

The “Vast Wasteland” in Retrospect

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First, a disclosure: I was a newly minted legal assistant to Newton Minow in May 1961, when the speech was given.¹ I and several other staff members had sought to persuade him to drop the “vast wasteland” phrase. I thought it was too intellectual—the broadcasters would hate the speech in any case and the wider public whose support Minow sought would not get the reference to the Eliot poem. Minow first agreed, and then at his wife’s urging, put the phrase back in. The subsequent public reaction—which made the “vast wasteland” phrase famous—put paid to any pretensions I might have had to expertise in public relations.

Whatever I thought of its language, however, I was a committed supporter of the speech’s substance, including its central demand that commercial telecasters provide programming that was socially worthy but undervalued by the commercial market. Yet today the speech reads like the relic of a bygone geologic age. This Essay attempts to explain why this should be so.

It is not, to begin with, that the intellectual bases for Minow’s activist stance toward broadcast program regulation have been decisively refuted. Consider the thesis that activist program regulation is warranted by the scarcity of broadcast frequencies; i.e., that the government may or must allocate limited frequencies to different uses, and that it cannot in so doing avoid responsibility for the social worth of the uses (as well as the users) that it licenses.² Even before 1961, this claim had been attacked by Ronald

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1. Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (May 9, 1961) [hereinafter Vast Wasteland Speech].

2. This thesis did not appear in the 1961 speech itself. *See id.* It soon appeared, however, in a speech to the Conference on Freedom and Responsibility in Broadcasting at Northwestern University on August 3, 1961, in which Minow defended his stance on broadcast regulation against charges that he was violating First Amendment freedoms. *See*

Coase, in a now-famous article which demonstrated that the electromagnetic spectrum is no more limited than any other economic resource; that the government could in principle define property rights in the use of the spectrum, auction them off (or dispose of them to private parties by lottery or some other means), and let them be, thereafter, allocated to different uses and users by the forces of the market.³ Since 1961, it has become commonplace for scholars and jurists to treat that demonstration as a total refutation of the claim that “frequency scarcity” justifies the regulation of broadcast program content.⁴ But the conclusion does not follow automatically from the premise.

Clearly, if frequency allocation and use were determined solely by property rights and market forces, no one could point to “frequency scarcity” as a reason that the government may or must assume responsibility for broadcast program content.⁵ But while Federal Communication Commission (“FCC” or “Commission”) broadcast licenses have many of the features of de facto property rights,⁶ the government has continued to determine the allocation and use of broadcast frequencies, and there is no likelihood that this situation will change anytime soon.

It does not matter whether one ascribes the persistence of the government allocation model to a general perception of its superior merit,⁷

NEWTON N. MINOW, EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST 72, 77-85 (Lawrence Laurent ed., 1964).

3. See R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12-27 (1959) [hereinafter *Coase 1959*]. See also R.H. Coase, *The Interdepartment Radio Advisory Committee*, 5 J.L. & ECON. 17 (1962).

4. *Turner Brdcast. Sys., Inc. v. FCC*, 512 U.S. 622, 638 n.5 (1994) (citing *Telecomms. Research and Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987)); LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 87-90 (1991); LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-209 (1987); MATTHEW L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 7-18 (1986); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1072-74 (1994); Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 218-40 (1986). See also Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 908-11 (1997).

5. The same would be true if problems of scarcity could be overcome through new technology and the spectrum could be treated as a “commons” to which anyone might have access. See, e.g., Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 STAN. TECH L. REV. 2, at http://stlr.stanford.edu/STLR/Articles/02_STLR_2.

6. See Howard A. Shelanski & Peter W. Huber, *Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & ECON. 581 (1998). The basic observation is not new. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 14-15 (1972); *Coase 1959*, *supra* note 3, at 22-23.

7. See, e.g., FCC, *SPECTRUM POLICY TASK FORCE REPORT* (ET Dkt. No. 02-135) (Nov. 2002), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf. While generally urging a move toward spectrum allocation via property rights and market forces

or to an unholy (if tacit) alliance among rent-seeking broadcasters, politicians, and bureaucrats.⁸ So long as we continue to base broadcast frequency allocations on government judgments of the “public interest” to be served, the argument that those judgments may or must consider broadcast program content will remain viable. That we *could* deal with broadcast frequency scarcity in some other fashion does not warrant reasoning *as if* we were already doing so.

