SIX

"But Not the Ownership Thereof": The Peculiar Property Status of the Broadcast License

A license provides for the use of such channels, but not the ownership thereof.
RADIO ACT OF 1927

Secretary Hoover's signature in New York City sells for $150,000 to $200,000, and the applications are now being picked up as for sale.
SENATE TESTIMONY, 1926

Introduction: The Broadcast Station as Legal Creation

This chapter focuses on the form of ownership that constitutes the most fundamental kind of power in broadcasting, the power of access to the airwaves, which is also the power to speak, to have free speech rights, in radio and television. The principal organizational unit in American broadcasting is the station, and a station is something that is owned, bought and sold. By law, station ownership grants power over and responsibility for what is broadcast; whatever free speech rights exist in broadcasting exist foremost for station owners. The principal way to gain the right to exercise free speech in radio and television, the principal way to gain access to the broadcast airwaves, is to buy a station.

A broadcast station, however, is not self-evidently an object. It is not just some equipment and studios. It requires a legally enforced boundary in the formless continuum of the radio spectrum—in other words, a channel. There is nothing inherent to the spectrum that indicates exactly where boundaries within it should be drawn. The spectrum itself is only a potentiality; unless a signal is generated, nothing exists, not even the "ether" that was once imagined to be the omnipresent substance in which electromagnetic waves propagated. The bands, channels, and technical standards that make up frequency-allocation charts are for the most part human projections onto that continuum, not scientific descriptions of natural objects.

In a sense, the charts are less like topographic maps of natural areas than they are like the street map of a city. But even this analogy is imper-

fect. Once built, city streets have an existence more durable than the city planner's imaginary scheme that created them. But if the spectrum's "street map" were to disappear, so would the streets. Roadways in the airwaves exist only as long as they are imagined to exist; their imaginary status is integral to their reality.

True, different frequency ranges are characterized by different propagation and information-capacity characteristics; for example, medium and shortwaves can travel over the horizon, higher frequencies cannot. But these technical characteristics only provide the most general limits to social choice. AM radio channels were originally set to their present width of 10 kilohertz, for example, not so much for technical reasons but because humans have ten fingers: although 1 kilohertz channels would be unworkable and 100 kilohertz channels impractical, the choice of 10 instead of 9 or 11 (or 10.0267) is basically because ten is a convenient number for a species that does most of its arithmetic in the decimal system.[1]

This is not to say that the boundaries drawn in the spectrum are whimsical. Like the borders between nations, borders in the spectrum are often coded records of past political struggles. The location of the FM band between channels 6 and 7 on the television dial, for example, is largely the product of the David and Goliath struggles that took place in the 1930s and 1940s between upstart FM advocates and the RCA Corporation.[2] The mediocre NTSC technical standards for color television in the United States grew out of a similar struggle between RCA and CBS, which was resolved as much by RCA's deep pockets and manufacturing base as by questions of broadcast quality.[3]

In the broad view, then, the relation of a license to a channel is not merely one of granting access to something that already exists, but one of creation. When the government creates a legal regime that regulates access to the spectrum, the statement "We grant you a license to channel 6" is what language theorists call a performative; like the statement "I

1. In the early 1980s AM channels were shrunk to 9 kilohertz in most of the world outside the United States as a way to open up more channels. The U.S. AM broadcast industry successfully kept the FCC from going along. Even if one accepts the industry's argument at the time that 9 kilohertz is technically inferior to 10 (many suggested the industry was worried more about increased competition in the band than decreased signal quality), this does not mean that 10 kilohertz is technically ideal; by the industry's reasoning, 11 kilohertz would be even better.

2. Erwin G. Krasnow and Lawrence D. Longley, "Smothering FM with Commission Kindness," in *The Politics of Broadcast Regulation*, 2d ed. (New York: St. Martin's Press, 1978), 107–17.

3. Brad Chisholm, "The CBS Color Television Venture: A Study in Failed Innovation in the Broadcast Industry," Ph.D. diss., Department of Communication Arts, University of Wisconsin, Madison, 1987.

pronounce you man and wife," it not so much describes an existing situation as it creates a new one. The practice of licensing is the primary means by which we create, enforce, and maintain the socially defined boundaries in the spectrum. When the 1927 Radio Act stated that its intention was "to maintain the control of the United States over all the channels of . . . radio transmission," it was *creating* channels, not, as the phrasing suggests, simply taking charge of channels that preexisted the law in a state of nature.

A station, then, is not simply a building with a transmitter in it. It is a combination of a particular channel with a particular transmitting facility, legally constituted and protected with a federally issued license. Scientifically speaking, there is nothing natural or technologically necessary about this combination: transmitters, channels, and conditions of control and ownership are all independent variables. Transmitters can be adjusted to different channels, and licenses need not be tied to either frequencies or facilities.[4] The station is an arbitrary social creation, as much imaginary as it is real; and it is that act of creation that makes it possible for the station to become a commodity, an "object" available for purchase and sale on a for-profit basis. The government's role in this act of commodity creation has been elaborate and ongoing: as technologies and industrial practices have evolved over the years, the number and character of government-created channels has continually expanded and mutated, requiring constant regulatory involvement with the maintenance of broadcast channels and the creation of new ones. Arguably, the single most important government intervention associated with commercial broadcasting is the legal creation and maintenance of that marketable entity we call a broadcast station.

This situation has created something of a quandary for liberal ways of thinking, in which property and the marketplace are thought of as autonomous and in need of shielding from government and politics. In this case they are thoroughly entwined with and dependent upon ongoing government intervention. Squaring this government intervention with liberal principles, therefore, has proven ideologically awkward. The most glaring problem concerns the "nonownership" clause of the Communications Act: the law simultaneously forbids ownership of the airwaves and invites their treatment as private property. But there are other oddities as well. In what would appear to be a violation of fundamental liberal principle, the creation of marketable, privately owned

4. It is possible, for example, to link the license to a person instead of to equipment or frequencies, as is the case with ham or amateur radio operators, whose licenses allow them to transmit on a variety of frequencies with a variety of equipment. See 47 C.F.R. pt. 97.

broadcast stations historically involved systematic government elimination of small private entities from broadcasting—amateurs, nonprofit broadcasters—in favor of large corporate and government institutions without compensation to the former or payment from the latter. And throughout its history, the licensing system has been characterized by a doctrinal instability, wherein the depiction of licensees in legal argument oscillates wildly between descriptions of them, on the one hand, as business entrepreneurs fundamentally autonomous from government and, on the other, as recipients of government privilege and thus fundamentally different from traditional entrepreneurs.

This chapter investigates both the processes by which the broadcast station has been commodified and the residual tensions that act of commodification has created. The first part of the chapter outlines the creation of the existing system of regulation in the early part of this century. The key features of that system, such as the simultaneous creation of marketable broadcast stations and the regulation of those stations "in the public interest," are shown to be the result of a distinctly ideological pressure: the need, central to the liberal imagination, to maintain a boundary between private property and government in the face of the government's helpful reach across that boundary when it creates broadcast stations.

The second part discusses the variety of political and regulatory responses to the tensions inherent in the existing system that have surfaced over the history of broadcasting. The responses have involved two mutually antagonistic legitimatory tactics. One tactic attempts to preserve the industry/government boundary by shielding government-created broadcast licenses from private control, that is, by limiting licenses' propertylike character. The other tactic attempts to uphold the same boundary by enhancing the propertylike character of licenses and by limiting government interference.

The effort to pursue the principle of private property in broadcasting, as a result, has been beset by a new version of an old tension: the regulation of the broadcast spectrum involves a paradoxical effort to use elaborate political intervention to achieve the goal of limiting political intervention. Most of the effort that has gone into the regulation of broadcast channels, this chapter will argue, has been directed toward negotiating this contradiction.

Enclosing the Spectrum, 1900–1920

To many of the first entrants into the world of radio communication, legal regulation of the spectrum was not a priority, and was for a period

actively opposed. Entrepreneurs were interested above all in developing and manufacturing individual pieces of equipment, physical things, for sale. Government regulation of radio signals was seen only as a restriction on entrepreneurial activities. And as we have seen, the amateurs were even more adamant about maintaining "open" access to the airwaves; radio's wide-open character was precisely what made it intriguing.

If any one individual deserves credit for inventing the notion that the radio spectrum might be usefully "bounded," and thus given some of the characteristics of property, it is probably Marconi. Marconi's managerial "exclusivity policy" was designed to extract profit, not by manufacturing devices for sale, but by regulating access to a communications system, which meant controlling access to the radio spectrum that made it possible. Implicit to the Marconi strategy, then, was a vision of the spectrum as a space or territory to be conquered and cordoned off, as something analogous to property.[5]

Yet at first Marconi was alone in his vision. The enclosure of the radio spectrum ultimately emerged in a process of interaction between military, corporate, and government interests that led to the first international treaty regarding radio in 1906. It is here, in the relations among large national and international institutions, not in the activities of the private individuals of Lockean fable, that a vision of the radio spectrum as something with propertylike characteristics crystallized.

The spectrum was not explicitly spoken of as a kind of property at first. Yet, as the navies of the United States and the European powers coaxed their governments into establishing legal powers over access to radio between 1903 and 1912, an understanding does seem to have emerged of the spectrum, if not as a commodity, then at least as a kind of *territory.* The leaders of the United States and the European powers came to assume that the radio spectrum was an unsettled, strategic territory analogous to the foreign lands they were then competing to colonize.

