Chapter 5:
Access to the Media

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This chapter proceeds in three stages. First, it examines the current state of access to the media. Then it reports on the challenge we face. It concludes by offering some suggestions for reform.

The Current State of Access

Television is expensive. The nature of the medium requires a broadcaster to spend a great deal of money to buy or create programs, and to broadcast them. The cost of television largely is responsible for the structure of the medium; it is driven by advertising which is driven by ratings numbers. Because of the costs involved in the production and dissemination of television programming, access to program creation or free expression has never been as possible in this medium the way it has in print, radio, cable, or the Internet.

With print, every citizen can, for a modest amount, express and share his or her ideas. This has been true since the founding of the nation and there is a long history of pamphleteers and independent journalists using their First Amendment rights to alert fellow citizens to issues close to their heart.[1] Short wave radio, ham radio and even the possibility of pirating a station open the possibility for self-expression to anyone who has the equipment. But television is different. Inherent in the structure of television is a profound barrier to individual entry or participation due to its cost and spectrum specifications.

Instead, television is created for the benefit of the public by private entities. Although television is administered by a governmental agency, the Federal Communications Commission (FCC), broadcast television is organized as a monopoly, but with, historically, an obligation to be a venue for not just entertainment, but also for education and culture and whatever is deemed to be in the best interest of the American people. In his introduction to the book *Wasteland: Children, Television and the First Amendment*, Newton N. Minow, former head of the FCC, talks about to Clarence C. Dill, one of the framers of the Communications Act of 1934—the first of Congress' Acts to regulate television and the document that created the FCC. Minow writes:

> I asked him what he had meant by the 'public interest.' Senator Dill told me that he and his colleagues had been of two minds: on the one hand, it was the middle of the Great Depression and they wanted to encourage people to risk their money in the new medium; on the other hand, they knew they had to have some legal standard with which to award licenses

[1] Al Gore. Keynote speech to the We Media Conference. (New York: October 5, 2005)

> to some people while rejecting others, because there were not enough channels to go around.[2]

Dill told Minow that the phrase "public interest, convenience and necessity" was actually a phrase frequently used by the Interstate Commerce Commission and suggested by a staff member. Since the 1934 Act was derivative of the 1928 Radio Act, the 'public interest' clause was never to apply to content.[3] Another important tenet of the 1934 Act was the limiting of licenses based on the assumption of frequency scarcity—the idea that there were only a small number of frequencies/channels available in a given market. With the advent of cable and satellite television and improvements in technology, it can no longer be said that there are a finite number of possible channels in need of strict licensing policies. This was one of the reasons that the so-called fairness doctrine and some of it corollaries were repealed by the FCC in 1987(see below). However, the law continues to regulate political advertising and access in the equal access and time rules, which do not apply to other media that are considered "press."

It did not take long for the public interest standard to be applied to content first by the Federal Radio Commission and then by the FCC under the 1934 Communications Act. Worse yet, court cases limited the scope of broadcaster content. In principle, an open marketplace of ideas would require that citizens be given a forum for free expression, including dissent against the government. In practice, however, since individual citizens do not often have access to the airwaves, broadcasters are meant to be our agents—articulating a broad spectrum of views in the stead of all who would speak out, if only they could—to make television a medium that speaks to, and for, everyone.[4]

Having the right to be heard (to have an audience) is an extension of First Amendment rights based not only on the free speech clause but on the freedom of assembly and right to petition the government clauses of the Amendment. Some argue that this implies a right to express personal and/or community imperatives, as well as a right to challenge authorities whose actions we do not approve. However, the economics and the structure of television preclude providing every individual or group with access. There are too many groups for the number of stations and time available to speak.

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[2] Minow, Newton N. and Craig LaMay, *Abandoned in the Wasteland: Children, Television, & the First Amendment*. (New York: Hill and Wang, 1995) p. 4.

[3] *Ibid*. During the debate over the 1927 Act, Congressman LaGuardia specifically asked whether the "public interest" standard applied to content. The authors told him it did not; it only applied to broadcasting a clear signal that did not interfere with the signals of others. 67 Congressional Record 5, 480 (1926).

