

The Constitutional Case against “Free” Airtime

by Laurence H. Winer

Executive Summary

Sen. John McCain (R-Ariz.) plans to revive his free airtime bill for the 108th Congress. The proposed law forces broadcasters to cover political campaigns and to subsidize advertising for candidates. Normally such legal restraints on editorial discretion would run up against First Amendment protections for the media.

Advocates of “free” airtime argue that the courts have long recognized that similar regulations on the media may pass constitutional scrutiny. Broadcasters do not actually own their slice of the spectrum but rather lease it from the federal government. The government has traditionally imposed “public interest” obligations on broadcasters in exchange for the original license. The free airtime requirements are seen as an additional “public interest” mandate.

The legal justifications offered for free airtime should not be accepted. Scarcity no longer marks broadcasting in the United States. Free airtime is not a price paid for use of the spectrum. The government does not own the spectrum. It does not regulate the content of newspapers because they use sidewalks to deliver their product. The broadcasters have created almost all the value of the licenses since 1927. Free airtime is less a payback for using the spectrum than an open-ended effort by Congress to extract favors from the broadcasting industry. Free airtime also places an unconstitutional condition on receiving a broadcasting license. The proposal transfers the burden of funding campaigns from supporters of candidates to commercial broadcasters, an unconstitutional transfer of wealth under the Fifth Amendment.

Requiring broadcasters to carry campaign-related content and finance content- and speaker-specific airtime cannot survive modern First Amendment scrutiny.

Introduction

The other shoe of campaign finance reform is dropping.¹ Sen. John McCain (R-Ariz.) is again taking the lead by sponsoring legislation requiring radio and television broadcasters to provide free airtime to political candidates in furtherance of their campaigns.² In fact, such airtime would not be free; we would pay a high price in one of our most precious currencies, freedom of the press.

Proponents of campaign finance reform have long sought to mandate some form of free airtime for candidates.³ Five years ago President Clinton established the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (popularly known as the Gore Commission) to deal in particular with the burgeoning costs of television advertising time for political candidates.⁴ The president expected this body to recommend, and the Federal Communications Commission then to implement, a program for government-mandated free television airtime for candidates for political office.⁵ The Gore Commission, a "Noah's Ark" of representatives of special interests,⁶ was not able to agree on any mandate, and some of its members had to settle for a statement urging broadcasters to do a better job of covering political campaigns.⁷

Yet the initiative behind the Gore Commission lives on. In June 2002 McCain publicly thanked political scientist Norman Ornstein, the cochair of the Gore Commission, and journalist Paul Taylor, head of the Alliance for Better Campaigns, for developing the core of the senator's current proposal.⁸ The following October McCain introduced S. 3124, the Political Campaign Broadcast Activity Improvements Act, to implement the proposal. He no doubt will reintroduce such legislation in the 108th Congress where he chairs the Senate Committee on Commerce, Science and Transportation to which S. 3124 was referred.⁹

Senator McCain's bill has three main components. First, it explicitly regulates program content by requiring broadcasters to devote at least two hours per week in the period just prior

to federal elections to "candidate-centered" or "issue-centered" programming, defined to exclude paid political advertising. At least one of those hours must be in an expanded prime time, and none can be "night owl" broadcasts between midnight and 6:00 A.M.¹⁰ Second, the act establishes a complicated voucher program, in the aggregate initial amount of \$750 million for each two-year election cycle, under which federal candidates and national committees of qualifying political parties (on behalf of federal, state, or local candidates) would be given vouchers to purchase broadcast time for political ads.¹¹ Broadcasters would have to accept those vouchers as payment; they could then redeem them at face value. Commercial broadcasters would have to finance the voucher system through an annually assessed "spectrum use fee" of between one-half and 1 percent of a station's gross revenues.¹² Finally, the proposed legislation would tighten the requirements of the current 47 U.S.C. § 315(b) to widen the circumstances under which broadcasters must charge political candidates only the lowest unit rate for advertising time.¹³

Overall, McCain's bill proposes to shift much of the cost of political campaigning, especially on television, from candidates and their supporters to broadcasters simply because the latter own and control an effective medium of mass communication. The details could vary and are not as important as the principles at stake. Put simply, requiring broadcasters to carry campaign-related content and finance content- and speaker-specific airtime cannot survive modern First Amendment scrutiny. Such a scheme also well may constitute a "taking" requiring just compensation under the Fifth Amendment.

Practical Issues

Broadcasters are not necessarily doing a good job of covering political campaigns, and their shortcomings attract appropriate criticism. Paul Taylor and the Alliance for Better Campaigns contribute positively to public discourse by cataloguing the deficiencies of

broadcasters and demanding better performance.¹⁴ When citizens expose, embarrass, and entreat, we may all applaud their efforts.

When interest groups and senators seek to use the heavy hand of government regulation of the press, however, they enter constitutionally forbidden territory. In the long run government regulation can hardly outperform the marketplace and institutional forces in improving how the press operates. As the Supreme Court once sagely observed, “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”¹⁵

The proposals for free airtime raise many practical questions that relate directly to the government’s heavy burden to sustain the constitutionality of free airtime.¹⁶ First, why focus on broadcast coverage of political campaigns? Proponents say the broadcast media are the major source of news and information, including information about political campaigns, for most of the American people.¹⁷ They also argue that campaign ads on television drive up the cost of campaigns, causing a host of allegedly deleterious side effects. Technological changes, however, are undermining both arguments. The proposals for free airtime are peaking just as the influence of broadcast television on political campaigns is rapidly declining because of the advent of new, proliferating electronic media and digital devices.¹⁸

But additional questions remain. What is the great value of television campaign ads that we should want to encourage them? Do they really inform and educate voters and foster deliberative democracy? Do we need more 30- and 60-second political ads that candidates might choose to run if such ads were available free of charge and that, with increasing frequency, may be “zapped” along with other commercials by proliferating technological devices?¹⁹ Just what is the candidate- and issue-centered discourse the proposals call for? Assuming, as is unlikely, that those can be adequately defined, why is this the favored form of campaign speech? And who will monitor compliance with such amorphous requirements,

and how? Why not instead have taxpayers subsidize the mailing to all registered voters of candidates’ position papers on the major issues in their campaigns? Alternatively, we could subsidize such position papers carried as paid inserts in major daily newspapers. Such written statements would have far greater potential for conveying meaningful information, especially if supplemented by “dueling” position statements continuously released during a campaign on opposing candidates’ websites. Indeed, those websites are perhaps the best source for educating oneself about, and even interacting with, a candidate.²⁰

If the complaint is that most people will ignore such messages in other media, that’s most unfortunate. The ultimate answer might be a better educated populace. But people have a right to ignore speech no matter how valuable others deem it to be.²¹ Why force broadcasters to subsidize candidates bombarding listeners and viewers with images and slogans they would rather avoid, and often do avoid?

Finally, why should we give preference to major political parties with grants of vouchers?²² If anything, it seems that fringe candidates and parties most need and deserve assistance in getting their messages to the voters, at least from the standpoint of the First Amendment interest in diversity of political thought and ideas. Broader subsidies, however, might mandate support for some rather unpopular or objectionable ideas.²³ But why is that any different from requiring support for the Republican or Democratic Party? There may be some political science theory behind the effort to strengthen the major political parties at the federal and state levels through vouchers, but broadcasters should not be made unwilling participants in this social science experiment.

Constitutional Issues

The First Amendment

Those practical problems are less important than the constitutional questions raised by the “free airtime” proposal. Under the

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Constitution, “We the People,” not just broadcasters or other media players, are guaranteed the benefits of a free press, not a press regulated by the government to achieve some currently fashionable view of the good. So I begin with a premise that should be largely uncontested: if mandates for free coverage of political campaigns were proposed for the print media (newspapers), they would be stillborn as a flagrant violation of the First Amendment. The Supreme Court’s *Miami Herald* decision in essence so holds, and *Miami Herald* is good law in both senses of that term.²⁴ As the Court has phrased it recently, the law “is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”²⁵ If free time, or space, for political candidates would be a total nonstarter applied to newspapers, why should the situation be any different for broadcasting?

The superficial answer is that broadcasting is different and that this difference is of significant constitutional moment. There is much truth to that, at least as a historical matter. The Radio Act of 1927 started us down an ultimately misguided path of government licensing of the broadcast media coupled with comprehensive regulation of the new media—a system anathema in this country for newspapers but generally upheld for broadcasting by the Supreme Court decades ago.²⁶ And this is where many people, including those favoring free time for candidates, would like to leave matters. But the world has changed. The world of the mass media marketplace has been revolutionized by technological developments and the digital/computer age; the world of First Amendment jurisprudence has similarly progressed.