The “frequency scarcity” thesis has been strengthened, moreover, by the current vogue for its kissing cousin—the belief that “the public owns the airwaves.”⁹ Ironically, in 1961, the “public ownership” thesis was little more than a rhetorical flourish with no independent power to turn the crank of legal analysis.¹⁰ Section 304 of the Communications Act, which was derived from the Radio Act of 1927, provided then (as it does now) that license applicants must waive any right to the spectrum “as against the regulatory power of the United States.”¹¹ That choice of language was deliberately intended to foreclose any claim that the government owns the spectrum as it does public lands.¹² In 1993, however, Congress authorized

(or, in some cases, via a “commons” approach), this FCC staff report recommends that “for the time being” the traditional “command-and-control” model continue to be applied to broadcasting, on the ground that the market cannot be relied upon to produce a variety of “public interest” benefits (including sufficient socially desirable programming—e.g., children’s education—and sufficient restraints on socially undesirable programming—e.g., indecent broadcasts). *Id.* at 44-45.

8. See Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC Auctions Take 67 Years?*, 41 J.L. & ECON. 529 (1998).

9. The “Vast Wasteland” speech relied heavily on this belief: “First: the people own the air. They own it as much in prime evening time as they do at 6 o’clock Sunday morning. For every hour that the people give you, you owe them something. I intend to see that your debt is paid with service.” Vast Wasteland Speech, *supra* note 1.

10. The plurality opinion in *CBS v. Democratic National Committee* exemplifies this usage. *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973). It said that “the use of a public resource by the broadcast media permits a limited degree of Government surveillance.” *Id.* at 126. But “the thesis . . . that broadcast licensees are granted use of part of the public domain” did not “resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints.” *Id.* at 115.

11. Communications Act of 1934, ch. 652, § 304, 48 Stat. 1064, 1083 (current version at 47 U.S.C. § 304 (2000)).

12. The Conference Committee on the 1927 legislation had substituted the waiver “as against the regulatory power of the United States” for the Senate bill’s requirement of a waiver “as against the United States.” The Act’s co-author, Senator Dill, defended this change by stressing that “[t]he Government does not own the frequencies, as we call them, or the use of frequencies. It only possesses the right to regulate the apparatus, and that right is obtained from the provision of the Constitution which gives Congress the power to regulate interstate commerce.” 68 CONG. REC. S2870 (Feb. 3, 1927). See also *id.* at S2872 (“We might declare that we own all the channels, but we do not.”); *id.* at S2874.

Either the term “United States” means only the regulatory power under the Constitution, or else it means a right which the Constitution does not give us to

the FCC, for the first time, to distribute licenses (limited to specified non-broadcast services) by means of auctions.¹³ In so doing, it required the agency to seek (among other things) the “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use.”¹⁴ The legislative history, moreover, refers to the spectrum as a “public” or “national” resource, from the use of which the government is entitled to recover an economic return.¹⁵

Advocates of program regulation soon argued that, because broadcasters use “the public’s” spectrum “for nothing,” the government, as representative of the public, has the right to demand payment in service to public ends the government specifies.¹⁶ And the FCC—in an action that was the high-water mark of the kind of program regulation that Minow espoused—justified rules that effectively require commercial television stations to devote three hours each week to children’s educational and informational programs on grounds of both “frequency scarcity” and “public ownership.”¹⁷

I repeat, therefore, that Minow’s approach has not been decisively discredited.¹⁸ Why does it nonetheless seem antique? I can suggest several reasons.

ask them to waive. There is no power to control radio stations except the power to regulate. The power to regulate is not the power to own.

Id. Senator Watson, Chairman of the Senate Committee, was equally emphatic:

The Government undertakes to regulate it, I will say to the Senator, as he is well aware, only by reason of the fact that it is interstate commerce. 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 that we seek to control.

Id. at S2872.

13. 47 U.S.C. § 309(j) (2000).

14. 47 U.S.C. § 309(j)(3)(C).

15. *See, e.g.*, H.R. REP. NO. 103-111, at 248-49, 253 (1993).

