DOCUMENT RESUME

ED 318 407 IR 014 311

AUTHOR Hazlett, Thomas W.
TITLE Physical Scarcity, Rent Seeking, and the First Amendment.
PUB DATE Oct 89
NOTE 29p.; Paper presented at the Annual Telecommunications Policy Research Conference (17th, Airlie House, Warrenton, VA, October 1-3, 1989). For other papers of this conference, see IR 014 305-322.
PUB TYPE Historical Materials (060) -- Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Broadcast Industry; *Federal Regulation; *Policy Formation; *Telecommunications
IDENTIFIERS Broadcast Access Rights; First Amendment; *Physical Scarcity; *Rent Seeking

ABSTRACT

The driving force in federal licensing has been the combined political interests of legislators desirous of obtaining valuable prerogatives over the assignment of frequencies; incumbent broadcasters, ever vigilant in restricting new entry into broadcasting; and "public interest" lobbyists, whose self-interests lay in politicizing the assignment process despite the expropriation which their constituents thereby suffered. Hence, a classic rent-seeking competition forged the licensing regime in broadcasting in the 1920s and has steadfastly maintained it since, due to the vector payoffs associated with such a scheme. The support for this thesis is evidence suggesting that the historical rendition of the pre-regulation broadcasting market offered in both the NBC and the Red Lion cases was largely fanciful, and that a more accurate history of the early broadcasting period reveals that an orderly market was reshaped by political interests to yield rents, not to solve interference. This history shows that physical scarcity and its ancillary justifications for content regulation are ad hoc rationalizations of policies adopted for specified political purposes. Most important for Constitutional considerations is that the means chosen to implement such dealings provoke precisely the same concerns that make government licensing of print unlawful; i.e., politicization of the press produces results antagonistic to the most fundamental First Amendment values. (GL)

Physical Scarcity, Rent Seeking, and the First Amendment

Thomas W. Hazlett
University of California, Davis

September 28, 1989

Paper to be presented to the Airlie House Conference on Telecommunications Policy, October 2, 1989. Working draft only. Please do not quote without permission of the Author.

1 The Uniqueness of Broadcasting.

> *Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies in a manner responsive to the public "convenience, interest, or necessity."*[1]

The dichotomy between constitutional protections extended to the print press (*e.g.*, books, magazines, and newspapers) and those afforded the electronic press (*e.g.*, broadcast television, radio, cable television, videotext) has received a great deal of attention in the legal, communications, and public policy literature.[2] The truncation of first amendment protection, blanketing print publishers but only scantily covering electronic publishers, has been established by the U.S. Supreme Court in ***NBC***[3], ***Red Lion***[4], and ***Tornillo***[5]. Around this legal interpretation has built up an impressive regulatory structure for the electronic press, with broadcasters licensed as "public trustees" by the Federal Communications Commission, and cable television operators franchised by local governments. In either situation, the character and performance of electronic publishers are explicitly taken into account in licensing and renewal decisions. The strictures against government discretion in print regulation are seriously compromised.

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1 ***Red Lion Broadcasting Co. v. F.C.C.***, 395 US 367 (1969), at 380-1 (footnotes omitted).

2 See Friendly, The Good Guys, the Bad Guys, and the First Amendment (1975); Lipsky, Reconciling *Red Lion* and *Tornillo*: A Consistent Theory of Media Regulation, 28 Stanford L.R. (1976), 563-588; Brenner and Rivers, eds., Free But Regulated: Conflicting Traditions in Media Law (1982); Pool, Technologies of Freedom (1983); Spitzer, Controlling Content in Print and Broadcast, So. Cal. L.R. (1985); Powe, American Broadcasting and the First Amendment (1987).

3 ***National Broadcasting Co., Inc. et al. v. United States et al.,*** 319 U.S. 190 (1943).

4 *Supra* note 1.

5 ***Miami Herald Publishing Co. vs. Tornillo*** 418 U.S. 241 (1974).

There has developed a series of justifications for this divergence. The most general line of reasoning developed by the courts, the Commission, Congress, and various communications law experts, is that broadcasting is fundamentally different than print in two ways, and that these differences allow the government to exercise regulatory discretion over content without violating the values underlying the first amendment. Indeed, such values *mandate* the exercise of such power. These differences are, firstly, that without government regulation of the broadcast band, no electronic speech would be possible; hence, the government in essence *creates* the entire category of broadcast speech[6] via regulation, giving it special authority to influence what is communicated. Secondly, the "physical scarcity" of the electromagnetic spectrum dictates a situation in which not all who wish to broadcast may do so; hence, the government must, in its simple custodial role, employ some discretion in selecting recipients of the "right" to broadcast. Indeed, the choicemaking process colors such a right so fundamentally at to turn a broadcasting license into a special privilege denied (necessarily, given scarcity) to others. The government may well, under the congressional mandates given in the 1927 Radio Act and the 1934 Communications Act, exercise such inherent discretion in the public interest, and assign (as well as administer) these subject privileges to private parties subject to broad regulatory jurisdiction not directly related to the interference problem.

