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First Prize Essay in Inmarsat International Institute of Communications Competiton.

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Abstract

THE EXTENSIVE REFORMS of the International Telecommunication Union, the result of extraordinary efforts over the last decade to redefine the future of international regulation, have not reduced the call for even stronger global jurisdiction over the booming growth and cascading transnational impact of telecoms and media organisations. In this essay, I examine the underlying tensions that make international agreement on a Global Communications Commission, with tough law-making and regulatory authority, so hard to achieve. My method is to project from the national experience to the transnational. I argue that media law and regulation, in the national context, enacts what I call a market for loyalties. Law serves to mediate among groups competing to affect or control national identity. Only if there is consensus among the major competitors in this market (which, as we shall see, is different from the market for goods), does law come effectively into play. Media law and regulation, with important, but irrelevant exceptions, exists, generally, for the convenience of those whom it is designed to serve.

Keywords

global communications commission, international telecommunication union, communication regulation, global communication

Disciplines

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Comments

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The market for loyalties: agenda-setting for a Global Communications Commission

by *Prof. Monroe E. Price*, Benjamin N. Cardozo School of Law, Yeshiva University, New York, USA

THE EXTENSIVE REFORMS of the International Telecommunication Union, the result of extraordinary efforts over the last decade to redefine the future of international regulation, have not reduced the call for even stronger global jurisdiction over the booming growth and cascading transnational impact of telecoms and media organisations. In this essay, I examine the underlying tensions that make international agreement on a Global Communications Commission, with tough law-making and regulatory authority, so hard to achieve. My method is to project from the national experience to the transnational. I argue that media law and regulation, in the national context, enacts what I call a market for loyalties. Law serves to mediate among groups competing to affect or control national identity. Only if there is consensus among the major competitors in this market (which, as we shall see, is different from the market for goods), does law come effectively into play. Media law and regulation, with important, but irrelevant exceptions, exists, generally, for the convenience of those whom it is designed to serve. The market for loyalties works on the global level as well as the national. What is true for the theory of development of a national or regional regulatory system applies with at least equal weight at the more universal. Without a consensus among those who compete in a global market for loyalties, law cannot evolve. Bureaucratic or administrative solutions to a problem that has so substantially divided the negotiating countries seem highly unlikely. Perhaps existing bodies will accrete power or new entities will be established. But the greater possibility is that in the absence of something like "the state" more informal, flexible, less visible mechanisms will continue to operate to shape the market. Euphemisms—such as level playing field or the free market—are employed to mask conflicts. Too much is at stake, at present, and there is too much uncertainty for there to be agreement on the harsh political and economic questions yet unresolved. Contests for geopolitical advantage, in terms of economic shares and ideological shares as well, are too lively for the participants to allow their resolution to be regulated and foreclosed. For example, the "level playing field" aspiration hides the fact that it is not sufficiently clear what the dimensions of the field should be, what constitutes levelness, and in whose interest a level playing field (or other metaphor disguising changed balances of power) must lie.

The rise of the nation-state

The experience in the nation-state is helpful in understanding the potential for global regulation for yet another reason. The very rise of the nation-state can be tied to its role in the regulation of the mass media. Scholars such as

Benedict Anderson have written about the role that the changing dynamics of the press had on the kind of community that was imagined, and how nation-states grew and gained or lost power from such changed conceptions. A similar transformation is occurring now, as technology—satellites, electronic highways, relentlessly global telephony, have qualities that make them seem unregulable, bursting from existing political boundaries.¹ Just as the rise of the nation-state was useful in bringing order to competition among media within its borders, a global communications entity can be brought into being to bring order to the transnational competition existing today. But for that to be the case, the first point returns: there must either be the coercive force that comes with sovereignty or a consensus that order—the cartelisation of identities—is desired.

Delineating a market for loyalties, then, can help us understand the legal and political responses to the gigantic, mysterious transformations now taking place in media industries as telecommunications becomes more global, confounding national borders and the reach of national legislation. As political boundaries crumble and new nations are created, the central function of the state in manufacturing identities becomes more clear. I explore the bond between the nature of the media and the endurance of the state to explain the potential bond between the nature of technology and the existence of a global regulatory order.

