OUT OF THIN AIR: USING FIRST AMENDMENT PUBLIC FORUM ANALYSIS TO REDEEM AMERICAN BROADCASTING REGULATION

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American television and radio broadcasters are uniquely privileged among Federal Communications Commission (FCC) licensees. Exalted as public trustees by the 1934 Communications Act, broadcasters pay virtually nothing for the use of their channels of public radiofrequency spectrum, unlike many other FCC licensees who have paid billions of dollars for similar digital spectrum. Congress envisioned a social contract of sorts between broadcast licensees and the communities they served. In exchange for their free licenses, broadcast stations were charged with providing a platform for a "free marketplace of ideas" that would cultivate a democratically engaged and enlightened citizenry through the broadcasting of "public interest" programming.

Few, other than the broadcasters themselves, would dispute that this "public trustee" doctrine has been a dismal failure. In exchange for the tens of billions of dollars of advertising revenue generated by their licenses, commercial television and radio broadcasters air very little—and some air none—of the kinds of locally oriented public affairs, political, educational, and cultural programming traditionally considered "public interest" fare. Congress and the FCC have failed to correct the mismatch between the proven profit-making power of public trusteeship and its anemic returns for the American people. To the contrary, Congress and the FCC, captured by the broadcast industry they regulate, have continued to subsidize commercial broadcasters constructively by awarding them new lucrative digital channels at no cost to them, while lifting ownership concentration limits and eliminating or failing to enforce the few remaining public interest programming requirements.

This Article begins by surveying the history of the public trustee doctrine, its First Amendment contradictions, and the legislative and regulatory failures and frustrations that have bedeviled the pursuit of a "free marketplace of ideas" on the

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nation's airwaves. It then explores the First Amendment's public forum doctrine as an alternative justification for government regulation of the public spectrum, reasoning in favor of the government's proactive creation and maintenance of public speech fora. After examining the Internet both as a public forum and as the sort of "free marketplace of ideas" that the broadcast spectrum was expected—but failed—to create, this Article argues that an affirmative public forum doctrine supports a requirement that broadcasters subsidize broadband Internet access in low-income and underserved communities.

I. INTRODUCTION

The history of American broadcast regulation is riddled with broken promises and unfulfilled aspirations. Congress and early communications regulators greeted the birth of broadcasting[1] in the early twentieth century as the advent of a new era in civic participation, with broadcast stations serving as platforms for a ubiquitous and universally accessible "free marketplace of ideas" that would cultivate a more deliberative democracy, and an enlightened, educated and engaged citizenry.[2] Like the Internet today, the nascent broadcasting medium was regarded as a vast and fertile public forum with great potential as a democratic resource. Herbert Hoover, then serving as Secretary of Commerce, articulated these aspirations when he declared in 1925 that "[t]he ether is a public medium, and its use must be for a public benefit."[3]

1. The focus of this Article is on commercial broadcasting. Public, non-commercial television and radio stations are subject to specialized federal regulations and different structural requirements prescribed by various federal statutes, most importantly the Public Broadcasting Act of 1967. *See* 47 U.S.C. § 396(a) (2000).

2. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 384–86 (1969); *see also* ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE 21 (1998), *available at* http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf. The Advisory Committee was empanelled by President William J. Clinton to examine whether television broadcasters transmitting over new lucrative digital television (DTV) channels should be required to meet certain quantified public interest obligations in exchange for their free use of the frequencies. *Id.* at 1. In its Final Report, it characterized the purpose of broadcast regulation in the following way:

> From the beginning, broadcast regulation in the public interest has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide. It has sought to cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.

Id. at 21.

3. GOV'T PRINTING OFFICE, DEP'T OF COMMERCE, PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE AND RECOMMENDATIONS FOR REGULATION OF RADIO 7 (1926),

Congress laid the foundations for what soon became known as the broadcast public trustee doctrine in the Radio Act of 1927[4] and its successor, the Communications Act of 1934.[5] The legislation prescribed a social contract of sorts between broadcast licensees and the American public. In exchange for the free and exclusive right to exploit their licensed channels of the public radiofrequency spectrum, broadcasters were required to air programming that served the "public convenience, interest, or necessity."[6] Congress left it to the regulators to define what this "public interest standard" entailed as the industry evolved.

The Federal Radio Commission, the provisional agency later replaced by the Federal Communications Commission (FCC), interpreted the public trustee doctrine as requiring that broadcast stations "be operated as if owned by the public. . . . [A]s if people of a community should own a station and turn it over to the best man in sight with this injunction: Manage this station in our interest."[7]

Although the FCC continues to claim that the broadcast regulatory regime promotes "the public's First Amendment interest in a robust marketplace of ideas,"[8] the government's lofty aspirations for broadcasting have proven unattainable. The FCC has failed to articulate a coherent and durable definition of "public interest" broadcasting and impose concordant programming requirements commensurate with the true value of broadcast licenses, which now generate upwards of $24 billion of annual broadcast advertising

available at http://earlyradiohistory.us/1925conf.htm. Secretary (and later President) Hoover stated that "[t]he dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, country-wide in distribution." *Id.*

4. Radio Act of 1927, Pub. L. No. 69-632, § 51, 44 Stat. 1552.

5. Communications Act of 1934, ch. 652, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–613 (2000)).

6. 47 U.S.C. § 303 (2000). Congress has lengthened the term of broadcast licenses through the years. The 1934 Communications Act prescribed a three-year term for broadcast licensees. 48 Stat. at 1084. In 1981, Congress extended the television license term to five years and the radio license term to seven years. Public Broadcasting Amendment Act of 1981, Pub. L. No. 97-35, § 1241(a), 95 Stat. 358, 736. In 1996 Congress extended the license terms once again to eight years for both television and radio stations. Telecommunications Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 56, 112.

7. *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 J. FED. COMM. B. ASS'N 5, 14 (1950).

8. *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, 18 F.C.C.R. 13,620, 13,688 (2003); *see also In re* Reallocation & Service Rules for the 698–746 MHz Spectrum Band, 17 F.C.C.R. 1022, 1124 (2002) (statement of Comm'r Michael J. Copps) (touting free commercial broadcasting as having a "special and critical role in our communities and in the nation's marketplace of ideas").

revenue alone for local television stations.[9] The FCC traditionally has considered locally oriented public affairs, political, educational, and cultural programming as satisfying the public interest standard, but its failure to require minimum quantities of such programming has resulted in its scarcity on the broadcast spectrum. Most broadcasters today air very little of this sort of public interest programming, and some air none of it at all.[10] Nevertheless, Congress and the FCC continue to confer onto broadcasters all of the privileges of public trusteeship, including, most recently, the assignment of a new, lucrative digital television channel at no cost to them.[11] By contrast, other FCC licensees, including landline and wireless telecommunications providers, paid in excess of $23 billion for certain digital licenses in spectrum auctions conducted over a four-year period in the 1990s.[12]

The failure of the public trusteeship model in broadcasting regulation is not the result of judicial hostility. To the contrary, the Supreme Court repeatedly has upheld the public trustee doctrine and its attendant regulation of broadcast speech against constitutional challenge. In 1969, the Supreme Court in *Red Lion Broadcasting Co. v. FCC* declared that in light of the public ownership of the airwaves, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[13] The Court reasoned that because "there are substantially more individuals who want to broadcast than there are frequencies to allocate,"[14] this scarcity permits the government "to put restraints on licensees" in

9. The 2003 revenue from television broadcast properties alone—stations and networks—totaled $18.8 billion for the largest three television networks, with the General Electric Company (NBC) earning $6.2 billion, Walt Disney Company (ABC) earning $4.8 billion, and Viacom (CBS) earning $7.8 billion. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2005: AN ANNUAL REPORT ON AMERICAN JOURNALISM: NETWORK TV (2005), http://www.stateofthemedia.org/2005/printable_networktv_ownership.asp. Total 2003 advertising revenue for local television stations topped $24 billion. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2005: AN ANNUAL REPORT ON AMERICAN JOURNALISM: LOCAL TV (2005), http://www.stateofthemedia.org/2005/printable_localtv_economics.asp.

10. *See infra* notes 58–60 and accompanying text.

11. *See infra* note 129 and accompanying text.

12. *See In re* Report to Cong. on Spectrum Auctions, 13 F.C.C.R. 9601, 9603 tbl.1 (1997) (reporting revenue from spectrum auctions totaling $23 billion); *see also Lessons from the United States Spectrum Auctions Before the S. Budget Comm.*, 106th Cong. (2000) (prepared testimony of Peter Cramton, Professor of Economics, University of Maryland), *available at* http://www.senate.gov/~budget/republican/about/hearing2000/cramton.htm (noting that two spectrum auctions in the mid-1990s yielded over $20 billion in revenue).

13. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

14. *Id.* at 388.

order to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[15]

The Supreme Court and Congress have continued to uphold this "scarcity rationale" despite persistent criticism from scholars and the broadcasters themselves. Some commentators have argued that the scarcity rationale was illogical at its inception because all media resources, including newsprint, are scarce.[16] Conflating the scarcity of content sources with the scarcity of awardable broadcast licenses, which was the Court's focus, they also argue that the scarcity rationale is obsolete now in the era of 500-channel subscription television, the Internet, and more efficient spectrum management. Few of these critics acknowledge that while many Americans can afford to access the diversity of content that pay television, Internet subscriptions, and other new media provide, many cannot. For a still-significant number of Americans, free over-the-air television is the *only* conduit to regular news, political information, cultural enrichment, education, and democratic engagement. This disparity in access makes it impossible to have a truly representative and functioning American marketplace of ideas.[17] In addition, although technological advances in digital spectrum management have made it feasible to accommodate more "channels" on broadcast frequencies,[18] the fact remains that demand for broadcast licenses far outstrips their supply.[19]

As a continuation of my analysis in *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation* (hereinafter *Changing Channels*),[20] this Article examines the persistent legislative and regulatory failures and First Amendment frustrations that have bedeviled the pursuit of the "free

15. *Id.* at 390; *see also* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) ("A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" (quoting Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966))).

16. *See, e.g.*, *infra* notes 96–98 and accompanying text.

17. As Professor Laurence H. Tribe warns, "[w]hen the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth?" LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988).

18. *See* David Weinberger, *The Myth of Interference*, SALON.COM, Mar. 12, 2003, http://www.salon.com/tech/feature/2003/03/12/spectrum/ (discussing how the transition to digital broadcasting presents significant opportunities to accommodate more channels on broadcast spectrum); *see also* Drew Clark, *Spectrum Wars*, NAT'L J., Feb. 19, 2005, http://nationaljournal.com/about/njweekly/stories/2005/0218njsp.htm.

19. *See infra* notes 104–105 and accompanying text.

20. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1 (2004).

marketplace of ideas" on the public airwaves. Part II begins with a brief historical overview of the public trustee doctrine, and proceeds to examine the constitutional, economic, structural, and political contradictions that contribute to the persistent failure of the broadcast regulatory regime. Part III shifts the focus towards an underanalyzed and underutilized First Amendment justification for government regulation of the public spectrum: the First Amendment's public forum doctrine, which not only protects expression in public spaces, but also argues in favor of the government's creation and maintenance of public speech fora. It begins with an overview of public forum law, and proceeds into an analysis of whether the broadcast spectrum indeed qualifies as a public forum. The Part continues with an examination of the Internet both as a public forum—or, more accurately, an amalgamation of countless public and private fora—and as the sort of "free marketplace of ideas" that the broadcast spectrum was expected but failed to create. I conclude with an analysis of how development of an affirmative public forum doctrine would lend support to a requirement that broadcasters subsidize broadband Internet access in low-income and other underserved communities.

II. THE DYSFUNCTION OF AMERICAN BROADCASTING REGULATION

A. The Foundations and History of the Broadcast Public Trustee Doctrine

By the middle of the 1920s, radio had evolved from a cultural novelty to a maritime and military communications tool, and a burgeoning commercial medium capable of becoming a ubiquitous presence in the lives of most Americans.[21] Responding to calls

21. The earliest regulatory interventions into the nascent technology of radio broadcasting in the first two decades of the twentieth century were limited to coordinating the use of specific frequencies between maritime and military users, and experimentation in the technology by individuals and private concerns intrigued by the capabilities of the new medium. *See* MARVIN BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY 4–6, 11–14 (2000); *see also* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 224–25 (2004). With the reach of each broadcaster's signal limited by modest transmitter power, signal interference was not of paramount concern in the early years of broadcasting. *Id.* at 348–49. After World War I demonstrated the remarkable value of radio in tactical operations and news dissemination, the number of broadcasting stations exploded, with almost 600 licensed radio stations operating in 1925. *See* Varona, *supra* note 20, at 11–12. The years 1921 and 1922 saw an especially dramatic increase in the number of stations, with a rise from 23 licensed stations as of

for regulation of the proliferating broadcasters, Congress enacted the 1927 Radio Act, which created the provisional Federal Radio Commission (FRC) and vested it with limited authority to issue radio licenses pursuant to the "public interest, convenience or necessity"—terms that Congress left undefined.[22] In a 1930 broadcast licensing decision, the FRC interpreted broadcasters' public interest obligation as "requir[ing] ample play for the free and fair competition of opposing views[,]"[23] a requirement that "applies . . . to all discussions of issues of importance to the public."[24]

Seven years after the FRC's creation, Congress passed the Communications Act of 1934 and delegated broad[25] regulatory power to the FCC, the FRC's permanent replacement.[26] The Communications Act, like the 1927 Radio Act, required that broadcasting be regulated in furtherance of the "public convenience, interest, or necessity,"[27] terms that the Supreme Court later acknowledged "were explicitly and by implication left to the Commission's own devising . . . ."[28] Armed with this authority, the FCC set about to implement and enforce public trusteeship of the nation's airwaves.

The FCC's repeated attempts over the last seven decades at elucidating and enforcing the public trustee doctrine have failed to produce a comprehensive set of durable and substantive programming requirements. In 1940, the young FCC announced that the public interest standard required broadcasters to be "sensitive to the problems of public concerns in the community and to make sufficient time available, on a non-discriminatory basis, for the full

December 1, 1921 to 570 licensed stations on December 1, 1922. BENSMAN, *supra*, at 30. The growth of broadcasting was so fast and so dramatic that the Supreme Court later noted: "With everybody on the air, nobody could be heard." Nat'l Broad. Co. v. United States, 319 U.S. 190, 212 (1943).

