Dean Krattenmaker’s Road Not Taken:
The Political Economy of Broadcasting in the
Telecommunications Act of 1996

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I will spend little time criticizing Thomas Krattenmaker’s article, because, in general, he has done a very good job. One who is to write a comment on a well-done piece has two choices. The commentator can nit pick over details or use the well-done article as a starting place for further work. I choose to do the latter. In particular, I want to use footnote 45 as the jumping off point. It reads, in part:

I am speaking here, of course, of the 1996 Act as it will be described in law, which requires that a public-regarding purpose be articulated as the basis for the statute . . . . Outside courts of law, many better (or more interesting) ways to analyze the Act might be employed. For example, one might compare the sources and amounts of political action committee (“PAC”) donations with the final provisions in the Bill. Senators and Representatives may have voted for the Act out of a conviction that this was the best way to maximize their PAC contributions, their chances for reelection, or their likelihood of immortality, but these are beside the point of this article.

In this comment I will take the path that Dean Krattenmaker rules out—political economy. I will attempt to describe some of the portions of the Telecommunications Act of 1996¹ (“1996 Act,” “new Act”, or “Act”) that deal with broadcasting in terms that one might not be able to use in a court of law, but which seem to me to give a richer account of what happened.

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I. THE ORIGINAL DEAL

In a previous article Thomas Hazlett\textsuperscript{2} described in detail the nature of the deal between broadcasters and politicians. This deal, originally forged in the Radio Act of 1927,\textsuperscript{3} was modified a bit by subsequent legislative and administrative practice, and ratified by the courts. I will distill and summarize the deal here to establish the baseline to which the Telecommunications Act of 1996\textsuperscript{4} should be compared. The deal will be divided into two parts: (1) the stuff for broadcasters; and (2) the quid pro quo for politicians.

A. Benefits for Broadcasters: "Free" Spectrum Protected from Competition

There are a large number of people who well recognize that the broadcasters function under a very splendid monopoly protection for their use of a particular section of the spectrum. If this section of the law or [Fairness Doctrine] regulations were to be repealed, I would be strongly moved to perhaps test their dedication to competition by offering provisions to the law which might necessarily either deal more fairly with renewals or something of that kind, or to deal perhaps with the issue of perhaps going so far as requiring payments for the use of a portion of the spectrum by broadcasters, or perhaps simply eliminating the monopoly under which they function so splendidly under the protection of a broad federal mandate which ensures them in their ability to enjoy splendid financial returns on the use of a public resource.

—Cong. John D. Dingell, Chairman, House Committee on Energy and Commerce\textsuperscript{5}


\textsuperscript{5} Broadcasters and the Fairness Doctrine, 1987: Hearings of the Subcomm. on Telecomm-
Broadcasters wanted two basic things. First, they wanted the use of the spectrum without charge. Second, they wanted protection from competition. In the Federal Radio Act of 1927 and accompanying administrative actions by the Federal Radio Commission (FRC), broadcasters got both items. The broadcasters were to be granted “free” licenses by the FRC, later the Federal Communications Commission (FCC or Commission), and very few such licenses were to be granted.6 The artificial scarcity created by the federal agencies made broadcasting licenses very valuable. By charging no up-front fee for the license, the agencies allowed broadcasters to earn “splendid financial returns on the use of a public resource.” But because the licenses were to be renewable, the broadcasters were given incentives to be extremely attentive to the desires of the FRC and FCC.

B. Benefits for Politicians: “Good Behavior” by Broadcasters

Congresspersons wanted and got an electronic press that would, in the main, not interfere with their re-election. Such a press needed to be a bit tame—one that would neither stir up too much political opposition, nor one that would shock or offend the great listening populace very much. To guarantee such a press, particularly in the shadow of the First Amendment, required some ingenuity. The response was, indeed, ingenious.

First, the administrative system did not give broadcasters title to spectrum. Instead, broadcasters received only licenses of limited terms (originally three years) that had to be renewed to allow continued operation. The administrative body, first, the Federal Radio Commission, and later, the Federal Communications Commission, would decide whether or not to renew the broadcaster’s license. From the start, the content of the broadcaster’s programs was a factor considered by the administrative agencies when deciding whether to renew (or decline to renew) a license. Note that this administrative system ensured that broadcasters would have continuing, intense interest in the substantive

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preferences of the administrative agency. If the agency would refuse to renew licenses of broadcasters that programmed particular content, the broadcasters would have to eschew that sort of material.

