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ROASTING THE PIG TO BURN DOWN THE HOUSE: A MODEST PROPOSAL*

STUART MINOR BENJAMIN†

This essay addresses the question whether one should support regulatory proposals that one believes are, standing alone, bad public policy in the hope that they will do such harm that they will ultimately produce (likely unintended) good results. This question can arise in many contexts. If one opposes a certain policy that will sound attractive to voters and/or legislators and would be popular in small doses but disastrous in large doses, one may decide to support the large dose, in the hope that people will soon realize their mistake. Or one may regard a set of proposed regulations as foolish and likely to hobble the industry regulated, but perhaps desirable if one believes that we would be better off without that industry.

I consider this question with respect to spectrum policy. One of the major impediments to greater spectrum liberalization is incumbents that likely are not the highest and best use of the wireless frequencies allocated to them. There is debate as to the desirability of spectrum rights for particular entities versus a commons model,[1] but there is no

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∗ With apologies to Jonathan Swift, who is much cleverer than I am. *See* JONATHAN SWIFT, A MODEST PROPOSAL (1729). As for the part before the colon, the Supreme Court has frequently noted that some regulations, particularly in the speech context, may have such far-reaching negative consequences that they amount to burning the house to roast the pig. *See, e.g.*, Butler v. Michigan, 352 U.S. 380, 383 (1957) ("The State insists that, by … quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."); Ashcroft v. ACLU, 535 U.S. 564, 604-05 (2002) ("In evaluating the overbreadth of [this] statute, we should be mindful of Justice Frankfurter's admonition not to 'burn the house to roast the pig.'" (quoting *Butler*, 352 U.S. at 383)); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127, 131 (1989) (invoking this quotation twice, for good measure); Reno v. ACLU, 521 U.S. 844, 882 (1997) ("In *Sable*, we remarked that the speech restriction … there amounted to 'burn[ing] the house to roast the pig.'" (citation omitted)).

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1. *Compare* Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J. L. & TECH. 287 (1998) (envisioning new networks that largely avoid interference, and contending that such networks will not be created by private actors, such that the most economically efficient option is for the government to create a wireless commons), *with* Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007 (2003) (noting that either the

real debate that our current system of spectrum rights keeps some lower-valued uses on wireless frequencies at the expense of higher-valued uses. This phenomenon flows from legal restrictions on the services that licensees can offer. Most existing licensees are permitted to offer a small number of services. Other services might be more valuable, but they are not allowed to provide them.[2]

Unsurprisingly, incumbents push for greater flexibility in the services they can offer (and, ideally, the ability to subdivide and sell or lease their spectrum rights). But while incumbents want greater flexibility, what they resist mightily (and understandably) is any change in spectrum policy that would reduce or eliminate their spectrum rights. Meanwhile, the general public has an interest in spectrum rights being devoted to their highest valued uses. That could be achieved by giving incumbents greater flexibility. But if such flexibility seems politically unpalatable, another way of moving to higher valued uses would be for the government to reallocate spectrum to new uses that the public would value more highly. And a simple way of achieving that would be to reclaim spectrum devoted to lower valued uses from the existing licensees, to allocate it to higher valued uses, and then to distribute (ideally, via auction[3]) spectrum rights to a new set of licensees.

This last idea alarms incumbents, for the obvious reason that they would lose something of value. And, as it turns out, incumbents have been successful in opposing any large-scale changes in spectrum allocation. The main reason for their success is that the wealth they derive from their control of valuable frequencies not only gives them an incentive to hold onto that spectrum but also gives them the funds to be effective lobbyists. Indeed, lobbyists for spectrum incumbents have done a good job of framing the issue. They have argued against possible changes to spectrum allocation by questioning why the government is trying to get rid of them. This line of argument privileges the status quo, of course—that is its essence, and purpose. The result is that the hurdles to changes in spectrum allocation are considerable. There have been

government or a private party will have to create protocols for the proposed networks, that private actors will create these networks if they are as attractive as Benkler suggests, and that the disadvantages of private control are outweighed by the disadvantages of public control).

2. *See* Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1 (2002).