16. *See, e.g.*, Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children’s Educational Television*, 9 HARV. J.L. & TECH. 11, 21-22 (1996).

17. *See* Policies and Rules Concerning Children’s TV Programming, *Report and Order*, 11 F.C.C.R. 10660 para. 149, 3 Comm. Reg. (P & F) 1385 (1996).

18. Senator John McCain recently introduced a bill that would, among other things: establish commercial broadcasting station minimum airtime requirements for candidate-centered and issue-centered programming before primary and general elections This legislation builds on the long history of requiring broadcasters to serve the public interest in exchange for the privilege of obtaining an exclusive license to use a scarce public resource: the electromagnetic spectrum. The burden imposed on broadcasters pales in comparison to the enormous value of this spectrum, which recent estimates suggest is worth as much as \$367 billion.

148 CONG. REC. S10,583 (daily ed. Oct. 16, 2002).

First, the 1962 all-channel receiver legislation, which required that television sets be capable of receiving UHF television signals,¹⁹ and the growth of cable television, which tended to equalize the ease of reception for UHF and VHF television stations,²⁰ made UHF stations viable (albeit not the equal of VHF stations). The result was an enormous growth in the number of both commercial and noncommercial public television stations.²¹ The existence of a nationwide, functioning public television service, which provides many of the programs Minow demanded of commercial telecasters, unavoidably makes those demands seem less urgent.

The growth of cable has had another relevant effect. We now have, in addition to six general-audience television broadcast networks and several Spanish-language networks, a wide variety of television networks that depend entirely on non-broadcast, cable transmissions and derive support from subscription payments as well as advertising. Some of the cable networks provide the kind of educational, cultural, and other programs that Minow demanded. None of the cable networks is constrained by “frequency scarcity.” This does not refute the “frequency scarcity” thesis as applied to broadcasters, but it once again reduces its significance—why should we care so much whether commercial broadcasters provide the desired service? And it creates a disparity between the regulation of broadcasters and cable services, which although not inexplicable, is certainly awkward.

Second, the general movement for deregulation of American industry, which arose during the Ford administration and reached its acme in the Reagan and first Bush administrations,²² had a major impact on FCC program regulation. Traditional efforts to require “public interest” programming in the context of license renewal were swept aside or diluted virtually to the point of insignificance, on the ground that they were no longer necessary to achieve “public interest” goals.²³

19. See 47 U.S.C. § 303(s) (2000).

20. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 214-215 (1992).

21. The growth of public television was also plainly helped by the institution of major federal funding, as well as by the advent of a VHF public station serving the New York metropolitan area—a development for which the Minow FCC could claim some credit. See Roy R. Russo, *Public Broadcasting*, in THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996, 147-64 (Max D. Paglin ed., 1999); NTA TV Brdest. Corp., *Memorandum Opinion and Order*, 44 F.C.C. 2563 (1961).

22. See generally MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985).

23. See Deregulation of Radio, *Report and Order*, 84 F.C.C.2d 968, 49 Rad. Reg.2d (P & F) 1 (1981), *aff'd in part and remanded in part*, United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); Revision of the Applications for Renewal of License and

Similarly, the “fairness doctrine” had for decades required broadcasters to provide some programming devoted to controversial issues of public importance and, in so doing, it allowed for a reasonable opportunity for the presentation of conflicting views. Although the constitutionality of the doctrine had been affirmed in ringing terms (on “frequency scarcity” grounds) by *Red Lion Broadcasting Co., Inc. v. FCC*,²⁴ the FCC now found the “frequency scarcity” thesis invalid and the doctrine both unconstitutional and contrary to the public interest. On review, the D.C. Circuit chose not to address *Red Lion* but found the FCC’s public-interest rationale independent of the Constitution and affirmed on that ground.²⁵

As noted above, the “frequency scarcity” thesis survived this blow and, in conjunction with the “public property” theory, returned to justify the current rule on children’s television programming. But the Clinton FCC, which adopted that rule, made no attempt to revive the “fairness doctrine” or any serious attempt to reinstate a vigorous practice of requiring “public interest” programming generally in the context of license renewal.

It seems highly unlikely that any such efforts will be made in the future. For the reasons already described, it no longer matters as much whether commercial television broadcasting is or is not a “vast wasteland.”