The Death of Scarcity and the Need for Strict Scrutiny

What standard of judicial review should be applied to the free airtime proposals? They clearly are content-based regulations of

speech as they explicitly favor a very particular category of speech and of speakers.²⁷ The proposals try to foster speech by political candidates, or programming about political candidates, focusing directly on their political campaigns.²⁸ As content-based regulations, the proposals should be subject to the demanding requirements of strict scrutiny, with the government bearing the significant burden of demonstrating that they serve a compelling state interest and are narrowly tailored using the least speech-restrictive means to achieve that interest.²⁹

But, the argument goes, while the proposals favor candidate speech they burden only the speech interests of broadcasters, infringing on their editorial discretion, and broadcasters, we all know, enjoy substantially reduced First Amendment protection. That is the teaching of *Red Lion* and the scarcity rationale for government regulation of broadcasting the Supreme Court sanctioned in that 1969 case when broadcasting was the only electronic medium of mass communication.³⁰ The Court asserted that physical scarcity was the unique, distinguishing characteristic of broadcasting that allowed it to be regulated in ways that could not be tolerated under the First Amendment for other media. But the scarcity rationale always has been a highly dubious notion both empirically and in theory.³¹ In particular, critics have raised three fundamental objections concerning

- whether such scarcity exists empirically;
- why the asserted scarcity, even if actual and physical in nature, should be a predicate for regulation since scarcity in some form is *the* basic economic fact of life, affecting all media and as such cannot justify selective regulation; and
- how does a specific form of scarcity that broadcasters may suffer justify each particular aspect of regulation, especially those aspects that are content based?

Scarcity now can have no further talismanic significance given the ongoing explosion of new forms of electronic media and new sources

of information. The new reality has been acknowledged by courts, commentators, and even some FCC commissioners.³² Whatever legitimacy the concept once may have had, and whatever some people might wish to imagine about its continued vitality, spectrum scarcity as a justifying rationale is now dead, if not quite yet buried. The mere mention of “scarcity” seems anachronistic in a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet.

People who would continue to rely on a concept of scarcity first must carefully define the concept they would invoke—for example, is it allocational scarcity (the demand for broadcast frequencies exceeds supply), numerical scarcity (without government intervention the public would be deprived of diverse viewpoints),³³ or some other kind of scarcity? Next they must demonstrate that such scarcity exists to a significant and unique degree in the media they would regulate. Then they must establish a close nexus between the condition and the regulation it supposedly supports.³⁴ No plausible argument can be fashioned along those lines; only people desperate to maintain government regulation of broadcasting hang on to the discredited anachronism of scarcity out of the justifiable fear that there is nothing to replace it to achieve the desired regulatory end. That approach just demonstrates the bankruptcy of such an enterprise.³⁵

We need not replay the death of scarcity here. It is clear that the government must look to the digital, electronic future that already includes broadcasting, cable, satellite, microwave, VCRs, new telephone technologies, and the Internet—not to mention the next revolutions sure to emerge from the laboratory—and cannot be wedded to the past.³⁶ So, if the shibboleth of scarcity can no longer be relied on, the central question becomes whether the government can develop and support any other rationale that adequately justifies regulation of broadcasters—especially content-based programming regulation such as free time proposals—under the amorphous notion of the “public interest.” The heavy bur-

den to do so clearly lies on the state;³⁷ the strong presumption must be that broadcasters, like all other members of the press, are protected by the First Amendment from such government regulation.

Moreover, whatever rationale or rationales the government now advances to support the free airtime proposals ultimately will have to survive strict judicial scrutiny and not merely the “peculiarly relaxed”³⁸ First Amendment review that usually has sufficed up to now. The Supreme Court expressed doubts about continued reliance on scarcity and applied heightened review in *FCC v. League of Women Voters*.³⁹ In *Turner Broadcasting*, the Court further acknowledged its doubts about scarcity and emphasized the “limited” and “minimal” control the government can exercise over broadcast programming.⁴⁰ In particular, and directly relevant to free airtime proposals, the Court emphatically noted that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.”⁴¹

As the constitutional guarantee of free speech has its “fullest and most urgent application” in political campaigns,⁴² the government would bear a “well-nigh insurmountable” burden⁴³ to justify further interfering with how broadcasters cover campaigns or provide candidates with airtime. The FCC would have to satisfy exacting scrutiny by demonstrating a compelling interest that is both narrowly tailored and necessary to serve that interest.⁴⁴ The government would have to “demonstrate that the recited harms are real, not merely conjectural, and the regulations will in fact alleviate those harms in a direct and material way.”⁴⁵ Mere assertions to this effect are not enough; the government must actually demonstrate that these conditions are met.⁴⁶ The only way to do that is to concretely establish, with clear and convincing evidence, the logical and empirical link between each specific proposal and the compelling interest it allegedly serves while, at the same time, showing that alternatives to the restriction of speech are not reasonably available.⁴⁷ With the plethora of alternatives avail-

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able in the modern communications age, the many practical difficulties with the free airtime proposals discussed above, and the declining importance of broadcasting in political campaigns,⁴⁸ the case cannot be made.

The Quid Pro Quo Argument

Proponents of free airtime proposals largely recognize the precariousness of continued reliance on a scarcity rationale and the *Red Lion* doctrine, as well as the difficulty of making the practical case at a heightened level of scrutiny. Their argument therefore shifts in an attempt to avoid those difficulties. The new approach—actually a reversion to emphasizing an old concept—is even more distressing as it perpetuates the outdated and pernicious view of broadcasting as a regulated, quasi-public utility and not an important segment of the free press and one of the great engines of our freedom and liberty.⁴⁹

The current argument thus focuses on the central premise of the 1927 Radio Act, namely government ownership of the electromagnetic spectrum, or “ether” as it was then inaccurately called. Advocates of free airtime note that broadcasters are given a license for free and exclusive use of a portion of the publicly owned spectrum and are legally protected from interference in its use. That grant is a tremendously valuable resource for which broadcasters are not charged. Instead, they hold the license in trust to serve the public interest. So, the argument goes, broadcasters can and should be required to pay a quid pro quo back to the public in the form of in-kind public interest obligations, now including the “modest” proposals for free airtime for political candidates.

This quid pro quo analysis, that even predates the 1927 Radio Act,⁵⁰ is being reinvigorated by the ongoing transition from analog to digital television broadcasting. To achieve this transition, as originally proposed by the FCC,⁵¹ Congress gave each current television broadcaster an additional 6 megahertz of spectrum to establish a digital channel, conditioned on the future surrender of each station’s analog license.⁵² The government then plans to auc-

tion off this returned analog spectrum and use the receipts to reduce the national deficit.⁵³ The eventual recovery of spectrum will leave each current broadcaster with the same slice of the spectrum—6 MHz—it now enjoys. Nonetheless, this approach gave rise to cries of “giveaway” and huge corporate welfare—the “Great American Ripoff”⁵⁴—with extravagant claims that the government simply gave away \$70 billion of spectrum to current broadcasters who are a potent lobbying force in Washington.⁵⁵ Politicians such as Senator McCain now demand that broadcasters pay this putative debt to the public by, perhaps among many other obligations, providing free airtime to candidates. This rhetorical appeal makes for resounding political bombast⁵⁶ but does not justify quid pro quo public interest regulation.

First consider the notion of government ownership of the spectrum. Electromagnetism, like gravity, is simply one of the four fundamental forces of nature. The very concept of public ownership of the electromagnetic spectrum is meaningless and cannot by itself justify anything. The government cannot own the spectrum any more than it can own gravity (or, for that matter, cyberspace, which the government did have a substantial role in creating). Public ownership here is simply a trope,⁵⁷ a way of stating the predetermined conclusion in favor of government regulation, a conclusion that needs other independent support. No one would assert government ownership of gravity as a justification for regulation—say, to support a federal excise tax on automobiles for the privilege of keeping a car “on” the road. Such an excise tax regulation might be justified in other ways, but the mere invocation of public ownership of the airwaves—with the corollary notion of broadcasters as public trustees of the frequencies they are allowed to use—adds nothing to the debate, which must proceed on other bases.