3. The literature on auctions is immense. There are tradeoffs involved, but the consensus is that, among methods of assigning licenses to particular licensees, auctions are the best option. *See, e.g.*, Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87, 107-08 (1997); Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53 (1999); Evan Kwerel & Alex D. Felker, *Using Auctions to Select FCC Licensees* (FCC Off. of Plans and Pol'y, Working Paper No. 16, 1985), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp16.pdf.

changes in spectrum allocation, and changes will continue to occur, but what is remarkable is how little change there has been.

This matters a great deal to information policy. Simply stated, creating new wireless services, expanding existing valuable wireless services, and experimenting with spectrum commons are made more difficult by the paucity of available spectrum.

In looking at current users of spectrum, two big ones jump out—over-the-air television broadcasting and government. For decades, broadcasting was the central use of spectrum, and the only one that was widely profitable. That has changed with the rise of wireless services like cellular telephony and the rise of alternatives to broadcast for the receipt of television signals, in the form of cable and satellite television. I have written elsewhere about the desirability of moving all, or at least most, over-the-air television broadcasting off the spectrum, and I will not belabor those arguments here.[4] But a few points bear emphasizing. First, 86% of American households subscribe to cable or satellite.[5] Second, the main advantage of transmission via spectrum versus transmission via wire—mobility—is largely inapplicable to broadcast television. The percentage of televisions that are in motion, watching over-the-air broadcast signals, and unable to access other means of receiving those signals (such as satellite) is tiny. To put the point differently, very few people watch broadcast television in a moving vehicle that does not have satellite reception. Third, television broadcasting occupies hundreds of megahertz of "prime beachfront" spectrum—frequencies that can be utilized for a wide range of uses, including many forms of point-to-point communication. The value of that spectrum is enormous. The revenue generated by selling the spectrum would depend on auction prices, of course, but the estimated range is in the hundreds of billions of dollars.[6] And because service providers could not capture all the value of the spectrum, the value to citizens—the consumer surplus created by the new

4. *See* Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country,* 46 WM. & MARY L. REV. 439 (2004).

5. Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Annual Report*, 21 FCC Rcd. 2503, app. B, tbl. B-1 (2006).

6. *See* Evan R. Kwerel & John R. Williams, Changing Channels: Voluntary Reallocation of UHF Television Spectrum vii (FCC Off. of Plans & Pol'y Working Paper Series, Working Paper No. 27, 1992), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp27.pdf. Another estimate of the auction value of the broadcast spectrum, based on the auctions for spectrum for third generation wireless services, is $367 billion. *See* Michael Calabrese, Battle Over the Airwaves: Principles for Spectrum Policy Reform 4 (New Am. Found., Working Paper, 2001); Thomas Lenard, *No More Delays on Digital TV*, C|NET, May 4, 2004, http://news.cnet.com/2010-1040-5203382.html.

services—would far exceed the auction revenue.[7]

There would be costs to ending television broadcasting. One of these need not (and likely would not) be the demise of the companies that currently produce broadcasting, or a diminution in their programming. As I discussed in an earlier article, the very likely result would be that broadcasters would become cable and satellite channels alongside the existing cable and satellite channels—which is the status that broadcasters already occupy for the 86% of homes that rely on cable or satellite.[8] But there would be a cost in the form of the dislocation of those who rely on broadcast television and cannot afford the alternatives. There is, however, a fairly easy way to shift this cost to the government for those people who are too poor to afford cable or satellite: the government could pay for satellite dishes or cable hook-ups and a basic set of channels (slightly better than those individuals were getting via broadcast) for less than $10 billion.[9] Simply stated, the costs of subsidizing cable or satellite service for the 14% of households that do not subscribe to cable or satellite but want television service would be a small fraction of the value of broadcast frequencies, as reflected in the value of those frequencies at auction once they could be used for any service.[10]

It is possible that broadcasting is the highest and best use of some of the spectrum, and thus that at least some spectrum licensees that could offer any service would still choose to offer broadcast. That is not an argument in favor of keeping so much spectrum devoted to broadcasting, however: we should still leave the choice to spectrum licensees, so that they can make their own determinations about the highest valued use of their spectrum—whether broadcast or otherwise. But this does underscore the fact that when I talk about the demise of broadcasting, I am doing so on the assumption that broadcast is not the highest valued use of the spectrum. My real complaint, though, is not with broadcasting *per se*, but with spectrum allocation rules that prohibit flexibility in the use of the broadcast spectrum.

