro and con, respectively),[117] the fundamental concern during the "chaos" period was in reestablishing a traffic system. Rosen concludes that major radio broadcasters, Commerce Department officials, and listeners groups supported the White pro-Hoover legislation, while the nonprofits and anti-Hoover political interests backed the Dill proposal.[118] The only essential difference in the measures was distributional; the commission approach, with members chosen from each of five geographical regions and with specific nonprofit protectionist language, was seen as widening access to the regulatory process for those interests not well vested in the Administration. This latter group included Senate Democrats (a minority), and anti-Hoover Republicans, particularly Senator James E. Watson (R., Indiana), chairman of the Committee on Interstate Commerce.[119] This coalition won, and control of licensing was ostensibly wrestled away from Commerce Department control.[120]

[115] *Id.* at 99.

[116] *Id.* at 100.

[117] The Indiana Broadcast Listeners Association did, in sharp contrast to the major broadcasters, advocate an engineering study of the feasibility of expanding the broadcast "below 100 meters" (that is, above 3,000 kHz). As international agreements in 1927 set aside significant wavelengths in this region for broadcasting (see above), and as lower frequencies were reserved for mobile, amateur, and government use in the United States, this was a logical suggestion. Listeners Recommend New Bills be Drafted, N. Y. Times (January 9, 1927).

[118] Rosen, *supra* note 34, at 98.

[119] *Id.* at 96–97. Another "public" group consisted of small, independent broadcasters, who feared (correctly, it turned out) that they would receive poor time and wavelength assignments under the National Association of Broadcasters-backed legislation. They opposed both bills. *Id.* at 103.

[120] It is unclear which side actually determined policy actions following the Radio Act of 1927. While Dill's legislation clearly prevailed in law, establishing the Federal Radio Com-

IX. The 1927 Radio Act as an Equilibrium Political Solution

Although licensing control passed into the hands of an independent commission, economic allocation was not much affected vis-à-vis the rights established in the pre-"breakdown" period. By virtually all accounts, the commission made legal what Secretary Hoover had accomplished via extralegal authority: it recognized priority-in-use rights to spectrum space, with discretionary power and time assignments favorable to those broadcasters serving larger audiences. Marginal broadcasters with irregular transmissions were expropriated altogether; nonprofit institutions were relegated to crowded spectrum "ghettos" where time was scarce and listenership difficult to attract. Many such licenses were soon withdrawn by their owners due to unsustainable financial losses. In its third annual report, the Federal Radio Commission described its interpretation of the "public interest, convenience, or necessity" standard it had utilized in establishing order in the airwaves.

> The first important general principle in the validity of which the commission believes is that, as between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right. This is not a doctrine of vested rights or an extension of the property law to the use of the ether; it applies only as between private individuals or corporations operating stations and not as between either of them and the plenary power of the United States to regulate interstate commerce.
>
> Where two contesting broadcastings do not have otherwise equal claims, the principle of priority loses its significance, in proportion to the disparity between the claims. In a word, the principle does not mean that the situation in the broadcast band is "frozen" and that existing stations enjoying favorable assignments may not have to give way to others more recently established.
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> • • •
>
> Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience or necessity means nothing if it does not mean this. The only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible.[121]

This passage is entirely in line with FRC and subsequent FCC policy pronouncements, in coupling de facto property rights with the potential

mission by statute, Hoover moved quickly to exercise control over all presidential nominees for commissioner and even to use Commerce Department funds to pay for FRC expenses, strangely unprovided for in the initial legislation. Hence, Hoover's hand was decisive in all early FRC rule making.

[121] Federal Radio Commission, Annual Report 32 (1929).

for agency discretion in the "public interest." The market is neither purely private nor, in substance, one of government control, but is ruled by a hybrid policy in which spectrum rents are shared by private users and government regulators or their assignees. This distribution makes eminent sense for the two principal transactors, Congress and broadcast license holders, and gives both equity "owners" incentives to maximize rent values.

That the arrangement was legally fashioned to wear the clothing of "public interest" led quickly to logical curiosities. While condemning all forms of "selfishness," it asserts that advertising—quite controversial in the 1920s radio market and often condemned even by radio champions such as Herbert Hoover—would not be so defined, on the grounds that the selfish aspect of advertising makes enjoyable programs economically possible. Yet that view may as well be substituted into the argument for self-interest as a motive anywhere. The commission's purpose in condemning private self-interest and then endorsing advertising (the manner in which financial self-interest was pursued in radio) was to endorse an implicit marketplace standard, allowing licensees to maximize audiences and, hence, ad revenues, while carefully regulating "selfish" speech—that is, the airwaves would not be used for controversial communications interesting merely to a minority of listeners. This was the "selfishness" that the FRC believed it had a mandate to regulate. And, interestingly, it is the form of broadcasting of least interest to major broadcasters, particularly when one's competitors are similarly constrained.

The commission's "public interest" solution to the property right problem essentially accomplished the following:

1) it served to establish quickly and cheaply de facto property rights to spectrum based on the priority-in-use rule;

2) it thinned out the spectrum by failing to renew licenses of 83 broadcasters in July 1927 and gave reduced power and time assignments to nonprofit organizations;[122]

3) it awarded enhanced power assignments (as high as 50,000 watts—up from 5,000 watts) to some fortunate large broadcasters, generally network affiliated;[123]

4) it established a rights-enforcement mechanism, wherein license holders were to self-police the airwaves by filing complaints against interfering broadcasters;[124]

[122] Barnouw, *supra* note 33, at 216.

[123] *Id.* at 218.

[124] Federal Radio Commission, *supra* note 44, at 16.

5) it froze AM band width at essentially its 1924 size, using less than five percent of the then-utilizable capacity for broadcasting.

This solution represented an optimum politically because each of the influential parties was given a share of the rents created in proportion to their political influence, making each better off than they would fare in alternative nonlicensing arrangements. Such rents emanated from the allocation of spectrum rights to private users on a nonfee basis and from entry restrictions enhancing the values thereby created. In that vested rights were developing and lengthy, costly litigation would have followed had an expropriation of major broadcast license holders occurred, an outright nationalization of airwave property was not a desirable alternative for regulators. Such a course would also have carried the opportunity cost of an immediate loss of support by major broadcasters. It was far better for regulators to award broadcasters generous rents subject to "public interest" discretion in the licensing process that could be partially apportioned by incumbent officeholders.

Broadcast licensing became, hence, an inordinately political affair. FRC General Counsel Louis G. Caldwell noted the "political pressure constantly exercised . . . in all manner of cases," and the 1927 Act's creator, Senator Dill, pointedly rejected a later suggestion that congressional members treat the commission like a court of law and refrain from attempting to influence assignments.[125] The 1928 Davis Amendment was in the spirit of further politicization of wavelength assignments, and an authoritative Brookings Institution study soon reported that "probably no quasijudicial body was ever subject to so much Congressional pressure as the Federal Radio Commission."[126]

What was evident was that the issuance of zero-priced franchises could stimulate an effective rent-seeking competition from constituencies willing and able to pay for the broadcasting privilege, with the means of payment constrained by existing legal institutions. Hence, pecuniary transfers to the U.S. Treasury were not a viable option because they would have represented a de facto expropriation of not only private spectrum users, but also of political decision makers in both Congress and the regulatory bureaucracy. Instead, other margins in a quid pro quo arrangement were developed. For instance, Congress immediately acted to regulate content with such incumbent protectionist devices as the equal time rule (codified in the Radio Act), and the commission very quickly found it could exercise authority over broad forms of content, such as "fairness."[127] And, of course, pure influence peddling in the procurement of licenses could yield both legal and extralegal benefits for incumbent Congressmen.

[125] Barnouw, *supra* note 33, at 217.

[126] Laurence F. Schmeckebier, The Federal Radio Commission 55 (1932).

It is interesting that "public interest" or "citizen" groups also acceded to the rent distribution form of regulation, even though their announced interests were soon liquidated by the regulatory apparatus selected. Educational broadcasters, for example, were treated very harshly by the Federal Radio Commission: "virtually all stations operated by educational institutions received part-time assignments," sharply increasing educational station fatalities in 1928 and 1929.[128] Yet their advocates had supported placing the question of license distribution into a political context where nonprofit spokesmen had access; this was preferred to a pure market allocation where all such leverage would have evaporated. The preliminary evidence suggests that a principal-agent problem dominated the interest group action of such nonprofit lobbyists, biasing their actions toward the establishment of institutions in which the agents' specific human capital—advocacy in the press, testimony in public hearings, and so forth—and not announced group objectives, was maximized.

The basic stability of the broadcast regulatory structure derives from the commission's ability to establish an off-budget auction, in which the rents associated with licensure are appropriated to competitive constitutencies as merited by the political pressure they effect. This can lead to a shifting equilibrium, as groups rise and fall in influence, but the agency's task is to find, at any moment, the optimum solution given the various claimants' strength. This is achieved via public hearings, where such demand intensities are gauged, ex parte contacts, congressional liaison and funding levels, and the market for postagency employment.[129] (Similarly, the legislative and executive branches calculate optimal oversight strategies based on such factors, as well as campaign contributions and [for Congress] speaking fees paid by trade associations.) Zero-priced broadcast licensing is not a "giveaway" of public resources in the strict sense; rather, it is the stimulus generating a rent-seeking competition in dimensions where gains may be internalized by regulatory authorities. Auction claimants are rewarded with rents in proportion to their economic and political strength, which is only to say that licenses go to highest bidders denominated in currency that can be converted by actual decision makers.

[127] By 1929, the commission was taking "fairness" into account in licensing decisions. See Federal Radio Commission, *supra* note 120, at 33.

[128] Barnouw, *supra* note 33, at 218.

[129] Robinson, *supra* note 3, offers a fascinating overview of this general process.

Hence this market exhibits Posner's classic "taxation by regulation," as has been noted (looking at regulatory decisions decades hence) by Bruce Owen.[130] What is noteworthy here is that the framework selected in 1927 was not the result of a series of "historical and technological accidents," nor did it reflect "simple ignorance on the part of courts, commissions, and Congressional committees of the economics and technology of broadcasting."[131] Private spectrum rights were not rejected in favor of government allocation out of "ignorance" but were actually established as part of a hybrid regulatory system that respected vested rights in broadcast spectrum and even enhanced them in value via supply restriction. Such private rights were "purchased" by broadcaster subsidies to "public interest" concerns, a tax which initially amounted to little more than nominal acquiescence to (and political support for) a federal licensing authority but would, over time, include significant payments to unprofitable local programming, "fairness doctrine" regulation, extensive proof of commitment to "community" in station renewals, and the avoidance of broadcasting content offensive to the political party in power.[132] That this means of payment is used to charge for the use of scarce spectrum, and not money bids to the fisc, is no more "mistaken" or "accidential" an arrangement than the sales price set by Oliver North on "bargain" missiles to the Ayatollah, allowing Colonel North to divert the excess demand not to the U.S. Treasury but to a *Contra* account in Switzerland.[133] Rents created by policy can be at least partially extracted by regulators exercising authority in the public interest, but property rights of the latter become severely diluted once such rents flow into the general budgetary pool.

The fact that spectrum fees and discretionary regulatory authority are substitutes has never been misunderstood in the U.S. regulation of the broadcast spectrum. While the Department of Commerce established a

[130] Owen, *supra* note 27, at 46–47.

[131] *Id.* at 43–44. Why the courts, specifically, have tended to endorse the constitutionality of the regulatory scheme chosen requires a different explanation than that given in this article for the behavior of regulators and politicians.

[132] See Robert Crandall, Regulation of Television Broadcasting, Regulation 31–39 (January/February 1978); Noll *et al.*, *supra* note 3; Owen *et al.*, *supra* note 27; Levin, *supra* note 3; Walters, *supra* note 27; and Powe, *supra* note 27.

[133] Whether regulators or legislators extract rent for "self-interest" or "ideological" purposes (assuming these to be distinct ends) is an interesting question beyond the scope of this article. While the North example prompts one to think of ideological preferences, the broadcast regulation experience suggests both motives to exist simultaneously (and, of course, as substitutes). The essential point is that rent may be extracted, whatever the ultimate purpose. See Fred McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. of Legal Stud. 101–18 (1987).

separate designation for radio broadcasters only on September 15, 1921, by early 1922 Herbert Hoover and the radio interests were already considering the nature of the tradeoff involved. "Now the radio world was anxious for regulation to prevent interference with each other's wavelengths. A good many of them were insisting on the right of permanent pre-emption of the channels through the air as private property. And I concluded that would be a monopoly of enormous financial value and we had to do something about it."[134] What Secretary Hoover did was to call the first radio industry conference (February 1922) where he established the "public interest" rationale for regulation. The regulatory strategy selected reflected a keen sense of the fundamental value and importance of the budding marketplace. "It is inconceivable that we should allow so great a possibility for service, for news, for entertainment, for education, and for vital commercial purposes, to be drowned in advertising chatter, or for commerical purposes that can be well served by other means of communication. . . . There is involved . . . in all of this regulation, the necessity to so establish public right over the ether roads that there may be no national regret that we have parted with a great national asset into uncontrolled hands."[135]

X. Auctions, Property Rights, and Coase: A Conclusion

Ronald Coase has theorized that policymakers of the twenties were largely unaware of the efficient solution to the common resource problem in spectrum, when "[T]he simplest way of doing this would undoubtedly be to dispose of the use of a frequency to the highest bidder, thus leaving the subdivision of the use of the frequency to subsequent market transactions."[136] Yet the early history of broadcasting shows why this was not the simplest assignment rule. Airwaves were not resources that had been carried in inventory by any public agency. In essence, the spectrum for broadcasting was discovered by radio pioneers and exploited by entrepreneurs who risked capital in the creation of valued rights. Early discoveries were rapidly communicated; the number of broadcast stations populating this new frontier jumped to several hundred virtually overnight. And by then the public auction idea was moot; resource owners were established, and auctioning their spectrum was far from the simplest allocation rule.

Homesteading was. Indeed, the legislation that established federal control of the airwaves owes its success in great measure to the methodical

[134] In Johnson, *supra* note 21, at 81.

[135] *Id.* at 83.

[136] Coase, *supra* note 7, at 30.

manner in which the FRC and, subsequently, the FCC, have observed the homesteading principle in practice.[137] But, of course, this allocation mechanism is not identical to a priority-in-use rule enforced at common law. Market transfers are screened by federal authorities; license renewals are less than costless or riskless; new spectrum use for broadcasting is prohibited by law. The system has transferred net resources to incumbent broadcasters, broadcast regulators (including oversight congressional committees), and advocates of the "public interest."

One of the most interesting findings available in observing the actual establishment of these private rights is the manner in which political "rights" were quickly vested as well. The partnership of airwave holders (private) and airwave rights grantors (public) created a natural community of interest for those agents intimately involved in creating the rights structure itself. In essence, Secretary Hoover, Senator Dill, and Congressman White "homesteaded" broadcasting policy nearly as quickly as broadcasters staked out the spectrum. Reverting to a money auction would have expropriated the political agents' de facto rights as well.

Of course, new spectrum allocations were made as early as 1923, 1924, and 1927. They would be granted without dollar payment, as would later allocations of VHF and UHF television (1940s and 1950s), microwave and satellite broadcasting rights (1970s), and cellular telephone frequencies (1980s). It is interesting to note that the early assignments were made in a sort of prospective homesteading basis—awarded to comparatively advanced broadcasters who were likely to exploit the resources most quickly and fully. Yet the system of assignment which later developed to replace the pioneering rule (when government awarded de novo rights) came after an established legal structure demonstrating a political optimum was firmly in place in the radio market. This would guide policymakers in the creation and assignment of new rights. The institution then established was the comparative hearing, where political interests could be weighed in a formal procedure in order to achieve a social maximum—as determined by the assignment authority. Bringing themselves to the nexus of decision making in a brisk competitive rivalry for zero-priced frequency rights has given regulators and lawmakers a very well understood discretion over the life and death of lucrative and influential broadcasters.[138]

[137] It is also revealing that, even decades later, international divisions of spectrum rights were achieved via national homesteading. Levin, *supra* note 27, at 106–7.

[138] Comparative hearings were not a radical departure from the homesteading solution of the 1920s but an institutional adaptation to a new market where the vested rights of broadcasters to "ether" were somewhat weaker. But the principal result of the de jure outcome was the de facto result of Hoover's "priority-in-use," *Oak Leaves*' "pioneering," and the FRC's "public interest" standards: the best television assignments were won by the major radio networks (which had, in essence, established a vested right in FCC influence).

Once the initial homesteading had occurred, diverse constituencies came to demand their share of lucrative spectrum rights. These demands brought the prevailing industry attitude vis-à-vis property rights to the fore well before the Radio Commission was born. The May 1926 issue of *Radio Broadcast* featured a provocative essay dealing with the moral dilemma involved in deciding who—including the antivivisectionists—should be allowed to broadcast.

> [S]uppose that the anti-vivisectionist brethren want to broadcast, and have the money, but can't get a license because there are no wavelengths left? Isn't that a hardship, in a world where publicity is everything and the inarticulate go under? Already flour mills, vaudeville theaters, public service corporations, colleges, cabarets, Christian Scientists, Zionists, and the Y.M.C.A. have stations on the air, and why should not the anti-vivisectionists, who consider their cause vastly important, be given a wavelength? They would have got one, if they had come a little earlier. Let them divide time with an existing station, it is proposed. But the existing stations are filling their time. If a man or a firm has invested $100,000 in a broadcasting station, taking away some of its time may cut the value of the investment 50 percent, or more. That is confiscation, and not ethics.[139]

That the soon-to-be established Radio Commission would endow large commercial broadcasters not only with de facto private rights to airwaves but would also protect them with monopolistic restrictions (by freezing broadcast band width) was testimony to the broadcasters' perfect understanding of economics and politics, the eagerness of legislators and regulators to channel competitive forces to the political arena in their self-interest, and the willingness of "public interest" agents (antivivisectionist and otherwise) likewise to push the auction process toward the political sphere no matter what its ultimate economic effect on the constituencies they purported to represent. There was little confusion over the role of property rights; the political conflict was in constructing a prevailing "distributional coalition."

The public interest licensing arrangement has not come about due to "simple misunderstandings which are rife in discussion of government policy toward the radio industry."[140] Nor was "The main reason for government regulation of the radio industry . . . to prevent interference."[141] Indeed, as early as 1924, the *American Economic Review* very

[139] Dreher, *supra* note 77.

[140] Coase, *supra* note 7, at 32.

[141] *Id.* at 24.

nicely framed the property rights problem in these words: "Are we not simply dealing with space in a fourth dimension? Having reduced space to private ownership in three dimensions, should we not also leave the wave lengths open to private exploitation, vesting title to the waves according to priority of discovery and occupation?"[142]

The policy pursued by the Commerce Department was then seen for what it was. In the most complete volume dealing with the economics of broadcasting to that time, Hiram Jome's 1925 analysis[143] saw that any spectrum confusion would be ameliorated by either effectively expanding the band width so as to eliminate scarcity, or by rights definition and rational market behavior. "Unless technical advances remedy the situation, the tendency will be for certain broadcasting stations to establish property rights to wave lengths as a protection against interference. In effect, this is what happens when wave lengths are assigned by the licensing authorities."[144]

The interference problem was not a puzzlement to the policymakers of the time. But later analysts would miss the obvious, apparent solution in favor of the theoretically appealing auction model of allocation. "Define and sell" is an analytically satisfying approach to resource allocation problems. It achieves appealing results in terms of both allocation and equity (that is, rents go to the public treasury). Yet it has led even the best economists astray in interpreting the intent and, hence, the actual origins of broadcast regulation in the United States.

In focusing on the idea of auctions, it was not recognized that the first claimants on broadcast spectrum resources were private prospectors whose rights became vested in fact, if not in law, before the government was generally aware of its "inventory." These rights seriously complicated any future auctioning of spectrum as it would upset the quasi-legal arrangements already established. Wave owners did not want the government charging for spectrum that they de facto owned. Significantly, "fiat allocation"[145] was not the initial assignment rule, "priority-in-use" was. Hence, private rights were vested in law and in fact from the earliest days of radio.