Within the United States, the principal form of resistance to these efforts came from the amateurs with, it seems, some help from entrepreneurs. Together, they successfully lobbied against attempts to bring U.S. law into line with the 1906 treaty for four years, arguing that the 1906 international rules were restrictive, premature, and technically naive.[6] There is little evidence that they based their resistance on any kind of sophisticated political or legal analysis. Yet in the amateurs' organiza-

5. Susan J. Douglas, *Inventing American Broadcasting, 1899-1922* (Baltimore: Johns Hopkins University Press, 1987), 101.

6. Douglas, *Inventing American Broadcasting,* 216.

tional practices one can detect the outlines of an alternative vision to the one that was driving the legal enclosure of the airwaves by corporate-military coalitions. The amateurs quite successfully developed extralegal, grassroots means of creating order in the airwaves, such as time- and channel-sharing arrangements in populous areas, informal traditions and codes of etiquette for on-air behavior, and, eventually, a volunteer network for relaying messages that spanned the nation.[7] If there is a legal precedent to the vision implicit in amateur activities, it is the medieval tradition of the commons, which, in its ideal form at least, functioned as a common public space open to all, owned neither by individuals nor by the state, and maintained as much by shared traditions as by legal policing.

The possibility of a treatment of the spectrum as a commons, however, was eliminated with the assertion of the principle of legally enforced limitations on spectrum access in the Wireless Ship Act of 1910 and the Radio Act of 1912. Property rights were not discussed at the time. If they had been, it might have raised troubling questions. In the 1912 act, after all, private individuals—the amateurs—were forcibly ejected from their place in the spectrum without compensation, while others, notably the Marconi Company, were granted a place of privilege by what amounted to a government bequest. The corporate liberal tropes of technological necessity, expertise, the national interest, and overriding public purpose were relied upon instead. The aura of technological complexity and public urgency surrounding the 1912 act, in sum, thoroughly overshadowed potential concerns about political and social issues in general, and property in particular.

One can detect in the logic of the 1912 act some implicit answers to questions of property, however, based not in explicit principles but in corporate liberal habits of thought. Was it legitimate to eject the amateurs from their established places in the airwaves? Was it fair to grant Marconi such a large protected chunk of the spectrum free of cost? Yes, according to the logic of the act: these actions were legitimate and fair because of the complexities of radio, public safety, and the national interest as determined by the experts, that is, by Marconi engineers and navy officers. Were not some questions still left unresolved? For example, was Marconi accruing private property rights in the spectrum by dint of his investments after 1912? Yes, many questions were left unresolved: this is inevitable in complex, evolving technologies, which is why the act established a mechanism for dealing with such contingencies, the administrative power of the secretary of commerce and labor.

7. Ibid., 209.

Significantly, however, as long as the corporate liberal establishment imagined radio as a strictly point-to-point, strategic communications technology, the airwaves themselves were conceived merely as a means toward the ends of profit through the sale of other goods: equipment, patents, parts, and services. Property relations were extended only to relatively traditional realms, and the airwaves were legally regulated purely in terms of their role in systems of communication and manufacture. The idea that the airwaves themselves might be subject to commodity exchange was not seriously broached.

Commodifying the Spectrum, 1920–1934

The commodification of the spectrum, turning it into something that could be bought and sold, came during the first years of the broadcast boom, the years when radio became an instrument of broad-based popular communication and a key element in the consumer society. The marketable broadcast station seems to have been a casual and relatively uncontroversial outgrowth of the process by which the Commerce Department under Hoover's direction gradually established broadcasting as a corporate activity. Once Hoover established the principle of regulating broadcasting in terms of channel allocations that established different classes of service according to transmitter power, corporate affiliation, and broadcast content, it occurred to businesses interested in selling their broadcast equipment that they might include broadcast licenses as part of the package. At their request, the Commerce Department began to transfer their licenses along with the equipment. The license thus came to be understood as attached to the equipment rather than to the individual broadcaster, and the institution of the marketable broadcast station was born.

It says something about our culture that, like the erection of a barrier between two-way amateur radio and one-way broadcasting, this profoundly definitive policy was undertaken with almost no discussion. The only recorded discussions of the matter that do exist are buried deep inside the records of congressional hearings that occurred several years after the policy was initiated. During Senate hearings on the pending 1927 Radio Act, for example, Department of Commerce solicitor Stephen Davis testified,

> We have felt this way about it.. . . that the license ran to the station rather than to the individual. In other words, we have never felt it wise to adopt a policy under which we would say to an

> individual, "Yes; go in and build this station at whatever cost there may be. If you die it is worth nothing. If you change your mind and want to quit broadcasting it is worth nothing. If you get into business trouble it is worth nothing to your creditors. It has got only a refuse value."[8]

The policy of transferring licenses when stations were sold, then, was thought of as a means to increase the security and likelihood of profit for investors by extending the power to gain returns on investment beyond the profits from broadcasting itself and beyond traditional forms of property to the station itself. That it also helped to *create* that economic value went largely unremarked, perhaps because of the blurring of description and prescription characteristic of popular functionalism: the system simply existed "out there," and the government fulfilled its function of serving it. The general principle was the same that governed licensing procedures overall: the functional goal of nurturing, not formal private rights, but the autonomy and power of private capital and the "system" of broadcasting "necessary" to progress. To Hoover and others like him, in sum, the positive value of encouraging the corporate development of broadcasting was obvious; if this meant using government to transfer licenses when private individuals contracted to sell stations, Hoover's Commerce Department saw no reason to object.

Again, a mystified sense of technology that conflates social with technological choice seems to have helped legitimate the practice. During hearings, one senator remarked with regard to the structure of the policy: "I understand the policy of giving the licenses to the machine rather than to the individual. . . . I do not offhand see any fault with that, because I can see sound reason for not liquidating equipment all over the country. . . . There is no justification for abandoning this apparatus because the license expires."[9] What is odd about this comment is that, strictly speaking, "equipment" or "apparatus," that is, radio transmitters, physical plant, and so forth, would *not* be "abandoned because a license expires." Transmitters and the like can be and are regularly sold on a marketplace basis without licenses, just like any other device whose use is regulated, like a used car, an airplane, or ham radio equipment. Just because they require licenses to operate does not mean that they can't be sold. What was threatened with being worth "nothing" or with being "abandoned" in the absence of a license was not the equipment per se

8. Senate Committee on Interstate Commerce, *Radio Control: Hearings before the Committee on Interstate Commerce,* 69th Cong., 1st sess., 1926, at 42 (hearings on S. 1 and S. 1754), January 8 and 9, 39.

9. Statement of Senator James Couzens, ibid., 44.

but the station. What the senator seems to have been referring to, therefore, was the "station" as a whole, which he mistook for "apparatus." To him, and one suspects to some other politicians, the social and political underpinnings of a station were hidden behind a mystified technology.

In any case, by the early 1920s access to the spectrum was being controlled by two distinct mechanisms: licenses to broadcast could be had either from a government office or from private individuals, the former limited by administrative fiat, the latter largely by price. When the Commerce Department declared the airwaves full and ceased issuing licenses in 1925, the only way to gain access to the airwaves within the existing framework was by purchasing an existing station with a license. The market for broadcast stations has been brisk ever since.

This mixed bag of private and public means of access and regulation required some ingenuity to be rendered legitimate. The classical liberal faith in formal, bright-line property rights had only recently begun to lose its centrality in legal and political discourse, and so muted versions of it applied to radio did surface in the 1920s. Most significantly, in his memoirs Hoover hinted that in the early 1920s some commercial radio manufacturers were "insisting on a right of permanent preemption of the channels through the air as private property," which prompted him to organize the First Radio Conference as a means to resolve the conflict between these groups and other claimants to the spectrum.[10] The threat of individual private parties using classical liberal principles to stake claims in the spectrum against the designs of both the military and corporations thus may have been a key motivation lurking behind the entire range of Hoover's associational efforts in the twenties.

There were other classical liberal efforts as well. The American Bar Association, for example, took a short-lived stand in favor of formal property rights in the spectrum. In December 1926 an ABA committee released an interim report on radio legislation, which argued that when licenses are refused to existing stations, the stations are legally entitled to compensation.[11] Simply by virtue of the fact that broadcasters profited from the use and sale of their stations, in other words, they had a naturally existing property right in their channels, and any government usurpation of that right amounted to takings requiring compensation. Private use and sale for profit, the argument seemed to be, automatically created private property rights subject to legal protection from govern-

10. Herbert Hoover, *The Memoirs of Herbert Hoover: The Cabinet and the Presidency, 1920-1933* (New York: Macmillan, 1952), 139-40.

11. Stephen Davis, *The Law of Radio Communication* (New York: McGraw-Hill, 1927), 66-67.

ment interference, public-interest clause or no. Similarly, in the legal vacuum that ensued after the collapse of the Commerce Department's authority, a circuit court case tried to resolve a dispute between two broadcasters by turning to classical property rights; *Tribune Co. v. Oak Leaves Broadcasting Station* upheld a licensee's right to enjoin an interloper on the licensee's channel.[12]

The *Oak Leaves* case, however, was not understood at the time so much as a competing method of ordering broadcasting as it was a stopgap, an action taken using familiar tools to solve a local dispute until more comprehensive solutions were worked out at the federal level.[13] Hence, although Department of Commerce solicitor Stephen Davis took it as obvious that "[r]adio communication is a natural right" in some sense of that phrase,[14] he did not interpret this to mean that there were common law property rights in the spectrum. "[T]here is no absolute right of transfer," he told a Senate committee.[15]

In the years that followed, both Congress and the courts upheld Davis's view. As early as 1922, draft bills before Congress suggested that broadcasters be required to get permission before selling or otherwise transferring licenses.[16] A fear that common law property rights might be used against government efforts to regulate lay behind a proposed 1924 joint resolution of the House and Senate, "affirmed that the ether was a public possession and provided for limited grants for its use."[17] A Senate

12. *Tribune Co. v. Oak Leaves Broadcasting Station,* 68 Cong. Rec. 216 (1926; reprint of Circuit Court, Cook County, IL, decision of November 17, 1926). See also Harry P. Warner, "Transfers of Broadcasting Licenses under the Communications Act of 1934," *Boston University Law Review* 21 (November 1941): 585, 591; and Matthew Spitzer, "The Constitutionality of Licensing Broadcasters," *New York University Law Review* 64 (November 1989): 990, 1046.