Under this view there has built up a host of secondary justifications for the "public trusteeship" model. The most important spring from the idea that, as new technology has taken us beyond the traditional forms of communication known to the Founding Fathers, the harshly libertarian first amendment stricture, "Congress shall make no law ... abridging freedom of speech, or of the press...", must be replaced by affirmative governmental obligations promoting the *underlying values* of free speech and press. Due to changing economic and technical conditions, a *laissez faire* approach to the press market will no longer accomplish what the first

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6 We will consider only broadcasting in the discussion to follow.

amendment was once designed to accomplish, principally, free wide-open and robust citizen discussion of key public issues vital to the health of American democracy. Rather than delimiting the sphere of state action in regards to the broadcast press, the Constitution actually calls for the governmental promotion of, (1) a *diversity of voices*, such that various viewpoints may be heard[7]; (2) the *rights of listeners*, which should over-rule those of speakers.[8]

A substantial regulatory edifice has been erected in the shadow of these first amendment arguments. There has, however, developed a loose concensus among scholars crossing disciplinary lines that the edifice is constitutionally shaky. Henry Geller, a longtime FCC official and Washington insider in telecommunications policy, recently noted that, "In view of recent court decisions and trends, I believe that eventually the broadcast industry will have the same advantages under the First Amendment as the newspaper industry does now."[9] Matthew Spitzer, in a major forthcoming article, also believes that the old justifications for dichotomous treatment of print and broadcast will likely soon fall at the hands of the Supreme Court, even if new justifications are found.[10] This widespread disbelief in the veracity of current policy springs largely from the following arguments.

Since the pathbreaking analysis by Ronald Coase[11], it has been generally understood by scholars that the logic of the ***NBC*** decision, and later of ***Red Lion,*** was logically false. Just

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7 "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." ***Red Lion,*** *supra* note 1, at 392.

8 "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Ibid.*, at 390.

9 Geller, Broadcasting and the Public Trustee Notion: A Failed Promise, 10 Harv. J. on Law & Public Pol. (1987), 87-90.

10 Spitzer, The Constitutionality of Licensing Broadcasters, N.Y.U. Law R. (1990, forthcoming).

11 Coase, The Federal Communications Commission, 2 J. of Law & Econ. (1959), 1-40. An even earlier analysis with similar insights, however, appears in Herzel, "Public Interest" and the Market in Color Television Regulation, 18 U. of Chic. L. Rev. (1951), 802-16.

because exclusive rights to spectrum are necessary for the efficient functioning of the broadcasting industry, does not mean that government must either own, allocate, or regulate (in terms of content, ownership, *etc.)* such rights. It is sufficient that the time, place, and frequency coordinates be legally defined and enforced by government. This judicial function, moreover, turns out to be nothing more or less than the property rights "traffic cop" function of government necessary to deter anarchistic chaos in any private market. In arguing that federal licensing of broadcasters was necessary to eliminate the interference problem potential to any common resource (which many economic resources lacking legally defined rights will quickly turn into[12]), the Court mistakenly compacted two distinct functions -- rights *definition* and rights *assignment* -- into one.

The economics of this revisionist analysis are flawless. The resulting persuasiveness has attracted many efforts to fix this "mistake" in first amendment law by showing that a *private* assignment mechanism is indeed workable for electromagnetic spectrum, and outlining the details of such a market.[13] The principle feature of such approaches is that the federal government will define property rights in spectrum, and will collect payments (as in an auction) for its use. No regulation of content is required to technically solve the commons problem in

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12 Wherever private enforcement costs are high, in fact. In some situations, alternatively, the private market may well handle the property rights enforcement problem as well or better than government police powers. It appears that spectrum rights, like many other goods (copyrights, trade names, water rights, *etc.)* are expensive to enforce without state-supplied legal institutions.

13 See De Vany, et al., A Property Market System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study, 21 Stan. L. Rev. (1969), 1499; Minasian, Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation, 18 J. of L. & Econ. (1975), [CITE].

airwave usage. Proponents of such regimes appear to believe that the analytical errors of earlier generations legal policymakers may now be corrected due to the inventions of more logically appealing regulatory structures.[14]

The second line of criticism of prevailing law which has gathered considerable momentum is the view that the market has clearly changed since the current regime was constructed, and even since the ***Red Lion*** precedent was crafted. So, granting *arguendo* that physical scarcity was once a problem, the technical ability to exploit the electromagnetic spectrum has so vastly increased in recent decades, with cable, satellite, and low power television (to name just three new product delivery sources) adding dramatically to viewer choice, that any once critical scarcity problem has been surmounted.[15] Such a position can most easily be supported by comparisons of the typical market shares of broadcasting outlets v. print outlets. Major daily newspapers, such as the Miami Herald, routinely demonstrate far greater market power and general community influence than do surrounding radio or TV stations. Yet, it is clear from ***Tornillo*** that such market power (even if adjudged a natural monopoly) is insufficient justification for government regulation of content. Abundance has replaced scarcity in the electronic press, particularly in relationship to the benchmark of the first amendment-protected print media.

This paper takes the view that such arguments over the logic and historical condition of the physical scarcity justification for special treatment of the electronic press basically miss the key determinants of the current policy regime. The driving force in federal licensing, the historical record shows, has been the combined political interests of legislators desirous of obtaining

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14 Spitzer's primary contribution is in making the point that the existing legal structure may be invariant with respect to the veracity of its premises; stripping the Emporer of his clothes will not annoy the King. Spitzer, *supra* note XX.

15 See Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, Tex. L. Rev. (1982), _____; Powe, *supra* note ___.

valuable prerogatives over the assignment of frequencies; incumbent broadcasters, ever vigilant in restricting new entry into broadcasting, and "public interest" lobbyists, whose self-interests lay in politicizing the assignment process despite the expropriation which their constituencies thereby suffered. Hence, a classic rent-seeking competition forged the licensing regime in broadcasting in the 1920s, and has steadfastly maintained it since, due to the vector of payoffs associated with such a scheme. While the general "public interest" in a free press has not been thereby well-served, the structure has efficiently distributed gains to precisely those players most influential in erecting and maintaining it. This accounts for the system's longevity and vigor in the face of strongly compelling public interest arguments striking at the heart of the regime.

