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Misregulating Television: Network Dominance and the FCC

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MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC. By *Stanley M. Besen, Thomas G. Krattenmaker, A. Richard Metzger, Jr.,* and *John R. Woodbury.* Chicago: University of Chicago Press. 1984. Pp. viii, 202. Cloth, $24; paper $9.95.

Television is a major force in modern American society. Bridging both time and distance, it brings realistic representations of far away events into the average American's living room. Even more important, the commentary, sets, and special effects used in television programs can have a dramatic sensory impact on the viewer, arousing emotions and instilling opinions about the world around him and even about himself. Recognizing this influence, many commentators have expressed dissatisfaction with the programs broadcast into American homes. They criticize television programs as boring, repetitious, and expressive of negative cultural stereotypes. One writer has simply labeled television a "vast wasteland."[1]

Congress certainly underestimated the impact that the broadcast media would have on American culture when, in 1934, it established the Federal Communications Commission.[2] Initially, the Commission's main purpose was to control the distribution of the available radio frequency spectrum among users. As time passed, the importance of the broadcast media as a source of entertainment and information grew. Along with this growth came heightened awareness that FCC regulation pervasively influences the shape of the broadcast industry.[3]

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1. N. MINOW, EQUAL TIME 52 (1964).

2. Just a few years earlier, in 1912, a naval officer testified before a House committee: "[T]he department believes that wireless communication should be *limited* as far as possible, to its *legitimate field;* that is, communication between the shore and vessels at sea." E. DOERING, FEDERAL CONTROL OF BROADCASTING VERSUS FREEDOM OF THE AIR 4 (1939) (reflecting the government's underestimation of the potential impact of radio) (emphasis in original).

3. By the late 1930s one commentator said, writing about radio:

> Art thrives upon competition and spontaneity of ideas. One cannot regulate mediocrity out of existence. At best one can supplant one mediocrity with another. . . . All that regulatory authority can do to assist radio as an art is (1) to safeguard the public with regard to freedom of speech, and from indecent and obscene language and material, and (2) to maintain the competitive vitality of broadcasting as a whole so that the best possible program service will result.

Id. at 39 (quoting Hettinger, *The Economic Factor in Radio Regulation,* 9 AIR L. REV. 115, 126 (1938)).

In *Misregulating Television,* Stanley M. Besen,[4] Thomas G. Krattenmaker,[5] A. Richard Metzger, Jr.,[6] and John R. Woodbury[7] attempt to explain why the FCC's regulatory policies led to the development and continued existence of only three national television networks, which together control eighty percent of the prime time viewing audience and ninety percent of total television industry revenues (p. 4). The authors' thesis, which they finally admit in chapter three,[8] is not that large, national networks are bad, but rather that there are too few such networks. Under the heading "Basic Principles," the authors write:

> [T]here is no reason to value, for its own sake, a reduction in television network size. As explained [in Chapter Two], networking is an efficient method of supplying television programs to viewers and the simple fact that networks "dominate" the industry . . . is neither surprising nor threatening. The number of networks and the relationships among them may substantially affect the Commission's economic and social policy goals, but the fact of networking does not. [pp. 23-24]

The authors derive this thesis from the premise that large networks are the most cost effective means of providing television programming (pp. 6-7).

By equating social desirability with economic efficiency, the authors take a gigantic intellectual leap over the social influence inherent in television. This thesis is convenient, though, because it leads directly to the authors' conclusion — that almost all television regulation should be abolished. *Misregulating Television* is really just a rationalization for television deregulation.

4. Stanley M. Besen is a senior economist at the Rand Corporation and was formerly codirector of the FCC Network Inquiry. The FCC initiated the Network Inquiry to investigate the desirability and feasibility of adopting more rules regulating network conduct, many of which had been suggested by the Justice Department's antitrust proceedings against ABC, CBS, and NBC. In those proceedings, initiated in 1972, the Justice Department had alleged that the three major networks had monopolized the business of exhibiting prime time television programs. Pp. 1-2.

Although all of the authors were members of the FCC Network Inquiry, much of the research for this book took place after the Inquiry had concluded. The authors do not represent this book to be the findings or conclusions of the Inquiry. P. 2.

5. Thomas G. Krattenmaker is a Professor of Law at Georgetown University and was formerly codirector of the FCC Network Inquiry. *See also* note 4 *supra.*

6. A. Richard Metzger, Jr. is a member of the Washington, D.C., law firm of Wald, Harkrader, and Ross. He was principal counsel to the FCC Network Inquiry. *See also* note 4 *supra.*

7. John R. Woodbury is vice president of research and policy analysis for the National Cable Television Association and was senior staff economist for the FCC Network Inquiry. *See also* note 4 *supra.*

8. The authors hint at their economic approach in their introduction:

> Simply put, our goal is to employ the tools of legal and economic analysis to consider what functions the commercial practices of television networks serve, whether those practices undermine the goals of the Communications Act or national antitrust policy, and how regulation of these practices might affect the industry's performance in an expanded marketplace.