Commercial and Noncommercial AM, FM, and Television Licensees, 49 Rad. Reg.2d (P & F) 740 (1981), *recon. denied, Memorandum Opinion and Order*, 87 F.C.C.2d 1127, 50 Rad. Reg.2d (P & F) 704 (1981), *aff’d*, *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial TV Stations, *Report and Order*, 98 F.C.C.2d 1076, 56 Rad. Reg.2d (P & F) 1005 (1984), *recon. denied, Memorandum Opinion and Order*, 104 F.C.C.2d 358, 60 Rad. Reg.2d (P & F) 526 (1986), *aff’d in part and remanded in part*, *Action for Children’s TV v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). In the “Vast Wasteland” speech, Minow had promised to make license renewal the focus of his efforts to reclaim the “wasteland.” *Vast Wasteland Speech*, *supra* note 1.

24. 395 U.S. 367 (1969).

25. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The rationale that the court affirmed was (1) that the overwhelming number of broadcast and non-broadcast television outlets made it unnecessary to impose the doctrine on individual broadcasters in order to provide the public with access to conflicting views on public issues; (2) that the doctrine had operated to discourage broadcasters from presenting controversial programming; and (3) that, by involving the government in close supervision of broadcaster editorial judgments about the coverage of issues, the doctrine had created opportunities for serious abuse of power. *Syracuse Peace Council*, 867 F.2d 656. See FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 32–35 (1975) (asserting that the complainant whose claims were upheld in *Red Lion* was acting at the behest of the Democratic National Committee, some of whose officials sought to employ “fairness” complaints to discourage right-wing assaults on the Kennedy administration over radio or television).

Moreover, even those who (like me) believed in Minow's attempt to reform the "wasteland" no longer have confidence in the efficacy or the wisdom of the attempt to achieve that result by regulation.

As to efficacy, it suffices to cite the first-year law students' favorite, *Lumley v. Gye*.²⁶ Courts cannot make opera singers sing, and administrative agencies cannot make commercial broadcasters provide unprofitable cultural, educational, or informational programming that is creative and effective. The FCC rule requiring minimum amounts of children's educational and informational programming has undoubtedly increased the quantity of programming shown on the tube that meets the only kind of standard an administrative agency can enforce. But one doubts that there has been a major change in the degree to which the commercial medium performs the desired function effectively.

As to wisdom, the regulatory model based on "frequency scarcity" and "public ownership of the spectrum" has always had a repressive potential. Justice Brennan (among others) argued that "frequency scarcity" can justify only affirmative content requirements, not prohibitions or restrictions.²⁷ But if the government is responsible for the failure of broadcasters to provide socially desirable content, it is hard to see why it is not responsible for their provision of socially undesirable content.

Well before Minow, the FCC had acted on this supposition. It had taken action, for example, against what it regarded as news "distortion" or "slanting" by a broadcaster hostile to the incumbent Democratic administration.²⁸ The social and political convulsions of the 1960s and 1970s resulted in serious FCC investigations and admonitions about news "staging" or distortion in the coverage of marijuana smoking by college students, poverty in the South, the riots at the 1958 Democratic National Convention, and the public relations activities of the Defense Department.²⁹

26. 118 Eng. Rep. 749 (Q.B. 1853).

27. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting).

28. See *KMPC, Station of the Stars, Inc., Order Designating Application for Hearing*, 14 Fed. Reg. 4831 (Aug. 2, 1949); G.A. Richards, *Memorandum Opinion and Order*, 14 F.C.C. 429, 5 Rad. Reg. (P & F) 1292 (1950) (hearing on whether to renew the licenses of a radio broadcaster who allegedly ordered the slanting of news in a manner hostile to those he disfavored, including prominent Democrats).

29. See *WBBM-TV, Order Instituting Inquiry and Investigation*, 33 Fed. Reg. 5058 (Mar. 1968); *Inquiry into WBBM-TV's Brdcast. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party, Report*, 18 F.C.C.2d 124, 16 Rad. Reg.2d (P & F) 207 (1969); *Network Coverage of the Democratic Nat'l Convention, Letter*, 16 F.C.C.2d 650, 15 Rad. Reg.2d (P & F) 791 (1969); *CBS Program "Hunger in America," Memorandum Opinion*, 20 F.C.C.2d 143, 17 Rad. Reg.2d (P & F) 674 (1969); *CBS Program "The Selling of the Pentagon," Letter*, 30 F.C.C.2d 150, 21 Rad. Reg.2d (P & F) 912 (1971).

