EXPLAINING YOURSELF: THIRTY YEARS AFTER "A MARKETPLACE APPROACH TO BROADCAST REGULATION"

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It's an enormous, humbling honor to be asked to speak about the work of a person whose work I have long admired—me. The first time I was ever asked to speak about something I wrote was in the eighth grade. I was asked to speak about it in the principal's office at Beverly Vista Elementary School. And like today's article, it was a co-written effort. In that case my co-writer was Paul Diamond, the publication was entitled the "Merry Fat Cat Fink," and it was a satirical newsletter as only satirists in the eighth grade can accomplish.

The faculty advisor behind it slithered out of sight, and Paul and I were required to gather up the few copies. In that case I must say I picked my writing partner well, at least in terms of a pedigree. His dad, I.A.L Diamond, had won the Oscar for writing the film "The Apartment" four years earlier with Billy Wilder. Paul would go on to write a film about our senior year of high school which pretty much bombed at the box office but launched the acting career of Steve Guttenberg of "Police Academy" fame.

Anyway, I was lucky enough to join another wonderful partner to write the article that was published in the 1982 *Texas Law Review*,[1] Mark Fowler. Anyone who has worked with Mark knows he is a supportive, fresh thinker who disdained the trappings of high office, even though he held one for nearly six years. He was instantly receptive to the challenge of making a formal policy case for changes in regulation. And he realized that to be credible, he had to have more than rhetoric or the power of a voting majority on the Federal Communications Commission (FCC). So we wrote this article over 1981 and 1982 in order to make sure that changes in

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1. Mark S. Fowler & Daniel L. Brenner, *A Market Place Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

broadcast law were grounded in a full understanding of the history of the FCC's decisionmaking. This especially applied to content-based decisions. Fowler was convinced that broadcasters should be entitled to the same First Amendment protections as those who worked at newspapers.

Recall, in the decade before, the U.S. Supreme Court had found that broadcasting and newspapers weren't entitled to the same protection. In 1969, in *Red Lion Broadcasting Co. v. FCC*,[2] the Court upheld the government's right to require radio and television stations to abide by the fairness doctrine and the right of replies to personal attacks. Five years later, in *Miami Herald Publishing Co. v. Tornillo*,[3] the Court unanimously found that the First Amendment protected newspapers from having to provide a right of reply. And, scarcity was cited as the reason for regulation in *Red Lion.*[4]

This scarcity rationale seemed fuzzy to me as a law student and even fuzzier when Mark and I thought about its impact on the First Amendment. The protections of the First Amendment against no laws abridging freedom of the press, including the electronic press, we were sure, would be increasingly important. And yet the FCC regulated the electronic press more than newspapers could ever be.

What is the scarcity rationale? It argues that there are more takers than spaces for those who want to operate broadcast stations. So government must pick who gets which frequencies under the public interest standard. There were, and are, noncontent related elements of the standard, things like diversity of ownership, local ownership, and credits for applicants who belonged to a class that had been historically underrepresented in broadcast ownership. But in the end, the FCC could, and did, consider programming content in the evaluation of an applicant or a licensee seeking renewal.

That is, everything else being equal, a licensee whose programming serves more diverse interests and tastes should be favored over a licensee who will cater to narrow tastes, interests, and viewpoints. The FCC licensing policies tried mightily to avoid reaching a decision based on this criterion. But it lurks behind every indecency finding today, just as it became the basis for the *Red Lion* decision, which upheld the fairness doctrine and the personal attack rules.

The winners in this process were big winners and were in many cases the existing owners of radio licenses. How big? Well, imagine the wealth and power created by an FCC license in the 1960s and '70s, when a network affiliate could command a third or more of the viewing from all TV

2. 395 U.S. 367, 396 (1969).
3. 418 U.S. 241, 256–58 (1974).
4. *Id.* at 248–52.

households.

