1996

The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Must Fail - Abandoned in the Wasteland: Children, Television, and the First Amendment by Newton N. Minow and Craig LaMay 1997 Survey of Books Relating to the Law: Legal Regulation and Reform

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THE INEVITABLE WASTELAND: WHY THE PUBLIC TRUSTEE MODEL OF BROADCAST TELEVISION REGULATION MUST FAIL

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ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT. By *Newton N. Minow* and *Craig LaMay*. New York: Hill & Wang. 1995. Pp. xi, 237. $11.

More than thirty years ago, Newton N. Minow,[1] then Chairman of the Federal Communications Commission ("Commission"), scolded broadcasters for failing to meet their obligations to the general public and, in particular, to the nation's children.[2] Minow challenged broadcasters to "sit down in front of your television set when your station goes on the air and stay there . . . keep[ing] your eyes glued to that set until the station signs off" (p. 188). Chairman Minow assured them that if they did so they would "observe a vast wasteland" (p. 188). In an indictment that still rings true today, Chairman Minow described commercial television programming as "a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence and

* Assistant Professor of Law, Indiana University, Indianapolis. B.A. 1987, M.A. (Philosophy) 1987, Emory; J.D. 1991, LL.M. 1991, Duke. — Ed. I gratefully acknowledge the insights and assistance provided by Dean Thomas G. Krattenmaker and Professor Scot Powe, Jr. Thanks also to E. Gary Spitko, Kurt A. Wimmer, and Professor S. Elizabeth Wilborn, who were instrumental in the development of this piece. Finally, I wish to thank Chairman Minow, who was kind enough to read and comment on an earlier draft of this review essay. Although he agrees with some of my conclusions, he does not agree with all of the views set forth herein. This is not particularly surprising because the review posits that commercial broadcasters can never be real public trustees; Chairman Minow, on the other hand, maintains that commercial broadcasters can and should be full partners with the Commission in serving the public interest. Notwithstanding this basic disagreement, I firmly believe that Chairman Minow and Professor LaMay have written a terrific book that documents a critical national problem and demonstrates the need for some kind of governmental response. In sum, I am sympathetic with Chairman Minow's ends, even though I question the probable efficacy of some of his means. The views expressed herein are my own and, as always, any and all errors and omissions should be laid at my doorstep.

1. Counsel, Sidley & Austin, Chicago; Professor, Medill School of Journalism, Northwestern University. Newton Minow served as Chairman of the Federal Communications Commission from 1961 to 1963.

2. *See* app. 2 (reprinting Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961)).

cartoons," laced with "commercials — many screaming, cajoling, and offending" (p. 188). The end result of this parade of horribles: "boredom" (p. 188). Chairman Minow concluded by asking the broadcasters if "there is one person in this room who claims that broadcasting can't do better" (p. 188).

Whether or not one agrees with Chairman Minow's observations about the "vast wasteland" of television, one cannot fault his courage. Daniel-like, he stormed into the lion's den at its own national convention and indicted the broadcasting industry for failing to meet its collective obligations to the nation: "Gentlemen, your trust accounting with your beneficiaries is overdue. Never have so few owed so much to so many" (p. 189).

Notwithstanding Chairman Minow's best intentions, his efforts as Chairman during the Kennedy Administration did not remake television's landscape. Unfortunately, in the intervening thirty-five years, the "vast wasteland" has only grown vaster.[3] If one scans a recent edition of *TV Guide,* one will find that the networks and local affiliates still offer viewers a "procession of game shows, violence, audience participation shows, [and] formula comedies about totally unbelievable families." Contemporary programming has evolved only in that the violence is now ubiquitous and ever more graphic, the sex ever more sultry and lacking in moral sensibility. In addition, these programming formulae have repeated and spread, like electronic kudzu, on countless independent television stations, not to mention dozens (and soon hundreds) of cable channels.

In *Abandoned in the Wasteland: Children, Television, and the First Amendment,* Chairman Minow freely concedes that the battle he began in 1961 has not yet been won.[4] Nevertheless, Chairman Minow, with the assistance of his coauthor Craig LaMay,[5] renews his commitment to and redoubles his efforts on behalf of the project he began in 1961: ensuring that commercial broadcasters honor in practice their statutory commitment to operate in the "public interest."[6] Minow and LaMay's work is both a vigorous defense of the public interest standard as a mainstay of commercial broadcast television regulation and a call to arms for the strict enforcement of the public interest standard.

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3. This is a state of affairs that Chairman Minow recognizes, implicitly if not explicitly. *See* pp. 4, 7, 14-15, 199-202.

4. Indeed, with the passage of time, Chairman Minow claims that his initial volley, the "Vast Wasteland" speech, was a failure because "[t]he two words that I wanted people to remember from the speech were not 'vast wasteland.'" P. 4. Instead, "[t]he two words I cared about were 'public interest.'" P. 4.

5. Assistant Professor, Medill School of Journalism, Northwestern University.

6. *See* 47 U.S.C. §§ 303, 309(a) (1994).

The sad truth, however, is that the Commission's attempts to implement the public interest standard, which Congress enshrined in the Communications Act of 1934[7] and the Telecommunications Act of 1996,[8] are a portrait of regulatory failure, notwithstanding the good faith efforts of virtually every subsequent Chairman of the Commission.[9] The Commission's efforts to enforce the public interest standard largely have failed to produce cognizable improvements in either the quality or scope of commercial broadcasters' discharge of their "public trustee" responsibilities.[10]

Although Minow and LaMay focus on the issue of children's television programming, their overall objective is to salvage the public interest standard from the ash heap of administrative law history. For those familiar with the history of the public interest standard over the past sixty years, this task's difficulty easily ranks with Hercules's cleaning of the Augean stables. Undeniably, the stakes are high: Minow and LaMay posit that television exposes our children to thousands of hours of mindless violence and lascivious trash (pp. 5, 17-19, 26-40).

Even if one grants that commercial television broadcasters are not fully meeting the programming needs of the nation's children or, for that matter, are also failing to provide other essential social, political, and educational programming, the question of how best to redress this state of affairs remains open. One response would be to rely on greater government regulation that would require com-

7. Ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613 (1994)).

8. Pub. L. No. 104-104, 110 Stat. 56.

9. President Reagan's first appointee as Chairman, Mark Fowler, is a possible exception. Chairman Fowler argued strongly that the market — not the Commission — should define the public interest. Pp. 102-04; *see also Spectrum Auctions: Proposals for FCC Management of the Airwaves Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 8 (1986) (statement of Mark S. Fowler, Chairman, FCC); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207, 208-13, 230-36 (1982). In pursuance of this general policy, Fowler dismantled many of the Commission's regulations codifying commercial broadcasters' public interest obligations. In addition, Dennis Patrick, Chairman Fowler's immediate successor, generally embraced a deregulatory agenda as chairman. *See generally* Harry A. Jessell, *The Fall of the First*, BROADCASTING & CABLE, Aug. 12, 1996, at 12; *cf.* p. 127 (describing Chairman Patrick's efforts to enforce the Commission's rules against broadcasting indecency).

10. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 143-74, 297-331 (1994). Notwithstanding its demonstrable shortcomings, the public interest standard continues to enjoy strong support in some quarters — including the incumbent Chairman's office. *See, e.g.*, Reed E. Hundt, *A New Paradigm for Broadcast Regulations*, 15 J.L. & COM. 527 (1996) (mounting a vigorous defense of the public interest standard and arguing that commercial television broadcasters must think and act like public trustees); Reed E. 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 (1996) (same); Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters*, 45 DUKE L.J. 1089 (1996) [hereinafter Hundt, *The Public's Airwaves*] (same).

mercial broadcasters to provide programming deemed essential, including educational children's programming, public interest programming, and similar fare. An alternative approach would be to recognize the reality that commercial television broadcasters do not act in the public interest, but rather are business people who must use a public resource in order to make and sell their product. Minow and LaMay appear dedicated to the former public interest model, even as they recognize the viability of the latter, market-based approach (pp. 154-61).

Part I of this review essay examines the public interest standard and the history of the Commission's efforts to implement it. Part II then critiques the public interest standard and argues that because of the serious (and seemingly intractable) problems the Commission has experienced in trying to implement it, the public interest standard should be abandoned. Part III takes up the First Amendment issues associated with the Commission's efforts to require broadcasters to meet their public interest obligations. Although there are serious First Amendment questions associated with government efforts to impose subject-specific programming requirements on commercial broadcasters, Part III argues that such schemes are probably constitutional. Part IV describes the three principal alternatives to the public interest standard: a system of spectrum royalties, common carrier regulation, and sole reliance on the market. Part IV concludes that a system of spectrum royalties coupled with direct government subsidies of desired "public interest" programming would be a far more efficient means of securing public goods than attempting to coerce unwilling commercial broadcasters to produce and air programming that they view as unprofitable. Part V argues that the programming efforts of public broadcasters have ensured that the nation's children have not been *completely* abandoned in the wasteland, and suggests that a renewed commitment to public broadcasting, which has been and remains a sort of oasis in the "vast wasteland," is the best means of meeting the nation's public interest programming needs.

Ultimately, Chairman Minow's attempted defense of the public interest standard is a noble failure. To say, as this essay does, that the public interest standard is unworkable in practice, however, is not to say that the fate of public interest programming must be left to the vicissitudes of the market. *Abandoned in the Wasteland* presents a compelling case for governmental intervention to correct the market's failure to provide essential programming — especially educational children's programming. Moreover, although Chairman Minow defends the public interest standard, he also seems prepared to move beyond it, if necessary, to meet the programming needs of the nation. In sum, Chairman Minow's dream of a national television service that challenges its audience and

helps to create a citizenry capable of self-government is achievable, provided that Congress and the Commission rethink a flawed first premise of federal broadcast regulation: that commercial broadcasters are capable of acting as "public trustees."

I. THE PUBLIC TRUSTEE MODEL OF BROADCAST REGULATION

Chairman Minow passionately endorses the "public interest" model as a paradigm for the regulation of commercial television broadcasters. Under this model, commercial broadcasters serve as "public trustees" (pp. 66-67, 114-15). As such, they can and should be required to provide certain public goods (including educational children's programming) in exchange for the privilege of using the public's airwaves.[11] This model conceives of commercial broadcasters as fiduciaries of the general viewing public. The public trustee model serves as the foundation of contemporary broadcast regulation; it also undergirds the Supreme Court's landmark decision in *Red Lion Broadcasting Co. v. FCC*.[12]

The public interest standard has a long (though not storied) history. Congress first adopted the public interest standard in the Radio Act of 1927,[13] charging the Federal Radio Commission (the Federal Communication Commission's immediate predecessor) with managing the airwaves in a fashion consistent with the "public interest, convenience, and necessity."[14] In 1934, Congress revisited telecommunications policy and expanded greatly the federal regulatory role to encompass almost every kind of communications endeavor. The Federal Communications Commission replaced the Federal Radio Commission and the 1934 Communications Act charged the Federal Communications Commission with both licensing and regulating broadcasters in the "public interest."[15] To this day, the Commission distributes licenses to would-be radio and television broadcasters free of charge, subject only to the restriction

11. *See* Charles D. Ferris & Terrence J. Leahy, *Red Lion, Tigers, and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 313-26 (1989).

12. 395 U.S. 367 (1969). Under *Red Lion*, broadcasters enjoy lesser First Amendment rights than newspaper publishers or cablecasters. Because broadcasters rely on access to public airwaves and because more people wish to obtain broadcasting licenses than there are available frequencies, the Supreme Court has held that the government may regulate broadcasters' programming decisions. *See* 395 U.S. at 371-72, 375-76, 386-92, 394; *cf.* Miami Herald Publg. Corp. v. Tornillo, 418 U.S. 241 (1974). For a history of the *Red Lion* decision and a critique of its reasoning, see LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 31-51, 86-90, 110-20, 197-215 (1987).

13. Ch. 169, 44 Stat. 1162 (*repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102).

14. *See* pp. 72-77; KRATTENMAKER & POWE, *supra* note 10, at 8-27; POWE, *supra* note 12, at 52-67.