P. 3.

The authors begin their analysis of television regulation by explaining how the FCC's spectrum management policies made the development and continued existence of only three national networks inevitable. The authors argue that the FCC initially allocated too small a range of the available broadcasting frequencies to television. Then, the Commission tried to locate at least one broadcast facility in each U.S. community. Different frequencies had to be allocated to communities in close proximity to one another to avoid interference between the broadcast signals. As a result, each community received only a few broadcast frequencies. The authors contend that only three high quality television transmissions can reach 100% of U.S. television households (pp. 14-15).

Networks can compete equally only if they can reach audiences of equal size (pp. 5-9). The authors contend that, using all available frequencies, a fourth network would reach only 91.3% of U.S. television households, a fifth 81.1%, and a sixth only 66.8% (p. 15). Thus, additional networks would be handicapped by smaller audiences over which to spread their operating costs.[9]

Limiting their analysis to economic terms and assuming that increasing the number of national networks will produce the most desirable television programming (pp. 24-26), the authors conclude that the FCC spectrum management policies are complete failures (pp. 168-69). Unfortunately, the authors never explain what goals the FCC attempted to meet with these policies. (pp. 14, 27-28). There must be some explanation for the Commission's desire to have a television transmitter in each community, whether it was political pressure or an incorrect evaluation of the nature of the television industry.[10] The authors' arguments appear logically correct but seem suspect because only one side is presented.

Next, the authors devote Chapter Three to the development of criteria with which to judge the effectiveness of FCC television regulation. This chapter is unconvincing. The authors conclude that the regulatory scheme should "further the values of competition, diversity, and localism" (p. 23). According to the authors, these "values" roughly correspond to the "widely agreed upon" (p. 21) "fundamental goals [of broadcast regulation] — economic efficiency, an economic environment conducive to the enjoyment of First Amendment freedoms, and the observance of the policies established by the Communications Act" (p. 29). Goals other than economic efficiency, however,

9. The authors do assert that a fourth network could be profitable, but that the FCC erected barriers to entry that blocked efforts to create additional networks. Pp. 8-9. Many of these barriers have been removed. *See infra.*

10. The authors "confess [their] inability to understand" the Commission's concern over localism. *See* pp. 27-29.

become empty words in the mouths of the authors. They betray their bias openly, writing:

> An argument can be made that competition is the single criterion by which FCC regulations of network behavior should be measured. Certainly most economic policies that might be advocated are protected by competition. Further, insofar as the economic regulation of nonbroadcast media in this country can be said to rest on a coherent principle, that principle seems to be reliance on competition . . . .
>
> *Nevertheless,* diversity and localism are frequently suggested as additional or alternative criteria by which FCC economic regulations should be judged. This apparent paradox may be resolved, we think, by considering, *in light of what has been said,* precisely what those terms might signify. Properly understood, each can describe an additional, appropriate criterion by which to assess the Commission's performance.[11]

The authors then define and discuss diversity and localism in strictly economic terms,[12] without recognizing the limitations of their economic analysis. The authors attempt to trivialize criteria that do not fit comfortably within their economic model. Recognizing the inconsistencies that remain between their criteria and their model, the authors concede: "Candor and completeness in judging these issues . . . requires that we confess our inability to understand what positive values the 'community localism' criterion reflects" (p. 28). This inability to recognize noneconomic values characterizes the authors' approach to the entire subject of television regulation.

Moreover, the authors fail to establish a logical connection between their premises and their conclusions. For example, the authors do not explain why the community localism criterion supports their conclusion that more *national* networks are needed. Additional national networks would certainly find it just as difficult as current networks to produce shows of local importance. In addition, the authors never apply these criteria to the examination of the FCC spectrum-management policies that preceded this chapter. Taken as a whole, *Misregulating Television*'s treatment of these criteria creates the impression that the authors only included this discussion to imply that their conclusions were the result of objective, multivalued analysis.

The remaining chapters of *Misregulating Television* are devoted to economic analyses of (1) the network-affiliate relationship, (2) the net-

11. Pp. 25-26 (emphasis added). Although the authors assert that competition "achieves many ends that are conducive to realizing First Amendment values," p. 25, it seems evident that the primary goal they seek to advance through competition is economic. They state, "[u]nder competitive conditions, the number, quality, content, and cost of programs are determined by impersonal marketplace forces . . . ." P. 25.

