

Television Policy: Economic v. Content Regulation and Deregulation

by Lori A. Brainard

We regulate television (TV) because the electromagnetic spectrum over which broadcasters send their programming signals is deemed to be a finite and public resource. Given that not all who want to broadcast can do so, the Federal Communications Commission (FCC) was formed in 1934 and instructed to regulate broadcasting in the “public interest.” Though we argue about what “the public interest” is and how to achieve it, policymakers and regulators generally operate under a consensus that some regulation is necessary both to allocate the spectrum and to shape the important public space that TV constitutes.

We tend to simplify the policy debate by casting it as one between regulation and deregulation, and we frequently hear that deregulation is on the march. But the actual choice is rarely between these two extremes. Rather, regulators have an enormous toolbox available to them in seeking to shape the nature of this public space. And the debate is usually about tinkering with and emphasizing or de-emphasizing various regulatory tools. Regulatory tools for TV fall into two categories. Economic regulations affect the broad shape of the TV industry by determining, for example, who gets to own a station. They are

Lori A. Brainard (brainard@gwu.edu) is Assistant Professor of Public Policy and Public Administration at The George Washington University, 805 21st Street, NW, Suite 601, Washington, DC 20052. She is the author of *Television: The Limits of Deregulation* (Boulder: Lynne Rienner Publishers, 2004).

content-neutral. Content regulations, by contrast, involve the FCC in review of programming.

During different historical periods, policymakers and regulators have preferred different combinations of economic and content regulation. The current era seems to be one in which we are relying more on content regulation and less on economic regulation. This essay describes this trend and discusses why it should concern us.

The Regulators' Toolbox

All regulations ultimately shape the public space constituted by TV. Economic regulations, including licensing rules and ownership limits, seek to shape TV programming indirectly. Given the finite and public nature of the electromagnetic spectrum, broadcasters must receive a license, for a definite term, from the FCC in order to operate. Licenses are renewable by the FCC. The FCC awards licenses to those whom it believes will serve the public interest through their programming. Ownership regulations, which limit the number of stations a company can own and/or the extent of the population a single corporation can reach via its owned stations, are intended to protect against industry concentration—thereby protecting the general public from a monopoly of the “marketplace of ideas.” Broadcasters argue that such regulations impinge on their economic freedom.

By contrast, content regulations include rules requiring broadcasters to air children’s programming and limit the amount of advertising during such programs. Reg-

ulations also mandate that broadcasters rate their programs and embed the ratings into their signals to be decoded by a V-Chip implanted in TV sets. Other regulations prohibit obscene programming and limit indecent and profane programming to certain hours. Penalties for violations include monetary forfeitures and license revocation. Other regulations seek to ensure that broadcasters air programming that serves the diverse needs of an entire community, rather than those of a particular subgroup. Broadcasters argue that such regulations impinge on their constitutional freedom of speech.

With such a vast toolbox, often more than one kind of regulatory tool is suitable for pursuing a given regulatory objective. For example, regulators can choose to involve themselves in content and require broadcasters to air certain programs, not air certain kinds of programs, and air a diversity of viewpoints. Alternatively, regulators can restrict the extent of permissible ownership in order to spur competition that might result in the desired programming. Over the course of TV regulatory

continued on page 8

IN THIS ISSUE	
Television Policy	1
Media Ownership Rules	2
Media Concentration	4
Censorship on TV	6
Books	11

Broadcast Media Ownership Rules: Can the FCC Get It Right?

by Adam Candeb

A. J. Liebling's quip that "freedom of the press is guaranteed only to those who own one" crystallizes the conundrum of regulating media ownership. Democratic deliberation requires vigorous debate among diverse views. Concentrated ownership allows too few entities to control too much media content, arguably stifling debate. But, government regulation of media ownership limits freedom of expression, also arguably stifling debate.

Since the New Deal, the Federal Communications Commission (FCC) has restricted broadcast ownership, limiting the number of television and radio stations one firm can own nationally and locally. It also limits cross-ownership between newspapers and television and between radio and television.

Last summer, the FCC relaxed these restrictions in its *Biennial Media Ownership Order*. Echoing a national outcry from consumer groups and editorial boards, politicians reacted fiercely. *Broadcasting & Cable* reports that Representative Lynn Woolsey (D-CA) called the FCC's new rules a "Saddam-style information system in the United States," while Senator Byron Dorgan (D-ND) claimed that "the FCC's order is part of a galloping orgy of concentration."¹ The courts also reacted fiercely. In a blistering rebuke, the U.S. Court of Appeals for the Third Circuit remanded the *Biennial Media Ownership Order*, finding it violated the Administrative Procedure Act.

Politicians' support for ownership restrictions is complex. Despite their polemics, they generally will not expend too much capital to oppose centralized media ownership *per se*. After all, few

politicians object to the FCC's accelerating approvals of large media mergers, such as Rupert Murdoch's NewsCorp's purchase of DirecTV, the nation's largest home satellite company, and the AT&T and Comcast cable merger.

Rather, politicians want primarily to protect local broadcasters that cover news in their own districts. At the same time they want to be perceived as opposing media consolidation while not foreclosing the possibility of campaign contributions from those same media conglomerates. From that perspective, the *Biennial Media Ownership Order* simply reflects an inept FCC-brokered deal to protect local broadcasters from the increasing power of large media conglomerates.

Beyond this prosaic Washington interest-balancing, however, this debate does implicate broader democratic civic culture and consumer welfare concerns. Politicians, in general, like weak, decentralized media because it lowers the "cost" for exposure and renders one outlet's unfavorable coverage less damaging. Concentrated media markets make politicians "pay" higher prices for coverage by media monopolists, i.e., they must be ever more solicitous of the press and provide greater access. Robert Kaplan writes: "The ongoing centralization of major media outlets ... has created a new realm of authority akin to the emergence of a superpower ... The very cynical compromises politicians increasingly need to make ... further immobilize them. Politicians are weaker than ever; journalists stronger."²

Echoing this concern, President Clinton, a media consolidation opponent, used to tell people there were only two major media outlets in Arkansas—one owned by a supporter and one owned by a detractor. If his detractor owned both, then Clinton claimed that neither he nor any other progressive would ever get his message across.

Finally, concentration can increase advertising cost because advertisers must bargain with media outlets with market, even monopoly, power. This increases the

cost of "information," which is, of course, vital to the efficient workings of a free market. It also can lead to more commercials and depressed viewership.

Regardless of whether one sees the conflict as involving parochial economic interests or democracy's survival, the controversy turns on whether the FCC can competently regulate this area. The recent *Biennial Media Ownership Order* debacle indicates not. If media ownership laws are to be free from interminable judicial review, Congress itself must set ownership limits. If we want serious understanding and monitoring of media concentration, the FCC must be reformed.

