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# The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)

Jim Chen

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# The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)\*

Jim Chen\*\*

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\* *Watch* THE LAST PICTURE SHOW (Last Picture Show Productions, Inc. 1971).

\*\* Associate Professor of Law, University of Minnesota Law School <chenx064@maroon.tc.umn.edu>. Daniel Farber, Philip Frickey, Daniel Gifford, E. Thomas Sullivan, and Jonathan Cleveland supplied helpful suggestions, and Stephen Safranski provided able research assistance. A faculty workshop at the University of Minnesota Law School on Nov. 29, 1995, sharpened my focus as this article approached publication.

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## I. BOULEVERSEMENT ON SUNSET BOULEVARD

Federal communications law has "collapse[d] like the walls of Jericho."<sup>1</sup> The Telecommunications Act of 1996<sup>2</sup> heralds the dawn of the fateful day on which structural regulation of America's mass media markets must either stand or fold. Now that Congress has administered "the devastating blow that modern technology has threatened to deliver for three decades,"<sup>3</sup> courts, communications commissioners, and the communicators themselves face the daunting task of reconciling and reconsidering the shards of the Communications Act of 1934.<sup>4</sup>

Numerous tremors preceded the ongoing landslide in federal communications law. Between 1992 and 1996, no fewer than four separate laws regulating mass communications quaked or fell at the feet of hostile judges. An abortive 1992 attempt in the D.C. Circuit to invalidate the "private cable" exemption<sup>5</sup> as applied to satellite master antenna television systems proved to

1. J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1209 (1993) (book review).

2. Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.) [hereinafter Telecommunications Act].

3. Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEMPHIS L. REV. 1315, 1340 (1995).

4. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613 (1994)).

5. See 47 U.S.C. § 522(7)(B) (1994) (excluding facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" from the definition of a cable system, thus exempting such facilities from local franchising obligations), amended by Telecommunications Act, *supra* note 2, § 301(a)(2), 110 Stat. at 114 (extending the private cable exemption to any "facility that serves subscribers without using any public right-of-way").

be a false signal of the judicial assault that lay ahead.<sup>6</sup> Even as the Supreme Court reversed the D.C. Circuit and declared the private cable exemption “virtually unreviewable,”<sup>7</sup> the D.C. Circuit successfully invalidated three aspects of the Communications Act<sup>8</sup> as applied to direct broadcast satellite services.<sup>9</sup> By 1994, pizza-sized satellite dishes carried the news that the Supreme Court itself had joined the deregulatory frenzy by casting constitutional doubt on Congress’s ability to control cable operators.<sup>10</sup> Meanwhile, lower federal courts reached a consensus that Congress could not prohibit local telephone companies from offering video programming services to their subscribers.<sup>11</sup> For a moment, it appeared as though the Supreme Court itself might authorize local telephone companies to enter the cable television business.<sup>12</sup> Technological advances raised the stakes enormously: unlike coaxial cable used to transmit conventional cable signals, “switched” telephone wiring can deliver “video dialtone,” or “an enriched version of video common carriage” that enables interaction between programmers and viewers.<sup>13</sup>

What the federal judiciary launched, Capitol Hill completed. The 104th Congress has aggressively rolled back many of the laws that have defined the industrial organization of mass

6. See *Beach Communications, Inc. v. FCC*, 965 F.2d 1103, 1105 (D.C. Cir. 1992) (per curiam) (invalidating the private cable exemption as an equal protection violation), *rev'd*, 113 S. Ct. 2096 (1993).

7. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993).

8. See 47 U.S.C. §§ 335, 544 (1994) (regulating direct broadcast satellite services, facilities, and equipment).

9. *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8-10 (D.D.C. 1993).

10. See *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2471-72 (1994) (demanding further empirical proof to support the “must-carry” obligations imposed under 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), 535(a) (1994)).

11. See, e.g., *US West, Inc. v. United States*, 48 F.3d 1092, 1106 (9th Cir. 1994) (invalidating 47 U.S.C. § 533(b) (1994), which bans any common carrier from providing video programming to subscribers), *vacated*, 116 S. Ct. 1037 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 185 (4th Cir. 1994) (same), *vacated*, 116 S. Ct. 1036 (1996); see also *GTE California, Inc. v. FCC*, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (“[Section 533 of Title 47] is an irrational obstruction to the exercise of free speech.”).

12. See *FCC v. Chesapeake & Potomac Tel. Co.*, 115 S. Ct. 2608 (1995), *granting cert.* to 42 F.3d 181 (4th Cir. 1994), *vacated*, 116 S. Ct. 1036 (1996).