[4] *Freedom, Technology and the First Amendment*, at p. 176 quoted by Erwin G. Krasnow, "The "Public Interest" Standard: The Elusive Search for the Holy Grail. Briefing Paper Prepared for the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters." October 22, 1997 (found at: www.ntia.doc.gov/pubintaadvcom/octmtg/Krasnow.htm

The Fairness Doctrine was the FCC's first solution to this problem. Promulgated in 1949, the goal of the fairness doctrine was to ensure that contrasting views on important questions were presented on television and radio, usually in editorial segments at the end of news broadcasts. The penalty for not adhering to this standard was an exhaustive examination of company logs by the FCC and the possibility of the revocation of a broadcaster's license. Unfortunately, the effect on broadcasters was the opposite of the FCC's intentions; broadcasters avoided editorializing on controversial subjects to avoid having to put many speakers with contrasting views on the air. One of the problems was that viewers could file complaints about not being allowed to comment. Instead of examining these complaints at license renewal time, the FCC took it upon itself to investigate each individual complaint soon after it was received. This procedure cost broadcasters enormous amounts in terms of legal fees, which in turn had a chilling effect on broadcasters' speech. In 1987, the FCC suspended the Fairness Doctrine labeling it "constitutionally suspect" due to its chilling effect and the death of the scarcity doctrine.

In 2000, *Radio-Television News Dirs. Ass'n v. FCC* resulted in the demise of two rules that were seen as extensions of the suspended Fairness Doctrine. Under the Personal Attack rule, broadcasters were required to allocate on-air time for a person who was attacked on the broadcaster's airwaves to respond to the attack. The second rule — the Political Editorial rule —bound broadcasters to give political candidates airtime to respond to editorials that opposed the candidate or that endorsed an opposing candidate.[5]

Deregulation and advances in technology have divided the history of television into two distinct eras, and each era expresses one of the two ways in which the First Amendment is often interpreted. Thomas Jefferson believed successful democracies required an educated electorate, which meant an open forum of ideas. Justice Oliver Wendell Holmes articulated this model in his dissent in *Abrams v. United States* in 1919: "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[6] James Madison, the main author of the Bill of Rights, believed that only through free speech, knowledge and informed debate could the citizenry choose their representatives well and make their voices heard on the issues important to them. It is this understanding of the First Amendment that guided the Supreme Court decisions in *New York Times v. Sullivan*[7] and *Red Lion Broadcasting v. FCC*[8]— both cases affirm

[5] Shirelle Phelps, Ed. "Television." *Encyclopedia of Everyday Law*. Thomson Gale, 2003. eNotes.com. 5 July, 2007 <http://law.enotes.com/everyday-law-encyclopedia/ television>
[6] 250 U.S. 616, 624 (1919) Holmes, J., dissenting.
[7] 376 U.S. 254 (1964)
[8] 395 U.S. 367 (1969)

the public's right to have access to facts and views needed for an informed understanding of the socio-political landscape, even though those views may be bias or incorrect. The Madisonian view is typified by Justice Louis Brandeis' statement that "the greatest menace to freedom is an inert people,"[9] and affirmed, by Justice William O. Douglass who, in *Terminiello v. Chicago*, a First Amendment case unrelated to the media wrote the "function of free speech...is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[10]

In contrast, there is the view that the government should not try to create a free marketplace but instead allow one to emerge on its own. This view supports the position that the First Amendment precludes requiring the media to present views it does not believe in. *Miami Herald Publishing Co. v. Tornillo*, for example, overturned a Florida law that required a right of reply.[11] In that battle over the suspension of the Fairness Doctrine, Mark Fowler, a Reagan appointed FCC Chairman, argued that television was "just another appliance. It's a toaster with pictures."[12] He wrote:

> Put simply, I believe that we are at the end of regulation broadcasting under the trusteeship model. Whether you call it "paternalism" or "nannyism" – it is "Big Brother," and it must cease. I believe in a marketplace approach to broadcast regulation . . . . Under the coming marketplace approach, the Commission should as far as possible, defer to a broadcaster's judgment about how best to compete for viewers and listeners, because this serves the public interest.[13]

The weakness of this paradigm is its *a priori* premise that broadcasters are diverse enough to provide all of the essential contrasting views we need to make intelligent decisions. This paradigm certainly does not provide equal access to the medium. What is true of television, of course, is true of newspapers. They are owned for the most part by large conglomerates, such as Gannett and Tribune. Since the right of newspapers to deny access is sacrosanct under First Amendment law, such as the *Miami Herald* ruling, it follows that other media should have the same right.