In any event, even if broadcasting is the highest valued use of at least a portion of the spectrum, that will almost certainly end soon. The value of spectrum for over-the-air broadcasting will decrease as a result of two basic trends: first, the percentage of households relying on over-the-

7. *See* Thomas W. Hazlett, *The U.S. Digital TV Transition: Time to Toss the Negroponte Switch* 21 (AEI-Brookings Joint Ctr. for Reg. Studies, Working Paper No. 01-15, 2001) (stating that the annual consumer surplus from new wireless services on broadcast spectrum could be as high as the total auction bids).

8. *See* Benjamin, *supra* note 4, at 496.

9. *See id.*; Hazlett, *supra* note 7, at 16.

10. *See Benjamin*, *supra* note 4, at 497-98.

air broadcast will likely continue to decrease, as people subscribe to cable or satellite; second, the percentage of people watching traditional over-the-air networks will almost certainly decrease, continuing a steady decline that began more than 30 years ago.[11] Indeed, the interesting question for the future is what percentage of users will move away from television networks (whether broadcast or cable/satellite) toward other forms of entertainment, thus accelerating the decline of broadcast. That is, broadcast has long been receiving a declining share of television viewership, but this may combine with sharp declines in television viewership overall to really hurt broadcasting. All these forces will, I think, ultimately lead the holders of spectrum licenses for broadcast to conclude that there are higher and better non-broadcast uses of their spectrum rights.

If the above is correct, then the government could simply allow broadcasters to offer any service on their spectrum (and subdivide and lease their spectrum to third parties as they see fit), and broadcasters would likely move away from over-the-air broadcast and to new services. The value of other services on frequencies currently devoted to broadcasting would be so high (and so much higher than the value of broadcasting) that an entity free to offer any service would choose something other than broadcasting, and make billions of dollars doing it.[12] This would be an enormous windfall for broadcasters (and, concomitantly, deprive the government of revenues that it would receive if it auctioned those frequencies), but perhaps that is a price worth paying to free up the spectrum.

For better or worse, such a complete opening of broadcast spectrum to other uses is unlikely to occur. Even more unlikely is the prospect that, in the next few years, Congress will force broadcasting off the spectrum. I think it is likely that broadcasting will shrivel, and thus leave the spectrum, in 20 years. But that is a long time to wait.

This sets up the question for this essay: does it make sense to support broadcast regulations that seem undesirable on their own terms but that may result in such harms to broadcasting that broadcasting leaves the spectrum sooner than it otherwise would? This question has particular salience in light of the Federal Communications Commission's

11. *See* Benjamin, *supra* note 4, at 482 ("In the 1970s, over 90% of viewers watched one of the then-three major broadcast television networks (ABC, CBS, and NBC). Since that time, cable and satellite television have changed the television landscape dramatically. The broadcast networks' share of television viewers has steadily declined as the cable channels' share has increased. In fact, cable channels now have a majority of the audience share: the now-seven broadcast networks combined garner less than a 50% share of hours viewed.").

12. And in the unlikely event that they freely chose to offer broadcasting on at least some of their frequencies, we would know they were doing so because they concluded that this was its highest valued use, not because the government's allocation rules deprived them of options.

January 2008 *Report on Broadcast Localism*[13] that would effectively require broadcasters to provide locally-oriented programming and to comply with new administrative regulations (including advisory boards reminiscent of the ascertainment requirements that the Commission jettisoned in 1984[14]) that could prove fairly costly. But the larger question involves a host of proposals that would raise broadcasters' costs or reduce their potential income. Should we welcome new regulations on broadcasters that will make broadcasting unprofitable?

My contrarian take is that the answer will often be "yes." Some regulations that would be undesirable standing on their own will be desirable once we factor in the degree to which they will hasten the demise of over-the-air broadcasting.

It is worth emphasizing that I am not talking about regulations that impose costs but have even greater benefits on their own terms, because such regulations are desirable in their own right. My focus here is on regulations that have greater costs than benefits when considered in isolation, but which are ultimately desirable because they have the added benefit of leading broadcasting's frequencies to be opened up sooner. Some such regulations will, on their own terms, be near-misses in terms of a benefit/cost analysis. That is, they will have benefits, by leading to better programming or to some non-programming benefit (e.g., a more fair distribution of society's resources), but those benefits will be outweighed by their costs. Some regulations will impose costs and have no benefits because they are ineffectual. Finally, some regulations will impose costs on broadcasters and not only have no benefits but also impose additional costs in their effects (e.g., make programming worse). My point in this essay is that the benefit of pushing broadcasting off the spectrum may transform many of these regulations into desirable ones.