15. *See* pp. 76-81; *see also* KRATTENMAKER & POWE, *supra* note 10, at 28-30, 33-35.

that the licensees operate their stations in the public interest.[16] Although licenses are only valid for a limited period of time, licensees who adequately discharge their public interest duties can look forward to renewal.[17]

Although it is difficult to define precisely the "public interest" in the context of commercial broadcasting, Chairman Minow argues that the public interest standard means that those holding commercial radio and television licenses must use their broadcasting systems to facilitate democratic self-governance by enlightening, educating, and challenging the American people.[18] Analytically, the public trustee model makes a great deal of sense.[19] After all, commercial broadcasters do enjoy the privilege of using the public's airwaves (reaping tremendous profits along the way); they should not be permitted to enjoy this valuable privilege without conferring tangible benefits on the public in return. Several prominent academics, including Professors Cass Sunstein and Owen Fiss, have broadly endorsed the public trustee model.[20] Moreover, the incumbent Chairman, Reed Hundt, routinely invokes the "public trustee" status of commercial television broadcasters as a justification for imposing myriad new regulations on commercial television broadcasters.[21]

In defense of the public interest standard, Chairman Minow cites the writings and speeches of Thomas Dewey and Walter Lippman (p. 116). Both offered expansive and comprehensive vi-

16. *See* 47 U.S.C. §§ 303, 307, 309(a) (1994).

17. *See* 47 U.S.C. § 307(c); *see also* Brandywine-Main Radio Line, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

18. *See* pp. 3-7, 14-15, 58-59, 96-104, 152-61, 187-94; *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 67-77, 81-92 (1993). *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Owen M. Fiss, *Silence on the Streetcorner*, 26 SUFFOLK U. L. REV. 1 (1992); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) [hereinafter Fiss, *Why the State?*].

19. Throughout this review essay, I will use the terms "public interest" and "public trustee" in a largely fungible fashion to describe the idea that commercial broadcasters must provide certain public goods in exchange for their use of the airwaves. I do so because the Commission and most commentators treat the public interest duties of commercial broadcasters and the public trustee status of commercial broadcasters as freely interchangeable concepts; the concepts both describe the same thing. As a theoretical matter, however, the existence of public interest duties should not necessarily transform broadcasters into public trustees. *See* KRATTENMAKER & POWE, *supra* note 10, at 157-74 (describing the evolution of public interest duties into an overarching concept of commercial broadcasters as public trustees). Krattenmaker and Powe argue persuasively that the concepts do have different policy implications and that the broader "public trustee" model is particularly problematic because it "may give powerful legitimacy to the claim that the remedy for failed regulation is more regulation." *Id.* at 174.

20. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); SUNSTEIN, *supra* note 18, at 87-92, 119; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-25 (1986); Fiss, *Why the State?*, *supra* note 18, at 787-90.

21. *See* sources cited *supra* note 10.

sions of the "public interest" — definitions that, in Chairman Minow's words, would "invite contemptuous snickers" if offered up today in the context of commercial television broadcasting (p. 116). Nevertheless, because of the importance of certain social goods, including the raising of our children in a responsible and nurturing environment, Minow argues that the concept of the public interest must remain relevant in contemporary society.[22] His concerns about the importance of nurturing our children are well taken. One is left with the nagging question, however, of how the Commission might meaningfully enforce the public interest standard without jeopardizing the First Amendment rights of broadcasters.[23]

Chairman Minow argues that the public interest standard has failed to produce sufficient compliance efforts because of the Commission's unwillingness to enforce it, "not because broadcasters, the FCC, and Congress had no idea what it meant" (p. 114). Minow, however, never answers the critical question of *why* the standard went unenforced. For him,

> [t]he larger question is, what kind of people do we want to be? Do we want to be the kind of nation, the kind of people, who abandon their children to a state of subhuman exploitation and regard them only as customers, recognizing them as citizens only when they arrive on the brink of constitutional protection. [p. 138]

For Minow, the fact that television could be better means that television must be better (pp. 138-42). In Minow's view, the public interest standard represents the best means of demanding and achieving excellence from the broadcasting community.[24]

It is difficult to quarrel with the assertion that television should help prepare our children for work and play, for family life, and civic life. Children spend an inordinate amount of time watching television and, for better or for worse, television constitutes a major influence on their development and socialization (pp. 5-6, 17-26). In addition, television can (and sometimes does) contribute to the cultural, political, and civic life of the community through its programming (pp. 83-85). Thus, television can provide public goods that benefit the community as a whole.

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22. *See* pp. 117-19; *see also* SUNSTEIN, *supra* note 18, at 84-85, 89-91; Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1762-65 (1995).

23. *See* KRATTENMAKER & POWE, *supra* note 10, at 313-15, 317-19 (arguing that the "first principle" of governmental regulation of broadcasters should be a healthy respect for their editorial freedom, that this entails a concomitant obligation to avoid any regulatory scheme that infringes on this freedom, and that because consumer preferences shape broadcasters' editorial decisions, attempts to regulate viewing patterns are unlikely to succeed anyway).

24. *See* pp. 152-61; *see also* SUNSTEIN, *supra* note 18, at 67-77, 81-92 (arguing that a public trustee model of broadcasting and government regulations designed to implement such a model are absolutely essential if television is to promote effectively "Madisonian goals," notably including meaningful elections and enlightened democratic self-governance).

It makes a good deal of sense to analyze television's ability to contribute to the commonweal through the prism of the "public interest." The nation relies on television to provide certain public goods, even if the demand for those goods is not immediately apparent in the evening Nielsen ratings.[25] The question remains, however, whether continued reliance on commercial broadcasters to safeguard the public interest makes sense. If, as Chairman Minow suggests, commercial broadcasters view our children as nothing more than "markets for commercial gain," as "chattel to be rounded up and sold to advertisers" (p. 19), how can we trust these very same corporate opportunists to sacrifice their own financial interests in order to meet the programming needs of their youngest viewers? Although I agree completely with Chairman Minow's observation that "the public interest requires us to put our children first" (p. 14), it is not clear to me that it will ever be possible to "put our children first" by leaving them in the care of commercial broadcasters.

Chairman Minow valiantly attempts to defend the public interest standard and provides ample evidence to demonstrate that certain kinds of programming are essential to the well being of the nation.[26] Minow, however, ultimately fails to make a convincing case for the public trustee model of broadcast regulation. As will be discussed more fully below, the principal alternative approach — requiring broadcasters to pay for the right to use the airwaves — makes for more sound public policy.

II. The Failure of the Public Trustee Model

Notwithstanding its attractions, the public interest model of broadcast regulation suffers from several problems. Foremost among these is the fact that the public interest standard conflicts squarely with the broadcasters' financial self-interest. Since the earliest days of broadcasting, commercial broadcasters have relentlessly pursued profits at the expense of the public interest.[27] Thus,

25. *See* Sunstein, *supra* note 18, at 68-72, 89-92, 119, 244-50.

26. *See* pp. 66-69, 101-04, 114-16, 118-19, 152-54. Chairman Minow argues that, among other things, television must educate both children and adults, pp. 5-6, 66, 202, address and promote issues of civic responsibility, pp. 152-53, and disseminate information about candidates for political office, pp. 202-04.

27. *See* pp. 84-104. In fact, those faced with initially regulating the commercial broadcast television service knew that existing broadcast radio services targeted a mass audience, and therefore knew (or should have known) that the new television service would be similar in this regard. As early as 1947, scholars studying television's potential warned that commercial radio broadcasters were not discharging their public trustee duties adequately. Pp. 90-94. Moreover, a year earlier, in 1946, the Commission's own staff completed a study of radio broadcasting and concluded that the Commission was failing to enforce the public interest standard in making licensing decisions. Pp. 92-93. The result of these findings was negligible: the staff's "research and analysis succeeded in exposing the industry's disregard of its public interest obligations and the FCC's willful neglect of them, but [its recommendations were]

as a matter of sound business practice, broadcasters attempt to reach the widest possible audience by airing programs that comport with the public's tastes. This really should not come as a surprise. Why should the industry's reliance on access to the electromagnetic spectrum affect its basic motivations and responsibilities? Ranchers with herds that graze on public lands, oil companies that drill on leased government lands offshore, and paper companies harvesting timber from public lands all lustily pursue rents with wild abandon. Few have suggested that these enterprises owe some special duty of care to the general public as a quid pro quo for their use of public properties, much less that the government has the right to determine the content of their end products.

Chairman Minow responds that, unlike ranchers, oil companies, and paper companies, the television industry enjoys the free use of the public airwaves (pp. 3-12, 14-15, 90-104, 189-94). This is certainly true and arguably should be a distinction that makes a difference.[28] But there are at least two potential governmental responses to this seemingly incongruous treatment: the government could impose public interest obligations on broadcasters or, alternatively, it could simply require broadcasters to pay for the use of the spectrum. Chairman Minow's book is largely a defense of the first approach, although he recognizes the benefits and attractions of the alternative scheme (pp. 155-61, 178-80).

The basic problem that must be overcome is that the public trustee model presumes that the "trustee" will act as a fiduciary for the benefit of the viewing public. Commercial broadcasters have established, however, that their primary motivation is the collection of rents from the sale of advertising time; they routinely avoid furnishing goods that benefit the public in order to maximize their rents. Minow argues that this constitutes a breach of duty. I agree, but, unlike Minow, believe that the duty rests on an untenable premise: that broadcasters will act in ways inconsistent with their financial self-interest.

Giving commercial broadcasters licenses to use the public's airwaves with the admonition that they must use the resource in the public interest is not much different from handing the national forests over to Georgia Pacific, Weyerhauser, and other paper companies and telling them to use the forests in the public interest. The probable results of such a policy are not terribly difficult to imagine. Obviously, if maintaining old growth forests is a public policy objec-

never formally adopted, and all five stations it singled out for review had their licenses renewed." P. 93.

28. Because ranchers and miners operating on public land presently enjoy rock bottom rents, the distinction between these groups and commercial broadcasters could be viewed as only one of degree, rather than kind.

tive,[29] the nation cannot leave the fox to guard the henhouse. Yet, this is precisely the result of the nation's approach to licensing the use of the airwaves. The public interest standard is a poor mechanism for protecting public values because those called to serve the public are not capable of acting as public servants. Moreover, it would be both wrong and counterproductive to fault the broadcasting industry for failing to undertake a task in which it has no interest and for pursuing sound business objectives. A fox cannot help its nature (which is to eat, not safeguard, chickens); expecting the fox to protect the chickens reflects a failure of good sense on the part of the farmer, not the fox.[30]

Nevertheless, like a hopeful farmer who fervently believes that the fox can be reformed, the Commission grants radio and television licenses to corporate entities, most of which are held by private companies responsible to shareholders or partners for the entity's overall financial performance. Thus, in most cases, management, at both the corporate and station level, operates under a fiduciary duty to use the entity's resources to maximize the shareholders' returns (which conveniently and simultaneously furthers management's self-interest).[31] The "public's trustee" is also the shareholders' fiduciary. This would not present a problem if a broadcaster's public trustee duties were consistent with sound business practices. History teaches that they are not.

After reading Chairman Minow's history of the abject failure of the public interest standard since its inception in the late 1920s (pp. 58-104), one cannot help but wonder if the standard is capable of meaningful implementation. Unless one posits that the Commissioners are either completely corrupt or hopelessly inept, the Commission's failure to fashion and implement successfully a meaningful vision of the "public interest" by now suggests that it is not. Almost inexorably, one comes to the conclusion that the problem inheres not with the men and women who have served on the Commission over the last six decades, but rather with the public interest standard itself. Sixty years of failure should lead us to question whether the public interest standard represents an attaina-

29. *See generally* Jeffery C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages,* 43 DUKE L.J. 879, 879-86, 901-10 (1994).

30. *But see* pp. 34-43, 115-19, 186-90 (arguing that broadcast executives should recognize and accept moral responsibility for their programming decisions).

31. *See* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 22-23 (3d ed. 1988); MILTON FRIEDMAN, CAPITALISM & FREEDOM 133-36 (1962); David Millon, *Theories of the Corporation,* 1990 DUKE L.J. 201, 225-31. *See generally* DEBORAH A. DEMOTT, FIDUCIARY OBLIGATION, AGENCY, AND PARTNERSHIP: DUTIES IN ONGOING BUSINESS RELATIONSHIPS (1991); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation,* 1988 DUKE L.J. 879, 880-85, 908-23; Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions,* 91 YALE L.J. 698, 700-03 (1982).

ble public policy objective or, rather, the administrative state's own version of the Holy Grail.