22. Radio Act of 1927, Pub. L. No. 69-632, §§ 9, 11, 44 Stat. 1162, 1166–67.

23. *In re* Application of Great Lakes Broad. Co., 3 F.R.C. 32, 33 (1929), *aff'd in part and rev'd in part*, Great Lakes Broad. Co. v. Fed. Radio Comm'n., 37 F.2d 993 (D.C. Cir. 1930).

24. *Id.*

25. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380 (1969) ("[Congress's] mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive . . . .' " (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943))).

26. *See* Communications Act of 1934, ch. 652, Pub. L. No. 73-416, § 4(a), 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. §§ 151–613 (2000)).

27. *Id.* § 307(b), 48 Stat. at 1084. Congress used the phrases "public convenience, interest, or necessity" and "public interest, convenience, or necessity" interchangeably in the 1934 Communications Act. *See, e.g.*, 47 U.S.C. § 302(a) (using the former term); 47 U.S.C. § 303 (using the latter term). Both iterations of the phrase have become known as the "public interest" standard.

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

discussion thereof."[29] Not surprisingly, this vague measure of broadcaster compliance with the obligations of public trusteeship led to widespread criticism of the FCC for not expecting enough in return from broadcasters for the value of their licenses.[30] That criticism spurred the FCC to issue in 1946 its "Public Service Responsibility of Broadcast Licensees." The infamous "Blue Book" marked the FCC's first attempt at articulating a comprehensive list of public interest programming obligations.[31] It instructed broadcasters to air a "reasonable" quantity of programming not supported by commercial advertising, but underwritten by broadcasters themselves to cover issues of local importance.[32] It also identified discrete categories of programming—including "discussion," "talks," and "education"—that it expected all broadcasters to air on penalty of license non-renewal, and it adopted a new license renewal form that reflected the new requirements.[33]

The Blue Book bombed. Immediately upon its release, the already powerful broadcast lobby attacked it as a violation of the First Amendment rights of broadcast licensees to determine their own programming content.[34] The FCC capitulated and almost never referred to the Blue Book in subsequent orders and decisions, largely ignoring the matter of station compliance with the public interest programming standards when evaluating license renewal applications. In fact, its enforcement of the public interest standard became so lax that in 1950 it renewed the license of a station, WOAX, which explicitly refused to air any programming qualifying as "public interest" fare.[35]

After several high-profile scandals involving rigged television game shows and the use of "payola" to bribe radio personalities to promote certain recordings[36] brought negative attention to the lack

29. *In re* The Mayflower Broad. Corp., 8 F.C.C.R. 333, 340 (1940). One year later, the FCC indicated that broadcast licensees had "a recognized duty to present well-rounded programs on subjects which may be fairly said to constitute public controversies of the day within the framework of our democratic system of government." *In re* Metro. Broad. Corp. (WMBQ), 8 F.C.C. 557, 577 (1941).

30. *See* Bill F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C. L. REV. 1057, 1061–62 (1982).

31. *See* FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946) (nicknamed the "Blue Book" because of its blue cover).

32. *Id.* at 12–39, 40–47.

33. *See* Chamberlin, *supra* note 30, at 1062–63, 1063 n.24.

34. *Id.* at 1063 n.25.

35. *In re* Revocation of License of Station WTNJ, 6 Rad. Reg. (P & F) 1101, 1101–03 (1950).

36. *See In re* Enbanc Programming Inquiry, 44 F.C.C.2d 2303, 2303–05 (1960); *see also Hearings on Television Quiz Game Shows Before a Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce*, 86th Cong. (1959).

of regulatory oversight of commercial broadcasters, the FCC attempted for a second time to implement comprehensive public interest programming requirements by means of the "1960 Programming Statement."[37] This time, the FCC acknowledged that although the First Amendment prohibited the FCC from dictating broadcast programming selection, the broadcasters themselves were bound by the 1934 Communications Act and their status as public trustees to air programming meeting the "public interest, needs and desires of the communit[ies]" in which they were licensed.[38] The FCC characterized such programming as fitting within a non-exclusive list of fourteen categories, which included "opportunity for local self-expression," "public affairs programs," "political broadcasts," "educational programs," and "service to minority groups."[39] In a speech to the National Association of Broadcasters, then-FCC Chairman Newton N. Minow accused broadcasters of neglecting their public trustee duties and allowing the fertile broadcast spectrum to become a "vast wasteland" of programming that did little to cultivate democracy.[40] He warned: "Gentlemen, your trust accounting with your beneficiaries is overdue. Never have so few owed so much to so many."[41]

Despite Chairman Minow's bluster, the 1960 Programming Statement, like the "Blue Book," proved ineffective. The FCC rarely referred to it in assessing broadcasters' license renewal applications and proceeded to routinely grant license renewal applications in very large batches, with little or no scrutiny of the public interest performance of the individual applicants,[42] despite

37. *Enbanc Programming Inquiry*, 44 F.C.C.R.2d 2303 (1960).

38. *Id.* at 2314.

39. *Id.* The other nine categories were "the development and use of local talent," "programs for children," "religious programs," "editorialization by licensees," "agricultural programs," "news programs," "weather and market reports," "sports programs," and "entertainment programs." *Id.* The 1960 Programming Statement also instructed broadcast licensees to investigate the particular public interest programming needs of their local communities. *Id.* That requirement resulted in the promulgation of the "ascertainment" rules, which laid out detailed requirements on how licensees would document their efforts in determining and satisfying the particular viewing needs and tastes of their communities of license. *See In re* Primer on Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650, 656–58 (1971).

40. Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961), *in* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION AND THE FIRST AMENDMENT, 188 app. 2 (1995).

41. *Id.* at 189.

42. *See, e.g.*, *In re* Renewals of Broad. Licenses for Ind., Ky., & Tenn., 42 F.C.C.2d 900, 900 (1973) (approving license renewal applications of 374 stations). For more examples of en masse approvals, see Varona, *supra* note 20, at 25 n.98.

multiple instances where broadcast licensees would air no public interest programming whatsoever.[43]

The FCC's continued attempts to interpret and enforce the public trustee doctrine by means of new, tangible requirements ceased in the early 1980s with the advent of the Reagan Administration's efforts to effect sweeping federal deregulation. President Reagan's FCC Chairman, Mark Fowler, articulated the deregulatory animus best by quipping that "television is just another appliance, it's a toaster with pictures."[44] Chairman Fowler charged that the FCC had no authority to prescribe any particular programming, "public interest" or otherwise,[45] given the First Amendment and § 326 of the Communications Act of 1934, which prohibits the FCC from censoring broadcast content.[46] Chairman Fowler proclaimed that "we are at the end of regulating broadcasting under the trusteeship model."[47] In its place, Fowler advocated what he called a "marketplace approach" to broadcast regulation. No doubt inspired by the Chicago School's exaltation of private markets as arbiters of the true public interest,[48] Fowler mandated that "the Commission should, so far as possible, defer to a broadcaster's judgment about how best to compete for viewers and listeners because this serves the public interest."[49]

The sweeping deregulatory efforts at the FCC led to the elimination of many of the public interest broadcasting requirements. It instituted what was referred to as "postcard renewal" for broadcast

43. *See, e.g.*, *In re* Application of The Titanic Corp. Radio Station WGGR, 34 F.C.C.2d 501, 501–02 (1972) (granting license renewal to Duluth, Minnesota FM radio station WGGR, which aired virtually no public interest programming in its "all-music" format).

44. Bernard D. Nossiter, *Licenses to Coin Money: The FCC's Big Giveaway Show*, 241 NATION 402, 402 (1985) (quoting a radio speech delivered by Mark Fowler).

45. Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 210 (1982) (urging Congress and the FCC to "focus on broadcasters not as fiduciaries of the public, as their regulators have historically perceived them, but as marketplace competitors").

46. 47 U.S.C. § 326 (2000) ("Nothing in this [Act] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

47. Mark S. Fowler, The Public's Interest, Address Before a Meeting of the International Radio and Television Society (Sept. 23, 1981), *in* COMM. & L., Winter 1982, at 51, 52.

48. *See, e.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 665 (1998) ("Chicago school law and economics, for example, argu[es] in the domain of antitrust, that the market will take care of the problem of monopoly or, in the domain of securities regulation, that markets will clear themselves of failure."); *see also* Douglas Litowitz, *A Critical Take on Shasta County and the "New Chicago School,"* 15 YALE J.L. & HUMAN. 295 (2003); George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON. 1 (1962).

49. Fowler, *supra* note 47, at 52.

licenses, which required no substantive licensee reporting or federal review of public interest programming.[50] In August of 1987, the FCC also eliminated the Fairness Doctrine, which it had long touted as the centerpiece of the public trustee doctrine.[51] The fairness doctrine required broadcast licensees to "cover vitally important controversial issues of interest in their communities," and in doing so, "provide a reasonable opportunity for the presentation of contrasting viewpoints on those controversial issues of public importance that are covered."[52] The FCC agreed with the arguments of the broadcast lobby that the doctrine had a "chilling effect" on broadcasters' speech.[53]

B. The Public Trustee Obligations Today

The deregulatory purge of the 1980s left commercial broadcasters with very few tangible public interest programming obligations to compensate for their use of the public spectrum. Although television broadcasters are still nominally required to air "programming that responds to issues of concern to the community,"[54] the FCC does not enforce the requirement.[55] It is not surprising, therefore, that television licensees are criticized for airing very little, and in many cases, no locally oriented public interest programming.[56]

50. *See* Varona, *supra* note 20, at 27–30.

51. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043, 5049–50 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

52. *Id.* at 5058 n.2.

53. *See id.* at 5043 (citing *In re* Inquiry into Section 73.1910 of the Commission's Rules & Regulations Concerning Alternatives to the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.R. 145, 169 (1985) ("[I]n stark contravention of its purpose, [the fairness doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance.")).

54. *See In re* The Revision of Programming & Commercialization Policies, Ascertainment Requirements, & Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1077 (1984), *aff'd in part and remanded in part sub nom.* Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

55. *See* Varona, *supra* note 20, at 33–37.

56. For example, an October 2003 Alliance for Better Campaigns study of the programming of forty-five television stations in seven cities found that less than one-half of one percent of the stations' total programming was comprised of local public affairs programming. ALLIANCE FOR BETTER CAMPAIGNS, ALL POLITICS IS LOCAL, BUT YOU WOULDN'T KNOW IT BY WATCHING LOCAL TV (2003); Jennifer Harper, *Study Finds 'Near Blackout' of Local Public Issues on TV*, WASH. TIMES, Oct. 28, 1993, at A10 (noting the study's finding that "there were three times as many 'Seinfeld' reruns as local public-affairs shows on TV stations nationwide"); *see also* PHILIP M. NAPOLI, MARKET CONDITIONS AND PUBLIC AFFAIRS

A key component of the local public affairs programming obligation has been the coverage of political campaigns and elections, in that such coverage promotes an informed electorate.[57] Yet a 2002 Lear Center study found that of 10,000 local newscasts on 122 television stations in the top fifty markets, only forty-four percent of those news broadcasts devoted any coverage at all to the electoral campaigns leading up to the November 2002 elections.[58] Of those that did, the aired stories averaged less than ninety seconds in length. Commercial broadcast coverage of the last Democratic and Republican presidential nominating conventions represented an all-time low, with ABC, CBS, and NBC each airing only three hours of coverage for each of the conventions[59]—a dramatic difference from the broadcast coverage of the 1972 conventions, which totaled 180 hours.[60] The "free" networks explained their non-coverage of the political conventions by pointing to the availability of the coverage via broadband video on their websites or on their cable network affiliates,[61] making no provision for those Americans who could not afford the still-expensive monthly rates for broadband Internet access or cable subscription service.[62]

Besides the unenforced and unsatisfied requirement that broadcasters air locally oriented public interest programming,

PROGRAMMING: IMPLICATIONS FOR DIGITAL TELEVISION POLICY: REPORT PREPARED FOR THE BENTON FOUNDATION 9 (2000) (concluding in a January 2000 study of 142 commercial television stations in twenty-four major markets that stations aired an average of 1.1 hours of local public affairs programming in a two-week period, and that of 47,712 total surveyed programming hours, only 0.3% could be classified as local public affairs programming).

57. *See In re* Pub. Interest Obligations of TV Broad. Licensees, 14 F.C.C.R. 21,633, 21,647 (1999) ("The Commission has long interpreted the statutory public interest standard as imposing an obligation on broadcast licensees to air programming regarding political campaigns.").

58. THE LEAR CENTER LOCAL NEWS ARCHIVE, LOCAL TV NEWS COVERAGE OF THE 2002 GENERAL ELECTION 4 (2003), *available at* http://learcenter.org/pdf/LCLNAReport.pdf.

59. *See* Jim Rutenberg, *Network Anchors Hold Fast to Their Dwindling 15 Minutes*, N.Y. TIMES, July 26, 2004, at P1 (criticizing the major commercial networks for all but abandoning convention coverage) ("We're about to elect a president. . . . The fact that you three networks decided it as not important enough to run in prime time, the message that gives the American people is huge. . . . As a citizen, it bothers me." (quoting the Public Broadcasting Service's Jim Lehrer)).

60. *See* Editorial, *Prime-Time Politics*, BOSTON GLOBE, July 15, 2004, at A10.