Newspapers, as well as cable operators, use public rights-of-way—the streets and sidewalks—to distribute their messages. Newspapers also use the spectrum through satellite transmissions to gather the news and sometimes to convey page layouts to dis-

tant printing plants. News trucks burden the streets, news racks and kiosks burden the sidewalks, and newsprint and newspapers litter the environment. Yet none of this justifies regulating the content of newspapers, even though in some sense such regulation might “improve” the papers and render a public service. Why should broadcasters, or other electronic media, be subject to content regulation any more than newspapers? The quid pro quo argument adds nothing to the misplaced assertion of government ownership.

Until recently, successful licensees did not pay anything for the frequency license per se.⁵⁸ But the original licensees from the early days of radio and television did not necessarily get anything then of great present value. Rather, what they received was exclusive use of a previously idle and only potentially valuable resource that needed their investment, imagination, and entrepreneurship to develop into a productive asset. Those broadcasting pioneers, allowed to air advertising to support themselves, took all the risks of substantial, long-term investment in developing facilities, programming, and audiences and then provided a free, universal public good to anyone who purchased a receiver. Some garnered the rewards of their efforts. But not all did; any number of initial licensees faltered in favor of more skilled successors.⁵⁹

Those who did succeed satisfied the public interest as best measured by the marketplace, not by a Washington bureaucracy. Along the way they returned huge benefits to the public. They developed an extraordinarily important and vibrant communications industry that enriched both the culture and the economy of the country, helping to define the American identity and the American community during the 20th century.⁶⁰ They created jobs and paid taxes on the wealth they created from this previously wholly nonproductive resource. Over the years many broadcasters sold their licenses through FCC-approved transfers, and their successors presumably paid fair market value for the licenses they acquired. Indeed, not surprisingly, the vast majority of current

broadcast licensees are market transferees from original licensees,⁶¹ so this quid pro quo argument does not apply to them, any more than it can apply today to the successful bidder for a new license.

The transition to digital television adds nothing to the analytically unsound quid pro quo argument for public interest regulation or obligations. Congress decided to give existing analog broadcasters the first and exclusive opportunity to develop digital television to substitute for their analog spectrum. Perhaps Congress should have auctioned off the new digital licenses whose recipients, having conspicuously paid up front through competitive bids, might not be subject to the demand for providing any public interest obligations such as free airtime. On the other hand, it could be argued that Congress may have known exactly what it was doing in adopting an approach that it thought would best “preserve and promote the competitiveness of over-the-air broadcast stations.”⁶² Conversion to digital is a very expensive proposition for broadcasters, and there is no guarantee they will be able adequately to recover this expense in the new, highly competitive television marketplace. There may be no more dynamic or harder-to-predict market than that involving telecommunications and electronic media. Not surprisingly, the transition to digital is not going well, prompting FCC efforts to aid the process.⁶³

Some members of Congress also have been concerned about the long-term economic viability of free, over-the-air television in an increasingly competitive video marketplace in which 85 percent of television households now receive their signals from a multi-channel video program distributor rather than over-the-air broadcasting, and broadcasting’s market share of the television audience is declining precipitously.⁶⁴ Indeed, concern for preserving free, over-the-air television was a crucial component of the congressional rationale for the cable must-carry rules. The Supreme Court heavily relied on this rationale to barely sustain the constitutionality of those rules.⁶⁵ Thus, it could be argued that broadcasters, both currently in analog for-

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mat and soon in digital format, already provide the American public with a substantial “quid” in return for their licenses in the form of their contributions to the economic marketplace and the marketplace of ideas. Broadcasters created a remarkably successful system of free, universal over-the-air television service with programming highly valued by large segments of the public. In many countries this service is not free, and Congress, wishing to preserve our long-standing and highly successful system, may have “given” broadcasters additional spectrum to induce them to undertake the expensive digital conversion without further jeopardizing their ability to compete and survive in the new, fiercely competitive media marketplace. The “payback” to the public already exists in the form of free, universally available channels that exist because they serve the public interest as best and most appropriately measured in the media marketplace.⁶⁶

Still, critics persist in arguing that current broadcasters have been given free of charge a hugely valuable public asset and now should be made to pay for it in kind with public interest obligations such as free airtime for political candidates. This is because those critics claim that, even though broadcasters have amply paid and repaid for their licenses in the secondary market, broadcasters still haven’t paid full value for them. That is, the licenses they acquired came at a discounted price because they were impressed with well-known public interest obligations.⁶⁷ That discount now is to be paid back in kind in the form of free airtime, in addition to other, existing public interest obligations.

The ambiguity of this argument reveals its first flaw. What is the amount of the discount and how does it compare to the value of which public interest obligations? The panoply of regulations of broadcasting has waxed and waned over the years. At any time, how could a prospective broadcaster know what additional obligations might be imposed in the future to rationally calculate an appropriate “discounted” price to acquire a license? A vague obligation to offer some

programming generally appropriate for children, for example, is very different from a later-imposed guideline quantifying a minimum number of hours per week of specifically defined children’s programming.⁶⁸ Today’s broadcasters already operate under reasonably narrow and well-defined requirements about selling ad time to candidates for political office and offering equal opportunities for reply time.⁶⁹ Now they are told they should bear additional, substantial obligations regarding political campaigns.

In the future what further, amorphous requirements will be imposed in the name of even more payback for the alleged license discount? The “payback” for the discounted license is neither specified by contract nor determined in a free market. No rational buyer would agree to an open-ended contract under which a seller has the exclusive right to determine at any future time how much more a good will cost. In fact, the language of contract and markets is not apt here. The “seller,” Congress, determines the value of the payback whenever it wishes at its collective whim. Thus the language of “payback” is really just a pretext for Congress’s imposing costly obligations on broadcasters.

Unconstitutional Conditions

The in-kind quid pro quo argument runs into an even more substantial constitutional objection: Congress may not impose unconstitutional conditions on the exercise of freedom of expression. The doctrine of unconstitutional conditions is admittedly a somewhat uncertain realm.⁷⁰ But as Dean Kathleen Sullivan of Stanford Law School has summarized the doctrine, “[G]overnment may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”⁷¹ In application this almost surely means a newspaper could not be offered a tax credit based on a promise not to run any editorial critical of the president, or based on an agreement to run a certain amount of free political ads. It suggests that a magazine’s favorable postal rates could not be conditioned on matters affecting con-

tent. The federal government may appropriate funds from general tax revenues and provide money to candidates to purchase political ads in accord with the editorial discretion of the media. This does not mean, however, that the government may achieve results with similar economic consequences through other means that displace, or even appear to displace, the press's free exercise of editorial discretion.

While the government may license broadcasters, that does not mean it can impose any conditions it wishes upon them in the name of the public interest. Land may be conveyed subject to a public easement, but a basic First Amendment freedom, the ability to exercise editorial discretion, cannot be granted subject to governmentally imposed conditions.⁷² As one court recently phrased it, "Congress cannot make the receipt of a valuable government license contingent upon the recipient's surrender of its First Amendment Rights."⁷³ In short, the government may not put a price on broadcasters' free exercise of editorial discretion. Thus the notion of quid pro quo—a conditional grant of a broadcast license—adds nothing to the argument for free airtime, which has to find independent justification elsewhere if at all.

The important principle at stake here can be illustrated by any number of examples, but consider the notable silence of two Supreme Court cases decided just last year. *Thompson v. Western States Medical Center*⁷⁴ involved a statutory exemption from the Food and Drug Administration's standard drug approval requirements for compounded drugs, that is, drugs that a pharmacist or doctor creates from combinations or mixes of ingredients to tailor a medication for an individual patient. The exemption, however, was conditioned upon a number of restrictions, including one that raised First Amendment concerns, namely that the providers of such drugs refrain from advertising or promoting particular compounded drugs. The exemption from the drug approval process conferred a substantial benefit on the pharmacies that challenged the restriction. Yet the Court held that the ban on advertising and promotion was an unconsti-

tutional restriction. There was no argument in the case that the speech ban, like the other non-speech-related statutory restrictions, was valid simply because it was a condition the government imposed in the context of granting a substantial benefit and, indeed, a condition arguably directly related to the benefit.⁷⁵ Rather, the government had to carry the burden of independently justifying the restriction, which it could not do even under the relaxed First Amendment protection that applies to commercial speech.