The support for this thesis is evidence sugesting that the historical rendition of the pre-regulation broadcasting market offered in both ***NBC*** and ***Red Lion*** was largely fanciful, and that a more accurate history of the early broadcasting period reveals that an orderly market was reshaped by political interests to yield rents, not to solve interference. This history shows that physical scarcity and its ancillary justifications for content regulation are *ad hoc* rationalizations of policies adopted for specific political purposes. Most important for Constitutional considerations is that the means chosen to implement such dealings provoke precisely the same concerns which make government licensing of print unlawful: politicization of the press produces results antagonistic to the most fundamental first amendment values.

2 The Genesis of Regulation.

In my forthcoming paper[16], I show at some length that the evidence is compelling that major broadcasters, leaders in both the executive and legislative branches of the federal government, and (to a much lesser extent) "public interest" advocates combined politically to produce the Radio Act of 1927. The motive force behind the law was not the interference

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16 Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J. of L. & Econ. (April 1990, forthcoming).

problem in broadcasting, a problem which had been dealt with smoothly on a first-come, first-served exclusive rights rule implemented by the U.S. Department of Commerce, 1920-26, but the difficult question of "Who Should Control the Airwaves?"[17] The short story describing this episode proceeds as follows.

Commercial radio broadcasting was launched in the United States on November 2, 1920, and began catching on as a business proposition in late 1921. By the end of 1922 there were over 550 broadcasters (see Table 1), all confined to, basically, *one* frequency by the federal authorities. Separation by time and place, involving a difficult coordination of a new media, kept transmissions from interfering one with another. Such divisions were arranged in the licensing function of the Commerce Department, often subject to agreements worked out voluntarily (sometimes entailing the exchange of money) between broadcasters.

The right to broadcast was obviously key to the entire market. Should there be confusion as to the ownership of a frequency at a particular time and place, then it would be difficult for "the ether" to go to its highest valued (or any valued) use. The legal problem was that the Secretary of Commerce, Herbert Hoover, was quite aware that the Radio Act of 1912 instructed him to award a license to *any* applicant. It was apparent that such open entry conditions would entail the loss of any rental values accruing to stations which had begun transmitting and were building significant audiences. Hoover, a policy entrepreneur of great renown, immediately seized on the opportunity to control the situation to the benefit of newly established broadcasters by convening a series of annual Radio Conferences, 1922-25, and implementing the allocation plans agreed to by the broadcasting interests there represented. These essentially amounted to denying new applications to existing broadcast rights, unless the incumbent agreed to some time-sharing arrangment (which, for a price paid by the entrant, they might).

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17 As the ACLU's Morris Ernst appropriately put the question. Ernst, Who Should Control the Airwaves? 122 The Nation (21 April, 1924), 443-4.

Commerce expanded the AM broadcasting band in 1923 and again in 1924, establishing a range from 550 Kilocycles to 1500, virtually our current dial. Preferential assignments were made to the most established broadcasters with the largest audiences, exactly in line with industry sentiment regarding the new allocations. Property rights were secure enough, in fact, that transferability was respected, and frequency rights sold for significant premia. New broadcasters were now instructed to enter the broadcasting market via purchase of existing stations, as new assignments were unavailable. Larger and larger audiences were reached, as the price of sets fell and the quantity sold increased steadily. Retailers proclaimed the 1924 holiday season as "Radio Christmas."

The historical account given by the Court in ***NBC*** and repeated in ***Red Lion*** (as quoted above) is cast into serious doubt by the simple evidence in Table 1, showing radio set sales monotonically increasing, year-by-year, until 1926. Under the Court's pre-1927 "chaos" version, the predicted radio set sales profile would exhibit a significant kink upon establishment of an orderly market, *i.e.* 1927 (the Radio Act was signed into law 23 February, 1927). Indstead, radio sales rose steadily throughout the early radio years, with a downturn in 1926. This is explained straightforwardly by the quick creation of *de facto* property rights (by the Department of Commerce on a "priority-in-use" basis), and the interruption of that system in July 1926 to February 1927 time frame commonly referred to as "the period of the breakdown of the law."

In a "wave-jumping" case invited by the Secretary of Commerce, who had been requesting a congressional mandate for a discretionary standard in his rights assignments function since 1921, a federal district court ruled that the Secretary had no legal right to deny a broadcasting license (as had been held by a court in 1923[18]), *nor* the ability to set place or hours of operation. In that the limiting of new licensees to just those time, frequency and power assignments selected

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18 ***Hoover v. Intercity,*** [CITE HERE] (1923).

by the Commerce Department effectively gave the Department the power to enforce exclusive rights to spectrum (simply by not issuing any new licenses to time, place, and frequency placements currently in use, without the consent of the current user), the decision forced abandonment of a property rights system which had efficaciously solved the potential "commons" problem in radio. Chaos ensued from the ruling, as predictable not only in hindsight[19], but as promised by Hoover and a host of contemporary commentators.[20]

There was little then mysterious about the ability of private property rights to functionally create a smoothly operating radio broadcasting market. Nor about the problem entailed with ill-definition of rights. Rather than "confusing" federal licensing under a public trusteeship standard with the necessary and *sufficient* enforcement of exclusive rights to spectrum, there was widespread understanding of exactly the cause and effect of either order or chaos at the time of the 1927 Act. This would be lost in *post hoc* explanations of the licensing regime, most importantly given in ***NBC*** and ***Red Lion.*** Note the vast difference in historical accounting detailed in the first annual report of the Federal Radio Commission, born in the 1927 Act, with the key passage from ***Red Lion*** above:

> *We have had about six years of radio broadcasting. It was in 1921 that the first station (KDKA) started operating. and soon grew in popularity, sales mounted, and a great new industry was in the making. Then something happened.*
>
> *In July, 1926, just 10 months ago, the Attorney General of the United States rendered his famous opinion that the Secretary of Commerce, under the radio law of 1912, was without power to control the broadcasting situation or to assign wave lengths. Thus, after five years of orderly development, control was off. Beginning with August, 1926, anarchy reigned in the ether.*
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> *As the result many stations jumped without restraint to new wave lengths which suited them better, regardless of the interference which they might thus be causing to other stations. Proper separation between established stations was destroyed by other stations coming in and*

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19 See Coase, *supra* note XX, at _____.