Fortunately for broadcasters, there were two ways of figuring out what to do. First, the FRC and the FCC were political creatures, created and funded by Congresspersons who had vital interests in the agencies' operations. If you figure out what Congresspersons wanted, you could not be far from the desires of the agency. Second, the agencies made their preferences explicit, through rulemaking and case-by-case adjudication.

1. Extremist Speech

First, the FRC and the FCC have always been deeply involved in regulating the ways in which broadcasters can "take sides" in politics. At first, the obvious way to ensure that powerful broadcasters did not destabilize the status quo (that is, fail to help reelect incumbents) was to prohibit broadcasters from editorializing, which is exactly what the agencies did. Extremist stations were either taken off the air or threatened into relative blandness. Initially the FCC prohibited editorializing. Then, in 1949, the Commission reversed course and allowed editorializing, but required that the editorials be fair. Requiring fairness ensured that time given to extremist positions would be costly, for all mainstream points of view would need to be covered. Further, the fairness doctrine was developed. This doctrine required that stations cover controversial issues of public importance, and give reasonable opportunities for the presentation of contrasting viewpoints when covering such issues. However, the doctrine was implemented in a way that ensured a deadening of public discourse, and also tended to exclude non-mainstream viewpoints. In this way the public got a bit of public

9. See, e.g., Trinity Methodist Church, South v. Fed. Radio Comm., 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 (1933) (denial of renewal of station license on the ground that the public interest would not be served by granting the application).
14. Id.
affairs programming, but a very centrist version of public affairs that would be unlikely either to offend the vast majority of voters’ sensibilities or to suggest much in the way of new political ideas.

2. *Indecent Speech*

Congress also gave explicit instructions to avoid offending voters’ sensibilities in other ways. "Obscene, indecent, or profane" broadcasting was made a crime,15 and enforcement was left with the FCC.16 Although the prohibition was made explicit in the statute and implementing regulations, this was probably not necessary in the early years of broadcasting. Attentive broadcasters, using valuable temporary licenses in protected, oligopolistic, markets would have been unlikely to offend either their political benefactors or their listeners with indecency. When radio broadcasting became less concentrated, due in part to the development of the FM band, it became worthwhile for radio broadcasters to serve minority tastes. Thus, starting in the 1970s, the FCC had to intervene directly to keep broadcasting from offending what were, at times, majority tastes.17

3. *Political Broadcasting*

Congress and the FCC have also promulgated a number of rules regarding political broadcasting, most of which are designed to ensure the appearance of a fair process without destabilizing incumbency. For example, 47 U.S.C. § 312(a)(7) guarantees candidates for federal elective office reasonable access to broadcasters’ signals.18 A licensee who refuses to take a paid political ad for a Congressional candidate does so at his peril.19 Moreover, if one candidate gains access, other candidates must be given access on the same terms.20 The FCC, however, does not

17. Id.
18. "(a) Revocation of station license or construction permit. The Commission may revoke any station license or construction permit — (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312 (a)(7) (1994).
19. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 392-93 (1981). However, the opinion indicates that if the licensee has sufficiently good reasons for doing so and acts in good faith, he can escape liability. Id. at 390.
20. 47 U.S.C. § 315 reads in part "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford
require that broadcasters give free time to candidates who cannot afford to take advantage of the same terms.21 In other words, if a well-funded candidate for Congress buys a spot, and a poorly-funded competitor for the same office cannot afford to buy a spot on the same station at the same price, the broadcast station need not provide free time. This obviously preserves the advantage of well-funded candidates. Because incumbents tend to be better funded than challengers, the advantage tends to work in favor of incumbents.

When the operation of one of these rules threatened to destabilize incumbency, Congress changed the rule.22 The “equal time” provision of § 315 had been interpreted to apply to candidate appearances on regular news shows.23 Because incumbents appear on the news far more than do challengers, this interpretation would have greatly increased the rate at which challengers had to be featured, and might lead broadcasters to cover newsworthy incumbents less frequently. The net result would be to equalize the amount of “free” publicity that incumbents and challengers garnered from broadcasters. To avoid this outcome, Congress amended § 315 to exempt news coverage of candidates and other similar free coverage.24

Broadcast stations also had to be the right “size” in order to give incumbents and broadcasters the incentive to take advantage of the rules described above. In brief, broadcasters had to cover areas that looked somewhat like Congressional districts or states (for Senators). Such coverage allowed incumbents to buy time without paying for a lot of listeners who were not voters in the district or state. Further, such coverage gave broadcasters incentives to cover the incumbents on news shows, because the incumbents would be of interest to the viewers. These incentives optimized the incumbent’s advantage.