13. Telephone Co.-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, Further Notice of Proposed Rulemaking, 7 F.C.C.R. 300, 306 (1991). See generally Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1629-32 (1995) (contemplating how the emergence of interactive media will affect free speech jurisprudence).

communications since the New Deal. The Telecommunications Act of 1996 will allow the regional Bell operating companies (the seven "Baby Bells" spun off from AT&T by the Bell divestiture decree)<sup>14</sup> to provide long-distance telephone service.<sup>15</sup> Coupled with the opening of local telephone service to all who would bear the traffic, including AT&T and the other long-distance giants,<sup>16</sup> long-distance deregulation would permit AT&T, its former local divisions, other long-distance companies, and even cable companies to compete in local *and* long-distance telephone markets. Virtually complete deregulation marks a stunning conclusion not only to the breakup of the Bell System, but also to over six decades of regulatory legislation.<sup>17</sup>

The Communications Act of 1934 is dead; long live the Telecommunications Act of 1996. Before the regulators of America's wires and airwaves ride into the sunset, however, let us contemplate the panoramic backdrop of federal mass communications law's last picture show. If Jericho must fall,<sup>18</sup> let the sun stand "still . . . in the midst of heaven" one more day before

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14. See, *United States v. AT&T Co.*, 552 F. Supp. 131, 223-25 (D.D.C. 1982) (approving the breakup of the Bell System), *aff'd mem. sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. AT&T Co.*, 524 F. Supp. 1336, 1381 (D.D.C. 1981) (denying AT&T's motion to dismiss the United States' antitrust suit). See generally MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW §§ 4.4-4.10.3 (1992) (describing the history and terms of the Bell divestiture decree).

15. See Telecommunications Act, *supra* note 2, § 151, 110 Stat. at 86-92 (adding 47 U.S.C. § 271, which authorizes interexchange telecommunications by Bell operating companies). See generally Jim Chen, *Titanic Telecommunications*, 25 SW. U. L. REV. 535 (1996) (surveying the legal and economic implications of Bell operating company entry into the interexchange market).

16. See Telecommunications Act, *supra* note 2, § 101(a), 110 Stat. at 61-70 (adding 47 U.S.C. §§ 251-253, which establish ground rules for interconnection to existing local exchange networks and for the removal of state-law barriers to entry); *Rochester Tel. Corp.*, 160 Pub. Util. Rep. 4th 554, 566-71 (N.Y. Pub. Serv. Comm'n 1994) (approving an "Open Market Plan" for the development of competition within Rochester's local telephone service market); *AT&T Communications of Illinois, Inc.*, No. 95-0197, 1995 Ill. PUC LEXIS 823 (Ill. Commerce Comm'n Dec. 6, 1995) (permitting an AT&T subsidiary to provide facilities-based local exchange telecommunications). See generally Mark Landler, *The Big Boys Come Calling: Rochester Is Courted by AT&T and Time Warner*, N.Y. TIMES, Oct. 23, 1995, at C1, C6 (describing life after local telephone deregulation in Rochester).

17. See generally Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 7 (Max D. Paglin ed., 1989).

18. See *Joshua* 6:1-27.

it sets.<sup>19</sup> Although regulating industrial market structure has always required an enormous leap of faith,<sup>20</sup> six decades of communications law have injected a heavy dose of agnosticism. This law, now entering its final phase, has passed by so swiftly and so tumultuously that it easily can be forgotten. Lest the ghosts of the checkered regulatory past smother the glories of a technologically boundless future, let us convert yesterday's lessons into tomorrow's guideposts.

In this turbulent setting, it is hopeless to prophesy what the world of mass communications "will do in fact."<sup>21</sup> In a "larger economy[]" where "every right granted by law" is constantly renegotiated by an "informal parliament of merchants, middlemen, and consumers,"<sup>22</sup> no one knows precisely where consumer demand will carry tomorrow's mass media markets. Instead, after defining the economic phenomenon of mass communications in Part II of this Article, I will survey the history of structural regulation of mass communications in the United States.

Confident that "a page of history is worth a volume of logic,"<sup>23</sup> Part III traces two distinct and contradictory philosophies expressed in federal mass communications law. On one hand, federal regulators have equated broadcast content with broadcaster identity and prescribed the regulation of market structure and industrial organization as the best means for protecting the public interest in broadcasting. Another jurisprudential strain, equally old if not equally enforced, encourages the courts and the FCC to accord presumptive reliance on competition to achieve precisely the same regulatory objectives.

Neither the Telecommunications Act of 1996 nor related

19. *Joshua* 10:13.

20. See Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. (forthcoming 1996) ("[Regulation of market structure rests on] two core articles of faith. *First*, structural regulation of economic activity assumes that certain forms of market structure and industrial organization are economically or socially pernicious. *Second*, regulators believe that these evils can be effectively addressed by legal restrictions on the formation or structure of individual firms.") (emphasis in original).

21. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

22. Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 829 (1995).

23. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.); cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1902) ("The life of the law has not been logic: it has been experience.").

judicial controversies over communications policy will resolve this decades-long debate. If history teaches anything, however, it is the hard lesson that regulators ignore the economics of a technologically driven industry at their peril. Part IV of this article accordingly outlines certain antitrust-inspired regulatory principles for designing tomorrow's mass media markets. Regulators should reconcile communications law with latent economic principles that have remained underenforced in the FCC's conventional interpretation of the "public interest."<sup>24</sup> The emergence of gargantuan media conglomerates, each large enough to control vast amounts of programming but none powerful enough to conquer the entire industry, requires a comprehensive rethinking of mass communications and its regulation. The imminent collapse of the mass communications cathedral as we know it promises to transform certain notions central to the regulatory project—scarcity, networks, and the very idea of competition itself. As it was on the day when Jericho fell, let the trumpets blare.<sup>25</sup>

## II. TALKING ALL AT ONCE

### A. UNSTABLE AT ANY SPEED<sup>26</sup>

What is this phenomenon called mass communications? By air, by wire, or by newsrack,<sup>27</sup> modes of mass communication enable one speaker to reach as broad an audience as technology and consumer interest permit. "Broadcasting" in its pre-industrial sense defines every would-be mass communicator;

24. Cf. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978) (discussing certain valid but "underenforced" constitutional norms).