*Republican Party of Minnesota v. White*⁷⁶ dealt directly with campaign speech. The Minnesota Supreme Court's Code of Judicial Conduct prohibited any candidate for election to the state judiciary from "announc[ing] his or her views on disputed legal or political issues."⁷⁷ The code placed many restrictions on the privilege of seeking or holding judicial office. But again, the state was not allowed to impose the ban on speech contained in the "announce clause" simply as a condition of this privilege. Rather, applying strict scrutiny, the Court required the state to show that the announce clause, even interpreted narrowly, was specifically tailored to serve the state's asserted compelling interests in preserving the impartiality, and appearance of impartiality, of the state judiciary. The state failed that test, and the announce clause was held to violate the First Amendment.

Specifically in the context of broadcasting, in *FCC v. League of Women Voters*⁷⁸ the Court in 1984 struck down a provision requiring public broadcast stations that receive federal funds from the Corporation for Public Broadcasting not to "engage in editorializing." Even applying only intermediate scrutiny, the majority found the statute incompatible with the First Amendment, rejecting the dissent's view that Congress could impose such a condition on the knowing receipt of public money.⁷⁹

Thus the mere presence of a government subsidy does not entail the government's right to control the speech supported by governmental funds. In *Rust v. Sullivan*⁸⁰ the Court upheld a program under which proj-

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ects receiving federal family planning funds were forbidden to discuss abortion with patients. The Court rejected the argument that this restriction on speech was an impermissible condition—viewpoint discrimination—attached to a federal subsidy. But, as the Court has explained in *Legal Services Corp. v. Velazquez*,⁸¹ this result in *Rust* depended on the fact that, pursuant to a federally funded program, the government was simply controlling its own speech, its own message, and its own program. In contrast, when a governmentally subsidized program seeks to facilitate private speech, not to promote a governmental message, the government cannot impose similar conditions on that speech. The Court made precisely this distinction in *Velazquez* in finding unconstitutional restrictions imposed on lawyers receiving federal funds from the Legal Services Corporation, restrictions that prevented lawyers representing indigent clients from challenging in court the validity of existing welfare law. Indeed, the Court in *Velazquez* relied in part on two public broadcasting cases in explaining that the traditional private nature of the speech or medium in question—the lawyer speaking on behalf of his or her private client and the broadcaster exercising its own editorial discretion—precludes the government from influencing that speech or medium.⁸²

Whether a federally mandated program for free airtime for candidates is viewed as a condition imposed on the general “subsidy” to broadcasters from the grant of a broadcast license itself, or as a specific limitation on the terms of the license granted, neither can support the intrusion on private broadcasters’ editorial discretion. As the Court put it in *Velazquez*, “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”⁸³

Many people rely on the “Carter-Mondale” case, *CBS v. FCC*,⁸⁴ as precedent to support free airtime mandates, but that decision does not alter the above analysis. That 1981 case, upholding a statutory requirement in 47 U.S.C. § 312(a)(7) that broadcast-

ers sell some time to qualified candidates for federal office, belongs to the outmoded *Red Lion* era prior to the technological explosion of new electronic media. The Court dealt with the First Amendment argument in only a few paragraphs at the end of its opinion by simply invoking *Red Lion*. The Court surely stressed the importance of “enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process”⁸⁵ Even so, the Court stressed that § 312(a)(7) merely “creates a limited right to ‘reasonable’ access” for which the broadcaster may charge and which is subject to considerable broadcaster discretion.⁸⁶ But in the digital age of a plethora of communications media, the heavy burden would rest with proponents of free airtime to demonstrate, and not merely assert, that their proposals to commandeer broadcast time free of charge, on top of the equal opportunities provisions of § 315 and the affirmative access rights in § 312(a)(7), are both necessary for, and the least speech-restrictive way of achieving, this objective. At the same time, since there is no longer a meaningful constitutional distinction among the different forms of news media, this argument will somehow have to avoid the logical conclusion, which the Court surely would not accept, that all media of mass communication could be similarly commandeered. That would be, to say the least, a daunting task.

The Taxation Argument

Proponents of free airtime might hope to avoid constitutional difficulties by categorizing their proposals as merely a tax on broadcasters, for there is nothing in the First Amendment that immunizes the media from generally applicable business and economic regulation, including taxation.⁸⁷ The mandate for broadcasters to devote a minimum amount of time to specific campaign-oriented programming could not be so characterized, but perhaps the contribution of in-kind vouchers, or certainly the “spectrum usage fee,” might be portrayed as merely an unobjectionable tax. Yet, such a tax

on a segment of the press could not escape strict scrutiny.

Cable operators pay a franchise fee to their municipalities for the burden they place on public rights-of-way by installing, maintaining, and using their systems. Similarly, a spectrum management fee imposed on all broadcasters and tied to supporting a necessary, minimal governmental role in spectrum allocation and management might be constitutionally uncontroversial. The Court has even upheld the extension of a generally applicable sales tax to one segment of the mass media (cable).⁸⁸ But a free airtime tax does not fit under any of these categories; rather, it is a special tax applicable to broadcasters and broadcasters alone. It lacks the political constraint on taxation available when a tax applies to a broad constituency.⁸⁹ If such a tax could be imposed, it would provide all too handy a lever, through potential rate adjustments, for indirect government coercion of all sorts of broadcast programming from campaign coverage to children's television to indecency control.⁹⁰ The threat posed to First Amendment interests by such a tax would require that it survive strict scrutiny.⁹¹

But the free airtime tax is even worse, for it is not just a tax but a targeted tax coupled with a subsidy for a very particular class of speakers and for a very particular content of speech. If the government imposed a true and appropriate spectrum management fee on all broadcasters, placed the proceeds in general government revenues, and then decided to subsidize political campaigns with grants of money from all tax revenues, there might not be a constitutional problem. Although government subsidies for speech are not free of First Amendment concerns, there is considerably more flexibility for government action here than with direct regulation of speech.⁹² But a subsidy supported simply by a highly specialized and localized tax is not a subsidy;⁹³ it is speech compulsion that violates the First Amendment. As the Court recently articulated this principle, "We have not upheld compelled subsidies for speech in the context of a program where the principle object is speech itself."⁹⁴

If public financing of political campaigns, in whole or in part, is a good idea, the burden of achieving that public benefit should be spread among the public at large and not disproportionately imposed on radio and television broadcasters.⁹⁵ Politicians might like to posture that they are extracting a payback for the public from recalcitrant and ungrateful broadcasters. But willingness to pay when the means to pay are available offers a good measure of perceived worth; the "public interest" should not have to depend on a seemingly costless appropriation from commercial broadcasters.⁹⁶ Taxpayers at large are the intended beneficiaries of subsidies for political ads, and taxpayers can insist on appropriate governmental accountability for such use of their tax dollars. The government should not seek to deflect responsibility for such ads by making it appear that funding is coming from commercial broadcasters at no cost to the public.

The Fifth Amendment

Broadcasters certainly own the tangible assets of their stations. Since the 1927 Radio Act, however, the cardinal principle of government regulation of broadcasting has been that broadcasters may use the portion of the spectrum in which they are granted licenses "for limited periods of time," but they have no ownership rights in the spectrum itself. Rather, ownership and control of the spectrum, to the extent these concepts make sense, are reserved to the government.⁹⁷ Since broadcasters lack an explicit ownership interest,⁹⁸ some observers believe a regulation such as free airtime for candidates could not constitute a taking of broadcasters' property requiring just compensation under the Fifth Amendment.

But the matter is not so simple. The Fifth Amendment's Takings Clause states that "nor shall private property be taken for public use without just compensation." The Supreme Court has interpreted this provision to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

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whole.”⁹⁹ Free airtime proposals, however, do precisely that: they transfer the burden of supporting political campaigns from backers and supporters of candidates who in “all fairness and justice” should provide their support. These proposals then place the burden not on the public at large (the next best “fair and just” source of support) but rather on commercial broadcasters, a small and select subset of the public who have no particular reason to financially support politicians and who should be left free to cover political campaigns according to their own, independent editorial discretion. Free airtime proposals thus violate at least the spirit, if not also the letter, of the Fifth Amendment.