A. Locating the Market

Let me turn, then, to the relationship of media to regulation in the nation-state. It is somewhat easier to describe a market for goods than a market for loyalties. In a market for automobiles or sugar, there are usually identifiable buyers and sellers; there is a market-clearing price and a means for settling accounts. To establish a market for loyalties, it is difficult to locate exact counterparts: the major "sellers" or producers are the manufacturers of identities, classically the

government, but others as well such as interest groups and businesses as a class, those for whom myths and dreams and history can be converted into power and wealth.² The "buyers" are citizens, subjects, nationals, consumers—individuals or their surrogates—receivers of the packages of information, propaganda, advertisements, drama and news propounded by the media. The consumer can, and does, "pay" for one set of identities or another in several ways which, together, we call "loyalty" or "citizenship." But the price is not in the ordinary coin of the realm. More often, the charge for loyalties includes the payment of taxes, the obeying of laws, and the readiness to fight in the armed services. Indeed, merely staying within the dominion of a state, where migration is an option, can constitute a form of payment for loyalty.

One has to look at the producers or supply side as well. The supply side in the market for loyalties has a structure which is disserved by reductionist terms like "state" or "government" or "political party." Sometimes, citizens have little choice in terms of national identity, with only a single seller (or a small, relatively undifferentiated group) with which to deal. Were this usually the case, there still might be a market, but it would tend toward the qualities of a totalitarian society in which the cost of disloyalty is high and in which the competition is almost always outlawed.³ On the supply side of national identities, the market for loyalties is enriched by the potential instabilities of all national identities, and the fact that the choice among them is, at least at a moment of some instability, more varied and competitive than might usually be the case. What we may commonly mean by a modern "transition society" is a post-socialist entity where the formal market for loyalties is no longer monopolistic, though the transition could ultimately be from one form of monopoly or near-monopoly over identities to another.

The economic model provides insight into what the government considers its most important

potential competition in its effort to maintain power, since these competitors are most likely to be taxed or proscribed or otherwise discriminated against. Here, the question is what products constitute "substitutes" in the market for loyalties. In that sense, the preoccupation that European governments long have had with competition from commercial broadcasters suggests that their impact on allegiances was perceived to constitute a substitute for more traditional packages of identity. Advertising persuades individuals to consume rather than to save and invest; in this and other ways, the cumulative impact of advertising has consequences for particular visions of the public good. Marketers of historic or traditional or nation-based national identities compete with sellers of consumer goods, who are trying to impress the citizen with an identity that ties them to a world or global community.

B. Media Structures and Barriers to Entry

Enormous effort is expended by governments everywhere to articulate, shape, and reinforce images considered vital to their continuance, images that constitute versions of national identity, what Seton-Watson has called "official nationalism," the conscious effort of government to shape a set of narratives that provide a cohesive framework for ongoing state legitimacy. The question is how these efforts have been manifested in the market for loyalties, how they have been affected by changed technology, and how they will be limited, again, by the changes that are forthcoming.

One of R. H. Coase's early economic analyses of law showed how regulation, in Britain, was used to limit competition from radio signals from France and Luxembourg. His history of the early BBC suggested how a medium, with transnational potential, was seized by internal interest groups, using law to exclude external competition. With important exceptions, often propaganda-related, broadcasting

was turned into an essentially nation-based enterprise for its first half-century.

In the Western European states, this phenomenon was captured by the virtually universal practice of limiting broadcasting competition for national identities, until the mid-1970s, primarily to entities controlled by government or closely related to it. If there was to be a competition for loyalties, it would be mediated through the government. These were not oppressive states, and they respected freedom of information. But the monopoly over the twentieth-century's most powerful medium was a reflection of strong state participation in the market for loyalties; it was difficult to surrender and often important to the internal mediating, suppression or working out of differences.