The FCC responded by limiting the power of radio broadcasters to 50 Kw, thereby limiting the signals’ reach.25 In addition, stations were

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located in virtually all sections of the country. When the Federal Radio Commission erred politically by licensing almost all of the radio broadcasters to the highly populated areas, Congress intervened.

Concerned about the paucity of stations in the South and West, and fearing that the spectrum would become monopolized by stations located in the major cities . . . Congress in 1928 amended the Radio Act to require the FRC to equalize, as nearly as possible, the number of stations, their power, and time of operation among five zones into which it divided the country. Further, the stations allocated to each zone were to be distributed evenly among the states in that zone.26

4. *Pork Barrel*

Congressmen also wanted something of material value for their districts. The value could be derived in several ways. First, a local broadcasting station could be a source of jobs for the community. A broadcasting station must hire people, from station manager to janitor, who will work in the district and spend their paychecks locally. In addition, to encourage broadcasters to hire local on-air talent, the FCC required broadcasters to air "local, live" shows.27 Second, because broadcasters' coverage areas were crudely tailored to local district size, local merchants could efficiently advertise their local goods and services to local consumers. The result would be a more vibrant local economy. Thus, there was an additional reason for the FCC to limit the reach of broadcasters' signals.

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The list of regulatory items that can best be explained through political economy could go on for many pages. As the recent deal to implement the Children's Television Act of 199028 by requiring three hours per week of "educational" television shows, the list will likely keep growing. But rather than turn the crank on the political economy machine for days on end, I will stop here and point out merely that the Congress wanted a lot and, for the most part, got what it wanted.

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26. *Id.* at 163.
27. This requirement has been dropped. See Ginsburg, *supra* note 25, at 171. [Reprinting Federal Communications Commission, Public Service Responsibility of Broadcast Licensees (1946)].
II. STUFF HAPPENS

In the past twenty years several changes in the law and economics of broadcasting have altered the value of the deal to both broadcasters and Congresspersons. In this section I will describe some of these changes and the attendant alteration in the political and economic value of broadcast regulation.

A. New Entry

The phenomenal growth of cable television in the past twenty years has introduced a hitherto unimaginable degree of competition for broadcast. The new competition produced two effects. First, the increased competition has reduced (a bit) the value of VHF television licenses. The prime time market share of the big three over the air networks (ABC, NBC, CBS) has fallen from over 90% to under 60%. Affiliation is, as a consequence, worth less. The fractionation of the audience reduces, in general, the value of VHF licenses. This marginally reduces the broadcasters’ incentives to comply with the rules. Second, and perhaps more important, cable networks were free of many of the content controls imposed on over-the-air broadcasters. This freedom allowed cablecasters to present levels of sex, violence and language in their programming that broadcasters had never dared transmit. When a significant segment of the viewing public migrated away from over-the-air networks to cable nets, the traditional broadcasters had little choice. In order to compete, the broadcasters changed their programming, increasing the sexual and language content somewhat. The new programming, however, offended significant numbers of viewers (and voters), thereby reducing the value of the deal to politicians. Radio, which saw a huge number of new stations on the air since the 1970s, also increased the amount of sex talk in an effort to snare listeners. Furthermore, the Internet, a wireline type competitor of both cable television and broadcast, has started to provide large amounts of material, includ-

29. See Neilsen Media Research, People’s Choice: Ratings According to Neilsen, Aug. 19-25, Broadcasting & Cable, Sept. 2, 1996, at 29 (showing that the shares for ABC, CBS, and NBC were, respectively, 16%, 15%, and 20%).

30. In contrast, UHF licenses, which previously had to labor under the disadvantage of poor reception, look as good as VHF stations on cable. Their value may have been enhanced.

31. The value of the licenses remains high enough, however, to ensure sufficient compliance.
ing sex, violence, and political extremism, that many find offensive. These developments further reduced the value of the old political deal to Congress, and created a demand for more direct action.