In addition to a financial structure that forecloses our access to television's audience, advertisers' interests in television programming diminishes access and thus, First

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[9] Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 375 (1927), quoted in Cass R. Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, 1997) p. 169.
[10] 337 U.S. 272 (1949) (found at: www.bc.edu/bc_org/avp/cas/comm/free_speech/terminiello.html)
[11] Sunstein, Cass R., *Free Markets and Social Justice* (New York: Oxford University Press, 1997) p. 169.
[12] Ibid, quoting Nossiter, Bernard, "Licenses to Coin Money," 240 *Nation* 402 (1985)
[13] Fowler, Mark, "The Public Interest," 61 Fed. B.J. 213 (1982), quoted by Erwin G. Krasnow, "The "Public Interest" Standard: The Elusive Search for the Holy Grail. Briefing Paper Prepared for the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters." October 22, 1997 (found at: www.ntia.doc.gov/pubintaadvcom/octmtg/Krasnow.htm)

Amendment opportunities. In his book *Democracy and the Problem with Free Speech*, Cass R. Sunstein describes how our access to ideas is skewed by advertisers:

> Sometimes the media is quite naturally led to be generous to the advertiser's products and to the advertiser's more general economic interests. This is a perfectly predictable consequence of the broadcaster's economic self-interest... Sometimes the media seeks to decrease the partisan content of its own presentations and to diminish controversy, so as to avoid giving offense to advertisers and their customers. Sometimes the media is a led to seek to attract certain audiences—say, upper-income people between the ages of twenty-five and forty-five—precisely because these are the groups to which advertisers seek most to appeal. When the media is led in this direction, it is also led to ignore or downplay other demographic groups, even if those groups are numerous. It should not be controversial to suggest that all of these consequences are troubling from the Madisonian point of view.[14]

At the core, there is a fundamental tension between citizens having access to all ideas and the property rights of media owners. Owners derive their livelihood from the volume of advertising that is invested in their enterprise. In *The Audience Reflected in the Medium of Law: A Critique of the Political Economy of Speech Rights in the United States*, Ruggles argues that "the value of advertising services . . . depends on the degree of private control exercised over the audience's communicative activity."[15]

If owners were compelled to allow citizens to have access to contrasting ideas, the owner's enterprise would be compromised by the creation of an environment that is less attractive to advertisers. This is no less true if citizens were to buy airtime from the media owner. From the property rights perspective, a media outlet is a valuable commodity because of the audience it reaches and the control it has over its programming content. Many broadcasters have built up strong markets for their stations. Advertisers, seeing this value, want to associate their products with this content. But free speech is, by its nature, expressed by challenge and criticism which, when present in the media environment, make the environment less attractive to advertisers, thereby diminishing the media owner's value. Sunstein continues this line of thought: "Programming content is produced not merely by audience demand, but also by the desires of advertisers. Viewers are in this way the product as well as its users; they are what advertisers are buying when they purchase commercial time. Viewers are commodities as well as consumers."[16]

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[14] Sunstein, Cass R., *Democracy and the Problem with Free Speech*. (New York: The Free Press/ Macmillan Inc. 1993) p. 63.
[15] Ruggles, Myles Alexander. *The Audience Reflected in the Medium of Law: A Critique of the Political Economy of Speech Rights in the United States.* (Norwood: Ablex Publishing Corporation, 1994) p. 17.

[16] Sunstein, Cass R., *Democracy and the Problem with Free Speech.* (New York: The Free Press/ Macmillan Inc. 1993) p. 58.

