Speaking Freely

Opinions on the First Amendment and Communications Policy

The First Amendment and the Fallacy of the Public's Airwaves

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On May 9, 1961, some 50 years ago, then-FCC Chairman Newton Minow delivered his still-famous "vast wasteland" speech to a group of shocked broadcasters attending a convention of the National Association of Broadcasters.[1] Characterizing television as a "vast wasteland," he lambasted broadcasters for not dedicating enough time to public-service broadcasting. "The people own the air," he said. "For every hour that the people give you, you owe them something. And I intend to see that your debt is paid with service." He warned broadcasters that he "did not come to Washington to idly observe the squandering of the public's airwaves."

A half-century after the "vast wasteland" speech, the debate on the merits of broadcast regulation continues to center on the concept of "public ownership of the airwaves." That phrase is repeated with born-again intensity by consumer-group activists and government officials who call upon the government to intervene in the programming decisions made by radio and television stations. Echoing Minow's mantra, current FCC Commissioner Michael Copps has said that "using the public airwaves is a privilege — a lucrative one and I fear that the FCC has not done enough to stand up for the public interest."

The public-airwaves concept, particularly as it concerns the authority and mission of the Federal Communications Commission, has led to much misunderstanding and confusion. It is a mischievous notion that has been misused as a rationalization for government regulation.

[1] Newton N. Minow, "Television and the Public Interest," Speech Before the National Association of Broadcasters (May 9, 1961), reprinted in Newton N. Minow, *Equal Time: The Private Broadcaster and the Public Interest* (Lawrence Laurent, ed., 1964).

Indeed, the public-ownership notion is the main reason for broadcasting's second-class status under the First Amendment. According to the late Supreme Court Justice William O. Douglas, the argument that the government can control broadcasters because their channels are "in the public domain" — because they use air space — could be applied to regulate speech in parks, since they are also in the public domain. "Yet people who speak there do not come under government censorship."

The radio frequency spectrum cannot be seen, touched, or heard. It has existed longer than man, and like air, sunlight, or wind, cannot be owned by anyone. Does a person who uses a windmill to grind grain or pump water owe the "public" for the use of the wind? What about the sunlight used by those who grow wheat, corn, or other crops? And what about the use of the "public's air space" by aircraft? The list could go on and on, and in each case it can be said that someone is engaging in a business enterprise by using a "public resource."

Author Ayn Rand brought some common sense to bear on the question of "public ownership" of the airwaves in observing "no essential difference between a broadcast and a concert: The former merely transmits sounds over a longer distance and requires more complex technical equipment. No one would venture to claim that a pianist may own his fingers and his piano, but that the space inside the concert hall — through which the sound waves he produces travels — is 'public property' and, therefore, he has no right to give a concert without a license from the government. Yet this is the absurdity foisted on our broadcasting industry."[2]

The concept of public "ownership" of the airwaves is demonstrably at odds with Congress's intent in enacting the Radio Act of 1927 and the Communications Act of 1934. Senator Dill, co-author of the Radio Act, commented: "The Government does not own the frequencies, as we call them, or the use of the frequencies. It only possesses the right to regulate the apparatus…. We might declare that we own all the channels, but we do not." Senator Watson, chairman of the Senate Interstate Commerce Committee, made a similar observation: "We do not own the railroads but we regulate them. We do not own the ether but we control the right to the use of that ether. That is all we seek to control."

The Congressional Research Service conducted a study of the legal problems raised

[2] Ayn Rand, *Capitalism: The Unknown Ideal* (1966), p. 124.

by proposals to assess fees from broadcasters for their use of the spectrum; the group reached the following conclusion on ownership of the airwaves:

> Under past or present legal authority, the notion that the public or that the Government "owns" the airwaves is without precedent. We find no case that so holds. Furthermore, when enacting the Radio Act of 1927, the Congress specifically deleted a House-passed declaration of ownership.

Former secretary of state Dean Rusk, while noting the need for frequency allocation to prevent interference, cautioned the Government against using this as an excuse for regulating the electronic press. "There is justification in the licensing of frequencies to prevent confusion in the technicalities of broadcasting," said Rusk, "but to extend the regulation to the informational function of broadcasting is not warranted." Rusk considered the notion that the "airwaves belong to the people" as irrelevant as saying that the North Star or the Law of Gravity belongs to the people.

The spectrum is there whether it is used or not; only when it is enhanced by the use of broadcasters and others does it have any value at all to the public. The talent, technical knowledge, and financial resources of broadcasters have added to the value of the spectrum. Without a signal supplied by the broadcaster, the spectrum is just so much empty space.

Closely related to the public-airwaves concept is the notion of scarcity. The combination of public ownership of the airwaves and scarcity has been used as the underlying *raison d'etre* for applying the public-interest standard to regulate the programming practices of broadcasters. In 1984, the U.S. Supreme Court, in *FCC v. League of Women Voters of California,* 468 U.S. 364, 376-77 n.4 (1984), stated that it was prepared to revisit the scarcity concept if Congress or the FCC signaled "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." Fourteen years later, the U.S. Court of Appeals for the D.C. Circuit, in *Tribune Co. v. FCC,* 133 F. 3d 61, 64 (D.C. Cir. 1995), commented that "the Supreme Court's suggestion that it might reconsider the scarcity doctrine on the FCC's signal in *League of Women Voters* may impose an implicit obligation on the Commission" to review the spectrum scarcity rationale.

The Supreme Court's decision was rendered more than a quarter of a century ago, at a time when the world of media communications was analog, consisting primarily of paper, ink, and airwaves. The Internet, satellite technology, digital broadcasting, and wireless broadband have revolutionized the way Americans communicate. The Justice Department, in approving the XM/Sirius merger, recognized the highly competitive and expanding audio market.

There is no blinking from the fact that technological developments have advanced so far that the time has come for both Congress and the FCC to revisit and to renounce the notion of scarcity in today's digital world. That action is consistent with a research recommendation contained in a paper issued by the FCC's Media Bureau in March 2006 that concluded the scarcity rationale for regulating broadcasting is no longer valid. The rationale, the paper concluded, is based on fundamental misunderstandings of physics and economics, efficient resource allocation, and technology.

The time has come for the FCC to take the following actions: Renounce the discredited concept of public ownership of the airwaves, bury the scarcity rationale, and adopt the approach advocated by former FCC chairman Mark Fowler,[3] by applying a public-interest standard based on minimally regulated marketplace forces rather than content regulation. Fowler once said that whether you call the public-trusteeship model of regulating broadcasters "paternalism" or "nannyism," it is "Big Brother," and it must cease. Amen.

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[3] The rationale for marketplace regulation was presented in a law review article by Chairman Fowler and Daniel Brenner, his legal assistant. See Mark S. Fowler & Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," 60 Tex. L. Rev. 207 (1982). Critical of the "trusteeship model" and the use of the "vague" public interest standard to impose programming restrictions, they concluded that in light of advances in technology, the scarcity rationale was no longer viable and that the marketplace, the listeners, and viewers should define the public interest. In their view, the public-interest standard abridged broadcasters' First Amendment rights.

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