Why the Third Circuit Remanded the FCC's *Biennial Media Ownership Order*

The FCC justified the *Biennial Media Ownership Order* on the grounds it has relied

FOCUS

on Law Studies

Teaching about law in the liberal arts

ALAN S. KOPIT

Chair, Standing Committee on
Public Education

MABEL MCKINNEY-BROWNING

Director, Division for Public Education

JOHN PAUL RYAN

Consulting Editor

The Education, Public Policy, and Marketing
Group, Inc.

Focus on Law Studies (circulation: 5,451), a twice-annual publication of the American Bar Association Division for Public Education, examines the intersection of law and the liberal arts. Through the articles, essays, dialogues, debates, and book reviews published in *Focus*, scholars and teachers explore such subjects as voting rights, law and the family, law and religion, human rights, and constitutional interpretation, as well as such legal policy issues as school desegregation, gun control, capital punishment, and affirmative action. By examining the law from a variety of disciplinary and interdisciplinary viewpoints, *Focus* seeks both to document and nourish the community of law and liberal arts faculty who teach about law, the legal system, and the role of law in society at the undergraduate collegiate level. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the American Bar Association.

© 2005, American Bar Association Division for
Public Education, 321 N. Clark, 20.2, Chicago, IL
60610.

Adam Candeb (candeb@law.msu.edu) is Assistant Professor in the College of Law at Michigan State University. The author of numerous law review articles, he was an attorney-advisor for the Federal Communications Commission in the Media Bureau and in the Common Carrier Bureau, Competitive Pricing Division (he did not work on the *Biennial Media Ownership Order*).

upon in its media orders for decades—its restrictions further “competition, localism, and diversity,” particularly in news coverage. The FCC never has developed acceptable metrics for these goals, but instead uses a proxy, the number of independently owned outlets. The FCC simply assumes, without any verification, that more outlets necessarily further its goals. The Third Circuit, like the D.C. Circuit and Seventh Circuit when reviewing the FCC’s ownership limits in similar and/or related cases, did not buy the FCC’s assumptions, remanding both cross-ownership rules and the local radio and television caps. (Congress reversed the national television cap.) The FCC’s failure to rely upon coherent metrics proved fatal.

The Two Cross-Ownership Rules. The FCC eliminated both the radio-television and television-newspaper cross-ownership rules, which limit or prohibit common ownership between radio and television and television and newspaper, respectively, in the same community. In their stead, the FCC allowed unlimited ownership in large media markets, retained limits in the smallest, and relied on a “Diversity Index” (DI) to determine whether other markets were “at risk” and subject to further regulation. Modeled after the Herfindahl-Hirschman Index (HHI) in antitrust, the DI measures “viewpoint diversity” concentration by squaring each firm’s market share. The DI, however, only really counts the number of participants in a market, not the diversity and dissemination of views. A market with 50 independent television stations all saying the same thing would rank higher in the DI than an NPR and FOX News duopoly.

Not surprisingly, the court rejected the DI because it failed to coherently count heads and meaningfully estimate media diversity. The DI weighted various media (newspapers, radio, etc.) by their market share in the total media market but did not weight the market share of each media within its category. Thus, as the court observed, “the Dutchess Community College television and the stations owned by ABC” receive equal weighting. The court also rejected the Commission’s inclusion of Internet news, but exclusion of cable news in its diversity calculation. Again, the FCC was on shaky grounds because it attempt-

ed to pick and choose which outlets to “count” rather than observe consumer behavior and the nature of news coverage, *i.e.*, measure real media diversity.

Local Television Cap. The FCC’s order relaxed the local television cap, permitting a single firm to own two or three television stations in certain markets. Specifically, the order permitted triopolies in markets of 18 stations or more and duopolies in markets of 17 or fewer, provided that in no case would there be common ownership in the most-watched four stations. The FCC, however, continued to prohibit common ownership among the top four stations in any given market.

This cap, therefore, treated ownership of the fifth, sixth, and seventh most-watched station equivalent to that of the 16th, 17th, and 18th. It was designed to ensure that most markets would have six firms because six *equal-sized* firms would create an HHI index below 1,800. Of course, the FCC simply assumed that the firms would be equal-sized, and the court had no problem finding this assumption irrational. Again, the FCC’s insistence that mere head-counting adequately reflects diversity led to its indefensible result.

Local Radio Cap. The ownership order retained the existing limits of local radio ownership, which are tiered to the size of the market. Its most restrictive limit was to allow common ownership of up to five commercial radio stations in the smallest markets, allowing greater common ownership in larger markets. This rule was designed to guarantee five firms in all markets.

The Commission primarily relied on two articles in game theory, 15 and 30 years old respectively, for its claim that five equal-sized competitors in each market is a sufficiently competitive and diverse market. The court found the Commission’s reliance irrational, because the Department of Justice’s (DOJ) merger guidelines and current policy contradict these articles’ claims. Further, the FCC inconsistently relied on the DOJ Merger Guidelines in other parts of the order. Finally, the court also found illogical that the five voices, regardless of market share, contribute meaningfully to diversity.

What the *Biennial Media Ownership Order* Says about the FCC

Despite the enormous amount of research within the FCC and from specially commissioned economic research from outside sources, the ownership order was an intellectual disaster. Data and results were misused, misunderstood, or simply ignored. The FCC’s inability to set forth a meaningful definition of “media diversity” and its lack of institutional competence to deal with complex economic issues led to this unfortunate result.

First, as the Third Circuit determined when striking down the *Biennial Media Ownership Order*, the FCC’s repeated definition of diversity as the number of independently owned firms in a given market hardly reflects what most people think of as diversity and produces illogical results. Judge Richard Posner made this same point when vacating the FCC’s television syndication rules in *Schurz Communications v. FCC*, 982 F.2d 1043 (1992):

It is very difficult to see how the sheer *number* of producers or outlets could be thought a good thing . . . we assume that the Commission thinks of source diversity and outlet diversity as means to the end of programming diversity. Are they? It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity. [1054]

The FCC, recognizing the indefensibility of this position, often modified a pure head-count definition of viewpoint diversity by adding a different factor, such as market share, as in the Diversity Index’s weighting of various media sectors. Unfortunately, it never did so consistently, failing to consider market share within media sectors in the DI, treating common ownership of the small stations equivalent to common ownership of large stations in the local television cap, and completely ignoring market share in the local radio cap.

Even though the FCC relies on the First Amendment to justify its unwillingness to adopt more expansive definitions of di-

continued on page 10

Whoever Owns the Medium Owns the Message: Why Federal Media Ownership Rules Affect Us All

by Harold Feld

In June 2003, the Federal Communications Commission (FCC) released an order relaxing long-standing rules restricting how many media outlets a single company could own. Although the FCC and Congress have steadily relaxed the ownership rules since 1981, the new rules would have allowed unprecedented levels of concentration. In all but the most rural areas in the United States, a single company could own the local daily newspaper, three local television stations, a mix of local AM and FM radio stations, and the local cable system. In addition, a single company would be permitted to own an unprecedented number of national stations. With an ability to reach 45% of the country through direct ownership (or more, given certain loopholes in the rules), national television networks such as Viacom (parent of CBS and UPN) and News Corp. (Owner of FOX) could bypass local affiliates and directly own and centrally control most, if not all, of their television stations.