Conversely, regulators and legislators did not desire to part with their ownership rights, exercised in the license assignment process, which auctioning would do both legally (claimants could argue that they had established greater rights via their payment for such) and practically (as any pecuniary payment to the treasury for broadcast rights would necessarily lower the intensity of competition for new licenses or renewals). It is only the "public interest" discretion that legislators or regulators may realistically employ to internalize benefits, once we see license fees as common resources owned jointly by government policymakers. Moreover, in proportion to their political strength, agents for organized nonindustry, nongovernmental interests concerned with broadcasting tend to favor the licensing regime as transfers of wealth in terms of political currency. By being endowed with human capital specific to the public regulation process, they acquire rents not available to them in a common law-based regulatory structure for spectrum rights.

The behavior of regulators in this market is far less mysterious, or analytically error prone, than has been previously asserted. When viewed in the context of utility maximization, these actors have pieced together a regulatory apparatus that is entirely consistent. Although the modern interpretation of broadcast regulation has been built upon the view that federal licensing was a faulty allocational policy with unforeseen—and unfortunate—consequences, the construction of public interest licensing distributed property rights to spectrum in a manner in which the important regulatory players were compensated as anticipated. Most compellingly, a common-law solution to the "tragedy of the commons" problem was seen by the creators of the regulatory system as an unsatisfactory alternative, due specifically to its distributional effects. That the political marketplace pointedly vetoed a property rights solution that would bypass regulators and legislators while holding entry open into broadcasting was not a reflection of technical incompetence but of self-interested rationality.

[142] William Wallace Childs, Problems in the Radio Industry, 14 Am. Econ. Rev. 520, 522 (1924).

[143] Dr. Jome was professor of economics at Denison University and dedicated his lengthy volume on radio economics to his teacher, Richard T. Ely.

[144] Hiram L. Jome, Economics of the Radio Industry 173 (1925), footnote omitted.

[145] Owen, *supra* note 27, at 36.

TIME
VIEWPOINT
Sunday, Apr. 09, 2006

Pssst! Who's behind the decline of politics? [Consultants.]

On the evening of april 4, 1968, about an hour after Martin Luther King Jr. was assassinated, Robert F. Kennedy responded with a powerfully simple speech, which he delivered spontaneously in a black neighborhood of Indianapolis. Nearly 40 years later, Kennedy's words stand as an example of the substance and music of politics in its grandest form and highest purpose—to heal, to educate, to lead. Sadly, his speech also marked the end of an era: the last moments before American public life was overwhelmed by marketing professionals, consultants and pollsters who, with the flaccid acquiescence of the politicians, have robbed public life of much of its romance and vigor.

Kennedy, who was running for the Democratic presidential nomination, had a dangerous job that night. His audience was unaware of King's assassination. He had no police or Secret Service protection. His aides were worried that the crowd would explode as soon as it learned the news; there were already reports of riots in other cities. His speechwriters Adam Walinsky and Frank Mankiewicz had drafted remarks for the occasion, but Kennedy rejected them. He had scribbled a few notes of his own. "Ladies and gentlemen," he began, rather formally, respectfully. "I'm only going to talk to you just for a minute or so this evening because I have some very sad news ..." His voice caught, and he turned it into a slight cough, a throat clearing, "and that is that Martin Luther King was shot and was killed tonight in Memphis, Tennessee."

There were screams, wailing—just the rawest, most visceral sounds of pain that human voices can summon. As the screams died, Kennedy resumed, slowly, pausing frequently, measuring his words: "Martin Luther King ... dedicated his life ... to love ... and to justice between fellow human beings, and he died in the cause of that effort." There was near total silence now. One senses, listening to the tape years later, the audience's trust in the man on the podium, a man who didn't merely feel the crowd's pain but shared it. And Kennedy reciprocated: he laid himself bare for them, speaking of the death of his brother—something he'd never done publicly and rarely privately—and then he said, "My favorite poem, my favorite poet was Aeschylus. He once wrote, 'Even in our sleep, pain which cannot forget falls drop by drop upon the heart,'" he paused, his voice quivering slightly as he caressed every word. The silence had deepened, somehow; the moment was stunning. "'Until ... in our own despair, against our will, comes wisdom through the awful grace of God.'"

Listen to Kennedy's Indianapolis speech on Time.com and there is a quality of respect for the audience that simply is not present in modern American politics. It isn't merely that he quotes Aeschylus to the destitute and uneducated, although that is remarkable enough. Kennedy's respect for the crowd is not only innate and scrupulous, it is also structural, born of technological innocence: he doesn't know who they are--not scientifically, the way post-modern politicians do. The audience hasn't been sliced and diced by his pollsters, their prejudices and policy priorities cross-tabbed, their favorite words discovered by carefully targeted focus groups. He hasn't been told what not to say to them: Aeschylus would never survive a focus group. Kennedy knows certain things, to be sure: they are poor, they are black, they are aggrieved and quite possibly furious. But he doesn't know too much. He is therefore less constrained than subsequent generations of politicians, freer to share his extravagant humanity with them.

"Television," Walinsky said many years after his Kennedy apprenticeship, "has ruined every single thing it has touched." There was some puckishness to this—he was talking about professional basketball, if I remember correctly—but Walinsky is a serious man and he wasn't really joking. Yes, television has been a wondrous thing. Vast numbers of people now watch presidential debates, State of the Union messages, prime-time press conferences, not to mention terrorist attacks, hurricanes and wars in real time. But television also set off a chain reaction that transformed the very nature of politics. "This is the beginning of a whole new concept," said a very young Roger Ailes as he stage-managed Richard Nixon's 1968 presidential campaign. "This is the way they'll be elected forevermore. The next guys up will have to be performers." Television brought other changes as well. Suddenly, politicians were able to use televised advertising to communicate in a more powerful and intimate (and negative) way than ever before—and suddenly politicians had to raise vast sums of money to pay for those ads. Television demanded transparency, and so the rules of politics had to change as well: no more selection of presidential candidates in smoke-filled rooms.

Hubert Humphrey, in 1968, was the last Democrat to win his party's nomination without winning the most votes in the primaries. Most politicians tend to be cautious, straitlaced people. Confronted by the raging television torrent, by the strange new theatrics of public performance, which makes every last word or handshake a potentially career-threatening experience, they sought creative help to navigate the waters. And so, the pollster-consultant industrial complex was born. By 1976, the process had been turned upside down. A politician most Americans had never heard of—Governor Jimmy Carter of Georgia—won the Democratic nomination, and then the presidency. Ronald Reagan nearly defeated the incumbent President Gerald Ford for the Republican nomination. Carter's pollster, a 26-year-old named Patrick H. Caddell, gave him precise poll-driven instructions about how to conduct himself as President. To be successful, Caddell wrote, Carter would have to run a permanent campaign.

Some of my best friends are consultants. They tend to be the most entertaining people in the political community: eccentric, fanatic, creative, violently verbal and deeply hilarious—the sort of people who sat in the

back of the room in high school and shot spitballs at the future politicians sitting up front. But their impact on politics has been perverse. Rather than make the game more interesting, they have drained a good deal of the life from our democracy. They have become specialists in caution, literal reactionaries—they react to the results of their polling and focus groups; they fear anything they haven't tested.

In early 2003, I had dinner with several of the consultants who advised Al Gore in the 2000 presidential campaign. I asked them why Gore, a passionate environmentalist, had spent so little time and energy talking about the environment during the campaign. Because we told him not to, the consultants said. Why? I asked. Because it wasn't going to help him win. "He wanted to talk about the environment," said Tad Devine, a partner in the firm of Shrum, Devine & Donilon, "and I said to him, 'Look, you can do that, but you're not going to win a single electoral vote more than you now have. If you want to win Michigan and western Pennsylvania, here are the issues that really matter—this is what you should talk about.'"

Gore won Michigan and Pennsylvania, but he lost an election he should have won, and he lost it on intangibles. He lost it because he seemed stiff, phony and uncomfortable in public. The stiffness was, in effect, a campaign strategy: just about every last word he uttered—even the things he said in the debates with George W. Bush—had been market-tested in advance. I asked Devine if he'd ever considered the possibility that Gore might have been a warmer, more credible and inspiring candidate if he'd talked about the things he really wanted to talk about, like the environment. "That's an interesting thought," Devine said.

But apparently not as interesting as all that: Devine, Bob Shrum and Mike Donilon fitted Senator John Kerry for a similar straitjacket in the 2004 campaign. In some ways, the Kerry campaign was even worse. After all, the Senator was a student of politics. He had spent his entire life hankering for the presidency. And then he proceeded to make precisely the same mistake as Gore, allowing himself to be smothered by his consultants. Perhaps the worst moment came with the Bush Administration torture scandal: How to respond to Abu Ghraib? Hold a focus group. But the civilians who volunteered for an Arkansas focus group were conflicted; ultimately, they believed the Bush Administration should do whatever was necessary to extract information from the "terrorists." The consultants were unanimous in their recommendation to the candidate: Don't talk about it. Kerry had entered American politics in the early 1970s, protesting the Vietnam War, including the atrocities committed by his fellow soldiers in Vietnam. But he followed his consultants' advice, never once mentioning Abu Ghraib—or the Justice Department memo that "broadened" accepted interrogation techniques—in his acceptance speech or, remarkably, in his three debates with Bush.

"We're going to meet the voters where they are," Shrum had told me early in the Kerry campaign, which sounded innocent enough—but what he really meant was, We're going to follow our polling numbers and focus groups. We're going to emphasize the things that voters think are important. In fact, Shrum had it completely wrong. Presidential campaigns are not about "meeting the voters where they are." They are about leadership and

character. Mark Mellman, Kerry's lead pollster, figured that out too late. "If you asked people what they were most interested in, they would say jobs, education and health care," he later said. "But they thought the President should be interested in national security."

In Austin, Texas, the political consultant Mark McKinnon watched the Gore and Kerry campaigns from a unique perspective. He had spent his life as a Democrat and now he was working, as a matter of personal loyalty, for his friend George W. Bush. Very much to his surprise—and to his wife's horror—McKinnon was in the midst of a conversion experience, not so much to the Republican philosophy but to the Republican way of doing campaigns. It was so much simpler. Maybe it was because Republicans were more businesslike and saw their consultants as employees, rather than saviors (and paid them accordingly—with a flat fee, rather than a percentage of the advertising buy). Maybe it was just the way Bush and Karl Rove went about the practice of politics. But this was, without a doubt, the tidiest political operation he'd ever seen. There was none of the back biting, staff shake-ups or power struggles that were a constant plague upon Democratic campaigns. There was little of the hand wringing about whether the shading of a position would offend the party's interest groups. Issues, in fact, seemed less important than they did in any given Democratic campaign. And McKinnon had come to a slightly guilty realization: maybe that was a good thing. Rove's assumption was that voters had three basic questions about a candidate: Is he a strong leader? Can I trust him? Does he care about people like me?

Politics was all about getting the public to answer yes to those three questions. Of course, an integral part of the job was aggressively—often stealthily and sometimes disgracefully—painting the opposition as weak, untrustworthy and effete. McKinnon was amazed the Democrats had never quite figured this out. In fact, they had it backward: the character of their candidate, they believed, would be inferred from the quality of his policies. But in the television era, fleeting impressions mattered far more than cogent policies. Presidential politics had been reduced to a handful of moments and gestures. In fact, the 2004 campaign came down to two sentences. Kerry: "I actually voted for the $87 billion [to fund Iraq] before I voted against it."

Bush: "You may not always agree with me, but you'll always know where I stand."

Presidential campaigns are, inevitably, about character. In 2004, at a moment of real national consequence for the United States, character was expressed in the most limited, nonpositive way imaginable: I know you don't agree with me—in fact, most polls showed the public thought that Bush had taken the country in the wrong direction—but at least I'm telling some version of the truth as I sort of see it. Oh, and by the way, you can't trust a thing the other guy is saying. This was the clinching argument at a time of war in the world's oldest and grandest democracy.

Roger Ailes was right when he predicted at the beginning of the television era that in the future all politicians would have to be performers. But politicians are, for the most part, lousy performers.Their advisers are pretty awful at what they do too. In the absence of inspiration, they have fixed upon the crudest, most negative and robotic forms of communication.

They've made moments like Robert Kennedy's in Indianapolis next to impossible.

Consultants are unavoidable, given the complexity of modern communications. But I have a vague hope that the most talented politicians now realize that the public has come to understand what market-tested language sounds like, and that there is a demand for leadership, as opposed to the regurgitation of carefully massaged nostrums. To be sure, the old tricks—the negative ads, the insipid photo ops—still work, but only in the absence of an alternative. What might that be?

I hate predictions. Most pundits, like most pollsters, get their information by looking in the rearview mirror. But let me give 2008 a try. The winner will be the candidate who comes closest to this model: a politician who refuses to be a "performer," at least in the current sense. Who speaks but doesn't orate. Who never holds a press conference on or in front of an aircraft carrier. Who doesn't assume the public is stupid or uncaring. Who believes in at least one major idea, or program, that has less than 40% support in the polls. Who can tell a joke—at his or her own expense, if possible. Who gets angry, within reason; gets weepy, within reason ... but only if those emotions are real and rare. Who isn't averse to kicking his or her opponent in the shins but does it gently and cleverly. Who radiates good sense, common decency and calm. Who is not afraid to deliver bad news. Who is not afraid to admit a mistake. And who, above all, abides by the motto that graced Franklin Delano Roosevelt's Oval Office: let unconquerable gladness dwell.

Wanted: High-Speed Highways

INSTEAD OF LIMITING THE SPEED of vehicles for safety's sake, why not attain the same end by making roads safe for speeding?

Increased automobile speeds on rural highways made possible by construction of roads designed to reduce accidents is predicted by Maxwell Halsey, traffic engineer of the National Bureau of Casualty and Surety Underwriters, in an article in *Civil Engineering* (New York).

Says a reviewer in the New York *Times:*

"Through rural highways, he suggests, should be constructed with a raised center strip dividing the road into two distinct traffic lanes.

"This, he asserts, would prevent head-on collisions. Such roads are made more necessary, he holds, because the higher comfortable riding speed of inexpensive cars, which make up about 70 per cent. of present registrations, have increased the average highway speed at least ten miles an hour.

"'Increasing highway speed merely reflects the individual's demand for increased mobility,' Mr. Halsey writes. 'The twentieth century has placed such a high value on time that the motorist does not like to waste any more of it than necessary in getting from one place to another. It was only a few years ago that highway speed was limited by the class of car the individual could afford.

"'It is true that the inexpensive cars could go fast, but they were not comfortable at high speeds, and wore out much more rapidly. Car manufacturers soon realized this, and the cheapest cars now on the market have comfortable driving speeds which more nearly approach those of higher-priced cars, and they are capable of traveling at speeds in excess of those which existing highways can take care of in safety.'"

BOTH vehicle and surface are now capable of permitting the average speed desired by most motorists, Mr. Halsey thinks, but the design of intersections and straightaways is not such as to make these speeds safe. He goes on:

"The point is, then, that people want increased mobility, as evidenced by the rapid development of automobiles and airplanes, and the traffic authorities should prepare their highways for increased speeds with safety—proposed laws and rigid enforcement notwithstanding.

"Average highway speeds have not yet reached their maximum, and unless highway design is improved to keep pace with them, more and more accidents wi l result.

"The raised center strips will prevent head-on collisions by forcing motorists to drive on the right-hand side of the highway, by eliminating mid-block turns, and by reducing headlight glare. The building of three- and four-lane highways, with the outside lanes of smooth cement and the inside lane or lanes of rough macadam, encourages motorists to use the attractive outside lanes, leaving the center free for passing. Improved shoulders will induce motorists to park off the traveled way."

Are We Exploding?

ASTRONOMERS are now intensively at work on the solution of one of the universe's greatest scientific problems.

It is thus stated by Science Service's *Daily Science News Bulletin:* "Is the universe actually exploding like a gigantic shell, flying to pieces at the rate of thousands of miles per second, and doubling its size every fourteen hundred million years?" It goes on:

"Sir James Jeans, British astronomer, revealed here after visiting Mt. Wilson Observatory in California that an answer to this important question may be expected from a dual attack by Mt. Wilson scientists, which promises to be successful in a few years. The discovery that the great nebulæ or gigantic star groups are rushing away from us at terrific speeds, some as high as 12,500 miles a second, was termed by Sir James 'a major difficulty in understanding the processes of nature.' This outward bursting of the universe's units was discovered at Mt. Wilson Observatory through shifts in the spectral lines of light from the distant nebulæ.

"Whether the immense recessional velocities observed by Mt. Wilson astronomers are real exploding motions of the universe or whether the research now in progress will prove them to be merely apparent effects that can be explained otherwise, Sir James did not express an opinion. But he did explain that the stars are known to be millions of millions of years old, and that the universe, if it has been exploding continuously, must have once been extremly small and compact.

"Explaining the size and structure of the universe as explored by the Mt. Wilson telescopes, Sir James said that if the farthest reach of the largest telescope to-day, a distance that would take light a hundred and forty million years to cross, were only one mile, and 300 tons of apples were scattered about approximately twenty-five yards apart, then each apple would roughly represent a nebula or gigantic aggregation of stars like the Milky Way system in which our sun is but one of several hundred million stars."

Television's Dilemma

NOW THAT WE HAVE TELEVISION, what shall we do with it?

This question, we are told in a press bulletin issued by Television News Service (Boston), expresses somewhat the dilemma of the television broadcasters. Says Hollis Baird, chief engineer of Shortwave and Television Corporation: "It's really not so bad as that, but being a new art, it offers an unlimited field of study as to how it can be made the most of in an entertainment way." He goes on:

"Television may count as a blessing the fact that the voice end of the radio art has been so highly developed that television entertainment must be considered as a sight-and-sound proposition.

"The talking motion-pictures have successfully demonstrated the great value of combined sight-and-sound entertainment. In television this is a great help at this time, since the added entertainment of the sound compensates to a great deal for the limitations of present-day television, successful as it is.

"One of television's first steps will be the projection of talking-picture films which will bring to the home entertainment based on sight and sound which is the result of years of work on the part of motion-picture producers.

"In addition, mere news flashes need no longer be sent out audibly, for a news event recorded by sight and sound can be put on the air the day it happens, in the evening, when every one will be at home to enjoy it.

"Then comes the more involved question of studio productions, direct pick-up entertainment.

"New photocell equipment permits close-up and long shots so that a variety enters television which was lacking in the first efforts.

"Fading-in from one of these 'shots' to the other can be accomplished electrically as easily as a motion-picture fades from one scene into another. This will bring up the question of scenery.

"How much background can be picked up? Upon this will depend the scenic effects. Undoubtedly suggestion and exaggerated details will make up the earliest scenery.

"Then there will be the question of make-up. If make-up can help a motion-picture actor or actress with the fine definition which present-day movies permit, it will surely have a big place in television.

"Just what colors will be best, what features will need emphasis, and many other points will have to be considered.

"The subjects of entertainment will be of interest. Simple variety or vaudeville acts lend themselves most easily to television, but there is a richer field than this, particularly in the dramatic field. That the public definitely favors drama is shown by the great popularity of dramatic skits on the air to-day despite the very definite limitations of drama which come to the ear only.

"The tremendous possibilities of air-drama incorporating sight as well as sound are easily foreseen. Television will have a technique different from motion-pictures, altho allied to them, and once this has been worked out along with the normal progress television is making, the ultimate result will be home entertainment which, if mentioned even ten years ago, would have labeled the prophet as at least some one with badly wandering fancies."

Curran Theatre

OFFICE
CHAS. NEWMAN
MANAGER

San Francisco, Cal., May 27, 1924

Radio Corporation of America,
New York City,

Gentlemen,-

Your semi-portable Super-Heterodyne Radiola set is truly the last word in radio. I used it on my private car all through the West and received programs from distant stations exceedingly well. I even heard stations while the train was going sixty miles an hour.

The Super-Heterodyne has made an ardent radio enthusiast of me.

Very sincerely yours,

al Jolson

Radiola Super-Heterodyne

with six UV-199 Radiotron tubes, and Radiola Loudspeaker. Note the compartments to hold the batteries. Entirely complete except batteries.

$269

RCA

This symbol of quality is your protection

Al Jolson listening in on his Radiola Super-Heterodyne, in his private car. Photo taken by Hanley's Photo & Radio Shop, Kansas City, Mo.

