

## Carl Ramey's *Mass Media Unleashed*

Henry Geller\*

This superb book treats an important issue: the proper regulatory policy for broadcasting in the twenty-first century.<sup>1</sup> Before doing so, it discusses the necessary background in a most comprehensive fashion, including numerous supporting footnotes that enable further exploration of the points made. Thus, it describes today's mass media, and their performance under existing policy. As to policy, the book sets out the role and dismal performance of the Federal Communications Commission ("FCC"), Congress, and the courts (e.g., the Court of Appeals for the District of Columbia Circuit).

The book treats two policies: the public trustee policy and the deregulatory market policy, which was introduced in 1980 and has now reached full fruition. The former is based on the consideration that more people want to broadcast than there are available frequencies or channels, that the government chooses one licensee, and therefore, that one must act as a trustee for the public.<sup>2</sup> The governing act specifies the public interest areas—contributing to an informed citizenry, acting as a local outlet, and serving the educational needs of children. In these areas, the broadcaster must necessarily, at times, put public service first over maximizing profits.

Ramey has shown that even before the deregulation period, this public trustee scheme did not work.<sup>3</sup> The FCC for many years used an ascertainment approach when what was needed was quantitative guidelines as to minimum amounts of informational programs, including those of local origin and educational children's fare. Even during the period when the FCC had quantitative guidelines, they were never implemented. As Ramey states, no station ever lost a license based on inadequate informational or

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\* Henry Geller was Assistant Secretary of Commerce for Communications and Information in the Carter Administration and was General Counsel of the Federal Communications Commission ("FCC") from 1964-1970. He was also associated with several universities, especially Duke University.

1. CARL R. RAMEY, *MASS MEDIA UNLEASHED: HOW WASHINGTON POLICYMAKERS SHORTCHANGED THE AMERICAN PUBLIC* (2007).

2. *Id.* at 170.

3. *Id.* at 202-203.

educational programs.<sup>4</sup> He points to the egregious renewal of the WLBT station in Jackson, Mississippi, which was shown to have broadcast only the segregationist views of a raging current issue and only one fifteen minute early morning show for African Americans, even though they represented forty-five percent of the local population.<sup>5</sup>

The lesson to be drawn from this history is that behavioral content regulation is simply unworkable in this sensitive First Amendment area. This was demonstrated again in the 1990s when the FCC adopted a weekly three-hour guideline for so-called “core educational programming” (programs that not only entertain but also are designed to educate either in a cognitive or a social purpose fashion). Implementation has again been inadequate, with studies showing that a substantial number of programs being relied upon by commercial broadcasters were not educational in any sense, and the number that might be so termed were all social purpose in nature (e.g., “Inside the NBA,” to teach youngsters leadership). As Ramey points out, viewers soon learned to rely upon public television and certain cable channels for educational programs.<sup>6</sup>

Ramey soundly calls this public trustee approach a charade.<sup>7</sup> There have been high costs to this charade, and not just the loss of public service programming, as important as that is. Take the undermining of the allocation scheme of local outlets, for example. With many radio stations controlled by the large national owners with little or no local fare, and with many TV stations doing no local news or other local programming, there is a huge misallocation of valuable spectrum that could be better used for mobile or similar telecommunications. TV stations that do not render significant local service, but rather rely primarily on entertainment such as movies or syndicated shows, could be replaced by satellite or powerful regional stations instead of the present local assignments.

Ramey points out that the FCC embarked on a deregulatory market approach in the 1980s. In 1981, it adopted “postcard renewal” for radio and, in 1984, for TV.<sup>8</sup> In the same decade, it eliminated both its cap on commercials for commercial TV and the fairness doctrine.<sup>9</sup> In the 1996 Telecommunications Act, Congress greatly promoted the deregulatory model by lengthening the license term from three to eight years and eliminating the comparative renewal opportunity (where a competitor could come in and challenge the incumbent by seeking to show that it could

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4. *Id.* at 198.

5. *Id.*

6. *Id.* at 226.

7. *Id.* at xiv-xv.

8. *Id.* at 39.