This decision prompted a political firestorm and launched a challenge in federal court. More than 2 million people complained to the FCC and to Congress about the proposed rules. Overriding objections from the Bush Administration and the Republican Party leadership, Congress passed a law overruling the FCC on the national ownership limit and froze the limit at existing levels. In June 2004, the remaining FCC rules were reversed by a federal appeals court in

*Harold Feld is Senior Vice President of the Media Access Project (www.mediaaccess.org), a non-profit public interest law firm that works to protect the public's right to speak and hear information from a diversity of sources on the electronic media of today and tomorrow. He is the author of numerous articles on media ownership and open network architecture, including "How Can the Government Compel the Media to Serve the Public, and How Can the Public Make It Happen?" (with Cheryl Leanza) in Elliot Cohen (ed.) *News Incorporated: Corporate Media Ownership and Its Threat to Democracy* (Prometheus Books, 2005).*

Philadelphia. As a result, the FCC will revisit the ownership rules in 2005.

Objection to relaxing the ownership rules came from both the left wing and the right. As Brent Bozell, the head of the conservative Parents Television Council observed:

When so many disparate organizations, groups ranging from the Catholic Conference to Common Cause, from the Family Research Council and the NRA to Move On, the Writer's Guild of America, and the National Organization for Women, are united on an issue, one of two things has happened. Either the earth has spun off its axis, and we have all lost our minds, or there is universal support for the concept.

What brought such a coalition together? Why does the issue of media ownership resonate with so many people across the political spectrum? The answer lies in the critical role the mass media play in our lives. Even in this day of widespread Internet access, political blogging, and hundreds of cable television networks, most people rely on their local television news and local daily paper to find out what is happening in the world around them. At the same time, the concentration of the mass media in the hands of a few companies, with broad ranging economic agendas and political interests beyond reporting news or providing entertainment, has made the quality of news more suspect. Many worry that such media giants place their economic self-interest or political agendas ahead of honest reporting of the news. Whether it is liberals concerned with dominance of conservative talk radio, or conservatives who fear that Dan Rather represents a concerted liberal bias in the media, people fear that a world of only one or two owners is a world of one or two views, and that their view is the one that will be shut out.

Recent events from the 2004 election show people have good cause to fear. As

election day approached, opinion polls showed President Bush in a statistical dead heat with Democratic challenger John Kerry. Political commentators identified Ohio and a handful of other battleground states as a "must win" for either candidate. As election day approached, Sinclair Broadcasting Group decided it would require all 62 of its television stations to preempt their regular programming to air "Stolen Honor," a partisan documentary critical of John Kerry's service in the Vietnam War created by long-standing political enemies of Kerry. This broadcast would be in addition to a centrally produced conservative commentary endorsing Republican candidates and positions, which Sinclair already required its 62 stations to air as part of their local news programming.

What made Sinclair's decision particularly important was both its size—with 62 stations it could air in nearly all of the battleground states, and also its concentration in Ohio. Sinclair owned at least two and sometimes three stations in every Ohio market. Ultimately, in the face of public pressure and protests from investors, Sinclair decided to air a program about the controversy surrounding "Stolen Honor" rather than air the show itself—a less partisan and more balanced approach. Nevertheless, the ability of a single group owner to broadcast highly partisan programming throughout a critical battleground state justifiably alarmed a large number of citizens about the power of "big media" to influence elections.

Imagine if the FCC order relaxing media ownership rules had been in effect, and Sinclair owned the local daily paper, radio stations, and cable systems in every market in Ohio. That many media assets, repeating the same message, create a powerful "echo chamber" that influences public opinion. As most members of the public are unaware of the common ownership of media outlets, having the same viewpoint repeated in numerous divergent outlets creates an impression of a broadly held consensus. Furthermore, studies have found that members of the

public absorb impressions about political candidates from widely repeated messages, even when survey respondents state that they pay no attention to such things. Further concentration of the media, therefore, risks giving one or a handful of companies the ability to control public debate on critical issues.

Even if companies are motivated solely by business considerations rather than by political agendas, this concentration of power raises serious concerns. In 1996, Congress considered whether to give broadcasters \$70 billion worth of spectrum free of charge to promote the transition to digital television or whether to sell the spectrum at auction. All broadcasters editorialized in favor of the giveaway. But the only newspapers that supported giving the spectrum to broadcasters were those whose parent companies owned a number of television stations.

Perhaps more telling is how the primary political opponent of the giveaway, Senator Bob Dole (R-KS), was persuaded to withdraw his objections. At the time, Dole was seeking the Republican nomination for the 1996 Presidential campaign. Shortly before the Iowa Caucus, Dole received a letter from the President of Hicks Broadcasting, which owned several stations in Iowa. The letter suggested that Dole's continuing opposition to giving away \$70 billion worth of spectrum to broadcasters might cost his campaign support. Dole took the hint and withdrew his opposition a few days later.

Finally, in many ways more important than what people see is what they don't see. A study by the Pew Foundation Project on Excellence in Journalism (PEJ) found that reporters routinely censor themselves to avoid news contrary to the financial interest of their parent company. PEJ also found that, as fewer owners controlled more outlets, the quality of local news suffered. Large corporations interested in cost cutting preferred to eliminate local news coverage in favor of national news or no news at all. In addition, the news actually covered increasingly focused on "soft news" about celebrities and sports, rather than "hard news" on public affairs.

Increased concentration of media also leads to concerns over increased corporate censorship. For example, alarmed by de-

clining church attendance, the United Church of Christ recently decided to air a commercial to appeal to people feeling excluded from their religious communities. In the ad, two night club bouncers stand in front of a church and turn away two men holding hands and a man in a wheelchair, while welcoming a stereotypical white nuclear family. A caption appears, and a narrator reads "Jesus didn't turn anyone away. Neither do we. The United Church of Christ." The scene changes to a multiracial crowd inside a church, including two women with their arms around each other. In the wake of the 2004 election and a renewed concern against antagonizing conservatives, Viacom (owner of CBS and UPN) and NBC refused to sell time to the United Church of Christ on its network programming or on any of its local affiliates. The networks stated that the commercials appeared to endorse gay marriage and were, therefore, too controversial. The decision was reminiscent of CBS' refusal to sell ad time to the liberal group MoveOn.org during the 2004 Super Bowl for an advertisement critical of President Bush's deficit spending.

Sinclair Broadcasting Group engaged in an even more blatant act of corporate censorship in April 2004, when it ordered its ABC affiliates to preempt an ABC News "Nightline" Special on Iraq. ABC had announced that, as a tribute to those Americans killed in action in Iraq, the episode would consist of Ted Koppel reading aloud the names of those killed. Sinclair accused ABC News of "hiding behind this so-called tribute ... to influence public opinion against military action in Iraq," and vowed to send its own news crew to find "success stories" in Iraq to support the administration's policies.