B. *Leaning Left*

From the 1970s to the present, broadcasters’ coverage of political issues, including elections, has leaned a bit toward the Democratic Party. This may have been in reaction to Watergate, or it may say something about the sort of person who is attracted to broadcasting, either as an owner or as a journalist. But whatever the reason for this tilt, it has increased the value of the deal to Democrats and reduced it to Republicans. Some Republicans, such as Bob Dole, became quite ambivalent about renewing the deal. As is well-known, Senator Dole suggested auctioning off broadcast licenses in the open market, which would in effect end the arrangement of the last sixty-nine years. In a rather shocking episode, Bob Dole was quoted by three broadcast network executives as saying to them in a private meeting: “Why should I give you a $40 billion giveaway when you’re driving my [approval rating] numbers through the floor on Medicare?” Although the Senator later denied linking the two issues, free licenses and news content, the network executives got the message. “Everyone took the comment [about news content] very seriously,” said one of the executives. But other Republicans, perceiving that even a left-leaning but administratively tethered broadcast press is better than a truly free press, have gotten behind the renewal. After all, even the current arrangement has tended to mute criticism of elected officials, to keep extremist crazies (other than Ross Perot) off the air, and to provide a way to control indecency. A truly free press, in contrast, could be dangerous and offensive. Democrats, on the other hand, have been quite unanimous in

32. This is my view. I am, I should note, a registered Democrat, so this is not mere partisan griping. However, even if I am wrong, Republicans clearly believe that broadcasters have tilted toward Democrats, which is all that is required to make this section work. Some academics share my view. See L. Brent Bozell III, *Perspective on Campaign ’96: TV is Swept Along By Its Bias,* L. A. TIMES, Aug. 21, 1996, at B9.


their appreciation of current arrangements.\textsuperscript{35} From their point of view, the arrangement is working perfectly.

From broadcasters' point of view, the left-leaning tilt almost represented a breach of the basic contract with the politicians. The broadcasters' problem, of course, is that there is no central, coordinating body that monitors and corrects the overall tone of political coverage. (The FCC is not empowered to do so, and any such attempt would likely be struck down by the courts.) However, the political parties evaluate the overall tone of coverage as a measure of compliance. Hence, liberal stations are left to their own decisions, and overproduce liberal coverage. From the point of view of the broadcasting industry, conservative-tilted coverage is a public good, but has been underproduced because of a lack of incentives. Each station wants to free ride on the conservative programming of other stations. The rise of conservative talk radio, starting almost ten years ago, partly ameliorates this effect.

C. The Death of the Fairness Doctrine

The fairness doctrine required broadcasters to cover controversial issues of public importance, and, when doing so, to provide reasonable opportunities for contrasting views on the controversial issue.\textsuperscript{36} Although the public justification for this two-part doctrine stood on the need to increase the quantity and quality of public affairs programming,\textsuperscript{37} the political purpose was likely to alter the tone of broadcast public affairs speech to be more centrist, and to blunt the force of trenchant political critique. In theory the second part of the fairness

\textsuperscript{35} Almost unanimous, that is. Rep. Barney Frank (Dem-Mass.), an openly gay Congressman who has received so much very bad publicity that it would seem he can no longer be hurt, is in favor of auctions. \textit{See} Rep. Barney Frank, Address to Citizens for a Sound Economy "Policy Watch Luncheon" 7, (Jan. 29, 1996) (transcript on file with author).

\textsuperscript{36} \textsc{Thomas G. Krattenmaker}, \textsc{Telecommunications Law and Policy} (1994).

\textsuperscript{37} As early as 1928 the Federal Radio Commission stated that the airwaves had no room "for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether." Instead, broadcasting stations were to act as electronic town squares, and competing ideologies were to "find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public, the microphone will undoubtedly be available. If it is not, a well-founded complaint will receive the careful consideration of the commission in its future action with reference to the station complained of." \textit{Great Lakes Broadcasting Co.}, 3 F.R.C.Ann.Rep. 32, 34 (1929), \textit{modified on other grounds} 37 F.2d 993 (D.C.Cir. 1930), \textit{cert. dismissed} 281 U.S. 706 (1930).
doctrine—requiring reasonable opportunities for all sides on any controversial issue covered—should inhibit public affairs speech by (1) raising the cost of such programming, since all sides must be included, and (2) reducing the demand for public affairs programs, since the end product is homogeneous and boring. At any rate, the fairness doctrine clearly operated in such a manner, but in 1974 the FCC issued a report denying that the fairness doctrine inhibited public affairs speech. The truth, however, was otherwise, and by 1985 the fairness doctrine was subject to a withering critique by Krattenmaker and Powe. When the Republicans took the Presidency and Senate in 1981, the FCC found the political will to reexamine the fairness doctrine. The agency issued the 1985 Fairness Report, finding that the fairness doctrine reduced the quality and quantity of public affairs programming, disserved the public interest, and probably offended the First Amendment. Despite all of this, the FCC refused to repeal the fairness doctrine. Instead, the Commission took the politically prudent path of suggesting that Congress do something. Almost immediately a pair of decisions from the District of Columbia Circuit Court of Appeals forced the Commission's hand. In response the FCC repealed the fairness doctrine on both public interest and constitutional grounds. Although the D.C. Circuit upheld the Commission's decision, the court did so in a way that left room for Congress to come back and pass the fairness doctrine again.