25. Cf. *Joshua* 6:20 ("So the people shouted when the priests blew with the trumpets: and it came to pass, when the people heard the sound of the trumpet, and the people shouted with a great shout, that the wall fell down flat . . .").

26. Cf. RALPH NADER, *UNSAFE AT ANY SPEED*, at ix (1965) ("A great problem of contemporary life is how to control the power of economic interests which ignore the harmful effects of their applied science and technology.").

27. Cf. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1507 (1993) (striking down a city's exclusion of "commercial publications [from] free-standing newsracks located on public property"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988) (striking down an ordinance "giving [a city's] mayor unfettered discretion to deny a permit application" for the placement of newsracks); DOUGLAS H. GINSBURG ET AL., *REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES*, at xlvi-xlvii (2d ed. 1991) (analogizing television and cable regulation to newsrack regulation).

even those who resort to sound trucks for want of less "loud and raucous" means of speech<sup>28</sup> seek to scatter their ideas in the way a cotton farmer strews seed on plowed and fertile land.<sup>29</sup> Though it will always be "easier for the rich to speak than it is for the poor,"<sup>30</sup> the sudden emergence of broadcasting technologies is opening unbelievably broad avenues for new communication, new speech, new ideas.

Sweeping technological change has not substantially changed the underlying mechanics and economics of mass communications. Oddly enough, in an age when the Internet and the facsimile machine have relegated many traditional forms of communication to the derogatory status of "snail mail,"<sup>31</sup> the definition of mass communications may still be found in Congress's seemingly anachronistic power "[t]o establish Post Offices and Post Roads."<sup>32</sup> Moreover, examining a communications system at terrestrial speeds may help us understand how traffic crosses an "information superhighway"<sup>33</sup> on which Einstein's law of relativity sets the speed limit.<sup>34</sup> In this respect, regulators and private players in modern mass media markets agree. The novel communications medium of "video dialtone" follows a "Post Office" model of "open entry," under which a unified delivery service merely channels a variety of entertainment and information services into households and leaves the services' success or failure to be determined by consumer receptiveness.<sup>35</sup>

28. See *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black, J., dissenting) ("There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places."); cf. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994) ("Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.").

29. See JAMES AGEE & WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN* 329-30 (2d ed. 1960).

30. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995).

31. *Watch Sandra Bullock in THE NET* (Columbia Pictures 1995).

32. U.S. CONST. art. I, § 8, cl. 7.

33. Then-Senator Al Gore first used this term to describe the information revolution. Al Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, WASH. POST, July 15, 1990, at B3.

34. Cf. Berman & Weitzner, *supra* note 13, at 1635-36 (noting how Benjamin Rush and James Madison viewed the post office, the state-of-the-art communications system as essential to participatory democracy).

35. See *In re Telephone Co.-Cable Television Cross Ownership Rules*, 7 F.C.C.R. 5781, 5807-08 (1992), *terminated by*, Telecommunications Act, *supra* note 2, § 302(b)(3), 110 Stat. at 124.



Just as privately owned common carriers must charge "just and reasonable" rates for interstate or foreign communication services,<sup>36</sup> the United States Postal Service<sup>37</sup> is obligated to charge "reasonable and equitable rates of postage."<sup>38</sup> *National Association of Greeting Card Publishers v. United States Postal Service*,<sup>39</sup> a 1983 Supreme Court controversy over the Postal Rate Commission's methodology for reviewing Postal Service rates, illuminates the intricate relationship between monopoly and competition in communications. Like the Court, we can afford to simplify the classes of mail: first class for letters, second class for newspapers and magazines, third class for bulk mail, fourth class for parcels, and the "Express Mail" overnight service.<sup>40</sup> When setting rates, the Rate Commission must require "each class of mail or type of mail service [to] bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs . . . reasonably assignable to such class or type."<sup>41</sup>

Lower federal courts had split over the amount of discretion that the Rate Commission enjoyed in "assigning" as opposed to "attributing" costs. In 1981, the Second Circuit held that the difference between these two verbs enabled the Rate Commission to "assign" costs freely as long as it "attributed" short-run variable costs to each class.<sup>42</sup> By contrast, an earlier D.C. Circuit decision required the Rate Commission to "attribute" and "assign" two independent tiers of costs before distributing any remaining "residual costs" in a discretionary fashion.<sup>43</sup> The Supreme Court adopted the Second Circuit's more flexible two-tiered scheme, permitting the Rate Commission "the use of any

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36. 47 U.S.C. § 201(b) (1994).

37. See 39 U.S.C. §§ 201-208 (1994) (outlining the organization of the U.S. Postal Service).

38. *Id.* § 3621. For exemplary cases describing the postal variant of cost-of-service ratemaking, see *Mail Order Ass'n of Am. v. United States*, 2 F.3d 408 (D.C. Cir. 1993); *United Parcel Serv. v. United States Postal Serv.*, 604 F.2d 1370 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

39. 462 U.S. 810 (1983).