12. The authors define "diversity" as "[t]he term . . . used to describe the goal of increasing the number and types of programs produced by different suppliers and broadcast to viewers by different firms." P. 26. They define "localism" as "[p]ermit[ting] more viewers (or more stations) to make more individual choices regarding what is broadcast," and "the broadcast of programs of limited geographic scope or interest." P. 28. They quickly dismiss the second version of localism, eliminating the only noneconomic rationale. *See* text following this note.

work — program supplier relationship, and (3) network ownership of local stations. These analyses are in part based on a previous article co-written by *Misregulating Television* coauthor Besen.[13]

Besen's previous article examined the relationship between networks and affiliates and the economic impact of FCC regulation on that relationship. One of the article's tangential observations was that "some of the benefits generated by the formation of a network accrue not to the network but to its affiliated stations. This fact may partly explain why a fourth network is not formed."[14] This objective observation in Besen's previous work is seized upon by the authors of *Misregulating Television* as potent ammunition in their battle against wasteful regulation. Because *Misregulating Television* assumes that the formation of new national networks should be encouraged, the transfer of wealth from networks to affiliates is undesirable. The authors also attack almost all FCC television regulation as strengthening affiliates or program suppliers at the expense of large, national networks.

Unfortunately, as with their discussion of the FCC spectrum-management policies, the authors never admit that any arguments exist contrary to their own. Nor do they admit that the FCC might have established these policies for rational reasons. The Commission could have originally envisioned television networks like PBS, which nationally broadcasts programs produced by local affiliates. Perhaps the FCC just wanted to give local affiliates and program suppliers some bargaining power against powerful national networks. That bargaining power could in turn further the authors' supposed goals of diversity and community localism. However, the reader must discover elsewhere arguments that counter the opinions expressed in *Misregulating Television.*

The greatest problem with this book is that it does not address the television industry as it currently exists. The authors recognize that the FCC has eliminated many of the entry barriers that it had imposed on pay and cable television. Their own statistics show that the number of subscribers to pay cable service has risen from 650,000 households in 1976 to 17.9 million households in 1983 (p. 12). There are more television programs available as a result of this boom in the number of cable subscribers.

Many of the questions that really need to be answered at this point in television's development concern the growth of cable television. Can it reach enough homes to circumvent the limitations imposed by

13. *Compare* Besen & Soligo, *The Economics of the Network-Affiliate Relationship in the Television Broadcasting Industry,* 63 AM. ECON. REV. 259 (1973) (formulating a model of the network-affiliate relationship in order to evaluate FCC objectives and relationships), *with* pp. 50-66 (explaining various economic details of the network-affiliate relationship).

14. Besen & Soligo, *supra* note 13, at 267.

the FCC's spectrum-management policies? Can it even reach enough homes to sustain its own existence? Can and should the FCC promulgate rules to help the cable industry? What is the future of "superstations," local stations which, via satellite, transmit their programming to cable systems nationwide? Can any of the special interest cable networks or the superstations evolve into nationally competitive networks? The questions continue, but the authors of *Misregulating Television* propose no original answers.

As a basis for recommendation of future FCC regulation, *Misregulating Television* is inadequate because the authors fail to address current issues. As a history of television regulation, the book is flawed by the authors' refusal to present balanced arguments. One redeeming quality of this work is that it explains the views of four participants in the most recent FCC Network Inquiry. Nevertheless, students of television regulation should also read some of the other works in this field.[15] They should approach the conclusions of *Misregulating Television*'s authors with skepticism.

The FCC is, in fact, moving toward the deregulation of television broadcasting.[16] Where this movement will eventually lead depends a great deal on the members of the Commission itself and the continued deregulatory climate in national politics. Television programming, however, is too significant a factor in the development of norms and values in society for the direction of its regulation to be determined by the sorely deficient arguments contained in this book.

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15. *See, e.g.*, Geller, *Communications Law — A Half Century Later*, 37 FED. COM. L. REV. 73 (1985); Jones & Quillan, *Broadcasting Regulation: A Very Brief History*, 37 FED. COM. L. REV. 107 (1985); Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communication Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875 (1981); Comment, *A "Better" Marketplace Approach to Broadcast Regulation*, 36 FED. COM. L. REV. 27 (1984); Comment, *Regulatory Approaches to Television Network Control of the Program Procurement Process: An Historical Perspective*, 8 FORDHAM URB. L.J. 563 (1980); Note, *A Regulatory Approach to Diversifying Commercial Television Entertainment*, 89 YALE L.J. 694 (1980). On the relationship between the FCC and the networks, see B. COLE & M. OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE (1978).

16. Pp. 4-20; *see* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207 (1982). Coauthor Mark S. Fowler is Chairman of the Federal Communications Commission.