There was at least one noteworthy attempt to pass the fairness doctrine into positive law in the late 1980s. On June 3, 1987, before the FCC had repealed the fairness doctrine, the House passed a bill codifying the fairness doctrine by 302-102. President Ronald Reagan then vetoed the bill, calling the fairness doctrine inconsistent with free-

41. Id. 102 FCC 2d at 225, 58 R.R.2d at 1198.
42. Meredith Corp. v. FCC, 809 F.2d 863 (D.C.Cir. 1987) (holding that the FCC failed to give adequate considerations to a station owner's constitutional arguments regarding the fairness doctrine); Telecommunications Research and Action Center v. FCC, 801 F.2d 501, reh'g denied 806 F.2d 1115 (D.C. Cir. 1986), cert. denied 482 U.S. 919 (1987) (holding that teletext is a traditional broadcast service and required the licensee to provide equal opportunities to competing candidates).
dom of speech and the press. Congress did not challenge the veto.

Years later, when the Supreme Court finally denied certiorari in the Meredith case—the D.C. Circuit case that had upheld the FCC’s decision to repeal the fairness doctrine—Congress once again attempted to act. No bill was passed.

The broadcasting market reacted immediately to the death of the fairness doctrine in 1987. In a forthcoming article Thomas W. Hazlett and David W. Sosa show that the volume of public affairs programming began growing quickly. Much of this growth was in talk radio, and the most popular of the talk radio shows—particularly the Rush Limbaugh show—were conservative. This new style of conservative talk radio was not genteel and balanced. It was loud, opinionated, and highly rated. In addition, it was widely credited with helping to produce the Republican victories in the Senate and House in 1994. The political cat was now out of the bag. Congress was now populated by a lot of Republicans who liked the look of broadcasting without the fairness doctrine.

D. Spectrum Auctions

To date the FCC has conducted approximately ten spectrum license auctions. All of these auctions have sold the right to use spectrum for nonbroadcast use, such as cellular telephone, pagers, or personal communications services. These spectrum license auctions generated over $20 billion in revenue as of April 5, 1996.

This figure puts into stark and undeniable terms the costs of running the present system. As a consequence, some (but not most) Congressmen nervously suggested

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49. The political economy of this is straightforward. Politicians want (almost) no content-based benefits from personal, individualized communications. Hence, there are much smaller political benefits to running a system where huge rents are distributed to spectrum-users. See Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why did FCC License Auctions Take 67 Years?*, J. LEG STUD. (forthcoming).

auctioning broadcasters’ spectrum.\textsuperscript{51} Renewing or redoing the basic deal between politicians and broadcasters was, for a short while, uncertain.

\section*{III. RENEWING THE DEAL}

The Telecommunications Act of 1996 represented an opportunity to redo the basic deal between politicians and broadcasters. The issue split politicians mainly, not perfectly, along party lines. Many Republicans, a la Bob Dole,\textsuperscript{52} were ambivalent. They had visions of dollars dancing in their eyes from auctions, and cared little for the left-leaning broadcasters. The conservative talk radio shows had been unleashed by deregulation and would likely flourish in a market environment. On the other hand, cutting broadcasters entirely loose would be dangerous—the broadcasters could become much more vicious and fearless watchdogs of Congress. The Democrats, in contrast, liked the idea of renewing the deal. As a result, some of the parts of the Telecommunications Act of 1996 that were passed can be described in the following political/economic terms.

\subsection*{A. Terms}

\subsubsection*{1. Free Spectrum for HDTV}

The 1996 Act authorizes the FCC to grant an additional channel for High Definition Television (HDTV) to each existing television licensee.\textsuperscript{53} This decision represents a renewal of the basic deal, and causes Dean Krattenmaker as much anguish as any portion of the new Act.

To those with a detailed knowledge of the history of misallocation and mis-assignment of the television spectrum, the grant to every existing television station of an additional channel for HDTV is an irony that borders on the tragic. A one hundred percent increase in the amount of spectrum allocated to commercial television broadcasting, and \textit{not one single addition-}

\footnotesize{\textsuperscript{51} The issue of spectrum auctions for broadcasting got support from two unlikely allies — Bob Dole and Barney Frank. Jeffrey Silva, \textit{Wireless Telecom Issues Larger than Dole or Clinton}, RADIO COMM. REP., Sept. 9, 1996, at 13.}


\footnotesize{\textsuperscript{53} Telecommunications Act of 1996 § 201, adding 47 U.S.C. 336(a).}
The new Act doubles the national resources committed to television, yet leaves the level of concentration in this industry completely untouched! For decades, first the FCC and subsequently the Congress bemoaned the virtual absence of minority ownership — and very small participation of women — in television broadcasting. Now, over 800 additional licenses are to be handed out, without increasing the ratio of minority or female or small business ownership one whit!

