



Look at the current state of the broadcasting business. You sell audiences to advertisers. There's nothing immoral about that, but your audience thinks your business is providing them with programs. And the FCC regulates you in much the same way the public sees you. It requires no blinding flash of originality on my part to see that this creates a very basic conflict.

CBS's Programming Vice President says:

"I've got to answer to a corporation that is in this to make money, and at the same time face up to a public responsibility. . ."

His counterparts at the other networks have the same problem. They all have to program what people will watch -- what gets the lowest cost-per-thousand. Sometimes that's what the people want to watch, but more often than not it's the least offensive program.



When we talk about communication technologies and the arts, we have to be careful. Most Government bureaucrats, lawyers, and engineers look at communication technologies as mediums for transmission-- "mediums" meaning "channels" or "pipelines" of communications. But to perhaps a majority of this audience, a "medium" is the substance the artists work with--oils, acrylics, and clay. The new communications technologies have an important impact on mediums in both senses of the word--in the first sense and in the second sense.

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The problem is not the limitation of the stereo FM channel or the video broadcast signal. The problem is what we put into it. And the current priorities favor soap operas, reruns, situation comedies, and news as higher priority over the best of our arts and cultural programs.

Why don't we find room? Is no one interested in seeing it? Is no one interested in producing it? On the contrary, we are in a period of great growth and ferment in artistic and cultural interests not only in New York and San Francisco, but in Minneapolis, Dallas, Atlanta, and even Washington, D.C. But why is none of that evident when you're watching your television screen? Why are classical music stations going off the air at a time when classical record sales are expanding? Of the programs that receive critical acclaim, why are so many British rather than American? Do they have better television transmitters? Are they culturally and artistically more diverse than the United States?

Maybe it is the structure of broadcasting. British television is essentially noncommercial. They can produce a program schedule to satisfy the special interests and hopefully to raise the public taste. We, on the other hand, are the only country with a predominantly private enterprise broadcast system. Other than in broadcasting, our private

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enterprise system has been able to support the arts and, indeed, a growth of the arts along with some intelligently directed Government assistance. Why aren't we able to do that in television? Is it because there is a conspiracy by the TV networks and advertisers against artists? Are there more skilled TV managers in England? Does England have more money to spend on television?

These aren't the problems. The problem is that we have placed our national television system into an economic and regulatory box that has little room for the arts. One side of the box is the limited number of television channels available. The second side is the commercial incentive to please most of the people most of the time. Third, is the vast concentration of economic power in the three television networks. The fourth side is public policy, the side that, depending on your point of view, holds or forces the other three together.

How does public policy affect the other three sides? The limited number of channels is the result of regulatory decisions as much as technology. The commercial incentive to appeal to a maximum audience can be tempered with public subsidy such as we have done with public broadcasting and the Endowment. And public policy can sanction or diminish concentrations of economic power in private hands.

series of rulings on broadcasting media fairness that clearly limit the free speech of the broadcaster and clearly discourage the free and open exchange of ideas we seek to foster. The reason for this confusion is clear: There can be no a priori definition of fairness that would be viable in a public debate so diverse as ours.

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A summary of the FCC's current theory then is roughly as follows:

Because of the scarcity of frequencies for broadcasting, and because they are distributed by the government to be used in the public interest, and because the broadcasting function is so important in our society, broadcasting station licenses are valuable public trusts. These valuable public trusts are to be given to private interests, but they are to be used in the public interest. The government is the final arbiter of what constitutes the public interest. The final step in this reasoning is that fairness in the coverage of controversial events and ideas is in the public interest and, therefore, must be determined and enforced by the government.