Congress established "the public interest, convenience, or necessity"[5] as the linchpin of regulating spectrum. This public interest test was invoked to deal with perceived scarcity, which in turn was based on the way the FCC allocated frequencies in its 1952 order.[6]

The scarcity rationale has been accepted by the Supreme Court for decades. In the 1943 *National Broadcasting Company*[7] case, Justice Frankfurter upheld ownership limits on networks.[8] He concluded that licensing under the public interest standard did not violate the First Amendment.[9] And the Supreme Court in 2012 declined to address whether rules against indecent broadcasts violate the Constitution in the *Fox Television Stations*[10] case, even though it threw out the FCC's rulings on procedural grounds. It did not reject the scarcity basis for regulating.[11]

What's wrong with this rationale? For one thing, in 1982, there were markets where there were spaces, but no takers. That is, the FCC's own table of allocations had communities where no one had applied to operate a TV station on available channels. So how could you argue that those who had TV station licenses should be subject to regulation based on spectrum scarcity? And yet, ironically, in these smallest markets, you might be the *most* concerned about a lack of diversity of voices and the power of the broadcaster in those situations. For example, the Nellie Babbs case from Dodge City, Kansas, arose during Mark's tenure.[12] A radio station played

5. 47 U.S.C. § 307(a) (2006).

6. Federal Communications Commission (FCC), Sixth Report on Television Allocations: Amendment of Section 3.606 of the Commission's Rules and Regulations, Sixth Report and Order, 1 Rad. Reg. (Pike & Fischer) Part 3, 91:601 (1952). For a useful review of the FCC's broadcast's policies see Sherille Ismail, *Transformative Choices: A Review of 70 Years of FCC Decisions*, 1 J. INFO. POL'Y 6 (2011).

7. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 227 (1943).

8. *Id.*

9. *Id.* at 226–27.

10. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) (overturning the FCC's decision for lack of notice to affected parties).

11. *Id*. (stating that "it is unnecessary for the Court to address the constitutionality of the current indecency policy").

12. *See In re* Applications of Cmty. Serv. Broad., Inc., 7 F.C.C. 5652 (1992). In this case, the individual who permitted the broadcasts, Nellie Babbs, was not in control of the station. *See* Barry Massey, *FCC Staff Supports Settlement of KTTL Licensing Case*, ASSOCIATED PRESS (Aug. 26, 1986, 7:38 PM), *available at* http://www.apnewsarchive.com/1986/FCC-Staff-Supports-Settlement-Of-KTTL-Licensing-Case/id5769c4f347ace715b6dded12f6f8-0f6f (explaining that Nellie Babbs transferred her interest in the radio station to her ex-husband, Charles Babbs, in October 1985 pursuant to the couple's divorce). The court had issued a restraining order to prevent Nellie Babbs from interfering in the operation of the partnership business or entering the radio station premises. *Id*. The husband sold the

recordings filled with bigoted and racist attacks nightly. It tested the strength of our argument, although the market ultimately tired of these broadcasts and the station was transferred. To this day I don't have a great answer to how that station served the public interest. But surely scarcity was not a true justification, had the FCC actually intervened to deny the station its license.

Another shortcoming of the scarcity rationale is that the *Tornillo/Red Lion* distinction had it backwards: large daily newspapers, not TV or radio, were the scarcer medium. How could newspapers, who were far scarcer in terms of head-to-head competition, be protected by the print model; but broadcasters, who might number in the dozens in large cities, be regulated, all in the name of scarcity? And in 1982, newspapers were often the most influential editorial voice; despite their diminishing revenues and circulation, they still are, compared to radio or even TV stations.

Another shortcoming of the licensing scheme was the FCC's almost laughable attempts at getting broadcasters to furnish public affairs programming by decree. For instance, stations would run community forum shows at 6:00 AM on Sunday and declare that they were meeting the needs and interests of the community. They were, if by "community" you were referring to insomniacs or the folks responsible for turning on the heat for early church service.

Or, take application of the fairness doctrine, which was ultimately eliminated by Mark's successor, Dennis Patrick, following efforts by Mark himself.[13] The idea of presenting contrasting viewpoints or different sides in a story is the hallmark of most journalism; and coverage of important issues is the essence of news. Those are the two prongs of the fairness doctrine, introduced in 1949.[14]

But the fairness doctrine could be, and was, used to go after unpopular speech, as the investigation into the *Red Lion* case revealed years later.[15] It's

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station to a company who had filed a competing license so the FCC never dealt directly with the charges. The FCC earlier had designated the station's license for hearing on whether it should be renewed but did not designate review on the contents of the offending broadcasts because they did not constitute a "clear and present danger." Cattle Country Broadcasting; Hearing Designation Order and Notice of Apparent Liability, 50 Fed. Reg. 37,272, 37,273 (Sept. 12, 1985).

13. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 656–58 (D.C. Cir. 1989).

14. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247–51, 1258 (1949).