The FCC, to its credit, stopped well short of the punishment demanded by the industry's critics and sought to limit its intervention to cases where "extrinsic evidence" demonstrated deliberate distortion. The chilling effect, however, was unmistakable. And those precedents remain "good law."³⁰

Similarly, although not reflected in the "Vast Wasteland" speech, Minow's approach to FCC program regulation encompassed an assault on broadcast smut. In *Palmetto Broadcasting Co.*, the FCC denied license renewal for a radio station upon the ground, among others, that the station's premier disk jockey repeatedly made remarks that were "coarse, vulgar, and suggestive material susceptible of indecent double meaning[s]."³¹ This finding was based, not on the statutory prohibition of obscene or indecent broadcasts, but on the "public interest" standard for broadcast licensing.³²

Subsequently, the FCC has based its attempt to regulate broadcast pornography primarily on this statutory provision and has been upheld mainly because of the "pervasiveness" of the broadcast medium—a ground that is independent of the "frequency scarcity" and "public ownership" theses.³³ But the broader "public interest" approach has never been repudiated. In the 1970s, when there was serious public pressure to do something, not merely about pornography, but more broadly about "sex and violence" on television, the FCC threatened to use the "public interest" approach in order to secure broadcaster compliance with its desire for an early evening "family viewing hour."³⁴

The dangers of these repressions of broadcast speech pale in comparison with the famous instance in which President Nixon entertained the idea of punishing the *The Washington Post* for its coverage of the Watergate scandal by threatening its license for its Miami television

30. See, e.g., *Serafyn v. FCC*, 149 F.3d 1213, 1216-24 (D.C. Cir. 1998).

31. *Palmetto Brdcast. Co. (WDKD)*, *Decision*, 33 F.C.C. 250, para. 4 (1962), *recon. denied*, 35 F.C.C. 101 (1963), *aff'd sub nom. Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

32. See 18 U.S.C. § 1464 (2000). The Minow FCC was aware that this decision tread on constitutionally dangerous ground. License renewal was also denied on the formally independent ground that the licensee had engaged in deliberate misrepresentations to the FCC, and the decision was affirmed by the D.C. Circuit on the latter ground alone. *Robinson v. FCC*, 334 F.2d 534, 536 (D.C. Cir. 1964) (per curiam).

33. See *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, *Memorandum Opinion and Order*, 56 F.C.C.2d 94, 32 Rad. Reg.2d (P & F) 1331 (1975), *on recon.*, *Memorandum Opinion and Order*, 59 F.C.C.2d 892, 36 Rad. Reg.2d (P & F) 1008 (1976), *aff'd sub nom FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The independence of the "pervasiveness" rationale was demonstrated by *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, which applied that rationale to cable television. 518 U.S. 727 (1996).

34. See *Writers Guild of Am., West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated*, 609 F.2d 355 (9th Cir. 1979).

station—an episode that was followed shortly by the filing of an application for the *Post's* Miami television facilities by a group including at least one close Nixon friend.³⁵ The all-but-standardless FCC process then used to deal with competing broadcast applications would have made it easy for a Nixon-dominated FCC to punish the *Post* without any overt intervention in broadcast (or newspaper) content. But that process (as applied to incumbent broadcaster license renewals) was virtually eliminated by the Telecommunications Act of 1996.³⁶ The dangers inherent in Minow's approach remain.

In short, the “Vast Wasteland” speech reads like a relic because it *is* a relic—the product of a very different time.³⁷ It can be usefully excavated and analyzed, but one would not like to see it come to life today.

35. See *Watergate Tape Points to White House Complicity in Challenges to Post-Newsweek*, BRDCST., May 20, 1974, at 25.

36. See 47 U.S.C. § 309(k) (2000).

37. Other 1961 supporters have long since recanted. See, e.g., Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341 (1998).