The Dutch System

I will focus on the Dutch radio and television system long famous for its intricate recognition of specific separated perceptions of Dutch national identities. I do so precisely to show how important national control of the medium was to the working out of a market for loyalties. Consistent with a political philosophy that assumes "pillarised" segments of society—Catholic, Protestant, liberal and socialist—the Dutch have established a television system that, for a long time, gave each segment its own unencumbered opportunity to broadcast, first on radio, then on television. Competition was among these groups for allocation of time available, with awards dependent on numbers of members they had. Internal informal sanctions, including taboos imposed by the groups themselves,⁴ rendered these pillarised broadcasting organisations powerful reinforcers of separate visions of Dutch identity, to limit, as it were, interbrand competition. What is interesting is not only the rules that determined what groups could participate, but the effort to exclude competitors that would pose a challenge to all of them. These included "pirates," spill-over signals, and, finally, directed programming from abroad using

satellite and cable.

The existing favoured interest groups, with government as the organising entity, used domestic law, multilateral agreements, resort to transnational regulatory bodies—whatever technique was possible, to retain national control over the mix and content of signals. The Dutch situation remains complicated. In terms of the economic model, however, the history of broadcasting in the Netherlands is illuminating for many reasons. Here was a place where the system was originally and explicitly designed to identify alternative proponents of a national identity and careful to allocate markets among them. These competitors, as might well be expected, sought to exclude others who might reduce their market share. Competition from abroad⁵ altered the capacity of the state to preserve the strength of the existing competitors or stabilise the ability of those who continued to seek to market loyalties to use the media to reinforce particular identities.⁶ One can say that the European Union serves as the next higher institution for the organisation of the media at a time when, as with the Netherlands, the technological capacity of the state to perform the function diminishes. An issue for the Union will be whether it is a practicable unit for policing a market for loyalties and enforcing rules for entry and competition within it. Turkey provides another dramatic history of the effort to maintain control over national identity. Article 133 of the Constitution gave Turkish Radio and Television Authority (TRT), at least until mid-1993, a monopoly over broadcasting. TRT was not only monopolistic, "it was also essentially the voice of the state, disseminating the unitary ideology and culture of Turkish republicanism and highly susceptible to government intervention." TRT remains charged, by statute, with "promoting the values of country, unity, republic, public order, harmony, and welfare, and to strengthen the principles of Kemal Ataturk's reforms."⁷ In an environment in which there had been deep divisions about alternate

national identities, TRT, as the proponent of the modern secular state, was seen as an instrument for cohesiveness. When the number of channels available was expanded in the 1980s to bring programme availability closer to world standards, the new channels, at the time, were all made part of TRT. When TRT was attacked for leaning to the left and broadcasting programs that legitimated Islamic fundamentalism—a doctrine considered hostile to the secular state—the agency's director general was forced to resign.⁸ Examples in which law is used to protect particular national identities can be reproduced in Belgium, Germany, in China, almost everywhere: in each case demonstrating how national legislation is used in widespread fashion to allocate internal markets and to establish, where possible, cartels of allegiances.

C. New technology, globalism and the market for loyalties

The primary function of international legal organisations, until recently, has been to preserve the power of the nation-state to regulate its own market for loyalties. To put it in the words of the American poet, Robert Frost, "good fences make good neighbours." The task of the ITU could be redescribed as the design and registration of such fences and the enforcement of anti-poaching principles. To understand that historic function, difficult in itself, and not always wholly articulated, is indispensable for coming to grips with the complexity of a transition to wholly different expectations. National markets, constrained by borders, were long the key determiner of the market. For most of the century, the international order assumed that radio transmissions were primarily within the boundaries of one nation; the international function was to dispense frequencies so as to assure that these conditions of market division were met and enforced. International regulations and arrangements were built on the assumption of limiting broadcasting to "national service of good quality

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within the frontiers of the country concerned." In the interludes between the Great Wars, there were, for example, bilateral and multilateral agreements to control propaganda subversive to the state system. For example, the League of Nations' sponsored Convention Concerning the Use of Broadcasting in the Cause of Peace provided that the high contracting parties mutually undertake to prohibit, and if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the determinant of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order of the security of a territory of a high contracting party.⁹ Now, some propose functions of the global body that would be vastly different. A GCC would retain the traditions and needs of the past, the close ties to the nation-state. But, as the experience of the ITU has shown, there is a sharply conflicting role: assisting in the world-wide spread of technology, which implies invading the meaning and effectiveness of borders it has almost always been committed to preserve. The old paradigm is preserving the power of the nation-state (or the region) to control its internal debate (subject, in some way, to human rights principles). The new paradigm foresees a promotional role, one in which, at the end, a global system might exist in which the power of the state to perform its traditional market-regulating role would be substantially in question. The current reforms of the ITU are an example of evolution toward a system reflecting, and attempting to harmonise, these disparate tendencies. In the new system, for the convenience of all, standards can evolve and rules of the game will be discussed to determine whether to modify, slightly, the practices of satellite-based programmers and voice channels to cross borders. The reforms clarify and streamline the powers of the ITU so that it can respond, more quickly, to the needs of its very broad range of constituents.