15. The case was part of a Democratic "massive strategy . . . to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide it was too expensive to continue." *See* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 115 (1987) (quoting Bill Ruder, Democratic operative). The case is also discussed in FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN

worth recalling what that case was about. It arose in 1964 when a radio preacher, Billy James Hargis, used a prerecorded radio program to attack Fred Cook, the author of a book highly critical of Barry Goldwater, the Republican candidate for president. With Democratic Party support, Cook demanded free response time from the almost two hundred stations that broadcast the show to rebut the Hargis charges. All of the stations except one complied with the fairness doctrine-based demand. WGCB, a station in the Pennsylvania hamlet of Red Lion, proposed to sell commercial time for the rebuttal instead of offering free airtime to Cook. The FCC ordered free time.[16]

But little stations weren't the only target and liberals weren't the only to invoke its remedial powers. The very first documentary offered by the 1972 documentary news program *NBC Reports* was *Pensions: The Broken Promise*, which exposed inadequacies in national pension funds that resulted in severe losses for veteran workers. The report won a Peabody Award and praise from the American Bar Association. But it was also investigated by the Nixon Administration's FCC, in response to a complaint by the conservative media watchdog group Accuracy in Media. It complained that the report was one-sided and thus violated the fairness doctrine. The case went all the way to the U.S. Supreme Court, which let the appeals court decision stand.[17] But it cost the National Broadcasting Company (NBC) (and its news division) hundreds of thousands of dollars to defend itself.

And as a practical matter, in either of these or other fairness doctrine cases, the doctrine really provided an untimely cure to the perceived problem. If the FCC found a violation and ordered balance, there was no reason to suspect that viewers would see the mandated response anyway, so there was often no practical value of the doctrine as government fiat.

Looking at the law review article's impact, it is clear that FCC policy up until 1982 had given scant attention to the real-world, economic aspects of spectrum licensing. The past thirty years have proved that the impact of Fowler and Brenner may have been greatest in bringing more critical thinking to how spectrum should be valued and licensed. Drawing from the work of Ronald Coase[18] and others, we argued for the somewhat obvious point that spectrum is a resource like other resources in society.

BROADCASTING (1976).

16. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 371 (1969).

17. Nat'l Broad.Co. v. FCC, 516 F.2d 1101, 1109 (D.C. Cir.1974), *cert. denied sub nom.* Accuracy in Media v. Nat'l Broad. Co., 424 U.S. 910 (1976) (holding that the National Broadcasting Company did not violate the fairness doctrine by producing *Pensions*).

18. *See, e.g.*, Robert H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON 1, 17–24 (1959).

And like other resources, American society should use market mechanisms to assign who gets the use of that resource.

We didn't go as far as insisting that the "highest and best" user of the spectrum should supplant incumbents. We didn't, in particular, challenge the right of broadcasters to remain on their frequencies and be replaced by other spectrum users if the other users could demonstrate a better use of the channels. In short, we weren't anywhere as radical as the FCC and Congress are today.

The current FCC and Congress, through reverse auction rulemaking, are trying to apply market forces to spectrum use.[19] The Fowler and Brenner *Texas Law Review* article more simply averred that a system of granting broadcast licenses based on First Amendment considerations should be unconstitutional, just as it would violate the First Amendment to license printing presses on content-related grounds. That left the market to do so.

A critic might say Fowler and Brenner punted because we did not call for the return of all licenses and a spectrum auction to determine who would operate broadcasting (or other spectrum-based activity), based on who would pay the most. Then, as now, broadcaster investment in stations and facilities raised insurmountable political hurdles as well as takings issues under the Constitution. But we did suggest license fees as a reasonable way to obtain some of the economic benefits that incumbent broadcast licensees had received and continued to receive.

And we affirmatively pointed out that our marketplace approach would not always deliver programs that addressed minority tastes and interests, whether cultural, ethnic, or emerging. So we argued that some of the spectrum fees could—and should, at least one author believed—go to support public broadcasting. That way, unmet programming in American society, from long-form news programs to hard-hitting documentaries to high-culture offerings to sports that lacked widespread appeal, would be available. If the public wanted it, let the market provide it. If the public couldn't or wouldn't register its desire through the market, have a mechanism to provide it through public broadcasting to at least broaden the mix. True libertarians might say tough tinsel—funding public broadcasting causes more harm than good. That was not the view of the article.