This highlights a very important consideration: if a regulation would tend to entrench broadcasting's place on the spectrum, then the regulation will not help to free up the spectrum and should be avoided. Hurting broadcasters is simply a means towards the goal of opening up wireless frequencies, so a regulation that frustrates this goal hurts broadcasters without achieving any countervailing benefit. The form of entrenchment to which I am referring is regulations that increase the benefits to government officials of having over-the-air broadcasting. This is a straightforward principal/agent problem. Government officials (and in particular members of Congress) have reasons to want to preserve

13. Broad. Localism, *Report & Notice of Proposed Rulemaking*, 23 FCC Rcd. 1324 (2008); *see also* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Report & Order*, 23 FCC Rcd. 1274 (2008).

14. Revision of Programming and Commercialization Policies, *Report & Order*, 98 F.C.C.2d 1075, ¶ 45 (1984).

broadcast television that have nothing to do with what their constituents want.[15] The lifeblood for elected officials—and one of the biggest advantages of incumbency—is free advertising, for example coverage of an official's visits to local community events.[16] The easiest and most effective way for members of Congress to reach their constituents without having to pay for advertising is to appear at a community event that is covered by the local television station. Constituents have little reason to value this coverage, but politicians do.[17] Because the interests of government representatives and their constituents are not aligned in this respect, we have reason to expect that government actors will aim to protect broadcast television beyond what their constituents would want.[18] Indeed, the history of broadcast regulation is characterized by coziness between government actors and incumbent broadcasters.[19] This has led to government policies that have created barriers to entry for potential competitors and given valuable goodies to broadcasters.[20]

The possibility of entrenchment suggests a classification scheme for broadcast regulations that impose costs and/or reduce revenues: We should look to see what impact, if any, the regulations would have on broadcasters' behavior, and what impact they would have on government officials' desire to keep broadcasting alive because broadcasting benefited them.

Some specific applications will help to flesh this out and to illustrate the degree to which these considerations can point in different directions. Many people would regard free airtime for political candidates

15. *See* Charles Platt, *The Great HDTV Swindle*, WIRED, Feb. 1997, at 57 ("So long as broadcasting is protected from the free market by legislators who depend on TV to get themselves reelected, Congress will continue giving broadcasters special treatment and favors, and consumers will suffer.").

16. *See* Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 973 (1988) (stating that incumbents are generally better known than challengers because of free advertising, including local television coverage of the incumbent).

17. *See, e.g.*, Stephen Labaton, *F.C.C. Chief Talks of Frustration and Surprise*, N.Y. TIMES, Sept. 22, 2003, at C6 (noting that local broadcasters "have considerable influence because they are in every Congressional district and control most of the television and radio outlets that are vital to political life....").

18. Polling regarding the national ownership cap supports this point. *See* Matthew Rose, *TV Networks Join Forces to Fight Backlash over Station Ownership*, WALL ST. J., Sept. 2, 2003, at A1 (noting a survey showing "that only 11% [of respondents] believe network ownership of their local station is a bad thing and 68% think the market should decide whether that should happen or not" and quoting a pollster as saying "I have never seen a situation where politicians have a greater disconnect from the people they represent").

19. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING (1994).

20. *See* Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53, 62-63 (1999) (suggesting that "regulators' real interest in perpetuating the existing spectrum administration stems from their desire to maintain the steady flow of political rents generated by control over spectrum.").

as a positive change in programming.[21] It would also be costly for broadcasters, and if the costs were high enough it would satisfy the criterion of having costs exceeding its benefits. But it is also likely to exacerbate the principal/agent problem, as it would lead politicians to become even more desirous of keeping broadcasting alive than they already are. Thus beyond its benefit/cost ratio standing alone, it would have the additional cost of making broadcasters' continued use of the spectrum more, rather than less, likely – a step in the wrong direction.