AL JOLSON
Gets the Fun En Route
with a Radiola Super-Heterodyne

Al Jolson gets the fun—gets the music—the sport news—speeding along, listening in. He picks up his "Super-Het" and takes it aboard. No wires, no connections to make. No batteries to carry—they are all inside. Great convenience—but most of all, great performance. The music *is* music—rich and true and mellow. The speeches are clear-voiced and humanly real. Distant programs come in, in full volume, on the loudspeaker. No station ever interferes with another, and each is to be found always on the same marked spot on the dials, ready to be tuned in. Simple—clear—*real!*

Radiola Loop

Distance fans are adding this loop to the "Super-Het" for unusual distance records. Sold ready to be assembled without use of tools.

Model AG-814 . $12.00

"There's a **Radiola** *for every purse"*

Send for free booklet that describes every Radiola.

RADIO CORPORATION OF AMERICA
Dept. 229. (Address office nearest you.)
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Radiola

REG. U.S PAT. OFF.

Press deemed in state of peril

Public favors local outlets

By Jennifer Harper
THE WASHINGTON TIMES

Americans continue to be troubled about the state of the press. But journalists themselves are troubled as well, according to "The State of the News Media 2006," a massive series of surveys and analyses released yesterday by the Project for Excellence in Journalism, a research group affiliated with Columbia University.

Local TV news and local newspapers won the most accolades from the public. Both were rated favorably by three-quarters of the respondents with majorities agreeing that local news organizations concentrated on facts rather than opinions. Such major dailies as the New York Times did not fare so well, garnering a 38 percent favorability rating.

Overall, the public increasingly sees their press as "slanted," with 72 percent thinking the press favored one side or other, according to a poll of 1,464 adults. The number is up from 66 percent two years earlier. About 60 percent found the press politically biased, up from 53 percent.

"Republicans and conservatives are even more prone to feel this way than Democrats," the survey stated.

It found that the percentage of the public who think press criticism of the military weakens the country is at its highest point — 47 percent — in two decades. Although 60 percent of the public approve of the press in a watchdog role over politicians, just 43 percent say the national press is moral.

The researchers found a "values gap on social issues." In a survey of 547 journalists, 6 percent felt that belief in God is necessary to be moral; the figure was 58 percent among the general public. About 88 percent of the press, compared with 51 percent of the public, think society should accept homosexuality.

An ideological divide between the national press and the public also persists. The survey found that 20 percent of the public described themselves as liberal; the figure was 34 percent among journalists. Although 33 percent of the public deemed themselves conservative; 7 percent of the press members identified themselves as conservative. The majority of journalists — 54 percent — say they are moderates, compared with 41 percent of the public.

"Most liberals don't see a liberal point of view," the researchers said, noting that fewer than a quarter of the liberal journalists could think of a news organization that was "especially" liberal; 79 percent could name a conservative news outlet. Among the conservative journalists, 68 percent could name an especially liberal news organization and 68 percent could name an especially conservative one.

Meanwhile, 55 percent of both print and broadcast journalists from national news organizations say the coverage of the Bush administration has not been critical enough in recent years.

"News people are not confident about the future of journalism," the researchers said, noting that 51 percent think journalism is going in the "wrong direction" for myriad reasons.

The entire poll can be viewed at www.stateofthenewsmedia.com.

INSIDE JOURNALISTS' MINDS

Columbia University's Project for Excellence in Journalism yesterday released its "State of the News Media 2006" series of surveys and analyses. These are among the findings in one such poll, a survey of 564 print and broadcast journalists.

7 percent of the national press identifies itself as conservative, **34 percent** claim to be liberal and **54 percent** moderate.

38 percent said they could identify a news organization that was especially liberal, while **82 percent** could identify one that was especially conservative.

91 percent said that a belief in God is not necessary to be moral.

55 percent say the press is not critical enough of the Bush administration, **8 percent** say the press is too critical and **35 percent** say the coverage is fair.

75 percent of journalists are concerned about "bottom-line pressures" affecting news quality. Among them, **86 percent** say the news avoids complex issues, **64 percent** say there is a blurring of news and commentary, **56 percent** say the press is too timid and **52 percent** say sloppy reporting is on the rise.

Source: Project for Excellence in Journalism

The Washington Times

The Washington Times

Conv.	Date	Conv. Time	Participants	Location	Duration	CD Info.	Remarks
251—17	4/27/1971	2:25p - 4:40p	P, HRH, JDE, ELM, KRC, APB, RCBM, WTP, JCW	EOB	1h 54m 40s	251a -18	Continues as RC 251b, 251c
488—7	4/27/1971	7:52a - 7:53a	P, SBB	OVAL	0h 0m 8s	488a -7	
488—8	4/27/1971	7:52a- 7:53a	P, Unk	OVAL	0h 0m 8s	488a -8	
488 9	4/27/1971	7:53a- 7:54a	P, APB	OVAL	0h 0m 12s	488a -9	
488—10	4/27/1971	7:55a - 8:04a	P, STA, HRH	OVAL	0h 8m 13s	488a -10	
488—11	4/27/1971	9:55a - unk before 10:05a	P, HRH, SBB, Unk	OVAL	0h 0m 46s	488a -11	
488—12	4/27/1971	Unk betweeen 10:05a - 10:16a	HRH, JCFl, JAB, FFl, GF, MSF, JSF, WFB, CPA, CTG, GPM, OET, JJF, GML, RCMcC, HDB, EED, CTW, WEK, RLZ, TOP	OVAL	0h 11m 14s	488a -12	Continues as RC 488b
488 13	4/27/1971	Unk between 10:16a & 10:19a	P, HRH	OVAL	0h 0m 19s	488b -2	
488—14	4/27/1971	Unk between 10:16a & 10:19a	P, SBB	OVAL	0h 0m 12s	488b -3	
488—15	4/27/1971	10:19a - 11:43a	P, HAK, MS, HRH, RLZ, JDE, SBB, Unk, HFd, LAI,	OVAL	1h 21m 12s	488b -4	Continues as RC 488c, 488d
488—16	4/27/1971	11:43a - 12:16p	P, WMB, GPS, SBB, Unk	OVAL	0h 22m 34s	488d -2	
488—17	4/27/1971	Unk between 12:16p & 12:40p	Unk [USSS]	OVAL	0h 1m 26s	488d -3	
488—18	4/27/1971	12:43p - 12:45p	P, WP, GP, JSD, WHP	OVAL	0h 2m 51s	488d -4	

The Washington Times

Culture, *et cetera*

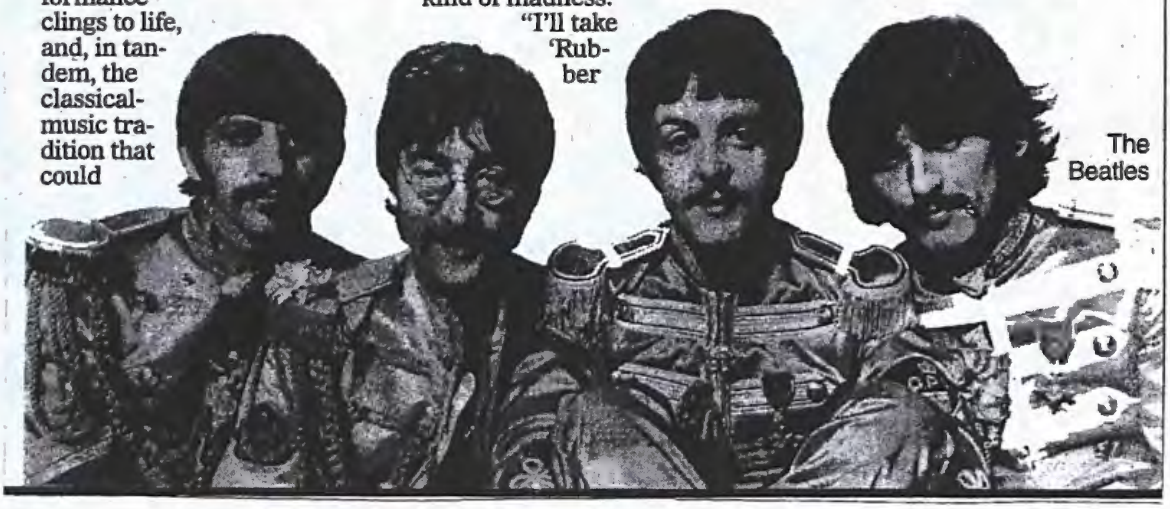
Studio madness

"In 1964, [classical composer] Glenn Gould made a famous decision to renounce live performance. In an essay published two years later, 'The Prospects of Recording,' he predicted that the concert would eventually die out, to be replaced by a purely electronic music culture. He may still be proved right. For now, live performance clings to life, and, in tandem, the classical-music tradition that could hardly exist without it. . . .

"A few months after Gould published his essay, the Beatles, in a presumably unrelated development, played their last live show, in San Francisco. They spent the rest of their short career working in the recording studio. They proved, as did Gould, that the studio breeds startlingly original ideas; they also proved, as did Gould, that it breeds a certain kind of madness.

"I'll take 'Rubber Soul' over 'Sgt. Pepper's.' . . . The fact that the Beatles broke up three years after they disappeared into the studio, and the fact that Gould died in strange psychic shape at the age 50, may tell us all we need to know about the seductions and sorrows of the art of recording."

— Alex Ross, writing on "The record effect," in the June 6 issue of the New Yorker



The Beatles

Glen O. Robinson, The FCC & the First Amendment: Observations on 40 Years of Radio & Television Regulation,
52 MINN. L. REV. 67, 119 (1967).

Douglas

Public TV Stations Seek CPB Changes

By PJ Bednarski -- *Broadcasting & Cable*, 11/1/2005 4:56:00 PM

The Association of Public Television Stations (APTS) is pushing for a legislative package that would change the composition of the Corporation for Public Broadcasting to "de-politicize" the board that has been a lightning rod of partisan bickering this year.

Currently, the president appoints nine members, no more than five from his own party. Under the APTS plan, the president would choose eight members, four from each political party. Of those four, two would be representatives of local public TV stations, and two from local public radio stations. The chair and vice chair could not be from the same political party.

That would seemingly guarantee frequent tie votes, but the board would also consist of the heads of the Library of Congress, the National Endowment for the Arts, the National Endowment for the Humanities and the National Science Foundation.

"We don't want to micromanage the CPB," said John Lawson, APTS president and CEO, whose organization represents 153 public stations. "But we want to shield it from the kind of bad publicity it's had for the last 10 months." He said he had discussed the idea at "highest levels" of PBS but the pubcaster had no comment.

The CPB's former chairman Ken Tomlinson, earlier this year, began complaining that PBS was too liberal. He hired consultants to study the liberal bias of *Now With Bill Moyers*, an expenditure that is being investigated. The CPB was to hear results of the investigation from CPB Inspector General Kenneth Konz on Tuesday, though the public may not hear about it until later.

When Tomlinson's term was up, he named Cheryl Halpern, a major GOP donor, as chairman, and tapped Gay Hart Gaines, also a prominent Republican, as vice chair. In addition, amid howls of protest, he earlier named Patricia Harrison, former Republican National Committee co-chair, as CPB's president.

APTS' Lawson said the CPB heavy-handedness toward programming matters endangered fund raising. "The danger for us is not just the potential of interference but the perception by viewers that we are succumbing to interference," he said. We are not hapless victims. We know how to push back."

He doubts the APTS proposal could be introduced as a bill in this session but said it was "intentionally crafted so that it could get bi-partisan support" and hinted that he has some Congressional backing. "There are lots of members who want to quote 'do something' unquote."

3. Andrew F. Inglis, *Behind the Tube: A History of Broadcasting Technology and Business* (Boston: Focal Press, 1990), p. 6.

4. Inglis, pp. 6–7. See also Erik Barnouw, *A Tower in Babel: A History of Broadcasting in the United States to 1933* (New York: Oxford University Press, 1966), pp. 9–11.

5. Degna Marconi, *My Father, Marconi* (New York: McGraw-Hill, 1962). See also Barnouw, *A Tower in Babel,* pp. 12–15; and Christopher H. Sterling and John M. Kittross, *Stay Tuned: A Concise History of American Broadcasting* (Belmont, Calif.: Wadsworth, 1990), pp. 25–27.

6. *New York Times,* December 15, 1901, pp. 1–2.

7. Helen Fessenden, *Fessenden: Builder of Tomorrows* (New York: Coward-McCann, 1940; reprint, with a new index, New York: Arno Press, 1974). See also Inglis, p. 49; Barnouw, pp. 19–21; and Sterling and Kittross, pp. 27–29.

8. Sterling and Kittross, pp. 33–34.

9. Lee de Forest. *Father of Radio: The Autobiography of Lee de Forest* (Chicago: Wilcox and Follett, 1950). See also Sterling and Kittross, pp. 33–34; Barnouw, *A Tower of Babel,* pp. 21–27; and Inglis, p. 13.

10. Sterling and Kittross, p. 29.

11. Public Law 264, 62nd Congress, August 13, 1912. See Frank J. Kahn, ed., *Documents of American Broadcasting* (Englewood Cliffs, N.J.: Prentice-Hall, latest edition).

12. Inglis, p. 55.

13. "History of the American Marconi Company," *Old Timer's Bulletin* 13 (1) (June 1972): pp. 11–18. See also the papers of the Canadian Marconi Company, Public Archives of Canada. These papers provide a glimpse into the radio industries of the time and their diversification.

14. Gleason L. Archer, *History of Radio to 1926* (New York: American Historical Society, Inc., 1938), pp. 63, 376–380.

15. Archer, pp. 162, 169, 177–189. See also Barnouw, *A Tower in Babel,* pp. 57–61; Sterling and Kittross, pp. 52–58; and Inglis, pp. 98–99.

16. Kenneth Bilby, *The General: David Sarnoff and the Rise of the Communications Industry* (New York: Harper & Row, 1986).

17. Sterling and Kittross, pp. 42, 59–60; and Barnouw, *A Tower in Babel,* pp. 67–72.

18. Joseph E. Baudino and John M. Kittross, "Broadcasting's Oldest Stations: An Examination of Four Claimants," *Journal of Broadcasting* 21 (1) (winter 1977): 61–83.

19. History of Broadcasting and KDKA Radio, Public Relations Department, Westinghouse Broadcasting Company, news release, n.d., pp. 1–34; cited in Lawrence W. Lichty and Malachi C. Topping, *American Broadcasting: A Source Book on the History of Radio and Television* (New York: Hastings House Publishers Inc., 1975), pp. 102–110.

20. "Concert by Wireless," *London Times,* May 20, 1920, p. 14.

21. "CFCF Canada's First Station" (unpublished station manuscript, Multiple Access Ltd., n.d.), p. 3. See also Donald G. Godfrey, "Canadian Marconi: CFCF the Forgotten First," *Canadian Journal of Communication* 8 (4) (1982): 56–71.

22. For the script of WEAF's first commercial continuity see Archer, pp. 397–398.

23. *Congressional Record* 67 (2) (1926): 2309.

24. Archer, pp. 110–113, 189; part of Archer's story is questioned by Bilby in *The General* and by Louise Benjamin. See Louise M. Benjamin, "In Search of the Sarnoff 'Radio Music Box' Memo," *Journal of Broadcasting and Electronic Media* 37 (3) (summer 1993): 325–335.

25. Sydney W. Head, Christopher H. Sterling, and Lemeul B. Schofield, *Broadcasting in America: A Survey of Electronic Media,* 7th ed. (Boston: Houghton Mifflin, 1994), p. 37.

Copyright Law and Practice
by William F. Patry
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signals, any network signals not carried locally if commercial advertising was deleted and local advertising substituted, and an unlimited number of educational broadcast signals. Cable systems were also required to pay 5 percent of the gross receipts from subscribers for the benefit of public broadcasting.[288] This proceeding did not go any further, but it did mark a change in previous FCC thinking, which had been heavily weighted toward protecting local broadcasters by keeping cable out.

As a result of the lack of enthusiasm for the 1970 proposed rules, the FCC joined forces with the White House Office of Telecommunications Policy to bring the various factions together with the goal of drafting final regulations that could be adopted by the FCC and that could then form the basis for copyright reform. After considerable hard bargaining, a take-it-or-leave-it compromise was offered by the White House that included communications and copyright components.[289] In its essential details, this compromise, known as the "Consensus Agreement,"[290] would have permitted, under the Communications Act, cable operators in the largest 100 markets to retransmit the distant signals of four independent commercial stations, any network signal not carried locally, and an unlimited number of educational broadcast stations. Cable operators were required to delete the commercial advertising contained in these distant signals and substitute local stations' commercials. Local exclusivity agreements were to be honored. Cable operators, broadcasters, and copyright owners committed themselves to support copyright legislation requiring compliance with exclusivity agreements, and providing a compulsory license for local signals and those distant signals covered under the communications section, the fees to be paid either according to a voluntary agreement, or failing such

[288] *Second Further Notice of Proposed Rulemaking*, Docket No. 18397-A, 24 FCC 2d 580 (June 24, 1970).

[289] *See* DRAFT SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, OCTOBER–DECEMBER 1975, ch. V at 14–18 (1975) and THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSE: AN OVERVIEW AND ANALYSIS: REPORT OF THE REGISTER OF COPYRIGHTS 15–18 (1992) for a review of this activity.

[290] The Consensus Agreement and accompanying correspondence are reproduced in the Draft Second Supplementary Report at 19–21. Not everyone in Congress was in favor of the role played by the White House in attempting to resolve the cable issue. Senator McClellan, Chairman of the Senate Subcommittee on Patents, Trademarks, and Copyrights was particularly critical. *See* 119 CONG. REC. 9389 (Mar. 26, 1973):

> It has been proposed that special treatment should be accorded the cable television royalty issue. The principal justification for this position is a private agreement developed by Dr. Clay T. Whitehead, Director of the Office of Telecommunications Policy. The Whitehead agreement has been generally interpreted as seeking to eliminate the Congress from any role in determining cable television royalty rates. Even though public law places copyright affairs exclusively in the legislative branch, neither the Copyright Office of the Library of Congress, nor the House or Senate subcommittees having jurisdiction in copyright matters, were represented at Dr. Whitehead's meetings.

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Miller's Lawyer Says He Sought Deal

AP Associated Press

Sun Oct 2,10:43 PM ET

Floyd Abrams, the attorney for New York Times reporter Judith Miller, said Sunday he had tried a year ago to reach an agreement with Special Counsel Patrick Fitzgerald concerning Miller's testimony about the leak of a covert CIA officer's identity.

Instead, a federal judge ordered Miller jailed when she refused to testify before the grand jury investigating the Bush administration's disclosure of CIA officer Valerie Plame's name. The reporter spent 85 days in jail before being released Thursday after she agreed to testify.

Appearing Sunday on CNN's "Reliable Sources," Abrams said: "I tried to get a deal a year ago. I spoke to Mr. Fitzgerald, the prosecutor, and he did not agree at that time to something that he later did agree to, which was to limit the scope of the questions he would ask, so as to assure that the only source he would effectively be asking about was Mr. Libby."

The Times reported that I. Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff, was Miller's source. In a statement Thursday, Miller said, "My source has now voluntarily and personally released me from my promise of confidentiality regarding our conversations." She appeared before the grand jury Friday.

Miller held out, Abrams said Sunday, in part because "she has other sources and was very concerned about the possibility of having to reveal those sources, or going back to jail because of them." Before she finally testified, Fitzgerald promised to limit his questioning to the Libby contacts regarding Plame.

Ignorant reporters

"It is settled wisdom among journalists that the federal response to the devastation wrought by Hurricane Katrina was unconscionably slow," Pittsburgh Press-Gazette national security writer **Jack Kelly** says.

" 'Mr. Bush's performance last week will rank as one of the worst ever during a dire national emergency,' wrote New York Times columnist **Bob Herbert** in a somewhat more strident expression of the conventional wisdom.

"But the conventional wisdom is the opposite of the truth," Mr. Kelly writes.

"**Jason van Steenwyk** is a Florida Army National Guardsman who has been mobilized six times for hurricane relief. He notes that: 'The federal government pretty much met its standard time lines, but the volume of support . . . was unprecedented. The federal response here was faster than Hugo, faster than Andrew, faster than Iniki, faster than Francine and Jeanne.'