13. "This court is of the opinion, from its interpretation of the act of August 13, 1912, that Congress did not intend to undertake to assume the right to regulate broadcasting under its powers given it to regulate commerce and that, *until such time as it does,* litigants may enforce such rights as they may have by reason of operating broadcasting stations in the State courts having jurisdiction" (*Tribune Co. v. Oak Leaves Broadcasting Station,* 218, emphasis added).

14. Davis, *Law of Radio Communication,* 14.

15. Senate Committee, *Radio Control,* 43.

16. The first version of this requirement appeared in a draft bill on April 20, 1922, which stated, "Such station license, the wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of to any other person, company or corporation without the consent in writing of the Secretary of Commerce" (S. 3694, 67th Cong., 2d sess. [1922]). See also H.R. 13733, 67th Cong., 1st sess. (1923); and Warner, "Transfers of Broadcasting Licenses," 594.

17. H.R. 7357, 68th Cong., 2d sess.; Marvin R. Bensman, "Regulation of Broadcasting by the Department of Commerce, 1921-1927," in *American Broadcasting: A Source-*

resolution, passed only days before the Radio Act itself, was more assertive: "the ether and the use thereof for the transmission of signals, words, energy and other purposes, within the territorial jurisdiction of the United States is hereby reaffirmed to be the inalienable possession of the people of the United States and their government."[18]

In a similar effort to protect the licensing system against private property claims, Congress hit upon the idea of requiring licensees to sign waivers relinquishing any such potential rights against the regulatory body. On July 3, 1926, the Senate passed joint resolution 125, which required licensees to "execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wavelength or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof."[19]

The ground was already well prepared, then, when Congress passed the 1927 Radio Act. Of course, the crucial phrase that divides the licensing mechanism from common law property is the nonownership clause, which provides for "the use of such channels, but not the ownership thereof," and which specifies that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."[20] The waiver requirement also made it into the 1927 act, though not without modification under pressure from concerned broadcasters: the references to "rights" were replaced with the vaguer "claim," and "as against the United States" was narrowed to "as against the regulatory power of the United States."[21] Section 12 of the act quietly wrote into law the Commerce Department's policy of transferring licenses along with stations by specifying that licenses to broadcast "shall not be transferred . . . to any person, firm, company, or corporation without the consent in writing of the licensing authority." In the years following the 1927 act, the constitutionality of license revocations without compensation was upheld by the courts.[22] A series of court

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book for the History of Radio and Television, ed. Lawrence W. Lichty and Malachi C. Topping (New York: Hastings House, 1975), 545.

18. 67 Cong. Rec. 4152 (February 18, 1927).

19. S. Res. 47, 69th Cong., 1st sess., signed into law December 8, 1926.

20. Preamble to Public Law 632, 69th Cong., 1st sess. (February 23, 1927).

21. Warner, "Transfers of Broadcasting Licenses," 592. The full text of section 5(H) of the 1927 Radio Act reads, "No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefore shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

22. *United States v. American Bond and Mortgage Co.,* 31 F. 2d 448 (N.D. Ill. 1929), affirmed 52 F. 2d 318 (7th Cir. 1931): regulatory authority does not violate the Fifth

cases in the early 1930s further affirmed the legitimacy of the regulatory practices established in the early 1920s.[23] And in 1934 section 12 of the 1927 act was simply folded into section 310 of the Communications Act, where it remains to this day.

Wealth through Regulation: On the Value of Stations

There is no doubt that the policy of using licenses to create and protect transferable stations has had the effect of establishing the broadcast spectrum as its own kind of real estate. The thriving and highly lucrative marketplace in broadcast stations has formed one of the key underpinnings of commercial broadcasting overall. Immediately following the passage of the 1927 act, the market value of stations went up dramatically, largely because the FRC reduced the supply of channels—between 1927 and 1929 the commission reduced the number of broadcast stations from 681 to 606 to reduce interference[24]—and because its new powers brought higher levels of stability and confidence to the broadcast business.

Since then, the regulatory system has continued to create new allocations at regular intervals, and therewith the conditions for new marketable broadcast stations. Since the late 1930s, technical improvements have allowed the number of AM radio allocations to grow from under one thousand to roughly five thousand. In 1941, furthermore, FM radio and VHF television bands were opened up, and the UHF band was made available for television in 1953.[25] In the 1980s the FCC took applications for nearly two thousand newly allocated low-power television (LPTV) channels.[26] And in the last few years, the FCC has initiated efforts

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Amendment and "is not an unconstitutional taking of property without compensation or without due process of law," 31 F. 2d at 455. See also *General Electric Co. v. Federal Radio Commission,* 31 F. 2d 630 (D.C. Cir. 1929); *KFKB Broadcasting Association, Inc., v. Federal Radio Commission,* 60 U.S. App. D.C. 79, 47 F. 2d 670 (1931); *Journal Co. v. Federal Radio Commission,* 60 U.S. App. D.C. 92, 48 F. 2d 461 (1931); and *Federal Radio Commission v. Nelson Brothers Bond and Montage Co.,* 289 U.S. 266 (1933).

23. That Congress has the power to regulate the use and operation of radio stations under the "commerce clause" of the Constitution was affirmed in *Technical Radio Laboratory v. Federal Radio Commission,* 59 U.S. App. D.C. 125, 36 F. 2d 111 (1929); *General Electric Co. v. Federal Radio Commission; KFKB Broadcasting Association, Inc., v. Federal Radio Commission;* and *Journal Co. v. Federal Radio Commission.*

24. Christopher H. Sterling and John M. Kittross, *Stay Tuned: A Concise History of American Broadcasting,* 2d ed. (Belmont, CA: Wadsworth, 1990), 632.

25. Ibid., 632–33.

26. LPTV channels operate at transmitter power levels small enough to allow their

to create channels for the new broadcast technology of high-definition television (HDTV).

Although the government plays a necessary role in *creating* this supply of marketable broadcast stations, however, the principal hurdle to access to the broadcast marketplace facing the majority of the population is not the FCC but the ability to buy a station. As a general rule, at any given time the supply of stations for sale greatly exceeds the supply of unclaimed licenses. This is especially true if one thinks in terms of access to broadcast audiences instead of access to channels: available unclaimed channels typically provide access to relatively small audiences because they tend to be of lower power, to be in less populated areas, or to involve technologies that have not yet established themselves among consumers (e.g., FM and UHF television in the 1950s). The number of those who enter the spectrum via new channels, therefore, is typically exceeded by those entering by station purchase.[27]

It is an undeniable feature of the existing system of regulation, furthermore, that broadcasters as a rule are able to sell their government-licensed stations to just about anyone for just about any price. In principle the FCC retains the power to revoke licenses without compensation, and to interfere with or even forbid the sale of a license. Nonetheless, over the years the FCC has stuck to the broad policy of maintaining a broadcast system based on the free exchange of capital and maximum autonomy from government interference, and has thus been extremely reluctant to invoke its theoretical powers. Only two television licenses have been revoked in the forty-year history of the medium, and fewer than 150 licenses overall have been revoked or denied renewal in the history of regulation, most of them involving technical problems in small radio stations. Radio and television licenses have changed hands by sale with FCC approval, on the other hand, in more than six thousand trans-

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introduction into areas already saturated with standard high-power channels. As of 1988, 455 LPTV stations were on the air, and the FCC had granted construction permits for another 1,359 (ibid., 467).

27. For example, in 1986, a period of heavy activity in the market for broadcast stations, 1,558 commercial radio stations changed hands by sale, compared to 123 stations that were new to the airwaves that year. Similarly, 37 new commercial television stations went on the air while 128 existing television stations changed hands. For new stations, see ibid., 633; for station transfers, see Joseph M. Foley, "Value and Policy Issues in the Marketplace for Broadcast Licenses," in *Telecommunications, Values, and the Public Interest,* ed. Sven Lundstedt (Norwood, NJ: Ablex, 1990), 273–74. These numbers, moreover, reflect numbers of channels but not audience size represented by each channel; in terms of audience size, the ratio of market entry by purchase versus entry by new licenses is likely to be much greater.

actions, many of which involved more than one station.[28] The overwhelming majority of applications for transfer of control of licenses have been approved, and the majority of existing broadcast licensees obtained their licenses through the purchase of stations.[29] The easy and most common mode of access to the broadcast airwaves, in sum, is by purchasing a station, and once a station is obtained its continued possession is very nearly guaranteed. If, as a few property-rights purists have darkly suggested, the FCC's power to revoke licenses and deny transfers constitutes a slippery slope with government control and censorship at the bottom, it also must be acknowledged that the commission has managed to cling to the uppermost edge of the slope with nary a slip for more than seventy years.