When ownership rules are in place to restrict how many outlets one company can own, this increases the likelihood that owners will have different interests and agendas. At the least, it increases the number of ways that an individual or group can put a potentially controversial or unpopular point of view into the public forum. In a world where Viacom and General Electric (NBC's corporate parent) own even more stations, local newspapers, and cable networks than they do now, how could the United Church of Christ reach its target audience? If Sinclair controlled newspapers as well as

television stations, how could alternate views on Iraq or other administration policies be debated?

Although the Internet provides one way for organizations to "get their message out," this does not balance the power of the mass media to control the political debate. Although bloggers and others have had success in influencing public debate when the mainstream media have picked up the story, they have had little influence when mainstream media declines to do so. For example, when conservative bloggers challenged the authenticity of documents in Dan Rather's story critical of President Bush's National Guard service, the conservative mass media also covered the story, triggering an investigation at CBS and public criticism. By contrast, despite widespread discussion of voter irregularities by left-wing bloggers and accusations that electronic voting results were deliberately altered in a manner that would have changed the outcome of the election, the mainstream media refused to cover this story. As a consequence, these bloggers have gained little public attention despite their comparatively high readership.

Indeed, when considering the power of the Internet to compensate for media ownership rules, it is important to remember that only 50% of the population has Internet access in the home. Furthermore, the Internet is not a mass medium but one that requires individuals to seek out information. It has little high-quality content focused on local news, and the most popular national news sites are either owned by the same media conglomerates that own the mass media or, like Yahoo! or Google, simply aggregate headlines from other media outlets.

Limits on media ownership cannot cure the problems with today's media, but they provide an opportunity for more diverse views to reach people and place some limits on the power that any one company can exercise. As the FCC and Congress reconsider this issue in 2005, the importance of maintaining the limits that remain on ownership has become even clearer than when the FCC issued its order in 2003. Hopefully, citizens will continue to remain engaged with the FCC and Congress and make their views known.

Sex on the Tube: The Media Business and Sexual Portrayals on American Television

by Richard A. Brisbin, Jr.

During the 1990s a momentous change occurred in the regulation of the sexual content of American television programs. Federal government and industry censorship of sexual portrayals and messages on American television suddenly seemed to disappear. During the 1950s, censors required that programs depict married couples asleep in separate beds. By the 1990s, glimpses of bare female breasts and the buttocks of both sexes appeared on network programs such as “NYPD Blue.” Indeed, empirical evidence shows a significant increase in the use of sexual dialogue in television programs (Kaye and Sapolsky, 2001). This article briefly examines the reconstitution of the censorship of *sexual portrayals* or pictorial displays of sexuality and dialogue about sexuality on television.

Until recently, Americans expected governmental censorship of displays of sexuality in the American media. Following Enlightenment political philosophy, the public regarded sexual displays, sexual language, and voyeurism—especially when it included women and homosexuals—as dangerous expressions of “passion” or “desire” detrimental to other persons or the self. Also, the public assumed that government could and should regulate the depiction of sexual passions through law. Relying on such assumptions, in the Communications Act of 1934, Congress assigned to the Federal Communications Commission (FCC) the authority to ban “obscene, indecent, or profane language” in broadcasts, and it

Richard A. Brisbin, Jr. (Richard.Brisbin@mail.wvu.edu) is Associate Professor of Political Science at West Virginia University, Box 6317, Morgantown, WV 26506-6317. He is the author of “Censorship, Ratings, and Rights: Political Order and Sexual Portrayals in American Movies,” in Studies in American Political Development 16 (Spring 2002), and several books, including A Strike Like No Other Strike: Law and Resistance During the Pittston Coal Strike of 1989–1990 (Johns Hopkins University Press, 2002) and Justice Antonin Scalia and the Conservative Revival (Johns Hopkins University Press, 1997).

permitted the FCC to fine or to suspend licenses of stations that broadcast such material. In 1941, the FCC extended its power to ban indecent programs on television stations. Because no broadcaster wanted to risk losing a license or profits, in 1952 the National Association of Broadcasters (NAB) adopted a Television Code that stated, “Special sensitivity is necessary in the use of material relating to sex Obscene, indecent, or profane matter, as proscribed by law, is unacceptable.” Consequently, sexual displays and dialogue disappeared from television.

Under content ratings, the law no longer suppresses most televised sexual portrayals.

The Reconstitution of Censorship

The reconstitution of censorship came about in two overlapping stages. First, new assumptions and new knowledge about sexuality and law emerged. Initiated by the works of Sigmund Freud and Alfred Kinsey, this knowledge included a psychological critique that questioned the benefits of the repression of sexual passions. Second, the opinions of federal judges began to question whether the regulation of sex in movies and indecency in radio broadcasts threatened expressive freedom. As a step in the clarification of expressive repression and rights, in *FCC v. Pacifica Foundation* (1978) the U.S. Supreme Court permitted the FCC’s regulation of indecency in broadcasting, but it created a bright-line definition of the indecent. Five of the justices upheld an FCC ban on broadcasts that included the specific “seven dirty words” of a radio broadcast of a famous monologue by comedian George Carlin. The justices justified censorship of

the words as a service to the public’s interest in the protection of the “well-being of its youth.”

In 1987, however, the FCC broke from the *Pacifica* definition of indecency. Without formal explanation the FCC expanded the definition of indecency from the seven dirty words to include other sexual portrayals. Coupled with this new standard, the Commission required that programs with sexual content be aired only in a “safe harbor” between midnight and 6:00 a.m. During the late 1980s and early 1990s, these actions generated both litigation and legislation. Decisions by the U.S. Court of Appeals for the District of Columbia about the constitutionality of a rider to an appropriations bill and a section of the Public Telecommunications Act of 1992 placed more burdens on the FCC to justify its definition of indecency. During this period cable television gained a significant share of the audience; however, the Supreme Court limited congressional efforts to control indecency in cablecasts. Motion pictures viewable on video cassette players and programs received at home directly from satellites and the Internet remained unregulated. Responding to the legal instability and the threat to their profits from viewers who sought out the sexual portrayals offered by new media technologies, over-the-air television broadcasters abandoned the NAB Code and included more sexuality in programming.

In 1994, Edward Markey (D-MA), chair of the House Telecommunications Subcommittee, learned about the V-Chip. The V-Chip was circuitry in a television receiver that a viewer could program with a remote control device to accept or reject the display of programming after a ratings signal. Markey proposed legislation to require the production of televisions containing the V-Chip. Meanwhile, Congress drafted a new telecommunications law to cope with the technological revolution in broadcasting. With the passage of the Telecommunications Act (1996), television regulation changed significantly. Congress included in the Act a specific section, Title V—“The Communications Decency

Act of 1996,” which opened with a section that amended the criminal penalties for obscene broadcasts to include Internet transmissions to persons under age 18. Also, the Act required the broadcast and cable television industry to rate programs for indecent language, sexual displays and dialogue and violence, and to locate an electronic signal of the rating on broadcasts by February 1997. If the deadline was not met, the Act provided for a presidential commission to rate and regulate programming. Third, as proposed by Markey, the Act required electronic manufacturers to install V-Chips in most new televisions. Finally, the Act permitted the FCC to establish new rules on children’s programming. The FCC then developed a regulation to encourage broadcasters to schedule three hours per week of programming directed at children younger than 16 years of age in the 7:00 a.m. to 10:00 p.m. period in exchange for expedited license renewals.