"For instance, it took five days for National Guard troops to arrive in strength on the scene in Homestead, Fla. after Hurricane Andrew hit in 2002. But after Katrina, there was a significant National Guard presence in the afflicted region in three [days].

"Journalists who are long on opinions and short on knowledge have no idea what is involved in moving hundreds of tons of relief supplies into an area the size of England in which power lines are down, telecommunications are out, no gasoline is available, bridges are damaged, roads and airports are covered with debris, and apparently have little interest in finding out.

"So they libel as a 'national disgrace' the most monumental and successful disaster relief operation in world history."

Ignorant reporters II

Fox News Managing Editor **Brit Hume** says most reporters in Washington don't seem to know much about the Federal Emergency Management Agency.

"We need to understand what FEMA is," Mr. Hume said yesterday on "Fox News Sunday."

"And it's an appalling fact that very few reporters in Washington seem to know what FEMA is. FEMA, first of all, is not a first responder. FEMA is basically a tiny little agency that has been kept weak. And you know why it's been kept weak? The governors want it that way. In each of these operations, it's always FEMA's job to work through the state and local government — particularly the state government.

"And it's a telling fact of all this that, even as we sit here speaking, the control of Louisiana National Guard and the other state National Guardsmen who are in there . . . has not been relinquished to the federal government because the governor didn't want to do it. And that is a telling fact in all this.

"Look, FEMA's job is just beginning. And what FEMA is, is an agency with supplies and a lot of money. And we're going to see that money spread around — though I guess we can talk about that in the next segment. But it's important to remember what FEMA is [and] what FEMA isn't."

Hindsight squatters

"Recriminations are all the rage today. But really, does anyone ever pay attention to the prophets of doom until it's too late?" the Los Angeles Times' **Michael Kinsley** writes.

"As a good American, you no doubt have been worried sick for years about the levees around New Orleans. Or you've been worried at least since you read that official report in August 2001 — the one that ranked a biblical flood of the Big Easy as one of our top three potential national emergencies. No? You didn't read that report in 2001? You just read about it in the newspapers this last week?" Mr. Kinsley said.

"Well, how about that prescient New Orleans Times-Picayune series in 2002 that laid out the whole likely catastrophe? Everybody read that one. Or at least it sure seems that way now. I was not aware that the Times-Picayune had such a large readership in places like Washington, D.C., and California. And surely you have been badgering public officials at every level of government to spend whatever it takes to reinforce those levees — and to raise your taxes if necessary to pay for it.

"No? You never gave five seconds of thought to the risk of flooding in New Orleans until it became impossible to think about anything else? Me neither. Nor have I given much thought to the risk of a big earthquake along the West Coast — the only one of the top three catastrophes that hasn't happened yet — even though I live and work in the earthquake zone.

"Of course, my job isn't to predict and prepare for disasters. My job is to recriminate when they occur. It's not easy. These days the recriminations business is overrun with amateurs, who are squatting on all the high ground. The fetid aroma of hindsight is everywhere."

Politicizing Katrina

"In trashing President Bush, Democrats have overplayed their hand as never before," the Weekly Standard's **Fred Barnes** writes, referring to Hurricane Katrina.

"Their criticism of Bush began soon after the levees broke in New Orleans and picked up steam once it became clear that thousands of people were stranded in New Orleans without food, medicine, or imminent prospects of being rescued. And the media, more hostile to Bush than ever, adopted the Democratic line that the slowness of rescue and recovery efforts was the fault of Bush and [**Federal Emergency Management Agency Director Michael D.] Brown**," Mr. Barnes said.

"Now, after politicizing Katrina and dividing the country, Democrats insist, disingenuously, that Bush depoliticize the issue and unify the country. He should go about this, Democrats argue, by choosing a 'unity' nominee for the second Supreme Court vacancy. Unity in this case means a candidate Democrats like. And he should jettison his domestic agenda, especially tax cuts. If Bush falls for this, he deserves to have his job rating drop (I suspect he won't).

"There's a good test of whether criticism of Bush is purely partisan. If the accuser also directs blame at **Louisiana Gov. Kathleen Blanco**, who froze in reaction to Katrina, and **New Orleans Mayor Ray Nagin**, so overwhelmed by the hurricane that he didn't carry out the city's emergency plan, then the criticism might have some merit. Another test is whether a critic cites real examples where FEMA failed to carry out one of its missions. Rescuing people from roofs isn't one of them. Most critics, like [House Minority Leader Nancy] Pelosi, fail to offer any specifics."

Tag team

"Some senior Democratic strategists are starting to sound like bitter Republicans when it comes to grumbling about **President Bush**'s teaming of his dad with **Bill Clinton** to raise Katrina aid," **Paul Bedard** writes in the Washington Whispers column of U.S. News & World Report.

"Republicans whined first when the tag team was formed after the tsunami. Their worry: Bush's move was helping to rehabilitate Clinton's image among his critics. Now Democrats believe Clinton's help on Katrina is a de facto endorsement of Bush's handling of the crisis. 'It's killing us,' said a consultant."

• *Greg Pierce can be reached at 202/636-3285 or gpierce@washingtontimes.com.*

The Age of Egocasting

Christine Rosen

Great inventions usually summon images of their brilliant creators. Eli Whitney and the cotton gin; Alexander Graham Bell and the telephone; Thomas Edison and the phonograph. But it is a peculiar fact that one of the inventions that has most influenced our daily lives for the past many decades is bereft of just such a heroic, technical visionary: the television. Schoolchildren aren't told the odyssey of Philo T. Farnsworth, the Mormon farm boy from Iowa who used cathode ray tubes to invent an "image dissector" in the 1920s, or the tale of Russian immigrant Vladimir Zworykin, who worked with the Radio Corporation of America on similar techniques around the same time. Few people know that the first commercial television broadcast occurred at the 1939 World's Fair in New York, where RCA unveiled its first television set.

What is true of the television set is also true of its most important accessory, the device that forever altered our viewing habits, transformed television programming itself, and, more broadly, redefined our expectations of mastery over our everyday technologies: the remote control. The creation and near-universal adoption of the remote control arguably marks the beginning of the era of the personalization of technology. The remote control shifted power to the individual, and the technologies that have embraced this principle in its wake—the Walkman, the Video Cassette Recorder, Digital Video Recorders such as TiVo, and portable music devices like the iPod—have created a world where the individual's control over the content, style, and timing of what he consumes is nearly absolute. Retailers and purveyors of entertainment increasingly know our buying history and the vagaries of our unique tastes. As consumers, we expect our television, our music, our movies, and our books "on demand." We have created and embraced technologies that enable us to make a fetish of our preferences.

The long-term effect of this thoroughly individualized, highly technologized culture on literacy, engaged political debate, the appreciation of art, thoughtful criticism, and taste-formation is difficult to discern. But it is worth exploring how the most powerful of these technologies have

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already succeeded in changing our habits and our pursuits. By giving us the illusion of perfect control, these technologies risk making us incapable of ever being surprised. They encourage not the cultivation of taste, but the numbing repetition of fetish. And they contribute to what might be called "egocasting," the thoroughly personalized and extremely narrow pursuit of one's personal taste. In thrall to our own little technologically constructed worlds, we are, ironically, finding it increasingly difficult to appreciate genuine individuality.

Master and Commander

Engineers created the first home remote control devices in the 1950s. They were rudimentary instruments that connected to the television with a wire and had unimaginative names like the "Remot-O-Matic" and the "Tun-O-Magic." Zenith called its device, aptly, the "Lazy Bones." These wired models offered viewers basic features, such as turning the television on and off, but they were not popular with consumers because the wires connecting the device to the set were cumbersome and often suffered from wear. Within a few years, several companies released more ambitious controls with appropriately futuristic names. A 1955 version of the remote, called the "Flash-Matic," was wireless, using a beam of light aimed at photocells in the corners of the television set to change channels and adjust volume. Advertisements for the Flash-Matic pictured a woman, transfixed before the television, her right hand clutching a remote control that is directing a sci-fi laser beam at the TV. Unfortunately, the supposedly sophisticated photo cells on the television were unable to distinguish the remote control's beams from sunlight, and frustrated Flash-Matic owners found their television tuners oscillating to nature's rhythms rather than their own.

In 1956, a Zenith engineer named Robert Adler solved this problem by using ultra-sonic technology to create the Space Command 400 Remote Control. This remote, which Adler patented, used aluminum rods and tiny hammers to create the pitched sounds that the television set interpreted as "off" or "on" or "channel up" or "channel down." The sounds emitted were inaudible to humans (although not to dogs, which were known to howl painfully as the Space Command went about its business) and the device itself required no batteries. The Space Command was the first reliable remote control device, convenient and well-designed, and Zenith had high hopes for its appeal to consumers, as Adler recognized in numbing prose in his patent application: "It is highly desirable to provide

a system to regulate the receiver operation without requiring the observer to leave the normal viewing position." In other words, if Americans were given an affordable way to remain comfortably immobilized while they consumed their televised entertainment, they would choose it.

A slew of copycat devices soon followed, but the increased cost of fitting televisions to receive the remote's signals kept the remote control from becoming immediately popular with consumers. According to the Consumer Electronics Association, it was 1985 before more televisions were sold with remotes than without. By the beginning of the twenty-first century, however, 99 percent of all television sets and 100 percent of all VCRs sold in the United States came with remote control devices, and infrared and digital technology had replaced Adler's miniature ultrasonics. In 2000, the average household contained four remote controls.

There is a Pavlovian brilliance to the remote control. It is light and easily manipulated with one hand. It responds immediately to any whim with the merest physical effort—more sound, more light, different image, just a tap of the finger or thumb will suffice. Even children are quickly able to master its functions. Sociologists Kathy Krendl and Cathryn Troiano studied fifty toddlers to find out if they knew what a remote control device (RCD) was, how well they could use it, and whether or not their parents limited their use. Their results are startling: "Fifty-two percent of the children said they used the RCD themselves" and "none of the children mentioned specific rules related to RCD use." One subject, three-year-old Jimmy, was incapable of articulate conversation and could neither recognize numbers nor tell time, but he "had mastered the basics of RCD use." He "primarily used the RCD to change channels on the TV in order to watch his favorite programs," and when told the time, clever Jimmy "knows if his program should be airing." Krendl's and Troiano's study underscores the technical simplicity of the remote control. "Preschool children are able to use the technology even at very young ages," and "reading, time-telling, and counting skills are not necessary for using the device effectively."

Despite the conventional wisdom, sociologists have found only modest differences in remote control use between men and women. Elizabeth Perse and Douglas Ferguson found that men "have more positive perceptions of remote control devices," in part because the remote control facilitates their pursuit of greater variety over familiarity. A 1997 report from the research firm Knowledge Networks/SRI observed that men were somewhat more likely than women to change channels during prime-time

viewing (37% of men changed channels ten times or more, while only 24% of women did). Nor are there dramatic disparities among different class, ethnic, and racial groups. Lawrence Wenner and Maryann Dennehy found that "demographic variables do not contribute in a meaningful way to explanations of RCD activities" among the students they studied. Rather, it is a basic human impulse—novelty-seeking—that plays the primary role in people's use of the remote control.

The Age of Choice

The original purpose of the remote control, as Zenith's president put it at the time of its creation, was to "tune out annoying commercials." But it was a federal regulation many years later that made the remote control the indispensable household object that it is today. The Federal Communications Commission's 1972 "Open Skies" decision deregulating satellite communications allowed cable television to become a popular reality in the U.S., as it rapidly did. As one observer noted, "the only people who had an inarguable, demonstrable need for an RCD for their television before the 1970s were the debilitated." But with the rapid increase in television channel offerings, we all needed the remote simply to navigate television's many new options. Cable television dramatically increased the range of choices, but it was the remote control, according to James Walker and Robert Bellamy, which "made it easier for viewers to be choosy."

Taken together, the remote control, combined with the proliferation of entertainment options generated by cable TV, encouraged a new kind of viewing behavior: grazing. Recounting his surveillance of one typical user, researcher Paul Traudt recorded his subject saying the following: "Okay... I'm lookin' for something that's catching my eye. I'll just hold the plus channel and I just go right through all the ... every channel until I see something... I say, 'Okay, let's stay here for a couple of seconds to see what's going on.'" Another research subject said, "I watch bits and pieces, take whatever's there and then go look, ya know, almost foraging for programming." So natural an activity is channel-surfing that Traudt found that his subjects often gestured as if holding an imaginary remote control, depressing imaginary buttons while discussing their viewing habits. With cable television our fertile savannah and the remote control our guide, we quickly became, as the title of a 1989 report conducted by *Channels* magazine suggested, "A Nation of Grazers."

It is worth noting that the word "grazing" is normally applied to the consumption activities of herd animals, unlike "browsing," for example,

which is the verb of choice for perusing library shelves. (We also use "browsing" to describe the way we examine the Internet: platform software such as Netscape or Explorer are the technical browsers; we choose among the results that they have retrieved). Grazing suggests a steady but laconic approach to consumption, and research by Walker and Bellamy found that "clearly the search for something better was the dominant motivation."

Although television grazing is the behavior we most indulge with our remote controls, we can control many other things with the touch of a button. I once watched a toddler point to a wood-burning fireplace and demand, "Turn it on!"—not out of some childish muddle about how to start a fire, but as a rational act, since in his house the only way to enjoy the gas fireplace was, literally, to turn it on with a remote control. So-called "smart remotes"—or universal remotes—can control upwards of twenty different devices in the home, including television and stereo equipment, air conditioners, ceiling fans, window treatments, and lights. Thinking about the next generation of smart remotes, sociologist Carrie Heeter writes, "Imagine coming home and saying 'relax me,' 'amuse me,' 'teach me,' or 'arouse me' to the TV set." Parents could encourage smarter TV viewing by their children, with remote controls that "engage the children in question-and-answer discussions about the program they just watched, helping them recognize stereotypes, talking about the consequences of violence, and so on.... The future belongs to 'smart' remotes."

Our grazing television behavior has moved some critics to view the remote control as a technological paintbrush, a tool that offers great creative possibility for its owner. Umberto Eco once praised the remote as a device that allows people to "transform something that was meant to be dogmatic—to make you laugh, to make you cry—into a free collage." The remote "can make the television into a Picasso." Others are less enthusiastic, calling the frenzied grazing of remote control users a "masturbatory art."

Even our furniture has adapted to the habits inculcated by the remote control. The manufacturer Floral City Furniture, for example, had a knack for capturing the zeitgeist in its designs. In 1928, as the telephone was changing the way people communicated, the company crafted a piece called "the Gossiper," a settee that "allowed people to sit, to phone, and to store things." But it was the recliner that made them famous, prompting the company to change its name to the more apt La-Z-Boy. The company explicitly links its history to Americans' increased addiction to television: "Known as the media decade," the La-Z-Boy company website notes, "the

1980s were defined by sitcoms, spin-offs, and cable, which increased our television-viewing options to an unprecedented 56 channels. People spent more time than ever in front of their TVs." By the late 1990s, La-Z-Boy was manufacturing the "Oasis" chair, which featured a motorized recliner, a beverage cooler, massage function, and a built-in telephone with caller ID—a comfortably tricked out bunker for the heavy television viewer who can't be bothered to interrupt his entertainment to answer the phone, walk to the kitchen, or pull out his own footrest. La-Z-Boy's print advertisements feature remote controls lovingly cradled in channel-stitched cushions, with satisfied customers, feet up, smiling vacantly at the television screen. It is the modern still life: Homunculus with Remote.

The remote control has influenced not only *how* we watch television—turning us into savvy consumers, postmodern artists, or herd-like grazers, depending on your perspective—but also *what* we watch on television. Television programmers reacted swiftly to the change in viewing behavior facilitated by the remote control. As Susan Tyler Eastman and Jeffrey Neal-Lunsford have found, producers soon realized the importance of "grabbing the viewers' attention at the beginning of a program," with the goal of instilling "a sense of loyalty or commitment" as quickly as possible. The remote control made television programming a more Darwinian enterprise. Turnover rates for new programs are high, and there "is an even shorter time for new programs to establish an audience before cancellation."

Merrill Brown, a former editor at *Channels* magazine who coined the word "grazing," believes that remote controls are largely responsible for many of the changes in programming adopted since the 1980s: the fast-paced, quick-edited, herky-jerky camera angles of MTV and other networks; the frequent cross-over appearances by television stars; the increase in expensive opening scenes and special effects. As Marshall Cohen of MTV described, "Programming is responding to grazing ... there is more cutting, shorter scenes, faster-paced shows, and more shorthand visual techniques." Other tactics include "hot switching," or moving directly from one program into the next without a commercial break, and "cold openings," where a program begins without any opening credits. And those ubiquitous network logos that appear in the lower right-hand corner of the television screen during programming are believed to offer subtle reminders to grazing viewers of their favorite channels.

In the end, it is difficult to find a single television program on commercial TV that has not been designed to respond to remote control use. The

device that began life as an accessory to television has now succeeded in transforming television content itself. The lavish first scenes of popular television dramas such as *CSI*, meant to hook the viewer early, and the quick cutaways and montage techniques of reality TV, are all responses to the power of the remote control. Like disciplined border collies, television executives devised creative techniques to manipulate the herd of television viewers who were refusing to view programs in their entirety—all without members of the herd ever feeling that coercive nipping at their heels.

The New Skinner Box

Despite its ability to allow viewers to control *what* they watched on television, the remote could do little to control *when* people watched. Viewers were still beholden to scheduling by network programmers. The ability to "time-shift" by recording a program to watch later was one of the main appeals of the VCR, which became inexpensive and popular in the 1980s. But recording one show while watching another often seemed to require a small army of video recording devices or a PhD in computer programming; even then, the technology was limited. This changed with the advent of the digital video recorder (DVR), a technology that has given us even greater control over television viewing than the remote, but is also impossible to imagine without it. Part video recorder, part computer, the DVR (or PVR, personal video recorder, as it is also known) can compress hundreds of hours of broadcast television programming and store it on a small hard drive for later retrieval. Most DVRs also allow viewers VCR-like control over live television, such as pause, slow motion, and rewind functions.

Only a small minority of homes currently own DVRs—about four percent, according to marketing research firm Knowledge Networks. As *Advertising Age* recently noted, this means that "more homes in the U.S. have outhouses" than these devices. But a similarly meager early market penetration was true for things such as Internet access, which quickly became much less expensive and much more popular. And like the Internet, DVRs are poised to experience rapid growth and acceptance. According to Forrester Research, 17 percent of households report interest in owning DVRs, and by next year, eleven million households are expected to purchase a DVR. Within five years, an estimated 41 percent of homes in the U.S. will have these devices.

The most popular DVR is TiVo, whose logo is a slightly anthropomorphized television set with clownish feet, cute antennae, and a coy

smile. The tone of TiVo's marketing campaign flatters the busy hyper-individualist in all of us—TiVo is all about you, as the "I" sandwiched between the letters "T" and "V" in the device's name suggests. With a knowing helpfulness, TiVo's trademarked slogan declares, "You've got a life. TiVo gets it." TiVo understands your desire to watch what you want, when you want to, rather than waste time randomly grazing. A secondary slogan—"Do More. Miss Nothing"—endorses the time-saving function of TiVo explicitly. But these slogans are not entirely reassuring when you consider their underlying assumptions: that you "miss" something if you don't watch television, for example. In practice, what TiVo really "gets" about your life (just as Adler understood about the remote control) is the fact that you're likely to spend more of it watching television if television viewing can be made to cater comfortably to your whims.

And TiVo can learn a great deal about your whims. Because TiVo has a hard drive, like a computer, it can store your viewing habits. It sometimes asks you to opine on different programs by pushing the "thumbs up" or "thumbs down" buttons on your remote, all in an effort to hone your preferences. By tracking your tastes in this way, TiVo is able to "surprise" you with other programs it thinks you will enjoy, a function that sometimes goes hilariously wrong. In 2002, *Wall Street Journal* reporter Jeffrey Zaslow mined the dangers of TiVo's taste predictions by talking to baffled customers whose TiVos thought they were gay, or neo-Nazis, or stalkers—all thanks to their occasionally eclectic viewing habits. TiVo can also send information about your viewing habits back to TiVo headquarters, which it does frequently. After Janet Jackson's titillating "wardrobe malfunction" during the 2004 Super Bowl, TiVo announced that it was the "most-watched moment to date" by TiVo users (such slow-motion replays of sexualized content have been dubbed "perv-mo" by TiVo users).

