Readings

Airing on the Side of Freedom

Regulating Broadcast Programming
by Thomas G. Krattenmaker and
Lucas A. Powe Jr.
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Reviewed by Daniel D. Polsby

This fine study, the product of the authors' long and productive collaboration, seeks to document the proposition that "government regulation of broadcast program content is intellectually bankrupt." It proposes that the commercial broadcasting industry be restructured in one of two ways: either radically, so as to become a sort of common-carrier business in which the proprietors of distribution conduits would have no say at all over the contents of the matter being distributed, or incrementally, with the content of broadcast speech completely deregulated but regulatory entry barriers lowered so as to allow for additional competition.

Since its founding more than 60 years ago the Federal Communications Commission (FCC) has been a textbook study in what can go wrong with administrative government even when an agency is in the hands of honest and (for the most part) capable people. The FCC was, to begin with, founded upon an incorrect premise: that property rights and market processes could not adequately harmonize the conflicting demands for radio frequency that would arise as the century progressed. The premise was not only mistaken, as Thomas Hazlett has shown, but dangerous, because when one entrusts a government bureau with such responsibilities, there is a risk that the agency's visionaries will begin to dream the self-aggrandizing dream of bureaucrats: "Here is this new medium, radio [and then television], squandering its promise by merely entertaining the masses, and in the lowest common denominator at that. Why should we settle for a 'vast wasteland'—'chewing gum for the mind,' as Fred Allen ungraciously but accurately called commercial radio—when the medium might uplift, educate, and inspire the American people?"

It was not long after its founding that the FCC came to insist that it was no mere traffic cop, in business to keep competing spectrum uses from bumping into one another. Rather, the commission argued, it should be thought of as an agent of moral uplift, superintending the "public interest" benignly but firmly, so as to steer the programming of the new industry into its highest and best use. The die was cast when the Supreme Court upheld this agency-concocted mission statement in *National Broadcasting Co. Inc. v. United States* (1943). A half-century of regulatory futility was to follow, imposing significant public and staggering private costs on the national economy.

What is the "public interest" that the FCC had sworn itself to uphold? From the beginning it was clear enough that the "public interest" meant something unique when used in connection with the radio spectrum. The First Amendment, after all, is based on the idea that government regulation of freedom of speech or the press is not a good idea. And the Communications Act of 1934 itself explicitly bans censorship. How then was the FCC to be more than a traffic cop but less than a censor? How does one steer between the proposition that government regulation is forbidden and the proposition that it is necessary?

Krattenmaker and Powe discuss with subtlety and clarity the agonies of the FCC, the courts, and Congress over those unanswerable questions. In conventional analysis, the First Amendment concerns the claims that speakers

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may assert against government interference. But in broadcasting that convention is turned inside out; the rights of the listener are paramount (so the Supreme Court affirmed in 1969 in *Red Lion Broadcasting v. FCC*), and so the speakers may be regulated in the interests of the listeners. That doctrinal prolapse follows from the assertion that because broadcast speakers are freeloading on a scarce government-owned resource, "spectrum," the government may set the terms upon which such speech occurs.

Yet the scarce "spectrum" that the government supposedly owns turns out to be only a habit of speech—a place-holder for a set of observations concerning the engineering characteristics of radio transmitters and receivers. And the scarcity of the spectrum is exposed as altogether an artifact of how it is regulated. Change the power of the transmitters and the sensitivity of the receivers, and the spectrum becomes more or less scarce. Hence, both the "scarcity" of the resource and the lack of "diversity" that supposedly follows from it are exposed as an effect of the regulatory environment, and hardly a justification for it.

The metaphor of spectrum scarcity has proved powerful indeed, for it has supported the entire apparatus of content regulation of broadcast speech, from the FCC's "chain broadcasting," that is, radio network, rules of the 1930's to the present-day jawboning over violence and children's programming.

It is not feasible to manufacture the "public interest" in broadcasting by regulatory indirection. The sort of programming that comes out of the end of the pipe will be largely determined by the incentives that are implicit in the structure of the industry that feeds into the pipe. For example, if "diversity" of programming is considered a principal ingredient of the public interest, it makes no sense to set up the industry so that three and sometimes four different companies are all scrambling after the same television audience in 150 different local markets. As Peter Steiner showed more than 40 years ago in his seminal article "Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting," in the *Quarterly Journal of Economics*, a monopolist would have better "diversity" incentives than broadcasters under the regime that Congress and the FCC have constructed. Once the structure is in place, tweaking the margins of the problem with hortatory proclamations or regulatory calisthenics like renewal "ascertainment" adds very little value.

Content regulation of broadcast speech has always had academic champions: Felix Frankfurter and Alexander Meiklejohn half a century ago and Lee Bollinger and Cass Sunstein today. The arguments change more in idiom and vocabulary than they do in substance. All involve giving the political community a certain priority over the market for speech. Krattenmaker and Powe have worked all their professional careers to lay those arguments to rest, only to see them return again in the garb of the latest academic fashion. But the end of their Sisyphean labors is at hand, thanks to the accelerating convergence of the worlds of radio, TV, cable television, and the computer. Freedom from regulation will be delivered in the end, not by the arguments for liberty, but by technological change that is already moving too fast to be regulated. The FCC will survive, not as arbiter of the "public interest," but as auctioneer of spectrum, certifier of radio frequency devices like garage door openers and microwave ovens, and traffic cop to make sure that no one poaches on anyone else's spectrum. Krattenmaker and Powe may have written the last book for a general audience on the subject of broadcast programming regulation. In 25 years only economic historians will find the subject of interest.