But to understand its dilemma, and that of other proposed global regulators, it is useful to return to the concept of the market for loyalties and how it will be established, regulated and policed in the future. This is an important question, both for nation-states and for the global entity, because the capacity of states, as I have pointed out, to use traditional forms of media law to establish barriers to entry and to parcel the market among various interests (including that of the government itself) is deteriorating. The media statutes that divide allegiances and control narratives already have the aura of being of another era, an era in which the bounds of competition for national identity could be contained. While the passion for using law to regulate loyalties and fence out competition proceeds unabated, these efforts seem doomed. Increasingly, there is a new market for loyalties, a global one. The competitors (producers in the terms I put earlier), are not only governments but great transnational corporations, religious entities and programmers of signals that bind together dispersed ethnic populations. The world is moving from a highly regulated, carefully divided series of relatively closed markets for loyalties to a situation in which local identities are subject to a new set of competitors, relatively unconstrained by national governments.¹⁰ Modern broadcasting devices, used as the perfect instruments for maintaining the state, are, also, consummate devices for undermining the established order. The nation state was, as Eli Noam has written, "at tension with cross-border allegiances—whether proletarian international solidarity, rebellious youth culture, international financial capital, or ethnic minorities." Now, however, new networks (for him the electronic capabilities as well as the satellite) weaken national cohesion, strengthening particularism and internationalising it. "It is difficult for a state to extend its powers beyond traditional frontiers, but it is easy for the new networks to do so."

Audio cassettes, circulated from France to Iran, rendered immediate the fiery zeal of the Ayatollah, helping to unite opposition to the Shah. Radio, in the last days of the Soviet era, gave to the people of Moscow the sense that they were a community, independent, at least, and stronger, at most, than the organisers of the reactionary coup. The lesson is not necessarily or only the lesson of freedom: it is also the lesson of imperilled narratives and susceptible regimes.

The contest of imagery

If one way of understanding the political essence of society is to examine and calibrate its internal web of message-sending,¹¹ then new technologies mean that the society of reference requires reinterpretation as the codes of interconnection are modified. The satellite, the most modern form of communication, echoes ancient forms of social, "the older imagining, where states were defined by centres, borders were porous and indistinct, and sovereignties faded imperceptibly into one another." Then, the technology and organisation of imaginings contributed, "paradoxically enough, [to] the ease with which pre-modern empires and kingdoms were able to sustain their rule over immensely heterogeneous, and often not even contiguous, populations for long periods of time." Now, kingdoms outside the established order have a similar capability to surmount self-contained national identities.

Who are the candidates for these new kingdoms? They can include dynamic and charismatic religious forces, Islamic or Christian. The possibilities also include a rejuvenated Voice of America, a BBC World Service, given a new charter by Parliament, or other modernised extensions of a national and propagandistic past. But mostly, these new producers, reaching past boundaries, include the kind of ideology that springs from MTV or the recognisable Western package, the appeal to the individual that is the underlying drumbeat of advertising-supported programs. Sometimes these potentates have

names, in the fashion of the monarchs of old, like Murdoch or Disney. Already, a global competition exists among the BBC, CNN, NBC Superchannel and Murdoch to establish hegemony over global news, if not imagery. These are not all kingdoms that have the emotional power to sustain the imagination of far-flung peoples, replacing the current order. There is no national identity of Murdoch, no flag or loyalty to Disney. But between, in general, religious faith and consumerism, there seems to be passionate battle enough. The contest of imagery is more likely to be found in the next generation of global tensions, not among nation states, but rather between clashing civilisations, defined by history, language, ethnicity and religion.¹² Seizure of the instruments of imagery, as much as weapons of destruction, will be a threat of the twenty-first century.