61. Joanne Ostrow, *Party Confabs Falling to Cable*, DENVER POST, July 22, 2004, at F3.

62. In February 2005, the FCC reported that the average monthly rate for cable service was $45.32 as of January 1, 2004. *See In re* Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, & Equip., FCC 05-12, No. 92-266, ¶ 7 (Feb. 4, 2005). The February 2006 version of the C|NET Editors' ISP Buying Guide estimates that most residential broadband cable, DSL (Digital Subscriber Line), or satellite broadband access accounts "start around $40, though you can get a better deal if you buy other services, such as phone or digital TV, at the same time." C|NET, C|NET EDITORS' ISP BUYING GUIDE 1, http://www.cnet.com/html/pdf/ba/bg/isp/isp.pdf (last visited Feb. 21, 2006).

broadcasters are subject to few additional public interest requirements. Television and radio broadcasters must afford candidates for federal elective office "reasonable access"[63] to commercial advertising spots at the "lowest unit charge"[64]—resulting in at least $1.6 billion in 2004 political advertising revenue for television stations alone[65]—and "equal opportunities" for political candidates to respond to opponents' appearances in station advertising or regularly scheduled programming.[66] They are categorically prohibited from transmitting "obscene" fare, and are required to restrict "indecent" programming between the hours of 10:00 P.M. and 6:00 A.M.[67] Although television broadcasters are required to air programming that serves the "educational and informational needs of children,"[68] neither Congress nor the FCC has issued a detailed definition of what programs would so qualify, leading broadcasters to claim that such animated offerings as "The Flintstones" and "The Jetsons" qualify as children's educational fare.[69]

63. FCC Broadcast Radio Services, 47 C.F.R. § 73.1944 (2004).

64. *Id.* § 73.1942. Stations are required to charge candidates for advertising time "the lowest unit charge of the station for the same class and amount of time for the same period" for 45 days in advance of a primary election and 60 days in advance of a general or special election. *Id.*

65. Mark Memmott & Jim Drinkard, *Election Ad Battle Smashes Record in 2004*, USA TODAY, Nov. 25, 2004, at 6A, *available at* http://www.usatoday.com/news/washington/2004-11-25-election-ads_x.htm (citing a report by the non-partisan Alliance for Better Campaigns that based its findings on research gathered by TNS Media Intelligence/Campaign Media Analysis Group).

66. 47 U.S.C. § 315(a) (2000); FCC Broadcast Radio Services, 47 C.F.R. § 73.1941 (2004). This rule, which also is known as the "equal time" rule, requires that stations give candidates an opportunity to purchase advertising time equal to opponents, and also requires stations to provide candidates a right to respond following the participation (and not mere coverage) of opponents in station programming. 47 U.S.C. § 315(a) (2000); 47 C.F.R. § 73.1941 (2004).

67. 47 U.S.C. § 303 (2000); 47 C.F.R. § 73.3999 (2004); *see also* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (upholding the indecency prohibition as constitutional). The FCC defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities." *Id.* at 657.

68. Children's Television Act of 1990, 47 U.S.C. § 103(a)(2) (2000); 47 C.F.R. § 73.671 (2004).

69. *In re* Policies & Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broad. Stations, 11 F.C.C.R. 10,660, 10,661–62 (1996); *In re* Policies & Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broad. Stations, 8 F.C.C.R. 1841, 1842 (1993). The FCC requires broadcasters to limit advertising in programs directed primarily at children to twelve minutes per program hour on weekdays and 10.5 minutes per hour on weekends. 47 U.S.C. § 102(b) (2000); FCC Broadcast Radio Services, 47 C.F.R. § 73.670 (2004). In 1996, the FCC implemented a license renewal application "guideline" encouraging, but not requiring, that television broadcasters air a minimum of three hours of children's educational programming per week. *Policies & Rules Concerning Children's Television Programming*, 11

Congress and the FCC continue to deregulate the broadcast industry, most significantly by lifting longstanding limitations on ownership concentration. Congress eliminated all regulatory limits on radio station ownership in the 1996 Telecom Act, which allowed Clear Channel Communications to dramatically increase its radio station holdings from 43 to 1,225 radio stations.[70] In late 2002, the FCC initiated a proceeding aimed at raising the local and national television station ownership limits and eliminating the longstanding prohibition on the common ownership of a same-city television station and newspaper in all but the smallest markets.[71] The FCC adopted these regulations, which also raised the cap on the number of television stations one entity could own from a total audience reach of 35% to 45%,[72] after receiving nearly 800,000 public comments—99.9% opposing the changes.[73] The regulations also increased the number of television stations a single entity could own to three in the nine largest media markets and two in the largest 162 markets.[74] Responding to the public uproar, Congress statutorily reduced the FCC's new national ownership cap to a maximum reach of 39% of the national audience.[75]

C. Why Broadcast Public Trusteeship Failed

There is no shortage of scholarly and other opinions about why and how the public trustee doctrine has failed to produce the free

F.C.C.R. at 10,661–62. It defined that programming broadly, as "any television programming that furthers the educational and informational needs of children 16 years of age and under in any respect, including children's intellectual/cognitive or social/emotional needs." *Id.* at 10,673 (quoting 47 C.F.R. §§ 73.671 (commercial stations), 73.672 (noncommercial stations)).

70. John Helyar, *Radio's Stern Challenge: The Shock Jock Is Leaving AM/FM,* FORTUNE, Nov. 1, 2004, at 123.

71. *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, 18 F.C.C.R. 13,620 (2003).

72. *Id.* Responding to over 342,000 messages from angry citizens, Congress statutorily lowered the FCC's national ownership limit to 39% of national audience reach. *See Powell Sees No Fast End to Media Rules Debate*, L.A. TIMES, Dec. 3, 2004, at C4.

73. *See Media Ownership Rules and FCC Reauthorization: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (2003) (statement of Michael J. Copps, FCC Commissioner).

74. *2002 Biennial Regulatory Review*, 18 F.C.C.R. at 13,668–69.

75. *See Powell Sees No Fast End to Media Rules Debate, supra* note 72. In addition, the Third Circuit Court of Appeals remanded the FCC's new same-city newspaper-television cross-ownership rule and its local ownership rule on the grounds that the FCC had adopted them in an "arbitrary and capricious" manner without adequate evidentiary support. Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

marketplace of ideas envisioned by Congress and the early regulators in the 1920s.[76] In *Changing Channels*, I examined in detail some of the principal causes for the continuing dysfunction of public trusteeship.[77] In brief, the public trustee doctrine has failed to live up to its lofty goals because of the intractable First Amendment, structural, and political contradictions upon which the doctrine was precariously premised.

1. The First Amendment Paradox—There is an obvious and fundamental First Amendment contradiction between the broadcaster's rights as a speaker and its obligations as a public trustee. The FCC, in the words of the Supreme Court in 1973, must "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act," while simultaneously ensuring that broadcasters fulfill their obligation to the public.[78] The Communications Act on the one hand requires the FCC to regulate broadcasters "consistent with the public interest,"[79] but on the other hand warns that "[n]othing in this [Act] shall be . . . construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station."[80] The Act exalts broadcasters as public trustees, giving them free use of the airwaves in exchange for affirmative content duties, but then declares that "no regulation or condition shall be promulgated . . . by the Commission which shall interfere with the right of free speech by means of radio communication."[81]

Despite this tension, the Supreme Court has upheld the authority of the FCC to regulate broadcast content in furtherance of the public interest in every First Amendment challenge to the public trustee doctrine it has addressed. The Court's earliest defense of the public trustee doctrine was in the 1934 case of

76. *See, e.g.*, Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341 (1998); Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 1 COMMLAW CONSPECTUS 97 (2003); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why The Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000).

77. *See* Varona, *supra* note 20, at 52–89.

78. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973). The Court acknowledged the "difficulty and delicacy" of the FCC's statutory duty to "oversee without censoring." *Id.* at 118.

79. 47 U.S.C. § 302(a) (2000).

80. *Id.* at § 326.

81. *Id.*

National Broadcasting Co. v. United States, which addressed the broadcast industry's First Amendment challenge to the FCC's "chain" or network broadcasting regulations.[82] Rejecting the broadcasters' argument that the FCC's role was limited merely to serving as a "traffic officer, policing the wave lengths to prevent stations from interfering with each other," the Supreme Court declared that instead of just merely supervising signal traffic, the FCC has "the burden of determining the composition of that traffic."[83] Articulating what has since become known as the "scarcity rationale," Justice Frankfurter reasoned that: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who may wish to use it must be denied."[84]

In 1969, the Court again affirmed the scarcity rationale and the public trustee doctrine itself in *Red Lion Broadcasting Co. v. FCC*.[85] There, the Court upheld the constitutionality of the fairness doctrine and related public interest rules by reasoning that broadcasting regulation's primary purpose is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[86] As noted above, the fairness doctrine required broadcasters to cover vitally important controversies in the communities they served and, when they did so, to provide contrasting viewpoints.[87] Broadcasters argued that the fairness doctrine infringed upon their right to free speech by dictating the content of their programming.[88]

Rejecting the broadcasters' arguments, the *Red Lion* Court reaffirmed the scarcity rationale, reasoning that because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle [for broadcasters] to posit an unabridgeable First Amendment right to broadcast comparable to

82. Nat'l Broad. Co. v. United States, 319 U.S. 190 (1934).

83. *Id.* at 215–16.

84. *Id.* at 226.

85. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

86. *Id.* at 388.

87. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110–12 (1973); *see also In re* Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc'ns Act, 48 F.C.C.2d 1, 1 (1974), *aff'd sub nom.* Nat'l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977).

88. *Red Lion*, 395 U.S. at 386 (noting that the broadcasters alleged "that the rules abridge their freedom of speech and press" and that the First Amendment "protect[ed] their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency").

the right of every individual to speak, write, or publish."[89] In light of the scarcity of broadcast licenses, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[90] The Court concluded that:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[91]

The Supreme Court continued to reaffirm the constitutionality of the public trustee doctrine during the four decades following *Red Lion*,[92] largely rejecting the attacks against the doctrine by broadcasters[93] and scholars who repeatedly have criticized the scarcity rationale as unfounded and obsolete. The National Association of Broadcasters (NAB), for example, has argued that broadcast speech should no longer be subject to public trustee constraints because scarcity is a thing of the past. It claims that "the number of broadcast facilities [has] exploded" since *Red Lion* was decided and

89. *Id.* at 388.

90. *Id.* at 390.

91. *Id.* at 389.

92. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (refusing to apply the scarcity rationale to the Internet); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (citing the importance of local television service in upholding the constitutionality of the FCC's "must-carry" rules requiring cable television systems to carry the signals of local television stations); FCC v. Pacifica Found., 438 U.S. 726 (1978) (citing the public trustee doctrine in upholding the constitutionality of the FCC's indecency rules). Justice Kennedy's opinion for the majority of the Court in *Turner* noted that the Supreme Court's prior cases "permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner*, 512 U.S. at 637. He then reiterated the scarcity rationale:

> [T]here are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.

Id.

93. Some broadcasters have gone so far as to dispute the government's claim that the airwaves are a public resource. *See infra* note 199 and accompanying text.

that "the vast increase in the number and variety of non-broadcast outlets (including cable, Direct Broadcast Satellite and the Internet) makes the idea of 'scarcity' . . . seem almost quaint."[94] Professor Cass Sunstein agrees with the broadcasters in this respect, writing that "[l]icenses are no longer technologically scarce, thanks in part to cable television; the spectrum can be made available to remarkably many people, and the number is increasing."[95]

Judge Robert Bork, echoing the criticism first articulated by celebrated Chicago School economist Ronald H. Coase,[96] articulates the view that there is no intelligible justification distinguishing spectrum scarcity in broadcasting from resource scarcity in other communications media. He writes that although "[i]t is certainly true that broadcast frequencies are scarce . . . it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media."[97] Judge Bork reasons that "[a]ll economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of journalism."[98]

These attacks on the scarcity rationale interpret the Supreme Court's conception of scarcity too broadly. There is no debating the contention that there is now a proliferation of media sources and content of every sort available to the average American. There also is no question that *source* scarcity has been a component of the Supreme Court's scarcity rationale. Because the broadcaster's role is that of "a public trustee charged with the duty of fairly and impartially informing the public audience,"[99] it is true that the availability of alternative sources of information advances the ultimate objective of broadcasting regulation. In repeatedly upholding

94. Comments of Nat'l Ass'n of Broadcasters at 12–13, *In re* Pub. Interest Obligations of TV Broad. Licensees, No. 99-360 (FCC Mar. 27, 2000), *available at* http://www.fcc.gov/cgb/dro/comments/99360/5006314422.pdf.

95. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 54 (1995) ("Because licenses are not scarce, the doctrine can no longer be justified as an effort to promote diversity in programming."); *see also* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 279 (2003) (arguing that direct broadcast satellite and other "multichannel video program distributors" (MVPDs) "have, in effect, eliminated the scarcity of the spectrum as a constraint to television-based communications").

96. Ronald H. Coase, *The Federal Communications Commission System*, 2 J.L. & ECON. 1, 14–18 (1959) ("[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists.").

97. Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

98. *Id.*

99. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

the scarcity rationale, however, the Supreme Court has not equated the scarcity of content sources with the more specific "allocational" or license scarcity in the broadcast medium specifically.[100] As the *Red Lion* Court made clear, scarcity exists "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate."[101] The Supreme Court has not interpreted "frequencies" or "licenses" in the figurative sense, encompassing all modes of mass communication, but instead in the more restrictive literal sense, confining its scarcity analysis to the limited capacity of the broadcast spectrum alone.[102]

Although critics are correct in acknowledging that new cable, satellite television, and Internet technologies have dramatically increased the diversity of content sources and the opportunities for speakers to access mass audiences, those new technologies have done nothing to lessen the persistent scarcity in broadcast frequencies available for license. And while it is true that spectrum management developments have enabled the FCC to wrest more assignable frequencies from the spectrum,[103] there remains an extreme mismatch between available broadcast licenses and market demand. There are only 1,368 commercial television stations on both the UHF and VHF bands in the United States,[104] with few additional licenses available. In fact, the FCC warns potential broadcast license applicants to "be aware that frequencies for these services are always in heavy demand," and that in 2004, "the Commission received approximately 30,000 inquiries from persons seeking to start radio broadcast stations" alone.[105]

In addition, the notion that the scarcity of broadcast spectrum is materially indistinguishable from the scarcity of other media resources overlooks the inherent fixed capacity of the radio frequency spectrum. Broadcast spectrum is rivalrous. One channel

100. *See* Varona, *supra* note 20, at 57–64.

101. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

102. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638–39 (1994) (refusing to apply broadcast precedent to the cable context) ("The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium.").

103. *See* Yoo, *supra* note 95, at 279 (discussing the use of tighter channel spacing, "spread spectrum" technologies, lower power, and other developments for the increase in available broadcast channels).

104. News Release, FCC, Broadcast Station Totals as of June 30, 2005 (Aug. 29, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260747A1.pdf. By contrast, there are only 379 non-commercial, public television stations, and 13,557 AM and FM stations. *Id.*

105. FCC, HOW TO APPLY FOR A BROADCAST STATION (2005), http://www.fcc.gov/mb/audio/howtoapply.html.

of frequency cannot be used by two speakers simultaneously without rendering the channel useless from interference.[106] By contrast, newsprint and Internet web pages are nonrivalrous. Anyone who wishes to publish a newspaper or web page may do so.[107] There is enough newsprint and space on the Internet to accommodate all or at least most interested speakers. Although there are economic barriers to entry into newspaper and Internet publishing, there also are economic barriers to entry into broadcasting. Just as newspaper publishers must purchase printing presses and newsprint, broadcasters must purchase cameras and transmitters. What is materially different, however, is that the medium through which newspaper publishers disseminate their message—newsprint—is owned exclusively by them. By contrast, the broadcast medium remains a publicly owned and administered resource provisionally entrusted to broadcasters.