Children's television programming provides an excellent example of why the Commission's efforts to force commercial broadcasters to think and behave like public trustees should be abandoned. Historically, the Commission's efforts to cajole commercial broadcasters into meeting the programming needs of children have failed, a fact that Chairman Minow freely admits (pp. 43-57). Minow and LaMay carefully document the on-again, off-again history of the Commission's efforts at requiring commercial television broadcasters to air a nontrivial amount of educational children's programming (pp. 40-57). Time and again, the broadcasting industry promised to mend its ways, but nothing really changed. As Minow explains, "[t]he American 'debate' over children and television has . . . been something of a travelling circus, reappearing every few years, preceded by grand pronouncements and followed by meaningless gestures" (p. 43). The cycle repeats itself because "broadcasters tend to respond to pressure when the heat is on, only to return to business as usual later" (p. 48).

Chairman Minow argues that commercial broadcasters did a better job of meeting the programming needs of children in the 1950s (pp. 84-95). At that time, however, broadcasters faced little competition in the market for in-home entertainment programming. In the 1950s and early 1960s, cable television and video cassettes did not vie for the viewers of commercial television broadcasts. In light of the monopoly conditions that existed, broadcasters were better able to subsidize less profitable (if not unprofitable) educational and cultural programming (pp. 84-98). Relatedly, relatively few Americans owned television sets. Most viewers and most stations were concentrated in large metropolitan areas; "by 1950 only about 7 percent of American homes had a TV set, and only large urban areas received television signals" (p. 85). Accordingly, early television audiences were "well educated and, by modern standards, critical" (p. 85).

Neil Simon's *Laughter on the 23rd Floor* chronicles the effect of the broader distribution of television sets throughout the nation: sophisticated programming aimed at an upscale, urban audience declined and more basic fare became commonplace; comedies doing spoofs of classic theater and opera (such as Sid Caesar's *Show of Shows*) gave way to less demanding subject matter. As Minow himself concedes, "[w]ith mass audiences, television changed" (p. 86).

In the current environment, competition for advertising revenues is fierce; broadcasters compete both with each other and with

cablecasters and other media for the nation's attention.[32] As a consequence, commercial television broadcasters can no longer afford to forgo ratings points in order to meet the special programming needs of a particular segment of their audience.[33] Competitive forces make it tremendously unprofitable to produce and broadcast children's programming; this is especially true of programming aimed at very young children. Moreover, the advertising market for children's programming is much weaker than for programming aimed at adult audiences.[34]

Despite the rather dim prospects for success, the Commission has opened another chapter in the saga of its attempt to force commercial broadcasters to provide an adequate supply of educational children's television programming. In August of 1996, the Commission adopted new regulations implementing the Children's Television Act of 1990.[35] These regulations require television stations to air at least three hours per week of educational or informational children's programming.[36] I do not question the Commission's good faith in adopting these new rules; nevertheless, they are unlikely to improve significantly parents' programming choices on commercial television stations.[37]

The reasons are quite simple. First and foremost, "[l]eft to the marketplace, children will receive either very bad service or none at all" (p. 14). This is so because "[p]rograms that really *are* educational and informational, and that target narrow age groups, will always have audiences too small to generate the ratings that sponsors want."[38] Chairman Minow argues that broadcasters view children as a business opportunity and little else (pp. 15, 19, 43-57) — and he is right!

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32. *See* Florence Setzer & Jonathan Levy, *Broadcast Television in a Multichannel Marketplace, in* 6 F.C.C.R. 3996, 3999 (OPP Working Paper No. 26, 1991).

33. It is not just children's television programming that has disappeared. Serious cultural offerings have been banished to the public broadcasting system. This is not because there is not an audience for theater, opera, symphony, and ballet. Rather, it is because the potential audience for such programming is significantly smaller than for a hospital drama or a situation comedy about a dysfunctional family. *See* KRATTENMAKER & POWE, *supra* note 10, at 313-15; James T. Hamilton, *Private Interests in 'Public Interest' Programming: An Economic Assessment of Broadcasters' Incentives,* 45 DUKE L.J. 1177, 1179-86 (1996).

34. *See* p. 57; Hamilton, *supra* note 33, at 1180-81; Hundt & Kornbluh, *supra* note 10, at 15-16. For an extended discussion of commercial broadcasters' failure to provide significant quantities of educational children's programming, see *In re* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10660, 10674-82 (1996).

35. *See* 11 F.C.C.R. 10660. *See also* Children's Television Act of 1990, Pub. L. No. 101-437, title I, § 103, 104 Stat. 997 (codified as amended at 47 U.S.C. §§ 303a, 303b (1994)).

36. *See* 11 F.C.C.R. at 10662-63, 10697-715, 10718-26.

37. *See* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming,* 45 DUKE L.J. 1193, 1239-43 (1996).

38. P. 57. *But see* Hamilton, *supra* note 33, at 1184-85.

The fate of the *Captain Kangaroo Show,* which CBS cancelled in favor of providing morning news programming, demonstrates the depth of the problem. Bob Keeshan, Captain Kangaroo himself, explained that his objective was never to serve a mass audience, but rather was to reach the very youngest television viewers:

> People over the years have said, "Well, the Captain had a very small audience." Well, my God, if I had a large audience, I'd start questioning what I was doing wrong. Fifteen percent of this nation is the total juvenile audience. How can I possibly, by commercial network standards, build a large audience when I start with that small number? So there is no good commercial reason for doing quality-oriented children's programming. The marketplace will not take care of the child audience. [p. 57]

New government regulations will not change the way that broadcasters think, and, for reasons that are quite unextraordinary, broadcasters think like business people concerned with maintaining an acceptable bottom line.

It is certainly true that broadcasters did a better job of meeting the programming needs of children in times past. But this reflected the noncompetitive nature of broadcasting in the 1950s (coupled with a small, relatively upscale and sophisticated urban audience) more than a willingness on the part of broadcasters to forgo profits in order to serve the public interest.[39] As the marketplace for advertising has become more competitive, commercial television broadcasters increasingly have focused their efforts on building and maintaining mass audiences; a larger audience means that advertis-

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39. *See* pp. 84-104; *cf.* KRATTENMAKER & POWE, *supra* note 10, at 306-09 (arguing that television's so-called "Golden Age" was not a redoubt of Civic Republican values and, in contrast, that the commercial television networks currently do a relatively good job of reporting important news stories). Oligopolists can afford to be generous. For example, prior to divestiture, American Telephone and Telegraph cross-subsidized certain intercity long distance rates by charging higher prices for local telephone service. *See* THOMAS G. KRATTENMAKER, FEDERAL TELECOMMUNICATIONS LAW 511-13 (1995). When the Department of Justice succeeded in forcing "Ma Bell" to divest itself of its local and regional telephone services, this cross-subsidy was no longer available. *See* Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications,* 5 YALE J. ON REG. 517 (1988); *see also* United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *affd.,* 460 U.S. 1001 (1983). For a discussion of the break up of American Telephone & Telegraph, see MICHAEL KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW §§ 4.4-4.10.2 (1992). The theoretical result should have been cheaper local telephone services but more expensive long distance rates; this does not seem to have happened, perhaps because of the intense competition for long-distance customers and the continued monopoly status of most local telephone companies. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 271, 110 Stat. 56, 86 (1996); H.R. REP. No. 104-458, at 144-50.

In the case of commercial television broadcasters, competition from alternative sources of entertainment programming, notably including cable service and video cassettes, have limited the industry's ability to extract higher rents from highly profitable programming as a means of subsidizing "public interest" programming, like *Captain Kangaroo.* Because cross-subsidization of programming is no longer available, the commercial television broadcasters will inevitably prove unwilling to forgo programming decisions that tend to maximize overall returns.

ers will pay higher rates for spots. Programming aimed at a niche market by definition excludes a large portion of the potential viewing audience and, consequently, is intrinsically less profitable.[40]

The new regulations implementing the Children's Television Act of 1990[41] will require broadcasters to air a minimal amount of educational children's programming. Whether this programming will be materially better than the broadcasters' prior efforts remains to be seen,[42] but there is good cause for skepticism.[43] Even though the Commission has adopted regulations that require commercial television stations to air programming that they would otherwise prefer not to broadcast, it cannot make them produce first-rate public interest programming. Given that commercial broadcasters have virtually no financial incentive to invest in such programming, it is almost certain that they will make only whatever minimal efforts are necessary to placate the Commission's staff.[44] Similarly, the Commission is likely to experience difficulties in deciding whether particular programming is "educational" or "informational" in nature; in fact, the new rules rely on the "good faith judgment of broadcasters" to classify particular shows as "educational"

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40. It is, of course, possible to program successfully to niche markets. Ivy League football games might generate sufficient ratings in certain time slots in the Northeast to produce an acceptable revenue stream, just as professional golf has a relatively small (but quite dedicated and affluent) viewing audience. Unlike Ivy League graduates or professional golf fans, however, children as a class lack the financial wherewithal to make educational or informational children's programming an attractive niche market. Beyond toy manufacturers, cereal companies, and fast food restaurants, there is relatively little demand for marketing opportunities aimed at children generally and this is doubly true for marketing efforts geared toward very young children.

Of course, advertisers do not merely want to attract large audiences; rather, they wish to attract large audiences comprised of persons meeting certain predetermined demographic characteristics. *See* Kurt A. Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 COMM/ENT L.J. 329, 460-68 (1986). Predictably, advertisers most prize the segment of the market that controls the most disposable income: the "young, white, high-income demographic." *Id.* at 465. Thus, in a very real sense, a broadcaster's product is not a particular show, but rather a particular audience.

41. Pub. L. No. 101-437, title I, § 103, 104 Stat. 997 (codified as amended at 47 U.S.C. §§ 303a, 303b (1994)).

42. *See* Marc Silver & Anna Mulrine, *Fall's Edutainment Fix*, U.S. NEWS & WORLD REP., Oct. 7, 1996, at 67 (describing new children's programming offerings on commercial television networks, including a spate of "pro-social sitcoms").

43. *See* KRATTENMAKER & POWE, *supra* note 10, at 310-11 (arguing that regulatory attempts to force commercial broadcasters to produce and air "quality" programming or to alter viewers' programming preferences are unlikely to succeed); Krotoszynski, *supra* note 37, at 1236-46 (arguing that the Commission's new educational children's programming rules are not likely to have a significant impact on the quality of educational children's programming).

44. *See* pp. 157-58; Henry Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise*, 10 HARV. J.L. & PUB. POLY. 87, 89-90 (1987) [hereinafter Geller, *A Failed Promise*]; Henry Geller, *Fairness and the Public Trustee Concept: Time to Move On*, 47 FED. COMM. L.J. 79, 79-80 (1994) [hereinafter Geller, *Fairness*].

or "informational."[45] Finally — and perhaps most importantly — it is unclear whether the Commission itself was really serious about educational children's programming or was simply posturing to assist the incumbent President in an election year.[46] Even assuming the Commission's good faith commitment to enforcing its new rules, the broadcasters' profit-seeking mentality, coupled with the inherently subjective nature of the "qualitative" component of the Commission's rules, calls into doubt whether, in the long run, commercial stations will produce and air a sufficient quantity of high quality educational programming for children.

In sum, there is little reason to believe that the Commission's latest effort will prove to be more than a rerun of its earlier attempts at forcing broadcasters to meet the educational and informational programming needs of children.[47] Children's television spins a tale common to virtually all of the Commission's efforts to enforce the public interest standard: the Commission's efforts are "full of sound and fury, [s]ignifying nothing."[48]

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45. *In re* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10660, 10701 (1996).

46. *See* Heather Fleming, *TV Gored in Chicago,* BROADCASTING & CABLE, Sept. 2, 1996, at 6; Chris McConnell, *Law of the Land: Three Hours of Kids TV,* BROADCASTING & CABLE, Aug. 12, 1996, at 11. If the Commission's commitment to children's television is genuine, then it must be both ready and willing to enforce its new regulations with the only meaningful sanctions at its disposal: nonrenewal or short term renewal of broadcasters' licenses or both. However, nonrenewal of a license — easily the Commission's most potent regulatory weapon — has been employed only rarely and never as a punishment for failing to meet the programming needs of children. *See* p. 98 ("The FCC has almost always renewed licenses, regardless of claims about a licensee's service."). The 1996 Telecommunications Act ensures that this device will be even less effective as a regulatory tool — the Act extends the licensing period for television stations from five to eight years. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 56, 112 (amending section 307(c) of Title 47 to permit the Commission to issue television licenses good for eight years). Thus, the Commission will review a station's overall public interest performance only once every eight years — hardly a credible threat. Moreover, the new Act codifies the Commission's prior practice of routinely renewing licenses by mandating a strong presumption that incumbent broadcasters' licenses will be renewed. *See* Telecommunications Act of 1996 § 204, 110 Stat. at 112-13 (requiring the Commission to grant license renewal applications unless the applicant has engaged in serious misconduct or a pattern of minor misconduct). The new children's television rules anticipate to some extent the monitoring problem associated with the longer license period by establishing an initial auditing program with licensees subject to review for compliance with the new rules in three years. *See In re Policies and Rules,* 11 F.C.C.R. 10660, 10726. In addition, parents who believe that a local broadcaster is not in compliance with the Commission's rules can file a complaint directly with the Commission.