Many TiVo customers were startled to learn that TiVo compiles detailed information about its subscribers. Indeed, TiVo recently inked a deal with Nielsen Media Research to monitor and record its customers' viewing habits. As Michael Lewis noted in an early and elegant analysis of TiVo in the *New York Times Magazine* in 2000, "They accumulate, in atomic detail, a record of who watched what and when they watched it. Put the box in all 102 million American homes, and you get a pointillist portrait of the entire American television audience." Concerned about possible infringements on privacy, Reps. John Dingell, Edolphus Towns, and Edward Markey sent a letter to the Federal Trade Commission in 2001, asking them to investigate whether TiVo was engaged in "unfair or

deceptive practices" when it claimed it did not use individually identifiable data about its customers. The letter noted, "Apparently, the only thing stopping TiVo from identifying the viewer is a procedure the company has elected to perform once the personally identifiable data is already transferred and in TiVo's possession."

One pattern of behavior that clearly interests TiVo analysts is the tendency to skip over ads. A recent report by Forrester Research found that TiVo and other DVR users skip 92 percent of commercials. Most viewers simply fast-forward through commercials on their TiVos, though interestingly, a study by the Advertising Research Foundation has found that such fast-forwarding may not blunt the force of a commercial's message: "You will recall it just as well as if you had seen the whole thing." Still, one can imagine a significant transformation in the advertising industry as TiVo becomes a mainstream technology, and some have already speculated that Internet and print advertising might be the beneficiaries.

Ironically, the ease with which TiVo allows users to avoid commercials has encouraged a more insidious form of advertising—product placement within programs themselves. Savvy TiVo users on an e-mail listserv recently noted the placement of large Coca-Cola cups at the judges' table on *American Idol* and frequent glimpses of the Ford logo on the cars driven by the detectives on *Law & Order*. Writing in *Folio*, Michael Learmonth catalogued many product endorsements—from Home Depot, Labatt's beer, Pepsi, and Nokia—on programs such as *Best Damn Sports Show Period* and youth-oriented programming on the WB network. Other technology observers have predicted that we'll soon witness the birth of the wicked stepchild of TiVo and QVC, with interactive television and home shopping channels merging to allow viewers to purchase the clothes, jewelry, or kitchen gadgets they're seeing on television programs—all with just a press of a button on their remote controls.

TiVo Nation

The enthusiasm for TiVo is at times absurd. "TiVo is the greatest thing since wheat," former San Francisco 49ers quarterback Steve Young enthused. "TiVo is the most amazing thing ever invented!" says Rosie O'Donnell. Documentary filmmaker Pete Jones recently declared that, "TiVo has changed my life more than children. It's the only thing in my life that I can count on week after week." During a question and answer session at an electronics show in 2003, Federal Communications Commission Chairman Michael Powell described TiVo as "God's machine."

Far from the madding celebrity crowd, TiVo zeal also runs high. One man told Knight-Ridder news service, "Omigod, you can have my TiVo when you pry it from my cold, dead fingers!" "I've converted. It's my new religion," another said. "I was a Jew, but not anymore. I'm now a TiVo." A TiVo spokesperson described how devoted users send in photographs of TiVo snowmen, jack-o-lanterns carved to resemble the TiVo logo, and, in perhaps the most chilling image, a snapshot of an infant dressed up as the unique, peanut-shaped TiVo remote control. "There's such a unique emotional connection between people and this product," a TiVo spokesperson told the *Contra Costa Times*, in a comedy of understatement.

TiVo enthusiasts on one community listserv unabashedly refer to themselves as the "TiVo Army," adopting military-style ranking based on the number of hours of TV they have stored on their devices (0-19 is a private, 20-199 a lieutenant, and so on, until you reach 5000 hours and are deemed a colonel). After their names, many contributors to the listserv include detailed listings of the models and hours programmed on each of their TiVo units. Many TiVo users on the forum own more than one TiVo, which appears to be common among users. A writer for the *Chicago Tribune* noted that he and his wife each have their own TiVo, so that he can watch ESPN's *SportsCenter* upstairs and "my wife can be downstairs zipping through hours of home-designing shows," prompting one to wonder what, exactly, they ever do together in their leisure time.

Speaking to *Newsweek* in 2003, TiVo's CEO, Michael Ramsay, noted the device's "amazing evangelical following." "People say it changes their lives and helps them manage their children's time. What we have tapped into here is really a lifestyle phenomenon where people believe that TiVo is ... giving them more control and more choice. And that's a good thing in this busy day and age." One man, interviewed by the *New York Times*, even credited TiVo with an improvement in his son's academic performance. "Before we got the TiVo, my son was getting C's and D's in school because he was staying up late to watch his shows and going to school half-awake." With TiVo, however, he's now getting more sleep and his grades are improving. TiVo undoubtedly changes children's experience of television. One blogger, whose daughter was three months old when the family purchased their first TiVo, "gets quite confused when we are watching a non-TiVo TV, and she asks to watch 'a kids' show,' and we have to explain that this TV won't do what ours at home does." She thinks the television is broken. Another mother whose child has grown up watching DVDs said of her four-year old, "She just takes for granted that you can

always cue up the song or scene that you want, or watch things in whatever order you want."

In a survey of their subscribers, TiVo found that 98 percent of them "couldn't live without" their TiVo and "another 40 percent said they would sooner disconnect their cell phone than unplug their TiVo." It is butler, boyfriend, playmate, and therapist manqué.

The company's goal is to make TiVo the "focal point of the digital living room," although it hastens to add that this "doesn't make the television the centerpiece of our homes." In fact, television *has* become the centerpiece of many American homes. One company is now manufacturing a hi-tech television mirror so that we can watch TV during our daily bathroom routines. Another recent advertisement pictured a family gathered around the fireplace, although not in a traditional scene of family conviviality. Rather than looking at each other, their gazes are all fixed on a point above the fireplace: they are staring at the large, flat-screen television that now dwarfs their hearth.

If our advertisements are any guide, we are using devices such as TiVo less as efficient, multi-tasking, modern assistants than as technological enablers that help us indulge in excesses of passive spectacle. TiVo does not free us to watch less TV by eliminating waste; it seduces us with more TV by making television a more perfectly self-centered experience.

Preliminary studies, such as Forrester Research's report, "The Mind of the DVR User," have found that although DVR users adapt quickly to the technology, they also report watching more television after purchasing one. A writer for DTG, the industry association for digital television in the U.K., noted in 2000 that "TiVo-equipped households watch 3 hours more TV a week than other households—but they don't watch scheduled TV anymore." Another study by Next Research found that the number was even higher, with DVR users watching five to six hours of additional television per week. Talking to a family enthusiastic about the DVR, Ken Belson of the *New York Times* recently reported, "the Huntleys did not anticipate how quickly the DVR would transform their viewing habits." As the satisfied Mrs. Huntley describes, "We thought we wouldn't need more than 30 hours when we had the first machine, but now we think that 120 hours is not enough." Even Leo Laporte, a TiVo enthusiast who has written a *Guide to TiVo*, concedes, "We'd like to think that all of the time saved not watching shows in real-time and skipping over commercials is being used for the betterment of humankind.... But in point of fact, it's probably just resulted in watching more TV." One recovering TiVo addict

called it "silicon crack" and said that after five months of heavy TiVo use, he and his wife "snapped out of it to realize that we were watching a helluva lotta TV. Hours and hours of it per day."

TiVo's marketing language encourages its users to overlook this salient fact. On its website, it emphasizes that the machine records hundreds of hours of programming for you, "all while you're out living your life." But it never says how we should characterize the time spent *actually watching* those hundreds of hours of shows when we're back at home. In "The TiVo story," the company's perky founding narrative, the authors write, "TiVo's overriding philosophy is that everyone, no matter how busy, deserves to enjoy the home entertainment of their choosing, at their convenience."

This avoids the more important question of whether watching TV is really what we should be spending so much time doing in the first place. We are talking about the technology, not about what it encourages us to do. Like e-mail, TiVo offers us a more efficient way to perform a particular task, but in this case that "task" is watching television. For those who worry about the negative impact of television, this is akin to celebrating the invention of an easier and more effective syringe for injecting heroin.

Television on Demand

Meat powder made Pavlov's dog drool; television does something similar to our brains. As an extensive treatment of television viewing habits in *Scientific American* noted in 2002, "Psychologists and psychiatrists formally define substance dependence as a disorder characterized by criteria that include spending a great deal of time using the substance; using it more often than one intends; thinking about reducing use or making repeated unsuccessful efforts to reduce use; giving up important social, family, or occupational activities to use it; and reporting withdrawal symptoms when one stops using it." Researchers have found that "all these criteria can apply to people who watch a lot of television."

Even if you don't believe that there is such a thing as "television addiction," Robert Kubey and Mihaly Csikszentmihalyi have compiled some startling statistics about our viewing habits: they found that "on average, individuals in the industrialized world devote three hours a day" to watching television, which is half of their total leisure time. We spend more time watching television than doing anything else but sleeping and working. Using an "Experience Sampling Method" to track people's feelings about television, Kubey and Csikszentmihalyi found that people watching TV

reported "feeling relaxed and passive," a state that electroencephalograph studies of TV watchers have supported; viewers experience "less mental stimulation, as measured by alpha brain-wave production, during viewing than during reading." This pleasurable sense of relaxation ends as soon as the TV is turned off; what doesn't end is "passivity and lowered alertness."

Why is this the case? One explanation is a biological condition called the "orienting response," which Ivan Pavlov identified in 1927. As the *Scientific American* study notes, "the orienting response is our instinctive visual or auditory reaction to any sudden or novel stimulus," and includes the dilation of blood vessels to the brain and the slowing of the heart. Researchers such as Byron Reeves of Stanford University and Esther Thorson of the University of Missouri have studied brainwaves to determine how television activates the orienting response and found that it does so with great facility; this explains why some people lament that they can't *not* watch a television when it is on. Babies as young as six weeks have been found to attend to the images flashing across the TV screen. "In ads, action sequences, and music videos, formal features frequently come at a rate of one per second, thus activating the orienting response continuously," *Scientific American* notes.

An overworked orienting response can have negative consequences for our mental and physical state. Two researchers at Yale University found that television viewing contributes to decreased attention spans and impatience with delay, as well as feelings of boredom and distraction. "Heavy viewers report feeling significantly more anxious and less happy than light viewers do in unstructured situations, such as doing nothing, daydreaming or waiting in line."

Nevertheless, we continue to watch a lot of television, and to induct our children into the culture of viewing. In his trenchant critique of television in *Amusing Ourselves to Death*, Neil Postman noted, "We are by now well into a second generation of children for whom television has been their first and most accessible teacher and, for many, their most reliable companion and friend." Postman wrote this in 1985, when researchers such as Gavriel Salomon had already concluded that "the meanings secured from television are more likely to be segmented, concrete and less inferential, and those secured from reading have a higher likelihood of being better tied to one's stored knowledge and thus are more likely to be inferential." This is especially true for children. An April 2004 study in *Pediatrics* concluded that "hours of television viewed per day at both ages one and three was associated with attentional problems at age seven," even

controlling for factors such as socioeconomic status. "Limiting young children's exposure to television as a medium during formative years of brain development," they concluded, "may reduce children's subsequent risk of developing ADHD" (attention deficit/hyperactivity disorder).

But scientific study and cultural criticism have never succeeded in persuading Americans to give up their televisions. "Throughout our history with The Box," argues Bruce Gronbeck, "we have believed fervently that it brings good, not bad; that even when it's bad it can be controlled; and that when we cannot control ourselves a technology will arise to help us do it." TiVo is precisely this kind of technology. By helping us control what we watch and when we watch it, we mistakenly believe that we are also exercising a broader self-control over our television viewing habits; by only watching what we want to watch, we reason, we will watch less. But early evidence suggests that this is not the case. TiVo users actually end up watching more hours of television every week, including shows they might have skipped without regret if they were not available "on demand." By emphasizing the efficiency of the technology—rather than what the technology is making more efficient—we avoid having to ask whether we really should be watching so much television in the first place, or reflect upon what television does to our intellect and character.

Pod People

The remote control and TiVo are not the only ultra-personalized technologies to captivate us in recent years. One of the earliest technologies of individualized entertainment was the Walkman, the portable radio and cassette player introduced by Sony in July 1979. Marking the twenty-fifth anniversary of the Walkman recently, a writer for the *Philadelphia Inquirer* recalled his enthusiasm for the "mix tape" that the Walkman promoted: "Countless new soundtracks beckoned. I made running tapes, sunning tapes, sauntering tapes, strutting tapes." He was no longer "a prisoner of Donna Summer or Molly Hatchet on the radio." He created personal, portable soundtracks for life.

Not everyone was pleased by this new development, however, and some critics expressed concern that the Walkman would dramatically transform our experience of music for the worse. As music columnist Norman Lebrecht argued, "No invention in my lifetime has so changed an art and cheapened it as the Sony Walkman." By removing music from its context—in the performance hall or the private home—and making it portable, the Walkman made music banal. "It becomes a utility, undeserv-

ing of more attention than drinking water from a tap." The Walkman was no doubt aided in this transformation by the rise of "elevator music." But the Walkman seemed to make everywhere we go an elevator and all music into elevator music. As Lebrecht laments, it "devalued magnificence and rendered it utilitarian."

Today, the iPod—the portable MP3 player that can store thousands of downloaded songs—is our modern musical phylactery. Like those little boxes containing scripture, which Orthodox Jewish men wear on the left arm and forehead during prayers, the iPod has become a nearly sacred symbol of status in certain communities. Introduced only three years ago by Apple computer, the iPod is marketed as the technology of the disconnected individual, rocking out to his headphones, lost in his own world. In certain cities, however, the distinctive white iPod headphones have become so common that one disgusted blogger called them oppressive. "White headphone wearers on the streets of Manhattan nod at each other in solidarity, like members of a tribe or a secret society."

When he introduced the iPod, Apple CEO Steve Jobs claimed that "listening to music will never be the same again." Judging by the testimonials of iPod users, this was not merely marketing overstatement. One iPod enthusiast spoke of his device in tones one usually reserves for describing a powerful deity: "It's with me anywhere, anytime.... It's there all the time. It's instant gratification for music.... It's God's own jukebox." Like TiVo, iPod inspires feverish devotion in its users.

The iPod is not yet a mass technology, due partly to its fairly steep price: the less expensive iPod mini still costs $250. Like TiVo, it is still a technology for the minority—only about one percent of the American population owns one. But like the VCR and the cell phone before it, increased competition and lowered manufacturing costs should eventually drive down prices, at the same time that downloading music from the Internet continues to grow. One estimate from *Newsweek* suggested that by 2008, one third of all songs purchased will be from downloads. The iPod and its competitors are clearly here to stay.

Like TiVo, control is the reason people give when asked why they love iPod. In a February 2004 interview with *Wired News*, Michael Bull, who teaches at the University of Sussex and writes extensively about portable music devices, argued, "People like to be in control. They are controlling their space, their time and their interaction.... That can't be understated—it gives them a lot of pleasure." Like TiVo, this degree of control, once experienced, inspires great loyalty; the praise of iPod users echoes

that of TiVo owners, both of whom often remark on how they can't believe they ever lived without the devices. But because the iPod is a portable technology, just like the cell phone, it has an impact on social space that TiVo does not. Those people with white wires dangling from their ears might be enjoying their unique life soundtrack, but they are also practicing "absent presence" in public spaces, paying little or no attention to the world immediately around them. Bull is unconcerned with the possible selfishness this might foster: "How often do you talk to people in public anyway?" he asks.

This fear of becoming too disconnected from the world around them has prompted some iPod fans to wean themselves from the device. Writing in the *New York Observer* this past summer, Gabriel Sherman discovered the hazards of iPod addiction when he missed his subway stop. "In the past year," he wrote, "I had grown increasingly numb to my surroundings, often oblivious to the world around me, trapped in a self-imposed bubble." His iPod was "like a drug," he confessed, it "had come to dominate my daily existence." He found he was missing the "urban orchestra playing around me ... except for better bagels, I had traded one kind of suburban isolation for another."

Some also worry about iPod's effect on music itself, not only on the listeners. The iPod facilitates a "sampling" approach to music. You can listen to an entire Mahler symphony straight through; but you can also enjoy Bach, the Buena Vista Social Club, and the memoirs of a Buddhist acolyte in one sitting. A touch of Verdi and Strauss can be followed by a healthy dose of Eminem and Kelis. It's all up to you. Like TiVo, iPod offers us an unprecedented level of control over what we want to experience, and this is the feature of the technology most often discussed and praised. But the iPod, like the Walkman, can be leveling or narrowing as well as freeing. It erodes our patience for a more challenging form of listening. The first time a person sits through an opera, patience is tested; they might wonder whether hour after hour of *Die Meistersinger* is really worth it. But with experience and patience comes considerable reward—the disciplined listener eventually achieves a different understanding of the music, when heard as its composer intended. Listening to "Mahler's Greatest Hits" is not the same thing. Sampling is the opposite of savoring.

More profoundly, iPod might change the way we experience the *creation* of music. As portable, high-quality music becomes more readily available, it might dampen our enthusiasm for seeing music performed live or reduce live music to mere spectacle. Listening to live music is a differ-

ent pleasure from merely donning headphones, in part because the listening happens under circumstances not under the complete control of the listener. To watch tension and release move across the face of a solo pianist or to see the rock musician strut lithely across the stage—to watch performers physically caught up in the musical moment—adds an entirely different layer of meaning to the experience of listening. In live performance we listen to music in a way that is less passive and less mundane. The convenience of iPod and its ability to facilitate easy listening is undeniable; but we should not let its convenience discourage us from seeking the distinct pleasure of hearing music made, not merely replayed. And we should be careful that our desire for convenient music does not make all music simply convenient—transforming what musicians do, how they work, and what they write to appease our iPod-driven demand.

Egocasting

What ties all these technologies together is the stroking of the ego. When cable television channels began to proliferate in the 1980s, a new type of broadcasting, called "narrowcasting," emerged—with networks like MTV, CNN, and Court TV catering to specific interests. With the advent of TiVo and iPod, however, we have moved beyond narrowcasting into "egocasting"—a world where we exercise an unparalleled degree of control over what we watch and what we hear. We can consciously avoid ideas, sounds, and images that we don't agree with or don't enjoy. As sociologists Walker and Bellamy have noted, "media audiences are seen as frequently selecting material that confirms their beliefs, values, and attitudes, while rejecting media content that conflicts with these cognitions." Technologies like TiVo and iPod enable unprecedented degrees of selective avoidance. The more control we can exercise over what we see and hear, the less prepared we are to be surprised. It is no coincidence that we impute God-like powers to our technologies of personalization (TiVo, iPod) that we would never impute to gate-keeping technologies. No one ever referred to Caller ID as "Jehovah's Secretary."

TiVo, iPod, and other technologies of personalization are conditioning us to be the kind of consumers who are, as Joseph Wood Krutch warned long ago, "incapable of anything except habit and prejudice," with our needs always preemptively satisfied. But it is worth asking how forceful we want this divining of our tastes to become. Already, you cannot order a book from amazon.com without a half-dozen DVD, appliance, and CD recommendations fan-dancing before you. And as our technologies

become more perceptive about our tastes, the products we are encouraged to consume change as well. A story in the *Wall Street Journal* recently noted that broadcasting companies such as Viacom are branching out into book publishing. A spokesman for Viacom's imprint, which targets 18-34 year olds, told the *Journal*, "Our readers are addicted to at least one reality TV show, they own one iPod, and they are in love with their TiVo." Companies are capitalizing on this knowledge by merging their products. Viacom's contribution to literature are books that spin off of television shows: *He's Just Not that Into You: The No-Excuses Truth to Understanding Guys*, written by a former *Sex and the City* writer, and *America (The Book)*, by *The Daily Show's* faux-naïf anchorman, Jon Stewart, for example.