40. *Cf. id.* at 813 n.2 (organizing postal services according to "four broad classes of mail").

41. 39 U.S.C. § 3622(b)(3) (1994).

42. *Newsweek, Inc. v. United States Postal Serv.*, 663 F.2d 1186 (2d Cir. 1981), *aff'd and remanded sub nom. National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 462 U.S. 810 (1983).

43. *National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 569 F.2d 570, 586-87 & n.59, 592-93 (D.C. Cir. 1976), *vacated on other grounds*, 434 U.S. 884 (1977).

method that reliably identifies causal relationships" between postal rates and costs of service.<sup>44</sup>

Alexander the Great unraveled the Gordian knot by slicing it. We likewise can penetrate this regulatory tangle by acknowledging the federal postal monopoly. Private competitors led by United Parcel Service had defended the D.C. Circuit's "extended use of cost-of-service principles" as a "necessary" tool for "avoid[ing] subsidization of those classes of mail for which the Postal Service has competition, such as parcel post, by other classes of mail for which the Postal Service enjoys a statutory monopoly, such as first class."<sup>45</sup> Thanks to rents collected under its monopoly over first-class mail, the Postal Service does enjoy a small war chest. In classic fashion, the private competitors argued that the Postal Service would cross-subsidize unregulated lines of business, especially parcel and premium services. (This is precisely the instinct that justified line-of-business restrictions in the Bell divestiture decree.)<sup>46</sup>

But the Postal Service makes a poor competitor. The Postal Service has never been able to leverage its first-class monopoly into cross-subsidies for other profit-making services. "Federal Express and other competitors" have made a fortune at the Postal Service's expense,<sup>47</sup> and the overnight mail delivery market all but epitomizes "healthy competition in a declining unit cost industry."<sup>48</sup> Rather, the Postal Service's first-class war chest finances second-class mail, the delivery system of choice for newspapers, magazines, and other periodicals with substantial "educational, cultural, scientific, and informational value."<sup>49</sup> The Postal Rate Commission's "value-of-service" pricing scheme<sup>50</sup> represented "a convenient method of subsidizing" a

44. *Greeting Card Publishers*, 462 U.S. at 833-34.

45. *Id.* at 829.

46. *See, e.g., United States v. Western Elec. Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,121, at 66,267-70, 66,282-83 (D.D.C. July 26, 1984).

47. Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1356 (1986).

48. *Id.* at 1355.

49. 39 U.S.C. § 3622(b)(8) (1994); *cf. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 159 n.10 (1973) (Douglas, J., concurring in judgment) (arguing that "the existence of newspapers," especially the most vulnerable "10,000 magazines and small newspapers . . . is dependent upon . . . second-class postage rates").

50. *See generally Burlington N. R.R. Co. v. ICC*, 985 F.2d 589 (D.C. Cir. 1993) (reviewing the ICC's decision to use a "revenue over variable cost" method

avored form of communication.<sup>51</sup> There was and is no need to tap the federal fisc for a tax-financed subsidy. Instead, internal cross-subsidization transfers the political struggle over postal rates out of the House Ways and Means Committee and into the Postal Rate Commission.<sup>52</sup>

Despite its fabled inefficiency, the Postal Service exhibits the essential characteristics of a regulated mass communications system. Like telephony (literally, "far speaking")<sup>53</sup> or airline service, postal service is at its core a system for connecting any two points. In the aggregate, however, these connections form a *network*, an entity far more impressive than its individual components.<sup>54</sup> The postal network enables the bulk-mailer to reach millions of households at once.

In the communications context, the idea of a network serves as a healthy reminder that a single medium can serve multiple purposes simultaneously. The same Postal Service that delivers heart-to-heart *billets-doux* also drops tons of junk mail on unsuspecting recipients. A fiber optic network connecting millions of households is no less a broadcast medium than a snippet of the electromagnetic spectrum. Thus the local telephone company becomes an "integral component in an indivisible dissemination system,"<sup>55</sup> merely one of many nodes in an all-embracing "network of networks."<sup>56</sup>

instead of its traditional "constrained market methodology" for setting rates in markets dominated by a single rail carrier); William J. Baumol & David F. Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 AM. ECON. REV. 265, 280 (1970) ("[U]nless marginal cost pricing happens to provide returns sufficient to meet the [legally mandated] revenue requirement, a quasi-optimal allocation calls for systematic deviations of prices from marginal costs throughout the economy") (emphasis in original); Frank Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47 (1927).

51. Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 26 (1971).

52. See Edmund L. Andrews, *A Publishers' Slugfest Over Postal Rates*, N.Y. TIMES, Nov. 13, 1995, at C1 ("The cliché around here is that second-class mail accounts for about 5 percent of revenues, 10 percent of volume, and about 90 percent of the headaches").

53. See KELLOGG ET AL., *supra* note 14, § 1.2.1, at 5 (describing the Greek etymology of *telephony*).

54. For two recent articles making this point, see generally Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSPECTIVES 93 (1994); Stan J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSPECTIVES 133 (1994).