47. In fact, Chairman Hundt has already moved on to greener vistas. His most recent speeches focus not on enforcing the new children's programming rules, but rather on requiring broadcasters to provide free time to candidates for political office. *See, e.g.,* Harry A. Jessell, *Hundt Calls for Free Time,* BROADCASTING & CABLE, Sept. 30, 1996, at 26. In fairness to the Chairman, he overcame very long odds in convincing his colleagues to adopt qualitative and quantitative standards for educational children's programming. *See* Jessell, *supra* note 9, at 12-13; McConnell, *supra* note 46.

48. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5; *see also* Geller, *Fairness, supra* note 44, at 82-84.

Just as commercial broadcasters fail to air programming beneficial to children, they also make programming decisions that are affirmatively harmful to children. In particular, Chairman Minow argues that commercial broadcasters are morally blameworthy for airing tawdry talk shows during the late afternoon and early evening — time periods when significant numbers of children watch television (pp. 36-40, 116-19). He attributes the decision to broadcast shows featuring, among other things, "transsexual prostitutes," "sadomasochists," and an odd assortment of persons afflicted with a variety of perversions and sexual dysfunctions, to the revenues that such shows generate; Oprah sells more advertising time, at higher prices, than Captain Kangaroo ever did (pp. 37-42, 56-57). From a public interest perspective, one cannot justify a commercial broadcaster's decision to seek larger profits at the cost of providing badly needed educational children's programming.

Viewed from the perspective of a corporate fiduciary, however, the licensee's decision is perfectly logical and perhaps even mandatory. A programming director who routinely selected programming designed to better the community would not remain a programming director for very long if the decision resulted in a decreased revenue stream. Similarly, a station group or network executive cannot place the public interest ahead of the shareholders' interests without potentially violating a fiduciary obligation to the corporation. At most, an executive could pursue public interest objectives to the extent necessary to avoid placing the station's license in jeopardy. Any efforts to serve the public interest over and above the bare minimum needed to avoid the loss of the license would probably be inconsistent with the corporate fiduciary duty to operate the entity for the exclusive benefit of the shareholders.[49]

49. It would be convenient, but probably erroneous, to argue that the shareholders' interest includes the public interest, broadly defined. *See* FRIEDMAN, *supra* note 31, at 133-36 (arguing that corporations cannot operate broadly in the public interest without violating fiduciary obligations to the shareholders); Easterbrook & Fischel, *supra* note 31, at 700-03 (same); Millon, *supra* note 31, at 201, 225-31 (noting the argument); *see also* Edward S. Adams & Karl D. Knutsen, *A Charitable Corporate Giving Justification for the Socially Responsible Investment of Pension Funds*, 80 IOWA L. REV. 211, 217-39, 248-49 (1995); Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers*, 35 ARIZ. L. REV. 989, 1022-30 (1993). For better or for worse, the law of corporate fiduciary duties defines the "shareholders' interest" as achieving and maintaining the highest possible returns on the shareholders' investments. *See generally* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); BREALEY & MYERS, *supra* note 31, at 22; FRIEDMAN, *supra* note 31; John C. Coffee, *Regulating the Market for Corporate Control*, 84 COLUM. L. REV. 1145, 1217 (1984); John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 73-75 (1980); M.J. Pritchett III, Comment, *Corporate Ethics and Corporate Governance*, 71 CAL. L. REV. 994, 1004-11 (1983); *Corporate Director's Guidebook*, 33 BUS. LAW. 1595, 1599-1601 (1978). *But see* William J. Carney, *The ALI's Corporate Governance Project*, 61 GEO. WASH. L. REV. 898, 919-22 (1993) (lamenting the modern trend toward broadening the scope of management's discretion to use corporate assets to further social, rather than financial, objectives); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160-61 (1932) (arguing that corporations must serve the public interest as well as the share-

Accordingly, regulatory efforts that attempt to enforce various "public trustee" duties, such as showing a minimum amount of educational children's television programming,[50] ultimately are doomed to failure.

Theoretically, the Commission could alter the dichotomy between public trustee and corporate fiduciary duties by adopting strict regulations that mandate public interest service by licensees and enforcing these mandates vigorously. This potential solution to the problem, however, is unlikely to succeed. First and perhaps most importantly, the Commission is itself constrained by Congress. Over the course of the last century, commercial broadcasters and federal legislators have developed a symbiotic relationship: the broadcasters provide the incumbent politicians with the media exposure they need to remain in office and, in return, the officeholders keep the Commission at bay. The arrangement constitutes a kind of "iron triangle,"[51] in which the regulators are subject to indirect forms of control by the regulated. The Commission does not possess sufficient independence to undertake an aggressive enforcement program over the strenuous and sustained objections of commercial broadcasters and their congressional allies.[52]

The inherent limitations that exist on any federal agency charged with overseeing a vast industry constitute a second impediment to an effective program of regulation. The Commission does not currently possess either the personnel or fiscal resources to police a variety of public interest obligations aggressively. Instead, the Commission and its staff must prioritize their enforcement policies, both with respect to the objects of enforcement and the scope of enforcement. By way of example, the Commission requires broadcasters to serve the value of "localism" by providing programming responsive to the needs of their community of license.[53] Every re-

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holder's interest); Marlene A. O'Connor, *Restructuring the Corporation's Nexus of Contracts*, 69 N.C. L. REV. 1189 (1991) (arguing that corporate officers might be permitted to use corporate assets for socially desirable projects without incurring liability); *cf.* p. 193 ("[R]emind your stockholders that an investment in broadcasting is buying a share in public responsibility."). Even if a particular board of directors wished to pursue public goods at the expense of shareholders' returns, market pressures are likely to make such action impossible: either the directors would refrain from acting or angry shareholders would work for their ouster from the board. *See* Millon, *supra* note 31, at 229-31.

50. *See, e.g., In re Policies and Rules*, 11 F.C.C.R. 10660.

51. *See* GORDON ADAMS, THE IRON TRIANGLE (1981); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 524-37 (4th ed. 1992); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 158-63, 168-71 (1990); Edward J. Janger, *The FDIC's Fraudulent Conveyance Power Under the Crime Control Act of 1990: Bank Insolvency Law and the Politics of the Iron Triangle*, 28 CONN. L. REV. 67, 67-70, 88-92 (1995).

52. *See* ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION (1973).

53. *See* Henry v. FCC, 302 F.2d 191, 194 (D.C. Cir. 1962); *In re* Deregulation of Radio, 84 F.C.C.2d 968 (1981); *In re* Network Programming Inquiry, 25 Fed. Reg. 7291, 7294-95 (1960);

newal application sets forth a litany of various programming efforts made to meet this obligation; most stations meet this obligation by producing and broadcasting local news programming in addition to obscure "local color" shows that air at odd times of the programming day.[54] With the proliferation of broadcast television stations, however, most communities are now served by independent stations or stations affiliated with tertiary networks (such as UPN and Warner Brothers) or both. More often than not, these stations do not bother to produce or broadcast local news coverage.[55]

The Commission has not undertaken any major review or attempt to enforce its "localism" policy during the 1990s; communications lawyers who represent broadcasters in license renewal proceedings know that a perfunctory effort at meeting the Commission's localism requirement will be satisfactory. If the Commission decides to make localism an enforcement priority, it will inevitably come at the cost of another "public interest" objective, e.g., equal employment opportunity efforts, enforcing indecency rules, etc.[56]

Of course, some of the Commission's rules can be enforced through complaints filed by private parties. For example, private parties can initiate enforcement of the Commission's indecency and political broadcasting rules.[57] Self-enforcement, however, is not

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KRATTENMAKER & POWE, *supra* note 10, at 76-81; Ervin S. Duggan, Remarks before the Mississippi Association of Broadcasters (June 27, 1992) (transcript available at 1992 FCC LEXIS 3548); Timothy B. Dyk, *Full First Amendment Freedom for Broadcasters*, 5 YALE J. ON REG. 299, 304-06 (1988). The Commission's policies regarding multiple ownership and cross-ownership of media outlets also constitute part of its "localism" efforts: by diversifying ownership of broadcasting stations, the Commission hopes that programming will better reflect the preferences of myriad viewing audiences. *See* KRATTENMAKER & POWE, *supra* note 10, at 86-96. In addition, the Commission's now-abandoned "ascertainment" rules also constituted a part of the Commission's localism efforts. *See id.* at 79-81. For a critique of the Commission's localism policies (among other things), see GEORGE A. KEYWORTH, II ET AL., THE TELECOM REVOLUTION: AN AMERICAN OPPORTUNITY 31-33 (1995).

54. Broadcasters do not mind producing local news programming because it is wildly profitable. *See* KRATTENMAKER & POWE, *supra* note 10, at 311. Locally produced "community interest" programming does not fare as well in the marketplace; accordingly, television stations tend to air such programming either Saturday afternoon or early Sunday morning — both times at which there would be a small audience regardless of the programming. Radio stations usually broadcast their "local" programming during the early morning hours on the weekend or late at night on Sunday — hence, your local top-40 station will most likely only discuss the adequacy of the local police department at midnight on Sunday.

55. Moreover, most radio stations use stock, preprogrammed formats developed and distributed by national syndicators — locally originated programming is either minimal or nonexistent.

56. *See* Chris McConnell, *Radio Indecency Complaints on Front Burner at FCC*, BROADCASTING & CABLE, Oct. 7, 1996, at 64 (reporting that the Commission's efforts at enforcing equal employment opportunity guidelines and political broadcasting rules have, by the Commission's own admission, hampered its efforts to enforce its indecency rules).

57. *See, e.g., In re* Complaint of Dianne Feinstein, 10 F.C.C.R. 7193 (MMB 1995); *In re* KRTH(FM), 9 F.C.C.R. 7112 (1994); *In re* Codification of the Commn.'s Political Programming Policies, 7 F.C.C.R. 678 (1991); *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990).

sufficient to deter broadcasters from engaging in conduct that ostensibly disserves the public interest if the rents from continuing their regular course of behavior are sufficiently high.[58] Moreover, the Commission's ability to punish violations of its rules is subject to congressional oversight and control. If the Commission regularly attempted to assess fines and forfeitures sufficient to deter undesirable conduct by licensees, the commercial broadcasting community's congressional allies would undoubtedly come to the industry's rescue.

The problem cannot be solved in the absence of a truly independent Commission. Incumbent federal legislators, however, are highly unlikely to abandon voluntarily their efforts to shape (and sometimes control) Commission activities: the power to control the Commission gives them leverage over local commercial broadcasters.[59] This leverage, in turn, requires local broadcasters to be sensitive to their political needs.[60] To quote a classic (if cynical) aphorism, "one hand washes the other."[61]

The third, and perhaps most difficult, problem associated with attempts to enforce the public trustee standard relates to the inherently subjective nature of the Commission's standards. This is so because the Commission's public interest standards are often vague

58. *See* Paul Farhi, *Bad Taste, Good Business: To His Employer, Howard Stern Easily Passes a Classic Cost-Benefit Test,* WASH. POST, Mar. 27, 1994, at H1. The Howard Stern/Infinity Broadcasting indecency case demonstrates this phenomenon. Even after his employer, Infinity Broadcasting, incurred over a million dollars in fines, Howard Stern remained happily, if vilely, ensconced behind his microphone. *See In re* Sagittarius Broad. Corp., 10 F.C.C.R. 12245 (1995). Infinity Broadcasting ultimately settled pending indecency complaints with the Commission by paying $1.7 million to the government and promising to go forth and sin no more. *See* 10 F.C.C.R. 12245; Anthony Ramirez, *Radio Giant Set for a Growth Spurt,* N.Y. TIMES, Sept. 18, 1995, at D7. One should question the Commission's seriousness about enforcing the public interest standard based on its decision to permit the Infinity station group to acquire even more radio stations — stations that will further expand Mr. Stern's audience. *See id.; cf. In re* Applications of Alliance Broad., 11 F.C.C.R. 5742 (1996) (waiving ownership limits to facilitate Infinity's acquisition of additional radio stations); *In re* Sagittarius Broad. Corp., 10 F.C.C.R. 12245 (settling outstanding indecency complaints and authorizing transfers of new station licenses to Infinity); *In re* Applications of Infinity Broad. Corp., 10 F.C.C.R. 9504, 9506 (1995) (authorizing acquisition of additional radio stations); Chris McConnell, *FCC Indecency Review Yields Few Fines,* BROADCASTING & CABLE, Jan. 27, 1997, at 26 (quoting the FCC as saying, in connection with the Westinghouse-Infinity merger, that complaints against Stern "raise no substantial and material question of fact concerning Infinity's qualifications to be a commission licensee"). The Commission continues to face difficult decisions regarding Howard Stern's on-air antics and the enforcement of its indecency rules. *See* McConnell, *supra* note 56, at 62-64 (suggesting that the Commission might link indecency complaints to station transfers in the near future).