Broadcasters’ bundle of rights in their licenses has been increasing substantially in recent years. The privileges of a current licensee go well beyond those of earlier generations. Initial licenses for exclusive use of specified frequencies by analog commercial broadcasters now are granted by auction with a strong expectation of renewal.¹⁰⁰ Indeed, the statutory “limited” time of a license is becoming practically indefinite,¹⁰¹ and the license now is essentially freely transferable.¹⁰² The substantial deregulation of broadcasting in the last few decades¹⁰³ has further increased the property rights broadcasters now enjoy in their licenses. And the easing of structural, ownership regulations the FCC is currently considering¹⁰⁴ most likely will accelerate this trend in which broadcasters, formally mere licensees, in fact on a practical, functional basis effectively own rights in the spectrum. Thus the substantial bundle of rights modern broadcasters now enjoy in their licenses easily comprises “property” for purposes of Fifth Amendment analysis of regulatory takings.¹⁰⁵

The test the Court applies to determine whether just compensation is required for such regulatory takings of property, however, is far from straightforward. The classic, if Delphic, pronouncement is Justice Holmes’s “general rule” that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a tak-

ing.”¹⁰⁶ Thus the Court has acknowledged that, with few exceptions, regulatory takings analysis requires “essentially ad hoc, factual inquiries” and cannot proceed according to any “set formula.”¹⁰⁷ In this analysis, any claims about the weighty public benefits of a free airtime program would encounter difficulties similar to those involved in establishing the sufficiency of the state interest under First Amendment analysis.

One key factor in evaluating a regulatory taking is to ask whether the government regulation of property interests “frustrate[s] distinct investment-backed expectations.”¹⁰⁸ That is exactly what free airtime for candidates would do. By mandating free airtime for candidates the government would be commandeering access to an audience to induce viewers to watch what the state thinks they ought to watch. This audience is what, in fact, the government program would be targeting. But an audience has to be earned by someone having something to say that other people want to hear and watch. Over the years broadcasters have been rather successful in creating and developing their audiences by satisfying the public interest in programming as best measured in the marketplace. Broadcasters then sell their audiences to advertisers—political candidates and others—to sustain their business. Government usurpation of such transactions, especially to the proposed tune of \$750 million every two years, would not only interfere with but destroy reasonable investment-backed expectations.¹⁰⁹ Since broadcasters through their programming have created their audiences, it is singularly inappropriate and illegitimate, on both First and Fifth Amendment grounds, for government to appropriate and redirect those audiences in the name of the public interest.

As Justice Holmes admonished long ago, “[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”¹¹⁰ Whatever merit a public subsidy for political advertisements on television might have should be measured by the public’s willingness to visi-

bly and directly fund that subsidy. Such subsidy may not be achieved through an unconstitutional, forced transfer of wealth, disguised as regulation, imposed on broadcasters.

Conclusion

As Justice Stewart once noted, “There is never a paucity of arguments in favor of limiting the freedom of the press.”¹¹¹ Some people find compelling the “public interest” arguments advanced for requiring broadcasters to follow a government-ordained scheme of airing political campaign ads and bearing the financial cost of doing so. But, as the Supreme Court has noted, “[T]he ‘public interest’ standard necessarily invites reference to First Amendment principles.”¹¹² And that involves not only the interests of broadcasters as speakers but also the public’s pre-eminent interest in a free and unfettered press, not one managed by a government agency even for ostensibly good purposes.

A free press does not buy its freedom through content-based “paybacks” mandated by the government. The “payback” is serving the needs and interests of listeners and viewers by earning success in the marketplace. That, in turn, depends crucially on the media maintaining both actual and perceived independence from the government and the credibility that can come only from such independence.¹¹³ Journalists routinely go to great lengths, and often endure personal sacrifice and opprobrium, to protect their independence and legitimacy.¹¹⁴ And the American public’s reliance on the media is never more important than in times of uncertainty and crisis such as the present.¹¹⁵

Especially in such circumstances, it would be exceedingly foolish to compound the considerable practical and constitutional problems with free airtime proposals by casting broadcasters into a forced deal with the government on an issue as sensitive as the campaigns of political candidates. That would unwisely and inappropriately compromise broadcasters’ traditional role as “watchdogs”

over the government. All told, the price of free airtime for political candidates would be far too great.

Notes

1. The first “shoe,” the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002) (BCRA), a comprehensive modification of federal election campaign law was subject to constitutional challenge in the United States District Court for the District of Columbia, *McConnell v. FEC*, 2003 WL 2010983 (May 1, 2003), and now is heading for expedited Supreme Court review pursuant to § 403(a) of that act. Original versions of the BCRA included a provision for free airtime for candidates, but that provision was removed to allow passage of the legislation. See www.cnn.com/transcripts/0207/06/rs.00.html (interview with Sen. John McCain, July 6, 2002).

2. See “McCain Calls for Free TV Time from Broadcasters,” Press release, June 19, 2002, http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=531.

3. For an informative debate on free airtime for candidates, see Norman Ornstein and Barbara S. Cochran, *Slate Dialogue: Air Time for Candidates*, August–November 1997, www.slate.msn.com.

4. See “Radio Address of the President to the Nation,” June 28, 1997, *Weekly Compilation of Presidential Documents* 33 (July 7, 1997): 991–92. “For years, I have supported giving candidates free time . . . [and today] I’m appointing two distinguished Americans to lead a commission that will help the FCC decide precisely how free broadcast time can be given to candidates, as part of the broadcasters’ public interest obligations.” See also William J. Clinton, “Remarks to the Conference on Free TV and Political Reform and an Exchange with Reporters,” March 11, 1997, *Weekly Compilation of Presidential Documents* 33 (March 17, 1997): 334; and *Broadcasting & Cable*, February 9, 1998, p. 80.

5. See James Bennet, “Clinton Suggests Licensing Deal for Free TV Time in Campaigns,” *New York Times*, March 12, 1997, p. A1. Cf. William J. Clinton, “State of the Union Address,” January 23, 1996, *Weekly Compilation of Presidential Documents* 32 (January 29, 1996): 90, where Clinton asserted that “the era of big Government is over.”

6. Ken Auletta, “What Will Broadcasters Have to Give Up for Free TV?” *New Yorker*, November 9, 1998, pp. 34, 35 (quoting Gore Commission

A free press does not buy its freedom through content-based “paybacks” mandated by the government.

member Newton Minow).

7. See *Charting the Digital Broadcasting Future, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, December 18, 1998, www.ntia.doc.gov/pubintadvcom. The final report was the basis for an FCC proceeding, *In re Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, Notice of Inquiry, 14 FCC Rcd 21633 (1999), as to how broadcasters can best serve the public interest during and after their transition from analog to digital transmission. This was followed by *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket No. 00-168, Notice of Proposed Rulemaking, 15 FCC Rcd 19816 (2000) (proposing rules regarding disclosure of broadcasters' activities in the public interest), and *Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, Notice of Proposed Rulemaking, 15 FCC Rcd 22946 (2000) (clarifying broadcasters' obligations regarding children's programming in a digital television environment). These proceedings languished but now have been revived by the FCC's calling for additional, current comments in the course of its second periodic review of the progress of the conversion to digital broadcasting, *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15, Notice of Proposed Rulemaking, ¶¶ 107-12 (rel. Jan. 27, 2003).

8. See "McCain Calls for Free TV Time from Broadcasters"; and Paul Taylor, "The Case for Free Air Time," Alliance for Better Campaigns, March 2002, www.bettercampaigns.org/freeairtime/monograph.pdf.

9. See Bill McConnell, "Maverick McCain Rides Again," *Broadcasting & Cable*, November 11, 2002, p. 7.

10. Sen. 3124, § 3, 107th Cong., 2d sess. (2002).

11. *Ibid.* § 4.

12. *Ibid.*

13. *Ibid.* § 2. See "Gouging Democracy," Alliance for Better Campaigns, 2001, www.bettercampaigns.org. This report claims local television stations were systematically gouging candidates in the closing months of the 2000 campaign by exploiting loopholes in the § 315(b) lowest unit rate provision to increase the prices of campaign ads. The Toricelli Amendment, eliminated from BCRA, the campaign finance reform measure enacted in 2002, would have strengthened the lowest unit rate provision. See Paige Albiniak, "Sound and Senate Fury," *Broadcasting & Cable*, March 26, 2001, pp. 6-10. Sec. 305 of the BCRA, however, now conditions a federal candidate's entitlement

to the lowest unit rate upon the candidate's not directly referring in his ad to an opposing candidate or, if he makes such a reference, the candidate must personally appear in the ad for at least the last four seconds, and the ad must include a printed statement approving broadcast of the ad. This provision appears to be an indirect way of controlling so-called negative political ads.