Fearing that the benefits of the 1996 Act might be undone if the industry waited for the government to assign ratings to programs, broadcasters agreed to an offer from President Bill Clinton to attend a White House summit on ratings. At the meeting Jack Valenti of the Motion Picture Association of America (MPAA) argued for the adoption of an age-based system of ratings like those used by the movie industry. Experience with MPAA ratings convinced Valenti that this policy would be good for parents and children as well as the industry’s economic health. After two hours behind closed doors with the President, representatives of all major media firms and trade associations and the presidents of the Actor’s Guild and Writer’s Guild agreed to an age-based ratings system proposed by Valenti. Representatives of parental and religious groups did not participate in these discussions.

After the summit, an Implementation Committee chaired by Valenti developed an age-based ratings scheme with six categories for programs: TV-G for general audience; TV-Y for children; TV-Y7 for children age seven and older; TV-PG for parental guidance in viewing by younger children; TV-14 for viewing by children age 14 and older; and TV-MA for mature audiences. It decided not to rate commercials, news, and sports programs. The committee agreed that the broadcaster

would display the rating on screen as a small identifier for the first 15 seconds of the program. The rating would activate a programmable V-Chip that could block access to programs of a ratings category. Criticism of the lack of specificity of the age-based ratings immediately came from concerned parental and religious interest groups. Critics contended that the age-based categories did not forewarn parents about violence, sexual portrayals, and sexually charged language. Valenti, as chair of the Implementation Committee, tried to stonewall. However, eventually, negotiations among several of the interest group critics, the representatives of broadcasters, Valenti, Markey, other members of Congress, and Vice President Al Gore produced a compromise on a ratings scheme. It added the letters “S” for various sexual situations, “L” for coarse or indecent language, “D” for suggestive dialogue, and “V” for violence in smaller case lettering below the six-category, age-based rating. The precise meaning of these letters varied with the six-category age rating under which they appeared. They also agreed to a new rating, TV-Y7 FV, for programs with fantasy violence (see Center for Media Education, 1999: 2–3). Reacting to these events, cable firms agreed to rate programs to accommodate the V-Chip, but the NBC network decided not to add the S-L-D-V letters.

The Content Ratings Process

With the advent of ratings, choices about sexual portrayals presumably passed from the FCC and network censor to the individual viewer or the parent of child viewers. For the viewer, the ratings signal is an option to *insure* themselves against the *risk* of viewing undesirable sexual displays or hearing dialogue about sexual desires and acts in programs. With the rating as individualized insurance, the indecency regulation process marginalized the FCC. It can only penalize obscenity as defined by *Miller v. California* (1973), the seven dirty words identified in *Pacifica* (1978), and the depiction of “sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards” in the hours between 6:00 a.m. and 10:00 p.m. (47 C.F.R. 76.701) Consequently, when a “wardrobe malfunction” caused the exposure of singer Janet Jackson’s breast during the unrated telecast of the 2004 Super Bowl half-time show, the FCC proved an ineffective censor. It could only fine CBS and

each of the 20 stations it owned the maximum \$27,500 permitted by Congress. FCC censorship has become the post-event penalization of very few extreme events in response to interest group and other political pressure.

For the five media conglomerates that control most American broadcast and cable networks, the ratings process therefore means that they can lawfully subject willing consumers to most kinds of profitable sexual portrayals or choose to exclude unprofitable sexuality from their programs. Ratings also serve as insurance for the goal of broadcasters—profits. Indeed, as one CBS executive stated, “I’m not interested in culture. I’m not interested in pro-social values. I have only one interest. That’s whether people watch the program” (Gitlin, 2000: 31). For the media conglomerates, the rating of a program is an economic concern that has to fit into their overall assessment of the potential profitability of investing in a program. When the age and content rating arrived, broadcasters discovered that the rating assisted advertising agencies in the placement of advertisements aimed at a specific audience. The media and advertisers learned that prescribed amounts of sex in programs sold specific commodities and services, so the rating not only provided insurance against sexual risks for the audience, it came to be insurance against the risks to media and advertiser profits from the misplacement of profitable commercials.

Although the rating could protect corporate profits, the meaning of the rating could also be manipulated. The industry devolved rating to “the producer who creates the program or the network that broadcasts it ...” (Center for Media Education, 1999: 5). The ratings task was thus assigned to personnel in the standards and practices units of the networks and television production companies who could be directly or indirectly influenced by the needs of their bosses. When coupled with the lack of precise rules for the identification of specific sexual language and images within each age-based ratings category, the opportunity arose for discretionary judgments and “incorrect” decisions by ratings personnel. This practice often produced liberal interpretations of the sexual portrayals allowed within a ratings category (see Kunkel et al., 2001).

continued on page 10

Television Policy: Economic v. Content Regulation and Deregulation

continued from page 1

history, regulators from different eras have chosen to emphasize different tools.

Historical Use of Regulatory Tools

In the early decades of broadcast TV, regulators focused on devising a licensing system and determining the broad parameters of what constituted acceptable programming service. They also developed ownership limits in order to preserve competition and promote diverse programming. In the 1960s, the FCC began to promulgate content regulations. It was during the 1970s that we saw the advent of early (though vague) children's TV regulations. During the mid-to-late 1970s, however, some policymakers began to argue that the FCC's role in content should be dramatically reduced and that the agency should rely on stricter ownership limitations. For example, Lionel Van Deerlin (D-CA), then chair of the Communications Subcommittee of the House of Representatives, offered legislation repealing most content regulation and instituting stricter ownership limits. He believed that trying to shape TV through substituting economic regulation for content regulation was preferable to involving the government directly in content. The bill ultimately died, and the project of substituting economic regulations for content regulations was interrupted during the 1980s, as President Ronald Reagan's appointees on the FCC attempted to deregulate TV entirely. Mark Fowler, whom President Reagan appointed to chair the FCC in 1981, believed that TV was simply a "toaster with pictures" and that there was no need for any regulation at all. Fowler's agenda ultimately was stymied by Congress.

Since the 1990s, we seem to be in an era in which regulators and policymakers prefer content regulation to economic regulation. Licensing rules have been steadily relaxed. Broadcasters may now renew their licenses by postcard, and licenses are rather automatically renewed with little (if any) review of their past programming service. Ownership limits have been incrementally, though steadily, relaxed. Although, in the early years of broadcasting, TV broadcasters were limited to owning 3

stations, they now may own an unlimited number of stations, exceeding no more than 39% of the total audience.