59. *See* KRATTENMAKER & POWE, *supra* note 10, at 294-96.

60. This sensitivity includes providing reasonable access to advertising time (as mandated by sections 312(a)(7) and 315 of the Communications Act), but also includes other indirect considerations, such as free (favorable) coverage on local news broadcasts. *See* KRASNOW & LONGLEY, *supra* note 52, at 71-72. *See generally* Hazlett, *supra* note 51, at 161-63, 168-71 (1990) (describing the political motivations that led Congress to declare the airwaves public property).

61. *See* Hazlett, *supra* note 51, at 143-63.

and, accordingly, the enforcement of licensees' public interest duties requires the Commission to make inherently subjective decisions about the nature and quality of the broadcasters' compliance efforts. In the context of educational children's programming, the Commission must determine whether particular programming has a substantial educational or informational component.[62] In the first instance, the Commission will rely on "good faith" characterizations by broadcasters as to whether particular programming has a significant educational or informational purpose. Deciding whether particular programming is "educational" or "informational," however, is a matter of subjective judgment: Peggy Charen suggests that *Little House on the Prairie* would qualify[63] whereas Senator Earnest Hollings has cited *The Smurfs* as educational "pro-social" children's programming.[64] At the same time, commercial broadcasters have claimed that shows such as *Power Rangers* and *The Jetsons* constitute educational children's programming.[65]

Of course, the Commission maintains and enforces a number of straightforward, easily applied, objective rules that codify certain public interest duties. A good example is the limit on the amount of commercial matter that may be aired during children's programming.[66] Section 303a(b) of the Children's Television Act limits commercial matter in children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.[67] The Commission has implemented these limitations in its regulations[68] and regularly enforces them; broadcasters that violate the limitations on advertising time in children's programming are subject to fines (or forfeitures, in Commission parlance) and several stations have in fact been fined for violating these limits.[69] Lowest-unit-charge requirements for candidates for federal office (also embod-

62. *See* 47 C.F.R. § 73.671(c)(1)-(6) & note 1 (1997).

63. *See* Henry A. Jessell, *Peggy Charren: Victory At Long Last,* BROADCASTING & CABLE, Aug. 12, 1996, at 20, 24.

64. *See* S. REP. No. 104-227, at 8 (1989).

65. *See* Comments of Dale Kunkel at 1-3 (Oct. 16, 1995), *In re* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10660 (1996) (MM Docket No. 93-48); Dale Kunkel & Ursula Goette, *Broadcasters' Response to the Children's Television Act* (Oct. 12, 1994), *exhibit to* Comments of Dale Kunkel, *supra;* Dale Kunkel, *Broadcasters' License Renewal Claims Regarding Children's Educational Programming* (May 7, 1993), *in* Comments of Dr. Dale Kunkel (May 7, 1993), *In re Policies and Rules* (MM Docket No. 93-48).

66. *See* 47 U.S.C. § 303a(b) (1994).

67. 47 U.S.C. § 303a(b).

68. *See* 47 C.F.R. § 73.670 (1995).

69. *See, e.g.,* UTV of San Francisco, Inc., 10 F.C.C.R. 10986 (1995); Stainless Broad. Co., 10 F.C.C.R. 9961 (1995); WPIX, Inc., 10 F.C.C.R. 8911 (MMB 1995); Scripps-Howard Broad. Co., 9 F.C.C.R. 2547 (MMB 1994); WRBD, Inc., 8 F.C.C.R. 5079 (MMB 1993); KEVN, Inc., 8 F.C.C.R. 5077 (MMB 1993).

ied in the Communications Act[70]) are another example of objective, quantified public interest requirements. These requirements have been enforced successfully, and there is virtually uniform compliance, even by pesky, profit-seeking commercial broadcasters.[71]

The efficacy of the Commission's enforcement efforts changes considerably when subjective criteria are at issue. The Commission's qualitative standards for educational children's programming provide a good example. On the one hand, for the first time, the Commission has quantified, in the form of a three hour per week processing guideline, the amount of educational children's programming a station must show in order to be assured of renewal of its license. This standard gives commercial broadcasters' theoretical obligation to meet the programming needs of children more concrete meaning and provides both the Commission's staff and broadcasters with specific guidance on how to process broadcasters' license renewal applications. If the regulations work as intended, there will be less guesswork involved with renewal applications and the "public interest" obligation will take on real meaning.[72]

As with most, if not all, public interest programming obligations, however, there remains a subjective element to children's programming requirements: What programs can count towards the three-hour requirement? In its regulations enforcing the Children's Television Act, the Commission adopted a tightened, clearer definition of what counts.[73] It even did its best to use objective criteria (e.g., such programming must be at least thirty minutes in length, must air between 7:00 AM and 10:00 PM, etc.). But the Commission could not avoid completely a subjective element: the program must have as a significant purpose educating and informing children. Enforcing this kind of criterion is extremely difficult. Who is to say what constitutes a significant purpose? What does it mean to "educate and inform"?

As compared to other methods of achieving public interest objectives — for example, spectrum fees coupled with direct subsidies of public interest programming — attempting to create and enforce these subjective measures of public interest performance is a game not worth the candle. Independent of problems associated with a lack of will or political limitations, the problem of subjectivity naturally leads to lax enforcement on the part of the Commission because it is difficult, especially for bureaucrats, to make

70. *See* 47 U.S.C. §§ 312(a)(7), 315(b) (1994); 47 C.F.R. § 73.1942 (1996).

71. *See In re* Complaint of Dianne Feinstein, 10 F.C.C.R. 7193 (MMB 1995); *In re* Codification of the Commn.'s Political Programming Policies, 7 F.C.C.R. 678 (1992).

72. *See* Hundt, *The Public's Airwaves, supra* note 10, at 1111-15.

73. *See* 47 C.F.R. § 73.671(c) (1996).

rational judgments based on very subjective criteria.[74] Thus, in the Children's Television Report and Order, the Commission emphasizes that it will become directly involved in determining whether a program has a significant educational purpose only "as a last resort."[75] Generally, the Commission will attempt to rely upon "the good faith judgment of broadcasters" regarding the educational or informational nature of particular children's programming — the very same broadcasters that are driven by the profit motive. So we come full circle, back to something approximating the state of affairs that existed prior to the adoption of the rule.

All of the above suggests a need for finding alternatives to the public interest model. The principal alternative approach to obtaining public goods would be to rely on direct government subsidies. This approach recognizes that radio and television broadcasting licenses constitute a very valuable type of property, a property that conveys the right to use the public airwaves to make money — and lots of it. Like other industries that rely on public property to facilitate their business operations — for example, the oil and gas industry — broadcasters should be required to pay for the public's resource (in this case, access to the electromagnetic spectrum). Once the broadcaster purchases the right to use the airwaves, however, the government should be largely indifferent to what the broadcaster airs. Ultimately, broadcasters will be directly responsive to the programming wishes of the general public, airing programming that most appeals to mass audiences.[76]

In sum, the public trustee model of commercial broadcasting is doomed to failure because it is largely antithetical to the commercial interests of broadcasters and virtually incapable of being vigorously enforced. Notwithstanding these problems, Minow argues very persuasively that public goods must be secured for the benefit of the citizenry. If commercial broadcasters are unwilling to provide these goods, then someone else (read: "the government") must do so.[77]

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74. Moreover, one might also ask whether parents really want Commission bureaucrats determining what their children should watch.

75. *See In re* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10660, 10701 (1996); 47 C.F.R. § 73.671 note 1 (1996).

76. *See* KRATTENMAKER & POWE, *supra* note 10, at 278-81, 298-301, 307-16; *cf.* SUNSTEIN, *supra* note 18, at 81-92 (arguing that broadcasters should not be directly responsive to popular tastes because audiences' tastes are socially constructed, and suggesting that if presented with "better" programming (e.g., more enlightened, more educational, etc.), audiences would learn to like it).

77. *See* HENRY GELLER & DONNA LAMPERT, CHARGING FOR SPECTRUM USE (1989); Geller, *A Failed Promise*, *supra* note 44, at 87.

III. HANDS OFF THE WASTELAND: BROADCASTERS AND THE FIRST AMENDMENT

Commercial television broadcasters have argued consistently that the First Amendment prohibits the government from enacting regulations that require broadcasters to air particular kinds of programming.[78] If the public interest model of broadcast regulation is to function effectively, however, the Commission must be able to hold broadcasters accountable if they fail to meet their public trustee duties. This necessarily implies both a power to review past broadcaster performance and an ability to require broadcasters to air public interest programming prospectively; if the Commission lacks either of these powers, it simply cannot enforce the public interest standard in any meaningful fashion.

Therefore, a necessary question in evaluating the viability of the public interest standard is whether the government possesses the constitutional authority to enact regulations shaping (if not dictating) commercial broadcasters' editorial decisions. Although the matter is not entirely free from doubt, the government probably possesses that power; whether it should exercise this authority is another matter entirely. Once again, children's programming provides a useful analytical prism.

Relying on cases recognizing a "children's First Amendment," Chairman Minow argues that the Commission should act both to protect children from inappropriate programming and also to ensure that age-appropriate programming is available on free, over-the-air commercial television stations (pp. 107-36). "In a nation where, increasingly, children spend more time with television than anything else, it is unacceptable that that time should be taken up principally by salesmen, animated assault artists, and leering talk-show hosts" (p. 118). In addition, Chairman Minow specifically endorses the use of technologies that empower parents to screen their children's television viewing (the so-called "v-chip") (pp. 22-25, 109-11, 164-66).

Chairman Minow is rather circumspect about the government's power to compel broadcasters to air particular kinds of programming. Although he argues that the First Amendment should not be reduced to "the logical equivalent of a suicide pact" (p. 6), and posits that cases involving primary and secondary education and indecency cases establish that "children are a special case under our Constitution" (pp. 121-23, 131), Chairman Minow never explains how direct governmental control of commercial broadcasters' programming decisions can be squared with the free speech and free

78. *See, e.g.*, Comments of the National Association of Broadcasters at 13-17 (Oct. 16, 1995), *In re Policies and Rules* (MM Docket No. 93-48).

press guarantees of the First Amendment. Thus, one is largely left to guess precisely why those who might question the constitutionality of such laws or regulations stand "on doubtful legal ground" (pp. 132-33).

On the other hand, Chairman Minow makes a very persuasive case for the proposition that the government may enact laws and regulations to protect children from exploitation of various sorts, including channelling otherwise protected speech so as to minimize its impact on a potential child audience.[79] These are largely defensive or protective measures, however, that burden speech in order to safeguard the young; the Supreme Court has never endorsed the proposition that government may mandate speech deemed beneficial to children. As Professor Rodney Smolla explained in formal comments filed with the Commission on behalf of the National Association of Broadcasters, requiring commercial broadcasters to air particular programs represents a new departure in the field of broadcast regulation.[80]

On balance, I am convinced that the government may enact viewpoint-neutral requirements on commercial television broadcasters to meet the educational needs of the nation's children. This result can be reached either by applying *Red Lion* or by rethinking whether commercial children's television programming even constitutes noncommercial speech.[81] At the same time, however, one

79. In this regard, Chairman Minow's reliance on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), seems particularly well founded. *See* pp. 125-28. *Pacifica* provides strong support for the v-chip provisions of the Communications Act of 1996. *See* J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1132 (1996); Hundt, *The Public's Airwaves*, *supra* note 10, at 1097, 1118-29. For better or for worse, the Supreme Court appears ready to endorse limited restrictions on speech if the speech might be harmful to a child audience. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); New York v. Ferber, 458 U.S. 747 (1982); *Pacifica*, 438 U.S. 726. With respect to the v-chip, I agree with Chairman Minow that it is the equivalent of a technologically advanced mute button and, provided that the government does not directly rate programs, it is not inconsistent with the First Amendment. *See* Balkin, *supra*, at 1153-65; Krotoszynski, *supra* note 37, at 1194.