Although the scarcity rationale supporting public trusteeship is still defensible, the FCC has avoided walking the First Amendment "tightrope" altogether. Regardless of whether its failure to implement meaningful public interest programming obligations is attributable to a hyper-sensitivity to the rationale's criticisms, an abundance of caution against infringing broadcast speech, or to the other contradictions inherent in broadcast regulation, the practical result has been that public interest programming is whatever the broadcasters say it is.

2. The Structural Paradox—Despite congressional and FCC intentions, the effectiveness of the public trustee doctrine is vexed additionally by the unsuitability of the broadcast spectrum for hosting a free marketplace of ideas. The marketplace metaphor has its origins in John Milton's *Areopagitica*, which rejected the government licensing of speech in favor of the "free and open encounter" between truth and falsehood,[108] and John Stuart Mill's *On Liberty*, which advocated "the clearer perception and livelier impression of

106. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 212 (1942) (acknowledging that at the inception of broadcasting and before spectrum regulation, signal interference caused "confusion and chaos" because "[w]ith everybody on the air, nobody could be heard").

107. *But cf.* Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 41–42 (2002) (discussing, *inter alia*, the distinction between rivalrous and nonrivalrous resources, and contending that the scarcity distinction between broadcast spectrum and other media is problematic) ("If two people try to print on the same paper at the same time, or to talk into the same tin can tied to a string at the same time, or for that matter to sit in the same chair at the same time, they will interfere with one another."). Broadcast spectrum is fundamentally different from Professor Benjamin's hypothetical paper, tin can, and chair, in that spectrum is publicly owned, whereas those other items presumably are not.

108. JOHN MILTON, AREOPAGITICA 74 (Sir Richard C. Jobb ed., Cambridge Univ. Press 1918) (1644), *available at* http://www.uoregon.edu/~rbear/areopagitica.html.

truth, produced by its collision with error."[109] It was woven into American First Amendment jurisprudence by Justice Oliver Wendell Holmes, who wrote in 1919 that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[110]

The marketplace metaphor is especially relevant to issues of democratic self-governance. Professor Sunstein calls this the "Madisonian conception of free speech."[111] One of the principal authors of the Constitution, James Madison considered the purpose of the First Amendment to be the cultivation of an informed and enlightened electorate that, as sovereign, would be empowered by reasoned discussion and access to a diversity of opinion to make good decisions for the democracy.[112] First Amendment scholar Alexander Meiklejohn also studied this Madisonian perspective and concluded that because citizens in a democracy are self-governed, they must have access to "the unhindered flow of accurate information" in order to make the best decisions.[113]

It is not difficult to see how broadcasting fails to satisfy the requirements of a marketplace of ideas. Television and radio generally do not provide fora for "free and open encounters" between competing ideas. They do not provide interactive platforms for free debate, and they do not present citizens with an "unhindered flow" of information to inform their self-governance.[114] Quite to the contrary, commercial broadcasting is unidirectional, highly mediated, and often criticized for transmitting distortions, not reflections, of reality.[115]

Instead of serving as a marketplace of ideas, where public interest programming is a commodity, commercial broadcasting in reality is a marketplace of viewers in which advertisers buy access to

109. John Stuart Mill, *On Liberty of Thought and Discussion*, *in* UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 102, 104 (E.P. Dutton & Co. ed., 1951). Both Milton's and Mill's ideas made their way into Justice Oliver Wendell Holmes's articulation of the marketplace of ideas in his 1919 *Abrams v. United States* dissent, where he wrote that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

110. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

111. SUNSTEIN, *supra* note 95, at xvii.

112. *Id.* at xvi–xvii.

113. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19 (1960).

114. *See* Varona, *supra* note 20, at 64–66.

115. *See id.*

audiences.[116] As Professor Sunstein memorably characterized it, commercial television treats "eyeballs as the commodity."[117] The romantic notion of broadcaster as public trustee simply does not reflect a reality in which broadcasters, many of whom are beholden primarily to shareholders demanding optimal profit, make decisions only by looking at the advertising-driven bottom line.[118] Because democracy-feeding public interest programming earns lower ratings than more sensational fare, the true market demand does not justify its inclusion in the programming schedule. In addition, the rapidly increasing consolidation of the broadcast industry[119] has made it even more difficult for broadcasters to fulfill their duty to air programming that is responsive to the needs of their local communities.[120]

3. The Political Paradox—Finally, and perhaps most importantly, the extraordinary political influence of the broadcast lobby has played a key role in the inability, or unwillingness, of Congress and the FCC to devise and enforce durable substantive public interest programming requirements. The FCC is a textbook example of an administrative agency "captured"[121] by the industry it regulates. The commercial broadcast industry has one of the most influential[122]

116. The Supreme Court itself recognized the importance of advertising to commercial television in upholding the FCC's rules requiring cable television systems to carry free over-the-air television stations on their basic tiers of service. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) ("[T]he must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue . . . to maintain their continued operation.").

117. Sunstein, *supra* note 76, at 514.

118. *See* Varona, *supra* note 20, at 67–69.

119. For an excellent analysis of the effects of media consolidation on local broadcast service, see Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613 (2004); *see also* Varona, *supra* note 20, at 71–77.

120. One of the most alarming recent manifestations of the problem of media consolidation is that of the Minot, North Dakota market, where Clear Channel Communications—which owns 1,240 radio stations in 292 markets—owns all six of the commercial radio stations. Katy Bachman, *Fighting Through the Static*, MEDIAWEEK, May 5, 2003, at 20. In January 2002, local public safety authorities could not reach anyone at any of the stations for help in warning local residents of the need to avoid the area of a hazardous chemical spill. *Id.* The stations were inaccessible because they were all being remotely operated from the Clear Channel corporate headquarters in San Antonio, Texas, and were airing pre-recorded feeds. *Id.*

121. Marver Bernstein was the first to describe the phenomenon of agency capture, whereby an agency becomes so entangled with the industry it regulates that it ultimately is controlled by the most powerful interests in that industry. MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79–97 (1955). Thomas W. Merill describes agency capture as "meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating." Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

122. The National Association of Broadcasters, the broadcasters' principal trade association, has been called a "lobbying juggernaut in Washington" that "steamroll[s] the

and wealthy[123] lobbying operations in Washington. The industry's lobbyists lavish gifts upon the legislators and regulators charged with overseeing broadcasters.[124] The "golden revolving door," typical in other capture cases,[125] can be found between the broadcast industry and regulators as well, with many prominent regulators and lawmakers becoming industry leaders and advisors themselves.[126] The great political influence of the broadcast lobby is fueled not only by money, but also by the broadcasters' unique ability to provide positive, negative, or worse yet, no coverage of an elected official or senior political appointee back home.[127] It is not surprising, then, that NAB President Edward O. Fritts can boast that "no one has more sway with members of Congress than the local broadcaster."[128] As evidenced by the broadcasters' controversial

opposition." Louis Jacobson & Bara Vaida, *Broadcast Blues*, 35 NAT'L J. 2560, 2560 (2003). Senator John McCain (R-Ariz.), who as chairman of the Senate Commerce Committee oversees the FCC, has referred to the broadcast lobby as "one of the most powerful influences here in Washington." Alicia Mundy, *Big John Takes Charge*, MEDIAWEEK, Dec. 16, 1996, at 17.

123. In the four years following the enactment of the 1996 Telecommunications Act, the fifty largest media firms spent $111 million in lobbying expenses. ROBERT MCCHESNEY, THE PROBLEM OF THE MEDIA 55 n.147 (2004) (citing data from the Center for Public Integrity); *see also* Varona, *supra* note 20, at 82–83.

124. In a May 2003 report, the Center for Public Integrity documented that between May 1995 and February 2003, senior FCC officials had accepted gifts of airfare, lodging, and entertainment expenses totaling nearly $2.8 million, much of it from broadcasters. *See* Bob Williams & Morgan Jindrich, *On the Road Again—and Again: FCC Officials Rack Up $2.8 Million Travel Tab with Industries They Regulate*, CENTER FOR PUB. INTEGRITY, May 22, 2003, http://www.publicintegrity.org/telecom/report.aspx?aid=15.

125. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 16 (1990) (noting that following the capture of an agency by a regulated industry, "the regulatory scheme is maintained in the interest of the regulated industry by bureaucrats who look both to Congress and to the industry for their rewards" which can include "the prospects of further career opportunities in the private sector").

126. Michael K. Powell, FCC Chairman between January 2001 and January 2005, is now a senior advisor at Providence Equity Partners, where he advises the communications investment firm and its clients on "regulatory issues in the media." *Former FCC Chairman Michael Powell Joins Providence Equity Partners as Senior Advisor*, BUS. WIRE, Aug. 11, 2005. Mr. Powell joins a cadre of former FCC Chairmen who departed the FCC for lucrative posts advising the FCC's regulatees, including Charles D. Ferris, Mark Fowler, Reed Hundt, William Kennard, Dennis Patrick, and Richard Wiley. *See Michael K. Powell's Golden Revolving Door*, CENTER FOR DIGITAL DEMOCRACY, Aug. 11, 2005, http://www.democraticmedia.org/news/washingtonwatch/FCCrevolvingdoor.html.

127. *See* Paul Taylor, *Superhighway Robbery*, NEW REPUBLIC, May 5, 1997, at 20, 21. Taylor notes that broadcasters "hold the ticket to every congressman's heart—access to the six o'clock news." *Id.* He posits that elected officials and regulators "live in a world where image is a fragile commodity, where paranoia is a survival tool and where it's taken as a given that if the station manager, the news director and the anchorman think you're a helluva guy, that's a very good thing." *Id.* Former Congressman Henson Moore (R-La.) agrees, noting that "[o]bviously, the broadcasters report the news, so I think most people in elective politics listen to them." Jacobson & Vaida, *supra* note 122, at 2562.

128. Taylor, *supra* note 127, at 20.

"free" transition to digital spectrum, the industry also has an ability not to cover themselves at all when the broadcast industry and its lobbyists engage in questionable or otherwise newsworthy activities. There is little wonder, therefore, that loud FCC and congressional demands for more broadcaster accountability as trustees of the public's airwaves consistently are silenced by the industry's manipulation of those airwaves.[129]

III. APPLYING PUBLIC FORUM ANALYSIS TO BROADCAST REGULATION

A. The Public Forum Doctrine as an Alternative Justification for Broadcast Public Trusteeship

Although its defenders have justified the public trustee doctrine by continued reliance on the embattled scarcity rationale, some scholars and commentators have appealed to the Supreme Court's public forum analysis to provide an alternative justification for the unique quid pro quo of broadcasting regulation.[130]

1. Overview of the Public Forum Doctrine—Before its elucidation of the public forum doctrine in 1939, the Supreme Court discerned no difference between the rights of private and government property owners in restricting speech on property they owned. For example, in *Davis v. Massachusetts*, the Supreme Court upheld a conviction for speaking on Boston Common without a permit.[131] In holding that the government has a right both to restrict and allow access to publicly held property, the Court reasoned that "[t]he right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[132]

Forty years later, the Supreme Court rejected the reasoning in *Davis* and articulated what became known as the public forum doctrine in *Hague v. CIO*.[133] In *Hague*, the Court voided a Jersey City, New Jersey ordinance that forbade public meetings and the distribution of printed materials in streets and other public places

129. *See* Varona, *supra* note 20, at 84–89 (detailing the broadcast industry's effective silencing of demands for digital television licenses).

130. *See infra* note 173.

131. Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

132. *Id.*

133. Hague v. CIO, 307 U.S. 496 (1939).

without a permit.[134] Writing for the Court, Justice Roberts articulated what continues to serve as the fundamental tenet of public forum analysis:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[135]

In striking down the Jersey City ordinance as violative of the First Amendment, Justice Roberts noted that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all," but that "it must not, in the guise of regulation, be abridged or denied."[136] The *Hague* Court reasoned that by interfering with the right of citizens to use public areas for meetings and the dissemination of their messages, the Jersey City ordinance not only violated these citizens' First Amendment right to speech, but also their right to peaceful assembly.[137] Justice Roberts wrote that the right to gather and discuss issues of community importance is fundamental to democracy. He posited that "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom."[138] Professor Harry Kalven characterized the *Hague* plurality as having created "a kind of First-Amendment easement" on public property.[139]

The Supreme Court refined its conceptualization of the public forum doctrine in a number of relatively recent decisions, most importantly *Perry Education Association v. Perry Local Educators'*

134. *Id.* at 518. The *Hague* case was brought by the Committee for Industrial Organization and several private citizens who had applied for permits to distribute written materials on Jersey City streets in support of union movement and were denied. *Id.* at 500–03.

135. *Id.* at 515.

136. *Id.* at 515–16.

137. *Id.* at 512–13.

138. *Id.* at 513. The *Hague* Court declared that "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* (quoting Unites States v. Cruikshank, 92 U.S. 542, 552 (1875)).

139. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13.

Association.[140] In *Perry*, the Court refused to find a public forum in an interschool mail and teacher mailbox system in Perry Township, Indiana, public schools.[141] In so doing, the Court refined its definition of the public forum doctrine by identifying three principal categories of fora—traditional, designated and nonpublic—and prescribed tests for each.

Traditional public fora are those, like the sidewalks, streets, and parks discussed in *Hague*, that encompass public spaces typically reserved by government for "public assembly and debate."[142] In these "quintessential public forums," the government may not prohibit all speech or other communicative activity.[143] To enforce a content-based restriction in such a traditional public forum, the government must show that the restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[144] The *Perry* Court recognized that the government may prescribe restrictions on the time, place, and manner of the speech or expressive conduct, so long as such restrictions are content-neutral, "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[145]

Designated public fora are those pieces of public property that the government has opted to open "for use by the public as a place for expressive activity."[146] The Supreme Court has further classified designated public fora into the categories of unlimited and limited categories.[147] Unlimited designated public fora include government-owned properties, like a municipally-owned auditorium available to the public at large,[148] that are available for use by virtually all interested speakers. By contrast, limited designated public fora comprise government-owned properties that are not accessible to the general

140. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

141. *Id.* at 44–47.