55. *General Tel. Co. v. FCC*, 413 F.2d 390, 402 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

56. Sidak, *supra* note 1, at 1210.

Regulation adds a crucial element to the network as a conceptual device. Access to a restricted communications network equals the right to broadcast, and the use of that right yields some measure of diversity. In the name of diversity, regulators may demand that certain types of speech, such as locally originated or minority-oriented programming, be provided as a condition of licensing. As we shall see, the FCC and the courts have interpreted the Communication Act's "public convenience, interest, or necessity" standard<sup>57</sup> by equating diversity with the identity of individual broadcasters. This enterprise died of a single, tragic flaw: the failure to heed the laws of economics.

## B. THE DEEP STRUCTURE OF MASS MEDIA MARKETS

### 1. An Epic Tale

Like ancient Gaul,<sup>58</sup> the natural gas industry,<sup>59</sup> and virtually every other line of business in an age of mass production and mass consumption,<sup>60</sup> mass communications consists of three distinct segments: production, wholesale transmission, and retail distribution to end consumers. At first glance, program production hardly seems amenable to command-and-control regulation, regardless of whether producers "cultivate" programs as though they were farm commodities<sup>61</sup> or whether they engage in the relatively haphazard "gathering" of talent wherever they find it.<sup>62</sup> Vicious competition dominates this

57. 47 U.S.C. § 303 (1994).

58. See C. JULIUS CAESAR, COMMENTARII CUM A. HIRTI ALIORUMQUE SUPPLEMENTIS RECOGNOVIT BERNARDUS DINTER 1 (1890) ("*Gallia est omnis divisa in partes tres.*") (Gaul is wholly divided in three parts).

59. See *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 691 (1954) (Clark, J., dissenting) ("The natural gas industry, like ancient Gaul, is divided into three parts. These parts are production and gathering, interstate transmission by pipeline, and distribution to consumers by local distribution companies.").

60. Cf. *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1352 (5th Cir. 1976) (describing the chrysanthemum industry as one comprising three tiers: breeders, self-propagators, and retail florists), *cert. denied*, 429 U.S. 1094 (1977).

61. Cf. Capper-Volstead Act § 1, 7 U.S.C. § 291 (1994) (authorizing "[p]ersons engaged in the production of agricultural products as farmers" to organize capital-stock and nonstock cooperatives with a modest degree of immunity from the federal antitrust laws).

62. Cf. 15 U.S.C. § 717(b) (1994) (preserving state authority to regulate the interstate transportation, "local distribution," and "production or gathering" of

sector. Like other systems of public utility regulation, federal communications law prescribes regulatory supervision of transmitters and distributors. A study of the entire market suggests why.

The *production* sector consists of actors generating information and creating messages. Closer examination discloses a sharp divide within this sector. One subsector constantly generates information it wishes to sell as intrinsically valuable. In other words, if a speaker could overcome prohibitive transaction costs and connect to potential listener-buyers, he or she could sell the information for its own sake. Indeed, under some circumstances, a speaker may find it possible to make direct sales. A distinct subsector communicates in a vastly different fashion. By and large, the messages generated here are not marketable in themselves; they convey information leading to future commercial transactions. This subsector likewise benefits from the broadest possible dissemination of its information, since every listener is a potential customer.

These two subsectors are, of course, the news/sports/entertainment and the advertising segments of the communications industry. Conveniently, their spheres of activity correspond to the constitutional divide between "core" and "commercial" speech.<sup>63</sup> These subsectors rely heavily on each other. Entertainers offer goods in high demand but often cannot finance the effective transmission and distribution of their messages. Advertisers have plenty of money to communicate their messages, but no willing audience. Under the traditional "three-cornered" model of broadcasting, "[b]roadcasters lure audiences with programs and sell the audiences to advertisers, who in turn show advertisements to the audiences."<sup>64</sup> Audiences themselves do not directly pay for programming.<sup>65</sup>

Consider the phenomenon of mass communications through one sequence of anecdotes on the rise of the Indigo Girls. Though now a folk duo of some repute, Amy Ray and Emily Saliers were once numbered among an indistinct multitude of struggling start-up musicians. Like most other such performers,

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natural gas).

63. See generally *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-66 (1980).

64. Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 305 (1991).

65. *Id.*

they solicited and accepted "contributions" during informal performances. Soon they began to sell gigs to Greek-letter organizations in Atlanta and Athens, Georgia. More lucrative engagements awaited them at establishments that generate more revenue from liquor sales than from admission fees.<sup>66</sup> Eventually a big studio signed the Indigo Girls, and the duo went on to a streak of successful recordings and performances.

But this "Epic" story is missing one element. The market for musicians is chronically overcrowded. The likelihood that any folk duo, however talented, would go national was remarkably slim. In their infancy, the Indigo Girls, like any other group, lived and died by exposure. Many vendors simultaneously wanted to reach the audience attracted by the Indigo Girls' music. What the entertainers and the advertisers needed was a mutually beneficial arrangement and for reaching as many potential listener-buyers as possible.