The public interest model, it must be said, had a salutary role that was

19. Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, 27 FCC Rcd. 12,357, 12,359 (2012) (implementing Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (Spectrum Act)).

never explicit in the FCC's policies if you believe more news, documentaries, and high culture was important to add to TV's mix. Communications attorneys and government affairs types could warn their broadcast clients—especially those who got caught rigging contests, having lousy hiring practices, or double-billing advertisers—that it might be time to class up the act. For instance, after the quiz show scandals of the early 1960s, CBS Broadcasting, Inc. (CBS) launched *CBS Reports*.[20]

And to this day the same network runs the Kennedy Centers Honors in December. Legend has it that, apart from all the good will it generates from the Washington elite who attend—how they get free tickets to this gala and dinner is one of the enduring mysteries of the nation's ethics laws—the show was initially telecast during a week that the ratings companies didn't rate programs. It was my recollection that founder Bill Paley later urged that there be weeks set aside for no ratings, so program executives could program without having to answer to the bean counters at the ad agencies and down the halls.[21] Today, of course, with Facebook providing the equivalent of ratings for every keystroke, it would be impossible. We are a measured society, and not in a good way!

So what have we learned some thirty years after the article? Four years after its publication, I went to teach at University of California, Los Angeles (UCLA) Law School and became the Director of its Communications Law Program. Charlie Firestone, who is presenting at this symposium and is at the Aspen Institute, was tasked with finding his successor and recruited me. The idea of returning to Los Angeles appealed to me. But shortly after I accepted, the hiring was attacked by a group, no longer in existence, called National Citizens Committee for Broadcasting (NCCB).

No matter that all three previous directors had recruited me and issued a public letter decrying the campaign (maybe I should have been more supportive of personal attack rules). The attack ignored that I was a Democrat, had been hired by the previous Democratic Chairman as his assistant, and had campaigned for the Democratic Presidential candidate, George McGovern, a decade before. The NCCB angrily complained to the law school faculty, students, and administration that a Reagan appointee was coming to UCLA to undermine the school's program. Charles Young, UCLA's longtime and fabled chancellor, said (with some exaggeration) upon meeting me at a faculty event, "I have had more letters

20. TELEVISION NEWS ANCHORS: AN ANTHOLOGY OF PROFILES OF THE MAJOR FIGURES AND ISSUES IN UNITED STATES NETWORK REPORTING (Thomas Fensch, ed., 2001).

21. WILLIAM S. PALEY, AS IT HAPPENED: A MEMOIR (1979). Curiously no reviews of this book exist online.

about you than anyone else I can remember."

Like many episodes in life, there are often two sides. Let me share one important personal one. Dr. Everett Parker was a board member of the NCCB. Dr. Parker's name emblazons the United Church of Christ's annual award for public service and is known to many of us. He was liberty's champion when he took on a Mississippi TV station in the 1960s for refusing to air programs or news stories that featured black Americans. Eventually the station, WLBT-TV, had its license stripped—not by the FCC but by the D.C. Circuit, in an opinion by then Judge Warren Burger.[22] There has never been an American, I think, who made better use of the broadcasting laws than Dr. Parker.

Dr. Parker reached out to me during this ugliness to say that, although he didn't agree with the policy conclusions of the *Texas Law Review* article, he used it in his classes at Fordham as a teaching tool, and he thought I would be a fine teacher and director. And he was disgusted at the behavior of his fellow NCCB board members in conducting this attack. He resigned from the Board. His assurance during this period meant the world to me.

But back to the future, so to speak: as the 2012 *Fox Television Stations* indecency case makes clear, the article did not change too much in broadcast regulation. It is as if regulators or legislators cannot fathom a world without a "stop" button on the electronic press. The popularity of culture trends makes it hard for the government not to react to content—from Vice President Quayle's 1992 attack on *Murphy Brown*[23] to the Super Bowl wardrobe malfunction[24] to President Obama's disdain[25] for Fox's coverage of the birther issue[26] to the right's insistence that the liberal news media "buried" Rand Paul's filibuster on the Obama Administration's drone policy.[27]

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22. Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 997, 1009 (D.C. Cir. 1966).

23. *See* Vice President Dan Quayle, The *Murphy Brown* Speech (May 19, 1992), *available at* http://livefromthetrail.com/about-the-book/speeches/chapter-18/vice-president-dan-quayle (criticizing the television show *Murphy Brown*).

24. *See* CBS Corp. v. FCC, 663 F.3d 122, 125 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012) (discussing the FCC's reaction to the exposure of Janet Jackson's breast during the Super Bowl XXXVIII halftime performance).

