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Putting the Right Nail in the Broadcast Content Regulation Coffin

by

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In the last few months, broadcast content regulation by the Federal Communications Commission under the public interest standard is grabbing attention after decades of dormancy. This attention was prompted by allegations that potential applications for approvals of transfer of a group of broadcast stations involving (separately) ABC and CBS might be contingent on retractions of unfavorable news coverage or entertainment viewpoints. The (temporary) removal of Jimmy Kimmel from his late-night talk show following his controversial comments about assignment of blame for the assassination of activist Charlie Kirk seemed to crystallize this attention.

Prompted by the Jimmy Kimmel brouhaha, I have seen calls for the Supreme Court to rule the FCC's "Fairness Doctrine" unconstitutional, surprising not on the merits but because I thought the FCC rescinded that policy forty years ago. As an economist, I am not going to get into constitutional questions. However, whether and what sort of program content regulation could respond to market failures is in my bailiwick. Those who argue that technological and market changes have made content regulation irrelevant are correct, but perhaps not for the reasons most suspect. In the era in which television was exclusively an advertiser-supported over-the-air medium, there might have been a market failure. But before getting to that, I should explain why the two leading arguments for content regulation back then did not support content interventions.

The first of these was that broadcast spectrum used by television and radio broadcasters was “publicly owned.” This was shorthand for the idea that a broadcaster needed a license from the FCC to operate. But that fact in and of itself is inherently irrelevant to whether broadcasters are using the spectrum efficiently. In economic terms, efficient use is assessed based on whether there are unmet benefits to the users and consumers of broadcasting that exceed the costs of meeting those needs. That calculation is independent of “public ownership” of the spectrum.

Public licensing can impede efficient spectrum use if existing licensees can influence whether the FCC allows more competition, or whether the FCC uses non-economic criteria to grant licenses. (The fundamental argument for spectrum auctions is that those who can generate the greatest value in how they use the spectrum can be expected to bid the most for it.)

The second argument, perhaps exacerbated by the first, is so-called “scarcity.” On the face of it, even in the ad-supported era, this was an odd claim, in that the number of broadcasters typically exceeded the number of daily newspapers in a metropolitan area, yet newspapers were constitutionally protected from content regulation. And even if scarcity were relevant, the market failure would be reduced competition, implying less output – fewer viewers and listeners. If so, content rules like the “Fairness Doctrine” that required broadcasters to air content different from what they otherwise would have chosen to air responding to market demands would reduce output even more. Needless to say, “scarcity” – and “public ownership,” for that matter – are empirically much less compelling today as viewers can access content through cable, fiber, and satellite delivery, and through streaming over the Internet.

But in the ad-supported broadcast era, there was a meaningful market failure, just not one implied by scarcity and public ownership. When programming was supported exclusively by advertising, viewers were not the consumers of broadcasts – they were the “product.” The economic function of the “broadcasting” platform was to deliver eyeballs to advertisers. This implied that programs that a relatively small audience was willing to pay for, but who either would not be large or responsive enough to commercials to generate much revenue – or who would be unlikely to watch programming interrupted by commercials – would not be aired, even if the benefits to that audience exceeded the cost of producing and broadcasting such programs. The absence of a direct viewer support mechanism was a market failure.

However, the proper response to that market failure was likely not to regulate broadcaster content regarding public issues. Rather, the response should have focused on providing programs to the relatively small audiences that would be willing to pay for them. The most efficient way to meet this objective looks a lot like “public broadcasting.” That the beneficiaries from policies to support public broadcasting would be a group of high income and highly educated elites should not go unnoticed.

Economically efficient responses to market failures may not support content related policies in general, or public broadcasting in particular. There may be non-economic justifications. One could look at public broadcasting as a widely available educational service, comparable to schools or public libraries. Whether to provide that support and on what basis is for legislatures to decide. Whether I agree or not, Congress has spoken on the issue at the federal level. The door remains open for state and local governments to fill that void.

But the rationale that viewers have no way to pay directly for the programming they prefer is long gone. Hundreds of premium cable and streaming services catering to all sorts of interests and tastes meet that demand. For many of those services, one can pay more to avoid commercials if those are particularly annoying. That, and not “public ownership” or reduced “scarcity” per se, are why policies created decades ago regulating broadcast content should be eliminated.

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