20 See Hazlett, *supra* note XX, at _____.

> *camping in the middle of any open spaces they could find, each interloper thus impairing reception of three stations -- his own and two others.*[21]

The solution created by the Commission was to order established broadcasters to "return" to previously held assignments (i.e., pre-breakdown), and to expropriate new entrants.[22] Expanding the number of broadcast frequencies so as accomodate all then existing broadcasters was emphatically rejected. This could have been done "extensively," by enlarging the commercial broadcasting band from 1500 kc to 2000 kc, or "intensively," by reducing channel separations from 10 kc to 7 kc. Radio broadcast interests bitterly opposed this, and the idea of eliminating interference via supply expansion was dropped with finality.[23] The result was a classic regulatory capture, featuring significant industry rents created via public policy, which were shared with political constituencies in proportion to their effective influence over policy.[24] It is central to understand that the effective policy regime launched by the Radio Act of 1927, however, did not *change* the radio market according to the "public interest," so much as it simply reasserted property rights under federal law, claims which had been recognized in fact[25] and capitalized financially during the 1920-26 period, when no public trusteeship model was

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21 Federal Radio Commission, Annual Report (1927), at 10-11. The Commission was reprinting a speech given by Commissioner O.H. Caldwell of New York, 11 June, 1927.

22 Hazlett, *supra* note XX, at _____.

23 The FRC noted that "United opposition to widening the broadcasting band in order to accomodate more stations was expressed at the hearings by representatives of the radio art, science, and industry... Stout opposition was registered also against reducing the frequency separation between channels from 10 to 7 kilocyles... " FRC, *supra* note XX, at 3.

24 See Gilligan, et al., Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887, 32 J. L. & Econ. (1989).

25 Indeed, the property rights to a broadcast frequency were upheld at common law in ***Oak Leaves v. Chicago Tribune*** (1926). An injunction was issued to stop an interloper from broadcasting within 50 kc of WGN in Chicago, the precise separation standard employed the following year by the FRC. The decision was based on the "pioneering" rights of WGN in homesteading its frequency. Hazlett, *supra* note XX, at _____.

incorporated into policymaking. The *chaos-before-1927 and order-after-1927* analysis of the Court in ***Red Lion*** is entirely at odds with the accounting given by contemporary analysts, including the Federal Radio Commission.

3 The Early Demand for Political Control

Numerous analysts who believe that the ***Red Lion*** physical scarcity logic is uncompelling are apt to explain the Court's deferential attitude to regulatory authority as springing from a view that the electronic media are just not like the hard-news media of print journalism.[26] This contention is untestable, in that it concerns the psychic motivations of jurists, but a further supposition is. This is the historical observation that radio was not, at first, considered to be part of the press, and that regulatory institutions sprang up which treated broadcasting simply like a business (or even a public utility). The legal importance of the argument is that it interprets the resulting licensing structure, even if wrongheaded, as a benign happenstance dictated by the need to create a property rights system to solve the interference problem.

As seen above, the interference problem was seen in sophisticated terms, and few illusions prevailed as to the need for a federal licensing standard as a solution to that problem. The political demand to regulate radio precisely because it was instantly identified as a powerful medium of expression, however, is very strongly suggested by the facts. This adds a very different gloss to the modern interpretation which fixes and ignorance as to future market events analytical mistake as the major components behind the demand to license the electronic press.

a. The immediate rise of radio censorship.

That radio broadcasting was seen to be influential as a transmitter of ideas and information of great social impact can be directly inferred by the instant concern over the political

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26 See Pool, *supra* note XX, at _____; Powe, *supra* note XX, at _____.

ramifications of specific radio programs. This concern was expressed on both sides of the market: political actors were quick to intimidate, and radio producers were quick to self-regulate, in the fear that the consequence of offensiveness would be costly political trouble.

Numerous early instances of censorship are given in the historical accounts of Ithiel de Sola Pool, Eric Barnouw, and Philip T. Rosen.[27] The birth of commercial broadcasting was literally of political substance, as Westinghouse chose to transmit presidential elecion returns on 2 November, 1920, from what would become KDKA in Pittsburgh. Similarly, the party conventions of 1924 were landmarks for broadcasters, who eagerly exploited the high profile news events to build radio audiences across the country.

Indeed, the coverage of the Democratic Convention of that year was controversial, as the Party attempted to control coverage, distrusting the radio reporters to provide sufficiently favorable news to the public.[28] It is interesting that the Republicans were not similarly nervous; their Party controlled the licensing process and had more subtle means of control at its disposal. Moreover, the incumbent party had proven its influence specifically, when earlier that year it cowed a New York radio station from airing a speech critical of Secretary of State Charles Evans Hughes, who had previously delivered a major policy address on the station.[29]

Censorship involved specific issues and stances taken by radio personalities, including the advocacy of property rights in water,[30] birth control,[31] and evolution.[32] Stations were encouraged

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27 Barnouw, A Tower in Babel (1966); Pool, *supra* note XX; Rosen, The Modern Stentors (1980).

28 Democratic censorship efforts are detailed in Barnouw, *supra* XX, at 149-50.

29 *Ibid.*, at 139-40.