25. *See* Ben Smith, *President Obama Takes on the Birther Political Circus*, POLITICO (Apr. 27, 2011, 3:03 PM), http://www.politico.com/news/stories/0411/53823.html.

26. *See* Melody Johnson & Eric Shroeck, *Fox News Goes Full Birther*, MEDIA MATTERS FOR AMERICANS (Apr. 20, 2011, 9:12 AM), http://mediamatters.org/research/2011/04/20/fox-news-goes-full-birther/178860 (explaining how Fox News embraced the birther issue).

27. Ed O'Keefe & Aaron Blake, *Paul's Filibuster in Opposition to Brennan, Drone Policy Ends after Nearly 13 Hours*, WASH. POST (Mar. 6, 2013), http://articles.washingtonpost.com/2013-

On this last score, TV critics have long grouched about how little coverage is given to important public policy issues. Fred Friendly's 1967 memoir of his CBS days bemoaned the carriage of repeats of *I Love Lucy* instead of Senate hearings on the Vietnam War.[28] But today important hearings do not go uncovered. Thanks to C-Span 1, 2, 3 (and really no reason to stop there), it is possible to bring attention to public affairs events.

Which points to what really happened after our article was published. We didn't herald "a marketplace approach" to broadcast regulation. What happened was that the marketplace *approached* and swarmed over broadcasting. Cable penetration in 1982 was mainly in areas that had poor reception. Remember, CNN had launched only in 1980.[29] Today, with hundreds of networks, including local, national, and world news—not only on cable but on digital broadcasting as well—Americans have a huge amount of broadcast news and public affairs coverage, and not only from a U.S.-centric perspective.

About ninety percent of U.S. households subscribe to multi-channel video providers, that is, cable and direct-broadcast satellite (DBS).[30] And while there are cord cutters, these homes often use high volumes of Internet-provided content. Commercial broadcasters are but one of many voices in a rich market of content.

Cable and DBS face their own economic challenges, particularly in figuring out a way to continue program diversity amidst ever-increasing costs tied to sports and entertainment. Public broadcasting, too, is searching for its role in the construct suggested by the 1982 article. It's pretty amazing to realize that tennis was only on public TV for the longest while. The commercial marketplace eventually acquired all of those rights. But those who would say cable has made public TV obsolete should ask whether we have a commercial counterpart to programs like *Frontline, News Hour,* or educational kids programming.

As noted earlier, the article's effect on radio and television regulation was less eventful than its injection of spectrum economics into communications policy discussions.

Not only did Mark's tenure see the advent of widespread cable and

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03-06/politics/37497854_1_modern-filibuster-filibuster-end-debate.

28. *See* FRED W. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL . . . 213, 250 (1967).

29. COMPANY HISTORY, TURNER BROADCASTING SYSTEM, INC., http://www.turner.com/#/company/history (last visited Aug. 3, 2013).

30. *See, e.g.*, DMA HOUSEHOLD UNIVERSE ESTIMATES: NOVEMBER-2011, TVB.ORG, http://www.tvb.org/admin.tvb.org/iframe/dma/Cable_and_ADS_Penetration_by_DMA.asp (last visited Aug. 3, 2013). Penetration may be declining as more homes cut the cord or rely on Internet-based video.

telephone competition; the Fowler FCC authorized the first cellular licenses. The first licenses—analog—were assigned two to a market. One was called the wireline set-aside, given to AT&T (remember this is all pre-divestiture of Ma Bell) for its contributions to launching the service. The second was available using comparative hearings, the same clunky device in the FCC's toolbox that it had used for broadcasting licenses.

To his great credit, Chairman Fowler dissented to the set-aside for AT&T.[31] He did not believe one company should get all these licenses for its past contributions. I say great credit because as Chairman he could have priggishly held up cellular licensing by using his prerogative over the scheduling of the agency's decisions. This tactic, unfortunately, has become more common as the FCC became more politicized. Instead, he let the vote go forward and dissented.

Now before this law school erects too big a statue to Mark, let's recall that he didn't quite bring Mr. Market to the fore. He was unable to implement spectrum auctions to decide who got the cellular licenses. In fact, the FCC would try lotteries[32] before Congress realized that it could raise and keep revenues through auctions,[33] and could stop the foolishness that characterized comparative hearings for cellular licenses. Think about it: the FCC was giving away what turned out to be billion-dollar grants based on who had their lawyers and engineers concoct the winning contour map for service.[34] And the FCC had switched to lotteries primarily because the comparative process led to unacceptable delays, not because it failed to account for the economic value of the spectrum involved.