Quite obviously, the critical facility is broadcasting, primarily radio but possibly even broadcast or cable television. (This story takes place, after all, during the early days of MTV.) A quick examination of radio station operation exposes another problem, however. There is an enormous volume *and* variety of information being produced. Such are the vicissitudes of competition.<sup>67</sup> A programming director can connect with some ease to a few advertisers, but not to a substantial number of entertainers. Hence the rise of a national *transmission* sector, made up of firms that specialize in garnering entertainment and selling them in marketable bundles to local broadcasters and cable operators. Again the structure of the law reflects subspecialties within the sector: whereas the copyright notion of a phonorecord defines the stock-in-trade of today's music publishers and yesterday's radio networks, the copyright notion of audiovisual works defines the work of today's cable programmers and broadcast television networks.<sup>68</sup> Though the multiple channels for transmitting mass media are less tangible than the

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66. Cf. INDIGO GIRLS, *Closer to Fine*, on INDIGO GIRLS (Epic 1989) ("I stopped by the bar at 3 a.m. / To seek solace in a bottle or possibly a friend"). But cf. GIN BLOSSOMS, *Lost Horizons*, on NEW MISERABLE EXPERIENCE (A&M Records, Inc. 1992) ("Drink enough of anything to make this world look new again . . . and when the sun smiles how could it be wrong").

67. See generally Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

68. See 17 U.S.C. § 101 (1994) (defining, *inter alia*, "audiovisual works" and "phonorecords").

natural gas pipelines that kept the old Federal Power Commission busy, both industries are sprawling, "unitary enterprises" that integrate the delivery of valuable goods from initial production to ultimate consumption.<sup>69</sup>

The final sector, *distribution*, is the traditional regulatory focus of the FCC. So far we have encountered no physical restraints on entry and exit. To be sure, the transmission industry exhibits some of the characteristics of a natural monopoly: a large initial capital investment, increasing returns on scale, and constantly declining marginal costs of production over the relevant range of output.<sup>70</sup> But the transmission sector during the pre-electronic era (*i.e.*, book and newspaper publishers) faced similar barriers to perfect competition. Traditional mass communications law focused on the distribution sector on the assumption that local broadcasting acted as a bottleneck. The electromagnetic spectrum is limited; manipulation of signal strength allows a regulator to adjust but not expand the atmosphere's capacity for wirelessly transmitted messages. The likeliest channel by which individual consumers receive information is the local distribution facility. Hence the fixation with broadcast licensing and broadcaster identity.

## 2. The Terms and Conditions of Competition

Three factors loom large in the project of describing or prescribing competition in mass communications. The first is the basis by which firms at various levels of the industry compete. A dominant or monopolistic firm does not necessarily price-gouge or suppress output.<sup>71</sup> "Free" broadcasts cannot and do not compete on the basis of price. Consumers do not pay in dollars, but rather in forgone uses of time spent in front of the tube. Rather, inadequate competition in the transmission and

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69. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 488 (1950) (Jackson, J., dissenting); *accord* *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 515 (1989) (noting that the production, transportation, and sale of gas operate as one enterprise).

70. *See generally* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 *STAN. L. REV.* 548 (1969).

71. To be sure, exclusive cable franchises charge all that the traffic will bear, and state-owned television networks in Europe restrict the broadcast day to encourage their citizens to pursue alternative pastimes and perhaps even to retard the rate of American cultural encroachment. By contrast, the traditional "three-cornered" model of advertiser-financed broadcast television, *see supra* text accompanying notes 63-65, contemplates neither a system of direct viewer finance nor a significant public role in programming.

distribution sector would retard product differentiation and responsiveness to the broadcast audience. The presence of healthy competition thus expresses itself through *diversity* in *program content* and *viewpoint*.<sup>72</sup> Content, arguably the single most important factor in traditional First Amendment analysis, is also the basis by which mass communicators compete.<sup>73</sup> Although the mind-numbing monotony that rules in the absence of diversity hardly needs definition, Ellen Burstyn's cinematic admonition is worth noting: "Just remember, Beautiful: everything gets old if you do it often enough."<sup>74</sup>

Like any other quantitative or qualitative characteristic of a marketed good, programming diversity depends on a mixture of producer-specific and consumer-specific factors. Historically, most FCC policies designed to affect program content and viewpoint have focused on local broadcasters. Most observers agree that regulation has made some difference, even if it has not genuinely succeeded. Deregulation would result in a vastly different mix of programs.<sup>75</sup>

A focus on local broadcasting—the distribution sector in mass communication—arguably gives short shrift to a second, crucial factor affecting competition. That factor is *vertical integration*. Existing or potential competition can alter the relationship between the vertically tiered sectors of the industry. A substantial body of FCC policy assumes that encouraging local distribution firms to produce programs can offset the risk that a structurally competitive production sector might be dominated or even wholly absorbed by more powerful firms. Vigorous competition exposes the production sector to domination by a transmission sector that consists of a few firms engaged in oligopolistic, nonprice competition.

Overwhelming market dominance in the transmission of information overshadows the risk of potential distributional

72. *Cf.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 585 (1981) (defining diversity according to a radio station's "entertainment format"); Action for Children's Television v. FCC, 821 F.2d 741, 743 (D.C. Cir. 1987) (describing children's programming as a vulnerable specialty market).

73. Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 164 (1995).

74. *Watch THE LAST PICTURE SHOW*, (Last Picture Show Productions, Inc., 1971).