The same might be the case for the revival of the personal attack and political editorial rules.[22] Incumbents know that their incumbency entails a huge advantage (incumbent re-election rates for the House have averaged 95% since 1990), and so they likely regard the personal attack and political editorial rules as a net benefit.[23] Yes, this means that their opponents will have equal time if attacked. But it also means that the incumbent can respond to an attack, and a sharp attack on a politician is one of the relatively few phenomena that can significantly change the dynamics of a political race. Since the incumbent starts as the presumptive winner of a given election, defanging such a game-changing possibility should benefit an incumbent more often than it hurts her. So the imposition of personal attack and political editorial rules might further entrench over-the-air broadcasting, creating an additional cost of such a regulation.

One possible objection to my proposal is that there might be some regulations that are so inefficient that the prospect of hastening the departure of broadcasting from the airwaves will not be sufficient to justify them. After all, my point is that the demise of over-the-air broadcasting is a benefit that should enter into our regulatory calculus, but there is no guarantee that that benefit will outweigh the cost of a regulation that would otherwise be deadweight loss. My answer is that

21. *See, e.g.*, CTR. FOR RESPONSIVE POLITICS, BEYOND THE 30-SECOND SPOT: ENHANCING THE MEDIA'S ROLE IN CONGRESSIONAL CAMPAIGNS 42-65 (1988); JOHN ELLIS, NINE SUNDAYS 18 (1991); NEWTON N. MINOW ET AL., PRESIDENTIAL TELEVISION 159-66 (1973); Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1100-09 (1996).

22. These were rules mandating that broadcasters provide airtime for responses to any "personal attacks" or "political editorials" that they broadcast. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (rejecting a First Amendment attack on the personal attack and political editorial rules); STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 224-227 (2d ed. 2006) (discussing the "tortured path" of ultimately successful attempts to repeal these rules).

23. Ctr. for Responsive Politics, Reelection Rates Over the Years, http://www.opensecrets.org/bigpicture/reelect.php?cycle=2006 (showing that the incumbent reelection rate for the House of Representatives since 1990 has been 95% (and the average has been below 96% in only one of the last five election cycles), whereas Senate reelection rates since 1990 have been a comparatively low 88%).

we should expect a linear relationship between costs imposed on broadcasters and the likelihood of them abandoning over-the-air broadcasting. Every dollar of additional costs for broadcasters is one less dollar of profit, and thus reduces the attractiveness of over-the-air broadcasting as a business model. And don't forget the pot of gold at the end of the rainbow: once broadcasting leaves the spectrum, much more valuable services can utilize those frequencies.

This does suggest one last element of desirably inefficient regulation: it should impose costs on broadcasters but be inexpensive for the government to administer. Government costs are not only deadweight losses but also do not hasten the demise of broadcasting (except insofar as they lead some regulators to want to push broadcasting off the spectrum to eliminate those government costs – an incentive in which we can have little confidence, given the fact that government regulators do not bear those costs). So the most desirable form of regulation is one that does not exacerbate the principal/agent problem and imposes significant costs on broadcasters but not on the government.

Where should this lead us, in terms of broadcast regulation? The most obviously desirable regulations are probably those that are pure deadweight loss—regulations that cost broadcasters significant amounts of money but have no impact on their behavior. This category would include onerous record-keeping requirements, ascertainment requirements, etc. These are unlikely to have any impact on programming, and thus will likely be pure cost.[24]

Regulations that affect broadcasters' behavior will be trickier, because the attractiveness of the change in the broadcaster's behavior will often be in the eye of the beholder. But at least some regulations would produce arguably positive changes in broadcasters' behavior that would not seem to increase the principal/agent problem. One example is children's television. The Federal Communications Commission effectively requires three hours of children's programming per week, through its processing guidelines.[25] Why not increase that to 15 or 25 hours per week? There will be tons more programming aimed at educating children, and it will reduce the viewership of broadcasting and thus hasten the demise of broadcasting – what I would regard as a win-win.

24. In rejecting the original ascertainment and record-keeping rules, the FCC found that those rules had no real impact on programming, and instead were pure costs for broadcasters. *See* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report & Order*, 98 F.C.C.2d 1076 (1984).

25. *See* Policies & Rules Concerning Children's Television Programming, *Report & Order*, 11 F.C.C. Rcd. 10,660 (1996).

