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Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes

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Public Airwaves, Private Mergers: Analyzing the FCC’s Faulty Justifications for the 2003 Media Ownership Rule Changes

INTRODUCTION.....	1482
I. THE 2003 RULE CHANGES.....	1484
A. <i>The FCC Decision</i>	1484
B. <i>The Legislative Response</i>	1486
II. THE NEW SCARCITY.....	1488
A. <i>Scarcity as Historical Justification for Communications Regulation</i>	1488
B. <i>The FCC’s Measure of Scarcity: Increased Choices for the Media Consumer</i>	1491
C. <i>Imperfect Substitutes: Broadcast and the Internet</i>	1494
D. <i>The Cost of Ownership Concentration: Scarcity in the Marketplaces of Media and Ideas</i>	1499
III. THE ARBITRARINESS OF THE RULE CHANGES.....	1502
CONCLUSION.....	1508

INTRODUCTION

On June 2, 2003, citing increased competition in the new media climate and pointing to authority in the Telecommunications Act of 1996,¹ the Federal Communications Commission (“FCC”) voted to change longstanding rules regarding the ownership of media outlets.² The changes, the product of the most comprehensive review in the FCC’s history, relaxed regulations that limited the ability of media entities to purchase additional outlets in their current markets as well as their capacity to enter into new ones.³ The new rules increased the

1. The Communications Act of 1934, as amended by the 1996 Telecommunications Act, states that in regards to existing regulations, the FCC “shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.” 47 U.S.C. § 161(a)(2) (2000).

2. Press Release, FCC, FCC Sets Limits on Media Concentration 1, 3, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf (June 2, 2003) (on file with the North Carolina Law Review). Republican Commissioners Michael Powell, Kathleen Abernathy, and Kevin Martin voted for the changes; Democratic commissioners Jonathan Adelstein and Michael Copps voted against them. *See id.* at 3.

3. *Id.* at 1, 4–7. For the purpose of this Recent Development, an individual communications “market” is the community to which a particular media entity provides information through a broadcast station, newspaper, or other medium. Part II.A uses the term “media marketplace” to refer to all actual and potential broadcast media outlets in individual markets across the United States.

number of stations a broadcast network can own nationwide and relaxed rules regarding cross-ownership of newspaper and broadcast outlets in the same market. The vote also lifted restrictions on the number of television stations one company can own in a particular market.⁴

The FCC developed the media ownership rules that generally restrict the number and type of outlets a single firm can own mainly to prevent excessive horizontal consolidation of ownership in broadcast media.⁵ Historically, the FCC's policy has been "to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming" and to "safeguard against undue concentration of economic power."⁶ In reshaping the media ownership regulations in 2003, the FCC suggested that the limits the rules set at that time on ownership of broadcast television stations and cross-ownership of newspapers and television or radio stations no longer served the public interest as set out in the Communications Act.⁷ Nor did the preexisting rules serve the FCC's three policy goals of competition, diversity, and localism.⁸ The 2003 changes, stated the Commission, better reflected a modern and diverse media marketplace where consumers view broadcast as a provider of one viewpoint among many. The Commission also said the changes were in the interest of promoting and protecting competition, which provides consumers with a broader range of media choices.⁹

This Recent Development argues that the FCC's modifications to the media ownership rules relied on an incorrect assumption that media choices are substitutable and an empirically unsupported claim that the changes are in the interest of competition. The FCC's reconceptualization of scarcity on the basis of the substitutability

4. *Id.* at 4–7.

5. In the broadcast context, this Recent Development uses "horizontal consolidation" to refer to a single firm owning a number of local broadcast television stations.

6. Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 17, 18 (1984), *reconsidered*, 100 F.C.C.2d 74 (1985).

7. See Broadcast Ownership Rules, 68 Fed. Reg. 46,286, 46,300 (local ownership rule), 46,328 (national ownership rule), 46,312 (cross-ownership rule) (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73); Marc Fisher, *FCC Tests Reception for Lifting Owner Limits*, WASH. POST, Feb. 28, 2003, at C1. For an articulation of the FCC's mandate to serve the public interest, see *NBC v. United States*, 319 U.S. 190, 221 n.5 (1943) (indicating that the legislative intent behind the Communications Act was to give the Commission "full power to refuse a license to anyone who it believes will not serve the public interest" (quoting 68 CONG. REC. 2881 (1927) (statement of Sen. Dill))).

8. Press Release, *supra* note 2, at 1.

9. *Id.* at 1–2.

among different media was inconsistent with past articulations of that concept.¹⁰ The Commission also failed to develop a sufficient factual record for the rule changes to survive judicial scrutiny. Part I of this Recent Development briefly summarizes the FCC's rationale for easing ownership restrictions and the legislative response to the rule changes. Part II addresses scarcity, the principal rationale for regulation of communications media. It explains how each side in the battle over media ownership has constructed its justifications for either decreased or increased regulation around its own conception of scarcity. Part II also discusses why traditional media and the Internet, one medium on which the Commission based its substitutability rationale, are not adequate substitutes. Part III argues that the FCC's rationales for its changes are arbitrary and capricious as that standard has been defined in past cases.

I. THE 2003 RULE CHANGES

A. *The FCC Decision*

The June 2003 rule changes addressed concerns expressed by the communications industry and by the FCC's own findings regarding cross-ownership and the present media reality of consumer choice. The broadcast networks lobbied hard for a change in the rule capping the number of stations a network can own nationwide, claiming a need to acquire more stations and other outlets in order to remain competitive with cable, satellite, and the Internet and stating that the rules in their current form deprived the networks from enjoying the "efficiencies of consolidation."¹¹ In addition, the Commission relied upon studies demonstrating that stations that received a waiver from the FCC allowing them to own a newspaper in the same market have shared resources, broadcast more local news, earned higher ratings, and won more awards than stations in markets where newspapers and

10. Scarcity, the traditional justification for regulating communications media, states that the government can regulate a medium to the extent the media's availability is limited. See *infra* Part II.A (discussing the historical development and application of the scarcity rationale).

11. See, e.g., *Media Ownership (Broadcast Television): Hearing Before the Senate Comm. on Commerce, Sci. & Transp.*, 108th Cong. (2003) (statement of Mel Karmazin, President and COO, Viacom, Inc., the parent company of CBS) (arguing that the FCC should not deny broadcasters the ability to compete for customers and achieve efficiencies from consolidation "at a time when Americans are bombarded with media choices via technologies never dreamed of even a decade ago, much less 60 years ago when some of these rules were first adopted"), http://commerce.senate.gov/hearings/testimony.cfm?id=758&wit_id=2049 (on file with the North Carolina Law Review).

broadcast stations are separately owned.¹²

The FCC's 2003 decision affected three distinct media ownership rules. First, the Commission changed the national ownership rule by raising the broadcast networks' capacity for ownership of television stations from a maximum of thirty-five percent of the nation's total viewing audience to forty-five percent.¹³ Second, it amended the cross-ownership rule to lift the ban on owning a newspaper and television or radio station in the same city in markets served by nine or more television stations.¹⁴ Finally, the FCC modified the local ownership rule to allow one company to own up to three television stations in markets with eighteen or more television stations and two television stations in markets with seventeen or fewer television stations so long as only one of the company's stations is among the top four in ratings.¹⁵

In its Order justifying the changes, the FCC acknowledged that limiting horizontal consolidation of ownership of multiple media outlets is the most reliable means of promoting "viewpoint diversity."¹⁶ Viewpoint diversity is a policy goal that the Commission traditionally defines as the availability to the consumer of media content "reflecting a variety of perspectives."¹⁷ The Order affirmed this goal and stated that the Commission believed that viewpoint diversity fosters a robust marketplace of ideas, which serves as the foundation for the democratic process.¹⁸ However, the previous rules prevented broadcasters from keeping economic pace with their non-broadcast competitors, especially since cable and satellite companies earn revenue from both advertising and subscriber fees while broadcasters depend solely on advertising.¹⁹ The FCC concluded that broadcasters needed relaxation of the ownership rules in order to survive. The FCC raised the cap to forty-five percent, reasoning that while a national ownership cap was necessary in the public interest to

12. See Broadcast Ownership Rules, 68 Fed. Reg. at 46,313 (citing THOMAS C. SPAVINS ET AL., THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS 5-8, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf (2002) (finding that newspaper-owned station affiliates surpassed non-newspaper owned affiliates in every qualitative and quantitative measure) (on file with the North Carolina Law Review)).