So the law review article, while not specially calling for auctions for all spectrum, did introduce the views of Coase and spectrum resources into a

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31. An Inquiry Into the Use of Bands 825–845 MHZ & 870–890 MHz for Cellular Commc'ns Sys., 86 F.C.C.2d 469 (1981), *reconsideration,* 89 F.C.C.2d 58, 105–07 (1982) (Fowler, Chairman, dissenting on reconsideration).

32. Amendment of the Commission's Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Application Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175, 189–90 (1984), *aff'd on reconsideration*, 101 F.C.C.2d 577 (1985), *aff'd on further reconsideration*, 59 Rad. Reg. 2d (P & F) 407 (1985). The D.C. Circuit also approved the use of lotteries in general in Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1561–62 (D.C. Cir. 1987).

33. As part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387–392 (the 1993 Budget Act), Congress added Section 309(j) to the Communications Act of 1934 authorizing the FCC to award licenses for rights to use the radio spectrum through competitive bidding.

34. The FCC had historically used comparative hearings if more than one qualified applicant sought a license. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (discussing the statutory right to comparative hearings); Use of Bands 825–845 MHz & 870–90 MHz for Cellular Commc'ns Sys., 86 F.C.C.2d 469, 490–91 (1981) (noting that settlements are encouraged as an alternative to comparative hearings).

policy debate that had never paid much attention to them. The result has been billions to the U.S Treasury, rapid deployment of advanced networks, and a keener appreciation for using spectrum more efficiently to maximize throughput. (It has also led, in the view of some, to more consolidation in the wireless industry, although the market appears to be holding steady at four facilities-based providers).

That wasn't all. When you start thinking about spectrum, big ideas come to mind: why does a broadcast TV signal have to be six megahertz (MHz), especially after you transition to digital? Of course the FCC didn't want to fight that fight. I think it's fair to conclude that broadcasters got the digital dividend of being able to convert to high-definition television (HDTV) and still have two to three MHz for other uses.[35] Or consider the more basic question: why would you use spectrum for an essentially in-the-home service like TV instead of deploying or redeploying it for mobile communications? In other words, we had been using wireline facilities for telephone services until the 1990s and wireless facilities for TV; it should have been the other way around.

Now we're living through a reformulation again, but with broadband shaping our thinking. The wireline networks in the home are being replaced or supplemented by wireless. Wireline telephone subscription is declining sharply in the home, replaced by smart phones. And whole-house cable and DBS networks are being augmented by private unlicensed Wi-Fi networks. It's all about spectrum, from that standpoint.

And we're really at the dawn of this new age of spectrum. That's because as more devices seek out unlicensed—unmetered—Wi-Fi hotspots, the value of licensed spectrum will be affected. Curiously, some cable operators got out of the licensed spectrum business last year with the sale of Spectrum Co.[36] But cable operators are building Wi-Fi as fast as Wall

35. As one commenter put it in reviewing the 2010 National Broadband Plan:

> Throughout the section of the report dealing with the potential recapture of TV frequencies, the Commission suggests that the television frequencies are underutilized, and that television broadcasting is not the highest and best use for the channels. In the view of the Commission, this spectrum is not being used efficiently at the moment, as many television stations have the ability to transmit their over-the-air signals in less than the full 6 MHz of spectrum allotted to each television station. While High Definition programming and opportunities for multi-channel operations are possible on the current channel allotments, in the Commission's opinion, too few broadcasters are making full use of the spectrum.

David Oxenford, *FCC National Broadband Plan,* BROADCAST LAW BLOG (Mar. 16, 2010), http://www.broadcastlawblog.com/2010/03/articles/broadband-report/fcc-national-broadband-plan-what-it-suggests-for-tv-broadcasters-spectrum/.

36. Applications of Cellco P'ship For Consent To Assign AWS-1 Licenses, 27 FCC Rcd. 10,698, 10,699–700 (2012).

Street will let them.[37] It doesn't mean the end of licensed spectrum. But it does mean that more and more consumer features will incorporate spectrum as part of their functionality. Wi-Fi has the consumer appeal that 800-number calling had a generation ago. Consumers love "free."