Does this reasoning also apply to allowing uses, users, or licensing regimes that one regards as bad public policy onto the spectrum in the first place? The answer is no, for the simple reason that the power of incumbency is strong. This is due both to the anchoring effect and, more importantly, the fact that incumbency creates a constituency that will lobby fiercely to keep things as they are. Such lobbying can be such a powerful impediment to change that it seems foolhardy to create new incumbents in the hope that the decision will be sufficiently disastrous that it will overcome the lobbying power of the newly created incumbents.

Do my arguments apply to government spectrum? No, because there is a simple, and I believe realistic, way for government officials to properly value spectrum and thus use it more efficiently. The incentive problem is particularly large for government spectrum: Government officials have a great incentive to keep control of as much spectrum as possible, and no meaningful incentive to relinquish any of it. And there is no obvious future impetus for the government to relinquish. The forces at work are fairly straightforward. If government agents are unable to communicate effectively over the airwaves at some future critical point, the officials in charge of the government's spectrum will be blamed. Imagine the reaction if there were a repeat of the communications difficulties that occurred for first responders at the World Trade Center after the planes crashed into the World Trade Center on September 11, 2001.[26] The public would be frustrated, and they would be incensed if they heard that a government decision to relinquish some spectrum contributed to the problem. Meanwhile, the opportunity cost of underutilized spectrum is completely opaque – the public does not recognize the costs and government officials have no incentive to recognize them. A government official who decides to relinquish some of her agency's spectrum rights receives no rewards. But all of this leads to an obvious solution, namely that the opportunity cost of spectrum be included in agencies' budgets, so that government agencies' consumption of spectrum would be as costly to them as their purchase of tangible goods. Once we do that, we should expect government officials to use spectrum no less efficiently than they use cars, buildings, etc.

Returning to the focus of this essay, the calculus I am advocating is fairly straightforward: when considering the costs and benefits of a given regulatory regime, our calculation of the benefits should include the hastening of changes in spectrum rights that would create billions of

26. *See* Jim Dwyer et al., *9/11 Exposed Deadly Flaws in Rescue Plan*, N.Y. TIMES, July 7, 2002, at A1; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 297-311 (2004).

dollars in consumer value. There is nothing terribly radical about such a calculation. Costs and benefits can take a variety of forms. The point here is that what might seem like a cost (the demise of broadcasting) will have significant benefits (the transition of the current broadcast spectrum to other uses). The result is that regulations that might seem inefficient, standing alone, likely will have benefits that exceed their costs once we take into consideration the benefit of putting spectrum to a higher valued use more quickly.

Am I serious in writing all this? Not entirely, but mostly. I do think that society would benefit if the wireless frequencies currently devoted to broadcast could be used for other services, and the first-best ways of achieving that goal may not be realistic. I am proposing a second-best – a fairly cynical second-best, but a second-best all the same. I would prefer not to go down this path, but if that is the only way to hasten the shriveling of broadcast's spectrum usage, then it is probably a path worth taking.

But the larger mission of this essay is to highlight another point – namely the mistake entailed in devoting any significant set of wireless frequencies to broadcasting. The costs of that devotion are so great that they justify, in a benefit/cost analysis, measures that impose deadweight losses on broadcasters as a means of pushing broadcasting off the spectrum. If that is so, then we should prefer a transition toward greater flexibility in spectrum usage without having the considerable costs entailed in slowly choking off the profits of over-the-air broadcasting. Promulgating regulations that impose deadweight losses will hasten the movement of broadcasting off the spectrum, but the process will still take years and thus impose prolonged transition costs. If we could transition to more valued uses of the spectrum cleanly and quickly, we would be better off. We would have the same benefits and lower costs. This transition could occur in a way that would make broadcasters very happy (conferring value on them by giving them greater flexibility in the spectrum usage) or ways that might not make them happy (requiring them to pay for greater flexibility and/or assigning their frequencies to other users), but any of these outcomes would be preferable to the slow transition that inefficient regulations would entail.

There are some situations in which a slow, measured approach is ideal. Spectrum policy is not one of them. Opening up broadcast spectrum to other uses will create enormous value. One way or another, we need to hasten that process. Spectrum regulators of the world, unite! You have nothing to lose but your jobs.