13. Press Release, *supra* note 2, at 5; *Media Unbound*, WASH. POST, June 3, 2003, at A6.

14. Press Release, *supra* note 2, at 7; *Media Unbound*, *supra* note 13.

15. Press Release, *supra* note 2, at 4; *Media Unbound*, *supra* note 13.

16. Broadcast Ownership Rules, 68 Fed. Reg. at 46,288.

17. *Id.* at 46,287.

18. *See id.*

19. *See id.* at 46,292.

promote local content, the thirty-five percent figure was not necessary to preserve competition.²⁰

The FCC also found local ownership and cross-ownership rules unjustifiable on the bases of competition, localism, and diversity.²¹ The Commission relaxed the local ownership rules, which previously limited the number of broadcast stations an entity could own in a local market, in large part because of the prior rules' reliance on a now-antiquated notion that "only local TV stations contribute to viewpoint diversity."²² The Commission noted that previous regulations did not adequately weigh how outlets other than broadcast stations shape viewpoint diversity.²³ The FCC also replaced the cross-ownership rules, which prohibited the common ownership of a full-service broadcast station and a daily newspaper in the same area, with a rule that prohibited such combinations only in markets with three or fewer television stations, finding that the rules no longer promoted localism or diversity.²⁴

B. *The Legislative Response*

Congress wasted little time in reaching across the aisle in a bipartisan effort to undo the rule changes. In doing so, it acted on the concerns of an ideologically broad coalition extending from the Leadership Conference on Civil Rights to the National Rifle Association.²⁵ Members of Congress were also responding to their

20. *Id.* at 46,328.

21. Since its inception, the goals of competition, localism, and diversity have guided the FCC in developing its regulatory policy. In the media ownership rule change order, the Commission affirmed its longstanding commitment to promoting competition under the presumption that competitive markets will ensure the media consumer more choice, lower prices, and more innovative service. *See id.* at 46,289. Regulating for diversity ensures a wide dissemination of information from a range of broadcast sources; such an environment, the Commission stated, is "the foundation of our democracy." *Id.* at 46,287. And the principle of localism in federal broadcast regulation works to ensure that local broadcast outlets are responsive to the needs and interests of the communities they serve. *Id.* at 46,290.

22. *Id.* at 46,294.

23. *Id.*

24. *Id.* at 46,312. In fact, the FCC found that the cross-ownership rules may have inhibited local programming since entities that owned both a station and a paper aired more local news and public affairs programming. *Id.* at 46,313; *see also* SPAVINS ET AL., *supra* note 12, at 3-4 (finding that network owned-and-operated television stations produced more local programming than affiliates). Such companies could draw on the research and reporting assets of their newspapers to produce local programming and reap economic efficiencies that resulted in higher quality programming. Broadcast Ownership Rules, 68 Fed. Reg. at 46,313.

25. Stephen Labaton, *Ideologically Broad Coalition Assails F.C.C. Media Plan*, N.Y. TIMES, May 28, 2003, at C6.

constituents' concerns, as represented in the more than 520,000 negative public comments filed with the FCC leading up to the vote.²⁶ Conservative groups argued that the programming choices of the largest media companies have a corrupting influence on the nation's moral values and allowing those companies to expand their reach would only increase that influence.²⁷ Liberal groups warned against corporate control over access to news and the resulting reduction in coverage of local issues.²⁸

The legislative response took a populist tone, even among the Senate's most ardent supporters of big business.²⁹ On September 16, 2003, a resolution of disapproval, a rarely used mechanism that allows Congress to overturn rules set by regulatory agencies,³⁰ was

26. Jennifer Lee, *Comments Showed Solid Opposition*, N.Y. TIMES, June 3, 2003, at C8. The rule changes have received more public comment than any other proceeding in the FCC's history. Stephen Labaton, *Regulators Ease Rules Governing Media Ownership*, N.Y. TIMES, June 3, 2003, at A1; see also Stephen Labaton, *It's a World of Media Plenty. Why Limit Ownership?*, N.Y. TIMES, Oct. 12, 2003, § 4, at 4 [hereinafter Labaton, *World of Media Plenty*] (estimating the current number of public comments filed with the FCC regarding the rule changes at more than one million).

27. The NRA, for example, asked its four million members to voice their opposition to the changes, which would give "gun-hating media giants like AOL Time Warner, Viacom/CBS, and Disney/ABC" more control over the airwaves and allow the NRA's recruiting and public relations efforts to be hampered by the aforementioned conglomerates' refusal to sell it advertising. See Frank Ahrens, *Unlikely Alliances Forged in Fight over Media Rules*, WASH. POST, May 20, 2003, at E1.

28. See, e.g., Press Release, Center for Digital Democracy, *FCC Deals a Blow to Diversity and Democracy*, at <http://www.democraticmedia.org/news/june2.html> (June 2, 2003) ("Fewer owners of the mass media means fewer voices will be heard . . .") (on file with the North Carolina Law Review). Dissenting Commissioner Michael Copps's statement spoke directly to these concerns, declaring that the rule changes "empower[ed] America's new Media Elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend" and ceded "gatekeeper control" over media information to private interests as well as "veto power over the majority of what we and our families watch, hear and read." Press Release, Michael J. Copps, Commissioner, Federal Communications Commission, *Statement of Commissioner Michael J. Copps, Dissenting 1*, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.pdf (June 2, 2003) [hereinafter Copps Statement] (on file with the North Carolina Law Review).

29. Senator Trent Lott, a co-sponsor of Senate legislation to roll back the Commission's changes, stated from the Senate floor, "I am not one who thinks big is always bad." 149 CONG. REC. S11,388 (daily ed. Sept. 11, 2003) (statement of Sen. Lott). However, Senator Lott voiced his concerns almost immediately after the rule changes, warning that "[e]xpanding concentration of media ownership may be in the best interest of huge Washington or New York-based media giants, but it would not be in the best interest of Mississippi's smaller media owners or media consumers like you and me." Press Release, Trent Lott, *The FCC's Mistake*, at <http://lott.senate.gov/news/2000/0606.fcc.html> (June 6, 2003) (on file with the North Carolina Law Review).

30. Congressional Review Act of 1996, 5 U.S.C. § 802 (2000).

introduced by Senator Byron Dorgan³¹ and approved by a vote of fifty-five to forty.³² The Senate Commerce Committee also adopted a bill that amended the language of the 1934 Communications Act to preserve the thirty-five percent ownership cap.³³ After the House attached a measure to an appropriations bill effectively preventing the national ownership cap change from going into effect,³⁴ the House and Senate eventually compromised at a figure of thirty-nine percent for the national ownership cap, amending the cap language in the original Telecommunications Act.³⁵ The legislation did not address the Commission's revisions to the local ownership and cross-ownership rules. However, on September 3, 2003, the Third Circuit Court of Appeals stayed the local ownership and cross-ownership rule changes while it considered a challenge from a group of independent radio station operators.³⁶

II. THE NEW SCARCITY

A. *Scarcity as Historical Justification for Communications Regulation*

Historically, the principle of scarcity has been the underlying rationale for governmental regulation of the broadcast telecommunications industry. In *NBC v. United States*,³⁷ the Supreme Court recognized physical scarcity of the electromagnetic spectrum as the justification for the regulation of radio. As Justice Frankfurter

31. S.J. Res. 17, 108th Cong. (2003), <http://thomas.loc.gov> (on file with the North Carolina Law Review).

32. 149 CONG. REC. S11,519 (daily ed. Sept. 16, 2003); see also Stephen Labaton, *F.C.C. Plan To Ease Curbs on Big Media Hits Senate Snag*, N.Y. TIMES, Sept. 17, 2003, at A1 (reporting that twelve Republicans, forty-two Democrats, and one independent voted in favor of the joint resolution).

33. Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, S. 1046, 108th Cong. (2003), <http://thomas.loc.gov> (on file with the North Carolina Law Review).

34. H.R. 2799, 108th Cong. § 624 (2003), <http://thomas.loc.gov> (on file with the North Carolina Law Review); Christopher Stern & Jonathan Kim, *House Votes To Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A1.

35. See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (codified at 47 U.S.C.A. § 303 (West Supp. 2004)). The thirty-nine percent figure represents the current national market shares of the two largest networks, CBS and Fox. See Stephen Labaton, *Court Is Urged To Change Media Ownership Rules*, N.Y. TIMES, Feb. 12, 2004, at C14. This Recent Development analyzes the rationales the FCC put forward in attempting to raise the cap from thirty-five to forty-five percent.

36. See *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (per curiam) (order granting motion to stay).

37. 319 U.S. 190 (1943).

stated in upholding the FCC's regulatory authority to make licensing decisions, "certain basic facts" about radio led to necessary governmental intervention in the form of the Radio Act of 1927:

[Radio's] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.³⁸

Since the spectrum was not large enough to accommodate everyone who wished to use it, Justice Frankfurter concluded that "methods must be devised for choosing from among the many who apply."³⁹ Through the Communications Act of 1934, Congress charged the FCC with making those decisions.⁴⁰ The Communications Act gave broad authority to the Commission to regulate the use of the spectrum, in part by imposing public interest obligations and restraints on private users.⁴¹ The scarcity rationale has been similarly applied as justification for the FCC's regulation of the cable industry.⁴²

Since scarcity has been the guiding rationale for the federal

38. *Id.* at 213. The Radio Act of 1927, Pub. L. No. 69-632, ch. 169, § 1, 44 Stat. 1162, 1162, *repealed by* Communications Act of 1934, Pub. L. No. 73-415, ch. 652, § 602(a), 48 Stat. 1064, 1102, was the first attempt by the government to create a regulatory scheme for broadcasting, making clear that the spectrum was held in public trust by the federal government and loaned to licensees for use in the public interest. See JERRY KANG, COMMUNICATIONS LAW AND POLICY 68 (2001).

39. *NBC*, 319 U.S. at 216.

40. See Communications Act of 1934, Pub. L. No. 73-415, ch. 652, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2000)) (creating the FCC and charging it to regulate wire and radio communication).

41. See *id.* § 309(a), 48 Stat. at 1085 (codified as amended at 47 U.S.C. § 309(a) (2000)). For an excellent discussion of the history and context surrounding the passage of the Communications Act, see generally Glenn O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 3-24 (Max Paglin ed., 1989).

42. Cable is generally thought to have "medium scarcity" characteristics, a combination of physical and economic limitations on its use inherent to the medium that justifies the government's regulation of it. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994) (stating that the fact that "the cable medium may depend for its very existence upon express permission from local governing authorities" justifies regulation of cable operators); *Comty. Communications Co. v. Boulder*, 660 F.2d 1370, 1378 (10th Cir. 1981) (stating that natural monopoly limitations in the cable industry "make the cable broadcasting medium 'scarce' in much the same way that the finiteness of the electromagnetic spectrum makes wireless broadcasting a medium of essentially limited access").

government's regulatory authority over communications media, logic dictates that where scarcity is not present, the government's regulatory authority correspondingly decreases. *Miami Herald Publishing Co. v. Tornillo*⁴³ and *Red Lion Broadcasting Co. v. FCC*,⁴⁴ two cases in which "rights of reply"⁴⁵ were subject to First Amendment challenges in broadcasting and print contexts, illustrate this point.

In *Miami Herald*, a Florida newspaper challenged a state statute that granted political candidates equal space in newspapers to respond to printed criticism and attacks on their records.⁴⁶ The Court recognized the economic pressures inherent in the newspaper industry, which had led to the failure of a great number of urban newspapers, particularly in formerly competitive markets, and had "made entry into the marketplace of ideas served by the print media almost impossible."⁴⁷ The Court also acknowledged that "a newspaper is not subject to the finite technological limitations of time" that serve as a barrier to allowing equal access in the broadcast context.⁴⁸ However, in invalidating the statute, the Court held that it was incorrect and economically infeasible to assume that a newspaper could expand to allow the government or other public figures equal space in column inches to respond to accusations made in the press.⁴⁹ More problematically, the Court observed, the statute could well deter the press from covering political figures or issues for fear of having to comply with a demand for access by an individual under the statute.⁵⁰ Such government-enforced rights of access, the Court stated, would dampen the press's critical role in facilitating public debate under the First Amendment.⁵¹

The Court, however, held an analogous right of reply—the now-defunct Fairness Doctrine⁵²—constitutional in the broadcasting

43. 418 U.S. 241 (1974).

44. 395 U.S. 367 (1969).

45. "Rights of reply" are statutes that grant public figures, such as political candidates, a right of access to a particular medium in order to respond to accusations made by or through that outlet. See, e.g., *Miami Herald*, 418 U.S. at 244.

46. *Id.* at 243–46.

47. *Id.* at 251.

48. *Id.* at 256–57.

49. *Id.* at 257. The Court also found that such a right of reply statute violated the First Amendment by infringing on editorial control. *Id.* at 258.

50. *Id.* at 257.

51. *Id.*

52. The Fairness Doctrine, originally adopted in 1949 and renounced by the FCC in 1985, required broadcasters to cover public affairs issues in the communities they served and, more relevant to *Red Lion*, required broadcasters to provide reasonable

context. In *Red Lion*, a broadcaster challenged the Fairness Doctrine when an author demanded the right to reply to a commentary accusing him of working for Communist-affiliated publications and making false charges against city officials.⁵³ The Court explained the constitutionality of the Fairness Doctrine by stating that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁵⁴ Since broadcast access was technologically and physically scarce and *depended* on government regulation for its existence through the licensing of space on the broadcast spectrum, it was subject to greater regulation than print, which enjoyed a historical tradition of independence from governmental interference.⁵⁵

B. *The FCC’s Measure of Scarcity: Increased Choices for the Media Consumer*

Since the delivery of communications service is an inherently technological practice, it would seem that advances in technology and scarcity are inversely proportional. Spectrum scarcity decreases as new technology allows more information to travel across the airwaves. For example, with technological innovations that have allowed for shared frequency usage, “refarming” of the spectrum, and microwave communication,⁵⁶ the broadcast spectrum is both deeper and broader today than Justice Frankfurter interpreted it to be in 1943.⁵⁷ Because physical scarcity decreases as advances in communications technology increase, as technology continues to develop, scarcity in the spectrum may effectively cease to exist.

However compelling the technology/scarcity dialectic argument may be, the Supreme Court considered and rejected such a position in

opportunities for the presentation of both sides of those issues. *See generally* DONALD J. JUNG, *THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE 1981–87* (1996) (surveying the history and eventual demise of the Fairness Doctrine).

53. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 371–73 (1969).

54. *Id.* at 386 (citing *Joseph Burnstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

55. *See* CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK* 131 (2000) (observing that while a private individual can start a newspaper in any city in the United States, provided he has the money to do so, that same individual could not start a television or radio station because of the licensing requirement for broadcast).

56. *See generally* FREDERICK J. DAY & HUONG N. TRAN, *REGULATION OF WIRELESS COMMUNICATIONS SYSTEMS* 109–215 (1997) (analyzing the historical relationship between technological advances in wireless telecommunication and the regulations promulgated by the FCC).

57. *See supra* notes 38–40 and accompanying text.