80. *See* Statement of Rodney A. Smolla in Support of the Comments of the National Association of Broadcasters at 6-17, *reprinted as attachment 6 in* Comments of the National Association of Broadcasters (Oct. 16, 1995), *In re Policies and Rules* (MM Docket No. 93-48); *cf. In re Policies and Rules*, 11 F.C.C.R. 10660, 10728-33.

81. *See* Krotoszynski, *supra* note 37, at 1201-36. Minow and LaMay agree that most children's television programming consists of thinly veiled attempts to sell various and sundry products. *See* pp. 10-11, 19, 25, 57, 167-68. As Professor Rodney A. Smolla has noted, the constitutionality of governmental regulations that mandate particular speech is questionable. *See* Statement of Rodney A. Smolla in Support of the Comments of the National Association of Broadcasters, *supra* note 80, at 6-10. In a variety of contexts, however, the government has mandated broadcaster speech under *Red Lion*. *See, e.g.*, 47 U.S.C. § 317 (requiring sponsorship identification for paid broadcasts); 47 C.F.R. § 73.1212 (1995) (same); *cf.* McIntyre v. Ohio Elections Commn., 541 U.S. 334 (1995) (holding that the government may not require a private citizen to identify her authorship of a political tract as a precondition to distributing the tract). Similarly, a television station must provide candidates for federal office "reasonable access" to their facilities, which may entail airing commercial material that violates the

should be deeply skeptical about the ability of governmental regulation to bring about a renaissance in educational children's programming on commercial television stations.[82] For a variety of reasons, command and control regulations mandating a minimum amount of children's television programming and establishing some basic guidelines defining such programming will not ensure that children's programming needs are met.[83] On the other hand, reliance on the market to provide educational programming also has a number of nontrivial shortcomings.

Chairman Minow is probably correct in asserting that the Commission could attempt to enforce the public interest standard more aggressively without transgressing either its statutory or constitutional authority. The larger issues, however, are whether such efforts would be effective in a broader sense and, given the available alternatives, whether the public interest standard represents the most logical model for the regulation of commercial broadcasters. For the reasons set forth below, I believe that the Commission should refrain from attempting to codify the public interest obliga-

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station's usual editorial standards. *See* 47 U.S.C. §§ 312(a)(7), 315 (1994); 47 C.F.R. § 73.1944 (1996). More generally, the federal government has mandated that tobacco products carry warning labels about their potential health effects. *See* 15 U.S.C. §§ 1331, 1333, 1335a (1994); Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 588 (D.D.C. 1971). These practices suggest that the government may regulate the content of commercial speech, not only by prohibiting speech deemed harmful, but also by mandating speech deemed beneficial. *Cf.* Pacific Gas & Elec. Co. v. Public Util. Commn., 475 U.S. 1 (1986) (invalidating on First Amendment grounds an order requiring a utility to provide an environmental group open-ended access to its billing envelopes). In order to survive constitutional attack, such a scheme must meet *Central Hudson*'s substantial governmental interest, narrow tailoring, and nexus requirements, *see* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557 (1980), which the order at issue in *Pacific Gas* did not. *See* 475 U.S. at 19-21; 475 U.S. at 22-24 (Marshall, J., concurring).

The Commission's educational children's programming regulations differ significantly from the regulation at issue in *Pacific Gas.* The most obvious distinction is that the Commission's regulations do not affect a broadcaster's ability to select or reject particular programming; unlike *Pacific Gas,* the regulatory regime does not confer a right of access to a broadcaster's facilities. More importantly, if one characterizes much of contemporary children's programming on commercial television stations as "commercial speech," the nexus between a government-imposed requirement that broadcasters air a small amount of educational children's programming and the state's interest in the education of its youth is obvious. In order to achieve a substantial governmental interest, the state is simply requiring that some portion of a broadcaster's commercial speech educate and enlighten the child audience. Ultimately, the controlling factor in the First Amendment analysis should be that the Commission's regulations do not prevent a broadcaster from airing children's programming devoid of educational content. *See generally* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1509-10 (1996) (finding the link between a ban on price advertising for alcohol and the state interest in avoiding maladies associated with alcohol abuse too attenuated to pass muster under *Central Hudson*); 116 S. Ct. at 1520-22 (O'Connor, J., concurring) (same); *cf.* Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 340-47 (1986) (holding that the link between a ban on casino advertising and the substantial state interest in avoiding evils associated with compulsive gambling satisfied *Central Hudson*).

82. *See* Krotoszynski, *supra* note 37, at 1236-46; *see also* KRATTENMAKER & POWE, *supra* note 10, at 309-16.

83. *See supra* notes 41-75 and accompanying text.

tions of broadcasters in favor of a regulatory scheme that places greater reliance on market forces.

IV. Irrigating the Wasteland: How To Make Television More Responsive to the Community's Programming Needs

Chairman Minow argues powerfully that critical national programming needs are currently unmet. At the same time, however, Minow's tremendous optimism regarding the efficacy of substantially increased regulatory controls aimed at giving the public interest standard some bite seems woefully overstated.

There are three basic alternatives to the public interest model of regulation: (1) a system of spectrum fees or spectrum auctions, (2) the imposition of limited common carrier duties, or (3) a pure market-based approach. Although each of these alternative models comes with a set of costs and benefits, the use of spectrum fees or spectrum auctions represents the most efficient way of providing public interest programming.

A. *Spectrum Royalties*

A spectrum fee or auction approach would require broadcasters to pay for the use of the airwaves; in exchange, they would be released from their public interest obligations. Given that commercial broadcasters do not wish to serve as public trustees and given the practical difficulties associated with trying to force them to undertake public trustee duties in good faith, the government should simply make broadcasters pay for their use of the spectrum. Indeed, Chairman Minow seems to recognize that the answer might lie in some sort of spectrum royalty assessed against commercial broadcasters.[84] In exchange for the use of the public airwaves, broadcasters would be required to provide the funds necessary to produce and disseminate the programming that we need as a nation but that is commercially unprofitable.

Abandoning the public trustee model in favor of a spectrum royalty regime would have the benefit of freeing commercial broadcasters from governmental restrictions on their editorial decisions — a result that would better serve our First Amendment values. It would also secure reliable financing for programming that is crucial to the well-being of the nation.[85] Finally, a direct spectrum fee is

84. Pp. 154-61. Even opponents of the public trustee model acknowledge and endorse the potential efficiency of a system of spectrum fees or royalties as a means of directly subsidizing public interest programming. *See* Fowler & Brenner, *supra* note 9, at 252-55.

85. The allocation of the funds raised through a spectrum fee could be used in several ways to subsidize public interest programming. Chairman Minow's model "Bill for Children's Telecommunications" would charge television broadcasters who fail to meet quan-

much more efficient at producing and providing public goods than the alternative — clunky regulatory command and control efforts, which are certain to be met with half-hearted attempts at compliance and routine backsliding.[86]

In *After the Rights Revolution* and elsewhere, Professor Cass Sunstein has argued that effective government regulation must work through and with the market — not against it.[87] The Commission's efforts to reform the "vast wasteland" of commercial television have been unsuccessful precisely because they reflect an attempt to use command and control regulations to overcome powerful market incentives.

This not to say that implementing a spectrum royalty or auctioning broadcast licenses would not present its own set of difficulties. For example, it would be difficult to set a precise figure for such fees. In this regard, the Telecommunications Act of 1996 raises a similar problem. The Act requires the Commission to establish a spectrum fee for "ancillary uses" of digital broadcast spectrum (for example, data transfer, subscription video services, and telephony); the fee will be based on an estimate of the amount of money that a broadcaster theoretically would have to spend if it bought the right

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titative and qualitative guidelines "1.5% of their gross advertising revenue," which would be paid to the Corporation for Public Broadcasting (CPB). Pp. 177-79. In turn, the CPB would use the monies "exclusively for the production and distribution of programming specifically designed to educate and inform child audiences." P. 179. He estimates that a one-percent spectrum fee on broadcasters' gross advertising revenues would generate about $250 million dollars to subsidize educational children's programming. Pp. 159-60. CPB currently serves as a source of funds for the development and production of educational programming (such as *Sesame Street* and *The Electric Company*) and could easily expand its efforts in this area. Monies raised from spectrum fees, however, need not be so used; alternative approaches exist. For example, the government could purchase blocks of airtime from commercial broadcasters for the purpose of airing public interest programming, including (but not necessarily limited to) educational children's programming. Alternatively, the government could directly subsidize the production of educational children's programming by program producers. By lowering the cost of such programming, commercial broadcasters theoretically should be able to earn equivalent returns by airing educational fare rather than steamy talk shows; one would hope that, if the financial disincentives were removed, broadcasters would choose voluntarily to serve the programming needs of children. Because CPB has a demonstrated ability to spend funds wisely, the allocation of spectrum fees to CPB would represent the safest approach to ensuring an adequate supply of public interest programming. Of course, countervailing values exist (such as avoiding the "ghetto-ization" of public interest programming on noncommercial television stations). The bottom line, however, is clear: a spectrum fee would leave public policymakers free to devise plans that utilize a variety of techniques to enrich the public discourse and to meet the educational needs of our nation's youth.

86. *See* GELLER & LAMPERT, *supra* note 77, at 11-21.

87. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 48-55, 107-10 (1990); SUNSTEIN, *supra* note 18, at 82-83; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State,* 62 U. CHI. L. REV. 1, 95-125 (1995); Cass R. Sunstein, *Administrative Substance,* 1991 DUKE L.J. 607, 610, 631-42; Cass R. Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873, 880-81 (1987).

to use the spectrum at auction.[88] Needless to say, this figure will prove difficult to calculate. In addition, adoption of general spectrum fees undoubtedly would face serious political difficulties; Congress is unlikely to enact legislation establishing broad-based spectrum fees applicable to the industry's use of the spectrum for traditional broadcasting activities.[89]

Notwithstanding the practical and political difficulties, a spectrum royalty regime would make a great deal more sense than continued reliance on command and control regulations. Such an arrangement would free broadcasters from their public interest obligations and, at the same time, ensure that public interest programming needs do not go unmet.

B. *Common Carrier Regulation*

Another alternative to the public trustee model of broadcast regulation would be to require commercial broadcasters to act as limited common carriers. This is the regulatory model presently in use for cablecasters[90] and direct broadcast satellites (DBS).[91] Under a common-carrier model, the Commission would mandate that commercial broadcasters reserve blocks of time for use by various independent programmers. The Commission would enact viewpoint-neutral, but subject-sensitive, regulations to decide precisely who would enjoy access to these blocks of time.[92] A common-carrier approach essentially would mean that broadcasters would have to relinquish their editorial prerogatives for a certain portion of the broadcast day to third parties who would then program this time. Moreover, the uses of this block of public interest time might change from time to time. For example, a station could give three hours per week to the Children's Television Workshop to program and, just before election day, the station might be required to reallocate this block of time to the League of Women Voters for debates and candidate statements.

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88. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56, 108-09 (to be codified at 47 U.S.C. § 336(e)).

89. *See* Geller, *Fairness, supra* note 44, at 82-84; Krotoszynski, *supra* note 37, at 1243-46.

90. PEG (public access, educational, and government) and leased-access channels, described at length in the recent *Denver Area* Supreme Court decision, meet the public interest obligation. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996); *see also* 47 U.S.C. § 531 (1994).

91. Commission regulations require DBS system operators to reserve four to seven percent of their system capacity for noncommercial use. This rule most directly benefits public broadcasters. *See* Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996); Harry A. Jessell, *Court OKs Cable Regs,* BROADCASTING & CABLE, Sept. 2, 1996, at 17.

92. *See, e.g.,* 47 U.S.C. § 531 (1994) (authorizing franchising authorities (i.e., local governments) to require cablecasters to reserve channels for noncommercial, "public, educational, and governmental" uses while denying cablecasters "editorial control" over such channels); *see generally Denver Area,* 116 S. Ct. 2374.