14. See generally Alliance for Better Campaigns, www.bettercampaigns.org. In recent years some major broadcasters have of their own volition been devising some innovative approaches, which are sometimes at odds with candidates themselves, who would prefer a little less exposure to the electorate. See Laurie Mifflin, "ABC Joins Others Offering TV Time," *New York Times*, May 9, 1996, p. A1.

15. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

16. See generally Annenberg Public Policy Center, "Free Television for Presidential Candidates: The 1996 Experiment," March 1997 (describing very mixed results from the voluntary donation by five major television networks of airtime to Bill Clinton and Bob Dole in the 1996 presidential campaign). The goals of free airtime proposals in terms of lessening and equalizing the costs of political campaigns and raising the level of political discourse, while seemingly laudatory in the abstract, in fact are quite problematic even on empirical grounds. See Lillian R. BeVier, *Is Free TV for Federal Candidates Constitutional?* (Washington: American Enterprise Institute, 1998); and Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton, N.J.: Princeton University Press, 2001).

17. But see Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Knopf, 2002), p. 15 (reporting that while in 1960 about 60 percent of the nation's television households watched the fall presidential debates, that percentage fell to less than 30 percent in 2000).

18. See Adam Nagourney, "TV's Tight Grip on Campaigns Is Weakening," *New York Times*, September 5, 2002, p. A1. And broadcasters are hardly the only, or even still the most important, sources for campaign coverage. See, e.g., Joe Schlosser, "CNN's Kind of Story," *Broadcasting & Cable*, March 13, 2000, p. 54, describing how the cable channel CNN is pulling out all the stops in coverage of presidential campaigns.

19. See Bill Carter, "Skipping Ads? TV Gets Ready to Fight Back," *New York Times*, January 10, 2003, p. C1, describing the rise of personal video

recorders that make it easy for viewers to skip commercials.

20. See Matthew Hindman, "How the Web Will Change Campaigns," *New York Times*, December 12, 2002, p. A23; and Jeffrey Selinger, "Campaigning Door to Door, and PC to PC," *New York Times*, October 24, 2002, p. E1. See also Tina Kelley, "Candidate on the Stump Is Surely on the Web," *New York Times*, October 19, 1999, p. 1; and Rebecca Fairley Raney, "Politicians Woo Voters on the Web," *New York Times*, July 30, 1998, p. D1. See generally the Democracy Network (DNet) at www.dnet.org created by the Center for Governmental Studies and the League of Women Voters Education Fund. DNet is an interactive and unfiltered website "designed to improve the quality and quantity of voter information and create a more educated and involved electorate. . . . DNet encourages candidates to address a wider range of issues, and to address those in greater depth, than they might in other media. Our goal is to increase voter understanding of important public policy problems, allow candidates to debate their positions in an electronic town-hall before online audiences, reduce the pressure on candidates to raise campaign funds, foster greater civic participation and interaction between voters and candidates, and create new online political communities." DNet's website even quotes Senator McCain: "On DNet, I was able to continually update my positions on multiple issues enabling voters to read my statements for themselves. I congratulate the LWV for using the Internet to reengage the public in the political process."

21. That is, people may make use of the "short, though regular, journey from mail box to trash can" the Court has endorsed as self-help for individuals who want to control their interaction with messages thrust upon them. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983).

22. See then-Justice Rehnquist's objection in *Buckley v. Valeo*, 424 U.S. 1, 293 (1976) (Rehnquist, J., concurring in part and dissenting in part), that the campaign finance law at issue there "enshrined the Republican and Democratic Parties in a permanent preferred position."

23. See *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (upholding right of public television station to exclude a "fringe" candidate—an abortion opponent—from a televised debate); and *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996) (holding that a television broadcaster could not relegate to late-night hours a federal candidate's campaign ads including images of aborted fetuses).

24. *Miami Herald* at 241 (unanimously holding unconstitutional state "right of reply" statute giv-

ing political candidates space to respond to criticism or attacks on their records in a newspaper); see also *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) (striking down a statutory ban on editorializing by public television stations that receive federal financial support).

25. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (holding that a privately organized parade may not be required to include a group conveying a message the organization does not wish to convey). Some people wish the law were different. Prof. Cass Sunstein, for example, a member of the Gore Commission who is well known for advocating a "New Deal" for speech and considerably greater government regulation of all media, including "more intrusive strategies" for regulating broadcasting, in the name of promoting his notion of Madisonian deliberative democracy and political equality. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993), p. 82; Cass R. Sunstein, "A New Deal for Speech," *Hastings Communications & Entertainment Law Journal* 17 (1994): 137; Cass R. Sunstein, "Free Speech Now," *University of Chicago Law Review* 59 (1992): 255; and Cass R. Sunstein, "The First Amendment in Cyberspace," *Yale Law Journal* 104 (1995): 1757. For some, among many, contrary views, see Burt Neuborne, "Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech," *University of Chicago Law Review* 62 (1995): 433 ("I find Professor Sunstein's thesis unworkable, unnecessary, and dangerous."); Robert Corn-Revere, "New Technology and the First Amendment: Breaking the Cycle of Repression," *Hastings Communications & Entertainment Law Journal* 17 (1994): 247; J. M. Balkin, "Populism and Progressivism as Constitutional Categories," *Yale Law Journal* 104 (1995): 1955 ("Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin."); John O. McGinnis, "The Once and Future Property-Based Vision of the First Amendment," *University of Chicago Law Review* 63 (1996): 49; and Glen O. Robinson, "The Electronic First Amendment: An Essay for the New Age," *Duke Law Journal* 47 (1998): 899. See generally "The Law and Economics of Property Rights to Radio Spectrum," *The Journal of Law & Economics* 41, pt. 2 (1998). As Professor Sunstein acknowledges, his approach would place "severe strain" on "some of the core commitments of current First Amendment law." Sunstein, *Democracy and the Problem of Free Speech*, p. 50. See also *ibid.*, pp. xi, xviii, xix.

26. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Court's opinion in *Red Lion* was joined by only seven justices. Justice Douglas did not partici-

pate and one seat on the Court was vacant. Later, Justice Douglas noted his disagreement with *Red Lion*, *CBS v. DNC*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring in judgment), and Justice Stewart expressed his “considerable doubt” about the opinion he had joined. *Ibid.* at 138 (Stewart, J., concurring).

27. See BeVier, pp. 38–39 (“[I]t is hard to imagine regulations that would be less content-neutral.”).

28. See Sunstein, “The First Amendment in Cyberspace,” p. 1803 (Government mandates for preferential access for public-affairs programming “[b]y hypothesis” would be content-based regulation.). The current McCain proposals appear to avoid the additional vice of some other suggestions that would attempt to mandate as well the format of the political ads—requiring, for example, that the candidate him- or herself appear on screen in the hope that this would eliminate or lessen so-called negative advertising. See § 305 of the BCRA described above.

29. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (emphasizing several times the need for strict scrutiny of content-based media regulation).

30. *Red Lion*. See also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637–38, 640 (1994).

31. The classic critique goes back to Nobel laureate Ronald Coase’s seminal papers, Ronald H. Coase, “The Federal Communications Commission,” *The Journal of Law & Economics* 2 (1959): 1; and Ronald H. Coase, “The Problem of Social Cost,” *The Journal of Law & Economics* 3 (1960): 1. Unfortunately, in his 1959 testimony before Congress, well prior to his Nobel honor, Professor Coase was asked if he was joking in suggesting Congress sell off the airwaves and get out of the business of regulating broadcasting. See Ronald Coase, “Comment on Thomas W. Hazlett, Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?” *The Journal of Legal Studies* 41 (1998): 577, 579. See also Dean Lueck, “The Rule of First Possession and the Design of the Law,” *The Journal of Law & Economics* 38 (1995): 419 (“The broadcast spectrum holds a special, almost holy, place in the economic analysis of law and the economics of property rights.”); and Ronald H. Coase, “Law and Economics at Chicago,” *The Journal of Law & Economics* 36 (1993): 248–50 (noting that the issue of property rights in the electromagnetic spectrum was central to the development of law and economics analysis at the University of Chicago).