142. *Id.* at 45.

143. *Id.*

144. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

145. *Id.* (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980); Grayned v. City of Rockford, 408 U.S. 104 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939)).

146. *Id.* In 1985, the Supreme Court clarified that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (holding that the Combined Federal Campaign (CFC), an annual charity drive appealing to federal employees, was a nonpublic forum).

147. For an excellent overview of the Supreme Court's categorization of public fora, see Logan, *supra* note 76.

148. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

public, but instead are "for use by certain speakers, or for the discussion of certain subjects."[149] For example, the court has classified as limited designated public fora public university meeting facilities,[150] student activities funds,[151] and municipal school board meetings.[152]

In administering designated unlimited public fora, the government is bound by the same first amendment requirements invoked by traditional public fora for as long as the character of the facility remains a designated public forum.[153] As with traditional public fora, the government may impose reasonable time, place, and manner restrictions, and content-based prohibitions that are "narrowly drawn to effectuate a compelling state interest."[154] In the case of designated limited public fora, the government, in "confining a forum to the limited and legitimate purposes for which it was created," may impose content-based speech restrictions that are "reasonable in light of the purpose served by the forum."[155]

The third public forum classification, that of a nonpublic forum owned or controlled by the government, applies where there is public property that "is not by tradition or designation a forum for public communication . . . ."[156] In these fora, which the Court often treats interchangeably with limited designated public fora for First Amendment purposes,[157] the government may impose time, place, and manner regulations and restrict the forum's use to its intended purpose "as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view."[158] Whereas content-specific regulation in traditional and designated public fora is subjected to the strict

149. *Cornelius*, 473 U.S. at 802.

150. Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university that makes its meeting facilities available to registered student organizations could not constitutionally bar use of the facilities by a registered student organization for purposes of religious worship and fellowship).

151. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that the University of Virginia's "Student Activities Fund," which subsidized a plethora of student activities and publications, was a limited public forum).

152. City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976).

153. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45–46 (1983).

154. *Id.* at 46 (citing *Widmar*, 454 U.S. at 262–70).

155. *Rosenberger*, 515 U.S. at 829 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). The government also may impose time, place, and manner restrictions, but must not discriminate on the basis of viewpoint. *Id.*

156. *Id.*

157. *See* Logan, *supra* note 76, at 1714 ("[R]egulation of both limited public forums and nonpublic forums receive similar, more deferential First Amendment scrutiny.").

158. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998) (quoting *Cornelius*, 473 U.S. at 800); *see also* Logan, *supra* note 76, at 1713–14.

scrutiny described above, such regulation in nonpublic fora is required only to be reasonable.[159] Quoting its opinion in *Adderley v. Florida*, the *Perry* Court reasoned that "[the] State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[160] The Supreme Court has held that non-public fora include a municipally-owned, public television station's political debate,[161] a government-administered charitable drive directed at federal employees,[162] Internet terminals in public libraries,[163] and a passageway connecting a U.S. Post Office to its parking lot.[164]

2. The Affirmative Public Forum Doctrine—A cursory review of the public forum doctrine and its attendant case law may suggest that the public forum doctrine is entirely reactive, responding only to the First Amendment challenges of speakers who claim interference with their speech on public property. A closer examination, however, reveals that the underlying purposes of the public forum doctrine suggest a First Amendment interest in the government's affirmative provision, and not just preservation, of public fora.

Professor Franklyn S. Haiman posits that "[a]ffirmative action by the government to enhance citizen expression [by] making available public sidewalks, streets, and parks for speeches or demonstrations" has "long been recognized as a minimal contribution expected of the state to the facilitation of a marketplace of ideas."[165] Professor Steven G. Gey agrees, arguing that "every culture must have venues in which citizens can confront each other's ideas and ways of thinking about the world."[166]

159. United States v. Kokinda, 497 U.S. 720, 730 (1990); *see also Cornelius*, 473 U.S. at 806 ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are content neutral.").

160. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 46 (1983) (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129–30 (1981); Greer v. Spock, 424 U.S. 828, 836 (1976); Adderley v. Florida, 385 U.S. 39, 47 (1966)).

161. *See Forbes*, 523 U.S. 666.

162. *See Cornelius*, 473 U.S. 788.

163. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

164. *Kokinda*, 497 U.S. 720. The "postal sidewalk" in question was on Postal Service property and provided the only connection between the Post Office and its parking lot. *Id.* at 723.

165. FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 297–98 (1981).

166. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538–39 (1998). Professor Gey concedes that this "noble heritage" of the public forum doctrine is "antiquated and somewhat inaccurate," considering that "speakers on street corners have rarely been as concerned with communicating Truth as they have been focused on winning converts or motivating those who are already converted." *Id.* He notes further, however, that even if the public forum doctrine's nobility is based on myth, "it is a myth that is indispensable to democracy . . . ." *Id.* at 1539.

Professor Laurence H. Tribe also advocates an affirmative component to the public forum doctrine, writing that "the public forum doctrine is an important recognition that it is not enough for government to refrain from invading certain areas of liberty," but that "the state may, even at some cost to the public fisc, have to provide at least a minimally adequate opportunity for the exercise of certain freedoms."[167] First Amendment scholar Rodney Smolla similarly concludes that a democracy requires that "every city, village, and hamlet in the nation should have at least one central gathering point that is treated as a traditional public forum."[168] Because open and accessible public fora are a fundamental requirement for a free and healthy democracy, federal, state and local governments collect taxes to fund the creation and preservation of such public spaces.[169]

An affirmative government interest in the provision of public fora for expressive activities is consistent with the traditional understanding of the importance of speech to the development of the individual and democracy itself. Justice Brandeis observed that "public discussion is a political duty" and "that the greatest menace to freedom is an inert people."[170] Public fora operate as important "safety valves" for the release of public passions,[171] as well as important sectors of a free marketplace of democratic ideas. Professor Alexander Meiklejohn counseled that because citizens of a democracy are self-governed, they must have access to "the unhindered flow of accurate information" and the public fora in which to

167. TRIBE, *supra* note 17, at 786, 979–80, 998, *quoted in* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1552 n.85 (2005).

168. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 208 (1992). Professors Gey and Smolla are not alone in suggesting that the government has an affirmative obligation to provide public fora. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 645 (1970), *reprinted in* Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 167 n.17 (2002) ("One important way in which the government can affirmatively promote a system of freedom of expression is by making available to individuals and groups the facilities for engaging in expression."); Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101 (discussing how the First Amendment "imposes affirmative duties on government to maximize the opportunities for expression").

169. Wasserman, *supra* note 168, at 197–98 (arguing that accessible public fora "are essential to preserving individual liberty, democracy, and an open society, all of which can flourish only if citizens are 'free to speak Truth to Power' "); *see also* Gey, *supra* note 166, at 1538 ("According to the noble myth of the public forum, protecting such speakers is essential to preserving a Western democratic culture, because democracy can only flourish if citizens are free to speak Truth to Power.").

170. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

171. *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA, 37 (9th ed. 2005) (discussing the importance of "blowing off steam" to the self-fulfillment rationales for freedom of expression).

debate and deliberate in order to make the best and wisest decisions.[172]

B. Broadcast Spectrum as Public Forum

With the public trustee doctrine under increasing attack as ineffective and obsolete, a number of commentators have proposed an alternative justification for broadcasting regulation in both the reactive and affirmative interpretations of the public forum doctrine.[173] One argument is that broadcast spectrum itself could be classified as a limited public forum, thereby allowing the government to regulate the content of broadcaster speech.[174] Its premise is that Congress made clear in both the 1927 Radio Act and the 1934 Communications Act that the frequencies utilized by broadcasters are public property.[175] The 1934 Communications Act declares that:

> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by

172. MEIKLEJOHN, *supra* note 113, at 19.

173. *See* Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); *see also* Graham, *supra* note 76, at 141 (2003) ("The broadcast medium is arguably a limited public forum."); Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 21 (1996) ("[I]n licensing out part of the public airwaves for free, Congress has conferred on broadcasters an enormous subsidy that carries important First Amendment consequences. Here, as in other contexts, the government may impose reasonable, viewpoint-neutral restrictions on a private party's use of public resources."); Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 996–97 (1997); Spitzer, *supra* note 76, at 1028–66 (arguing that the public forum doctrine could serve as an alternative foundation for broadcast speech regulation, but theorizing that government cannot constitutionally "own" all broadcast spectrum).

174. Before criticizing this approach, Professor Spitzer envisions such an argument beginning this way:

> "First," the Court might say, "it is true that all existing rationales for treating broadcasting differently from print under the first amendment fail. However, the government owns all of the electromagnetic spectrum (citing *Red Lion* [*Broad. Co.*, 395 U.S. 367 (1969)]). Therefore, we must decide if radio spectrum is a traditional public forum, a designated public forum, or a nonpublic forum."

Spitzer, *supra* note 76, at 1038.

175. *See* Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

> Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.[176]

Broadcasters do not own the frequencies through which they transmit their signals, but instead hold them in trust for the American people, the true owners of the spectrum. As is the case with other intangible fora, like the student activities fee in *Rosenberger*,[177] the broadcast spectrum is public property that serves as an important platform for speech and, as such, must yield to the demands of the First Amendment.

The broadcast spectrum does not qualify as a traditional public forum. Unlike the public streets and parks, it has not "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[178] By function of its scarcity and limited capacity, the broadcast spectrum cannot accommodate all or even many of the speakers that wish to use it as a platform. By that same measure, the broadcast spectrum also is not an unlimited designated public forum, defined as "public property . . . the State has opened for use by the public as a place for expressive activity."[179] Unlike the public university meeting facilities,[180] student activities fund,[181] and school board meetings[182] classified by the Supreme Court as unlimited designated public fora, broadcast frequencies cannot accommodate all, or even most, interested speakers.[183] In addition, the broadcast spectrum is not classifiable as a nonpublic government forum considering that in such a forum, "the government is acting as a proprietor, managing its internal operations,

176. 47 U.S.C. § 301 (1934).

177. As Charles W. Logan notes, the Supreme Court has applied forum analysis to tangible as well as intangible property. *See* Logan, *supra* note 76, at 1710–11 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (declaring that a student activities fund was "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable")).

178. Hague v. Comm'n for Indus. Org., 307 U.S. 496, 515 (1939).

179. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983).

180. Widmar v. Vincent, 454 U.S. 263 (1981).

181. *Rosenberger*, 515 U.S. 819.

182. City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976).

183. *See* Logan, *supra* note 76, at 1711 ("The Communications Act expressly states [at 47 U.S.C. § 153(10) (2000)] that broadcasters are not to be treated as common carriers—a conduit for the speech of others.").

rather than acting as lawmaker with the power to regulate or license."[184]

If the broadcast spectrum qualifies as a public forum at all, it would best fit within the classification of limited designated public forum.[185] As in the case of other limited designated public fora, like the student activities fund at issue in *Rosenberger*, broadcast spectrum is limited to select speakers—i.e., the broadcasters themselves—who are required to abide by certain content restrictions.[186] As is the case with other limited public fora, the government may constitutionally restrict access to the broadcast spectrum through the licensing and renewal mechanism, and can impose content-based regulations so long as they do not discriminate on the basis of viewpoint and are "reasonable in light of the purpose served by the forum."[187] The government also may impose time, place, and manner restrictions, as it does in the case of indecency.[188]

If broadcast spectrum indeed could be classified as a limited designated public forum, then the constitutionality of broadcast content regulation is not beholden to the public trust doctrine and the precarious scarcity rationale for its survival. Affirmative programming obligations, like the duty to air local public affairs, educational programming, and political candidate advertising, as well as negative programming restrictions, such as indecency and children's television advertising proscriptions, could survive as "reasonable in light of the purpose served" by the broadcasting medium.

Although this analysis is enticing, it has a number of notable shortcomings that question its viability. For example, some commentators who identify the public forum doctrine as a potential alternative to the embattled scarcity rationale have acknowledged that it may not provide a sufficient basis upon which to distinguish the First Amendment treatment of broadcasters from competing media players, such as newspapers.[189] In addition, Professor Matthew Spitzer has posited that the public forum rationale is a theoretically workable one for purposes of upholding broadcast regulation, but that the First Amendment itself may forbid the

184. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

185. Logan, *supra* note 76, at 1713; *see also* Graham, *supra* note 76, at 141 ("The broadcast medium is arguably a limited public forum.").

186. *See* Graham, *supra* note 76, at 141.

187. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804–06 (1985)).

188. *Id.* at 829.

189. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 225–29 (1994).

government from owning the entire broadcast spectrum.[190] There also has been some concern that the Supreme Court itself has circumscribed broadcast regulation from the application of public forum analysis. In *Arkansas Educational Television Commission v. Forbes*, the U.S. Supreme Court declared that "the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting."[191] In that case, the Arkansas Educational Television Commission (AETC), an Arkansas state agency that operates a network of five non-commercial (i.e., public) stations across the state, refused to invite independent candidate Ralph Forbes to participate in an AETC-aired debate for Arkansas's Third Congressional District seat.[192] The Eighth Circuit Court of Appeals ruled in Forbes's favor, finding that the televised debate was a public forum.[193] The Supreme Court disagreed, reasoning that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine," and that "[c]laims of access under our public forum precedents could obstruct the legitimate purposes of television broadcasters"[194] by transferring control over legitimate journalistic and editorial decisions from broadcasters to private individuals "who bring suit under our forum precedents."[195]

One commentator characterized the *Forbes* decision as "a rejection of the notion that the broadcast spectrum generally constitutes a public forum because the application of the public forum doctrine is even less tenable in the context of *private* broadcasting than in *public* broadcasting."[196] I disagree. While the *Forbes* case seriously hinders the ability of political candidates to rely upon the public forum doctrine in demanding access to broadcast debates, it has little if any bearing on the theory that the broadcast spectrum itself is a limited public forum with broadcast licensees as

190. Spitzer, *supra* note 76, at 1041.

191. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–73 (1998); *see also id.* at 673 ("In the case of streets and parks, the open access and viewpoint neutrality commanded by the doctrine is 'compatible with the intended purpose of the property.' So too was the requirement of viewpoint neutrality compatible with the university's funding of student publications in [*Rosenberger*]. In the case of television broadcasting, however, broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." (citation omitted)).