30 In Pool, *supra* note XX, at _____.

31 Rosen, *supra* note XX, at ____.

32 An early congressional measure to outlaw the advocacy of the theory of evolution was voted down. See Barnouw, *supra* note XX, at 197.

by the political explosiveness of controversial programming to stick to safer fare, such as music.[33] American Telephone & Telegraph specifically eschewed programming its own broadcast stations, preferring instead to operate on a common carrier basis, so as to forgo the inevitable political problems with political authorities. As a regulated utility, executives believed that the corporate exposure to penalties in the form of denied rate increases, *etc.*, was significant, and sought to remove themselves from any such liability that "editorial troubles" might create.[34]

The creation of the first radio network, the National Broadcasting Company, is noteworthy in two respects. First is its timing. It was formed during the period of alleged chaos, an odd moment in which to produce expensive network programming. Indeed, it debuted in September, 1926 -- precisely at the moment where even a more sophisticated historical analysis would reveal to be during "the period of the breakdown of the law." The key, however, is that the more powerful stations with which NBC was affiliated had firmly established rights even in the "anarchy" of July, 1926 to February, 1927. Hence, the initial programming was such a large success that a *second* NBC network (to form both Red and Blue networks) began broadcasting in January, 1927 -- also before any federal radio law to end the "cacaphony of competing voices."

The second interesting facet of NBC's tactical market entry was the very politick manner in which they conducted themselves. While newspapers of the era were openly partisan in their expressed viewpoints, organizer David Sarnoff very purposefully composed a voluntary advisory board tying together prominent citizens across a wide spectrum of opinion. While this difference could, in the traditional presentation, be inferred as evidence that contemporary actors, including Sarnoff, simply did not consider the radio to be imbued with the functions of the press, quite the opposite conclusion appears warranted. Sarnoff explicitly declared that the medium should be viewed legally as were newspapers: "the same principles that apply to freedom of the press

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33 *Ibid.*, at 141.

34 Barnouw, *supra* note XX, at 186.

should be made to apply" to radio.[35] And the careful political balancing of NBC advisors was an attempt to pre-empt anticipated calls for censorship due to the likely controversial nature of what was broadcast. Indeed, the choice of chairman for the Radio Corporation of America was itself largely motivated by the need for political connections to fend off likely efforts of government control.[36]

b. Herbert Hoover as political entrepreneur.

The control of the Department of Commerce during the early days of radio was obvious, although the limitations on Department discretion were apparent as well. The locus of legal authority clearly resided within the Department's aegis, and the annual Radio Conferences allowed industry officials to set technical and policy rulings in an orderly fashion. The ability of the Department to use its rights-enforcement apparatus in a more discretionary manner, however, favoring certain types of programming, for instance, was truncated by the lack of statuatory authority for any such action, and the industry preference for relatively discretion-free enforcement of priority-in-use property rights.

But the power of radio was obvious to Secretary Hoover, who (it is now safe to say) had his eyes set on higher political office, and who saw clearly that even the slightest ability to influence the performance of radio broadcasters would be a capital political asset. Indeed, the frequent cynical references during the middle 1920s in the trade and popular press to Hoover's interest in radio being motivated by his desire to be president of the United States is now highly suggestive. What is apparent, however, is that Hoover sought to establish political control in the Department of Commerce early on in the Harding Administration (wrestling it away from the

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35 In Pool, *supra* note XX, at 120. See also, Sarnoff, The Freedom of the Air, 119 The Nation (23 July, 1924), 90.

36 In January 1923, the firm specifically searched for an individual whose mainstream politics (and "Americanism") were unassailable, settling on General Harbord, a super-patriot who was formerly Gen. Pershing's chief of staff. Barnouw, *supra* note XX, at 124.

Navy Department and other governmental interests after a rough political skirmish), and immediately embarked on a legislative campaign (via his ally, Congressman White of Maine) to procure a mandate to regulate radio as according to "public interest."

There was little about radio that Herbert Hoover, an accomplished engineer and political operative, did not understand. It was his consistent goal, well before the "breakdown of the law," to achieve discretionary control over the content of what was broadcast precisely due to the fact that radio was such a powerful medium of expression. Whatever was said of radio later, Hoover always considered it a great organ of the press. As his Memoirs summed up his thoughts (as given in his speeches and articles of the time): "I was impressed with three things [concerning radio]: first, the immense importance of the spoken radio; secondly, the urgency of placing the new channels of communication under public control; and third, the difficulty of devising such control in a new art."[37]

More explicit still was Hoover's belief that the chaos of the airwaves was a welcome motivation for achieving the discretion over radio licenses which had not been forthcoming, largely because the radio market was working so smoothly (prior to the breakdown).[38] Yet, Hoover, while making precisely the same paeans to free speech that were customary then and now, was quite straightforward about the driving force for such control -- not to define rights to broadcast frequencies, but to influence what was said and who was to be allowed to say it:

> *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.... This is an administrative job, and for good administration must lie in a single responsibility.*

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37 Hoover, The Memoirs of Herbert Hoover: The Cabinet and the Presidency, 1920-1933 (1952), at 139. See also, Hoover, The Urgent Need for Radio Legislation, Radio Broadcast (_____, 1923), at 211.

38 See Hazlett, *supra* note XX, at ____.

> *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.*[39]

c. The Political Battle Over the Licensing Authority in the Radio Act.