The problem with reliance on a common-carrier obligation is that there is no guarantee, and little incentive, for the production of high-quality programming. *Saturday Night Live* parodied local community access cable programming with its *Wayne's World* skit. Whatever the merits of Wayne's and Garth's philosophical musings, one would be hard pressed to argue that their show would have represented a material improvement over the offerings regularly available on commercial television stations and commercial cable channels.

Theoretically, this problem could be alleviated to some degree by limiting access to the common-carrier blocks of time to organizations with bona fide educational, cultural, or political credentials. However, this solution would not address the problem of funding: simply put, it takes money to produce high quality educational programming; access to the airwaves, by itself, is not enough. In addition, permitting the government to pick and choose among speakers, in order to weed out undesirable or unworthy speakers, would present a threat of broad-based viewpoint-based censorship. Refusing to permit the Hare Krishnas, the Ku Klux Klan, or the National Organization for the Reform of Marijuana Laws (NORML) to use the common-carrier blocks of time would squarely violate core First Amendment values.[93] Yet, if the Commission's rules permitted such users to access the limited airtime available, it is doubtful that the nation's public interest programming needs would be met.

If one's public policy objective is to ensure a regular supply of high quality public interest programming, a common-carrier approach will not be successful.[94] The same market forces that lead commercial broadcasters to air relatively little public interest programming would ensure that critical national programming needs would still go unmet in the common-carrier blocks of time.[95]

C. *A Pure Marked-Based Approach*

Former Chairman Mark Fowler, Dean Thomas Krattenmaker, and Professor Scot Powe all have argued that the market is the most efficient mechanism for selecting programming for a mass audience.

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93. *See generally* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (discussing the tendency of local governments to restrict access to community cable channels in order to prevent unpopular speakers from using such channels as forums).

94. *See* KRATTENMAKER & POWE, *supra* note 10, at 327-29.

95. In this regard, the DBS regulations should be viewed somewhat more charitably. Public broadcasters will probably be the principal beneficiaries of the Commission's DBS common-carrier requirements. *See Time Warner*, 93 F.3d 957. In the absence of the Commission's regulations, it is unclear whether DBS service providers would carry public broadcasting stations or other sources of educational and cultural programming.

Broadcasters are directly responsive to advertisers who are directly responsive to potential consumers; ultimately, then, the American public gets the commercial television service that it wants. Commercial broadcasters simply display a mirror that both incorporates and reflects the American public's contemporary tastes. If the materials aired on commercial television really engendered feelings of revulsion or disgust, they would lack a mass audience. Thus, the argument goes, Nielsen ratings are a much better barometer of the popular will than the latest data runs from a public interest think tank.[96] There is much to commend reliance on a pure, market-based approach to broadcast regulation.

In a competitive market, the laws of supply and demand will achieve greater consumer satisfaction (or utility, or surplus, in economic parlance) than any other system of allocating resources. This is borne out in the case of commercial television and radio broadcasting: the profit motive generally has done a good job of encouraging broadcasters to show viewers programming that the public wishes to see. One could reasonably ask, "What's wrong with that?" Moreover, what is the realistic alternative? Trying to force-feed Shakespeare to an audience that will either change the channel or simply not bother to turn on their television sets at all? Even if one agrees with the proposition that there are certain types of very beneficial programming that the market will not deliver due to lack of competition, market imperfections, and other similar reasons, it is not at all clear that governmental intervention would succeed in elevating the taste and viewing habits of the American public. Moreover, in fairness to what commercial broadcasters already do, there is some very creative, very good programming on commercial television.[97] To the extent that particular programming falls outside

96. In fairness to Dean Krattenmaker and Professor Powe, neither has ever suggested that television does not provide important social goods or argued that broadcasters should be immune from criticism when they fail to meet the nation's educational and informational programming needs. Instead, Krattenmaker and Powe have argued that a variety of regulatory and market forces tend to impede commercial broadcasters' efforts to serve as public trustees and, in their view, truly competitive markets for viewers would meet virtually all consumers' needs. *See* KRATTENMAKER & POWE, *supra* note 10, at 40-45. The proliferation of niche channels on cable systems tends to vindicate this view. Thus, unlike former Chairman Fowler, they do not subscribe to the view that in public policy terms, a "television is just another appliance," nothing more than "a toaster with pictures." Caroline E. Mayer, *FCC Chief's Fears,* WASH. POST, Feb. 6, 1983, at K6. At the same time, however, like Chairman Fowler, Dean Krattenmaker and Professor Powe have been highly critical of proponents of increased governmental regulation aimed at improving the quality of broadcast programming. *See* KRATTENMAKER & POWE, *supra* note 10, at 313-15 (arguing that "[a]chieving the critics' goals by regulation is vastly more difficult than the critics acknowledge" and derisively characterizing Professor Sunstein's position as "the persistent belief of some elites that if only they could gain power, they would use it to impose their views of the good on those who are less enlightened").

97. This is a state of affairs acknowledged by Peggy Charen, the activist who has led the fight for requiring commercial broadcasters to meet the programming needs of kids. *See* Jessell, *supra* note 63, at 20.

this category, commercial broadcasters provide it to the public because literally millions of people are willing to watch it.

In response to advocates of a laissez-faire, market-based approach, Chairman Minow, like Professors Sunstein and Fiss, argues that the ratings fail to establish what the public *might* have watched.[98] Similarly, a rating fails to "reveal the depth of penetration, or the intensity of reaction, and it never reveals what the acceptance would have been if what you gave them had been better — if all the forces of art and creativity and daring and imagination had been unleashed."[99]

These are all valid objections to sole reliance on the marketplace to regulate programming choices. The difficulty, of course, is identifying how broadcasters could better predict which programs would attract a mass audience. As Dean Krattenmaker and Professor Powe observe, broadcasters have strong economic incentives to counter-program each other in order to maximize their potential audiences.[100] Thus, one finds CBS and NBC offering made-for-television dramas featuring threatened — but empowered — women on Monday nights during the football season. Why attempt to steal the adult male audience when a large plurality of the potential viewing audience might be open to watching something entirely different?

Of course, commercial television broadcasters do follow trends, and this entails replicating successful program formats (hence, the current spate of carbon copy shows emulating *Friends* and *ER*).[101] This behavior does not establish, however, that broadcasters are indifferent to audience tastes. Rather, it demonstrates their commitment to giving the public the programming that it desires.[102] All in

98. *See* p. 189; SUNSTEIN, *supra* note 18, at 88-92; *cf.* Stephen F. Williams, *Background Norms in the Regulatory State,* 58 U. CHI. L. REV. 419, 427-28 (1991) (arguing that complaints about the "low brow" content of broadcast television programming are inherently elitist in a free market economy).

99. P. 189. In addition, the market will not promote certain social goals and objectives, such as a shared civic culture and a commitment to democratic pluralism. *See* SUNSTEIN, *supra* note 18, at 70-77 (arguing that even in a "state of extraordinary competition," in which all consumer preferences are fully satisfied, important cultural and civic needs would probably go unmet).

100. *See* KRATTENMAKER & POWE, *supra* note 10, at 40-45.

101. *See* Fiss, *Why the State?, supra* note 18, at 787.

102. It bears noting that United States television programming is wildly successful not only domestically, but also internationally. American television programming so dominates the market that Canada and many of the nations of Western Europe have adopted trade barriers to its dissemination in the form of domestic content rules. *See* Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances,* 104 YALE L.J. 667, 681-84 (1994); Clint N. Smith, *International Trade in Television Programming and GATT,* 10 INTL. TAX & BUS. L. 97 (1993); Robin L. Van Harpen, *Mamas Don't Let Your Babies Grow Up to Be Cowboys: Reconciling Trade and Cultural Independence,* 4 MINN. J. GLOBAL TRADE 165 (1995); Katherine Stalter & Joseph Schuman, *Gaul Goal: Infopike Toll,* VARIETY, Jan. 23-29, 1995, at 50.

all, Chairman Minow's opponents seem to have the stronger argument: the public interest standard is a poor substitute for the market in assessing the immediate wants, needs, and desires of the public. Only by divorcing the "public interest" from the "public will" can one condemn the programming decisions of commercial broadcasters.[103]

Even if one largely accepts the critics' argument against the viability of the public trustee model of commercial broadcast regulation and embraces the market as a legitimate device for setting commercial broadcasters' programming priorities, one need not embrace the market as the sole embodiment of the public interest. The market certainly responds to the needs of mass audiences, but it is far less effective at meeting the needs of discrete subgroups within the population. For example, pharmaceutical companies might forgo research and product development efforts related to diseases affecting only a small portion of the population in favor of efforts at marginally improving treatments for maladies suffered by a larger subset of the population. Sound business practice would dictate marginally improving a basic pain reliever over finding a cure for a rare genetic disease; the return on investment would obviously be much greater for the product with a potential mass market.[104] Those afflicted with the rarer malady would be the victims of an imperfect market: the cost of funding the research necessary to develop a treatment probably could not be recovered by selling the product to those who need it. In such circumstances, the government or other private entities must supply the capital needed to make the product research financially viable. The hypothetical presents a classic case of the market failing to provide important social goods: absent outside intervention, a needed good will not be produced.

Commercial television programming reflects this very same phenomenon.[105] Programming that does not generate a sufficiently large audience will not be broadcast by the networks.[106] Thus, an educational program aimed at very young children will never be aired in prime time. The opportunity cost is simply too great for a rational broadcast executive to incur. No one can deny, however, that young children would benefit from age-appropriate, educational programming.[107]

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103. *See* Williams, *supra* note 98, at 427-28; *see also* KRATTENMAKER & POWE, *supra* note 10, at 313-15.

104. *See* Williams, *supra* note 98, at 429-30.

105. *See* Fowler & Brenner, *supra* note 9, at 250-55.

106. *See In re* Policies and Regulations Concerning Children's Television Programming, 11 F.C.C.R. 10660, 10674-82 (1996).

107. Even the principal apostles of a market-based approach to broadcast regulation concede this point. *See* Fowler & Brenner, *supra* note 9, at 253-54.

The market provides such programming, but only through alternative media, notably including video cassette tapes and cable programming. The economics of both video cassette tapes and cable programming permit the targeting of "niche" markets, including child audiences.[108] Children whose parents have the financial wherewithal to rent videos or purchase cable service will have their programming needs met. Children who lack the good fortune to have such parents will do without. The market, left to its own operation, will not provide age-appropriate programming on commercial, over-the-air television stations.

If, like Chairman Fowler, one is prepared to accept this state of affairs,[109] the necessary result is that the educational needs of a significant plurality of the nation's children will go unserved by commercial broadcast television. No rational nation would desire such a result as a matter of basic public policy. The United States will suffer politically, socially, and economically if we fail to meet the educational needs of our children. Simply put, educational children's programming is a public good that we should promote for every child living within our borders.

A pragmatic telecommunications policy demands that one accept the market as the arbiter of taste; it does not mean that one must accept the market as the only means of securing public goods. Reliance on the market to regulate mass communications should be viewed as a necessary evil that cannot be avoided given the symbiotic relationship that exists between the television industry, Congress, and the Commission. At the same time, the Commission, Congress, and the concerned public must look beyond the market to ensure that the core programming needs of the nation are met.[110]

D. *Choosing From Among the Options*

Chairman Minow quite correctly posits that commercial television broadcasters have failed to meet children's programming needs and, moreover, that this state of affairs results from a market failure. Likewise, he is correct to posit that government must take a more active role in securing a sufficient supply of public interest programming. My objection is not with his ends, but with some of

108. *See* pp. 59-62 (describing and lauding Nickelodeon).

109. *See* Fowler & Brenner, *supra* note 9, at 255-56.

110. One necessary incident of a pure market-based approach to broadcast regulation would be the auction of licenses for television and radio stations in the first instance. New television station licenses, including all the digital spectrum that broadcasters covet so dearly, should be auctioned to the highest bidder. *See* Hundt & Kornbluh, *supra* note 10, at 16-18. Such an approach would expedite the licensing process considerably and is the most efficient means of allocating spectrum: by definition, an auction process puts spectrum into the hands of those who value it most highly. Chairman Hundt is right to argue that commercial broadcasters cannot have their cake and eat it too. *See id.*

his proposed means. A system of spectrum fees, perhaps coupled with auctions to distribute new licenses, would further the public interest far more efficiently than renewed or expanded regulatory efforts by the Commission. Given the difficulties associated with attempting to enforce public interest obligations and the consequences associated with failing to meet the programming needs of our children, the American public cannot continue to tinker with a system that just does not work. The Clinton-Gore Administration's effort to "reinvent" government should include rethinking the first premise of broadcast regulation: that commercial broadcasters are public trustees and, accordingly, should enjoy free access to the public's airwaves.