32. See, e.g., *Turner Broadcasting* at 637–39; *FCC v. League of Women Voters* at 376 n. 11; *Tribune Co. v. FCC*, 133 F.3d

61, 68 (D.C. Cir. 1998); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc, with whom Edwards, C.J., and Silberman, Ginsburg, and Sentelle, J.J., concur); *Action for Children’s Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting at 684; Wald, J., dissenting), cert. denied sub nom. *Pacifica Foundation v. FCC*, 516 U.S. 1043 (1996); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442–43 (8th Cir. 1993) (Arnold, C.J., concurring in the judgment); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring), cert. denied, 493 U.S. 1019 (1990); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506–9 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987). Cf. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (stating that the lower federal court “is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense”); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (“[T]he scarcity rationale adopted by the Supreme Court . . . is . . . binding on this court.”); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (applying a form of scarcity rationale to the limited number of orbital satellite positions available for direct broadcast satellites), rehearing denied, 105 F.3d 723 (D.C. Cir. 1997). Two members of the FCC have noted the commission’s obligation to review the empirical basis of the spectrum scarcity rationale as the underlying premise of much of the FCC’s regulatory scheme. See 1998 *Biennial Regulatory Review: Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, Notice of Inquiry, Separate Statements of Commissioners Harold Furchtgott-Roth and Michael Powell, 13 FCC Rcd 11276, 11301 (1998). See also Michael K. Powell, “Willful Denial and First Amendment Jurisprudence,” Speech delivered to the Media Institute, April 22, 1998, www.fcc.gov/Speeches/Powell/spmkip808.html, (“[T]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today’s communications marketplace.”). But cf. *In re Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC 00-360, 17-18 (2000) (disavowing FCC’s earlier position in eliminating the Fairness Doctrine that the scarcity rationale and *Red Lion* no longer support a lower level of First Amendment scrutiny for broadcasting). The FCC’s approach to those rules, however, was promptly rejected in *Radio-Television News Directors Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

33. See *Syracuse Peace Council* at 682–84 (Starr, J., concurring).

34. See *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 883 (D.C. Cir. 1999).

35. See Michael K. Powell, “Acceptance Speech for the Media Institute’s Freedom of Speech Award,”

October 20, 1999, www.fcc.gov/Speeches/Powell/spmkip905.html, (describing the “scarcity fiction” as a “willful denial of reality in order for government to retain the power to control speech, unimpeded by the First Amendment, [that is] a subversion of the Constitution”).

36. The Supreme Court, for example, has characterized the Telecommunications Act of 1996, as “an unusually important legislative enactment” whose “primary purpose was to reduce regulation and encourage ‘the rapid deployment of new telecommunications technologies.’” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997) (quoting the act) (emphasis added). Indeed, in the section of the act on broadcast ownership, Congress instructed the FCC to biennially review all its ownership rules, stating: “The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.” 47 U.S.C. 161(b).

37. See, e.g., *Radio-Television News Directors Association*, 184 F.3d at 887–88 (holding that the FCC had not yet satisfied its burden of justifying nonrepeal of the personal attack and political editorializing rules).

38. *Time Warner*, 105 F.3d, at 724 (Williams, J., dissenting from denial of rehearing en banc).

39. 468 U.S. 364, 380 (1984) (invalidating a statutory ban on editorializing by public broadcast stations that receive federal funds from the Corporation for Public Broadcasting, an issue conceptually akin to requiring broadcasters to provide free airtime for candidates).

40. *Turner Broadcasting* at 649–52.

41. *Ibid.* at 650. See also *Hurley* at 573–74 (“[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message. . . . [O]ne who chooses to speak may also decide ‘what not to say.’”).

42. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971). See also *Buckley* at 48 (“Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”).

43. *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (state prohibition against paying circulators of initiative petitions violates First Amendment).

44. *Ibid.* at 420, 426; see also *McIntyre v. Ohio*

Elections Comm’n, 514 U.S. 334, 347 (1995).

45. *Turner Broadcasting* at 664.

46. *Ibid.*

47. Even under less than strict scrutiny, the availability of reasonable alternatives is often fatal to speech-restrictive government regulation. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (plurality) (1996).

48. Any argument for regulating a segment of the media such as broadcasting based on its effectiveness as a medium of communication or its presumed power to influence an audience—its importance in political campaigns, for example—would stand the First Amendment on its head. See *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

49. Cf. Elisabeth Rosenthal, “Beijing in a Rear-Guard Battle against a Newly Spirited Press,” *New York Times*, September 15, 2002, p. A1 (describing efforts of China’s Communist Party to maintain control over that country’s increasingly independent press).

50. See Daniel E. Garvey, “Secretary Hoover and the Quest for Broadcast Regulation,” *Journalism History* 3, no. 3 (1976): 67, quoting Herbert Hoover, Speech to the First National Radio Conference, February 27, 1922 (asserting the essence of a public trustee concept for government regulation of the nascent broadcast industry).

51. *In re Advanced Television Systems*, Notice of Proposed Rulemaking, 6 FCC Rcd. 7024 6 (1991).

52. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56 (codified at 47 U.S.C. § 336) (1996). See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809 (1997).

53. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, Title III, codified at 47 U.S.C. § 309(j)(14).

54. See “McCain Calls for Free TV Time from Broadcasters.”

55. In fact, current estimates based on recent spectrum auctions are far lower. See McConnell, “Maverick McCain Rides Again,” pp. 7, 8 (citing a Bear Stearns estimate that the entire digital allocation is worth only about \$500 million, less than the total cost of broadcast stations converting to digital). Cf. Simon Romero, “Next Wave Victory May Not Prove Too Lucrative,” *New York Times*,

January 28, 2003, p. C2 (describing the considerable drop in prices for spectrum for personal communications services).

56. See “McCain Calls for Free TV Time from Broadcasters” (referring to a “spectrum heist”).

57. See Glen O. Robinson, “Spectrum Property Law 101,” *The Journal of Law & Economics* 41 (1998): 620.

58. Congress now has moved to an auction system for awarding initial broadcast licenses. See 47 U.S.C. § 309(i), (j), (l).

59. See generally Stanley S. Hubbard, “The Effect of Privatization on Free Television,” in *Regulators’ Revenge: The Future of Telecommunications Deregulation*, ed. Tom W. Bell and Solveig Singleton (Washington: Cato Institute, 1998) (describing the difficulty the author’s family had in the 1940s in raising investment capital to build a pioneering television station at a time when many doubted television had a future or that a free television broadcast license had any value).

60. “From fireside chats to the Kennedy assassination to Vietnam to the first man on the moon to the avuncular news anchor trusted to report the truth—and, as well, on the entertainment side, from the classics of the golden age of television to the ‘big’ game to the latest hot sit-com—free, universal television has played a central role in each of our lives.” Laurence H. Winer, *Deficiencies of the “Aspen Matrix,”* *Issues in Broadcasting and the Public Interest*, no. 3 (Washington: Media Institute, April 1998), p. 7.

61. See Evan Kwerel and Alex D. Felker, “Using Auctions to Select FCC Licensees,” FCC Office of Plans and Policy Working Paper no. 16, May 1985.

62. H.R. Rep. no. 204, 104th Cong., 2d sess. 48 (1995) (House Commerce Committee report on the 1996 Telecommunications Act).

63. See *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, MM Docket No. 00-39, FCC 02-230 (Aug. 9, 2002); and Digital Broadcast Copy Protection, Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC 02-231 (Aug. 9, 2002). See generally Eric A. Taub, “The Big Picture on Digital TV: It’s Still Fuzzy,” *New York Times*, September 12, 2002, p. G1; and Bill McConnell, “FCC Turns DTV Sights on Cable,” *Broadcasting & Cable*, August 12, 2002, p. 6.

64. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, App. B and ¶180, FCC 02-338 (rel. Dec. 31, 2002).

65. See *Turner Broadcasting* at 646–47.

66. When it matters most, in times of emergency and great public need, broadcast journalism has a rich tradition of serving the public interest through extensive and crucial coverage of major events, often at substantial cost to the stations. See, e.g., “Washington TV, Stretched and Spent,” *Broadcasting & Cable*, October 28, 2002, p. 7 (describing the expense incurred in the extraordinary local broadcast coverage of the Washington area sniper story).

67. See *Time Warner*, 105 F.3d, at 728 (briefly discussing a supposed subsidy, or discount, in the auction for direct broadcast satellite channels equal to the pecuniary burden imposed by mandated set asides of several such channels for non-commercial, educational or informational programming).

68. See *Policies and Rules Concerning Children’s Television Programming*, 11 FCC Rcd. 10660 (1996) (establishing a “processing guideline” for requirement of a minimum amount of children’s programming on each television station).

69. 47 U.S.C. § 312(a)(7) (requirement to provide or sell reasonable access time to federal candidates); and 47 U.S.C. § 315 (equal opportunities provision for political candidates).