The instant recognition in the public sector that the radio industry would be hugely influential, may also be reflected in the intensity with which rival factions fought to establish control over the licensing authority as required in the competing proposals which surfaced in the House and Senate. The House version, drafted by Hoover's Commerce Department, allowed the Secretary to employ a "public interest" standard in selecting licensees. The Senate version, authored by C.C. Dill, a Washington Democrat, created an independent regulatory commission, the FRC. Each of the five Commissioners were to come from a different region, as the political nature of their assignments was recognized immediately. Between 1923 and 1926, three bills passed one house, only to die in the other. When compromise legislation expired at the 1926 summer recess, Hoover actually requested the famous Attorney General's opinion that touched off the "chaos of the airwaves."

The Senate held out for a commission which would require appointees to obtain Senate confirmation, a strategy quite similar to that pursued in the debate over the Interstate Commerce Act.[40] The House legislation allowed Hoover, however, to continue licensing broadcasters, but to allow "public interest" considerations to guide decisionmaking. While Hoover liked to argue for this plan on the grounds of administrative convenience and government efficiency (Coolidge and Hoover often attacked the creation of new independent agencies as wasteful proliferation of government), the claim fooled virtually no one in the Congress. Hence, he was immediately

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39 Hoover, Opening Address, Fourth Annual Radio Conference Proceedings (1925), at 58.
40 Gilligan *et al.*, *supra* note XX.

attacked by Representative Davis, as attempting an overly ambitious of bureaucratic power. For four years, essentially, the political jockeying went on. Finally, Hoover's Republican opponents in the Senate, fearful of the Secretary's suspected campaign for President, threw their weight behind the Dill bill, and broke the deadlock. The independent commission, the FRC, was born out of political squabbling directly caused by the important nature of radio, and was specifically taken out of the Department of Commerce due to apprehension over Hoover's use of leverage over radio broadcasters to receive favorable treatment in the 1928 presidential campaign.[41]

4 The Vacuity of "Physical Scarcity"

While the view has developed that the "physical scarcity" doctrine in ***NBC*** and ***Red Lion*** is an analytical error,[42] the confusion could well be due to the technological sophistication of electronic communications technologies which are relatively obscure to older generations of jurists.[43] While, again, psychological examinations of the underlying causes of errors in logical judgment is beyond the scope of this paper, there is an uncompelling nature to the currently fashioned response: If broadcasting ever were physically scarce, it is no longer so today, due to the discovery and employment of vast new sources of spectrum.[44] If the physical scarcity doctrine was meaningless at its creation, then it cannot be overturned by new empirical evidence on market supplies.

It is difficult to regard the physical scarcity doctrine as meaning anything at all. There is the economic argument of Coase's, well-taken, that scarcity pervades all economic goods, and that, *e.g.*, while Renoir paintings may be physically scarce (there is a finite, and easily determined, number of them in existence), the market auctions them off to their highest valued

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41 Rosen, *supra* note XX, at 10, 50, 84, 95-6.

42 Coase, *supra* note XX, at _____.

43 As argued in Pool, *supra* note XX at ____, and Powe, *supra* note XX, at ____.

44 Fowler & Brenner, *supra* note XX, at _____.

employments rather easily. Yet, the physical scarcity of airwaves cannot be similarly thought of, because frequencies are divisable (or expandable) in ways that works of art are presumably not. Bruce Owen has noted that the spectrum can be mined more intensively, using less separation between frequencies with more (and/or higher quality) broadcast transmitters and/or better receivers, or more extensively, deploying more sophisticated sending and receiving equipment so as to exploit progressively higher or lower wave lengths.[45] The idea of a fixed number of frequencies to be awarded to a fixed number of speakers simply begs the question of unit definition, as well as the question regarding how much of the spectrum is to be used for radio broadcasting. As only a small fraction of the band has ever been devoted to this purpose[46], the extensive margin has never been close to the binding constraint of economics and technology.[47]

Decisionmakers in the early days of radio could not have been unaware of such considerations; indeed, we have already noted that the first substantive FRC ruling was to reject two suggestions to increase the number of available frequencies, one by increasing the radio band, the other by reducing kilocycles per assigned frequency. Yet, despite the temptation to ascribe later court decisions to mere irrationality, perhaps another way of addressing physical scarcity should be advanced. Suppose one just cannot grasp the notion that intensive and extensive margins exist for further exploitation over all ranges in radio, that the spectrum is no

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45 Owen, Differing Media, Differing Treatment?, in Brenner and Rivers, eds., Free But Regulated: Conflicting Traditions in Media Law (1982), 35-51.

46 Hazlett, *supra* note XX, at ____.

47 Curiously, the ***Red Lion*** opinion expressed awareness of the inherently arbitrary definition of physical scarcity in allowing as how the number of frequency permits was indeterminate with respect to time coordinates (and, hence, infinite): "Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast week." 395 US 390-1. The same, obviously, is equally true with respect to geographical and frequency divisions.

more finite than zinc, timber, or oil, and that the appropriate size of the band will always depend on the cost/benefit trade-off faced on such margins. In other words, one cannot see the spectrum as an economic good. Physical scarcity is still inexplicable.

The easiest way to deduce this is to consider cable delivery. We are today familiar with cable television transmission of video signals over coaxial copper wires. Such cables are just "spectrum in a tube," as they have been dubbed by engineers. Whatever physical scarcity is thought to exist in the airwaves cannot even lead to a general physical scarcity problem due to the possibility of delivering precisely the same signals (non-interfering) over a wire between any two points. This is not, further, a miracle solution provided by high technology: U.S. consumers were receiving radio service via cable as early as 1923[48], and AT&T first considered transmitting radio signals in 1919 not via airwaves, but by wire.[49]

The truly interesting legal point is that the federal courts have indeed rejected the physical scarcity doctrine for cable television transmission. Cables are not finite like the airwaves, goes the logic. Yet, they deliver precisely the same product, and function as substitutes. Since "physical scarcity" denies the economic *(i.e.,* cost-based) approach to scarcity as relevant, the fact that one means is cheaper than another is unimportant. The ability to replicate a "physically scarce" technology with a "non-physically scarce" technology makes the former concept an empty box.