192. Forbes v. Ark. Educ. Television Network Found., 22 F.3d 1423, 1426 (8th Cir. 1994).

193. *Id.* at 1428–30.

194. *Forbes*, 523 U.S. 666, 674–75 (1998).

195. *Id.* at 675.

196. Douglas C. Melcher, *Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedoms of Broadcasters*, 67 GEO. WASH. L. REV. 100, 119 (1998).

the relevant speakers. In fact, the *Forbes* Court notes that "the debate was by design a forum for political speech by candidates,"[197] and that, applying forum analysis, the debate is classifiable as a "nonpublic forum, from which AETC could exclude Forbes in the reasonable, viewpoint neutral exercise of its journalistic discretion."[198]

In addition, premising broadcast regulation on a public forum analysis instead of the traditional public trustee doctrine does not address the argument of some broadcasters that public ownership of the spectrum is a fallacy. CBS, for example, argues that "the electromagnetic spectrum is not a thing which can be owned. The spectrum exists only by virtue of electromagnetic radiation, which is produced by a radio transmitter sending energy through space, and can only be utilized through broadcasters' investment of capital and initiative."[199]

Finally, although the proposal to justify broadcast regulation by means of the public forum doctrine may remedy some of the First Amendment concerns undermining public trusteeship, it does not do much to remedy the other political and economic impediments that have allowed broadcasters to exploit their public frequencies for enormous profit while giving little in return. It also does not remedy the structural incapability of the broadcasting spectrum itself to serve as a Madisonian free marketplace of ideas. Despite these and possibly other weaknesses, the public forum doctrine may be able to redeem the broadcast regulatory regime if its affirmative manifestation were broadly applied.[200]

C. The Affirmative Public Forum Doctrine as Vehicle for Broadcast Regulatory Reform

1. Past Proposals for Reform—The longstanding frustration with the ineffectiveness of the public trustee doctrine has generated increasingly insistent demands that it be reformed to require commercial broadcasters to deliver quality, democracy-building programming and services to the American people commensurate

197. *Forbes*, 523 U.S. at 675. Mr. Melcher acknowledges that the Court reached this conclusion. Melcher, *supra* note 196, at 119 n.121.

198. *Forbes*, 523 U.S. at 676.

199. Comments of CBS Corp. at v, *In re* Pub. Interest Obligations of TV Broad. Licensees, No. 99-360 (FCC Mar. 27, 2000), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6011155685.

200. *See infra* Part III.C.

with the value conferred upon the broadcasters' by the spectrum entrusted to them.[201] These calls have grown especially numerous and insistent over the past decade as a result of the ensuing transition from analog to digital television. Proposed reforms have included demands for new requirements such as enforced public interest programming quotas. These reforms include increased public affairs, educational, and children's television;[202] free air time for political candidates;[203] and the donation of datacasting[204] services to local educational and nonprofit institutions for the transmission of messages supporting civic participation and public education, health, and safety.[205]

At the height of the negotiations on the Telecommunications Act of 1996, Senator Robert Dole (R-KS) and Senator John McCain (R-AZ) demanded that commercial broadcasters be required to pay fair market value through an auction system for the new, lucrative digital channels they would be assigned pursuant to the transition to digital television.[206] The digital channels, which some commentators have appraised at being worth at least $12.5 billion (and as high as $365 billion), allow broadcasters to transmit high definition television and CD-quality sound over up to five "sub-channels" that also can accommodate pay-per-view services,

201. *See* Varona, *supra* note 20, at 89–94 (detailing various proposals for reform).

202. *See, e.g.*, ALLIANCE FOR BETTER CAMPAIGNS ET AL., PUBLIC INTEREST OBLIGATIONS PROPOSED PROCESSING GUIDELINES (2004), *available at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File_1588_1.pdf; *see also* Comments of the Alliance For Better Campaigns et al. at 3, *In re* Pub. Interest Obligations of TV Broad. Licensees, No. 99-360 (FCC Jan. 26, 2000), *available at* http://ftp.fcc.gov/cgb/dro/comments/99360/5006314105.pdf (proposing a requirement for free time for political candidates on broadcast television); Comments of the Benton Foundation at 5–6, *In re* Pub. Interest Obligations of TV Broad. Licensees, No. 99-360 (FCC Jan 26, 2000), *available at* http://ftp.fcc.gov/cgb/dro/comments/99360/5006314125.pdf (discussing lack of local public affairs programming and lack of quality local news).

203. *See, e.g.*, MEDIA ACCESS PROJECT, PROMOTING CIVIL DISCOURSE AND PROTECTING FREE SPEECH IN BROADCAST MEDIA (2004), http://www.mediaaccess.org/programs/civicdisc.

204. Television broadcasters' new digital channels afford them the opportunity to transmit more than one "sub-channel" of high definition video and audio, as well as pure data, such as Internet pages, sports, weather and stock market information, advertising-related and community affairs information. *See In re* Advanced Television Sys. & Their Impact upon the Existing Television Broad. Serv., 12 F.C.C.R. 12,809, 12,820–21 (1997).

205. *See* ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, *supra* note 2, at 3.

206. *See* Varona, *supra* note 20, at 85 (citing Mundy, *supra* note 122, at 20 (quoting Senator John McCain) ("I want to see taxpayers get value from this resource, which the spectrum is. It's not visible like most natural resources, like an oil resource, or public land, a gold mine you can see or touch. And I agree that there is certainly some legitimacy to the argument that broadcasters want to make this transition to [digital TV] and need time to change over. But to get this absolutely *free*[?] . . . No way.")).

specialized data services, and other digital fare.[207] Tellingly, Senators Dole's and McCain's passionate demands for broadcaster accountability ceased following the launch of Senator Dole's presidential campaign, which could not afford to antagonize the television media.[208] A $9.5 million lobbying campaign against imposing any charge on broadcasters for new digital spectrum[209] by the National Association of Broadcasters, which warned against a "tax on free television" that would threaten "your favorite shows,"[210] sounded the death knell for their calls at reform.

Although the renewed demands for tangible and quantified public trustee requirements on broadcasters merit serious consideration from the FCC and Congress, it is unlikely that these new demands would fare any better than the old. Demands for prescribed quantities of certain types of programming, subject to Federal approval, face the same obstacles that rendered the FCC's own attempts at definition and quantification of the public trustee standard symbolic at best, and meaningless at worst. The interrelated, irreconcilable contradictions upon which broadcasting regulation is precariously premised remain.[211]

By contrast, the longstanding proposal of Henry Geller, former FCC General Counsel and National Telecommunications and Information Administration (NTIA) Administrator, to replace the public trustee model altogether with a spectrum fee to fund noncommercial, educational television offers a much more promising solution. Geller has long proposed a spectrum usage fee of up to five percent on the gross advertising revenues of commercial television licensees.[212] Considering that the 2003 television station

207. *See* Ramesh Ratnesar, *A Bandwidth Bonanza: How the Networks Plan to Make Even More from a $70 Billion Handout*, TIME, Sept. 1, 1997, at 60; *see also* Paul Fahri, *Broadcast Executives Say Dole Vented Anger at Them*, WASH. POST, Jan. 12, 1996, at F1; Jacobson & Vaida, *supra* note 122, at 2561.

208. *See* Mundy, *supra* note 122, at 20 ("Logic says that in an election, you don't go ticking off broadcasters if you can avoid it.").

209. *See* Arthur E. Rowse, *A Lobby the Media Won't Touch: How the Media Wields Its Power in Washington—and Gets Away with It*, WASH. MONTHLY, May 1998, at 9.

210. *Id.*

211. These proposals do not do very much at all to resolve the First Amendment tensions inherent in the FCC's enabling legislation, the economic tensions in the commercial broadcasting industry that result in the commodification of viewers in the pursuit of the highest possible advertising revenue at the expense of public interest programming, the unparalleled political influence of the broadcasting industry in manipulating its overseers by electoral involvement as well as journalistic agenda-setting, and the fundamental unsuitability of the broadcasting medium to serve as a true free marketplace of ideas that promotes democratic engagement and cultivates an informed and enlightened electorate.

212. *See* Henry Geller, *Geller to FCC: Scrap the Rules, Try a Spectrum Fee*, CURRENT, Oct. 30, 2000, http://www.current.org/why/why020geller.html (observing that a one percent spectrum fee, which "would net roughly $250 million" and "go to public television solely for its

advertising revenue of only the top three broadcast networks CBS (Viacom), ABC (Disney), and NBC (General Electric) exceeded $18.8 billion, and the advertising revenue for local television stations approximated $24.2 billion, a five percent spectrum fee would generate at least $2 billion for taxpayers.[213]

In *Changing Channels*, I note that although Mr. Geller's spectrum tax proposal is laudable and deserves much more attention than it has received, its good intentions may be frustrated if the spectrum fee proceeds were directed only to fund public television.[214] Among other concerns, a commercial-to-public television cross-subsidy may result in no net increase for public television stations, considering that Congress—in an age of massive budget deficits necessitating nearly universal spending cuts—simply may decide to reduce federal budget appropriations for the Corporation for Public Broadcasting by the amount of the cross-subsidy paid by broadcasters.[215] In addition, although public television stations' mission statements are aligned with the public interest purposes of the public trustee doctrine, public television, like commercial television, remains a narrowly mediated medium affording few if any opportunities for true democratic deliberation. Moreover, the increasing budgetary pressures on public broadcasters have rendered them increasingly beholden to commercial interests,[216] and, as was

use in the educational field," is consistent with an FCC mandate that broadcasters "serve the educational needs of children"); Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 362–66 (1998) (proposing a three percent spectrum fee to supplement funding for the Corporation for Public Broadcasting).

213. *See* HENRY GELLER & TIM WATTS, NEW AM. FOUND., THE FIVE PERCENT SOLUTION: A SPECTRUM FEE TO REPLACE THE 'PUBLIC INTEREST OBLIGATIONS' OF BROADCASTERS 12–16 (2002), *available at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File_844_1.pdf.

214. *See* Varona, *supra* note 20, at 92–93. It is important to note, however, that although Mr. Geller originally directed his spectrum fee proposal to the subsidization of noncommercial, educational television, more recent iterations of his proposal have allowed for greater flexibility in the use of the proceeds. For example, in 2002, Mr. Geller and Mr. Watts posited that the fee proceeds also could be directed to the purchase of free air time for political candidates, or for the funding of a "Digital Opportunity Investment Trust." *See* GELLER & WATTS, *supra* note 213, at 12–13 (quoting NEWTON MINNOW & LAWRENCE GROSSMAN, DIGITAL PROMISE (2001)).

215. *See* Varona, *supra* note 20, at 92–93.

216. *See* Nat Ives, *On Public TV, Not Quite an Ad But Pretty Close*, N.Y. TIMES, Mar. 28, 2005, at C1; Press Release, Fairness & Accurancy in Reporting, The Commercialization of Children's Public Television (Mar. 15, 2000), *available at* http://www.fair.org/index.php?page=1925 (showing evidence that for-profit companies are using on-air underwriting credits as lucrative advertising conduits to reach affluent audiences); *see also* Don Aucoin, *On a Wing and a Prayer: Are Big Bird's Colleagues at PBS in Danger of Becoming Roadkill on the Information Superhighway?*, BOSTON GLOBE, Feb. 27, 2000, at E1 (discussing market and advertising pressures faced by PBS); Danny Schechter, *Rejected by PBS (Again!): The Wail of the American Independent Filmmaker*, MEDIA CHANNEL, May 19, 2001, http://www.mediachannel.org/views/dissector/

always the case, the political whims of Congress and state governments.[217]

Although Geller's commercial-to-public television cross-subsidy idea raises some concerns, its central proposition—that commercial broadcasters pay a tax for their use of the public spectrum—is of increasing appeal and viability. It is especially relevant at a time when other FCC telecommunications licensees have paid in excess of $23 billion for their use of public spectrum,[218] while television licensees, cloaked as public trustees, are awarded their lucrative digital channels for free.

2. Requiring Broadcasters to Subsidize Broadband Internet Access—Instead of having commercial broadcasters subsidize public television, I have suggested as a friendly amendment to Mr. Geller's proposal that commercial broadcasters subsidize access to broadband[219] Internet access to those Americans who presently cannot afford it or do not have access to it because it is not available in their communities.[220] Such a cross-subsidy would be consistent with longstanding universal service (e.g., "lifeline") cross-subsidies in telephone service, and 1996 Telecom Act's "E-Rate" program, which requires FCC telecommunications licensees (not broadcasters) to subsidize deeply-discounted Internet access for elementary and high schools and libraries.[221] Having broadcasters subsidize broadband Internet access also may be a means to help fund the efforts of hundreds of municipalities across the nation in providing

pbs.shtml (noting how PBS's increasing dependence on advertising has rendered it more sensitive and responsive to political and corporate interests).

217. *See, e.g.*, Derrick Z. Jackson, *Safe Harbor for Gay Bigotry*, BOSTON GLOBE, Feb. 2, 2005 at A15 (noting that the Public Broadcasting Service cancelled the national distribution of an episode of the children's program "Postcards from Buster" featuring a visit to a Vermont farm incidentally owned by a family led by two women after receiving a letter from Secretary of Education Margaret Spellings complaining that "[m]any parents would not want their young children exposed to the lifestyles portrayed in this episode"); *see also* Paul Farhi, *CPB Taps Two GOP Conservatives for Top Posts*, WASH. POST, Sept. 27, 2005, at C2 (reporting that the Bush Administration had appointed conservative activists and Republican donors Cheryl F. Halpern and Gay Hart Gaines to the Corporation for Public Broadcasting, with Halpern assuming the role of CPB Chairman, thereby "tightening conservative control over the agency that oversees National Public Radio and the Public Broadcasting Service").

218. *See supra* note 12 and accompanying text.

219. A "broadband" Internet connection, which currently can range from 2 to 6 megabits per second (mbps), allows for the efficient transmission of one-way and interactive video and sound files, text, and other resources that cannot be accommodated in a "narrowband" connection, which has a maximum transmission speed of 56 kilobits per second (kbps). FCC Strategic Goals: Broadband, http://www.fcc.gov/broadband (last visited Feb. 13, 2006).

220. *See* Varona, *supra* note 20, at 94–113.