Red Lion. The plaintiffs in *Red Lion* argued that even if a lack of frequencies existed at the time of the Radio and Communications Acts' passage, "this condition no longer prevails so that continuing control is not justified."⁵⁸ The Court responded by stating that while technology has made spectrum use more efficient, as technology has advanced, so too have uses for that technology.⁵⁹ Even decreased barriers to market entry as a result of technological advances did not justify a departure from the scarcity rationale, the Court concluded, because of incumbent broadcasters' experience and programming advantages over new entrants.⁶⁰ Thus, arguments for spectrum deregulation premised on a diminished government regulatory interest in a less scarce, more efficient spectrum would likely fail under *Red Lion*.⁶¹

The Commission's position in justifying the 2003 deregulation, however, was not merely that technological advances have made the broadcast spectrum less scarce and entry into the market easier. Rather, the FCC argued that scarcity, as it had been understood since the time of the Radio Act, has decreased because of increases in the availability of diverse information to the consumer.⁶² The Commission employed an "information" diversity understanding of decreasing scarcity that measures scarcity in terms of content across all media, rather than by each medium's natural transmission limitations as Frankfurter defined scarcity in *NBC*.⁶³ The rationale was not based on how the government allocates a scarce resource among the many who apply with the public interest as its guiding

58. *Red Lion*, 395 U.S. at 396.

59. *Id.* at 396-97.

60. *Id.* at 400 (listing "[l]ong experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement" as giving "substantial advantage" to incumbents).

61. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994) (stating that "although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence" and that the inherent differences in scarcity terms between cable and broadcast justified differential treatment of those two mediums in application of a standard of review under the First Amendment (citing *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984))).

62. See Broadcast Ownership Rules, 68 Fed. Reg. 46,286, 46,291 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) (stating that "today's media marketplace is characterized by abundance . . . [in] new modes of media" that have emerged since the establishment of media ownership rules in 1941 and "have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history This Report and Order [seeks to determine] the appropriate regulatory framework for broadcast ownership in a world characterized *not by information scarcity, but by media abundance*" (emphasis added)).

63. See *supra* notes 38-40 and accompanying text.

principle. Rather, the rationale of information abundance considered the many other options in addition to broadcast available for those applicants and for the consumer those applicants seek to reach. More communications options for the consumer—in terms of the Internet, cable, satellite, and other new media—lower government incentives to regulate broadcast outlets in radio and television. Historically, scarcity was tied to the limited availability of frequencies on the spectrum in the case of broadcast or to the limited capacity for market entry in the case of cable. The new media environment, the Commission claimed in 2003, called for a reconceptualization of scarcity on the basis of the abundance of content available to consumers from various media outlets. As Chairman Powell was quoted in the *Washington Post*:

When a rule was written in 1970, that was before cable TV or anything approaching the Internet. What's happening now is that technology creates many different platforms and means of distributing news content in a way that is much more dynamic and diverse, as opposed to [a time] when I say to my kids, "Sit down at 7 p.m., turn on Walter Cronkite, we'll get our news and go to bed."⁶⁴

The unmodified ownership caps, Chairman Powell stated, were black and white rules for a Technicolor world.⁶⁵ With the public's capacity to substitute among and across different media, the FCC argued, concerns regarding concentrations of ownership in one particular media, such as broadcasting, no longer justified outdated ownership restrictions. Consequently, scarcity as to one particular medium was no longer the appropriate overriding measure. As Powell told the Senate Commerce Committee two days after the vote, "today, news and public affairs programming—the fuel of our democratic society—is overflowing."⁶⁶ According to Powell, the rules required modification because they hindered consumer access to diverse and local public affairs content and restricted broadcast's capacity to compete.

64. Frank Ahrens, *A New Era for Media Firms?*, WASH. POST, May 13, 2003, at E1.

65. See Frank Ahrens, *FCC Eases Media Ownership Rules*, WASH. POST, June 3, 2003, at A1.

66. *FCC Oversight: Hearing Before the Senate Comm. on Commerce, Sci. & Transp.*, 108th Cong. (2003) (statement of Michael Powell, Chairman, Federal Communications Commission), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235110A1.pdf (on file with the North Carolina Law Review).

C. *Imperfect Substitutes: Broadcast and the Internet*

To justify deregulation of broadcast media, the principle of intermedium substitutability requires media alternatives to broadcast to be adequate substitutes. The increased viewpoints and diverse content that new outlets like the Internet offer the media consumer, the Commission's intermedium substitutability argument states, offset any real or imagined reduction in the number of media voices that concentrated ownership of local media outlets would cause.⁶⁷ But this Recent Development argues that the inherent differences between the Internet and traditional media and the way in which the public actually uses the Internet for news and public affairs information show that the Internet's effect is not nearly sufficient to counterbalance increased ownership concentration in broadcasting.

One major difference between Internet and broadcast in the regulatory context is that the Internet bears none of the responsibilities that broadcast outlets have to act in the public interest. The government uses its scarcity-based regulation interest to impose public interest directives on broadcast and cable, ranging from the provision of public access channels⁶⁸ to children's programming requirements.⁶⁹ In contrast, Internet content providers have no such obligations. The result is an environment that does not lend itself to deliberative processes that the governmental and societal rules of the media are designed to ensure.⁷⁰

67. See Broadcast Ownership Rules, 68 Fed. Reg. at 46,294.

68. See 47 U.S.C. § 531 (2000) (allowing a franchising authority to require a cable operator to provide channel capacity for "public, educational, or governmental use").

69. See *id.* § 303(b) (stating that in deciding to renew a broadcast license, the FCC can consider the extent to which the licensee "has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs").

70. The conceptualization of media's function under the First Amendment as a supplier in the "marketplace of ideas" is well established in jurisprudence and scholarship. See, e.g., *N.Y. Times v. United States*, 403 U.S. 713, 717 (1971) (declaring that "[i]n the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy"); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (stating that diversity of news sources is a vital interest because the "right conclusions are more likely to be gathered out of a multitude of tongues"); LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 27-28 (1991) (finding historical support for the propositions that "[t]he sovereign people needed information and the ability to discuss freely how their government was performing" and that revolutionary Americans "saw a free press as a 'bulwark of liberty' essential to their newly created state constitutions"); Burt Neuborne, *Media Concentration and Democracy*, 1999 ANN. SURV. AM. L. 277, 279 (stating that consolidation of ownership of media outlets results in private ownership over "the information marketplace in which we live" and that such consolidation is "dangerous for democracy").

In the traditional broadcast media context, courts have generally interpreted the Constitution as granting the government the ability to hush some voices in order to structure communication that protects freedom of speech and enables a diversity of voices to be heard.⁷¹ The common law, the regulatory environment, and the traditional media itself have developed a range of accountability rules and practices from station identifications to the running of author photographs alongside editorial columns that ensure the media consumer knows the identity of the content's messenger.⁷² These rules allow the media to perform its primary responsibilities to facilitate political speech and public discourse, to guarantee a continued accountability to the public, and to "ensure[] that citizens are socialized into a democratic political culture."⁷³

These media law rules and public interest norms do not operate to the same degree in the Internet environment. Courts have determined that the regulatory rationale of scarcity does not apply to the Internet, and, therefore, the government's regulatory interest in cyberspace is minimal.⁷⁴ In addition, much regulation applicable to the Internet would be considered content-based and would likely be found presumptively invalid.⁷⁵ The rules of accountability in the media are likewise inapplicable since the often anonymous nature of the Internet does not allow the media user to consider the source of the content.⁷⁶ The identity and the interest of the Internet speaker

71. See, e.g., *NBC v. United States*, 319 U.S. 190, 226 (1943) (holding that the FCC can adopt regulations that choose one speaker over the other under its public interest mandate); Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyberlawyer*, 9 B.U. J. SCI. & TECH. L. 1, 20 (2003) (stating that the government may curtail speech in order to protect freedom of speech).

72. Noveck, *supra* note 71, at 21.

73. *Id.*

74. See *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (distinguishing the Internet from traditional media on the basis of the Internet's lack of both scarcity and a history of regulatory restrictions on speech and stating that "[e]ach medium of expression . . . may present its own problems'" (alteration in original) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975))); see also Ryan Z. Watts, *Independent Expenditures on the Internet: Federal Election Law and Political Speech on the World Wide Web*, 8 COMM.LAW CONSP. 149, 159-60 (2000) (articulating how the Internet is different from traditional forms of mass communication and how those differences are manifested in the regulatory environment).