The nature of the global drama, the role of the programs and narratives poured through the skies as a technique of the new era may have been best captured—or inferred from its opposite—by the gifted Polish journalist and author Ryszard Kapuscinski. He was writing about Iran and the turn to Khomeini after the westernising experience with the Shah, but the words have a more general truth:

A nation trampled by despotism, degraded, forced into the role of an object, seeks shelter, seeks a place where it can dig itself in, wall itself off, be itself. This is indispensable if it is to preserve its individuality, its identity, even its ordinariness. But a whole nation cannot emigrate, so it undertakes a migration in time rather than in space.

Kapuscinski was writing, here, of resistance to existing messages from the West, a "walling in" that must use every technique possible to screen the compelling, attractive, permeating voices from without. This theory of atavism, this turn against modernity, also suggests one of the strong motivations, conscious or not, on behalf of the West, for projecting the enveloping narratives of its contemporary radio and television. There is a key here to the

importance of the stories that are pumped into the transition societies and the periphery of the developed world, a key to the impact of the dramas that emanate from the dream factories of Hollywood to be delivered to the villages of the Carpathians, pub-keepers in Wales, shepherds in the Basque Country, or workers in Azerbaijan. The rhythm and music of Western radio and television become, themselves, a push toward modernity against competing forces. Alan Rusbridger of the Guardian caught this "full surreality of the New Media World Order," in a village, an hour from New Delhi, where, adjacent to a the temple of the monkey-god, Hanuman, "young people chant, the family of Yogbal Sharma zaps from MTV with its legs, lipstick, kisses, jeans, fast cars, beaches, cafes, drink, and waterfalls," a representative sample of Star TV fare. In the years to come, Rusbridger observes, children will have to choose whether to spend Tuesday evening singing songs to Hanuman or watching Dynasty.¹³

Whether the competitors will be the powerful but amorphous industries of faith, or the distributors of blue jeans and alcohol, or empires yet unborn, the point remains the same: either way, the now-reigning oligopolies will be weakened, replaced by new allegiances, reinforced by a new media structure. That will be the case because the old market for loyalties survives no more. A new market will emerge, and it is there that the place for global co-ordination, allocation and regulation will find its home.

D. The Market for Loyalties and a GCC

The fierceness of competition—both for economic markets and for markets for identity—underscores the barriers to establishing a unified, powerful and comprehensive Global Communications Commission. The situation is increasingly dynamic and the competitors not fully identified. The existing building blocks of international bodies, the nation-states, have competing ideas, themselves, of the shape of the future. Pioneer ways of dealing with

the new technology suggest the kind of steps likely to persist in this transformative period. Regional multilateral arrangements, especially the Television Without Frontiers Directive, are harbingers. The 1989 Broadcast Directive can be read as an evolution from long-standing national forms of exclusion (maintaining monopolies for national broadcasters from foreign competitors), to a common union which encourages trade in ideas within the community but seeks to control competition from without. New technology serves as a prod for broader, supranational forms of regulation, for loci that provide more effective market division and policing given the geographical sweep of new media. Under the Directive, member states are responsible to consult with receiving counterparts if programming has destabilising consequences. The European Union is also a forum for eliminating national measures in which the government maintains close to a monopoly for itself. Those countries that oppose the content of messages coming from outside, for religious or political reasons seem to have, at present, little direct impact on the behaviour of the suppliers of programming. There are temporary exceptions, recently illustrated by the discussions between Rupert Murdoch and China over the carriage of the BBC. States have tried to turn to controlling demand for unfavoured programming, increasing, as it were, the price of viewing. In some settings, a partial or wholesale withdrawal from the mainstream of world communications commerce will be attempted so as to prolong the hold of existing national identities. Such a withdrawal can be policed at high cost and is increasingly ineffective. In Singapore, a ban on the purchase or use of satellite receiving dishes, absent a hard-to-obtain license, is designed to keep out those programs that are unapproved. Much more vigorous efforts to fence out foreign signals characterise China and Iran where watching foreign programming may be a crime.¹⁴ These steps are

extensions of the most obvious and easiest means of creating regulable barriers to entry during the early television era: to limit the number of channels of television available for public viewing and retain control of the scarce resource and that remains the case.¹⁵ Prohibition of satellite receiving dishes, moratoria on the award of broadcast frequencies and the maintenance of an uncertain legal regime rendering investment in cable unlikely are all examples of this strategy. In communities where feelings are intense, informal mechanisms, including the reporting of cultural disobedience and even terror might be reactions to the inevitability of norm-dissolving technologies.