221. *Id.* at 106–11. The quasi-governmental Universal Service Administrative Company (USAC) administers the Universal Service Fund, which collects and distributes funds associated with all FCC cross-subsidies, including "LifeLine Assistance," "Link-Up America," and the E-Rate program. *Id.* at 107–09.

universal low-cost broadband Internet access by means of community operated wireless ("Wi-Fi") networks.[222]

The United States ranks only eleventh in the world in broadband Internet penetration,[223] with only 17.3 million high speed-Internet customers[224] and 53% of the online population accessing the Internet via broadband connections.[225] Moreover, the Project for Excellence in Journalism notes that the rate of increase for broadband penetration slowed in 2004 as compared to the previous year, with significant parts of the country still not wired for broadband access.[226]

Although the "digital divide" between Whites and African-Americans and other minorities in Internet access has somewhat narrowed over recent years,[227] researchers have concluded that what remains is a marked disparity in access determined by household income and geographic location. The Pew Internet and American Life Project concluded that the still-high cost of personal computers and even narrowband Internet access[228] has resulted in far lower Internet access rates for households with incomes under

222. *See* NEW AM. FOUND., PROFILES OF MUNICIPAL AND COMMUNITY BROADBAND NETWORKS 4–16 (2005), *available at* http://www.newamerica.net/Download_Docs/pdfs/Doc_File_2245_1.pdf (profiling municipal Wi-Fi networks in Phila., Pa., Corpus Christi and Grandbury, Tex., Champaign-Urbana, Ill., and other communities); *see also* Chloe Albanesius, *Multiple Firms Vie for San Francisco's Wi-Fi Project*, NAT'L JOURNAL'S TECH. DAILY, Oct. 17, 2005, http://nationaljournal/com/members/search/ (search for article title; then follow hyperlink) (discussing San Francisco's low-cost Wi-Fi plans); Gene Kprowski, *Philadelphia Wi-Fi Won't End Debate*, EWEEK.COM, Oct. 4, 2005, http://www.eweek.com/article2/0,1895,1867155,00.asp (discussing Philadelphia's $15-to-$18 million installation contract with Earthlink Inc. for the deployment of a 135-square mile low-cost Wi-Fi zone).

223. FCC, AVAILABILITY OF ADVANCED TELECOMMUNICATIONS CAPABILITY IN THE UNITED STATES: FOURTH REPORT TO CONGRESS 41 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf.

224. Press Release, National Cable and Telecommunications Association, New Interactive Services Lead Cable's 2004 Activity to Date (July 6, 2004), *available at* http://www.ncta.com/press/press.cfm?PRid=512&showArticles=ok.

225. SUSANNAH FOX, PEW INTERNET & AM. LIFE PROJECT, DIGITAL DIVS., at ii (2005), *available at* http://www.pewinternet.org/pdfs/PIP_Digital_Divisions_Oct_5_2005.pdf.

226. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2005: AN ANNUAL REPORT ON AMERICAN JOURNALISM: ONLINE (2005), http://www.stateofthemedia.org/2005/printable_online_economics.asp.

227. *See, e.g.*, MARRY MADDEN, PEW INTERNET & AM. LIFE PROJECT, AMERICA'S ONLINE PURSUITS: THE CHANGING PICTURE OF WHO'S ONLINE AND WHAT THEY DO 5 (2003), *available at* http://www.pewinternet.org/pdfs/PIP_Online_Pursuits_Final.PDF.

228. Consumer Reports estimates the cost of the most inexpensive but reliable Internet-ready personal computer at approximately $500. *Ratings: Desktop Computers*, CONSUMER REPORTS, Dec. 2004, at 43. Monthly narrowband Internet subscriptions with major Internet Service Providers (ISPs) cost approximately $20 per month, with most broadband connections costing approximately $35 per month. *See generally* Broadband Reports.com, http://www.broadbandreports.com (last visited Feb. 13, 2006).

$50,000 as compared to wealthier households.[229] The FCC itself echoed these findings in a study on broadband Internet accessibility it released on July 7, 2005.[230]

The racial, geographic, and economic disparities in Internet access are especially troubling in light of how the Internet in many ways has realized the hitherto unfulfilled purpose of broadcasting to provide America with a ubiquitous "free marketplace of ideas." The Internet and its countless websites, discussion boards, web logs (more commonly known as blogs), chat rooms, entirely interactive "wiki" sites,[231] and other interfaces have provided millions of individual citizens with unprecedented opportunities for education, expression, discussion, and debate on an unlimited array of topics, including political, community, and social affairs.[232] There also is no question that Internet activism and journalism, even in its relative youth, has had a transformative effect on our nation's political life.[233] For example, the story of President William J. Clinton's affair with Monica Lewinsky, which led to his impeachment, was broken not by the major print or broadcast media but by Matt Drudge, the publisher of the web-based "Drudge Report."[234] Similarly, the initial success of Vermont Governor Howard Dean's campaign for the 2004 presidential nomination, which signed up 700,000 supporters and raised over $50 million via his campaign's website alone, also is credited to the power of the web.[235] In addition, web log publishers,

229. AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, THE EVERSHIFTING INTERNET POPULATION: A NEW LOOK AT INTERNET ACCESS AND THE DIGITAL DIVIDE 5 (2003), *available at* http://www.pewinternet.org/reports/toc.asp?Report=88 ("Independent of all other factors, having an income above $50,000 annually predicts internet use.").

230. News Release, FCC, High-Speed Connections to the Internet Increased 34% During 2004 for a Total of 38 Million Lines in Service 1–2 (July 7, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf (finding that high population density and high medium income are the two most reliable predictors for broadband Internet access); *see also* James E. Prieger, *The Supply Side of the Digital Divide: Is There Equal Availability in the Broadband Internet Access Market?*, 41 ECON. INQUIRY 346 (2003) (providing a more robust statistical analysis).

231. "Wiki" sites, with "wiki" meaning "quick" or "fast" in Hawaiian, allow all visitors to edit the contents of the site and add new content at will, easily and quickly, without any familiarity with Internet coding language. *See* Dan Mitchell, *A Blog that Blogs Corporate Blogs*, N.Y. TIMES, Jan. 7, 2006, at C5; Kushan Mitra, *Quicki Wiki*, BUS. TODAY, Apr. 24, 2005, at 128 (characterizing the online wiki encyclopedia, Wikipedia.com, which is six times as big as the Encyclopedia Britannica in terms of number of entries, as "online democracy at work").

232. *See generally* Varona, *supra* note 20, at 97–106.

233. *Id.*

234. Kathy Kiely, *Freewheeling 'Bloggers' Are Rewriting the Rules of Journalism*, USA TODAY, Dec. 30, 2003, at 1A.

235. Joan Vennochi, *A Bridge to Dean Nation*, BOSTON GLOBE, Feb. 24, 2004, at A19; *see also* JOE TRIPPI, THE REVOLUTION WILL NOT BE TELEVISED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING 221–23 (2004) (detailing the Dean Campaign's Internet organizing and fundraising strategies); Glen Justice, *Bush Still Has More Cash, But Kerry Leads Web Race*, N.Y. TIMES, May 21, 2004, at 18 (noting that approximately one-third of Democ-

bloggers, often aim their attention at perceived mishandling of national news stories by the broadcast media. For example, it was conservative bloggers who brought national attention to problems with CBS News's reporting of President George W. Bush's National Guard service—problems that resulted in the early retirement of Dan Rather from his post as anchor of the CBS Evening News.[236] As Professor Eugene Volokh, a blogger himself,[237] puts it, "[b]logs can extend the legs of this kind of story" in that "[r]ather than having a life span of a few hours, a [blogged] story may end up breaking into the mass media."[238]

Political engagement aside, the Internet has proven to be an important tool for educational and professional advancement. A 2001 study by the National Center for Education Statistics (NCES) revealed that increased Internet and computer access by students studying at the fourth, eighth, and twelfth grade levels resulted in higher test scores, with home Internet access correlating with higher overall academic performance.[239] Familiarity with and access to the Internet also is becoming a prerequisite for many employment opportunities in this country, even for job seekers in the poorest areas. For example, in 2002, the state of Alabama was criticized for mounting billboard advertisements for a state-run, "regional[,] virtual one-stop" employment center, which promised job postings, training, and assistance in one of the state's poorest regions using only an Internet website address (URL) as the contact information.[240]

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ratic Presidential Nominee John Kerry's campaign contributions were raised through his website).

236. *See* John Samples, *Reid This*, NAT'L REV., Nov. 16, 2005, http://www.nationalreview.com/comment/samples200511160846.asp; *see also* DAVID KLINE & DAN BURSTEIN, BLOG!: HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE 21 (Arne J. De Keijzer & Paul Berger eds., 2005); Michael Messing, *The End of News?*, N.Y. REV., Dec. 1, 2005, at 23.

237. *See* The Volokh Conspiracy, http://volokh.com (last visited Feb. 21, 2006).

238. *See* Sam Singer, *Nominee Roberts Faces Trial by Blog*, CHI. TRIBUNE, Aug. 6, 2005, at C8 (noting the effects of web log activism, or "blogosphere," on the federal judicial confirmation battles).

239. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NAT'L ASSESSMENT OF EDUC. PROGRESS: 2000 SCI. (2001), *available at* http://nces.ed.gov/nationsreportcard/science/results/internetuse.asp.

240. ANTHONY G. WILHELM, DIGITAL NATION: TOWARD AN INCLUSIVE INFORMATION SOCIETY 73 (2004) (citing Patricia Dedrick, *State Promotes Jobs Web Site Where Few People Use Computers*, BIRMINGHAM NEWS (Ala.), Nov. 29, 2002).

The Internet also has provided otherwise isolated individuals the ability to connect and build virtual communities on the Internet.[241] For example, the Internet has provided heretofore unavailable communication and community-building resources for gay men and lesbians living in remote or hostile environments,[242] and provides important virtual gathering places for other isolated minorities.[243]

Having commercial broadcasters satisfy their public trusteeship obligations by helping subsidize broadband Internet access also would circumvent the various paradoxes and obstacles blocking previous reform initiatives. It does not impinge upon the broadcasters' First Amendment rights, does not rely directly on the scarcity rationale, and would help counterbalance the broadcasters' political and agenda-setting power by providing wider access to the Internet's centers of political and social activism. A broadcast-to-Internet cross-subsidy also would be more politically viable than reform ideas dependent on content regulation, insofar as broadcasters, whose content is now fully digital and therefore compatible with Internet platforms, have burgeoning presences on the Internet and a commercial self-interest in increasing access to those offerings.[244]

3. The Internet as Public Forum—A number of scholars have posited that the Internet has many of the characteristics of a public

241. *See* Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745–46 (1995) ("What will be new are the communities that this space will allow, and the . . . possibilities that these communities will bring.").

242. Note, *Communities Virtual and Real: Social and Political Dynamics of Law in Cyberspace*, 112 HARV. L. REV. 1586, 1592–94 (1999) (describing gay and lesbian websites such as "The WELL" and "LambdaMoo" as "vivid examples of the capability of online groups to facilitate sustained and meaningful interaction among members"); *see also* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003) (describing how the Internet has provided isolated gay men and lesbians in otherwise hostile environments "a virtual community that constitutes an emotional lifeline").

243. *See, e.g.*, Black America Web, http://www.blackamericaweb.com (last visited Feb. 13, 2006) (providing news and information and discussion spaces for African-Americans); Deaf Nation, http://www.deafnation.com (last visited Feb. 13, 2006) (serving the deaf community); National Black Deaf Advocates, http://nbda.org (last visited Feb. 13, 2006) (serving as a gathering point for deaf African-Americans).

244. *See* Richard Sandomir, *CBS to Acquire CSTV for $325 Million in Stock*, N.Y. TIMES, Nov. 4, 2005, at C3 (detailing CBS's purchase of CSTV Networks, an amalgamation of 120 sports-oriented web sites and a cable network, to complement its main Internet sports site CBS Sportline.com, which combined with the CSTV web sites had 14.4 million unique hits in September 2004); *see also* Gail Schiller, *Nets Promotional Priority Based on Playing Favorites*, HOLLYWOOD REP., Sept. 12, 2005, http://www.hollywoodreporter.com/thr/search/article_display.jsp?vnu_content_id=1001096375 (reporting intensified efforts by the major commercial broadcast networks in expanding their Internet presences for purposes of cross-marketing programming and advertising).

forum.[245] This argument became especially compelling following the Supreme Court's 1997 decision in *Reno v. ACLU*, in which it struck down as violations of the First Amendment the "indecent transmission" and "patently offensive display" provisions of the Communications Decency Act of 1996.[246] In so doing, the Court characterized the Internet's components—the World Wide Web, discussion groups, E-mail, etc.—as "constitut[ing] a unique medium—known to its users as 'cyberspace'—located in no particular location but available to anyone, anywhere in the world, with access to the Internet."[247]

The Court acknowledged that the progenitor of the Internet was a U.S. Department of Defense program named ARPANET, which connected military computers with those at universities and defense contractors to facilitate collaboration and communication.[248] It also noted that "from the readers' viewpoint," the Internet (and specifically the World Wide Web) is "comparable . . . to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[249] From a speaker's perspective, "it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information."[250] Although the Court did not explicitly apply First Amendment public forum analysis to the Internet, its language strongly suggests that the Court regarded it as one.[251]

Although there is no question that the Internet provides the general public with a plethora of fora in which to speak, read, and listen, there remains debate about whether First Amendment public forum analysis applies to the Internet. The threshold inquiry, and biggest potential obstacle, is whether the Internet truly is "public."

Much of the Internet's infrastructure remains under Federal, and therefore public, control. The United States government controls each fundamental element of the Internet's infrastructure, including the Domain Name System, which assigns numeric Internet

245. *See, e.g.*, Gey, *supra* note 166, at 1611 ("It does not require much creativity to characterize the Internet as a public forum . . . .").

246. Reno v. ACLU, 521 U.S. 844 (1997).

247. *Id.* at 851.

248. *Id.* at 849–50.

249. *Id.* at 853.

250. *Id.*

251. *See* Gey, *supra* note 166, at 1611 ("[I]t is not unreasonable to suggest that the Reno majority opinion . . . treats the Internet as a public forum without actually making the designation explicit.").