Making Sense of Spectrum Regulation in a Liberal Universe

The idea of property as a natural right is so deeply ingrained in American consciousness that it cannot be said to have ever completely disappeared from the discourse surrounding broadcast channels, and has resurfaced in small ways over the years. In a few cases, property rights have been invoked explicitly. For example, when a few liberal activists managed to reserve a handful of the newly opened FM and UHF television channels for nonprofit broadcasters in the 1940s, the militantly anti-regulation industry trade magazine *Broadcasting* attacked the action with the suggestion that the reservations somehow constituted a violation of the industry's property rights. More frequently, however, the intimacy of government-business relations evidenced in licensing has generated vaguer forms of ideological uneasiness. There has always been some grumbling about government red tape in the licensing process, particularly when broadcast executives find themselves faced with the inconvenience of hiring lawyers to file lengthy license-renewal and station-transfer applications with the FCC. And when an FCC action makes the government-business linkage overly transparent, complaints inflected by property-rights ideology are heard. For example, when the

28. For denials, see Richard Ellmore, *Broadcasting Law and Regulation* (Blue Ridge Summit, PA: Tab Books, 1982), 114–15. For station sales, see Christopher H. Sterling, *Electronic Media: A Guide to Trends in Broadcasting and Newer Technologies, 1920–1983* (New York: Praeger, 1984), 45.

29. Note, "Radio and Television Station Transfers: Adequacy of Supervision under the Federal Communications Act," *Indiana Law Journal* 30 (1955): 351.

FCC recently guaranteed existing broadcasters HDTV channels, competitors complained about the injustice of this government "giveaway."[30]

In general, though, the system worked out in the 1920s has been a roaring success. The profits to be made in broadcasting are large, so the complaints have generally been muted. The FCC's theoretical powers to interfere with the ownership, sale, and control of broadcast stations have been rendered acceptable by the argument that broadcasting is technically unique, coupled to a policy of extreme constraint in invoking those powers. Some government intervention is necessary, it is thought, to build a free enterprise system that is free of government intervention—in the special case of broadcasting.

In the netherworld in which broadcast law and policy experts operate, however, a nagging unresolved question has remained: What is too much government intervention, and what is too little? At what point does government intervention cease to help and start to interfere with the free enterprise system it is supposed to protect? How are the "experts" that run the FCC supposed to find a politically neutral, objective way to draw a boundary between appropriate and inappropriate government intervention?

These are not just abstract questions. They are rendered "practical" in the policy world because lobbyists, in their search for ways to translate the designs of their clients into "neutral" terms, regularly exploit the ambiguity of the questions and manipulate them to their advantage. Because the exact location of the appropriate boundary between government and business is uncertain, it is easy for an industry faction to argue that desired FCC actions uphold the boundary and undesired actions inappropriately blur or cross it, and just as easy for that faction's opponents to argue the reverse. Over the years, then, industry squabbles have generated a series of opposing arguments that draw the boundary in different places, and thus put the FCC in the role of resolving those disputes by deciding where, for the moment, the line lies.

The different argumentative strategies that have been advanced over the years for drawing the appropriate boundary between government and business in the licensing mechanism can be placed in two broad categories. One constructs the principal threat as private interests gaining unfair advantage from the fact of government involvement, and thus interprets the public airwaves as a bulwark against private privilege. The other takes an opposite approach, seeking to minimize FCC intervention in licensing as a means to reduce government interference in private affairs.

30. Doug Halonen, "FCC Offers New Channels to TV Stations," *Electronic Media,* April 13, 1992, 1.

Public Airwaves as a Bulwark against Private Privilege

Since its origins in the 1920s, a constant theme of regulatory decision making has been the idea that the use of government-created channels by private businesses is justified only if private discretion is carefully limited. If a private broadcaster is able to get a license for free from the FCC and then turn around and sell that license with her station for a profit, is the broadcaster not profiting unfairly from a government bequest? If licensees select both their successor and the price paid for their stations, does this give them dramatically more control than the FCC over selecting entrants to the spectrum resource, and thus undermine the public-interest principle which justifies broadcaster's power in the first place? By this logic, appropriate FCC actions should seek to uphold the boundary between public and private interests by restricting the control of private interests over licenses. It is necessary, the argument goes, to carefully limit the powers of private interests in the public broadcast spectrum to prevent unfair advantage.

This pattern of thought appeared repeatedly in the years leading to the passage of the 1927 Radio Act, and left its mark on the legislation. During the Fourth Radio Conference, concerns were raised that some individuals were obtaining broadcast licenses solely for the purpose of resale at a profit, and suggestions were made that the Department of Commerce take action to prevent such "trafficking."[31] Shortly thereafter, during the hearings for the Radio Act, objections were raised when it was revealed that a station had sold for $50,000, considerably more than the value of its tangible assets.[32] Concerns were also expressed about the loss of regulatory control implicit in the practice of allowing license transfers at times when direct applicants were being refused licenses on the grounds of spectrum scarcity, and about the propriety of creating a de facto franchise through licensing.[33] These concerns helped ensure the presence of the nonownership clause and the requirement of FCC approval of transfers.

The nonownership principle, however, raised as many questions as it answered—questions that go right to the heart of what we mean by "ownership" and "value." For although the law did not grant full-fledged property rights in the spectrum and gave the FCC theoretical powers to intervene in station sales, the 1927 act and its successor nonetheless

31. Warner, "Transfers of Broadcasting Licenses," 595.
32. Senate Committee, *Radio Control*, 46.
33. Ibid., 45-47.

were clearly intended to underwrite Hoover's initial policy of upholding private ownership and exchange of stations in the name of free enterprise. After all, does not the ability of broadcasters to transfer licenses by sale create economic value in the license, and thus a form of de facto private property, in spite of the waivers and public declarations to the contrary?[34]

The dominant response to this question has been to resort to a common formalist legal strategy: turning a blind eye in the name of neutrality. The price paid for stations, the argument goes, is none of our business. The general policy was articulated in 1926 by the Commerce Department solicitor Stephen Davis, when he said, "We have never felt . . . that it was any part of our concern as to what price a man received for his broadcasting apparatus. . . . I have no doubt that the broadcasting privilege is going to be of very considerable value, the same as any other franchise becomes of value."[35] The same attitude was reflected in the following decade. In the *Seitz* case, for example, the FCC opined that "our primary consideration, from the standpoint of the public interest, deals not with the prevailing relationship between contract price and the items to be transferred, but rather with the qualifications of the proposed transferees and their ability to provide the public with an improved broadcast service."[36] This remains the policy today; prices paid in station sales are not considered particularly relevant to FCC decision making.

Yet in a corporate liberal environment, formalist limitations on legal and administrative inquiry are hard to maintain. Corporate liberal experts are expected to take into consideration entire systems. By a corporate liberal logic the structures and patterns underlying systems of market exchange are appropriately within the purview of decision making. So it is not surprising that the question of the value of station licenses, though not at center stage in the policy arena, has returned to haunt policy discourse at odd intervals over the years.

34. In the 1920s unease with this practice was sometimes expressed in terms of fears of monopoly. One senator, for example, argued that "[f]reedom to barter and sell licenses threatens the principle that only those who render a public service may enjoy a license. It would make possible the acquisition of many stations by a few or by a single interest. . . . this [is] a possibility to be guarded against." The senator was recommending the enactment of H.R. 9971, 69th Cong., 1st sess., an amendment restricting license transfers (*In the Matter of Powel Crosley, Jr.,* Docket 6767, in 11 F.C.C. 3 [1945], 40 [hereafter *Crosley*]).

35. Senate Committee, *Radio Control,* 43; Warner, "Transfers of Broadcasting Licenses," 600.

36. *In re Seitz,* Docket 5313, decided June 27, 1939, cited in Warner, "Transfers of Broadcasting Licenses," 612.

Bright Lines from the Left: The Bare-Bones Theory

One form that question took was what became known as the bare-bones theory, a policy tactic that, although defunct today, gained attention in the twenties, thirties, and forties.[37] The idea was that, if licenses cannot be owned, broadcasters should not be able to make money by selling them. In a sense the bare-bones theory addresses the ambiguities of corporate liberal boundary blurring by trying to redraw a classical bright line in a narrow context. Tacitly invoking the classic liberal assumptions that property exists most of all in physical things and is distinct from government-granted privileges, the bare-bones approach suggests that the public character of the spectrum should be preserved by drawing a sharp line between selling the tangible assets of a station—its equipment, buildings, and related "things"—and selling the ephemeral license itself, with the former allowed but the latter prohibited.

The Senate draft of the 1927 act did just that: it prohibited license transfers "if the consideration be greater than the reasonable value of the apparatus for which said license has been issued, and said exchange value shall in no case exceed the original cost of the apparatus."[38] Such a restriction, it was presumed, would eliminate any economic value in the license itself, preventing both trafficking and the accrual of any legally protected property rights in the spectrum. The clause was removed in conference committee,[39] but the practice suggested by the bare-bones theory was not expressly prohibited, thus leaving open the possibility that the commission could adopt a bare-bones approach in the future as an administrative rule, logically supported, perhaps, by the legislatively explicit public character of the spectrum.

After the 1927 act was passed, members of both Congress and the FRC continued to express concern about the possibility that licenses should not be allowed to take on the character of private property by accruing exchangeable monetary value. On January 29, 1932, the FRC proposed that transfer applications include an itemized breakdown of the values of both the tangibles and the intangibles included as part of the sale, on the ground that "the information now required by the Federal Radio Commission is not complete enough to permit the commission to determine whether or not value is being placed upon the wavelength or

37. Warner, "Transfers of Broadcasting Licenses," 587.

38. Ibid., 596. This policy was recommended by, among others, the ACLU. In Senate testimony an ACLU representative argued that "Secretary Hoover's signature in New York City sells for $150,000 to $200,000, and the applications are now being picked up as for sale. . . . you should prevent the sale above the cost of the equipment or the cost of the plant" (Senate Committee, *Radio Control,* 127).