The implications of this theory applied to broadcasting regulation are serious, but there is a distinct possibility that the theory may be extended to other media. Already there are fewer daily newspapers than radio stations. And the spectrum scarcity foundation for this theory is tenuous. Cable television does not use the broadcast spectrum; yet cable operators are held to the fairness standard on programming they originate. Not all of the spectrum reserved for broadcasting is used. The major

In the area of entertainment programming, there is much grumbling about program content. But this has not produced any major strains on the regulatory process, and therefore has had little impact on regulatory policy. The FCC has for all intents and purposes allowed a market to develop in broadcasting licenses based on their value as an entertainment and advertising medium. Many of these licenses have great financial value because of the monopoly advertising power inherent in the limited number of stations licensed in any given locality. The value of other licenses is less than operating costs. Those licenses are, therefore, unused for the same economic reasons that there are so few newspapers. Since there is money to be made by programming to reach the largest possible audience with a limited number of outlets, the marketplace incentives work toward programming wanted by large audiences. There is, of course, the vexing

IV { problem of unprofitable public interest programs and programming for minority tastes. But at least the majority tastes are passably satisfied most of the time; and the profitability of programming for the majority seems to subsidize enough minority-interest and public-interest programming to keep the FCC and the community complacent.

IV { In the discussion of controversial issues, however, the FCC has taken a somewhat different regulatory approach. Here, so the theory goes, the station must devote a significant fraction of its programming time to the discussion of controversial public issues and must afford each side of such issues a reasonable opportunity to be heard. The objective is overall fairness in coverage devoted to important controversial issues. The problem is how this is to be enforced.

Now I am all for the public interest in broadcasting. And I am
for the concept of private enterprise ownership of the media. But I feel
our public policy has a built-in inconsistency: We have structured the

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industry so that the incentives provided the private owners of the electronic media go one way, and we then impose public interest requirements directly counter to those incentives.

We have a basic Communications Act which was written in 1934

long before television, much less the newer media. Communication policy in the United States has historically been made by the Congress and the FCC. The FCC is a "quasi-judicial" regulatory agency, responsible to the Congress, not to the President. Because of its collegial structure and because of its judicial nature, the Commission is simply not well structured for policy development. It tends to make policy the way the courts make policy -- by retrospective case history, rather than conscious future planning. It was for this reason that the President asked the Congress to establish the Office of Telecommunications Policy. The Office of Telecommunications Policy serves as the central focus of Executive Branch communication policy development, and as

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IV { broadcasters to provide the kind and quality of programming that they want or think they want. The FCC has often succumbed to this pressure. But regulatory agencies rarely deal with economic incentives. They more often try to order certain types of results -- in this case programs. Then the broadcaster's program customer becomes the FCC as well as the advertiser. This is a relatively new and disturbing development. For example, we can fight the system all we want and order networks to free prime time for their affiliates. But if the prime time rule fails, it will not be because broadcasters don't want to provide high-quality programs or the programming industry doesn't want to produce them. It's just that the economics of the medium make it difficult or impossible for them to do so. We cannot change these facts by dictating the kinds of programs that are in the public interest. This type of program regulation is unfortunate but perhaps inevitable, when there is no opportunity for consumer choice in programming and when government attempts to force the outcome it desires while ignoring the economic structure of TV and the incentives built into that structure.

Until BEM, it was thought that the different treatment accorded the print media and the broadcast media was constitutionally justified because of the scarcity of spectrum space. That was a rationale that left broadcasters separate from the government and entitled to most of the benefits of First Amendment protection. But the Appeals Court in BEM moved far beyond the spectrum scarcity approach to create a new rationale for singling out the broadcast media for unique treatment under the Constitution. An outline of the BEM reasoning goes like this: (1) Broadcasting is now the most important public forum; (2) the content of such an important medium must be regulated for the public to derive full benefit from it; (3) the First Amendment barrier to content regulation of a communications medium does not shield government activities; and (4) therefore, content can be regulated if broadcasting is found to be the government for First Amendment purposes.

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We have forced television into an institutional structure designed some 40 years ago for radio broadcasting which requires the individual private licensee to exercise direct control over content. Recognizing the great power implicit in such an arrangement, together with the limited number of channels, there have been growing pressures in recent years to substitute for this private content control a countervailing power of Federal content control.

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