In 1996, Congress re-wrote the guiding principles by which media are regulated. The Telecommunications Act was a significant departure from both the letter and the spirit of the legislation that preceded it, particularly the Communications Act of 1934. The purpose of the 1996 Act was to bring the laws that regulate our media in line with new media forms, such as the Internet and mobile telephones. Much of the new Act was unremarkable but in the ensuing years, the most important change turned out to be the enabling of media operators to consolidate across platforms. The net effect of this change has been widely discussed in the television and film industries because, as a result of the 1996 Act, and the deregulation that followed it, we now live in an era in which large, multinational conglomerates control virtually all of what can be seen on television. Barry Diller, the former Chairman and CEO of Paramount Pictures, Fox Inc, and Vivendi Universal Entertainment said this before the National Association of Broadcasters on April 2003:

> Five corporations, with their broadcast and cable networks, are now on the verge of controlling the same number of households as the big three did 40 years ago. We didn't think that was such a healthy situation back then, but back then there was this real, scary regulation - they may have controlled 90% of what people saw, but they operated with a sense of public responsibility that simply doesn't exist for these vertically integrated giant media conglomerates, driven only to fit the next piece in their puzzle for world media dominance.[17]

In 2006, the FCC held hearings on the subject of media consolidation. Appearing before the committee were members of every one of the entertainment unions, as well as many recognizable names in that industry. This unprecedented hearing was precipitated by statistics that express the changes in the media landscape since the 1996 Telecommunications Act. As Jonathan Adelstein, one of the FCC's commissioners noted during the hearing, "Women make up over half of the U.S. population, but yet they own less than 5 percent of all television stations. Racial and ethnic minorities make up over 30 percent of the population, but yet they own less than 3.3 percent of all television stations."[18] Currently, six corporations create and control 90% of all that is seen on television (broadcast, cable or satellite) or at the movies, heard on the radio, or read in a major newspaper.[19] Ultimately, while the 2006 hearings were to establish the effects of changes in ownership rules, there was an important subtext that was expressed in the hearings: the ways in which media consolidation affect the flow of diverse ideas. (The next chapter in this report specifically examines the impact on news

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[17] Barry Diller, Keynote Speech to the National Association of Broadcasters. Las Vegas, NV April 7, 2003. (available at: http://www.wga.org/subpage_newsevents.aspx?id=379)

[18] Horwitch, Lauren. "Media Consolidation: Hollywood Versus The Big Six" *Backstage,* October 19, 2006 (found at: http://www.backstage.com/bso/news_reviews/multimedia/article_display.jsp?vnu_content_id=1003285440)

[19] *Ibid.*

dissemination.) If five conglomerates control almost all that we see, the public's access to diverse ideas could be limited.

The Challenges We Face

Ultimately, the challenges to the current system are three-fold: (1) Is television providing access to the public's political/social/cultural interests? (2) Do advertisers wield a disproportionate power over television's content? (3) Is diversity of opinion or representation evident in current programming?

The broadcast media has been one of the most regulated in our short history as a nation. The rules affecting newspapers are scant by comparison. So it may be time to reconsider television's social and legal contract with its public.

In a now-famous article called the *Tragedy of the Commons* (1968), Garrett Hardin, a noted biologist, developed the metaphor of a commons (public land upon which anyone is able to set their cattle to graze) to explain how a public resource becomes dissipated and eventually breaks down in the face of each individual's self-interest. Each "herder" sets as many head of cattle as are possible to graze on the commons. Over time, the commons becomes overgrazed, a negative consequence that has an equal effect on each "herder," regardless of how many head of cattle he has. And yet, because each "herder" wants to maximize the potential use of the commons, a "herder" may decide to add one more cow, because while he will share the negative effects of overgrazing, he alone has the significant value of having one more cow. In sum, if a person enjoys the complete and undiminished good (the cow), but only shares the bad (the overgrazed land), he will continue to add his good, without regard for the bad.[20]

Ultimately, television is a commons if (and only if) we choose to look at it as one. Ninety-eight percent of U.S. homes have at least one television; and the vast majority of those homes have access to cable.[21] Television began as an instrument for the distribution of entertainment and news. It was a commons, but actually, it is not one that belongs to the people, even though they issue the license to graze on the broadcast spectrum. It has become the commons of broadcasters and advertisers who may not have enough of an incentive to serve the public interest.