9. *Id.* at 40-41; Telecommunications Act of 1996, 47 U.S.C. § 251, *et seq.* (2006).

render better public service).<sup>10</sup> It directed the FCC to review its regulations every two years (now every four) to determine whether they should be eliminated in light of competitive developments.<sup>11</sup>

There have certainly been strong competitive developments, as Ramey describes: 11,000 radio stations, 1,366 TV stations, and even more significant, cable and satellite with their many channels and the Internet commencing to have a substantial and growing impact.<sup>12</sup> But as Ramey also points out, there is no basis whatsoever for thinking that increased market pressure would result in more public service by the commercial broadcasters.<sup>13</sup> In the face of this ever-growing competition and deregulation in the public trustee field, why would a commercial TV station decide to present public service programs like in-depth informational shows or a cognitive child's program? The situation is akin to an argument that the Environmental Protection Agency ("EPA") should decide to abandon its antipollution rules in the light of increasing competition in the industry.

Ramey proposes to end the charade and adopt a far-reaching new policy. I agree with the heart of that new policy, namely, instead of seeking to obtain public service by using behavioral content regulation to try to make commercial broadcasters act against their driving financial interest (and in a time of increasing competitive pressure), he would free them completely from public trustee requirements and would take modest sums from them for the benefit of public broadcasting.<sup>14</sup> This would reduce any lingering First Amendment strains on commercial TV, and, most importantly, the policy would rely upon an entity, public broadcasting, which wants to deliver high quality public service. That is its sole reason for existing. For the first time, government policy would be in accord with the driving considerations of the field.

I do have some differences from Ramey's proposed policy, none of which are major.<sup>15</sup> As Ramey notes, I suggested a five percent annual fee on the gross revenue of commercial TV stations (about \$1.25 billion).<sup>16</sup> I did so because (i) that fee would approximate the allowable franchise fee in

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10. *Id.* at 214.

11. *Id.* at 46.

12. *Id.* at 203.

13. *Id.* at 202.

14. *Id.* at 217-21.

15. For example, Ramey restricts the deregulated TV stations by requiring only broadcast operations. In the digital era, a large part of the channel's 19.4 Mbs (e.g., all but 3Mbs) can be used for nonbroadcast operations. So long as no interference is caused to broadcast or other operations, why should the now deregulated licensee not be allowed to use the facility for whatever use it deems to have highest value?

16. MASS MEDIA UNLEASHED, *supra* note 2, at 242, n. 64.

cable and (ii) the proposed public TV trust fund needs such a continuing source of revenue to successfully produce and publicize its expanded high quality efforts in cultural, children's, and in-depth informational programming. Ramey believes that this proposal would face great opposition from the commercial broadcasters and therefore proposes a much more moderate approach, largely relying on fees now paid by the commercial broadcasters under the present regulatory scheme.<sup>17</sup>

Ramey's pragmatic judgment is reasonable in the circumstances. However, I believe that in light of the increasing costs of TV production and the great need for public TV to supply high-quality public service, public TV should have the option of auctioning its spectrum, if the need for this course is shown, with the large sums thus gained added to its trust fund. Delivery of programming is not a crucial problem for public TV, with options such as cable, satellite, the Internet, and DVDs available; production of the programming is the critical problem.

Contrary to Ramey's proposal, I would not apply the public trustee regulatory scheme, with a restored fairness doctrine, to public TV. The system does need governance reform, and a new governing board could be established in a manner insuring prestigious members with high integrity and interest in public service areas.<sup>18</sup> This board could act like the Board of Governors of BBC and could assure compliance with congressional directives as to matters like fair and balanced journalism and elimination of the inappropriate commercial practices that are so pervasive today as a result of the financially starved condition of public TV.

On indecency, I agree with Ramey that the FCC should not be involved in enforcing the criminal statute and that the matter should be left wholly to the courts, with Department of Justice ("DOJ") participation.<sup>19</sup>

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17. *Id.* at 242-43.

18. For example, the following recommendation made as to CPB could be used for the new governing board:

[T]he Task Force recommends that in the future the president appoint a distinguished commission from the fields of broadcasting, education, the sciences, the arts, and the humanities to recommend five outstanding candidates for each vacancy .... The president would make his choice from the list, or if he is dissatisfied, ask the commission for more names. This method of appointment would guarantee a high level of leadership in public broadcasting, and would help to insulate public broadcasting more effectively from political influence without in any way lessening its accountability.

THE TWENTIETH CENTURY FUND, *QUALITY TIME? THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON PUBLIC TELEVISION* 36 (1993). The writer was a Task Force member.