Other instruments for affecting the shape of the market for loyalties are emerging. Antitrust policy is a possible means of affecting tendencies toward evolving monopolies or oligopolies in the software industry, or in the film industry, or among the new vertically-integrated giants, tendencies that may have a substantial impact on the competing narratives. This is not because Japanese-owned Hollywood firms will be more inclined to favour the country of their corporate owners. Rather it is because monopolies anywhere in the chain of control can and will be reflected in who has access to the technology and for what programming purpose. In some places, moral rights laws, and other aspects of copyright are hurdles to transnational distribution of programming. The United States has insisted on improved intellectual property regimes, more protective of American authors, in the former Soviet Union, the China and elsewhere, presumably so that, in the long run, a more developed market can succeed.

Many of these steps mark the further definition of telecommunications (and all information services) as commodities of trade, not the magic force for social cohesion. The very definition of information as a commodity and not as an engine of national identity, however, implicates the market for loyalties. The emphasis on media as trade

tends to move jurisdiction from a Global Communications Commission toward a World Trade Organisation in which the principles governing entry and competition are bound to have a trade-related rationale. Privatisation, too, can be seen to shift jurisdiction away from the specialised telecommunications regulators and toward general trade institutions.

As a provisional resistance to this tendency, the European Union, in the GATT negotiations, successfully insisted on the power to discriminate in favour of locally produced film and television programs as an exception to principles of free trade. The Union has developed a complex system of subsidies and other encouragements to create a European cultural space and to enhance the capacity of Europe to compete abroad in the area of programming. But here it was acting under the older vision, while simultaneously moving toward the new.

When all is said and done, the capacity of existing states to regulate the narrative of political discourse will be reduced by the new technologies and the mechanisms that are evolving for their exploitation. Even in an era of more limited broadcast entry, some argued that Radio Free Europe, Radio Liberty, and the Voice of America helped destabilise the Soviet regime. If abundant channels become easily accessible, universally available, and used by powerfully charismatic unmediated voices, the potential for novel, widespread, populist alliances, spreading across wide areas, will certainly be realised. There will be less control over which entities are unhorsed.

There is no close fit, as yet, between a global market for loyalties and a global regulating entity, but patterns may emerge. We are still at an early, frontier-like stage in the overarching competition among global voices and, as a consequence, no consensus can yet be available on the universal questions of standards, enforcement, and the role of the state.

Cautiously, mechanisms begin to find their way, mediating trans-border markets for loyalties, playing

necessary roles as local states require third-party interventions so that large-scale technological advances can take place. But sovereignty is a difficult thing to cede. The candidates for power—the ITU, the proposed World Trade Organisation, the Union on the regional level—all face the reality of sponsors reluctant to delegate or recognise that the transfer of control has the feel of inevitability. At some point, in the not too distant future, a global market for loyalties will require a global hand, invisible or not. But that moment is not with us yet. ■

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Footnotes

¹ For a general study of the reform efforts, see Audrey L. Allison, *Meeting the Challenges of Change: The Reform of the International Telecommunication Union*, 45 FED. COMM. L.J. 491 (1993).

² There are differences between those global or sectoral issues that more centrally affect national identity than those that seem, on the surface, more involved in the improvement of person to person or business to business communication. The struggle for extending global language and culture footprints raises more intractable questions than those involving economics alone. I will not, in this paper, deal with the extremely important technical issues, those involved in the reforming of the IFRB or even the reconstitution of the ITU itself.

³ Benedict Anderson, *Imagined Communities*, Verso 1992.