Finally, one has to consider the effects of a deregulated marketplace on broadcasting and society. That was, after all, the thing that got me into hot water when I went to UCLA Law School. In 1976, the motion picture *Network* presaged a TV world where lowest common denominator programming reached new lows, even during the news hour. Watching some reality TV today suggests that the movie had great predictive powers. And in the radio context, when the fairness doctrine was eliminated, station owners felt more comfortable bringing on highly partisan voices that would attract an audience. Loudmouths often do. But who would have expected it to be such a long-term phenomenon?

There are many reasons for the growth of right-wing or what some would call, in the short run, anti-Obama radio. Much of it has nothing to do with policy or even President Obama, in my view. We live in an angry world much of the time, despite our many blessings as citizens of this country. I doubt the reinstatement of the fairness doctrine would stem this anger or those who give voice, gain profit, or both, from it. Certainly the same voices, and even those in need of major pharmacological intervention, can be found on unlicensed media like cable networks or even that favorite of public interest advocates, leased and public access channels. And let's not talk about the Internet.

And there has been some good that has resulted from a more free-wheeling broadcast medium. While they may lag behind the creativity of cable networks, the major broadcast networks are surely taking advantage of the greater freedom a less regulated market produces—*The Simpsons*, *Modern Family*, and many others consistently bring creativity to free, over-the-air TV. Again, I doubt Coase and his acolytes, Fowler and Brenner, had much to do with it, but the door has opened up for more creative risk-taking in the medium.

Of course the market has made TV more competitive, increasing the costs to broadcasters. HDTV made a better viewing experience and led to lightweight, flat screens, but broadcasters had to buy into new transmission equipment. And marquee talent, especially for live sports, has become

37. *See* Roger Yu, *Comcast to Expand Number of Neighborhood Wi-Fi Hotspots*, USA TODAY, June 10, 2013, http//www.usatoday.com/story/tech/2013/06/10/comcast-wifi-hotspots/2407219/; *Cable MSO Discovers Way To Unlock Wi-Fi Potential*, SCREENPLAYSMAG.COM (Dec. 3, 2012), http://www.screenplaysmag.com/2012/12/03/cable-mso-discovers-way-to-unlock-wi-fi-potential/.

more expensive for broadcasters as over-the-air, satellite, and Internet distributors vie for the content. Live sports acts as broadcasting's bulwark against the inevitable move to a virtually all on demand program world that Netflix and cable's video on demand represent.

Every big contract announced in sports filters into cable and DBS rates, whether a subscriber, a sports network, or a cable company likes it or not. I'm all for people earning as much as they can. But let's admit that the process of paying high cost jock talent through the current system isn't a buyer-meets-seller market. And this problem is not going away under the current model.[38] We may be at an inflection point where the TV business has to change: cable operators carrying a content-rich bundle will have a harder time paying for niche programming because marquee athletes and actors or hit shows can and will get higher and higher pay. Must-have networks can drain the nickels away from should-have networks.

And even those must-haves—the broadcast network affiliates—may not have quite the comfortable future that today's retransmission consent payments made by cable operators and DBS suggest. Should the cable and DBS industry move to incorporate an *Aereo*-like solution[39] to bypass traditional local station retransmission and products like Hopper[40] strip out advertising, broadcasters may be forced to shift to a pay model.

That's a lot of change to think emanated from a law review article. And it probably reflects more hubris than historical causation. But I'm proud and appreciative of the opportunity provided by this symposium to reflect on this work some thirty years later and so grateful to the many who contributed to our thinking and writing, then and now.

Ideas matter. And as Mark taught me in working with him on developing the print model for broadcasting, ideals matter too.

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38. In May 2013, Sen. John McCain introduced legislation to unbundle cable packages. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013). *See also* John Eggerton, *McCain Introduces A La Carte Bill, Television Consumer Freedom Act Would Force Programmers, Operators to Unbundle TV stations, Co-Owned Cable Channels*, MULTICHANNEL NEWS (May 9, 2013, 5:49 PM), http://www.multichannel.com/distribution/mccain-introduces-la-carte-bill/143218.

39. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680–81 (2d Cir. 2013) (denying a preliminary injunction against a company that enabled users to watch broadcast television over the Internet).

40. Broadcasters have challenged the legality of services that strip out advertising. Fox Broad. Co. v. Dish Network, L.C.C., No. CV 12-04529, 2012 WL 5938563 (C.D. Cal. Nov. 7, 2012).