University of Chicago law professor Cass Sunstein engaged this dilemma in his book, *Republic.com*. Sunstein argues that our technologies—especially the Internet—are encouraging group polarization: "As the customization of our communications universe increases, society is in danger of fragmenting, shared communities in danger of dissolving." Borrowing the idea of "the daily me" from MIT technologist Nicholas Negroponte, Sunstein describes a world where "you need not come across topics and views that you have not sought out. Without any difficulty, you are able to see exactly what you want to see, no more and no less." Sunstein is concerned about the possible negative effects this will have on deliberative democratic discourse, and he urges websites to include links to sites that carry alternative views. Although his solutions bear a trace of impractical ivory tower earnestness—you can lead a rabid partisan to water, after all, but you can't make him drink—his diagnosis of the problem is compelling. "People should be exposed to materials that they would not have chosen in advance," he notes. "Unplanned, unanticipated encounters are central to democracy itself."

Sunstein's insights have lessons beyond politics. If these technologies facilitate polarization in politics, what influence are they exerting over art, literature, and music? In our haste to find the quickest, most convenient, and most easily individualized way of getting what we want, are we creating eclectic personal theaters or sophisticated echo chambers? Are we promoting a creative individualism or a narrow individualism? An expansion of choices or a deadening of taste?

The Shallow Critic

Questions about the erosion of cultural standards inevitably prompt charges that the critics are unduly pessimistic or merely hectoring. After

all, most Americans see no looming apocalypse in the fact that some of our favorite pastimes are watching television and downloading music from the Internet. Aren't our remote controls, our TiVos, and our iPods simply useful devices for providing us with much-deserved entertainment? "Americans love junk," George Santayana once noted. "It's not the junk that bothers me, it's the love." But few Americans have ever shared this sentiment. We like our cheesy reality TV shows and our silly sitcoms. We love the manufactured drama of *The Wire* and *The Sopranos.* What could be wrong with technologies that make our distractions more convenient? But as the critic Walter Benjamin once noted, "the distracted person, too, can form habits," and in our new age of personalized technologies, two bad habits are emerging that suggest we should be a bit more cautious in our embrace of personalized technologies. We are turning into a nation of instant but uninformed critics and we are developing a keen impatience for what art demands of us.

In his 1936 essay, "The Work of Art in the Age of Mechanical Reproduction," Benjamin argued that technological change (particularly mechanical reproduction) fosters a new perspective he called the "progressive reaction." This reaction is "characterized by the direct, intimate fusion of visual and emotional enjoyment with the orientation of the expert." Benjamin compared the live stage actor to the film actor to demonstrate this point: "The film actor lacks the opportunity of the stage actor to adjust to the audience during his performance, since he does not present his performance to the audience in person. This permits the audience to take the position of a critic, without experiencing any personal contact with the actor. The audience's identification with the actor is really an identification with the camera. Consequently the audience takes the position of the camera; its approach is that of testing."

Today, an increasing number of us consume culture through mediating technologies—the camera, the recording device, the computer—and these technologies are increasingly capable of filtering culture so that it suits our personal preferences. As a result, we are more willing to test and to criticize. As we come to expect and rely on technologies that know our individual preferences, we are eager as well to don the mantle of critics. And so we vent our frustrations on Amazon.com and are in turn ranked by others who opine on the helpfulness and trustworthiness of our views. We are given new critical powers to determine the fate of television plot lines; recently, the show *Law & Order: Criminal Intent* allowed viewers to vote on whether a character should live or die (the masses were lenient—

53 percent said the character should survive). Programs such as *American Idol* encourage a form of mass criticism by allowing millions of viewers to phone in their choice for a winner.

But although our mediums for viewing culture, particularly TV, encourage us to be critics, they do not require much critical judgment or even focused attention. As Benjamin suggested, "the public is an examiner, but an absent-minded one." Benjamin correctly feared that this avid but absent-minded criticism would lead to a lowering of culture and a public increasingly vulgar and simple-minded in its ability to understand art. "The conventional is uncritically enjoyed, and the truly new is criticized with aversion."

This brings us to the second tendency fostered by our personalized technologies: an impatience for what art demands. The more convenient our entertainments, the weaker our resolve to meet the challenges posed by difficult or inconvenient expressions of culture. Music and images are now delivered directly to us, and we consume them in the comfort of our own homes. You can see reproductions of major works of art by perusing the Internet; even literature has been modified for easy consumption. As critic Dubravka Ugresic has noted, "we can find it on CD, on the Internet, in interactive computer games, in hypertext." But to what effect? As Benjamin argued, "one of the foremost tasks of art has always been the creation of a demand which could be fully satisfied only later." This is the difference between the canvas and the screen. "The painting invites the spectator to contemplation; before it the spectator can abandon himself to his associations," Benjamin wrote. "Before the movie frame he cannot do so. No sooner has his eye grasped the scene than it has already changed." The qualities of the canvas—uniqueness, permanence—are the opposite of the screen, which fosters "transitoriness and reproducibility." And the canvas cannot be consumed in one's home, at will. It requires that we venture forth into the world that lies beyond convenience.

Benjamin feared that our impatience would eventually destroy the "aura" of art and eliminate the humility we ought to bring to our contemplation of it. But we haven't destroyed art's aura so much as we have transferred it to something else. Aura now resides in the technological devices with which we reproduce art and image. We talk about our technologies in a way (and grant to them the power over our imagination) that used to be reserved for art and religion. TiVo is God's machine, the iPod plays our own personal symphonies, and each device brings with it its own series of individualized rituals. What we don't seem to realize is that rit-

ual thoroughly personalized is no longer religion or art. It is fetish. And unlike religion and art, which encourage us to transcend our own experience, fetish urges us to return obsessively to the sounds and images of an arrested stage of development.

Control Freaks

In his 1909 story, "The Machine Stops," E.M. Forster, taking a page from Samuel Butler, describes a futuristic society where everyone on earth is now living in a vast hive underground and where every need is met by "the machine." The opening of the story reads as follows:

> Imagine, if you can, a small room, hexagonal in shape, like the cell of a bee. It is lighted neither by window nor by lamp, yet it is filled with a soft radiance. There are no apertures for ventilation, yet the air is fresh. There are no musical instruments, and yet, at the moment that my meditation opens, this room is throbbing with melodious sounds. An armchair is in the center, by its side a reading-desk—that is all the furniture. And in the armchair there sits a swaddled lump of flesh—a woman, about five feet high, with a face as white as a fungus. It is to her that this room belongs.

This is Vashti, and as the story unfolds, we find her struggling to come to terms with her son, Kuno, who wants to see the world above-ground, growing evermore suspicious of the power of The Machine.

The Machine itself controls everything. Vashti's comfortable little cell, like millions of others, has everything she could ever possibly need: "There were buttons and switches everywhere—buttons to call for food, for music, for clothing. There was the hot-bath button... There was the cold bath button. There was the button that produced literature, and there were of course the buttons by which she communicated with her friends." All communication is conducted through the machine; people rarely leave their rooms. At one point Vashti harks back to those "funny old days" when machines had been used "for bringing people to things, instead of for bringing things to people." The ease of Machine-fostered life has brought a corresponding flattening of desire and bred a terror of direct experience. When Vashti is forced to travel, she is seized by anxiety: "One other passenger was in the lift, the first fellow creature she had seen face to face for months. Few traveled in these days, for thanks to the advance of science, the earth was exactly alike all over." The sensibility is captured by the society's experts, who frequently remind citizens: "Beware of first-hand ideas!"

When The Machine begins to fail, the citizens, unable to muster resistance, passively adapt to the strange noises, moldy food, stinking bathwater, and "defective rhymes that the poetry machine had taken to emit." The Machine eventually grinds to a halt, panic ensues, and many people go crazy from experiencing "an unexpected terror—silence." Forster's dystopian story is a caution against imputing too much power to our machines, and of allowing feelings of technological empowerment to mask human weakness.

In his 1934 book, *Technics and Civilization*, Lewis Mumford challenged people to consider the accommodations they were making to their machines. "Choice manifests itself in society in small increments and moment-to-moment decisions as well as in loud dramatic struggles," he noted. "The machine itself makes no demands and holds out no promises: it is the human spirit that makes demands and keeps promises." But that spirit is easily captivated by its creations, leaving us too paralyzed to consider the human virtues and human weaknesses that our creations are encouraging. Joseph Wood Krutch raised similar concerns in *The Measure of Man*. Calling man "the animal which can prefer," Krutch did not worry about mankind becoming more like machines. He saw a different danger: man might become slavishly devoted to his machines, enchanted by the degree of control they offered him once he had trained them to divine his preferences. "It often happens that men's fate overtakes them in the one way they had not sufficiently feared," he wrote, "and it may be that if we are to be destroyed by the machine it will not be in quite the manner we have been fearfully envisaging."

TiVos and iPods will never destroy us. But our romance with technologies of personalization has partially fulfilled Krutch's prediction. We haven't become more like machines. We've made the machines more like us. In the process we are encouraging the flourishing of some of our less attractive human tendencies: for passive spectacle; for constant, escapist fantasy; for excesses of consumption. These impulses are age-old, of course, but they are now fantastically easy to satisfy. Instead of attending a bear-baiting, we can TiVo the wrestling match. From the remote control to TiVo and iPod, we have crafted technologies that are superbly capable of giving us what we want. Our pleasure at exercising control over what we hear, what we see, and what we read is not intrinsically dangerous. But an unwillingness to recognize the potential excesses of this power—egocasting, fetishization, a vast cultural impatience, and the triumph of individual choice over all critical standards—is perilous indeed.

Published: Nov 6, 20
Modified: Nov 7, 2005 11:16

Lack of curiosity is curious

By J. PEDER ZANE, Staff Writer

Over dinner a few weeks ago, the novelist Lawrence Naumoff told a troubling story. He asked students in his introductior to creative writing course at UNC-Chapel Hill if they had read Jack Kerouac. Nobody raised a hand. Then he asked if anyone had ever heard of Jack Kerouac. More blank expressions.

Naumoff began describing the legend of the literary wild man. One student offered that he had a teacher who was just as crazy. Naumoff asked the professor's name. The student said he didn't know. Naumoff then asked this oblivious scholar, "Do you know my name?"

After a long pause, the young man replied, "No."

"I guess I've always known that many students are just taking my course to get a requirement out of the way," Naumoff said. "But it was disheartening to see that some couldn't even go to the trouble of finding out the name of the person teaching the course."

The floodgates were opened and the other UNC professors at the dinner began sharing their own dispiriting stories about the troubling state of curiosity on campus. Their experiences echoed the complaints voiced by many of my book reviewers who teach at some of the nation's best schools.

All of them have noted that such ignorance isn't new -- students have always possessed far less knowledge than they should, or think they have. But in the past, ignorance tended to be a source of shame and motivation. Students were far more likely to be troubled by not-knowing, far more eager to fill such gaps by learning. As one of my reviewers, Stanley Trachtenberg, once said, "It's not that they don't know, it's that they don't care about what they don't know."

This lack of curiosity is especially disturbing because it infects our broader culture. Unfortunately, it seems both inevitabl and incurable.

In our increasingly complex world, the amount of information required to master any particular discipline -- e.g. computer life insurance, medicine -- has expanded geometrically. We are forced to become specialists, people who know more an more about less and less.

Add to this two other factors: the mind-set that puts work at the center of American life and the deep fear spawned by the rise of globalization and other free market approaches that have turned job security into an anachronism. In this frightening new world, students do not turn to universities for mind expansion but vocational training. In the parlance of journalism, they want news they can use.

Upon graduation, they must devote ever more energy to mastering the floods of information that might help them keep their wobbly jobs. Crunched, they have little time to learn about far-flung subjects.

The narrowcasting of our lives is writ large in our culture. Faced with a near infinite range of knowledge, the Internet slices and dices it all into highly specialized niches that provide mountainous details about the slightest molehills. It is no wonder that the last mainstream outlet of general knowledge, the daily newspaper, is suffering declining readership. When people only care about what they care about, their desire to know something more, something new, evaporates like the morning dew.

Here's where it gets really interesting. In comforting response to these exigencies, our culture gives us a pass, downplaying the importance of knowledge, culture, history and tradition. Not too long ago, students might have been embarrassed to admit they'd never heard of Jack Kerouac. Now they're permitted to say "whatever."

When was the last time you met anyone who was ashamed because they didn't know something?

It hasn't always been so. When my father, the son of Italian immigrants, was growing up in the 1930s and 40s, he aspired to be a man of learning. Forced to go to work instead of college, he read "the best books," listened to "the best music," learned which fork to use for his salad. He watched Fred Astaire puttin' on his top hat and tyin' up his white tie, and dreamed of entering that world of distinction.

That mind-set seems as dead as my beloved Dad. The notion of an aspirational culture, in which one endeavors to learn what is right, proper and important in order to make something more of himself, is past.

In fairness, the assault on high culture and tradition that has transpired since the 1960s has paid great dividends, bringing long overdue attention to marginalized voices.

Unfortunately, this new freedom has sucker punched the notion of the educated person who is esteemed not because of the size of his bank account or the extent of his fame but the depth of his knowledge. Instead of a mainstream reverence for those who produce or appreciate works that represent the summit of human achievement, we have a corporatized and commodified culture that hypes the latest trend, the next new thing.

A fundamental truth about people is that they are shaped by the world around them. In the here and now, get-the-job-done environment of modern America, the knowledge for knowledge's sake ethos that is the foundation of a liberal arts education -- and of a rich and satisfying life -- has been shoved to the margins. Curiously, in a world where everything is worth knowing, nothing is.

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THE AMERICAN ENTERPRISE Online
POLITICS, BUSINESS, AND CULTURE

Freedom of Speech
By Thomas G. West

It is widely believed that there is more freedom of speech and of the press in America today than at any time past. On the liberal side, Cass Sunstein writes, "Freedom of expression in America is now approaching a system of unregulated private markets." Liberal law professor Archibald Cox refers to America's "continual expansion of individual freedom of expression." Conservative scholar Walter Berns agrees: "Legally we enjoy a greater liberty than ever before in our history." I believe these views are incorrect. If we take "freedom of speech" in its true sense, there is substantially less of it in contemporary America than when our nation was founded.

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The Founders defined freedom of speech as the right of a citizen or organization to state whatever they wish without fear of punishment by government, as long as the statement doesn't unjustly harm some other individual or the community. James Wilson, a leader of the Constitutional Convention of 1787, stated the general view: "What is meant by the liberty of the press is that there should be no antecedent restraints upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual."

When it came to curbing abuses of free speech, the Founders relied primarily on the rule of law, so as to avoid government excesses. They opposed licensing the press, following the principles of the great English jurist William Blackstone, who wrote that freedom of the press meant above all that government could "not subject the press to the restrictive power of a licenser." In the absence of prior restraint on the press through licensing, government could correct abuses only by subsequent prosecution, with a trial by jury where private citizens, not government officials, would determine the verdict.

The Founders, then, believed that freedom of speech should rest on three pillars: There must be complete freedom for noninjurious speech. There must be no prior restraint on speech through licensing or censorship. And injurious speech must be punished through the due process of law. Unfortunately, all three pillars have been seriously eroded by recent government action.

The most important government intrusion on free speech speech came with the passage of the Federal Elections Campaign Act in 1971. The act currently bans private citizens and groups who cooperate or consult with a candidate for Congress from spending more than a fixed amount of money ($1,000 for individuals, $5,000 for groups) on his or her behalf. The act does leave a candidate's supporters free to publish on other topics, so long as they don't

engage in "express advocacy." Some courts, however, have held that any discussion of public policy issues prominent in a campaign is "express advocacy" even if a candidate's name is not mentioned, and this has scared many groups out of trying to help candidates for fear of the high legal bills and potential fines they will face if they are accused of violating the act. The law does, however, exempt newspaper owners from its provisions. These owners may spend whatever amount they wish publishing arguments in support of candidates with whom they consult or cooperate. (Is it a coincidence that large newspapers tend to support incumbents or Democrats?)

The Founders would have opposed the Campaign Act because it penalizes open discussion of issues at election time. As John Adams wrote, "Our chief magistrates and senators etc. are [elected] by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped and the people kept in ignorance, we had much better have the first magistrate and senators hereditary." Open discussion of "men and measures" is the single most important aspect of free speech. Otherwise, Alexander Hamilton wrote, "there was no other way to preserve liberty, and bring down a tyrannical faction."

Another restriction on free speech comes from limitations placed on employers involved in union elections. In a 1969 case, the Supreme Court ruled that employers can give their workers predictions about the effects of unionization "on the basis of objective fact," but that if the employer expresses his "belief, even though sincere, that unionization will or may result in the closing of the plant," then he is making an illegal "threat of reprisal or force," and if the union loses the election the government will overturn the result. Meanwhile, union organizers are permitted to say anything they please about the employer.

Restrictions on free speech have become a standard element in the enforcement of civil rights law. Courts have ruled that "harassment" is a federal crime under the Civil Rights Act of 1964. Courts have held that a "hostile environment" of harassment exists if, for instance, an employer puts religious articles in the company newsletter, or some employee argues that "women make bad doctors because they are unreliable when they menstruate." A federal circuit court has ruled that while the Act "does not require an employer to fire all 'Archie Bunkers'" in its ranks, the law does require that prompt action be taken "to prevent such bigots from expressing their opinion in a way that abuses or offends their co-workers." As legal scholar Eugene Volokh comments, "Said about almost any other variety of opinion, this statement would be a civil libertarian's nightmare. Imagine a law requiring that an employer take prompt action to prevent communists from expressing their opinions in a way that abuses or offends their co-workers.'"

The federal Fair Housing Act also punishes deliberative political speech. When two neighborhood activists in Berkeley, California, argued in newsletters and public petitions that the site chosen for a new homeless shelter (next to two liquor stores and a nightclub) was "grossly imprudent," the U.S. Department of Housing and Urban Development launched an investigation against them. The couple was threatened with fines of $50,000 plus additional damages, with HUD offering to drop the charges if the couple agreed "never to write or speak on housing issues again." After the facts were made public and a public uproar

resulted, HUD dropped its lawsuit. But less publicized government harassment continues against others. HUD has routinely held cities liable for political statements made against group homes by city residents—a form of indirect censorship. The result, according to journalist Heather MacDonald, is that "in every city in which HUD has pursued investigations against individuals and community groups, opposition to planned social-service facilities has been severely chilled—just as intended."

The second pillar of free speech erected by the Founders—bans on prior restraint of speech—has been seriously eroded over the past 75 years. Most Americans get their news today from organizations whose activities could be blocked literally at any time by government regulators.

In seventeenth-century England there were two forms of prior restraint. The first required printers to submit individual articles to government censors. The second mandated that printers obtain a license to publish from the Stationers' Company, the "monopoly body of printers" that, according to historian Frederick Siebert, was expected "to keep a tight rein on member printers in return for the grant of a royal charter." The Stationers, a quasi-governmental agency, was authorized to smash the presses of printers who didn't have licenses.

Britain repealed all licensing requirements by 1694, but freedom-loving Englishmen and Americans learned from this history how odious prior restraints on the press can be. The Founders agreed with Blackstone's argument that prior restraints on publication "subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."

There are ominous parallels between the methods of the Stationers' Company and those of the Federal Communications Commission in the United States. The right to broadcast in America, like the right to publish in old England, is under the ultimate control of the government, and is revocable at any time. Under the Communications Act of 1934, stations receive licenses to broadcast only when the FCC judges it to be "in the public interest, convenience, or necessity." The FCC has never defined what the term "public interest" means. It prefers to use a case-by-case approach that has become known as "regulation by raised eyebrow"—brandishing threats of hearings or delays at license-renewal time for stations that fail to go along with FCC wishes. The Commission has consistently favored broadcasters who share the views of government officials. Oddball or politically dissident stations have often been driven off the air.

The FCC's first large-scale act of censorship occurred in the late 1930s. The Yankee radio network in New England consistently editorialized against President Franklin Roosevelt. The FCC asked the Yankee network to provide details about its programming, and the network quickly ceased its anti-FDR editorials. While the FCC renewed the licenses of the Yankee stations, the agency warned that, as part of the "public interest" requirement, radio stations "cannot be devoted to the support of principles [the broadcaster] happens to regard most favorably."