⁴ See, for some efforts to relate economic analysis to speech issues, Ronald H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PAPERS & PROC. 384 (1974); Ronald H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975). See also, for discussions of the market for speech, per se, Stephen A. Gardbaum, *Broadcasting, Democracy and the Market*, 83 GEORGETOWN L.J. 373 (1993); Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925 (1990).

⁵ Cf. Justice Frankfurter's opinion in *Associated Press v. United States*, 326 U.S. 1, 27-29 (1945): "Truth and understanding are not wares like peanuts or potatoes." He contended that the constraints on the market for speech bring into play considerations "different from comparable restraints in a cooperative enterprise having

merely a commercial aspect."

⁶ There is an assumption here of consumer choice, of an autonomous individual exercising some modicum of preference. The existence of some possibility of choice is an important prerequisite of a market. The literature on whether these activities are the result of personal choice or are externally determined is rich enough to cite rather than recapitulate. See, e.g., Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

⁷ The question of the internal contest over identity spins into the world of pluralism and multiculturalism. The idea of contested identities presupposes a society in which choice exists, choices that seemed to have expanded with the industrial revolution and enhanced systems of intercommunication. One could look at the course of history as a series of sealing off and interaction among communities in terms of markets for loyalties with power, technology and commerce all having some part to play in the process.

⁸ China is an interesting case study. Chinese broadcasting is controlled and supervised by the Ministry of Radio, Film and Television. Its official primary task is to promulgate "the decisions, objectives and policies of the Chinese Communist Party, strengthen the relationship between the party and the general public, satisfy the citizens' demands for a higher standard of life, make the Chinese people work hard for the reformation, liberation and construction of a modernized society...." Zhen Zuo Liu, *Broadcasting for the People, To the People*, INTERMEDIA, Apr.-May 1994, at 10. China has sought to limit outside signals but as of 1992, it was estimated that there were 700,000 TVRO receivers (satellite dishes) in China. Lin Sun, *Foreign Capital and Foreign Equipment Fuel a Telecommunications Liftoff*, INTERMEDIA, Apr.-May 1994, at 12, 15.

⁹ For a review of a special kind of visual official narratives, see DANIEL DAYAN AND ELIHU KATZ, *MEDIA EVENTS: THE LIVE BROADCASTING OF HISTORY* (Harvard University Press: 1992).

¹⁰ See RONALD H. COASE, *BRITISH BROADCASTING: A STUDY IN MONOPOLY* (1958). The essay also demonstrated how law was used, more traditionally, to maintain, for newspapers as against radio, market share both of audience and for advertisers.

¹¹ See, generally, ELI NOAM, *TELEVISION IN EUROPE* (New York: Oxford Univ. Press 1991).

¹² Currently, there are three categories of associations. Category A, which obtains the most time, is reserved for associations with 450,000 members or more; Category B encompasses associations with memberships ranging from 300,000 to 450,000 and Category C associations have from 150,000 to 300,000 adherents. Broadcasting time is divided in a ratio of 5:3:1. See Willem F. Korthals Altes, *European Law: A Case Study of Changes in National Broadcasting*, 11 CARDOZO ARTS & ENT. L.J. 313 (1993). The modern style is to become a member of an organization because one likes its radio and television

guide, not because of a commitment to its principles. An exception is VPRO, a liberal entity supported by intellectuals because of its contribution to new ideas.

¹³ During the period of radio dominance, it was, in some parishes, proscribed for Catholic worshippers to listen to Protestant programs.

¹⁴ A Slovenian draft statute of the early 1990s imposes upon the public media responsibility "for the preservation of Slovenian national identity." At the same time, the draft, recognizing the rights of Italian and Hungarian minorities, provides that if a newspaper or television station is established in their regions, those communities must be consulted in the preparation of significant content as well as in the appointment and dismissal of the editor.

¹⁵ Particularly when it was in the Dutch language.

¹⁶ Aernout J. Nieuwenhuis, *The Crumbling Pillars of Dutch TV*, INTERMEDIA, Aug.-Sept. 1992, at 37.

¹⁷ Asu Aksoy and Kevin Robins, *Gecekondu-style broadcasting in Turkey: a confrontation of cultural values*, INTERMEDIA, June-July 1992, at 15. See also Haluk Sahin and Asu Aksoy, *Global media and cultural identity in Turkey*, 43 J. OF COMM. 31 (1992).