39. *Crosley,* 23.

license, and as a result there is considerable commercializing and trafficking in wavelengths and licenses," which at least some members believed to be contrary to the Radio Act.[40] Continuing concern about the casual character of commission review of license transfers, particularly the paucity of information gathered, produced a change in the language of the transfer clause as it was transcribed into the Communications Act: section 310(b) of the original 1934 act stated that license transfers should be allowed only if "the Commission shall, after securing full information, decide that said transfer is in the public interest." The fact that this was one of the very few original pieces of language introduced in the broadcast portion of the 1934 act suggests that Congress continued to cast a nervous eye on the practice of license transfers.

For the remainder of the 1930s, FCC decision making struggled to reconcile the broad policy of minimal interference in business affairs with the belief that licenses should not take on the character of private property. On the one hand, the commission had been directed to gather detailed information about transfers for the purposes of preventing licenses to gain economic value in and of themselves. On the other, its broad policy mandate was that it should provide the conditions for the free exchange of stations on a marketplace basis. Not surprisingly, when it did scrutinize the accounting details of transfers with great care, it brought upon itself accusations of meddling with management prerogatives.[41]

One of the FCC's more common responses to this dilemma was euphemism: as it became clear that stations regularly changed hands at values far in excess of their tangible assets, the commission described the intangible assets in terms of "earning capacity," network affiliation contracts, the existence of established audience habits of listening to a station, and so forth—in terms of anything but the possession of a license.[42] If stations involved property in intangibles, the thinking seemed to be, at least the intangibles ought to be nongovernmental. Of

40. Ibid., 41 n. 12.

41. For example, *Travelers Broadcasting Service Corp.* (WTIC), 7 F.C.C. 504 (1939).

42. An FCC press release from July 25, 1944, stated that "[t]he Commission . . . has approved transfers that involve going-concern value, good will, etc. There remains, however, a serious question . . . on which the law is not clear, as to whether the Commission should approve a transfer wherein the amount of the consideration is over and beyond any amount which can be reasonably allocated to physical values plus going-concern and good will, even though the written record does not itself show an allocation of a sum for the frequency" (Murray Edelman, *The Licensing of Radio Services in the United States, 1927–1947: A Study in Administrative Policy Formation* [Urbana: University of Illinois Press, 1950], 98, reprinted in *Administration of American Telecommunications Policy*, vol. 1, ed. John M. Kittross [New York: Arno Press, 1980]). See also Warner, "Transfers of Broadcasting Licenses," 601.

course audience size, affiliation, and earning capacity are all quite closely tied to the fact of a station's government-protected channel. A government-granted television channel in New York City, for example, will inevitably have a larger audience, more desirability to a network, and a greater earning capacity than one in a small Nevada town, even if all other variables such as owner investment, physical plant, and so forth are held equal. But this was not frequently discussed.[43]

Residual unease about the property status of broadcast licenses persisted into the 1940s. A 1945 bill introduced to the House, for example, would have amended the transfer section of the Communications Act to limit the price of stations, if not to tangible assets per se, then to double the value of the tangible property—a kind of qualified bare-bones approach.[44] The most emphatic attempt to resolve the dilemma, however, came when the FCC attempted to draw a hard and fast line between private property and broadcast licenses in the form of what became known as the AVCO rule. In 1945, in the wake of a license-transfer decision involving a company called the Aviation Corporation (AVCO), the FCC grew concerned about the way that relatively unrestricted license transfers amounted to an apparent abrogation of the commission's duty to enforce the public character of the broadcast spectrum.[45] Perhaps overstating the clarity of its mandate, the FCC intoned:

43. For the relation of market size and audience to station value, see Benjamin J. Bates, "The Impact of Deregulation on Television Station Prices," *Journal of Media Economics* 1 (spring 1988): 5–22.

44. H.R. 4314, 79th Cong., 1st sess., introduced on October 9, 1945. The bill would have amended section 310(b) of the act by adding "No transfer or assignment shall be approved in which the total consideration to be paid for broadcast property, tangible and intangible, exceeds the fair value of such property: Provided, that such fair value shall not exceed double the depreciated cost value of the tangible broadcast property transferred or assigned." The bill died in committee.

45. AVCO had contracted to buy the bulk of the manufacturing empire of Powel Crosley, Jr., which included a number of broadcast stations, including one of the largest in the country. AVCO thus had to apply for permission to transfer the licenses. In the course of the proceedings, it was revealed that AVCO was buying the stations only because Crosley refused to separate them from AVCO's real interest, his manufacturing concerns. AVCO executives, as a result, were thoroughly unfamiliar with broadcasting and broadcast law and performed embarrassingly before the commission. The transfer was approved by a vote of four to three after the executives expressed a "commitment" to acquaint themselves with the details of broadcasting. The entire affair disturbed even the commissioners who approved the transfer, however, and prompted the promulgation of the AVCO rule (*Crosley*, 3–43). For a discussion of the case that reflects some of the views that were current at the FCC during the period, see Charles Siepmann, *Radio's Second Chance* (Boston: Little, Brown & Co., 1947), 167–83.

"Our opinion has remained steadfast that people who enter broadcasting must recognize their obligation to render a public service. They cannot operate a station as they would a department store or a steel mill—for purely financial benefits."[46] The resulting AVCO rule required broadcasters who had contracted to sell their stations to give notice of the deal and its price for a sixty-day period, so that others wishing to buy the station could apply to the FCC, who would then choose among the competing applicants. In theory the rule shifted the power to choose a successor from the station owner to the FCC, while allowing the owner a fair price for his or her station.

The AVCO rule proved practically and politically unworkable. The rule imposed serious delays on sellers—sixty days plus the time needed to review competing applicants—and new uncertainties on buyers—why go through the trouble of negotiating to buy a station if the FCC might give the station to someone else after the contract had been concluded? During its four-year existence, very few competing applications were filed, so the FCC was unable to exercise the discretion it had hoped would be created by the rule. As a result the commission repealed the rule in 1949.[47]

Nonownership as "Soft" Property

The demise of the AVCO rule marked the end of the bare-bones theory. After 1949 the strong interpretation of the nonownership clause of the Communications Act was replaced by a soft reading, and ever since the FCC has taken as a given the fact that broadcast licenses have economic value. Since then, the blurred character of the boundary between property and government licenses has been largely accepted as a fact of life (with the exception of the New Right's "marketplace approach" discussed below). The FCC has abandoned all pretense of trying to maintain a bright-line distinction between public licenses and private property, allowing the distinction to become a matter of degree rather than of kind. The nonownership clause has been interpreted in a fully corporate liberal sense as a functional guideline, not a boundary-drawing rule. To the extent that it is addressed at all, it is taken to mean merely that the purchase and sale of stations involves some special conditions that allow for slightly more legal restraint than the exchange of unregulated goods when those restrictions serve some functional purpose, such as enhancing competition, social diversity, or quality programming.

Between 1962 and 1982, for example, the FCC enforced the "three-

46. *Crosley*, 24.

47. Ellmore, *Broadcasting Law and Regulation*, 101.

year rule" as a means to reduce trafficking in licenses.[48] The rule required a hearing for transfer requests within three years of an original grant, in the hopes of thus discouraging at least the most obvious forms of speculation in broadcast licenses. During its existence, the rate of growth of license transfers slowed, suggesting the rule had some effect.[49] In 1962 the commission also invoked a minor version of the bare-bones theory when it limited the cost of transferred construction permits it requires of broadcasters seeking to build a new station. Since then, construction permits may be sold, but not for more than actual expenses invested at the time of sale.[50] Interestingly, the Reagan-era FCC that abolished the three-year rule could not see fit to do the same for the limits on construction permits. Since construction permits are typically given before any physical plant is purchased or built, the absence of "tangibles" in the value of the permits is absolute. While the practical implications of this are trivial—the intangible value of broadcast licenses is of a nearly identical nature to construction permits, and generally of much greater value—the ideological implications are not. The role of government in creating the value of construction permits is so obvious and thus troubling to the liberal desire to see property in terms of physical things that even the radically deregulatory FCC of the early 1980s could not bring itself to remove this one bit of government interference in business affairs.

It is significant that the post-AVCO liberal strategy shifted from trying to *prohibit* "ownership" of licenses to accepting the fact of ownership and trying to shape the character of station owners, through policies on diversity of ownership and control of broadcasting. Since the 1940s the FCC has prohibited ownership of more than one broadcast network and more than one station in a single market.[51] Over the years it has also prohibited cross-ownership of broadcast stations with cable systems and newspapers, and limited the total number of stations a single owner can control.[52] In the name of ownership diversity, it has also sought to encourage ownership of stations by minority-group members

48. "March 15, 1962: Applications for Voluntary Assignments or Transfer of Control," *FCC Annual Report* 32 (1962): 689. See also *FCC Annual Report* 28 (1962): 56–57. Exceptions were made for lack of finances and (obviously enough) death of the licensee.

49. Foley, "Value and Policy Issues," 281.

50. Ellmore, *Broadcasting Law and Regulation,* 101.

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

52. On FCC regulations limiting newspaper cross-ownership, see 47 C.F.R. 73.35, 73.240, 73.636, upheld in *Federal Communications Commission v. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978). On limitations of number of stations—the so-called rule of sevens—see 47 C.F.R. 73.35, 73.240, and 73.636. See also *Multiple Ownership of AM, FM, and TV Stations,* 18 F.C.C. 288 (1953), affirmed in *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956).

by occasionally giving weight to minorities in comparative license hearings, allowing transfer of stations under FCC investigation to minorities (the "distress sale" policy), and allowing tax benefits to owners who sell their stations to minorities.[53]

None of the policies introduced since 1949 involve direct intervention in the majority of ordinary station sales; the basic fact of a marketplace in government-created broadcast licenses has been left untouched. To be sure, a few potential buyers and sellers of stations at various times have faced a few restraints because of post-1949 rules. Owners who wanted to sell stations within three years of purchasing them had to ask for special permission, potential buyers who already owned the maximum number of stations were prevented from buying more, and potential minority buyers have been given small advantages in the market for stations. Even when taken together, however, these cases directly involve only a small fraction of actual station sales and purchases.[54] None of the rules have substantially altered the general practice of freely buying stations at a market-determined price; throughout the rules' existence, most buyers and sellers of stations have been able to transact their business without any government interference beyond the filing of the appropriate forms.