75. See *Reno*, 521 U.S. at 871 (concluding that previous cases provided "no basis for qualifying the level of First Amendment scrutiny" that should be applied to the Internet); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (holding that governmental regulations that burden speech based on its content are subjected to "the most exacting scrutiny" the Court applies).

76. See, e.g., Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1146-57 (1996)

often remain a secret.⁷⁷

The Internet also serves to diffuse the collective public attention and interest that broadcast often focuses. Its nature points the user toward more and more individualized use. Internet advocates point to the proliferation of independent Web sites, or Web logs, as a fulfillment of the democratic promise of the Internet.⁷⁸ But arguably the Internet's greatest success has been its capacity to create the Market of One: individual information, delivered on demand, specifically tailored to the individual user's needs, interests, and desires. As Internet marketing becomes more sophisticated, less opportunity remains for the shared media experience on which public discourse is built. The content becomes narrower, focusing on discrete topics for the benefit of self-selected publics. It aims to capture viewers based on individualized preferences, rather than an inclusive dialogue.⁷⁹ Such an individualized dynamic of media use runs contrary to the notion of a *public* interest.⁸⁰

In addition, in terms of substitutability, the Internet as media substitute must be considered in terms not of its potential, but of its actual use. The democratic model that the First Amendment was designed to facilitate relies on the media to produce informed participants who can add to the public debate; the media's efficacy in this regard is measured by its actual effect.⁸¹ Studies of Internet use, however, show that the majority of Americans online use the Internet not to seek out diverse content, but as either a faster or more convenient way to get the same information that traditional media offers.

It is true that among those who use the Internet, the amount of

(stating the difficulties of applying traditional principles of defamation and obscenity to the anonymous Internet environment).

77. Noveck, *supra* note 71, at 7.

78. See Matt Welch, *Blogworld*, COLUM. JOURNALISM REV., Sept.–Oct. 2003, at 20, 22 (declaring that Web log technology has “for the first time in history, given the average Jane the ability to write, edit, design, and publish her own editorial product” for an investment of next to nothing and that the Web log delivers on the promises of democracy on the Internet that were heard in the 1990s).

79. See Fred H. Cate, *Privacy Protection and the Quest for Information Control*, in WHO RULES THE NET? 297, 297–98 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2003) (discussing how the Internet's architecture makes it the ideal medium to create personalized services).

80. See, e.g., Jay Rosen, *Terms of Authority*, COLUM. JOURNALISM REV. Sept.–Oct. 2003, at 35, 36 (stating that the public consists of “the great mass of people spread out over the nation but in touch with the same events, leading private lives but paying public matters some attention”).

81. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986).

time spent using the traditional media of radio and television decreases.⁸² Internet users in 2002 continued to watch less television than non-users,⁸³ and as Internet users gained more experience, television viewing among those users continued to drop.⁸⁴ However, despite evidence that the increased hours on the Internet come directly at the expense of hours watching television, only forty-six percent of those Internet users polled actually believed that the Internet could help them better understand politics.⁸⁵ Even fewer—less than twenty percent—believed the Internet gave them more say about what the government does.⁸⁶ Significantly, over the course of the three year study, these figures respectively stayed steady and declined.⁸⁷

The conceptualization of the Internet as an alternative media outlet is also not a true indicator of how the vast majority of Americans utilize it. Only thirteen percent of daily Internet users stated they use the Internet for news or political information.⁸⁸ This population is less than the number of users who use the Internet to check the weather (seventeen percent) or to look for information regarding a hobby (twenty-one percent) and is about the same as the percentage of users who look to the Internet for information about books, movies, or leisure activities (thirteen percent) or to check sports scores and information (twelve percent).⁸⁹

While some evidence exists that the use of the Internet as a news source increases during times of pressing public concern,⁹⁰ there is little indication that the public uses the Internet to seek out alternative viewpoints, as the principle of intermedium substitutability implies. A 2003 study by the Pew Internet and American Life Project examined the nature of the public's use of the

82. UCLA CTR. FOR COMMUNICATION POL'Y, THE UCLA INTERNET REPORT: SURVEYING THE DIGITAL FUTURE, YEAR THREE 33, at <http://www.ccp.ucla.edu/pdf/UCLA-Internet-Report-Year-Three.pdf> (Feb. 2003) (on file with the North Carolina Law Review).

83. *Id.* (finding that Internet users watched almost five hours of television less per week than non-users).

84. *Id.*

85. *Id.* at 69.

86. *Id.* at 70.

87. *Id.*

88. PEW INTERNET & AM. LIFE PROJECT, DAILY INTERNET ACTIVITIES, at <http://www.pewinternet.org/reports> (last updated Oct. 22, 2003) (on file with the North Carolina Law Review).

89. *Id.*

90. LEE RAINIE ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND THE IRAQ WAR 2, at http://www.pewinternet.org/reports/pdfs/PIP_Iraq_War_Report.pdf (last visited Jan. 7, 2004) (on file with the North Carolina Law Review).

Internet as a media source during that year's war with Iraq. The Pew study found that TV network and newspaper Web sites are the most popular sources for online news.⁹¹ Of those Americans who went online for war information, thirty-nine percent visited a network Web site, and twenty-nine percent visited a newspaper Web site.⁹²

The Pew study's findings regarding the public's use of the Internet during the war are also indicative of a larger point—that the majority of Americans who use the Internet to find public affairs information do so because of the Internet's convenience rather than its alternative content. The picture here is of an office worker away from the TV or a paper, checking CNN.com for news about military movement or international developments or of an individual checking the Web site of the local paper to follow election returns as they come in, rather than of a discriminating media consumer seeking out alternative viewpoints. Only four percent of users visited Web logs for information about the war, and only eight percent visited alternative news sites.⁹³ Web logs in particular were visited far more often by users less than thirty years of age with broadband connections.⁹⁴ Further, only seventeen percent of users said going online gave them a different point of view related to the war; sixty-four percent said the points of view on the Internet were the same as those offered by the broadcast or print media.⁹⁵

Perhaps the most troubling area in which the Internet is an imperfect substitute for broadcast and other media is in the inequality of Internet access that still persists. Whites are more likely to have access to the Internet than African Americans or Hispanics; the well-educated are more likely to access than those who graduated only from high school; and the affluent are more likely to have access than those who are less well off.⁹⁶ The Internet is still not an available substitute for a substantial minority of American media consumers.

91. *Id.* at 5.

92. *Id.*

93. *Id.*

94. *Id.* at 5–6.

95. *Id.* at 7; see also Joanna Glasner, *Media More Diverse? Not Really*, WIRED NEWS, at <http://www.wired.com/news/business/0,1367,59015,00.html> (May 30, 2003) (observing that giant corporations own the top five news sites and that newspaper chains run three of the next five most visited news sites) (on file with North Carolina Law Review).

96. See NAT'L TELECOMMS. & INFO. ADMIN., DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION 3, 8 (2000), <http://search.ntia.doc.gov/pdf/fttn00.pdf> (on file with the North Carolina Law Review); AMANDA LENHART ET AL., THE EVER-SHIFTING INTERNET POPULATION 4, at http://www.pewinternet.org/reports/pdfs/PIP_Shifting_Net_Pop_Report.pdf (Apr. 16, 2003) (on file with the North Carolina Law Review).

There are also particularly significant barriers to Internet use for the persons with disabilities.⁹⁷ Persons with disabilities have among the lowest levels of access to the Internet of any population in the United States. Of the sixty-two percent of those disabled individuals who do not use the Internet, nearly half said that their disability either impaired or prevented their use of the Web.⁹⁸ Adaptive technologies that are present in other media—such as closed captioning, large-print, or Braille newspapers—are either not available or priced prohibitively so as to make the Internet virtually inaccessible.⁹⁹

Media ownership rules are designed to ensure an adequate number of diverse viewpoints in the marketplace. While the public's expansive use of the Internet and other alternative media for public affairs information may one day justify changing the rules that ensure viewpoint diversity and allowing the same voice to own more outlets, as of now the Internet simply does not offer a true substitute for consolidated ownership of local television stations. Broadcast is still by far the loudest voice.