The acquisition by broadcasters of an additional license (apparently at no charge), then, is more than a property rights grab without parallel in the United States since the days of our previous robber barons, the railroads. It is also an extraordinary denial of our professed commitments to increase competition, to lower entry barriers and to expand opportunities for historically excluded persons in the broadcast industry.54

To all of this anguish I respond “yup.” All that good stuff—competition, low entry barriers, opportunities for minorities and women—had to go in order to renew the deal between broadcasters and politicians. The 1996 Act might represent an excrescence in public policy terms, but it is a completely understandable excrescence in its political economy.

If the 1996 Act had greatly increased the number of competing broadcasters, the value of existing licenses would have fallen, and the pool of rents to distribute to politicians and preferred groups of citizens would have dried up. Similarly, if Congress had auctioned off the spectrum and transferred the rents to the federal treasury, there would have been no rents for renewing the political deal. So as to renew the deal with broadcasters, the 1996 Act had to reject increased competition and extra revenues for the federal fisc.

Broadcasters, of course, did not get everything they wanted. To preserve the nature of the deal broadcasters had to continue to be regulated under a vague standard—the “public interest”55—that allows the FCC to skirt the First Amendment while monitoring broadcaster behavior. In addition, the broadcasters had to be required to provide broad-

casting service. If the broadcasters utilize the new spectrum for nonbroadcast service—something which may have great economic value but much less political impact for Congresspersons than broadcast service—then the broadcasters are to be charged the value of the spectrum.\footnote{Id. at § 201, adding 47 U.S.C. § 336(e)(2)(A).}

2. Increasing the Value of Licenses

The 1996 Act makes a couple of changes in the law of license renewal that increase the value of the licenses. Recall that the licenses must be valuable in order to spur voluntary compliance by the broadcasters. First, the 1996 Act increases the term of a broadcasting license to eight years,\footnote{Id. at § 203, amending 47 U.S.C. § 307(e)(1).} and the increase to eight years marginally increases the value of the license. The 1996 Act also solves another problem—license challenges. Under prior law any basically qualified applicant could apply for the expiring license of an existing broadcaster. The courts refused to allow the FCC to dismiss such competitive applications summarily, and only after protracted and bitter litigation did the courts agree to allow the FCC to give incumbent broadcasters an extra “thumb on the scales” when the FCC decided whether to renew challenged licenses.\footnote{See Citizens Communications Ctr. V. FCC, 447 F.2d 1201, 1213 (D.C. Cir. 1971) (holding that the FCC’s policy of granting full comparative hearings only upon an incumbent’s failure to provide substantial community services violated § 309(e) of the Communication Act of 1934, requiring a full hearing for denial of a renewal); Central Fla. Enters. v. FCC, 683 F.2d 503, 507-08 (D.C. Cir. 1982) (holding that renewal expectancy will be considered with other factors), cert. denied, 468, U.S. 1084 (1983).} Although these challenges were virtually never successful, they could impose huge costs on incumbent broadcasters. Lawyers’ fees and lost management time could run into the millions. To make things worse, competitive challenges were often unrelated to the factors that Congress cared about. The net result was a large and politically unproductive cost that had to be shouldered by broadcasters.

The new act “cures” this problem by essentially making the FCC the gatekeeper for competitive license challenges. The Act accomplishes this by first requiring that the FCC grant a license renewal if all of three conditions are satisfied:

1. the licensee has “served the public interest;”\footnote{Telecommunications Act of 1996 § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(A).}
2. the licensee has committed “no serious violations” of the
Federal Communications Act or of the FCC's rules;\textsuperscript{60} (3) the licensee has not committed any other violations "which, taken together, would constitute a pattern of abuse."\textsuperscript{61}

Although the FCC still might have to allow intervention in the form of a "petition to deny" by potential competitors or public interest representatives at this stage,\textsuperscript{62} the issue would not be whether another licensee would do a better job.\textsuperscript{63} The focus would only be on the performance of the licensee. In addition, even if a challenger is "victorious" at this stage, the challenger is unlikely to gain much of value. First, the FCC may decide to renew the license but impose some sanction, such as a fine. Second, even if the FCC does vacate the license and throw it open to new applicants, the challenger who has spent the money establishing the violations in the first hearing will likely face numerous applicants who took a free ride on the challenger's efforts. Thus, the Telecommunications Act of 1996 removes the incentives for a private challenger to spend the money needed to make trouble for an incumbent broadcaster. Consequently, the FCC has been given control over imposing what is, in essence, a huge fine on the incumbent licensee. The FCC can screen out the fines (also known as unsuccessful competitive challenges) unrelated to the political deal with broadcasters, thereby increasing the value of the license to broadcasters, while keeping the threat of a sanction available for politically salient misbehavior.