Since 1949, in sum, regulatory interventions into the buying and selling of stations have been at most pale echoes of the AVCO rule and the "bare-bones" interpretation of the nonownership clause. After experimenting with efforts to fully insulate the government-issued broadcast licenses from the realm of private property between 1921 and 1949, Congress and the FCC have accepted, or at least acquiesced to, the principle that licenses confer economic value that can be bought and sold on an open market.

Private Airwaves as a Bulwark against Government Interference

Adding to the Bundle of Rights

Another theme of regulation over the years adopts an opposite strategy to that of shielding public licenses from private ownership. The appro-

53. FCC, *1978 Statement of Policy on Minority Ownership of Broadcasting Facilities, FCC Annual Report*, 2d ser., vol. 68 (1978): 979; *Metro Broadcasting, Inc., v. Federal Communications Commission*, 110 S. Ct. 2997 (1990).

54. In 1986, for example, nearly a decade after the minority ownership rules were adopted, minorities still owned just 2.1 percent of the nation's more than eleven thousand broadcast stations (*Metro Broadcasting, Inc., v. Federal Communications Commission*, 3002 n. 1, 3003.

priate response, it is argued, is to move in the other direction, enhancing the propertylike qualities of licenses and further limiting the government's ability to intervene in their purchase and sale. This has been the logic underlying a broad variety of policy initiatives over the years.

Critics from both the right and the left have often found it irksome that, in the case of new allocations, broadcasters receive their licenses from the government for free, but are then able to turn around and sell those licenses for a profit. Whereas the bare-bones approach sought to rectify this boundary blurring by trying to somehow eliminate the property character of the airwaves, it has frequently been suggested that the property character of licenses should be made more consistent: broadcasters should pay the government for new licenses just as they would pay other broadcasters for existing licenses. If private enterprises are going to make a profit on a public resource, the argument goes, they should pay for the privilege, not get it for free. On this theory, a draft bill was introduced in 1933 that would have required broadcasters to pay assessments on their licenses.[55] The idea of assessments for licenses resurfaced in the 1950s,[56] and has been experimented with in nonbroadcast portions of the spectrum in the last decade. And numerous proposals have been advanced for leasing or even auctioning broadcast channels.[57]

Most broadcast license transactions involve existing licenses, and thus are already obtained by purchase. Leasing or auctioning broadcast channels, therefore, would only affect newly assigned or unused frequencies, which typically involve only a minority of license transactions. Another strategy for enhancing the propertylike character of licenses, therefore, involves attempts to reduce the government's ability to interfere with the actions of existing license holders. This was the strategy, for example, behind a 1952 amendment to the Communications Act. Concerned that the AVCO procedure constituted "an unwise invasion by a Government agency into private business practice,"[58] Congress ensured

55. S. 5201, 72d Cong., 2d sess. (1933). See also Harvey Sarner, "Assessments for Broadcast Licenses," *Federal Bar Journal* 21 (1961): 245.

56. Senate Committee on Government Operations, *Adjustment of Fees of the Federal Communications Commission,* Staff Memo 85-1-70 (October 28, 1957).

57. Harvey J. Levin, for example, has proposed that the public trustee concept be replaced with a system of government-leased broadcast channels priced with "shadow prices," that is, prices calculated to simulate the cost of a "real" market, thus inducing economic efficiency while retaining government control over the long term (*The Invisible Resource: Use and Regulation of the Radio Spectrum* [Baltimore: Resources for the Future and Johns Hopkins University Press, 1971], 119-30).

58. Senate Committee on Interstate and Foreign Commerce, on S. 658, S. Rep. 44, 82d Cong., 1st sess., reprinted in 97 Cong. Rec. (1951), 967. Previous attempts to restrain the commission's ability to intervene in station sales included the 1942 Sanders bill, H.R.

that the AVCO rule could not be revived by prohibiting the commission from considering competing applicants in the case of a transfer.[59]

Although sometimes depicted as a radical departure from regulatory history, the many deregulatory efforts in broadcasting of the 1980s can be equally well understood as a continuation of the same logic used in the 1933 proposal and 1952 amendment. For example, in 1982, prompted by arguments that the three-year rule constitutes "a needless inhibition on normal business and marketplace forces in the radio and television industries," the FCC eliminated the rule.[60] For similar reasons, in the 1980s the ownership limit on broadcast stations was raised to twelve, license terms were extended from three to five years for television stations and from five to seven years for radio stations, and the licensing process was greatly simplified—many licenses can now be renewed by postcard.[61]

Significantly, in all of these cases the principle of government licensing was left intact. What was constrained was the power of the government to intervene in private business practices in certain circumstances. Though not always recognized as such, there is a decidedly corporate liberal slant to many of these regulations. The goal can be construed as not so much formal or ideological consistency but as prudent management of the regulatory structure—trimming some regulations here, removing some barriers to entry there—in order to enhance the efficiency of the system overall.

Bright Lines from the Right: Deregulation and the "Marketplace Approach"

In the late 1970s and early 1980s, the notion of property rights in the spectrum, after gestating for a few decades among neolibertarian economists and think tanks, took on a newly legitimized form and emerged as a

5497, 77th Cong., 2d sess., which limited the "public-interest" test to the transferee's ability to construct and operate a station, rather than applying it to the entire transfer proceedings; and the similar 1943 White-Wheeler bill, which would have added a requirement that the transferee's qualifications matched those of the original licensee. See Note, "Radio and Television Station Transfers," 352.

59. Public Law 554 (July 16, 1952), 66 Stat. 716. The text of section 310 was amended to its present form by, among a few other changes, adding "Any such [transfer] application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

60. FCC, "Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control)," 52 Radio Regulation 2d 1081 (1982).

61. "Postcard Renewal," 87 F.C.C. 2d 1127 (1981), affirmed in *Black Citizens for a Fair Media v. Federal Communications Commission*, 719 F. 2d 407 (D.C. Cir. 1983).

major force in the mainstream policy arena for the first time since the early 1920s. The "market-based" or "marketplace" approach to spectrum regulation was a subspecies of that 1980s political movement, deregulation. Deregulation itself cannot be reduced to a single set of intellectual principles or political theories. It was shaped by matters ranging from voter disenchantment with politics to corporate resistance to environmental and safety regulation to the rise in popularity of transaction cost analysis and other products of the Chicago school of economics. Yet this larger movement helped bring to temporary prominence certain ways of thinking that, looked at in context, can suggest much about both the persistence and limitations of the liberal idea of property in the contemporary world.[62]

On the surface, economic competition seemed more central to the marketplace approach than private property did; the efficiencies of an unfettered marketplace were more often heralded than natural rights. Yet a faith in the marketplace alone hardly explains what was unique about the marketplace approach. Antitrust law is a profound expression of a faith in economic competition, yet it was eviscerated during the 1980s in the name of the same theories that underwrote the marketplace approach. And a policy generally favoring private enterprise in broadcasting has dominated since the 1920s, whereas the marketplace approach was typically described by its proponents as a radical departure from the last half century of broadcast regulation.[63]

The idea of property helps explain what distinguished the eighties' marketplace approach from more conventional promarket policies. Property was a central element of the logic of the marketplace fervor of the 1980s, a key to its deep structure. At moments this was explicit. As Chicago school hero Richard Epstein put it, "the grand idea of property and its principled necessity limitations provide the best guide for dealing with the complex modern issues that dominate our collective agenda today."[64] Yet it was, we shall see, more often implicit. The marketplace approach is usefully characterized as a neoformalist attempt to recreate a bright-line boundary between government and private property in the airwaves. Like the bare-bones theory, it sought to resolve ideological unease surrounding licensing by purifying the distinction between gov-

62. The best discussion of deregulation in telecommunications is found in Robert Britt Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (New York: Oxford University Press, 1989), especially 221–63.

63. Mark S. Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," *Texas Law Review* 60 (1982): 207.

64. Richard A. Epstein, "Property and Necessity," *Harvard Journal of Law and Public Policy* 13, no. 1 (1990): 9.

ernment intervention and private prerogatives. It sought to draw that line, however, between the license and government instead of between business and the license.

Underlying many of the law and economics–based proposals for a "property system of spectrum management," then, is a hope that the legal realists were wrong: property is not simply a shifting bundle of rights but something more like the nineteenth-century common law understanding of property as an absolute, natural right with a fixed content. As one spectrum-property theorist put it, "there is no middle ground" between a government-regulated system and a "pure market system" based in "freely transferable rights."[65] The contradiction *can* be transcended, the government's hand in the bundle of rights can be not only reduced but eliminated, if only we implement a full-fledged or "pure" property rights in the spectrum.

The 1980s version of this argument had its roots in discussions that began in the early 1950s. One of these discussions began in the Chicago school of economics; another appears to have taken place within the cultish right-wing intellectual movement led by Ayn Rand, who wrote an essay calling for property rights in radio frequencies in the 1950s.[66] This at first marginal trend called for the establishment of a property system that would create common law rights in the spectrum as an alternative to the current public-trustee concept.[67] This system would be superior, it was said, because the resulting market in spectrum access would allocate resources more efficiently and would in any case be more just.