Protocol (IP) addresses to domain names (such as http://www.wcl.american.edu) through the U.S.-based Internet Corporation for Assigned Names and Numbers (ICANN).[252] The Federal government's Defense Advanced Research Projects Agency developed and administers file exchange IPs, and the United States continues to fund and host a significant portion of the Internet "backbone," the matrix of computers at the Internet's core that keeps it connected and running.[253]

The Internet's infrastructure, however publicly owned it may be, does not serve as the platform for a single forum, but for the countless array of fora currently on the World Wide Web in the form of websites, discussion boards, blogs, chat rooms, and other interfaces. Although some of those fora are government-controlled—such as discussion boards hosted by public universities and municipalities—the great majority of the fora on the Web are controlled by private entities eligible for the full complement of First Amendment protections afforded to private speakers, including the right to silence or censor the speech of guests.[254] In fact, Professor Dawn Nunziato argues that "the vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities . . . who are not subject to the First Amendment's protections for free speech."[255] She warns, correctly, that "[w]hile it is often presumed that speech on the Internet will be 'uninhibited, robust, and wide-open,' the private entities that own and control the forums for Internet speech enjoy and often exercise the unfettered power to impose substantial restrictions on such speech."[256]

252. Jonathan Bick, *The Internet as Government Action*, N.J. L.J., Oct. 3, 2005, *available at* http://www.bicklaw.com/Publications/TheInternetasGovernmentAction.htm; *see also* Bradley S. Klapper, *U.S. Insists on Keeping Control of the Web*, BUSINESSWEEK ONLINE, Sept. 29, 2005, at 1 ("We will not agree to the U.N. taking over the management of the Internet." (quoting U.S. Ambassador David)).

253. *See* Bick, *supra* note 252.

254. *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1115–29 (2005).

255. *Id.* at 1116–17 (noting that a very large proportion of Internet speech occurs on sites controlled by private "Internet service providers (ISPs) like America Online (AOL) and Yahoo!, content providers like washingtonpost.com and nytimes.com, and pipeline providers like Comcast and Verizon," in addition to the web spaces provided by private employers and universities).

256. *Id.* at 1121 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)) (discussing a number of striking examples of private Internet forum hosts who enforce highly restrictive speech policies, including AOL's Terms of Service, which gives AOL "sole discretion to remove any content that . . . [is] objectionable, or inaccurate" and that includes "vulgar language," which is "no more appropriate online than [it] would be at Thanksgiving dinner"); *see also id.* at 1122 (citing Found. for Individual Rights in Educ., FIRE's Spotlight: The Campus Freedom Resource, http://www.speechcodes.org/schools.php (last visited Feb. 13,

To address this concern about the increasing privatization of Internet fora, and resulting reduction of truly public online spaces, proceeds from any broadcaster-to-Internet cross-subsidy, in addition to subsidizing access to the Internet, should subsidize the creation of government-mediated fora. These public Internet fora, like their "brick-and-mortar" counterparts, would be subject to the strictest First Amendment scrutiny as designated unlimited public fora.[257] Municipal Wi-Fi, an idea proposed by former president of NBC News and PBS, Lawrence K. Grossman, and former FCC Chairman, Newton N. Minow, contemplates such subsidy-eligible online public fora. Grossman and Minow proposed the creation of a "Digital Opportunity Investment Trust" (DOIT) that would develop a public Internet presence to "encourage an informed citizenry and self-government," and "make available to all Americans the best of the nation's arts, humanities, and culture; and teach the skills and disciplines needed in this information-based economy."[258]

Requiring broadcasters to subsidize broadband Internet access and the creation and maintenance of truly public fora on the Web would be consistent with the new interpretations of an affirmative, collectivist freedom of speech. For example, Professor Owen Fiss criticizes the notion that the core purpose of the freedom of speech is to protect the autonomy of individuals.[259] Fiss argues that such autonomy is merely a means to the true goal of the First Amendment: the cultivation of vibrant public deliberation necessary for informed self-governance.[260] He writes that "[a]utonomy is protected not because of its intrinsic value . . . but rather as a

2006)) (discussing examples of restrictive Internet speech codes in private college and university web services, including that of Colby College, which forbids Internet speech that may result in "a loss of self-esteem" in the individual to which the speech is directed, and that of Brown University, which restricts speech that may create "feelings of impotence, anger, or disenfranchisement," regardless of intent).

257. Such public Internet spaces would not qualify as traditional public fora because, as creations of a nascent technology, they "by long tradition or by government fiat have [not] been devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983). However, they likely would be classified as unlimited designated public fora, to which the same First Amendment strict scrutiny as speech restrictions in traditional fora would apply. *Id.*

258. NEWTON MINOW & LAWRENCE GROSSMAN, A DIGITAL GIFT TO THE NATION: FULFILLING THE PROMISE OF THE DIGITAL AND INFORMATION AGE 5 (2001). *See generally* THE DIGITAL PROMISE PROJECT, CREATING THE DIGITAL OPPORTUNITY INVESTMENT TRUST: A PROPOSAL TO TRANSFORM LEARNING AND TRAINING FOR THE 21ST CENTURY (2003), *available at* http://www.digitalpromise.org/about/report_to_congress/.

259. OWEN M. FISS, LIBERALISM DIVIDED 13 (1996).

260. *Id.* at 13–17.

means or instrument of collective self-determination. We allow people to speak so others can vote."[261]

Similarly, Professor Jack Balkin argues that the objective of freedom of speech is "to promote democratic culture," which is more than mere representative institutions and public debate, but instead is "a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals."[262] It "is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture."[263] He argues that "[f]reedom of speech means giving everyone . . . the chance to use technology to participate in their culture" by having the ability "to interact, to create, to build, to route around and glom on, to take from the old and produce the new, and to talk about whatever they want to talk about, whether it be politics, public issues, or popular culture."[264] Professor Sunstein generally agrees with Balkin and Fiss, calling for a "New Deal for speech" that would require the government to seek ways to realize the Madisonian conceptualization of the First Amendment by informing democratic decisionmaking with vibrant public deliberation reflecting a diversity of viewpoints and speakers.[265]

4. Cautionary Notes on the Online Marketplace of Ideas—Although the Internet hosts much more of a "marketplace of ideas" than the broadcast spectrum ever could muster, it is by no means a panacea for all that ails American democracy and culture. To the contrary, the Internet harbors dangers of its own. The Internet's ubiquity, vastness, and anonymity make it a vital forum for both democracy and crime. For example, it has been used by terrorists to radicalize and recruit the disaffected and organize attacks,[266] and by sex offenders to seduce their victims.[267]

261. *Id.* at 13.

262. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004).

263. *Id.* at 3–4.

264. *Id.* at 45.

265. SUNSTEIN, *supra* note 95, at xvi–xxx, 17.

266. Ronald Marks, *Homeland Security's Biggest Challenge: Too Much Information*, CHRISTIAN SCI. MONITOR, Nov. 21, 2005, at 9 ("Terrorists print their plans on the Internet in tens of thousands of blogs and chat rooms."); *see also Al Qaeda and the Internet*, WASHINGTONPOST.COM, Aug. 8, 2005, *available at* 2005 WLNR 12602578 (Westlaw) (transcript of online discussion with international terrorism consultant Evan Kohlmann, detailing the sophisticated use of the Internet by Al Qaeda and other terrorist organizations).

267. *See generally* Christa M. Book, *Do You Really Know Who Is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children*, 14 ALB. L.J. SCI. & TECH. 749 (2004); Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38

Moreover, the Internet's effects on democracy are in question. Professor Owen Fiss warns against overestimating the democratic value of the Internet, considering that "[t]he Internet provides vastly more information than television, but does so only if citizens actively seek that information out."[268] Professor Sunstein makes the related note that the Internet can polarize and fragment the public sphere.[269] Whereas editorial controls inherent in broadcasting and print media typically filter out extremist viewpoints in favor of a mediated and moderated sampling of content from a number of areas that audience members may not have sought out themselves, the Internet as a whole lacks that mediating and moderating function. A person predisposed to anti-Semitism, for example, may opt to restrict her Internet surfing to anti-Semitic and similar hate sites, thereby only receiving content that reaffirms her bias. Similarly, an immigrant who may not be prejudiced but has an interest only in Internet content from his native nation may eschew all other Internet fare for websites from his homeland and in his native tongue. Professor Sunstein worries that although "[u]nplanned, unanticipated encounters are central to democracy itself," the Internet enables users to bypass many if not all of those enlightening and broadening encounters in favor of only likeminded individuals and content.[270] His concern reflects the view of John Stuart Mill, who warned that:

> It is hardly possible to overrate the value . . . of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar. . . . Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.[271]

Another concern involving the viability of the Internet as a true marketplace of ideas involves the question of audience adequacy.

U. RICH. L. REV. 477 (2004) (analyzing the legality of sting operations to arrest Internet child sex predators).

268. Owen M. Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1216 (1999) ("Television informs even the passive viewer.").

269. CASS SUNSTEIN, REPUBLIC.COM 8–9, 236 (2001) (observing that the Internet enables users to create their own "Neighborhood Me," in which all of the information they receive and all of the people they associate with online agree with one viewpoint, however narrow and isolating it may be).

270. *Id.* at 8.

271. JOHN STUART MILL, 3 PRINCIPLES OF POLITICAL ECONOMY, at ch. XVII ¶ 17.14 (William J. Ashley ed., Longmans, Green & Co. 1909) (1848), *available at* http://www.econlib.org/library/Mill/mlP1.html.

In contrasting the Internet with broadcasting, Professor Jack M. Balkin notes that the emergence of digital communications created a different kind of scarcity: "It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention."[272] With such an unlimited array of fora on the Internet, audiences can be atomized, with significant concentrations of viewers hard to achieve.[273]

Professor Walter Effross advises caution in having the government affirmatively create public spaces for political speech on the Internet. He notes that "among the most remarkable aspects of the World Wide Web are its democracy and decentralization: anyone with access to the technology can contribute to a Usenet newsgroup, or put up a Web site on, almost any topic."[274] Segregating political speech to certain public areas of the Internet therefore would be unnecessary and counterproductive insofar as it "would conflict with the medium's essential virtues."[275]

Despite its dangers to physical safety and democracy itself, the Internet's benefits as a tool for democratic and cultural engagement outweigh its shortcomings. The Internet cannot be expected to be any safer and more effective as a marketplace of ideas than the brick-and-mortar gathering places that it has supplemented, and in many cases, replaced. As in any marketplace, Internet "consumers" are wise to heed the warning of *caveat emptor*.

Coupled with the subsidization of broadband access for underserved communities, the use of Broadcast-to-Internet cross-subsidy proceeds to fund the creation and maintenance of truly public fora on the web would help realize the Internet's fullest potential as an important democratic resource. Such a cross-subsidy also would enable broadcasters to pay their due by helping the Internet realize the free marketplace of ideas that proved unattainable in the broadcasting spectrum.

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272. Balkin, *supra* note 262, at 7.

273. Professor Ellen P. Goodman correctly notes that "[t]oday, the scarce resource is attention, not programming." Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1390 (2004).

274. Walter A. Effross, Dir. of the Program on Counseling Elec. Commerce Entrepreneurs at Am. Univ. Wash. Coll. of Law, Testimony Before the Democracy Online Project: Fencing Off Cyberspace—and Fending Off Democracy? (May 22, 2000), *available at* http://www.wcl.american.edu/faculty/effross/democracyonline.cfm.

275. *Id.* Professor Effross principally addressed the proposal to segregate political sites under the ".pol" domain. *Id.* He opposed the proposal on a number of grounds in addition to the decentralization of political speech on the Internet, including the definitional difficulties inherent in classifying sites as political or non-political, administrative and enforcement challenges, and problems with security against hackers. *Id.*

Although the challenge of audience scarcity applies to the Internet, it also is a real challenge in brick-and-mortar town squares, where attracting audiences for speech is not an easy task. Whereas the brick-and-mortar town squares offer citizens the opportunity to have the "unplanned, unanticipated encounters" that Professor Sunstein rightly deems "central to democracy itself,"[276] the Internet's viral and integrated nature enables similar encounters as well as the rapid acquisition of massive audiences. For example, in the months preceding the 2004 presidential election, some of the more popular bloggers whose sites allow readers to post messages of their own boasted enormous increases in audiences.[277]

IV. CONCLUSION

Although the beleaguered public trustee doctrine continues to serve as the justification for broadcast regulation, and specifically the limitations on the free speech rights of broadcast licensees, a broadened interpretation of the First Amendment public forum doctrine is a viable and potentially better alternative to the trusteeship model. It enables the government to impose reasonable regulations on the speech of broadcasters without relying on the scarcity rationale or other justifications associated with the public trustee doctrine that, although still valid, draw increasing criticism for being obsolete or outmoded.

An *affirmative* interpretation of the public forum doctrine—pursuant to which the government actively creates and maintains public fora for citizens' speech—contributed to the creation of the broadcast public trustee model, whose fundamental objective was the creation on the nation's airwaves of "an uninhibited marketplace of ideas in which truth will ultimately prevail."[278] The broadcast spectrum was intended to serve as a central point of community focus for, in the words of *Hague v. CIO*, "communicating thoughts between citizens" and "discussing public questions."[279]

276. SUNSTEIN, *supra* note 269, at 8.

277. KLINE & BURSTEIN, *supra* note 236, at 5 (reporting that the ten most popular political blogs "collectively had 28 million visits from readers, which rivaled traffic to the three 24/7 online cable news networks").

278. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

279. Hague v. CIO, 307 U.S. 496, 516 (1939).

After seven decades of failure by the public trustee doctrine to deliver a free marketplace of ideas on the broadcast spectrum, it is clear that the Internet is a much more viable electronic medium for hosting such a marketplace. As concluded by the trial court in *ACLU v. Reno*, "[i]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."[280] Yet broadband access to the Internet, which exposes users to otherwise inaccessible video, audio programs, and interactivity, remains too expensive or unavailable to many communities who are poor or live in underserved or unserved areas.

Because the Internet has become such a powerful resource for public speech, education, and democratic enfranchisement, an affirmative application of the public forum doctrine compels the government to make it easier for all speakers to access the Internet, and once there, visit virtual places where the full complement of First Amendment protections adhere. Broadcasters should be required to help provide access to such Internet public fora. After decades of profiting significantly from the constructive subsidy of unenforced public trusteeship, while commoditizing viewers and listeners on the public's own airwaves, broadcast licensees should have to earn the right to retain their FCC licenses by helping subsidize access to the Internet—the electronic medium that has realized the "free marketplace of ideas" that broadcasting promised but never delivered.

280. ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).