¹⁸ ELI NOAM, *TELEVISION IN EUROPE* 258 (New York: Oxford Univ. Press 1991).

¹⁹ *Ibid.*

²⁰ See *President Pushes TV Marti; ITU Pushes Back*, BROADCASTING, Apr. 9, 1990, at 37-38, reprinting message from International Frequency Registration Board (IFRB), an arm of the I.T.U. to the State Department concerning the legality of TV Marti, the American initiative to bring its television to Cuba. See also Steven Ruth, Comment, *The Regulation of Spillover Transmission From Direct Broadcast Satellites in Europe*, 42 FED COMM. L.J. 107 (1989).

²¹ International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, 186 L.N.T.S. 301. Article I. See also the Litvinov Agreement between the United States and the U.S.S.R. in which both countries promised not to spread propaganda hostile to the other and not to harbor groups working toward the overthrow of the other. See *Exchange of communications between the President of the United States and Maxim M. Litvinov People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics*, 28 AM. J. INT'L L. SUPP. 2 (1934).

²² The destruction of European capacities to enforce barriers to entry (at least among European countries themselves) has been partly caused by the decisions of the Court of Justice of the European Economic Community determined that broadcasting was a service, to be, by and large, held to the same Community competition standards as other services. See, e.g., Ad Van Loon, *National media policies under EEC law taking into account fundamental rights*, 14 MEDIA LAW AND PRACTICE 17 (1992).

²³ Part of the reason is the move, in the rhetoric of international instruments, from multilateral sovereign expressions of rights

of sovereigns to human rights, the rights of individuals irrespective of the actions of their sovereigns. Compare, for example, Article I of the Convention Concerning the Use of Broadcasting in the Cause of Peace, drawn under the sponsorship of the League of Nations, with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

²⁴ Eli M. Noam, "Beyond Territoriality: Economics and Politics in Telesociety," Columbia Institute for Tele-Information, Working Paper #690 (1994).

²⁵ Karl Deutsch, *Nationalism and Social Communication* (Cambridge: MIT, 1953).

²⁶ Benedict Anderson, *Imagined Communities*, 19.

²⁷ Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* 72(1993): 22.

²⁸ Ryszard Kapuscinski, *Shah of Shahs*, trans. William R. Brand and Katarzyna Mroczkowska-Brand (San Diego: Harcourt Brace Jovanovich, 1985).

²⁹ Alan Rusbridger, "The Moghul Invasion," *The Guardian*, 8 April 1994.

³⁰ See, generally, *THE POLITICAL ECONOMY OF COMMUNICATIONS: INTERNATIONAL AND EUROPEAN DIMENSIONS* (Kenneth Dyson and Peter Humphreys, eds., Routledge 1990).

³¹ See Council Directive 89/552/EEC of 3 October 1989, referred to as the Television Without Frontiers Directive, 1989 O.J. (L 298) 23. See also Television without frontiers: Green paper on the establishment of the common market for broadcasting especially by satellite and cable, COM(84)300 final.

³² Control over receiving technology to alter the structure of the markets is not new. In the United States, in the 1960's, Congress forced, through the All-Receiver Act, manufacturers of television sets to ensure that UHF as well as VHF channels were available so as to provide greater strength for public broadcasters. During the Third Reich, Germany controlled the manufacture of radio receivers so that they could be tuned only to approved frequencies.

³³ Much of the regulation of broadcasting has rested on the scarcity rationale, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), but the manufactured nature of the shortage has caused this ground to be derided. See, e.g., OWEN, *supra* note 1, at 1. A dramatic example of a maintained scarcity was apartheid South Africa which, by law, kept television out of the market for ideas altogether officially until 1976. The National Party considered that television would pose a threat to the Afrikaans language through overdependence on American and British programming and that the impact of television would be to undermine the "multi-nationalism" of its bantustan system. Robert Nixon, *Keeping Television Out: The South Africa Story*, INTERMEDIA, Aug.-Sept. 1992, at 35-36.

³⁴ As an analogy, consider the impact of televangelism, made into a mass mechanism by multichannel cable television, on American politics.