One of the more interesting by-products of this movement has been a reinterpretation of the history of broadcast regulation. The existing system, it is argued, is not necessary but political. The decisions that culminated in the 1934 act were the product of a broad social and political vision. The choice to regulate the spectrum according to the criteria of

65. Milton Mueller's conclusion to Edwin Diamond, Norman Sandler, and Milton Mueller, *Telecommunications in Crisis: The First Amendment, Technology, and Deregulation* (Washington, DC: Cato Institute, 1983), 93.

66. Ayn Rand, "The Property Status of the Airwaves," in *Capitalism: The Unknown Ideal* (New York: Signet, 1967), 122.

67. Leo Herzel, " 'Public Interest' and the Market in Color Television Regulation" (student note), *University of Chicago Law Review* 18 (1952): 96; Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 11 (October 1959): 1; Arthur S. DeVany, Ross D. Eckert, Charles J. Meyers, Donald J. O'Hara, and Richard C. Scott, "A Property System for Market Allocation in the Electromagnetic Spectrum: A Legal-Economic-Engineering Study," *Stanford Law Review* 21 (June 1969): 1499; Douglas Webbink, "Radio Licenses and Frequency Spectrum Use Property Rights," *Communications and the Law* 3 (June 1987): 3–29; Milton Mueller, "Technical Standards: The Market and Radio Frequency Allocation," *Telecommunications Policy* 12 (March 1988): 42–56.

the public interest was dictated less by spectrum scarcity than by the enactment of a set of political beliefs that involved nonobjective values being used to justify granting power to some groups at the expense of others.

But this does not lead to the notion that property itself is political. Instead, the period of interference in the mid-1920s, the property-rights advocates suggest, resulted not from a lack of government regulation, but from a lack of law, which they take to be something entirely different from the legislatively backed administrative rules that currently control the spectrum. In a seminal and highly respected essay, economist Ronald Coase argued that "the real cause of the [pre-1927] trouble was that no property rights were created in these scarce frequencies," and that the interference problems could have been better resolved by the introduction of property rights "without the need for government regulation." The untried alternative to the system of government intervention we have now, it is said, would have been the establishment of a full-fledged legally protected system of property rights.[68] What was needed in the 1920s was a kind of Homestead Act of the spectrum that would have given broadcaster-settlers legal protection from government, not subservience to it.[69]

The law/politics distinction generally requires some version of a state of nature, and the marketplace-approach theorists have found it in a peculiar version of broadcast history. They paint a picture of plucky commercial entrepreneurs restrained in the 1920s by the ham-handed actions of marauding government bureaucrats, as if the entrepreneurs flourished in a natural realm outside of government influence.[70] One author has argued, for example, that prior to 1926 "the radio industry operated very efficiently under a regime of saleable property rights in the spectrum. . . . No one believed that licensing in the 'public interest' was needed to allow broadcasting to function."[71]

As we have seen, this is hardly accurate. Practically speaking, the pre-1926 regime was virtually identical to the post-1926 regime, and while full-fledged property-rights advocates did exist prior to 1926, they seem to have been a minority even in the business community. It is clearly not the case that "no one" believed in the public-interest licensing. The consensus of the industry-dominated Radio Conferences was

68. Coase, "Federal Communications Commission," 14.

69. Rand, "Property Status of the Airwaves," 123.

70. For a similar characterization of the period, see Thomas Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," *Journal of Law and Economics* 33 (April 1990): 133.

71. Spitzer, "Constitutionality of Licensing Broadcasters," 1045.

that some form of public-interest regulation was necessary. Similarly, describing the pre-1926 radio system as operating "efficiently" greatly exaggerates the importance of station sales in the pre-1926 period. (The data are sketchy, but it seems likely that between 1920 and 1926 the majority of broadcasters did not obtain their licenses by sale.) It is not clear, furthermore, that an infant, experimental industry frequently faced by chaos and uncertainty, where the norm was operating at a loss, is best described as "efficient." For this picture to make sense the arbitrary legal restraints that enabled the entrepreneurs' activities—the 1912 elimination of the possibility of a nonlegal means of regulation, the subsequent marginalization of amateurs and nonprofits, and the administrative creation of marketable broadcast stations—must be ignored. Similarly, it must be overlooked that the existing regulatory system was created explicitly to create and uphold a competitive, free enterprise system in broadcasting that created the very active market in broadcast stations that now exists.

Market-based theorists must be selective in their interpretation of the development of broadcast regulation because they seek to maintain the belief that the system of property provides a form of social life that can and should exist apart from the arbitrary winds of politics. Property is not merely a bundle of rights, they wish to assert, it is not just another form of privilege; it is, if not a natural right, a nonetheless neutral and legitimate bulwark against arbitrary political action. They seek to deny, in other words, the legal realist argument that property is neither natural nor logically distinct from a privilege.

There are those among the spectrum-market tradition who might be relatively uninterested in such matters of political theory. Some, most notably Levin, have approached the proposals of the marketplace-approach school as if it were purely a matter of practical economic effects: spectrum auctions conducted in such-and-such a way would have such-and-such an effect on AM radio station prices, and so forth. These questions are important, and continue to be explored in interesting ways, particularly now that the Clinton administration is showing interest in adopting some of the marketplace-approach policies for different practical and ideological reasons (such as using spectrum auctions to raise government revenue). But the principles that helped bring these theories into the policy arena need to be addressed in their own right. The marketplace approach can be reinterpreted as just another battery of regulatory techniques to add to the already existing supply that has been accumulating since the 1920s, but it did not originate that way. It began with a belief in the separability of rights from privileges, of law from politics, and the blind spots in the revised histories of the period belie the

persistence of that belief. Ultimately, the legitimacy of the marketplace approach rests on the belief that "stations" can and should be neatly separated from the government actions that create and maintain them.

So it is important to look at the development of the proposals that began, at least, as promises to construct a system of formal, government-free property rights in the spectrum. The earliest pieces were vague but made it seem relatively straightforward. The natural course to follow, it was said, is the creation of freely transferable spectrum rights, created in the courts under tort law, much like the law governing ownership of land. Spectrum users would be able to stake a claim to a part of the spectrum whose "boundaries" would be defined in terms of bandwidth, time, geographical area, and transmission power.[72] Spectrum owners would be able to sue anyone who caused interference in their territory in court and collect damages (or, in extreme cases, perhaps they would be able to prosecute for trespass), thus eliminating the need for FCC regulation. Owners would be able to freely sell or rent all or any portion of their spectrum in any way they please.

Significantly, the marketplace-approach theorists have been more likely to proffer economic theorems than Latin quotations; they have tended to couch their arguments more in utilitarian than in natural-rights models. So the focus is usually less on abstract justice than on "efficiency." A favorite example concerns unused UHF frequencies. Since the UHF band was first opened up for television in the 1950s, large chunks of it have gone unused. At the same time, shortages exist in other nonbroadcast areas, which indeed suggests that the spectrum is not being used optimally. Those inefficiencies would be corrected, it is said, by the creation of a market in spectrum. Those not in need of their spectrum, such as holders of unused UHF licenses who are having trouble making a profit in television, would sell it to the highest bidder, presumably those who had the greatest need for it. The market would do a better job of regulating than the government.

While it seems fairly obvious that the UHF spectrum could be better utilized, the question here concerns whether it would be better to reallocate it in the traditional manner or try to turn it into a marketplace. Implementing a spectrum marketplace is not as simple as it might appear at first glance. It has been pointed out, for example, that the multiple negotiations and legal activity required to create and maintain such a system would be extraordinarily complex at best.[73] Interference from a broadcast signal travels much farther than the signal itself, and two non-

72. DeVany et al., "Property System," 17–25.

73. The following discussion relies heavily on Levin, *Invisible Resource*, 91–104.

interfering signals can interact so as to interfere with a third. If interference were to be prevented purely by tort law, then it seems likely that within a short time most broadcasters in a given region (e.g., the Northeast) would be involved in either negotiations with or legal action against most other broadcasters in that region. If spectrum owners chose, as would be their right, to subdivide their channels, perhaps selling narrow slices for particular uses, the result would be a proliferation of transmitters that would only compound the problem. Furthermore, at the outset any spectrum user would be faced with great uncertainty about the likely behavior of other users. Will they sue for any interference generated? Will they generate interference themselves? Such uncertainty would be likely to retard exploitation of the spectrum, thus reducing the "efficiency" of its use. In the words of one economist, common law property schemes in the spectrum are limited by the fact that "[e]nforcement and transfer costs will be too high [because] the number of transacting parties is very large and the withdrawal of any single participant can prevent a satisfactory agreement."[74]

An even more telling problem concerns the role of broadcast receivers in such a system. Logically, if property is a matter of common law principles and not of political fiat, then owners of television and radio sets have a stake in the spectrum, too. In fact, a striking characteristic of broadcasting is that the audience provides the overwhelming bulk of the capital necessary for the broadcast system through their investment in radio and television sets. If one includes the audience in a property system, however, it would become an extraordinary source of inertia against the efficient reallocations that are supposed to flow from a market system. What would motivate set owners to cooperate (i.e., agree to buy new sets) simply because a broadcaster decided to adopt a new more efficient transmission method in order to sell off part of her frequency to others?[75] Faced with this dilemma, even the more extreme advocates of a property-rights system in the spectrum agree that including the literally millions of people that make up the potential audience of a typical broadcast signal as joint "owners" in a court-based property system is a practical absurdity.[76]

As a result, if one looks at their proposals carefully, one finds that the marketplace-approach theorists who set out in search of pure property begin to introduce some impurities. For example, the scholar who boldly began from the proposition that "there is no middle ground"

74. Ibid., 96.
75. Ibid., 103–4.
76. DeVany et al., "Property System."

between a government-regulated system and a "pure market system" came upon the dilemmas of receiver rights and concluded that, although there would be reason to include receiver owners in a system of spectrum property rights, the dilemmas associated with such a system would not be resolvable within any kind of neutral, objective method. "The regulation of radio interference," he concludes, "boils down to a matter of *whose* subjective preferences will prevail. The standards of science or technical and economic efficiency cannot provide us with an answer to this question. We can answer it only by discussing whose preferences *ought* to prevail."[77] Unless the politics of this author are unapologetically feudal, one must assume that the discussion that resolves these matters of "subjective preference" would take place in the democratic political arena. After setting out to purify the spectrum of politics, the analysis leads to a quiet acknowledgment of the inevitably arbitrary, political foundations that will determine the structure of the property system it advocates.