3. \textit{Direct Content Controls on Indecency.}

One of the parts of the 1996 Act that Dean Krattenmaker seems to find worthy of ridicule is the Communications Decency Act of 1996.\textsuperscript{64}

So, Congress added to the 1996 Act a variety of censorship regulations designed to turn the Internet into a souped-up version of \textit{My Weekly Reader} and to return broadcast and cable television to the glory years of \textit{Amos 'n' Andy}. These new regulations are embedded in Title V of the new Act, which is called the "Communications Decency Act of 1996" ("CDA").\textsuperscript{65} I agree that as a matter of public policy the CDA deserves ridicule.

\textsuperscript{60} Id. at § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(B).
\textsuperscript{61} Id. at § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(C).
\textsuperscript{62} Id. at § 204(a)(1), adding 47 U.S.C. § 309(d) (1994).
\textsuperscript{64} Telecommunications Act of 1996 §§ 501-561.
\textsuperscript{65} Krattenmaker, supra note 54, at 145.
But as a matter of political economy (which, we recall, was not Dean Krattenmaker's concern) the CDA makes perfectly good sense.

Prior to 1970, controlling indecency over the airwaves was fairly easy. Indecency, defined in political economy terms as programming that offends majority sensibilities, was not much in evidence. Although this might have been the result of intense regulatory vigilance, I think it was not. Rather, the structure of the market—a triopoly—combined with moderately homogeneous tastes, rendered offensive programming unprofitable. In such a broadcasting market it paid to charm the great middle, rather than play to the (shocking) preferences of the minority.66 Starting in the late 1960s both parts of the market, supply and demand, changed. First, the supply side became competitive. The growth in the number of radio stations, coupled with the great growth in the provision of television channels over cable, fractionated the market greatly. In the old days it paid to get one third of 90% of the viewers. But in the increasingly competitive world of telecommunications getting all of a minority audience looks very profitable when compared to sharing the great middle with twenty or thirty competitors. As a consequence, the profit motive in a competitive environment induces some broadcasters, and many cablecasters, to program offensive material. The Internet has further fractionated and complicated the world. Now individuals with a few dollars can become programmers of sorts, and sometimes these people take pleasure at putting indecent material onto the net. As a consequence, many voters have taken offense, and Congress noticed.

Second, consider changes in demand. Although I cannot prove this, I strongly believe that the social consensus about what was appropriate public discourse, both political and entertainment, fell apart following the 1960s. This was undoubtedly due, in part, to the increased access of white America to the language and thought of minority groups who had been kept relatively “invisible” up to that point. Public use of obscenities by young students during political demonstrations also probably helped this process. The Supreme Court’s increasing protection for pornography during the 1960s may also have helped unravel the consensus. But whatever its reasons, the change in demand altered the incentives of video programmers. Once a large enough segment of society regarded “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits”67 as the object of hilarity rather than shock, programmers were

going to be tempted to air this material.\textsuperscript{68} At times they gave in to the
temptations. In response to the rise in offensive speech over radio,
broadcast television, cable television, and the Internet, many voters de-
manded a change. Congress, no longer able to rely on the old arrange-
ments to keep such material suppressed, had to change regulatory in-
struments. The CDA, in part a straightforward “command and control”
regulatory framework, emerged.

As Dean Krattenmaker notes, the central portion of the CDA
makes it a crime to “use[ ] an interactive computer service to
send to a specific person or persons under 18 years of age; or
[to] use[ ] any interactive computer service to display in a
manner available to a person under 18 years of age, any com-
ment . . . image, or other communication that, in context, de-
picts or describes, in terms patently offensive as measured by
contemporary community standards, sexual or excretory activi-
ties or organs, regardless of whether the user of such service
placed the call or initiated the communication.”\textsuperscript{69}

This section, if applied according to its terms,\textsuperscript{70} will chase vast amounts
of material from the Internet.\textsuperscript{71}

The CDA also contains a structural, as opposed to command and
control, type of regulation. The Act attempts to control sex and vio-
lence on television by requiring that every new television set sold in
the United States contain an electronic device which can receive pro-
gram ratings and, depending upon instructions given by the individual
television viewer, filter out particular programs.\textsuperscript{72} The electronic device
is called a “V-chip.”\textsuperscript{73} The Act also encourages distributors of video
programming to implement a voluntary rating system to work in con-

\textsuperscript{68} The ease with which a major law review will publish the “seven dirty words” is further
evidence of how much times have changed.