In the meantime, we have increased the relative emphasis on content regulation. The 1990 Children's Television Act requires broadcasters to air programming specifically designed to meet children's educational needs and limits the amount of advertising that can be shown during such shows. The law was enhanced in 1996 when the FCC passed a rule applying a quota for such programming and mandating that it be aired between 7 A.M. and 10 P.M. Similarly the 1996 Telecommunications Act mandated that new TV sets come equipped with a V-Chip (the "V" is

*There is not
much consensus
on obscenity,
profanity, and
indecenty rules.*

for "violence") that can screen out undesirable programming and mandated that broadcasters devise a ratings system to work with the V-Chip. A wide consensus tends to support these rules. Policymakers and the public alike view the child audience as vulnerable and not likely to be served by the workings of the free market. Further, such regulations do not require broadcasters *not* to air particular programming and, thus, are not viewed as censorship.

There is much less of a consensus surrounding obscenity, profanity, and indecency (OPI) rules, as evidenced by the controversy surrounding the 2004 Super Bowl half-time show with Justin Timberlake and Janet Jackson. Many view OPI rules as censorship because, unlike children's TV regulations, they prohibit and limit the airing of particular programming and, thereby, the viewing options available to the public. Present OPI rules have been in force since the Supreme Court clarified them in 1978 (*FCC v. Pacifica Foundation*, 438 U.S. 726). From an abundance of caution, however, regulators historically have been loath to enforce them, for fear that they will trample on broadcast-

ers' free speech rights and, indeed, on the public's right to hear and see a variety of programming.

Nevertheless, the FCC under Chairman Michael Powell (appointed chair by President George W. Bush in 2001) has increased OPI enforcement. At the National Press Club in January 2003, Chairman Powell boasted, "This Commission, since I took over, has worked diligently to increase our enforcement efforts... and I do think the enforcement efforts and fines we have levied have far surpassed those applied by previous commissions combined."¹ Thus, in the period between 1993 and 2000, the FCC issued 39 notices of apparent liability. In the period between 2001 through 2004, the FCC issued 29. In 2004 alone, the FCC issued 12—more than in any single year since the FCC began keeping data in 1993. In terms of fines, in the period between 1993 and 2000, the FCC proposed \$1,541,500 in fines. Between 2001 and 2004, the FCC proposed \$8,558,480 in fines. For 2004 alone, the FCC proposed \$7,928,080.² Historically, FCC enforcement has been targeted at radio broadcasters. Of the total number of notices of apparent liability between 1993 and 2000, only one was issued to a TV station. Between 2001 and 2004, four were issued to TV stations. In 2004 alone, three were issued to TV stations.

Clearly, regulators are altering the overall balance between economic and content regulation. Indeed, they appear to be emphasizing content regulation while deemphasizing economic regulation. Further, a particular kind of content regulation—OPI controls—appears to be on the increase.

Implications

The reliance on content regulation, particularly the increase in OPI enforcement, raises important considerations. First, content regulation is much more subjective than economic regulation. It is much easier to know when a person or company has violated ownership limits than it is to know when a TV station has broken OPI regulations. Different people have different tastes; one person's indecent broadcast is another person's art or harmless entertainment. Subjectivity raises enforcement questions. The FCC currently is investigating the NBC network for alleged

ly airing indecency and profanity in its live coverage of the 2004 Olympics opening ceremonies. The FCC is taking this action after receiving complaints from only nine viewers, out of the approximately 203 million viewers who tuned in over the course of the 17 days of Olympics coverage.³ Chairman Powell himself unwittingly demonstrated the subjectivity involved reviewing content. During the 2004 Golden Globe Awards, Bono (of the rock group U2) uttered an expletive. Though the FCC's staff report argued that no indecency regulations had been broken, Chairman Powell urged fellow commissioners to rule to the contrary. The FCC ruled the broadcast indecent, but proposed no fine.⁴ Thus, content regulation raises serious questions about whether, when, and how to enforce.

Second, the subjectivity involved in reviewing content also raises compliance problems for broadcasters. In November 2004, for example, sixty-six ABC affiliates chose not to run the widely-acclaimed movie, *Saving Private Ryan*, for fear that, owing to the film's violence and profanity, airing it would violate OPI rules.⁵ Similarly, in January 2005, PBS announced that it would censor a movie it planned to air. PBS announced that its airing of "Dirty War," about a bomb attack on London, would be altered to cut a shot of a nude woman who has stripped in order to be washed after the bomb goes off.⁶ The subjectivity involved in making and reviewing programming decisions causes compliance problems for TV broadcasters.

Third, it appears that broadcasters themselves occasionally capitulate to increased content regulation in order to set a favorable political tone for receiving other desired policy benefits. For example, although TV broadcasters did not favor the 1990 Children's Television Act (on the ground that it would violate their free speech rights), they did not vigorously lobby against it. At the time, TV broadcasters argued that cable TV system operators were engaging in economically predatory practices against them. Broadcasters sought favorable rules that would prohibit cable operators from economically discriminating against them. Broadcasters, as a result, did not vigorously oppose the children's TV legislation, and two years later Congress passed the 1992 Ca-

ble Act, which contained economic protection for broadcasters.

We observe a related phenomenon in the context of OPI enforcement. The FCC recently voted to relax its ownership limits (desired by many broadcasters), but the matter has not remained settled. Rather, the issue has bounced among the FCC, the Congress and the courts. Broadcasters believe that relaxed ownership regulation is a more important policy goal than content regulation. According to many industry analysts, broadcasters are "interested in keeping good relationships" with policymakers and regulators in order to receive favorable policy on the ownership question, even if it means capitulat-

*Broadcasters
often choose
economic freedom
over freedom
of speech.*

ing to increased content regulation.⁷ Broadcasters may be *choosing* to place their economic freedoms ahead of their constitutional freedoms.

Conclusion

Despite the availability of less restrictive (economic) means to shape the nature of TV, in recent years we have witnessed an increase in content regulation. This trend should concern us not only because it raises practical problems of enforcement and compliance, but also because it places broadcasters' free speech rights second in line to their economic rights. More worrisome is that broadcasters often seem to choose economic freedom over freedom of speech. But the larger concern does not so much relate to broadcasters' rights per se, as it relates to our rights—the rights of citizens in a democracy. In abdicating their own rights to freedom of speech, broadcasters are, by definition, handing over the right of the public to see and hear diverse programming and to make our viewing decisions for ourselves.

Endotes

¹ FCC Chairman Michael Powell in remarks at the National Press Club, 14 January 2004. www.npr.org/programs/npc/2004/040114.mpowell.html accessed on 17 January 2005. See also, The Center for Public Integrity, "Indecency on the Air." www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200 accessed on 17 January 2005.