Perhaps to avoid being swept into such murky politicized waters, most property-rights proposals suggest something more likely to be of comfort to the broadcast industry: that audience members be excluded from the property system by legislation, on the grounds of practicality and by way of other corporate liberal-era precedents, such as the limitations of the rights of shareholders vis-à-vis management.[78] That this tactic of using government power to draw protective boundaries around big capital in order to exclude the majority of private, rights-possessing individuals in society is quintessentially corporate liberal, and more in keeping with the values of Herbert Hoover than of John Locke, is not generally discussed.

The point here is this: Once one has made practical compromises with the initial ideal of a purely rights-based system, what is to distinguish qualitatively the proposed system from the compromised one we have now? How is the use of legislation to exclude audience members, the vast majority of participants in the broadcast system who collectively have made the largest investment, qualitatively distinct from the 1920s tactic of using the "public-interest" clause in the process of creating the market in broadcast stations? Once such compromises are introduced, we are back to tinkering with the mixed system created in the 1920s, not creating an alternative to it.

In sum, the conceptual problem with contemporary property-rights proposals is that the more practical they become, the less distinct they

77. Mueller, *Telecommunications in Crisis*, 113.

78. DeVany et al., "Property System," 55.

are from the existing system. In the current system, after all, the FCC's role is determinate only with new or marginal channels, whose economic value is slight. Most of the economic value in the spectrum is located in large, established, major market stations, which are already available for market exchange and have been since the 1920s; even AVCO was able to make its purchase. Thus, although the new proposals may differ greatly from the current system in their specifics, they would not be likely to really remove the politics, that is, the inevitability of value choices that favor some over others, from the enabling conditions of private commercial broadcasting. The alternative systems would, in the end, still intermingle private and public interests; the dilemma of using government to limit government interference would remain.

Conclusion: The Inevitably Political Character of Spectrum Property

The system of legal restraint extended over the radio spectrum in this century has been indisputably creative, at least in the economic sense. The marketable broadcast station created by this legal regime is a linchpin of the American broadcasting industry, which is one of the great economic success stories of the twentieth century. The results have been just as indisputably restrictive. Along the way, the force of law was used to arbitrarily eliminate a universe of possible alternatives to the corporate-centered, commercial system we have today: nonlegal means of spectrum regulation, amateur radio operators, and nonprofit broadcasters were all brushed aside or marginalized.

The case of broadcast licenses would suggest that the legal realists are correct: private property is political. It is a shifting bundle of rights with no absolute content, and thus the search for a hard and fast line between private property and government privilege is fruitless. All of the various regulatory proposals from the AVCO rule to the spectrum auctions are simply attempts to alter the content of the bundle of rights that comes with a license. Some proposals grant more sticks in the bundle to broadcasters, others less, but they are all just variations on a theme. They all involve the use of government to create a system of private control over broadcast frequencies; they may ameliorate, but cannot eliminate, the contradiction of using government intervention to limit government intervention.

Morris Cohen was one of the first to assert that property has no specific content but is rather a shifting, flexible bundle of rights, a set of contingent decisions about who gets what in what circumstances, deci-

sions that are inevitably political.[79] Cohen and his fellow legal realists would have been unsurprised by the fact that American spectrum regulation has been political, that it has involved elaborate government action and the arbitrary exclusion of some groups at the expense of others. Nor would they have been surprised that this political activity had the effect of generating exchangeable commodities subject to marketplace forces and to interesting economic analyses. They would have seen the political character of spectrum regulation as consistent with the nature of property in general, not as the product of some exceptional condition such as spectrum scarcity or the requirements of public safety.

It is not surprising that neoliberal economists have resisted the implications of the legal realists' arguments. What is striking about the story of the property status of the broadcast license is that practically *all* participants in the debate have ignored the possibility that property is inherently political. The legal regime associated with broadcast licenses, this chapter has shown, is not the product of a simple "disintegration" of the concept of property in twentieth-century law. On the contrary, the concept of private property and the values associated with it have played a clearly visible, if contradictory, role in the regulation of broadcast channels. There is something of property in the decision to regulate in the first place, that is, to use legal force to divide the airwaves into bands and channels with access limited to certain individuals for certain purposes, as if radio frequencies were so many tracts of land. But the American system of regulation is also heavily inflected at many points, not only by the idea of the spectrum as a kind of territory, but also by the more specific vision of private property rights understood as proper limits to government action.

On the one hand, the broad faith in the value and justice of a system of "private enterprise" that has shaped regulation of commercial broadcasting throughout the century is propped upon the concept of private property. Private, for-profit entities have been favored by regulation at least in part because of the belief that creating and upholding boundaries between private ownership and government action nourishes a just and economically viable society. The practice of buying and selling government-licensed stations that originated in the 1920s seemed just and practical to regulators because of this belief. The same can be said of the decisions to refuse the navy's request for a monopoly of the spectrum in 1912 and to allocate broadcast channels in a way that favored large commercial operations in the 1920s. Subsequent efforts to limit the

79. Morris R. Cohen, "Property and Sovereignty," *Cornell Law Quarterly* 13 (1928): 8–30.

government's ability to interfere with the exchange of broadcast stations such as the 1952 amendments to the Communications Act or the 1982 elimination of the three-year rule follow the same general logic. And it seems likely that the FCC's extreme reluctance to invoke its powers of license revocation over the years also reflects a general respect for the principle of the autonomy of private property.

On the other hand, the concern for property, for protecting the boundary between government action and private ownership, has also played a role in generating many of the efforts to *limit* the propertylike character of the broadcast spectrum. The practice of regulating the airwaves in "the public interest" was itself less a decision to limit private ownership in broadcasting overall than it was a way to justify and make sense of the use of government powers to aid private ownership. By framing the licensing system as an exception to the rule of private property, the public-interest clause and its justificatory structure of technical necessity and the national interest helped maintain the meaningfulness of the rule itself. The clause upheld the belief in the coherence and value of the property/government boundary by couching the government's helpful reach across that boundary on the grounds that radio was a special case.

The same logic underlies the numerous efforts to limit the "private" character of the spectrum. The nonownership clause of the Communications Act was not introduced because of a decline in the faith in the coherence or value of private property. On the contrary, it was introduced because its authors *did* believe private property was coherent. They believed the boundary between government action and private property rights should remain uncompromised in order to prevent the granting of unfair privileges. If property is merely a shifting bundle of rights, however, then the privilege to use a channel, even in its most qualified forms, *is* a form of ownership; a blanket statement prohibiting ownership of broadcast licenses while granting use of them has little meaning. Similarly, the AVCO rule was not introduced on the grounds that the bundle of rights associated with a license should be limited in a particular way for particular policy purposes. Rather, it was introduced on the grounds that the public-interest and nonownership clauses of the Communications Act prohibited actions associated with traditional ownership, such as the direct sale of licenses. In other words, the AVCO rule assumed the existence and coherence of a traditional regime of private property, and sought to uphold the presumed boundary between that regime and government-issued broadcast licenses.

The irony of the situation is this. A belief in the principle of private property has not been abandoned in broadcast regulation; the belief

informs many of the diverse regulatory innovations introduced in the system over the last seventy years, as well as the system itself. But the vigorous pursuit of the principle of property has led to a series of dilemmas. The fact that our law simultaneously has forbid ownership of the airwaves and invited their purchase and sale for more than sixty years is only the most glaring of these. The quandaries also manifest themselves in the fact that the existing system and right- and left-wing objections to it all share the belief that it is somehow unfair to allow licensees to profit from a government bequest originally obtained for free. All sides in the debate presuppose some belief in a coherent division between government activities and those of private profit-making institutions, yet reach dramatically different conclusions about the proper direction of regulation.

Jennifer Nedelsky has argued that, in the construction and interpretation of the Constitution, the protection of private property against democratic infringement became the paradigmatic instance for defining rights as limits to state action. The case of private property thus came to permeate our thinking about government and democracy in general; the habits of thought that resulted have outlasted the centrality of property itself in our legal and political systems.[80] The case of broadcast licenses bears out Nedelsky's thesis. On a broad level of justificatory discourse, the metaphors of property have played and continue to play a central role in broadcast policy. On the level of day-to-day practice, however, the simple existence of broadcast licenses fundamentally blurs the boundary between government and private interests. Government rules about the behavior of licensees may have important and beneficial effects, but none of them, not even the AVCO rule, could eliminate the fact that private interests make money off a government-created legal entity. Similarly, no efforts to limit the ability of government to interfere with the behavior of licensees can eliminate the fundamentally enabling role of government in the process. Even in the most extreme schemes, at some point, arbitrary political choices such as eliminating the audience from the property system will have to be made. At the same time that the American system for licensing broadcasting is the product of the belief in private property, in sum, it strains that belief to the breaking point.

It is fruitless to argue about whether licenses should be treated more like a right or more like a privilege. Even if licenses do confer property

80. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990).

rights, even if those rights are indistinguishable from the rights that exist for traditional commodities, and even if the resulting economic effects can be usefully analyzed in terms of transaction costs, the rights so conferred nonetheless rely on, and thus are inevitably and properly subject to, political intervention.