The FCC soon made exclusion of "partisan" content a requirement for all broadcasters. Stations swiftly understood that, under the agency's rules, broadcasting a "fireside chat" by President Roosevelt was considered "nonpartisan," while broadcasting a critique of his proposed legislation was deemed to be unacceptable partisan speech.

In 1949 the FCC codified its rules on political content by establishing the "Fairness Doctrine," which declared that stations had to balance any political opinions uttered on the air with opposing points of view. Most broadcasters responded by filling the airwaves with blandly liberal news shows stripped of anything that might offend a federal regulator. But by the early 1960s, a number of conservative radio and television stations had appeared, which the Kennedy administration tried to suppress. As President Kennedy's assistant secretary of commerce, Phil Ruder, later explained, "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."

The government shut down, among others, WLTB-TV in Jackson, Mississippi, a station strongly critical of federal civil rights policies of the 1960s. The station would introduce its nightly nbc news broadcast with an invitation to stay tuned for the real news after the biased East Coast liberal news was over. The government retaliated by revoking WLTB's license.

In a more famous case, the conservative Red Lion radio station was challenged in a Fairness Doctrine complaint secretly financed by the Democratic National Committee. In a 1969 decision, the Supreme Court ruled that the Constitution permitted the FCC to order Red Lion to give free air time to liberals who disagreed with its conservative broadcast content. The Court ruled, in other words, that the federal government could dictate the content of a station's broadcasting. Attempts by conservatives to fight back during the 1960s by getting the Fairness Doctrine applied in reverse to liberal broadcasters all failed.

Supreme Court Justice William O. Douglas once observed that "the regime of federal supervision under the Fairness Doctrine" causes broadcasters to echo "the dominant political voice that emerges after every election." For example, under pressure from the Nixon Administration, broadcasters downplayed the importance of antiwar demonstrations and ignored Watergate until it became a national scandal. It wasn't until 1987, when the FCC finally abolished the Fairness Doctrine, that this particular cloud lifted. Had the Doctrine not been laid to rest at that time during the Reagan administration, it is unlikely today's national political talk radio shows, among other content, could ever have taken to the airwaves without fear of government reprisals. Indeed, in 1993, Democrats in Congress tried to revive the Fairness Doctrine as a means of reining in Rush Limbaugh and other talk hosts, but the broadcasters defended themselves by mobilizing a public backlash.

The end of the Fairness Doctrine, however, doesn't mean that the broadcast media are now free. Broadcasters are still careful not to offend regulators. The beauty of licensing as a means of is that only a few rare examples of overt punishment are needed. As Nixon administration official Clay Whitehead once said, "The value of the sword of Damocles is that it hangs, not falls."

The third pillar of the Founders' scheme for protecting free speech was due process of law, relying on trial by jury to prevent abuses of speech freedom that could be injurious to individuals or the larger community. This pillar too is now crumbling. The one area where speech has become freer in the modern era is in the relaxation of libel, sedition, and obscenity laws. But these apparent liberalizations are in fact contractions of freedom. As one member of our founding generation once wrote, "Every man has a right to use of the press, [as] he has to the use of his arms." But he who commits libel "abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen." When a person's honor is stolen by malicious speech; when parents find it hard to teach their children personal responsibility because of pervasive obscenity; when those who would overthrow democracy are allowed to proceed without fear of punishment—in these cases freedom suffers to the point where it could one day perish.

Take the case of libel. In 1983, Hustler published a satire in which Rev. Jerry Falwell was portrayed as describing a drunken incestuous relationship with his mother. "I think I have never been as angry as I was at that moment," says Falwell, describing his reaction on first seeing the article. "In all of my life I had never believed that human beings could do something like this." In a formal deposition, Hustler publisher Larry Flynt admitted he was trying to "assassinate" the integrity of Jerry Falwell. Yet the Supreme Court ruled that no actionable injury had taken place.

Besides weakening libel laws, courts have also redefined free speech as "freedom of expression." Constitutionally protected "speech" now includes nude dancing, almost all pornography, vulgarities spoken in public and worn on clothing, personal insults, flag burning, and more. This replacement of "speech" with "expression" means that the critical distinction between saying something and doing something has broken down. It also means that the distinction between speech that communicates thought and speech that expresses mere emotion is lost. In the famous "f— the draft" case, the Supreme Court endorsed the view that, in Justice Harlan's words, "One man's vulgarity is another man's lyric."

It is true, then, that licentious speech now enjoys unprecedented protection. But expanded toleration for character assassination, vulgarities on bumper stickers, sex in the movies, and flag burning can hardly compensate Americans for greater censorship via government regulation. In too many areas, the ability of Americans to criticize government bureaus without fear of penalty or harassment has been dangerously restricted. And that is the kind of free speech that matters most.

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Published in *Old and New Media (Unavailable for purchase)* March/April 1996 Issue

ADMINISTRATIVE LAW – SPRING 2004 – OUTLINE

Profs. Edward W. Warren & Eric Wolff

Once the semester is over, all the hours of notes I took and the outlines I laboriously put together become useless—to me at least. So I thought I'd put them on my site (www.jerrybrito.com) in case they'd be of use to someone else, especially GMU students that come after me. You may copy and forward this document as long as you do not alter its contents. *–Jerry Brito*

I. **What is an agency?** Admin agencies are not courts and they're not agencies, but they affect the rights and duties. – They are created by legislation. – Organic statute. – The APA – kind of like a code of civil procedure, but the APA also has lots of substance in it.

APA § 551 (1) defines an agency – each authority of the gov. of the U.S. but not congress, courts, governments of territories of possessions, the D.C. government, military courts, and the president (not in the APA, but *Franklin v. Mass.* holds that president is not an agency.) So what is an agency? Agencies, commissions, etc.

Agencies do a lot of what legislature, courts, and the executive does. Adjudication is like court activity. Rulemaking is like legislation. The agencies do a lot of "other" including investigation, etc., that simulate the executive. All three functions are done by the same agency and this means there really isn't separation of powers. There are two types of agencies.

a. **Executive agency** – located squarely within the executive. They generally have one persona the head of the agency and they might be cabinet level. The head of the agency can be removed by the president at will.

b. **Independent agencies** – multi-member agencies or commissions. The vacancies on them are filled on a rotating basis by the president w/ Senate confirmation. However, the president cannot fire the heads of these agencies w/o a good reason. So you can have an independent agency wherein the head is of the opposite party than the president. They are not squarely in the executive and might be considered a fourth branch of government.

II. **Agencies and Article I (Congress) – <u>The Non-Delegation Doctrine</u>** – Agencies must be lawfully delegated their power before they can act. – Once created, Congress can only really control agencies by controlling their budgets and maybe repealing their regs via legislation (rare). The Supremes have only struck down delegation twice as too broad and it was during the New Deal (*Panama Refining* & *Schecter*). Since then they've been compliant.

Shechter Poultry - They said that agencies cannot be given unlimited authority to make rules; there has to be a limiting principle. But since this case the Supremes have upheld almost every delegation to an agency. This case is the outer limit of limitations.

Mistretta v. U.S. (sentencing commission case) – The <u>modern test</u> is that an agency

delegation of legislative power is constitutional as long as it states some intelligible principle that will guide the agency's rulemaking.

III. **Agencies and Article II (Executive)** – Two types of executive control:

a. **Appointments** – Under Art. II, § 2, only the president appoints the officers of the U.S. with Senate confirmation. Inferior officers may be appointed by the president alone, "heads of departments" or "courts of law" as Congress may direct.:

i. **Officers** – Head of agencies, etc. who are subject to Senate confirmation.

Buckley v. Valeo (FEC legis. appts. case) – Officers have to be appointed by the pres. There can be no legislative appointment of officers with executive power. Necessary and Proper Clause excludes doing stuff reserved to president.

Morrison v. Olsen – Special prosecutors are not officers (even though they are not subordinate to an officer), so you can have a court appoint them. Not officers b/c they are limited in power (even though their power is broad). Fact that this is an inter-branch appointment not a separation issue.

ii. **Inferior officers** – Appointments can be vested in the president alone, the courts, or the heads of departments.

Freytag v. Comm'n IRS – Tax ct. judges are inferior officers, so it's OK to have the tax court chief judge appoint them and not the president. Supremes said that tax ct (is a legislative ct) is a "ct. of law" under Appt. Clause. Scalia dissents saying Clause only meant Art. III courts.

iii. **Agency employees** – nothing in the constitution says how these should be appted.

Landry v. FDIC - ALJs are mere employees and not officers.

b. **Removal** – No parallel "Removal Clause" in the Constitution

i. The old distinction – At one end of spectrum, the president able to remove at will any employee that exercised purely executive power – certainly all officers. ***Myers v. U.S.*** (Oregon postmaster case.) At the other end of the spectrum are those employees that exercise purely quasi-judicial and quasi-legislative functions. ***Humphrey's Executor v. FTC*** – Congress created an independent commission and president tried to remove a commissioner. Supremes said no way; Congress can insulate them.

ii. The new distinction - ***Morrison v. Olsen*** – Per statute, you can't fire the special prosecutor at will, only for good cause. Although a special prosecutor exercises purely executive power, the Supremes say you have to look at the whole package and unless the removal restrictions impede the president from carrying out his duties, it isn't a constitutional violation. The SP serves only for a limited purpose and a limited time, so it's OK to insulate him. – It's thus now even easier for

Congress to limit the president's removal power.

IV. **Agencies and Article III** – Delegation of Judicial Power – Given that ALJs are not judges and not protected as such, how is it that they get to decide cases that look like judicial cases?

Northern Pipeline v. Marathon Oil – Three exceptions to Article III (1) Military courts, (2) territorial courts, and (3) public rights matters – where it's the government v. a private party. You can't hear private common law cases, etc. *The fact you have mil. & terr. cts. makes it hard to distinguish why you couldn't have other Art. I cts.*

Union Carbide – the court says that in public rights matters, sometimes you have private parties on both sides.

CFTC v. Schor – New (balancing) test – (1) is it a particularized area of the law? (2) Is it possible to have judicial review? (3) The public v. private rights matter is a factor but not dispositive. (4) Efficiency (in this case, the same action could have been brought in an Art. III court, and the choice was the party's, so Congress only promoting efficiency). (5) The fact that CFTC was an independent agency. (6) The consent of the parties.

After *Schor* it's incredibly difficult to invalidate adjudication b/c it violates Article III delegation.

What about the right to a jury trial? Only applies to common law (legal) actions, and not to equitable actions (like injunctions, etc.). There is no jury trial right for public rights matter. *Atlas Roofing*.

V. **Procedural due process** – The procedural due process rules set a minimum on the amount of procedure agencies can offer, especially in adjudications. There are four basic requirements to having a procedural due process problem

a. The procedural due process clause only applies to state or governmental action – Not a problem b/c by definition agencies are an authority of the government.

b. It only applies to individualized action – The action has to be directed at a small number of people and directed at them for a specific reason. This is in contrast to generalized action that affects everyone (or everyone within a class).

Londoner v. Denver – Londoner was complaining that his property assessment was too high and wanted a reduced tax b/c he said his property wasn't really benefiting from the street improvements in front of his property that where the cause of the assessment. The Supremes held that this was individualized action and that he had been denied procedural due process. (Note: If legislature had levied the tax itself, no problem, but when it delegates to another body, a hearing must be afforded.)

Bimetallic Investment Co. v. State Board of Equalization – Also deals w/ property taxes in Denver. The city rose taxes across the board. The plaintiff got a bigger bill than they were used to and they complained they didn't get procedural due process, didn't get a chance to complain or oppose the proposed hike. The Supremes held that this was not individualized action b/c it was across the board and so no violation of procedural due

process.

Only individualized action gets procedural due process b/c generalized action can be addressed in the political sphere, whereas individualized action you have no other recourse. Generalized action is similar to legislation, whereas individualized action is like court action.

c. There must be a protected interest – liberty or property. **(Not covered by Warren/Wolfe)**
   i. Property
      1. Old property – traditional indicia of wealth (like money or land, etc.). If an agency wants to take your money as a penalty for your actions, etc., this would be old property and would satisfy the third prong of procedural due process b/c property (old) is a protected interest.

      2. New property – other kinds of indicia of wealth (like gov. jobs, social security benefits, welfare, rights as a gov. contractor, etc.). It's a lot trickier to try to tell if you have a due process problem w/ these.

         Board of Regents v. Roth – Untenured prof. was fired. Supremes said there was no property interest in your job here. They said that the person must have more than an abstract need or desire to the thing, they must have an entitlement to it.

         Perry v. Singleman – Perry was another fire prof. but he did have a property interest b/c the University had passed out faculty handbooks that said that persons in Perry's position couldn't be fired w/ out good reason, so he had not just an expectation, but an entitlement to his job.

   ii. Liberty
      1. Fundamental liberty interests –
         a. Listed specifically in the Constitution or have otherwise been declare fundamental by the Supremes (like speech, voting, privacy, etc.) You don't need to find any expression of these liberties in state law (unlike property interests).

         b. Massive deprivation of liberty (like transfer to a mental hospital).

      2. State-created liberty interests – Like new property – you ask if you have an entitlement to them and look to state law, agency regs, or statutes for the answer.

d. **Misc.** – The mere fact that the state or agency has procedures does not automatically confer protected interests. Also, the protected interest has to be taken away on purpose by the government b/f due process rights come in.

e. How much process is due?

Goldberg v. Kelly – Normally due process requires that you get a hearing *before* you lose the protected interest. If the gov. wants to give only a post-termination hearing, it has to prove it was necessary. Procedural due process rights: notice of the protected loss, cross-examination, right to counsel, oral presentation, and you need a neutral decision maker.

Matthews v. Eldridge – Whether you are eligible here is a medical (mechanical)

determination, and not a subjective one that requires a hearing, so you can just be afforded a post-termination hearing. Matthews balancing test:

i. Value of the interest to the private party – the more important the interest, the more likely gov needs to provide more process
ii. What's the risk of error w/o providing the add'l process?
iii. The cost to gov. in providing add'l process?

VI. **Adjudication v. Rulemaking** – Rules look forward, whereas orders look backward. Rules apply to an open class of persons whereas orders apply to specific persons.

a. **Rulemaking** - § 551 (5) – the agency process for making, formulating, or repealing a rule. (4) An agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe a policy is a rule. A rule must apply to some (open) class of persons and be of future effect; this is generalized action usually and it doesn't trigger procedural due process.

b. **Adjudication** - § 551 (7) – the agency process for formulation of an order (6) an order is a disposition in a matter that is not a rulemaking. Is almost always individualized action for procedural due process purposes.

c. ***American Airlines v. CAB*** – CAB decided that only pure cargo airlines would be able to offer "blocked space". Mixed passenger/cargo airlines like AA weren't happy with this. AA said 'we have a license that authorizes us to sell space, etc. and what you're doing is amending our license, and that is adjudication.' The DC Cir. held it was not. It's a rulemaking b/c it applies to a class of entities and it only applies to the future.

VII. **Adjudication** – Involves specific named parties and is backward-looking.

a. **Formal Adjudication** – Tremendous amount of procedure guaranteed by the APA and is a lot like a bench trial. You get all the process in §§ 554, 556, and 557. 554 says that it and 556 and 557 apply "in every case of adjudication required by statute to be determined <u>on the record</u> after opportunity for an agency hearing". You tell whether you have formal adjudication by looking at the organic statute and seeing if it requires a hearing <u>on the record</u>. If it's just a public hearing, but w/o mention of <u>on the record</u>, then it's informal and the formal procedures are not triggered.

i. ***Chemical Waste Mang't v. EPA*** – The organic statute said that b/f the EPA could do 'corrective action' it had to provide a "public hearing", but this didn't amount to a formal adjudication b/c it didn't say "on the record".

ii. **Procedures of formal adjudication** – Timely notice of any hearing. It has to give notice of the issues contested. All interested persons gets to make submissions. There has to be a recommended decision made by the ALJ. The recommendation will be ultimately reviewed and decided by the Agency. There are restrictions on internal ex parte contacts. The ALJ cannot be supervised by any agency employee in the prosecuting wing of the agency. The person who conducts the hearing has to be an ALJ or has to be the agency head(s). The ALJ can administer oaths, issue subpoenas, makes rulings on proof and evidence, allows depositions to be taken, regulates course of hearing, hold prehearing conferences, rule on procedural

matters. Any evidence is admissible although the ALJ can rule out irrelevant info. There's no hearsay rule, but privileged communications are protected. The ALJ must allow adequate cross-examination and can take official notice of things.

United Church of Christ v. FCC – The TV viewers in the area are an interested party that have a right to intervene.

iii. **Decisions** – Agencies are bound by stare decisis and have to issue decisions compatible w/ their previous decisions. They are allowed to overrule their prior judgments, but when they do they have to explain why they did it; they can't just switch positions. Agencies have to explain on paper their decisions. § 557 (c) agencies must have a reasonable basis for their decisions.

b. **Informal Adjudication** – Anything that's not rulemaking and not formal adjudication. Personal, backward-looking, but not procedurally formal under the APA. Almost nothing in the APA covers informal adjudication. § 555 does cover it, but it doesn't give much in the way of process. It allows you to have a lawyer. It says that interested persons can appear. A witness that is compelled to testify under oath can review a transcript of their testimony. You can get prompt notice of a denial along w/ a brief statement explaining it unless it is self-explanatory. The other section that applies is § 558, which says that sanctions can only be implemented w/in the jurisdiction delegated to the agency. How do you protect fairness in informal adjudication? 1) Due process, 2) agency hearing regs, 3) statutes other than the APA including agency organic law, 4) administrative common law.

Citizens to Protect Overton Park v. Volpe – Sec. of Transp. gave go-ahead on highway per stat., which required no formal finding. Supreme found that 1) decision was reviewable [§ 706 - arbitrary, capricious, abuse of discretion, or not in accordance w/ law], and 2) although no formal finding was required, the dist. ct. has plenary power to make a record on which to review. The review should be on the information on which the secretary based his decision, and getting thins might even mean requiring him to testify.

c. **Hybrid** – Informal adjudication but with lots of procedures from formal adjudication are imported.

VIII. **Rulemaking** –

a. **Formal Rulemaking** – very, very rare – If the organic law says it is rulemaking that has to be "on the record", then it is formal, otherwise it's not.

i. ***Florida East Coast Railway*** – all the statute says was "after hearing" so there's no need for a formal § 556 and 557 procedure. Only if the organic statute says the magic words from § 553(c), "on the record after opportunity for an agency hearing" will formal rulemaking be required. If it doesn't say this, informal rulemaking will suffice. After this case, almost everything is done informally.

ii. **Procedural rights** – an ALJ or agency head has to preside, witnesses can be sworn, oral presentations allowed and cross-examination required, decision must be based on the record, limitations on ex parte contacts, etc. Has to explain the

bases for the rule promulgated.

b. **Informal Rulemaking** – Notice and comment rulemaking – most common – The only section in the APA related is 553.

Procedural rights – There has to be **notice** of the proposed rule by publishing it in the Federal Register. What has to be in the notice? § 553 (a) – the time place and nature of any hearing, legal authority under which the rule is being promulgated, the terms or substance or description of the subject in issue in the proposed rule. ***MCI v. FCC*** – Notice must be adequate and not a game of hide the ball.

There is then a **comment** period. These are written comments. There is no requirement that there be oral presentations in informal rulemaking under the APA. The comment period is open for a reasonable amount of time.

Agency then reviews comments and decides if it wants to adopt the propose rule, amend it, or scrap it all together given the comments. If the agency amends the rule during the comment period, does it have to post notice again? The logical outgrowth test – re-notice required only if the amendment changes the character or subject covered by the rule. If the agency is relying heavily on a particular statistical or scientific study, courts have held that they have to tell the interested parties about it.

If adopted, a rule can't take effect for 30 days to give parties time to comply. Exceptions include rules that relieve a burden, statement of general policy, or interpretive rules, and the good cause (emergency) exception.

When an agency adopts a rule, § 553 (c) requires "**a concise general statement of the basis and purpose of the rule**." Informal rulemaking is not limited to the record, but they can't switch rationales for the rule – no post hoc rationalization for a rule.