75. *See generally* Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349, 1382-84 (1985).



monopolies. The phenomenon resembles the relationship between the market power conferred by a patent and the market power that triggers searching antitrust scrutiny.<sup>76</sup> A legal system animated by its "instinctive aversion" to even the "limited patent monopoly" inherent in rights for inventors<sup>77</sup> must nevertheless concede that the availability of substitutes curbs the market power of patented products.<sup>78</sup> Likewise, local broadcasting looks far less like a monopoly when viewed in light of the vastly greater market power of nationwide radio and television networks. Although each local broadcaster enjoys geographic market power by virtue of the electromagnetic spectrum's physical limits, the many firms populating the distribution sector are puny *vis-à-vis* the mere handful of large networks. Under this scenario, encouraging *local programming* not only serves specific local constituencies but also promises to defend local broadcasters against networks that would otherwise leverage their power over transmission into comprehensive market domination. What John Kenneth Galbraith has termed "countervailing power" befits this strategy;<sup>79</sup> even Chicago School economists<sup>80</sup> concede that the occasional "bilateral monopoly" may have "a potentially beneficial impact on the eventual consumer."<sup>81</sup>

Finally, all three sectors have tended toward increasing competition. If the information superhighway has broadened far beyond the alley by which a few networks supplied their local

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76. See, e.g., *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) (noting that patents do not automatically provide immunity from antitrust); cf. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 9 (1958) (extending antitrust scrutiny to cases in which a firm attempts to leverage its market power in an unpatented product to another product market).

77. E.g., *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1965); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (describing the "monopoly privileges" in patents and copyrights as "limited grant[s]" designed "to motivate the creative activity of authors and inventors by the provision of a special [and temporally finite] reward").

78. See, e.g., Edmund W. Kitch, *Patents: Monopolies or Property Rights?*, 8 RES. L. & ECON. 31 (1986) (arguing that the property rights conferred by patents are restrained by competitive market pressures).

79. See JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 128-31 (1952).

80. See, e.g., GARY S. BECKER, *ECONOMIC THEORY* 94-95 (1971); MILTON FRIEDMAN, *PRICE THEORY* 191-92 (1976); GEORGE STIGLER, *THE THEORY OF PRICE* 207-08 (3d ed. 1966).

81. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 842 (1978) (White, J., dissenting).

affiliates, does it make much regulatory sense to remain obsessed about the original two lanes? True, the other lanes may be the mass communications equivalent of toll roads—cable and other subscription services charge access fees—but those lanes travel at higher speeds and lead to a greater variety of destinations. They combine the speed of an express train with the convenience of a local run. *Intermodal competition* in program production and delivery therefore promises consumers a superior information package. It also threatens to render obsolete all economic assumptions underlying the structural regulation of mass communications.

### III. REVISITING MASS COMMUNICATIONS LAW, THIS TIME WITH ATTITUDE

#### A. WE WANT THE AIRWAVES<sup>82</sup>

Federal communications law, so the world believes, is the story of an expert federal agency, charged with dividing scarce electromagnetic spectrum among applicants according to the "public interest." Hoping to forestall a dictatorial empire of the air, the regulators of the Republic set out to "carve [the airwaves] as a dish fit for the gods," without "hew[ing]" the broadcast spectrum "as a carcass fit for hounds."<sup>83</sup> In enacting the Radio Act of 1927<sup>84</sup> and the Communications Act of 1934,<sup>85</sup> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."<sup>86</sup>

During the early twentieth century, fear of monopoly was well-grounded. Primeval mass communicators repeatedly tried to conquer an entire entertainment or information industry.

82. *Hear THE RAMONES, We Want the Airwaves, on PLEASANT DREAMS* (Warner Bros. 1981).

83. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR*, act 2, sc. 1, ll. 173-74 (Riverside ed., Houghton Mifflin Co. 1974) (1599).

84. Ch. 169, 44 Stat. 1162, amended by, 46 Stat. 844 (1930); see also *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 274-87 (1933) (discussing the Radio Commission's authority); *Federal Radio Comm'n v. General Elec. Co.*, 281 U.S. 464, 466-67 (1930) (discussing the purpose of the Act).

85. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613 (1994)).

86. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); accord, *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

During World War I, the inventors of the earliest forms of movie technology tried to leverage their control over cameras, projectors, and film into comprehensive command of motion picture production, distribution, and exhibition.<sup>87</sup> Federal action on two fronts finally ended the threat. The Justice Department successfully broke up a multinational cartel that not only set the rental rates on films but also controlled virtually all film distribution in the United States.<sup>88</sup> Meanwhile, the Supreme Court repelled the same cartel's effort to condition the sale of patented projectors on an agreement to show only movies produced under the cartel's expired patents.<sup>89</sup>

Throughout the 1930s and beyond, Hollywood studios<sup>90</sup> and even distributors of motion picture advertising<sup>91</sup> used a variety of conspiracies and ham-fisted contracts to control retail film exhibition. By mid-century, print journalism had likewise become dominated by the few massive news organizations capable of amassing the capital needed to collect and deliver all the news that's fit to print.<sup>92</sup> "Payola," the practice of bribing

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87. See generally MICHAEL CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY* 16-21 (1960).