5 "The Rights of the Listener" and "Diversity"

The origins of radio regulation provide interesting vintages for the development of two doctrines used to back-up the physical scarcity analysis, (a) the supremacy of the rights of the listeners, and (b) a diversity of voices. The premise that physical scarcity makes broadcasting

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48 Barnouw, *supra* note XX, at 154.

49 *Ibid.*, at 106.

unique is buttressed with the idea that government licensing of broadcasters helps to further the public purposes behind the first amendment. Hence, discretion over content does not, on net, diminish freedom of the press.

In ***Red Lion*** the Court was blunt in rejecting the claims of the broadcaster who argued that the Constitution was designed to protect *his* right to speak, publish, or -- eventually -- broadcast: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[50] This line of argumentation was actually concocted by Herbert Hoover and the broadcasting interests as early as 1922. Beginning with the first of the annual Radio Conferences sponsored by the Department of Commerce, the major broadcasters adopted yearly resolutions asking for a federal regulatory regime, where radio stations would be licensed according to "public interest, convenience or necessity." From the first, this was justified by Hoover, Sarnoff, and the Conference resolutions, as demanded by the rights of the listening public.[51]

The industry angle in using such arguments was that the "public interest" and the "rights of the listeners" would be best served by establishing a federal regulatory regime which gave effective property rights to the biggest and most established broadcasters.[52] Hoover, while loyal in large measure to such interests, desired to become more personally involved in the award and adjudication of such rights in his role as a public servant. Most interesting politically, however, is that precisely the same philosophical views as to the optimal regulatory regime were advanced by spokespersons for "the public interest," non-profit broadcasters such as universities, churches, municipalities, labor unions, and the American Civil Liberties Union.

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50 395 US 390.

51 Barnouw, *supra* note XX, at 95; Hazlett, *supra* note XX, at ____.

52 This is, in fact, precisely what obtained. Hazlett, *supra* note XX, at ____.

One quirk here is revealed in that we know the end of the story. Non-profit broadcasting licenses were largely extinguished by the Federal Radio Commission by the early 1930s. So, with the advantage of hindsight, we may adjudge the efforts to obtain such licenses a failure in terms of their announced goals. But there existed a strong desire to promote public trusteeship because the non-profit lobbyists regarded federal licensing as a forum which afforded them the maximum return on their human capital. Despite the obvious agency problem (their principals were not well represented, as is apparent from the end result of expropriation), the enthusiasm for regulation was clearly driven by the desire of such lobbyists to influence the content and ownership of what was broadcast. The limits of such enthusiasm were quite broad, as indicated in the far-reaching opinion as to the parameters of federal regulation of Morris Ernst of the ACLU:

> *All records of broadcasting stations should be kept on forms prescribed by the Department [of Commerce] and opened periodically to the public. Such records should include programs which have been broadcast, itemized in accordance with types of broadcasting such as jazz, opera, speeches, etc... The public and the Department, in possession of such facts, may more wisely come to a determination as to whether or not the particular station should have its license renewed or revoked on the sole basis of public benefit.*[53]

"Diversity" very quickly became the regulatory rationale developed by such proponents of government control, who sought to achieve added influence over content via public trusteeship. They would stand to gain by a policy that allowed their "public interest" currency to help purchase broadcast rights in the rights "auction." That such a mandate instantly turns into rigorous government control and content censorship can be seen in the ambitious policy statement by Ernst above; that it is simply a vacuous standard depending solely upon the

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53 Ernst, Radio Censorship and the "Listening Millions," 122 The Nation (28 April, 1924), 443-4.

discretion of the political coalition exercising effective authority can be inferred from the expropriation of the very constituency which advanced the standard itself during the 1920s debate over radio legislation.

That the affirmative obligation to provide "diversity" over the airwaves[54] does great violence to the negative protection *from* authority in the first amendment can be seen in comparing U.S. law to Soviet law. The constitution of the U.S.S.R. contains many rights and freedoms, but all are to be delivered under the discretion of regulatory officials. When the state is put in the position of *supplying* particular outputs, such as a diversity of opinion sources, then constitional protections become both superfluous and ineffectual because only by applying subjecttive judgments may administrative agencies determine how to produce such outputs.[55]

Similarly, the "rights of the listeners" argument has been such a steady stand-by as a justification for governmental authority, even by opposing political interests, because it effectively transfers decisionmaking over outputs into the political/bureaucratic process. "Listeners or viewers" are served in the economic marketplace by private sellers, and in the political marketplace by government (and other) representatives. To argue for the "rights of listeners" is to beg the question; what is significant is *how* such rights are to be exercised, via voluntary patronage (private market) or federal representation (government regulation). Hence, as applied, the argument confuses listeners' rights, proper, with government regulatory rights. This insight, while perhaps subtle to outside analysts, has apparently been straightforward to petitioners for government discretion (always properly vested) since Hoover's initial arguments on the subject in the early 1920s.

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54 ***Red Lion,*** 395 US 390.

55 Indeed, the FCC supression of cable in the 1960s and 1970s as "reasonably ancillary" to the broadcast regulation mission shows how far towards a controlled outcome such affirmative provision of first amendment "values" can take an agency.