D. The Cost of Ownership Concentration: Scarcity in the Marketplaces of Media and Ideas

Like the FCC's content-based scarcity measure, opponents of the FCC's rule changes in academia, public service, and the mainstream media itself offered arguments premised on scarcity in speaking out against the changes. However, the opponents' argument and the argument that this Recent Development makes in opposition to the rule changes speaks to actual scarcity of access in consolidated media markets, not to the theoretical merits of intermedium substitutability. The real products of consolidation in scarcity terms are increased barriers to entry in individual media outlets and a concurrent scarcity of diverse voices in the marketplace of ideas. Unlike the FCC's rationale, which attempts to take scarcity off the spectrum, this Recent Development's argument is tied to ownership consolidation's likely result—increased barriers to entry to the broadcast spectrum that defines the media marketplace, an already limited resource.

97. LENHART ET AL., *supra* note 96, at 5.

98. *Id.* at 30.

99. *See id.* at 32 (stating that adaptive technologies for the Internet such as magnified monitors, head-mounted equipment, and large-button keyboards can cost up to ten times as much as standard equipment and that speech synthesizers and Braille interface machines can cost thousands of dollars).

These effects justify maintaining current levels of regulation.¹⁰⁰

In terms of competition, one of the FCC's three policy goals, the inevitable effect of the rule changes is the creation of more, not less, scarcity in the broadcast media ownership market. Centralization of outlets in the hands of fewer owners not only displaces local competitors who lack the resources to compete, it redistributes the scarce resource of media outlets among a smaller pool of larger owners. Despite the Commission's insistence that its changes were in the interest of competition, they actually will have the opposite effect. Incumbent conglomerate owners receive significant competitive advantages over new entrants as those hoping to enter the broadcast market must compete for fewer (scarcer) points of entry against multi-unit owners with vastly greater resources. Dissenting Commissioner Adelstein expressed concern that "small businesses will encounter great difficulty in raising the capital necessary" to buy media outlets, and because of the changes, small and minority-owned businesses will find it "even harder in more concentrated and expensive media markets to raise capital, own outlets or have their unique voices heard."¹⁰¹ Concentration's limiting effects on entry to the broadcast media market are simply not offset by the relatively low barriers to entry to the Internet.

Beyond the public policy argument regarding access, opponents argue the rule changes will infringe on a core function of the media—to inform and educate the public. Opponents predict that as broadcast is deregulated, concentrated ownership of media outlets will reduce the circulation of diverse opinions in the marketplace of ideas.¹⁰² Increased consolidation of ownership leads to fewer voices in the exchange of ideas, making it more difficult for minority

100. Some commentators have written that the increased corporate interests in broadcast requires concurrent increased levels of governmental regulation. *See, e.g.*, TILLINGHAST, *supra* note 55, at 150–51 (arguing that "as ownership of media outlets . . . becomes more concentrated in the hands of large corporations, unless there is some regulation of content by government, broadcasters cannot be trusted" to fulfill their public interest obligations and therefore calling for, among other regulatory frameworks, a reintroduction of the Fairness Doctrine).

101. Press Release, Jonathan S. Adelstein, Commissioner, Federal Communications Commission, Statement of Commissioner Jonathan S. Adelstein, Dissenting 8, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf (June 2, 2003) (on file with the North Carolina Law Review). Commissioner Adelstein concluded that the new rules will not just let large media companies get larger, they will effectively prevent smaller entities from breaking into the market. *Id.*

102. Tom Shales, *Michael Powell and the FCC: Giving away the Marketplace of Ideas*, WASH. POST, June 2, 2003, at C1.

viewpoints to be heard.¹⁰³ As an example of the likely effects of the rule changes, critics point to the effects of the deregulatory climate following the 1996 Telecommunications Act.¹⁰⁴ After 1996, the number of radio station owners decreased by one-third, and large corporate interests made diversity on the radio dial far scarcer by pushing profits at the expense of localism.¹⁰⁵ Even allowing for Chairman Powell's argument that technology and competition now offer the public more media choices, these critics state that the increase in the capacity for intermedium substitutability represents not a decrease in scarcity, but the same voices, speaking more loudly.¹⁰⁶ While satellite and cable offer a multitude of channels and the Internet offers news from around the world at the click of a mouse, the opposition argues that those outlets are dominated by the same handful of large corporations that control the presentation and, in many cases, the production of content for broadcast outlets.¹⁰⁷

The opposition sees the rule changes not as appropriate responses for an increasingly Technicolor world, but as a structural mistake that will lead to an increasingly colorless media climate, facilitating an oligopoly of media voices that has serious ramifications for the democratic model of governance. Dissenting Commissioner Copps looked at the rule changes and saw not many colors, but fewer: "centralization, not localism; . . . uniformity, not diversity; . . . monopoly and oligopoly, not competition."¹⁰⁸

103. Frank Ahrens, *FCC Plan To Alter Media Rules Spurs Growing Debate*, WASH. POST, May 28, 2003, at A1.

104. *E.g.*, JERRY KANG, COMMUNICATIONS LAW AND POLICY 29–30 (Supp. 2003).

105. For analysis concluding that the Telecommunications Act's deregulatory effects on radio ownership have been largely negative, see generally Michael Ortner, *Serving a Different Master—the Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139 (2000).

106. *See, e.g.*, TILLINGHAST, *supra* note 55, at 150 ("As for the 500 cable channels, what if they are all owned by the same corporation, or even controlled by the same gatekeeper? How confident in such an event can anyone be of receiving 'all' the information one needs?").

107. *See* Fiss, *supra* note 81, at 1412–13 (arguing that market interests are inconsistent with the production of public debate that democracy requires); Neuborne, *supra* note 70, at 277–82 (arguing that consolidation of media outlets in the hands of a few corporations is structurally dangerous for democracy); Labaton, *World of Media Plenty*, *supra* note 26. *But see* HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY 130 (1993) (arguing that an Internet newsgroup is a mass medium since information posted onto the Net can potentially reach millions, but differs from other conventional media in that unlike television or newspapers, any member of the Internet audience is also a potential publisher or broadcaster).

108. Copps Statement, *supra* note 28, at 3.

III. THE ARBITRARINESS OF THE RULE CHANGES

Even assuming that the FCC's principle of intermedium substitutability justifies decreased regulation, the FCC has not made the case that its rule changes would ensure more efficient economic competition. The Commission has not met its burden in showing how its changes would have their intended effect on the media marketplace.

The 2003 rule changes came about largely due to a series of decisions by the D.C. Circuit Court of Appeals.¹⁰⁹ Two of these cases in particular, *Sinclair Broadcast Group v. FCC*¹¹⁰ and *Fox Television Stations v. FCC*,¹¹¹ articulated a standard for the FCC's biennial reviews of its ownership rules under section 202(h) of the Telecommunications Act of 1996.¹¹² The *Fox* court, for example, concluded that "202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."¹¹³ The court interpreted section 202(h) as allowing the Commission to retain a particular rule only if it is "necessary in the public interest."¹¹⁴ The court read 202(h) as presumptively deregulative and held that the Commission failed to show how the national ownership cap was still necessary in the public interest.¹¹⁵ The court also found the Commission's defense of the local ownership rule in *Sinclair* to be arbitrary and capricious under the Administrative Procedure Act¹¹⁶ and remanded to the Commission for a more adequate explanation of the rule.¹¹⁷ In its application of those cases to its then-existing rules, the Commission read the court's interpretation of 202(h) as consistent with what it saw as the legislative intent of the Act as a whole—eventual deregulation

109. The D.C. Circuit has exclusive jurisdiction over appeals from Commission decisions and orders. See 47 U.S.C. § 402(b) (2000).