70. See Frederick Schauer, “Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency,” *Denver University Law Review* 72 (1995): 989.

71. Kathleen M. Sullivan, “Unconstitutional Conditions,” *Harvard Law Review* 102 (1989): 1413, 1415.

72. See *Time Warner*, 105 F.3d, at 728 (noting the “rather serious First Amendment problems” that would exist if the government controlled all newsprint that it then sold only to licensed newspapers that agreed to satisfy certain government-defined rules of content).

73. *Satellite Broadcasting and Communications Ass’n of America v. FCC*, 146 F. Supp. 2d 803, 830, aff’d, 275 F.3d 337 (4th Cir. 2001).

74. 122 S.Ct. 1497 (2002).

75. The government argued that advertising is a fair proxy for large-scale manufacturing, and that therefore conditioning the exemption from the FDA approval process on refraining from advertising was an ideal way to permit the easy availability of compounded drugs for individual patients who need them while also guaranteeing

that compounding is not used on such a scale as to undermine the FDA approval process. See *ibid.* at 1505–6.

76. 122 S.Ct. 2528 (2002).

77. *Ibid.* at 2531.

78. 468 U.S. 364 (1984) (invalidating 47 U.S.C. § 399).

79. *Ibid.* at 376, 380.

80. 500 U.S. 173 (1991).

81. 121 S.Ct. 1043, 1048 (2001).

82. *Velazquez* at 1049 discussing *League of Women Voters and Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666 (1998). As *League* and *Forbes* involved public broadcasters that receive some direct federal funding, the principle that government subsidy does not entail the right to influence editorial discretion is all the more powerful as applied to commercial broadcasters.

83. *Velazquez* at 1052.

84. 453 U.S. 367 (1981) (upholding 47 U.S.C. § 312(a)(7)).

85. *Ibid.* at 396.

86. *Ibid.* at 382 n. 8, 396 (emphasis in original). See also *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 445, 447 (D.C. Cir. 1980) (confirming that broadcasters have the option to charge for use of their stations under § 312(a)(7)).

87. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983).

88. *Leathers v. Medlock*, 499 U.S. 439 (1991).

89. *Ibid.* at 445–46.

90. See *Minneapolis Star* at 588; and *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

91. *Leathers* at 445–47. See also *Minneapolis Star* at 582, 585; and *Ragland* at 231.

92. See *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998). *Buckley* at 92–93 recognized that there are some ways in which the government may use public funds to support a system of campaign financing without exceeding Congress’s spending power or violating equal protection. But for a trenchant critique of campaign finance reform in general, including the problems with government financing, see Smith. See also Joel M. Gora, “No Law . . . Abridging,” *Harvard Journal of Law & Public Policy* 24 (2001): 841 (favor-

ably reviewing Smith’s book).

93. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (holding unconstitutional as a violation of the Commerce Clause a combined program of tax and correlated state subsidy whereas the tax itself, or the subsidy funded out of general state revenues alone, might have been permissible).

94. *U.S. v. United Foods, Inc.*, 121 S.Ct. 2334, 2340 (2001) (invalidating under the First Amendment a federal assessment on mushroom handlers used primarily to support generic mushroom advertisements).

95. See Thomas G. Krattenmaker and L. A. Powe Jr., “Converging First Amendment Principles for Converging Communications Media,” *Yale Law Journal* 104 (1995): 1719, 1732, and n. 65 (If a media marketplace is perceived as “impoverished, . . . subsidies may be an effective way of correcting its inadequacies, so long as these are true subsidies rather than extractions from media competitors; . . . [t]o be a subsidy the costs must be spread generally.”).

96. As former FCC commissioner Harold Furchtgott-Roth noted, “free” airtime is not a good idea; it is “just bad policy.” It will simply shift costs of campaigning from candidates’ willing contributors to the decidedly unwilling broadcast industry and American consumers. 1998 *Biennial Regulatory Review*, Notice of Inquiry at 21654, Separate Statement of Comm. Harold Furchtgott-Roth concurring in part and dissenting in part.

97. 47 U.S.C. § 301 (“[N]o such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”). See also 47 U.S.C. § 304 (licensee waives any claim, against the regulatory power of the United States, to any use of the spectrum based on prior use).

98. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (dicta that “no person is to have anything in the nature of a property right as a result of the granting of a license”); and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) (dicta that “[n]o licensee obtains any vested interest in any frequency”).

99. *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978), quoting *Armstrong v. United States*, 364 U.S. 49 (1960). See also *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2457–58 (2001).

100. 47 U.S.C. § 309 (i), (j), (k). The FCC now must renew the license of an incumbent broadcaster who is serving the public interest absent “serious violations” of the Communications Act or commission rules or a “pattern of abuse,” without regard to other potential licensees.

101. Similarly, the constitutionally mandated limited time for copyrights seems to know no

effective bounds. *Eldred v. Ashcroft*, 123 S.Ct. 769 (2003) (upholding the 1998 Copyright Term Extension Act).

102. 47 U.S.C. § 310(d). The FCC may not consider whether a transfer to someone other than the proposed transferee would better serve the public interest.

103. See *In Re Deregulation of Commercial Television*, 98 FCC 2d 1076 (1984).

104. *In Re 2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, FCC 02-249 (rel. Sept. 23, 2002). See Stephen Labaton, "Dream Nears Reality: Ease Up at the F.C.C.," *New York Times*, February 2, 2003, p. C1. Cf. Stephen Labaton, "Policy Defeat Puts F.C.C. Chief in Awkward Spot," *New York Times*, February 22, 2003, p. C1 (describing "deep personal and philosophical rifts at the F.C.C." that could affect the deregulatory agenda).

105. A "regulatory taking" may arise from government regulation of property that does not constitute formal seizure and transfer of title but controls its use and diminishes its value. The Court has interpreted the Fifth Amendment and regulatory takings to apply to personal property as well as intangible interests such as intellectual property; see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The Court has also interpreted the Fifth Amendment and regulatory takings to apply to and interest on private bank accounts; see *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003).

106. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

107. *Penn Central* at 124; and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

108. *Penn Central* at 127. See also *Palazzolo* at 2457 (One factor in assessing a regulatory takings claim is the "extent to which the regulation interferes with reasonable investment-backed expectations."); Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," *Harvard Law Review* 80 (1967): 1165, 1223 (describing deprivation of "distinctly perceived, sharply crystallized investment-backed expectations" as a basis for requiring just compensation).

109. It is no response to say that broadcasters, as public trustees, know they are subject to public

interest obligations such as free airtime and therefore such impositions must be part of their reasonable business expectations. That can't be true of new, additional obligations imposed on current licensees, and, moreover, an owner's reasonable, investment-backed expectations are not defined by pre-acquisition restrictions on the property. *Palazzolo* at 2462-64.

110. *Pennsylvania Coal* at 416; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

111. *CBS v. DNC* at 144 (Stewart, J., concurring).

112. *Ibid.* at 122.3

113. "The separation of journalism from government . . . is part of the genius of our constitutional democracy." Rodney A. Smolla, *Free Air Time for Candidates and the First Amendment*, Issues in Broadcasting and the Public Interest, no. 2 (Washington: Media Institute, 1998), p. 6.

114. See, e.g., Guillermo X. Garcia, "The Vanessa Leggett Saga," *American Journalism Review*, March 2002, p. 20 (describing the ordeal of six months in jail for an aspiring author who refused to turn over her notes and related materials to law enforcement authorities); Daniel Scardino, "Vaness Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege under Siege," *Communications Lawyer*, Winter 2002, p. 1 (discussing the legal issues in the Leggett matter).

Even the compelling moral duty to bear witness to war crimes committed in the Balkans has not persuaded some war correspondents to testify before the International Tribunal for the Former Yugoslavia in The Hague. See Nina Bernstein, "Should War Reporters Testify, Too?" *New York Times*, December 14, 2002, p. B9.

115. See, e.g., Ralph Blumenthal and Jim Rutenberg, "Journalists Are Assigned to Accompany U.S. Troops," *New York Times*, February 18, 2003, p. A12 (describing preparations for allowing journalists to cover any military action in the Persian Gulf); Thom Shanker, "Pentagon Says It Will Give Journalists Access to Frontline War Units," *New York Times*, December 28, 2002, p. A10 (same); and Walter Isaacson and Eason Jordan, "News from the Frontline," *Wall Street Journal*, January 6, 2003, p. A18 (describing the benefits of, and concerns about, allowing journalists to cover military operations).

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