6 Conclusion

The demand to regulate broadcasting in the United States has not been driven by the desire to control interference, which when combined with the error theory of federal licensing, produces the standard legal/economic analysis in sophisticated contemporary discussion. The motive to control broadcasting through federal licensing and public trusteeship has been, since its earliest days, driven by the political advantages to be had in influencing a key communications medium of increasing social importance. Certainly part of this demand can be ascribed to pure economic rent-seeking; controlling valuable franchises is lucrative. But influencing the direction of rent assignments and influencing the political slant of reporting are complementary outputs of the regulatory regime as constructed. Ideological rent seeking would almost certainly accompany financial rent seeking, as payments (or extractions) to the political licensing authority can be made in either dimension simultaneously. Only a special case "corner solution" would imply that just one form of exchange between licensees and licensors be employed.

This brings us to the very heart of the first amendment question in electronic communications. The contention of this paper, in fact, is that the actual historical creation of broadcasting regulation renders the standard pro-first amendment arguments of secondary consequence. It is not simply that we now possess the *know how* to set private property rights into free play in the broadcasting market, nor that we have discovered vast new supplies of electromagnetic spectrum to make the old physical scarcity arguments fade on even their own terms. What we are led to conclude is that the demand to regulate electronic communications has occurred largely for the very reasons which we have crafted a Constitution to protect us against: Government manipulation of an industry of supreme importance to democratic life.

The basic thrust behind the first amendment's right to a free press, *the* underlying first amendment value, is not that private markets function perfectly in regards to market structure, choice of topics, or "fairness." Indeed, freedom of contract is widely known to yield highly

variable results. The premise of the Constitution, however, is that competition between firms and individuals for subscribers is a better *process* than is ruling the market via government fiat. Not only is the latter entirely monopolistic, it is coercive. The measured cost/benefit analysis implicit in the first amendment is that the riskiness of the latter is less preferred outweighs the quality variance entailed in the former.

To deviate from this analysis should require a large burden of proof. Instead, ***NBC*** and ***Red Lion*** present historical accountings and lines of arguments which are seriously underwhelming. Perhaps the evidence most poignantly demonstrative here can be gleaned by one very important point in the latter decision. In dealing with the broadcaster's contention that government enforcement of the fairness doctrine would tend to chill free speech, and deter the coverage of controversial issues to begin with, the Court responded that such a possibility was indeed "a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled."[56]

Yet the concern was put to rest by noting the Federal Communications Commission could then force broadcasters to cover more controversy; the public interest could, in effect, simply be conjured by diligent, intelligent, watchful regulators. Moreover, the Court found the evidence as to the existence of a "chilling effect" lacking. In support, it cited Frank Stanton, President of Columbia Broadcasting System, as declaring in a November 21, 19068 speech: "[W]e are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation."[57]

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56 395 US 393.

57 *Ibid.*, at 394, f.n. 19.

It now appears, however, that while Mr. Stanton gave outstanding public speeches on the matter, his views on the "chilling effect" were substantially different in private. In fascinating internal White House memos produced during the Watergate investigation, Nixon Administration attorney Chuck Colson prepared a 25 September, 1970 report for Herb Klein and H.R. Haldeman detailing the very pointed meetings he had held with the "three network chief executives."[58] Among the highlights are the following observations:

> *The networks are terribly nervous over the uncertain state of the law.... They are apprehensive about us. Although they tried to disguise this, it was obvious. The harder I pressed them (CBS and NBC) the more accomodating, cordial and almost apologetic they became. Stanton for all his bluster is the most insecure of all.*
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> *To my surprise CBS did not deny that the news had been slanted against us. Paley merely said that every Administration has felt the same way and that we have been slower in coming to them to complain than our predecessors. He, however, ordered Stanton in my presence to review the analysis with me and if the news has not been balanced to see that the situation is immediately corrected. (Paley is in complete control of CBS -- Stanton is almost obsequiuous in Paley's presence.)*
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> *I had to break every meeting. The networks badly want to have these kinds of discussions which they said they had had with other Administrations but never with ours. They told me any time we had a complaint about slanted coverage for me to call them directly. Paley said he would like to come down to Washington and spend time with me anytime that I wanted. In short, they are very much afraid of us and trying hard to prove they are "good guys."*
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> *The only ornament on Goodman's desk was the Nixon Inaugural Medal. Hagerty siad in Goldenson's presence that ABC is "with us." This all*

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58 Reprinted in Bazelon, FCC Regulation of the Telecommunications Press, Duke L.J. (1975), 213-251.

> *adds up to the fact that they are damned nervous and scared and we should continue to take a very tough line, face to face, and in other ways.*
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> *I will review with Stanton and Goodman the substantiation of my assertion to them that their news coverage has been slanted. We will go over it point by point. This will, perhaps, make them even more cautious.*[59]

It may have taken us sixty years to remember why licensing the press was a bad idea. Perhaps it is appropriate to redisover why the first amendment was such a good one.[60]

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59 *Ibid.*, at 244-7.

60 Pool's convergence thesis makes this rediscovery more compelling. Whatever compromises have been made to date will only escalate in future decades, as the sphere of the electronic media expands, and that of print contracts.

Table 1

U.S. Radio Sets and Broadcasters: 1921-35

Year	Radio HH's (1,000's)	Sets Produced (1,000's)	Radio and Radio Part Expenditures ($1,000's)[a]	AM Stations
1921				1
1922	60	100	60,000	30
1923	400	500	136,000	556
1924	1,250	1,500	358,000	530
1925	2,750	2,000	430,000	571
1926	4,500	1,750	506,000	528
1927	6,750	2,350	425,600	681
1928	8,000	3,250	650,000	677
1929	10,250	4,428		606
1930	13,750	3,789		618
1931	16,700	3,594		612
1932	18,450	2,446		604
1933	19,250	4,157		598
1934	20,400	4,479		593
1935	21,456	6,030		623

Source: U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the U.S., Part 2 (September 1975), p. 796.

[a] Source: Barnouw 1966, pp. 125, 210.