\textsuperscript{69} Krattenmaker, \textit{supra} note 54, at 146.

\textsuperscript{70} Thus far two courts have struck down this portion of the CDA on first amendment
(1996). The recent Supreme Court case Denver Area Educational Telecommunications Consor-


\textsuperscript{71} As Dean Krattenmaker notes, there are also portions of the CDA designed to restrict the
amount of nudity on cable television. These provisions are structural, but alter structure in such
a way as to burden programming with nudity. \textit{See} Krattenmaker, \textit{supra} note 54, at 148.

\textsuperscript{72} Telecommunications Act of 1996 \$ 551(e), \textit{adding} 47 U.S.C. \$ 303(k).

\textsuperscript{73} For a full discussion, see Matthew L. Spitzer, The Constitutional Law and Economics of
the V-chip (draft).
junction with the V-chip.\textsuperscript{74} If the industry fails to implement a voluntary plan that is acceptable to the FCC within one year, the FCC is to promulgate a suggested ratings system.\textsuperscript{75} Although the industry is not required to rate programs, any program that is rated must be transmitted with its rating.\textsuperscript{76}

Those in Congress obviously hope that this will satisfy the political demand to “do something” about sex, violence and language on television. Once the issue is off of the table, Congress can turn its attention elsewhere.

4. Unchanged Terms: Dogs that Did Not Bark

In at least a couple of areas the 1996 Act is important for what was not done.

a. No Fairness Doctrine

As I noted above, the demise of the fairness doctrine at the hands of the FCC and the D.C. Circuit Court of Appeals in 1987 allowed for large changes in radio. In particular, talk radio, mainly conservative and highly unfair in terms of the old doctrine, grew quickly.

The 1996 Act represented a golden opportunity to repass the fairness doctrine.\textsuperscript{77} Congress, however, did no such thing. Was there a genuine change of heart in Congress about the utility of the fairness doctrine? Perhaps. But this change of heart was almost certainly on the Republican side of the aisle, and was doubtless spurred on by the belief that conservative talk radio, and in particular the Rush Limbaugh radio show, was partially responsible for the Republican victories in the 1994 elections. The Republicans have no interest in reinstitutioning an administrative rule that would crush what they perceive to be the engine of their victories.

b. Continued “Public Interest” Mandate for Broadcasters

The 1996 Act continued the requirement that broadcasters be regulated by the FCC so as to ensure that the broadcasters serve the “public interest.”\textsuperscript{78} In other words, the fiduciary theory of broadcasting licenses

\textsuperscript{74} Telecommunications Act of 1996 § 551(b), \textit{adding} 47 U.S.C. § 303(w).

\textsuperscript{75} Telecommunications Act of 1996 § 551(e)(1)(A).

\textsuperscript{76} Id. § 551(e)(1)(B).

\textsuperscript{77} Although the D.C. Circuit upheld the FCC abolition of the fairness doctrine, the court did so in a way that probably would have allowed Congress, with suitable findings of fact, to reenact the doctrine. \textit{See} Syracuse Peace Council, \textit{supra} note 43.

has survived more or less intact. This is needed, I claim, to allow the FCC to continue to enforce the political deal. The broadcasters are often expected to modify their content in ways that might be unconstitutional if they were spelled out in detail. A vague statutory mandate—and "public interest" is about as vague as possible—helps the FCC threaten and impose sanctions in ways that would be hard to justify if the vagueness were to be removed. In addition, the fiduciary theory under which broadcasters are to be regulated provides the theory for more specific sorts of regulations, such as three hours of educational television per week, when the spirit (of political expediency) moves the FCC.

IV. CONCLUSION

Dean Krattenmaker has done a fine job at providing a readable and usable roadmap to the 1996 Act. Although I might quibble with some of his analysis, his critiques are, in general, quite trenchant. I have attempted to augment his article by providing a first cut at understanding the broadcasting provisions of the 1996 Act in political economic terms. When so understood the 1996 Act represents a renewal of the basic deal between politicians and broadcasters that has held sway in this country since 1934.