110. 284 F.3d 148 (D.C. Cir. 2002).

111. 280 F.3d 1027 (D.C. Cir.), modified, 293 F.3d 537 (D.C. Cir. 2002).

112. Section 202(h) of the Telecommunications Act states that the Commission must review its ownership rules biennially to determine whether they remain necessary in light of current market competition. 47 U.S.C. § 161. The Act instructs the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

113. *Fox*, 280 F.3d at 1048.

114. *Id.*; see also *Sinclair*, 284 F.3d at 152 (summarizing the holding in *Fox*).

115. *Fox*, 280 F.3d at 1043.

116. 5 U.S.C. §§ 551–559, 701–706 (2000). The APA allows judicial review of agency decisions on the grounds that an agency allegedly acted arbitrarily and capriciously. See *id.* § 706(2)(A). The standard is usually interpreted by courts as requiring a rational relationship between the facts found and the action taken by the agency. See *Schurz Communications v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992).

117. *Sinclair*, 284 F.3d at 162.

of the telecommunications industry.¹¹⁸

In complying with the court's remands in *Fox* and *Sinclair*, the Commission developed a "Diversity Index" to justify its revision of the newspaper-broadcast cross-ownership rules. The Diversity Index, the Commission stated, "reflects the degree of concentration in viewpoint diversity in local markets."¹¹⁹ The Index also measured the availability of various types of media and assigned a weight to each class of outlet based on their relative value to consumers.¹²⁰ The Index addressed the deficiencies the *Sinclair* court noted in the Commission's rationales for supporting the caps, that is, the "unresolved issues about the extent to which alternatives provide meaningful substitutes to broadcast stations and are widely accessible."¹²¹

By both changing the rules and attempting to provide a firmer rationale for those changes, the Commission in effect threw the baby out with the bath water. Rather than simply develop firmer rationales for the rules, the Commission attempted both to comply with the court's presumptively deregulatory reading of 202(h) and, through the findings of the Diversity Index, to survive the arbitrary and capricious standard the court applied in the former cases under the APA.

In its decision to change the ownership rules, the Commission overstated the presumption towards deregulation. It read the court's directive for further consideration of the rules to mean the rules were fatally flawed and unjustifiable, rather than that their justifications contained insufficiencies the Commission could correct. The court neither found the rules in question inherently unjustifiable nor vacated them entirely, as the dissent in *Sinclair* called for¹²² and as the *Fox* court did to the FCC's cable-broadcast cross-ownership rule.¹²³

118. See Broadcast Ownership Rules, 68 Fed. Reg. 46,286, 46,287 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) (stating that section 202(h), as read by the court, "appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule").

119. *Id.* at 46,317; Press Release, *supra* note 2, at 9.

120. Broadcast Ownership Rules, 68 Fed. Reg. at 46,316-17.

121. *Sinclair*, 284 F.3d at 160.

122. See *id.* at 170-72 (Sentelle, J., dissenting) (stating that the majority "fail[ed] to fully appreciate" the statutory mandate of 202(h) and that since "the Commission presumably made its best effort to justify the Local Ownership Rule, and has come up short," the rule should be vacated).

123. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir.), *modified*, 293 F.3d 537 (D.C. Cir. 2002) ("Because the probability that the Commission would be able to justify retaining the CBCO [Cable/Broadcast Cross-Ownership] Rule is low and the disruption that vacatur will create is relatively insubstantial, we shall vacate

This supports the proposition that the court considered the rules themselves supportable under 202(h) and arbitrary and capricious review, but simply saw the rules' justifications as insufficient under 202(h)'s deregulatory presumption and the APA's arbitrary and capricious standard.¹²⁴ As dissenting Commissioner Copps stated,

Importantly, the court did not indicate that a relaxation of the concentration limits is warranted or required. On the contrary, the Commission could choose, if so inclined, to *tighten* its ownership rules. What the court demands is that the Commission provide more analysis and empirical data to justify the rules it adopts.¹²⁵

As discussed above, *Fox* and *Sinclair* are insufficiency of the record decisions, not judicial mandates toward inevitable deregulation. Even if a presumption in 202(h) towards deregulation exists, such a presumption can be overcome with a sufficiently developed showing that the rules were still necessary in the public interest. Neither *Fox* nor *Sinclair* stand for the proposition that deregulation pursued by the agency consistent with 202(h) is to be reviewed under anything other than standard arbitrary and capricious review.¹²⁶ The presumption does not relieve the agency of its obligation to make rules that have a rational connection between the facts before the agency and the agency's subsequent action, even if the action is deregulatory.

The new rule changes are subject to the same arbitrary and capricious standard under the APA that the D.C. Circuit applied in *Fox* and *Sinclair*. It is unlikely that the Diversity Index justifications underlying the new rules could survive such a challenge. In undertaking arbitrary and capricious review under the APA, the reviewing court must consider the degree to which the agency has "offered an explanation for its decision that runs counter to the evidence before the agency."¹²⁷ In terms of the Diversity Index, the

the CBCO Rule.").

124. See James E. Michel, *Student Article, Embarking on Its Most Extensive Review of Media Ownership: The FCC's Endeavor To Create a Happy Medium*, 15 LOY. CONSUMER L. REV. 249, 269 (2003). For another application of the APA "arbitrary and capricious" standard to the FCC, see *Time Warner v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) (stating that all the APA requires is a "rational connection between the facts found and the choice made" in order for an agency decision to withstand APA scrutiny).

125. Copps Statement, *supra* note 28, at 8 (footnote omitted).

126. See *Fox*, 280 F.3d at 1043-45 (holding that the decision to retain the national cap was both arbitrary and capricious and contrary to 202(h)).

127. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

review would rely on the FCC's responses in its Broadcast Ownership Rules Order to comments filed in response to its proposed rulemaking and on the degree to which the Commission's responses to these comments are nonresponsive, nonunderstandable, or even nonexistent.¹²⁸ There are areas in the Order where the agency failed to meet this standard and did not provide a reasoned explanation for its action in the face of empirical evidence brought by commenters.¹²⁹ For example, the Index uses a Nielsen survey conducted as part of an altogether separate study to determine how consumers use different media outlets for sources of news.¹³⁰ An *ex parte* communication filed by Media General critiqued the methodology of the Nielsen study, questioning its usefulness in a rulemaking concerning cross-ownership.¹³¹ Rather than respond to these empirical concerns, as is its obligation, the Commission merely stated that "the survey does, in fact, help us establish an 'exchange rate' for converting newspaper, television, radio and other media into common units so the Commission can measure the extent of concentration in the 'market of ideas.'" ¹³² Likewise, a comment filed by the Consumer Federation of America stated the Index was flawed because it did not consider the degree to which consumers used different media outlets as complements and not substitutes.¹³³ This criticism was dismissed by the Commission as "not invalidat[ing] the premise underlying the DI" since the goal of the Index is to measure the potential availability of diverse viewpoints to the consumer.¹³⁴ Such a response was itself unresponsive to an empirical charge that the Diversity Index, by counting each outlet as offering a separate viewpoint for diversity purposes, does not consider the degree to which consumers use different outlets for the same viewpoint.

The Index is also not a model of logical integrity and internal consistency; many of its measures, including its method of analogizing the *total number of stations in a market* to the *number of choices for*

128. *Id.* at 48 (stating that an agency must cogently explain in its rulemaking process why it has exercised its discretion in a given manner); *Fox*, 280 F.3d at 1043 (holding that the Commission's failure in 1998 to address contrary views the Commission itself had raised in a report fourteen years earlier constituted arbitrary and capricious rulemaking).

129. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002) (holding that the agency may not act counter to the evidence before it and must give a reasoned explanation for its action).

130. Broadcast Ownership Rules, 68 Fed. Reg. 46,286, 46,318 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

131. *Id.*

132. *Id.*

133. *Id.* at 46,319.