On the other hand, one could argue that the emergence of cable, now virtually available to everyone, allows programmers to narrow cast to audience subsets. The fragmentation of the sports audience is an obvious case. But more subtle is the ability of programmers to adapt to unique political subsets. A viewer can choose to surf here and there to be exposed to diverse ideas, or more likely, watch only those programs

[20] Garrett Hardin, "Tragedy of the Commons," *Science*, 162 (13 December 1968), pp. 1243 – 1248.
[21] http://www.mediacampaign.org/publications/primetime/tv_appb.html.

which supporter the viewer's ideology. In this way, cable diversity actually makes the viewing public more insular and opinionate than ever before.

Solutions

In contrast to the unregulated commons model in which each herder is effectively on the honor system, it may be possible to think of television as a commons from a different angle. As technology has advanced, the foundational idea that there is a limit to the frequencies upon which a television signal can be broadcast has turned out to be false. Equally, we are awash in other forms of broadcast such as cable and satellite and even streaming over the Internet. Today, if we have the desire, we can each take a message to the world in an e-mail or a blog. In principle, we can each have our own station with which to broadcast the sort of programming we would like to watch. The potential for diversity is boundless. And the spectrum is about to expand as analog broadcasting is converted to digital.

Sunstein, who worries that such an arrangement would "entail the elimination of a shared culture," points out the limitation of this idea.[22] This fragmented world would be the equivalent to everyone speaking at once, with no one to listen. And yet, it is also true that relatively few people are moved to share their views and interest with the world. This being the case, making a space for those who feel they have something to say has changed the First Amendment landscape. Many people get their news and their views, not from television, but from alternate modes of communication.

One way to reform this potentially isolating cacophony would be to change the FCC's objectives. Why not allow everyone to have a broadcast license? To drive a car one must be a certain age. One must pass a test to prove mastery of the equipment. The quality of the equipment (a VW microbus v. a new Maserati) doesn't matter as long as it is safe, but the output (good driving), does. And once a license has been procured, the driver is subject to the rules of the road. In this model, the FCC would function as a licensing agent much like the Department of Motor Vehicles, and as a monitor of the expression found on television. When radio licenses were first issued in 1928, it was without regard to programming content. The licensees were merely required to put out a quality signal and not interfere with the authorized signals of others.

Other solutions have been proposed which may affront First Amendment sensibilities. For example, mandating that 15% of each station's programming be in service to the public interest, or limiting the percentage of each station's revenue that comes from advertising. In *Democracy and the Problem of Free Speech*, Sunstein imagines government taxing all proceeds from advertising then returning the tax revenue to

[22] Sunstein, Cass R., *Democracy and the Problem with Free Speech.* (New York: The Free Press/ Macmillan Inc. 1993), p.76.

stations in proportion the size of each station's audience.[23] The prescription in this regard would be a minimum broadcast requirement of at least twenty hours per day. To maintain this level of programming, small operators would necessarily engage other small operators to create a robust and idiosyncratic landscape that is the ideal expression of both the marketplace and Madisonian understandings of the First Amendment (imagine a station with skateboard punks, Polish new immigrants and nature documentaries sharing the day's programming). In this model, a channel broadcasting a program created by a teen collective is as important as HBO. Each finds their audience based on the content they provide. While this might reward broadcasters for their relevance and audience attention, it might also homogenize the markets as each station sought the most popular programming in order to gain the most funding.

We need to examine such proposals carefully not only because of their First Amendment implications but because of damage they might cause to the broadcast industry. We note that there are millions of abandoned websites that can be found on the Internet, just as independent television networks, such as the WB, have gone under. This is the market in its purest form. The question is does this free market reflect the environment James Madison envisaged. He wrote, "Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[24]

And that leads us to the ultimate situation in this regard. The fact is that advertisers follow audiences; entertainment outlets seek audiences. *Thus audiences are in control of television.* They can demand more diversity, more news, and more quality. But often they do not. Instead, they seek reinforcement of their own views and their narrow perceptions of art. Thus, a national audience can pull television programming into a downward spiral or encourage it to segment into subsets of audiences. Given our understanding of the First Amendment, only the audience can solve this problem in a nation protected by the First Amendment.

[23] *Ibid.*, p. 86.
[24] James Madison's letter to W.T. Barry. August 4, 1822 (found at: http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html)