19 *MASS MEDIA UNLEASHED*, *supra* note 2, at 225; 18 U.S.C. § 1464 (2006). I should disclose here that with Professor Glen O. Robinson, former FCC Commissioner, I filed an amicus brief in *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007) (*See* Brief of Former FCC Officials as Amici Curiae in Support of Petitioners and in Support of Declaration That Indecency Enforcement Violates the First Amendment.) On June 4, 2007,

Ramey is also on target when he points out that it makes no sense, practically speaking, to have vigorous indecency enforcement as to over-the-air TV broadcasting, and, because of sound constitutional considerations, no indecency application as to subscription services like cable and satellite and to the Internet.<sup>20</sup> Further, consider that even as to broadcasting, eighty-five percent of viewers receive such service over a subscription operation, with blocking of unwanted programming available, and that in February of 2009, just a year from now, all TV will be digital, again enabling blocking. In these circumstances, I believe that the only sound way to proceed is to eliminate the entire indecency regime as unnecessary and unconstitutional.

Another prong of Ramey's proposed policy is to eliminate FCC enforcement of its ownership and related rules, and instead to expand antitrust enforcement by the DOJ or the Federal Trade Commission ("FTC").<sup>21</sup> I agree that this would be desirable. As Ramey shows, both the FCC and the Congress, especially in the 1996 Telecommunications Act, have undermined the important diversification principle—to diversify the sources of information coming to the American people.<sup>22</sup> I would place enforcement with the FTC, an independent agency with bipartisan composition, with explicit direction to act not only on economic facts but also on diversification considerations. In light of the poor record of the FCC, it would be constructive to have a new agency, the FTC, with a new explicit diversification mandate.<sup>23</sup>

With the complete deregulation contemplated by Ramey (and as further suggested by me as to public TV), it would be appropriate for the first time to replace the five-member FCC with a single administrator within the Executive Branch (similar to the EPA). The administrator would not be called upon to handle sensitive or political matters, such as licensing, ownership caps, or political broadcast rulings.<sup>24</sup> There are

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the court issued an opinion remanding the case to the FCC to explain why it changed policy (i.e., abandoned a cautious and restrained enforcement policy). Petition for certiorari is now pending before the Supreme Court. *See* Petition for Writ of Certiorari, *FCC v. Fox Television Stations, Inc.*, No. 07-582 (Nov. 1, 2007).

20. MASS MEDIA UNLEASHED, *supra* note 2, at 225-26.

21. *Id.* at 234.

22. *Id.* at 179. Ramey cites and quotes the statement of the Supreme Court in *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945), that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

23. Ramey indicates that with the elimination of public service obligations, the cable "must carry" rules might fail to a considerable extent. But these rules were sustained not on any public service content considerations, but rather on competitive grounds, stemming from cable's monopoly "gatekeeper" position. *See Turner Brdcst. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

24. I have not dealt with the important issue of free political broadcast time, as urged by

benefits with such a reform: greater efficiency, reduced costs, and heightened accountability. The President is responsible for Executive Branch activities and thus has to take greater care both with the appointment and the retention of the administrator. As a further example of promoting effective policy making, administration of the all-important spectrum area would come under a single focal point, instead of the present split between government and nongovernment. To gauge the difference, examine the effectiveness of the Director General of Telecommunications (“DGT”), supported by the Office of Telecommunications (“OFTEL”), in the United Kingdom as against the multimember FCC.<sup>25</sup>

This brings me to my final comment—Ramey’s acknowledgment of the great difficulty of effecting his proposed policy reform.<sup>26</sup> He is certainly right about that, and my additional suggestion of a single administrator is so “over the top” as to invoke the phrase, “in your dreams.” The opposition would come from many quarters—including Congress, which likes its present regulatory power over broadcast TV; the powerful commercial broadcasters, who like being called public trustees so long as there is no real enforcement; and public interest groups, who are still striving to obtain public service from the commercial broadcasting sector.<sup>27</sup>

Nevertheless, this excellent work, based on the long experience of a communications lawyer who knows so well how the present policy has failed, is a most commendable effort. At some point in this new century, with so many dynamic market and technological changes coming on stream, there may well be an overwhelming need to reform a regulatory scheme based on the wholly different and more staid conditions of 1927 and 1934. If so, Carl Ramey’s work is a great blueprint for that reform.

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reformers like Norman Ornstein, Thomas Mann, or Tracey Westen. This issue should be considered with campaign reform and is beyond the scope of Ramey’s work or my review.

25. For a full discussion of the above reform, see Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637 (1998).

26. MASS MEDIA UNLEASHED, *supra* note 2, at 221.

27. Such efforts should not be denigrated. If the broadcaster is a public trustee, it is simple logic that its public service obligations should be delineated so that both the broadcaster and the public know what is being required. See Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 348-62 (1998). It is therefore no wonder that the public interest groups keep trying, even though history is against them.