V. An Oasis in the Wasteland: The Role of Public Television

As Chairman Minow demonstrates, if there is any bright spot in the "vast wasteland" of television, it is surely public broadcasting (pp. 9-10, 60). "Apart from public television, our television system is a business attuned exclusively to the marketplace" (p. 10). It would be unrealistic to think that commercial broadcasters, in a fit of altruism, will sacrifice profitability to meet the needs of the nation's children. Public television programmers, free from the pressures of posting ever larger profits at the end of each quarter, think and act like public trustees. Indeed, public television both embodies and defines television broadcasting "in the public interest." I agree with Chairman Minow's observation that "[w]ere it not for public television, children's television would be a vaster wasteland than ever."[111]

Public television stations, individually and collectively, have amassed an impressive record of service to the nation's children. Of the twenty best children's shows aired in 1993 (as ranked by *TV Guide*), eight aired on PBS (p. 39). Eight more appeared on cable channels; the commercial networks broadcasted only four of the twenty (p. 39). Each day, PBS programming educates and entertains a nationwide preschool audience of *sixteen million* (p. 60). Commercial television broadcasters will never equal, much less exceed, this standard of performance.

Rather than focusing on the poor job that commercial broadcasters do in meeting the programming needs of our children, we should celebrate and build on the success of public television. At the federal, state, and local levels, government must commit itself to funding public broadcasting fully so that public television stations may continue to expand their considerable record of achieve-

111. P. 39; *see* Michelle Y. Green, *Educating Is a Tradition at PBS*, Broadcasting & Cable, Sept. 9, 1996, at 24.

ment.[112] As an alternative to maintaining the public interest standard, Chairman Minow endorses the use of spectrum royalties to underwrite various "public interest" programming (pp. 159-61). In his proposed "Bill for Telecommunications for Children," broadcasters who wish to opt out of public interest obligations must pay a spectrum royalty of 1.5%, which is to be paid directly to the Corporation for Public Broadcasting.[113] Such an infusion of resources would lead to a cornucopia of new programming aimed at meeting the needs of the nation's kids. A regulatory approach that relies on a direct spectrum fee coupled with the public subsidy of public interest programming would ensure not only that more programming aimed at children is available, but also that the programming is of high quality.[114]

Chairman Minow acknowledges that "[p]ublic broadcasting has for years been the only major programmer for very young children, with traditional favorites like *Sesame Street* and *Mister Rogers' Neighborhood,* as well as newer programs like *Barney and Friends, Lamb Chop's Play-Along,* and *The Kidsongs*" (pp. 60-61). In public broadcasters, the nation already has a group of public trustees committed to providing public goods; public broadcasters proudly and consistently work to meet the educational and informational programming needs of children and adults. Sound public policy dictates that the nation capitalize on the public broadcasting community's demonstrated commitment to and record of excellence.

Therefore, rather than trying to reform recalcitrant commercial broadcasters, Congress, the Commission, and the concerned public should refocus their efforts on ensuring that public broadcasters enjoy access to sufficient resources to fulfill their institutional mission. At a time when the leadership of Congress is demonstrably hostile to public broadcasting,[115] it is critical that the citizenry rally to the defense of its true trustee. Chairman Minow's book is somewhat frustrating in this regard: although he recognizes public television's many achievements, all too often he focuses his reform efforts on

112. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 75-78 (1996).

113. Pp. 178-79. This is certainly the most efficient method of channelling funding to local public broadcasters. The Corporation for Public Broadcasting functions much like the National Endowment for the Arts and the National Endowment for the Humanities, underwriting both local broadcasting systems and the production of new educational programming by local public television stations.

114. Of course, all of the monies raised from spectrum fees or royalties would not necessarily have to be allocated to public broadcasters. These funds could also be used by the government to purchase time on commercial television stations for educational television shows, candidate appearances, and similar "public interest" uses. *See supra* note 85.

115. Speaker of the House Newt Gingrich has repeatedly called for the defunding of public broadcasting and the abolition of the Corporation for Public Broadcasting. *See* Warren Berger, *We Interrupt this Program . . . Forever?,* N.Y. TIMES, Jan. 29, 1995, § 2, at 1; Tom Shales, *The Misguided Missile Aimed at Public TV,* WASH. POST, Feb. 27, 1995, at B1.

trying to make commercial broadcasters undertake duties for which they have no interest.

Chairman Minow overstates his argument that the nation's children have been "abandoned in the wasteland." Public broadcasters have met, and will continue to meet, children's programming needs in creative and entertaining ways. Provided that public broadcasters continue to enjoy access to the financial resources necessary to produce and broadcast high-quality children's programming, there will always be an oasis in the wasteland.

VI. Conclusion: The Inevitable Wasteland

At the end of the day, I am unable to share Chairman Minow's optimism regarding television's possibilities — much less the possibilities unleashed by the coming digital age of television.[116] Minow quotes E.B. White's observation at the dawn of the television age that "'we shall discover either a new and unbearable disturbance of the general peace or a saving radiance in the sky'" (p. 83; citation omitted). Television has never been, and is unlikely to become, an "unbearable disturbance." At the same time, despite its enormous potential, it will almost certainly never be a "saving radiance in the sky." Ironically, the public interest standard serves as the root cause of my pessimism.

From its inception in 1927, the public interest standard has had much more to do with the needs and wishes of Congress and federal regulators than it did with the needs of the Republic.[117] For example, upon recognizing the potential impact of radio broadcasting on political campaigns, Congress, not wishing to see a free and independent broadcasting community (similar to the free press), declared the airwaves to be "public property" and established a commission to oversee the use of the airwaves in the "public interest."[118] Thus, Congress ensured that it would retain a measure of control over the radio broadcasting industry. To this day, congressional oversight of the Commission provides useful leverage with broadcasters. In classic form, each side extracts a quid pro quo: broadcasters look to Congress to protect the industry from overzealous regulators, and members of Congress gladly provide political shelter from the regulatory storm — for a price.[119] Thus,

116. *See In re* Advanced Television Sys., 10 F.C.C.R. 10540 (1995) (fourth notice of proposed rulemaking and third notice of inquiry); *In re* Advanced Television Sys., 7 F.C.C.R. 3340 (1992) (second report and order); *In re* Advanced Television Sys., 6 F.C.C.R. 7024 (1991) (notice of proposed rulemaking); *see also* Chris McConnell, *FCC Enumerates TV's Future*, Broadcasting & Cable, Aug. 19, 1996, at 17.

117. *See* Dyk, *supra* note 53, at 313-24, 327-29; Hazlett, *supra* note 51, at 152-58.

118. Radio Act of 1927, ch. 169, 44 Stat. 1162 (*repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102).

119. *See generally* Krasnow & Longley, *supra* note 52, at 69-93.

Congress's control over the Commission ensures that local broadcasters will be sensitive to the needs of their local member of Congress. Congress will never willingly surrender its leverage over the broadcasting industry, and the public interest standard is a key component of this leverage.

Nor is the Commission likely to support the abolition of the public interest standard. Bureaucrats enjoy a highly developed instinct for self-promotion and self-preservation. The public interest standard gives the Commission a raison d'etre.[120] Although the Commission performs other duties, its various campaigns to reform television provide a useful spectacle for their congressional masters. The abolition of the public interest standard in favor of a system of spectrum royalties would necessarily result in a reduction of the Commission's staff and budget. Perhaps most importantly, it would reduce both the political importance of the institution and the visibility of the Chairman's office. The Commission has absolutely no incentive to help facilitate the demise of its public interest watchdog duties in favor of a system of spectrum royalties.

From the perspective of the regulated, the public interest standard is also a useful thing. Historically, it has not cost broadcasters much to comply with its public trustee duties, in large part because of the laxity of the Commission's enforcement efforts.[121] Should a poor sport somehow come to lead the Commission, Congress is always available to lend a hand. Perhaps most importantly, the public trustee model of broadcast regulation allows broadcasters to avoid paying for their use of the spectrum. The broadcasting industry argues that charging commercial broadcasters a royalty would be terribly unfair, in light of their onerous public trustee duties.[122]

The broadcasters recently wrapped themselves in the public trustee mantel when former Senate Majority Leader Bob Dole had the audacity to suggest that broadcasters should be required to pay for new licenses to broadcast High Definition Television (HDTV).[123] The broadcasters' fears never materialized. Even in

120. *See* KEYWORTH ET AL., *supra* note 53, at 31-34, 52-68 (proposing the abolition of the Commission in favor of market-based control on communications services).

121. *See* Geller, *Fairness, supra* note 44, at 83-84 (arguing that broadcasters would oppose the abolition of the public interest standard because "[t]hey like being called public trustees as long as the concept is never really enforced, and they would certainly oppose any spectrum fee, no matter what the First Amendment gains might be"); Jennifer L. Gimer, Note, *Tender Offers in the Broadcast Industry,* 1991 DUKE L.J. 240, 255-69 (describing the Commission's nonenforcement of the public interest standard in license transfer proceedings).

122. *See* Paul Fahri, *TV Claims Congress Could Steal the Show,* WASH. POST, Mar. 20, 1996, at D1; Mark Landler, *Dole Airwaves Plan Adds Up, But Is Unlikely to Win Support,* N.Y. TIMES, Aug. 7, 1996, at A12; Christopher Stern, *No Doubt About Digital: Broadcasters Appear to Have Carried the Day,* BROADCASTING & CABLE, Apr. 1, 1996, at 5.

123. *See* Christopher Stern, *Dole Puts Auction on Table,* BROADCASTING & CABLE, Jan. 8, 1996, at 4; *see also* Fahri, *supra* note 122. To the bitter end, Dole continued to advocate the auction of digital broadcast spectrum and the abolition of commercial broadcasters' public

an era when Congress is slashing aid to the most vulnerable members of our community, broadcasters will not have to pay for their use of the spectrum. Broadcasters and Congress have come to an understanding that, as in the past, broadcasters will enjoy free use of the spectrum (including new HDTV broadcasting licenses) in exchange for continuing to serve as public trustees.[124] In fairness, the broadcasters' support of the public interest standard is quite logical. The costs of discharging its "public trustee" duties pale in comparison to the potential costs that might be associated with a spectrum royalty or the auction of digital broadcasting licenses.[125]

At the end of the day, the "public interest" standard serves the interests of Congress, the Commission, and the broadcasting industry very well indeed. The only unserved constituency is the public. The chances of securing meaningful reforms in federal spectrum policy are bleak, precisely because the status quo serves the interests of the principal decisionmakers so effectively. If television remains a "vast wasteland," there is little cause for optimism that significant changes are on the horizon. At best, Congress might be persuaded not to sack and pillage the nation's public broadcasting system.

Chairman Minow argues persuasively and passionately that we are failing to meet the needs of our children. He is undoubtedly correct. If parents look to the commercial broadcasters, to the Commission, or to Congress for assistance, however, they are likely to come up empty-handed. The only way to ensure that the "vast wasteland" is occasionally mitigated by an oasis of quality is to support, individually and collectively, local public broadcasters. Public broadcasters, not the major commercial networks, are the real public trustees. At the local and state level, we must ensure that public broadcasters have the resources they need to educate, enlighten, and ennoble. The responsibility for ensuring that television serves as a "saving radiance in the sky" does not lie in halls of power in Washington, D.C. or in the board rooms of New York City. Instead, it lies with each of us in our homes, our schools, and our communities. Television will be as good, or as bad, as we choose to make it. If television fails to meet the needs of our children, we have only ourselves to blame.

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trustee duties. *See The Dole Goal: "Get Government Out of the Way,"* BROADCASTING & CABLE, Oct. 14, 1996, at 28, 28-29.

124. *See* Stern, *supra* note 122. *But see* Mark Landler, *Capitol Hill Fist on HDTV Isn't the Last Word,* N.Y. TIMES, July 1, 1996, at D1. Even though a spectrum auction makes sense as a matter of basic economics, it will "never fly politically." Landler, *supra* note 122.

125. *See* Geller, *Fairness, supra* note 44, at 82-84.