134. *Id.* at 46,319-20.

local programming and public affairs programming, invite claims of arbitrariness. A Diversity Index calculation begins by asking, through a Nielsen nationwide survey, from which media individuals in a given market get their local news and current affairs programming.¹³⁵ The Index then divides the entire share of each medium by the number of potential outlets in that given market to determine how many choices are available to each consumer.¹³⁶ Such a methodology can lead to arbitrary results.¹³⁷ For example, should a nationally owned UPN station with no locally produced content be considered a “choice” for local and public affairs programming that is given the same weight as a locally owned broadcast station with a local news department? Earlier in its own Order, the Commission stated that the Diversity Index “focuses on availability of sources of local news and current affairs,”¹³⁸ yet the Index has no mechanism to determine whether an outlet actually provides that particular kind of content. It merely counts stations in a market and presumes that each of those stations offer local content. The Index does not adequately address the digital divide issues discussed earlier, nor whether the Internet is a true local voice alternative or merely an alternative medium for the same information.¹³⁹ Such interagency inconsistency earned the local ownership rule a remand in *Sinclair*.¹⁴⁰

The court challenges to the new rules will not be the first time the courts have scrutinized the FCC’s rationale that decreased limits on ownership better reflect the public’s capacity to substitute among different media. Despite Chairman Powell’s statements implying that regulation of the media landscape has been left largely unconsidered since the time of Cronkite, the principle of intermedium substitutability was considered by the court of appeals in *Sinclair*. In

135. *Id.* at 46,318.

136. *Id.* at 46,320–21.

137. See generally MARK COOPER, CONSUMER FED’N OF AM., ABRACADABRA! HOCUS-POCUS! MAKING MEDIA MARKET POWER DISAPPEAR WITH THE FCC’S DIVERSITY INDEX 4, at <http://www.consumerfed.org/abra.pdf> (last visited March 26, 2004) (identifying, among other illogical results, that the Diversity Index gives more market weight in the New York City area to Dutchess Community College’s television station than to the *New York Times*) (on file with the North Carolina Law Review).

138. Broadcast Ownership Rules, 68 Fed. Reg. at 46,318.

139. *Supra* notes 90–99 and accompanying text; see also MARK COOPER, CONSUMER FED’N OF AM., MASS DEREGULATION OF MEDIA THREATENS TO UNDERMINE DEMOCRACY 2–3, at http://www.consumerfed.org/FCC_Rule.pdf (last visited Apr. 4, 2004) (expressing concern that the Internet is merely “a new *distribution channel* for existing news sources” and that eighty percent of Americans still get local news produced by newspapers and television stations) (on file with North Carolina Law Review).

140. See *infra* notes 141–45 and accompanying text.

that case, the court looked at the substitutability rationale and found the Commission's use of it to be inconsistent.¹⁴¹ The *Sinclair* court remanded the local ownership rule on arbitrary and capricious grounds, holding that while the Commission previously stated that counting other media voices more accurately reflected the level of diversity and competition in the media market for purposes of *cross*-ownership (in a decision that was not before the court),¹⁴² the Commission never explained why other media did not contribute to competition and diversity for purposes of *local* ownership (which was before the court).¹⁴³ Such an inconsistency in rulemaking was itself inconsistent with the FCC's obligation under the APA: "to provide a reasoned explanation for its action."¹⁴⁴ In deciding the ownership limit for the local ownership rule and what media outlets to include in determining common ownership in a local area, the Commission did not empirically demonstrate the degree to which intermedium substitutability occurred in the media marketplace nor what effect substitutability had on diversity as required under the APA.¹⁴⁵ Whether the Diversity Index reflects the effects of emerging alternatives in the media marketplace in a way that is not arbitrary and capricious will be the essential issue in the challenges to the new rules.

An additional rationale the Commission put forward in raising the national ownership cap to forty-five percent is to ensure the viability of broadcast networks by better allowing them to compete with cable.¹⁴⁶ Loosening regulation in one media outlet in order to allow it to compete with other newer markets, however, has a mixed record before the courts. In *Turner Broadcasting Co. v. FCC*, the Court affirmed the basic principle laid down in *Red Lion* and *Tornillo*—different media outlets merit different levels of regulation.¹⁴⁷ The *Turner Broadcasting* Court acknowledged that assuring the public has an array of media choices is "a governmental

141. See *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 163–64 (D.C. Cir. 2002).

142. *Id.* at 162.

143. *Id.* at 164.

144. *Id.* at 162 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

145. *Id.* at 164.

146. See Press Release, *supra* note 2, at 5 (stating that raising the national cap "protects localism and preserves free television"); see also *Media Ownership (Broadcast Television): Hearing Before the Senate Comm. on Commerce, Sci. & Transp.*, *supra* note 11 (providing a broadcaster's perspective on the difficulties of competing with cable).

147. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994).

purpose of the highest order.”¹⁴⁸ The Court also recognized the importance of protecting homes with only broadcast from the loss of television service from competition from cable.¹⁴⁹ The Court concluded, however, that in the case before it, there was a “paucity of evidence” that broadcast was in danger of extinction due to the threat of cable.¹⁵⁰

The *Turner Broadcasting* Court remanded to the district court for a fuller record since the Court could not “determine whether the threat to broadcast television is real enough to overcome the challenge” to the must-carry provisions brought by the petitioners.¹⁵¹ No evidence was offered, for example, that local broadcast stations had fallen into bankruptcy, turned in broadcast licenses, curtailed operations, or suffered a serious reduction in operating revenues. The government simply had not made the case that broadcast needed its regulatory help in order to compete with cable.¹⁵² Without such evidence, the “ensuring competition” rationale for lifting the national ownership cap in order to allow broadcast to better compete with cable by allowing networks to acquire more highly profitable local stations could be considered arbitrary and capricious under the APA. The FCC did not explain how a ten percent increase in the cap would allow broadcast networks to compete better with cable, nor did the FCC show actual harm to broadcast networks beyond declining ratings or even market share. Similarly, in the 2003 rule changes, the FCC failed to provide empirical support for the rule changes’ economic competition rationale as required by *Turner Broadcasting*.

CONCLUSION

In reconceptualizing scarcity and favoring intermedium substitutability, the Commission must show that the alternatives to broadcast offer truly accessible—and accessed—perfect substitutes. Showing that technological developments result in an increased diversity of speakers that will offset concentrations of outlet ownership requires a rigorous consideration of more than just the potential of that diversity. Current scholarship and research indicate that such a showing cannot yet be made. So long as the majority of Americans receive their public affairs information from broadcast, requiring diversity of ownership in broadcast outlets is the best

148. *Id.* at 663.

149. *Id.* (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

150. *Id.* at 667.

151. *Id.*

152. *Id.* at 667–68.

method of ensuring access to diverse viewpoints. By providing a broad range of information, media performs its essential role of enabling the public to make informed decisions and, thereby, serves the public interest protected under both the Communications Act and the First Amendment.

Rule changes in the interest of competition also carry an evidentiary requirement. Even assuming a presumptively deregulatory regime under section 202(h) of the Communications Act, any deregulation must still be empirically shown to have a direct and positive effect on competition. Without such data, any changes to the existing ownership rules are arbitrary. A competition rationale also requires data that show *economic* harm to broadcast because of direct competition with cable and satellite (quantitatively possible) as well as with the Internet (much more difficult). As a predicate to deregulation, the FCC must show caps have a direct negative effect on competition in the media marketplace that only their lifting can remedy. Mere decrease in market share or ratings is insufficient to show decreased capacity for competition. The FCC must demonstrate direct economic harm, such as loss of advertising revenue and decreases in network profitability.

To justify the ownership rule changes, the Commission must perform two distinct and seemingly inapposite tasks: it must show the alternatives to broadcast are both viable substitutes as sources of public affairs information and a threat to its existence. By rigorously favoring localism and diversity and limiting private ownership's capacity to threaten those principles, the FCC can ensure the media can perform its function of supplying information to the marketplace of ideas. The administration of a publicly owned resource, such as the broadcast spectrum, granted for use to licensees in the public trust, requires no less diligence.

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