² Data come from Federal Communications Commission, "Indecency Complaints and NALs: 1993-2004." www.fcc.gov/eb/broadcast/chart.pdf accessed on 13 January 2005. The figure for total 2004 fines includes amounts in consent decrees that exceeded the amounts in the notices of apparent liability in the consent decrees. However, even if we subtract the *total* amounts identified as such by the FCC, the 2004 figure would be \$3,657,970, still far more than in any other year.

³ www.fcc.gov/eb/broadcast/Pleadings/EB-04-IH-0570.pdf accessed on 17 January 2005. See also "Athens Chief Tells FCC Not to Fine NBC," *Washington Post*, 20 January 2005, p. D2.

⁴ Federal Communications Commission, "In the Matter of Complaints against Various Broadcast Licensees Regarding Their Airing of The 'Golden Globe Awards' Program. File No. EB-03-IH-0110. 3 March 2004. www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html accessed on 17 January 2005.

⁵ Lisa de Moraes, "'Saving Private Ryan': A New Casualty of the Indecency War," *Washington Post*, 11 November 2004, p. C1.

⁶ Lynn Smith, "PBS opts to trim nude scene from film 'Dirty War,'" *Los Angeles Times*, 17 January 2005, p. E1.

⁷ Quoted in Center for Public Integrity, "Indecency on the Air."

For Further Reading

Hamilton, James T. *Channeling Violence: The Economic Market for Violent Television Programming*. Princeton: N.J.: Princeton University Press, 1998.

Huber, Peter W. *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Television*. New York: Oxford University Press, 1997.

Kahn, Alfred E. *Lessons from Deregulation: Telecommunications and Airlines after the Crunch*. Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, 2003.

Editor

Broadcast Media Ownership Rules: Can the FCC Get It Right?

continued from page 3

iversity, none of the Supreme Court decisions, like *National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978)—that affirmed the FCC's power to regulate media ownership, contain such limits. Judge Posner, in his plea for content-cognizant analysis in *Schurz*, saw no First Amendment problems. Further, the FCC already makes content-based distinctions with no constitutional problems. Most obviously, its entire diversity analysis, which goes back decades, is based on distinguishing news stories from other types of media. It also routinely makes content-based distinctions between children's and adult programming and educational and noneducational programming.

Second, the FCC's analysis demonstrates a troubling lack of competence in producing and analyzing economic data. Although it commissioned 12 papers especially for the *Biennial Media Ownership Order*, the FCC hardly produced a record appropriate for serious policymaking. Only one paper was published in a peer-reviewed scholarly journal. While the FCC did commission a paper written by a leading scholar in media economics, Joel Waldfoegel of the University of Pennsylvania's Wharton School, his paper lacked important statistically significant results that had any clear policy application. Interestingly, the paper published in a peer-reviewed scholarly journal predicted possible consumer and social welfare loss from concentration largely due to increased advertising costs.³ The order ignored it and virtually all effects on consumer welfare.

The order's economic analysis, in fact, was deeply flawed. The FCC did not base either its Diversity Index or the local television cap with its inconsistent and/or illogical treatment of market share on any serious analysis. Further, the articles on which the local radio cap was based by their own terms did not clearly support a 5-firm competitive market. They modeled simple markets, like local professional services or tires, and their results do not have obvious applications to complex national media markets.

The FCC apparently did not expect serious judicial review. Paul Gallant, senior

member of the media ownership working group, the team that formulated the order, commented: "I suspect the commission was surprised by how willing the judges were to get into the weeds on where the commission drew the lines."⁴ Ken Ferree, FCC Media Bureau Chief, seemed to have a particularly idiosyncratic view of judicial "hard look" review of administrative agencies. Speaking about the Diversity Index, he said: "The judges came back and said, 'Well, you know, you should consider market shares.' Well, you know, gee, thanks, we only thought about that for 6 months and had a team of Ph.D. economists trying to work out what would happen with market shares."⁵

The Future

The Third Circuit's rebuke of the *Biennial Media Ownership Order* was apparently so blistering that the Department of Justice has declined to seek certiorari. Only a consortium of media companies, including Tribune Co., News Corp.'s FOX, Viacom Inc., and General Electric Co.'s NBC Universal, have sought Supreme Court review and, with neither the Solicitor General nor the FCC joining their appeal, it is unlikely to be successful. The rules, therefore, will probably go back to the FCC for yet more comment, review, and revision.

Sex on the Tube

continued from page 7

An Assessment

Under a system of age and content ratings, the law no longer suppresses most televised sexual portrayals. The advent of ratings seems to establish a marketplace of sexual ideas. But the ratings also assist media firms and advertisers in their pursuit of profits in this market. Therefore, for some critics the advent of ratings poses questions about who should control program content. How much freedom should media conglomerates have to gear the sexuality in a program to ensure a profitable audience share? Should choice of programs be left to individual viewers? Could they be better informed about their choices? Or, should the FCC or other public institutions more aggressively police the airwaves to protect the public welfare? The answers to these questions remain to be addressed in the political arena.

There are two wise policy approaches. Congress can end this saga and set limits itself, as it did with the national radio and television caps. This would at least provide market certainty and free administrative resources for use elsewhere. Alternatively, the FCC can engage in serious policy analysis. Diversity, itself, is not that elusive. Current economic and social scientific research can illuminate the structural connections between industry organization and content diversity of news output. Whether the FCC is institutionally capable of using such research is, however, not clear.

Endnotes

¹ John Eggerton, "Broadcasters Catching Hill," *Broadcasting & Cable* (July 28, 2003).

² Robert Kaplan, "The Media and Medievalism," *Policy Review* 47 (Dec. 2004/Jan. 2005).

³ Brendan M. Cunningham and Peter J. Alexander, "A Theory of Broadcast Media Concentration and Commercial Advertising," 64 *J. Pub. Econ. Theory* 557-575 (2004).

⁴ Ted Hearn, "Copps Feels Vindicated by Court Ruling," *Multichannel News* (July 5, 2004).

⁵ *Communications Daily*, "Ferree Sees Issues That Could Interest the Supreme Court" (July 1, 2004).

References

Center for Media Education. *A Parent's Guide to the TV Ratings and the V-Chip*. Washington, D.C.: Center for Media Education, 1999.

Gitlin, Todd. *Inside Prime Time*. Berkeley: University of California Press, 2000.

Kaye, Barbara K. and Barry S. Sapolsky. "Offensive Language in Prime Time Television: Before and After Content Rating." *Journal of Broadcasting and Electronic Media* 45: 303-319, 2001.

Kunkel, Dale et al. "Assessing the Validity of V-Chip Rating Judgments" In Bradley S. Greenberg (ed.), *The Alphabet Soup of Television Program Ratings (Y-G-PG-V-S-D-14-FV-MA-7-L)*. Cresskill, N.J.: Hampton Press, 2001.

Reviewed by David Schultz

The Problem of the Media: U.S. Communications Politics in the 21st Century by Robert W. McChesney. New York: Monthly Review Press, 2004. 352 pp. Cloth \$45.00 ISBN: 1583671064. Paper \$16.95. ISBN: 1583671056.