Vermont Yankee v. NRDC – NRDC sued claiming that the procedure followed in promulgating a nuclear waste rule was not sufficient (even though it was informal rulemaking). The DC Cir. struck down the rule saying there had to be cross-examination. The Supremes reversed saying cts. have no authority to add procedure. Agencies are only required to provide the process required in the APA or other law. *All the APA requires is 1) notice, 2) opportunity to comment, and 3) statement of basis and purpose.* The Supremes do leave the door open by saying that a ct. might require extra procedure "in extremely rare circumstances", which might mean if there's a history of giving extra procedures for a specific type of rulemaking.

c. **Hybrid Rulemaking** – Informal rulemaking, but with formal-like procedures imported in. The most common formal procedural requirement that is grafted in is oral presentations w/ cross-examination. What are the sources of these additional procedures? The organic law, agency regs, the agency might just decide to use it in a particular case, or due process when a rule is of a very, very narrow scope.

d. **Exceptions to Rulemaking** – Some rulemaking is exempt from all the requirements of § 553. These are: Military or foreign affairs rules. Rules that relate to agency management, personnel, agency contracts or benefit programs, etc. Some rules are exempt from just the

notice and comment requirement and the delayed effective date requirement. These are:

i. **Interpretive rules** – don't set any new policy, all they do is explain previous regs or statutes. Agencies often try to claim all sorts of things as being simply interpretations of prior rules, but they don't always get away w/ it.

Hoctor v. USDA – Animal Welfare Act allowed agency to regulate. Agency promulgated rule requiring enclosing structures to be of X structural strength. Agency then put out memo saying fences had to be 8 feet tall; it said this was an interpretation of the structural strength rule. Posner says it is not an interpretive rule because it is not interpreting the reg as written. Height of fence cannot be said to be an interpretation of structural strength. You don't come up with arbitrary numbers like "8 feet" in interpretive rules.

ii. **Statements of general policy** – open pronouncements that don't set any binding norm – unlike interpretive rules, policy statements don't have a definite effect like rules – again, watch out for agency trying to squeeze through a substantive rule this way. (Example of good general policy statement: "From now on,

iii. **Good cause** – Emergency rules. If the agency has to move quickly.

e. Can agencies be forced to make rules? No. It's up to agencies to decide what they'll do. Can you petition to have a rule made? Yes, § 553 (e) specifically says that you may petition, but you're at the agency's mercy. (But see § 706 (1) – "agency action unlawfully withheld")

Chenery I – Court will not consider grounds for affirming the agency that the agency itself did not rely upon – no post hoc rationalization – a court must base its review decision not on a rationalization that it can think of, but on the actual reasons

Chenery II – Agency is free to make policy either by rules or adjudication, and that choice is for the agency

?? NLRB – However, can't use adjudicatory process to make rules.

IX. **Judicial Review** - § 706 - To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be -
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the

reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

a. Preconditions for judicial review

i. **Standing** – To sue in any federal case you need constitutional standing, and to sue an agency you also must have standing (be the appropriate plaintiff) under the governing statute.

1. **Constitutional Standing** – You need (1) an injury in fact – a legally protected interest that has been violated, that is concrete, discreet and particularized, and is actual or imminent, (2) causal connection b/t injury and act, and (3) likely (not speculative) that court action will provide redress.

   Lujan v. Defenders of Wildlife (Egypt dam vs. wildlife) – You need injury in fact. Speculative traveling in the future is not injury in fact. Speculative whether the animals would be harmed. Maybe no redress b/c ct. can't stop dam.

   Note: There was a citizen suit provision here, but the Supremes say that Congress cannot grant standing to persons who have not suffered injury in fact caused by agency action and redressable by a favorable decision.

   F.O. Earth v. Laidlaw (neighbor sues for water pollution case) – as long as the plaintiffs can make a good claim that they have a connection to the place and they genuinely feel injured, they have standing. "If there are permit violations (pollution) and a member of the plaintiff group lives near there, it would be difficult to not find standing." Allows almost anything.

2. **Statutory Standing (Prudential Standing)** – § 702 – "[Only] A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." What does aggrieved mean? The injury has to be w/in the zone of interest that the agency is designed to protect.

   Assoc. of Data Processing v. Camp – "Aggrieved" means that persons seeking review must have suffered an injury that is "arguably within the zone of interests protected by statute." Test: interpretation of the relevant statutes to determine what interests are protected. For example, stenographers may be injured by the failure to create a transcript in formal adjudication, but they are not within the interests this requirement is intended to protect.

   Because prudential standing is an invention of the courts, Congress has the power to dispense with the requirement by statute (a citizen suit provision). Congress legislates against the background of our prudential

standing doctrine, which applies unless it is expressly negated.

ii. **Final order** – The agency has to have reached a final order b/f you can seek judicial review.

iii. **Ripeness** – The decision has to be ripe for review. Usually if you have an order it is ripe for review. It usually comes up with new rules that haven't been enforced yet. The question is, is the rule one that doesn't require any information to judge its legality.

Abbott Labs v. Gardner (drug naming case) – You didn't have to wait for the rule to be enforced to judge it, you had all the info necessary. The test: An issue is ripe for judicial review when (1) the issue is fit (by being (a) a final action, or (b) a purely legal issue), *and* (2) there'll be hardship to the parties in withholding court consideration (like having to change their primary conduct).

Test for ripeness restated: (1) Is it a purely legal question? If so, then it's ripe w/o needing enforcement. If it's factual, then you have to wait. (2) Would a court benefit from delaying the challenge? If so, not ripe. (3) The private party's interest in challenging. How much will waiting to enforce hurt the party.

iv. **Exhaustion of administrative remedies.**

1. Futility – exhaustion not a bar if you can show it would make no difference to seek further agency action.

2. Inadequate remedy – exhaustion not a bar if the agency doesn't have any reasonable remedy available to you.

v. **Primary jurisdiction** – when a court and an agency have concurrent jurisdiction. Courts often will stay a decision and refer it to the agency.

b. When judicial review is precluded - § 701 -

i. **Committed to agency discretion by law** – the agency authority is so broad that it is unreviewable. There's no applicable law (except the one the agency just made up), so it's not reviewable.

Heckler v. Cheney – The FDA had never approved the legal injection. Supremes say the FDA has such broad enforcement authority the cts. can't review their decision not to stop TX from executing the guy.

ii. **Clear statutory preclusion of judicial review** – rare – The Supremes read them with a heavy presumption that judicial review is allowed (that it is only limited). They sometimes have even read the opposite.

c. **Review of Legal Decisions** – ***Chevron v. NRDC*** – When an agency makes a legal determination, it is entitled to deference. When a court reviews an agency's construction of the statute that it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question because the court,

as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statue, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A ct. can only set aside an agency interpretation of a law if it is unreasonable.

Test: (1) Is there a clear answer in the statute (or caselaw) (is Congress's intent clear)? If yes, it's over; the agency only has one choice. (2) Has the agency been delegated authority to resolve the question? Usually yes if it's a complex matter w/in agency's expertise. (3) Is the agency's interpretation unreasonable? If it's reasonable, it's OK.

i. **What counts as "clear intent"?** – ***FDA v. Brown & Williamson*** (regulating cigarettes as drug delivery device case) – Although under the first two *Chevron* steps it seems like Congress meant to allow the FDA to regulate cigarettes, it's can't be the case b/c it would be contradicting other cigarette statutes on point (like subsidies).

ii. **What if there is "statutory ambiguity"?** – ***Nat'l Fed. Fed. Employees v. Dept. of Interior*** (midterm bargaining case) – If an agency says that the statute is unambiguous, and then a court finds that it is in fact ambiguous, then the agency *still* has to go back and interpret the stat language, even if they are going to come out the same way in the end. The agency's lawyer can't tell the court "even if you think the statute is ambiguous, you should still disallow midterm bargaining b/c we're going to interpret against it anyway" because that is post hoc rationalization barred by *Chennery I*.

Brand X v. FCC (cable modem case) – If a court finds that an agency interpretation of its statute is reasonable and consistent with the law, the panel may adopt that interpretation even if circuit precedent is to the contrary. *But* the earlier court decision may be disregarded in favor of the agency interpretation *only* where the precedent constituted deferential review of agency decisionmaking. If the precedent held either that the agency decision was unreasonable or the only possible interpretation of the statute, then the prior court's construction trumps the agency's interpretation.

iii. **What counts as "unreasonable agency interpretation"?** – ***Texas Muni. Power Agency v. EPA*** – A statute silent on a particular issue cannot preclude a particular agency interpretation of that issue under *Chevron*. ***But see U.S. v Mead.***

iv. **Is the court backing away from *Chevron*? Yes –**

INS v. Cardoza-Fonseca (refugee asylum case) – If an agency interprets two statutes to mean the same thing and it is challenged, a court gives not deference b/c under *Chevron*, the judiciary is the final authority on statutory construction and must reject administrative construction which are contrary to the clear congressional intent.

U.S. v. Mead (tariffs case) – Agencies get *Chevron* deference only when Congress intended it to have authority to act. When there's a gap in the law, even though it may be an ambiguity, a court might find that Congress never meant the agency to interpret to give itself authority. Also interpretive rules and informal adjudication do not get *Chervron* deference.

d. **Review of Findings of Fact** – § 706(2)(e) – agency determination of who did what when where and why –

   i. If the agency made the determination in a formal proceeding (on the record), then the agency will only be reversed if the determination lacks substantial evidence. The agency must only show a reasonable amount of evidence, as long as it's a debatable factual issue, the agency will get deference.

   ii. If the determination was not made in a formal proceeding, then it's an arbitrary and capricious standard. An agency's factual determination will then be set aside only if it's arbitrary and capricious. The agency can justify its evidence w/ info "outside the record" (because there's no record).

   Universal Camera v. NLRB – the ALJ finds a fact differently than the agency, who gets reviewed and who gets deference? The agency, but the ALJ's decision is still part of the record and a court can consider it.

   Substantial evidence means more than *some* evidence, it means such relevant evidence as a reasonable mind might accept as adequate.

e. **Review of policy decision** – The standard that applies in the arbitrary and capricious standard, but it has a different meaning in this context.

   Motor Vehicle Assoc. v. State Farm (seatbelt/airbag case) – Agency has to be able to guarantee that it took a hard look at all the policy consideration, looked at both sides of the issue carefully. Most often in informal rulemaking.

   The *State Farm* factors: A rule is arbitrary and capricious if the agency (1) has relied on factors that Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.

   Bureau of Engraving v. FLRA (union adjudication) – if an agency changes its mind and decides an issue differently than in a previous adjudication (but probably in a rule as well), it has to explain why. Just changing mind for no reason is arb. & capricious.

f. **Discretion** – decisions like penalties – judgment calls that aren't necessarily legal or factual. The standard is arbitrary or capricious, or an abuse of discretion. It has to be a shocking penalty that is markedly different from similar penalties. But agency gets lots of leeway.

g. **Miscellaneous** -

i. Venue – some statutes list a specific venue for some agencies, etc. And they might send you straight to appellate ct. (like D.C. Circuit).

ii. Declaratory judgment and injunction is the most common way to seek relief. You simply file a complain in district ct.

iii. Damage actions – seeking judicial review of agency actions that are unreviewable otherwise. § 1983 allows you to suit local/state agencies that might be denying you a constitutional or federal right.

Supreme Court Rules Broadband Cable Lines Need Not Be Shared With Competing ISPs

In a decision released June 27, 2005, the last day of the Supreme Court's term, the Court said that cable operators have no statutory obligation to allow other ISPs to provide high speed broadband service through the cable operator's wires.

The Court reversed and remanded the case to the U.S. Court of Appeals for the Ninth Circuit, finding the Commission's decision exempting cable broadband service from mandatory common carrier regulation was a lawful construction of the Communications Act and one entitled to judicial deference. *National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, No. 04-277 (U.S. June 27, 2005). This decision will help to shape the FCC's ongoing regulation – or deregulation – of the telecommunications and cable industries as well as the debate on "convergence" and "intermodal competition" and may also have far-reaching ramifications with respect to the interrelationships among federal agency actions, statutory construction and judicial review of agency decisions.

Background

The issue underlying this decision has been discussed since the late 1990s, when it was referred to as "open access" or "forced access." A federal court first gave credibility to the idea when it allowed a local cable franchise authority to consent to AT&T's purchase of a TCI cable franchise on the condition that AT&T allow unrestricted access to its cable broadband transmission facilities to Internet service providers unaffiliated with AT&T. *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999). On appeal, the United States Court of Appeals for the Ninth Circuit reversed, saying that cable modem service was a "telecommunications service" under the Communications Act and as such, conditioning a franchise transfer in this manner was beyond the city's cable franchising power. *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000).

Two years later, the FCC issued a *Declaratory Ruling* addressing the regulatory implications of broadband Internet service, which concluded that cable modem service provided by cable operators constituted an "information service" rather than a "telecommunications service" under the Communications Act. As an "information service," this service was not subject to common carrier regulation under Title II of the Act and unaffiliated Internet providers could not require a cable operator to allow them to provide broadband service over the cable operator's facilities. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) (the "*Declaratory Ruling*").

Several parties sought judicial review of the *Declaratory Ruling* and the Ninth Circuit, the same court that decided *AT&T Corp. v. Portland*, was chosen through a lottery to be the venue for the appeal. Relying on its own prior decision, the Ninth Circuit vacated the *Declaratory Ruling*, to the extent it said that cable modem service was not a "telecommunications service" and said the FCC could not interpret the Communications Act so as to exempt cable operators providing broadband service from Title II regulation. *Brand X Internet Serv. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

Decision

In an opinion authored by Justice Thomas, in which he was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, and Breyer, the Supreme Court reversed and remanded the decision to the Ninth Circuit. First, the Court decided to analyze the case using the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* requires a federal court to defer to an agency's construction of a statute, even if that construction differs from what the court believes to be the best interpretation, where the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable.

The Supreme Court first found that the FCC had the authority to address this issue and it had issued the *Declaratory Ruling* in an exercise of its authority. The Court next said that the Court of Appeals incorrectly relied on its decision in *AT&T Corp. v. Portland* rather than on *Chevron*, in concluding that the *Portland* decision's interpretation of the Communications Act overrode that of the FCC in the *Declaratory Ruling*. The Supreme Court gave broad discretion to the FCC, explaining that a court's prior construction of a statute trumps an agency's construction of that statute only when the prior court decision found that its construction followed from the unambiguous terms of the statute and thus left no room for agency discretion. In other circumstances, the agency may adopt a different statutory construction because the agency remains the authoritative interpreter (within the limits of reason) of a statute the agency is charged with administering.

The Supreme Court went on to find that the Court of Appeals erred in not giving deference to the FCC's interpretation of the definition of "telecommunications service." The Court said such deference was required because the Court of Appeals' *Portland* decision had found only that the best reading of the Communications Act was that cable modem service was a "telecommunications service," but not that this was the only permissible reading of the statute.

The Supreme Court also agreed that the FCC's construction of the "telecommunications service" definition was a permissible reading of the Communications Act that was entitled to deference under *Chevron*. The analysis required by *Chevron* mandates that a reviewing court first determine whether a statute's plain terms address the question and second, whether the statute is ambiguous on the point. If so, then the court must defer to the agency's interpretation as long as the construction is a reasonable policy choice for the agency to make.

Using this analysis, the Supreme Court said the FCC was reasonable in finding an ambiguity in the statute and holding that cable broadband service was a telecommunications service rather than an information service. The Court also found reasonable FCC's analysis of whether a cable operator providing broadband Internet service is "offering" telecommunications service directly to the public, which is the definition of a telecommunications service in the Communications Act. 47 U.S.C. section 153(46). The FCC had agreed that a cable operator uses "telecommunications" to provide consumers with Internet service, but it said the question of whether cable modem service included an offering of telecommunications depended on the nature of the functions offered to the end user. In that regard, the FCC found that an end user doesn't see cable broadband service as a telecommunications offering because the consumer uses

the telecommunications wire only in connection with the information-processing capabilities of Internet access. The integrated character of the service had led the FCC to conclude that cable modem service is not a stand-alone telecommunications offering. The Court disagreed with assertions that a cable operator in fact "offers" a telecommunications service when it sells broadband Internet service, finding that the components of broadband service are functionally integrated (like the components of a car), rather than functionally separate (like selling pets and leashes or pizza and pizza delivery).

The Court then reviewed the distinction between "basic" and "enhanced" services in the FCC's *Computer II* decision, which it said also supported the conclusion that the Communications Act is ambiguous about whether cable operators "offer" telecommunications when they sell cable modem service. The Court reviewed the FCC's regulatory treatment of facilities-based and non-facilities-based information service providers, concluding that if the Communications Act fails unambiguously to classify non-facilities-based providers that use telecommunications inputs to provide an information service as entities offering telecommunications service, then the Act also does not unambiguously classify facilities-based information service providers as telecommunications-service offerors. The relevant definitions do not distinguish between facilities-based and non-facilities-based carriers, and the Court said that this silence suggests the FCC has the discretion to fill the statutory gap.

The Court next found that the FCC's construction of the Communications Act was a reasonable policy choice for it to make. In so doing, the Court disagreed that the FCC's construction would unreasonably allow a communications provider to evade common carrier regulation by merely bundling an information service with a telecommunications service or that it would exempt any information service from common carrier regulation. The Court also disagreed that the FCC's decision was unreasonable because it would permit inconsistent regulatory treatment of DSL service and cable modem service, finding that the FCC had provided a reasoned explanation for treating the two services differently. Contrasting with the FCC's 1998 decision classifying DSL service as a telecommunications service, the Court said the *Declaratory Ruling* recognized that changed market conditions (e.g., the multiple platforms that were developing for offering broadband Internet service) warranted different treatment of facilities-based cable operators that provide Internet access. The Court also found nothing arbitrary in the FCC's approach of providing a fresh analysis of the issue as it applied to the cable industry. Finally, the Court said that the *Declaratory Ruling* appeared to be a first step in the FCC's effort to reshape the way it regulates information service providers and any inconsistency between the regulatory treatment of cable modem service and DSL service can be adequately addressed when the FCC fully reconsiders its treatment of DSL service in pending or future proceedings.

Separate Opinions

Justice Stevens wrote separately (presumably in response to Justice Scalia's dissent) to draw the distinction that, although the Court of Appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose an agency's contrary reading, this principle would not apply to a Supreme Court decision that would presumably remove any pre-existing ambiguity. Justice Breyer concurred in the decision that the *Declaratory Ruling* falls within the scope of its statutory authority – although just barely – but he wrote separately to take issue with Justice

Scalia's characterization of the Court's 2001 opinion in *U.S. v. Mead Corp.*, as to the formal process that is required for courts to afford deference to an agency's decision under *Chevron*.

Justice Scalia delivered a strong dissent, joined by Justice Souter and Justice Ginsberg. The dissent called "ridiculous" the majority's denial that one part of a joint offering is being offered merely because it is not offered on a "stand alone" basis. In the dissent's view, the telecommunications component of a cable modem service retains such ample independent identity that it must be regarded as being an offer when seen from the perspective of the end user who would reasonably view the cable modem service as providing both high-speed Internet access and other applications and functions, particularly given that the FCC requires the physical transmission pathway to the Internet for dial-up access and broadband DSL service to be sold separately from the Internet functionality. The dissent points to the FCC's statutory authority to forbear from imposing Title II regulation as a means to dispel concern that if cable-modem service providers were deemed to provide telecommunications services, then so must all ISPs.

Justice Scalia also faulted the majority's decision as producing a "breathtaking novelty: judicial decisions subject to reversal by Executive officers." According to Justice Scalia, the majority's approach means that even when an agency itself is party to a case in which a Court construes a statute, the agency could still disregard that construction and seek *Chevron* deference for its contrary construction the "next time around." Justice Scalia argues the majority's position that a court's interpretation is conclusive only if it finds that interpretation is "the only permissible reading of the statute" calls into question past statutory construction cases that did not include an "unambiguous" finding and creates a "wonderful new world" full of promise "for administrative-law professors in need of tenure articles and, of course, for litigators."

This summary was contributed by James S. Blitz and Julie A. Corsig of the Davis Wright Tremaine, LLP Washington, DC office. The opinion is attached as a .pdf file, along with the Commissioners' statements.