A threat is haunting democracy in the United States—a corporate-controlled media. Concentration of mass communications outlets into fewer corporate owners stifles free expression, chills the flow of information, and reduces political discourse to mass culture consumerism. At least, this is the argument of Robert McChesney who is a communications professor at the University of Illinois, Urbana-Champaign and the host of a weekly radio show on the media.

Up until recently, to the questions “Who runs America?” or “What factors threaten American democracy?” answers such as “big business,” “the rich,” or “government bureaucrats” might be likely. Now, public opinion surveys suggest that the media is increasingly perceived as a major power broker. While first newspapers, then radio, and later television have all been described as major forces in society because of their capacity to set political agendas, to inform, and even to entertain and amuse, the power of mass communications companies has rapidly changed in the last 20 years. In less than a generation, Ben Bagdikian—a noted media specialist and author—has chronicled the consolidation of the 50 largest media companies into barely a half dozen mega companies that control news and entertainment outlets across the mass communications spectrums.

Today, a handful of companies such as FOX, AOL Time Warner, Clear Channel, and a few others control not just radio

David Schultz (dschultz@gw.hamline.edu) is Professor in the Hamline University Graduate School of Management and in the Law School, 1536 Hewitt Avenue, St. Paul, MN 55104. He is the author of numerous books on the media, including his most recent one *Lights, Camera, Campaign! Media, Politics, and Political Advertising* (Peter Lang, 2004).

or television, but they also own these outlets along with movie studios, book publishers, and many of the new media services such as the Internet. If mere concentration of ownership were not in itself a problem, it is what this new corporate control is doing to the content of the news and to American democracy that poses perhaps the more potent threat to the free expression and circulation of ideas. If, as Marshall McLuhan famously wrote in 1967, the “medium is the message” when referencing how the structure of television affected its content, then the mantra for the twenty-first century must be that ownership is the message. How did all this happen?

The Problem of the Media is a chilling but powerfully written and engaging account of the transformation of the American media from the American Revolution to the present, placing special emphasis upon recent Federal Communications Commission (FCC) policies that have permitted the consolidation of ownership of media outlets—such as television, cable, radio, newspapers, and the new media (the Web and Internet)—into fewer and fewer hands. The book spins an important tale of how this happened, why it is a problem, and what needs to be done to place control of mass communications back in the hands of the people.

McChesney builds his book around challenging eight myths that are the pillar of contemporary mass communications policy in the United States. He argues *against* the following eight claims: (1) the media are not important, and their product simply reflects what the people want; (2) the present media ownership structure represents the intent of the Constitution’s framers, the First Amendment, and the natural outgrowth of democratic forces; (3) contemporary media policy reflects current public opinion; (4) commercial media offer the type of journalism necessary to the functioning of American democracy; (5) there is a left-wing bias in the news; (6) the media respond to market demands; (7) technology drives the media; and (8) there is no alternative to the status quo for media policy and ownership. All eight of these myths—articulated and defended by free-market zealots, in-

cluding the current FCC Chairman Michael Powell—are critically examined and debunked in *The Problem of the Media*.

Chapter One examines the history of the media in the United States. McChesney describes the media of the 1780s as mainly small pamphleteers and penny presses that bear no resemblance to the media establishments of today. Through the nineteenth century the press was often a partisan-controlled institution that was not profit-oriented. It was not until the end of the nineteenth century, and the beginning of the twentieth century, that the move from local to more national presses emerged. With that change, two others followed. First, to attract wider audiences, newspapers became less partisan and sought to become objective. Second, newspapers became more profit oriented.

With the advent of radio in the 1920s, Congress passed the 1934 Telecommunications Act that set up the FCC, the licensing system for the ownership and operation of stations, and the regulatory framework that governed radio, television, and mass communications policy until the 1996 revisions, which effectively deregulated media ownership to allow companies to multiply their communications holdings. The point in telling this history is that it debunks two myths. First, it shows that the type of media system that the framers sought to protect bears no resemblance to what has emerged. Second, it demonstrates how government policy has inextricably affected the growth and structure of the media market.

The next several chapters dissect the consequences of FCC policy and the new rules of media ownership. One result is that the news is now biased, but not in the way often described by conservatives. Instead, McChesney describes in Chapter Three how contemporary news reflects the corporate bias of the owners of NBC (General Electric) or ABC (Disney). This corporate slant affects what is covered in detail (i.e., the Scott Peterson trial) and what is not (corporate abuses and wrongdoings). Chapter Four addresses another problem—the commercialization of news or what is often called market-driven jour-

continued on page 12

nalism. News must make money, and to do that it has become conflated with entertainment. One result? News that is devoid of serious content, especially the kind that the First Amendment was meant to protect and which citizens need in order to make informed political decisions in a democracy.

Chapter Five challenges the notion that the media is a competitive market that reflects public opinion and diverse programming needs. Media giants have used their political muscle, including political contributions and lobbying power, to secure favorable rulings from the FCC and Congress. For example, in the 1990s, big media received free from the government the frequencies to broadcast high-definition television (HDTV), even though it had a market value of \$70 billion. The media secured this largess through their political influence. The 1996 Telecommunications Act relaxed ownership rules, creating empires such as Clear Channel Communications, which now owns more than 1,200 radio stations and uses a cookie-cutter format to

reduce programming costs. The result is less diversity within a community, where one company may own several stations, and less program diversity across the nation as fewer owners use less creativity to deliver a product.

By 2003, McChesney has painted a dismal picture of the American media industry. But the concluding chapter offers a ray of hope in telling the story of how efforts by the FCC to yet again relax ownership rules resulted in public and congressional backlash and a federal court decision staying that ruling. This glimmer of democracy demonstrates that perhaps the people can again take control of the media, but other reforms are also needed. These reforms, as documented in Chapter Six, include renewed enforcement of media antitrust laws, a reinvigorated public broadcasting system, tightening of media ownership rules, and changing copyright law.

Overall, no one reading *The Problem of the Media* will conclude that it is dispassionate

scholarship. McChesney is a well-known progressive activist and vocal critic of the corporate media structure. *The Problem of the Media* builds upon earlier works, such as *Rich Media, Poor Democracy*, which similarly examined how the new face of the media was threatening free expression. *The Problem of the Media* clearly is part of ongoing advocacy for a progressive and democratic media policy, and some readers will be left wondering how the facts have been shaped by ideology. However, McChesney's arguments are well-documented and supported, and critics will have to work hard to debunk his arguments.

The Problem of the Media is an important study that every student and citizen should read. It largely succeeds in its goal of debunking the eight myths that prop up contemporary telecommunications policy in the United States. It demolishes the arguments of free marketers, who see nothing wrong with the media and insist that the trove of reality-based shows on television is what the public really wants to see.



321 N. Clark Street
Chicago, IL 60610
312.988.5735
www.abanet.org/publiced

NONPROFIT ORG. U.S. POSTAGE PAID AMERICAN BAR ASSOCIATION