88. See *United States v. Motion Picture Patents Co.*, 225 F. 800, 811-12 (E.D. Pa. 1915).

89. See *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 513 (1917); cf. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 & n.4 (1962) (invalidating a movie studio's effort to force theaters into "block-booking" as a condition upon access to the studio's copyrighted films); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948) (same). These practices have given rise to the modern doctrine of "copyright misuse." See, e.g., *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 972-73 (4th Cir. 1990); Note, *Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values*, 104 HARV. L. REV. 1289, 1290-1307 (1991).

90. See, e.g., *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 538 (1954) ("alleging that . . . motion picture producers and distributors had . . . conspir[ed] to restrict 'first-run' pictures to downtown Baltimore theatres, thus confining . . . suburban theatre[s] to subsequent runs"); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 214, 232 (1939) (finding that distributors controlling "about 75 percent of all first-class feature films exhibited in the United States" had conspired to impose downstream restrictions on exhibitors); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44, 54-55 (1930) (invalidating terms by which film distributors would deal with exhibitors); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 41-42 (1930) (same).

91. See *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 393 (1953).

92. See *Associated Press v. United States*, 326 U.S. 1, 13 n.10 (1945) ("It is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the world.").

disk jockeys to play certain songs, has been a classic tool for advancing the pecuniary interests of a highly concentrated music industry throughout the twentieth century<sup>93</sup> and remains a substantial legal problem today.<sup>94</sup> In radio and broadcast television, comprehensive control of production, transmission, and distribution by a fully integrated network seemed equally inevitable.

These developments suggested that the real potential for monopoly lay in mass communications' transmission sector rather than the distribution sector. If so, Congress should have directly regulated the networks and movie studios in the same fashion as interstate electric utilities and natural gas pipelines. Through legislation contemporaneous with the Communications Act of 1934, Congress imposed traditional public utility regulation on the interstate transmission of electricity<sup>95</sup> and interstate transportation of natural gas.<sup>96</sup> No less than mass communications, these industries had become marked by "growing scarcity" and by "a highly concentrated control of the producers' market and of . . . consumers' supplies."<sup>97</sup>

But the Communications Act followed a different path. Congress expressly excluded radio broadcasters from the Act's definition of a "common carrier"<sup>98</sup> and instead ordered the FCC to issue broadcast licenses "as public convenience, interest, or necessity requires,"<sup>99</sup> with neither the power to set rates<sup>100</sup>

93. See generally R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979); J. Gregory Sidak & David E. Kronemyer, *The "New Payola" and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J.L. & PUB. POL'Y 521 (1987).

94. See 47 U.S.C. § 508 (1994) (requiring the disclosure of payments to individuals connected with broadcasts); *United States v. Goodman*, 945 F.2d 125, 128-29 (6th Cir. 1991); Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS B.A. J. 79, 84-85 (1994). *But cf.* Coase, *supra* note 93, at 318-19 (suggesting that payola may benefit consumers).

95. Federal Power Act, Act of Aug. 26, 1935, ch. 687, §§ 201-213, 49 Stat. 847-54 (1935) (codified as amended at 16 U.S.C. §§ 824-824m (1994)).

96. Natural Gas Act, Act of June 21, 1938, ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717-717w (1994)).

97. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 637 (1944) (separate opinion of Jackson, J.).

98. See Act of June 19, 1934, ch. 652, § 3(h), 48 Stat. 1064, 1066 (codified at 47 U.S.C. § 153(h)(1994)) ("[A] person engaged in radio broadcasting shall not . . . be deemed a common carrier.").

99. *Id.* § 303, 48 Stat. at 1082 (codified as amended at 47 U.S.C. § 303 (1994)).

nor the power to censor.<sup>101</sup> The die might have been cast well before the New Deal. Federal intervention in "the chaotic scramble for domestic air space" had begun with the Radio Act of 1912.<sup>102</sup> That effort failed, however, because the Secretary of Commerce and Labor had no power to prevent the use of unassigned frequencies, to restrict transmitting power and broadcasting schedules, or to deny a license that would interfere with existing stations.<sup>103</sup> In light of this legislative failure, the 1927 and 1934 Acts focused the government's attention on the licensing of local broadcasters.

The distributional "monopoly" that apparently inspired the Communications Act of 1934 and its predecessor statutes soon proved to be a mirage. By 1943, the FCC and the Supreme Court recognized that a far greater source of potentially distorting market power lay in the transmission sector, in the possibility that nationwide networks would dominate programming from the top down.<sup>104</sup> The original conception of mass communications law nevertheless remained, and to this day many observers assume that scarce frequencies would be wastefully allocated in the absence of a centralized scheme for rationalizing the initial allocation of broadcasting rights.<sup>105</sup>

At an early stage in the development of broadcast licensing law, the Supreme Court granted rival applicants the right to

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100. Cf. *id.* § 201(b), 48 Stat. at 1070 (codified as amended at 47 U.S.C. § 201(b) (1994)) (authorizing the FCC to set "just and reasonable" rates for "[a]ll charges . . . in connection with [interstate or foreign] communication service" provided by common carriers by wire or radio).

101. See *id.* § 326, 48 Stat. at 1091 (codified as amended at 47 U.S.C. § 326 (1994)) (denying the power of censorship to the Commission).

102. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 89-90 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 212 (1943).

103. See *United States v. Zenith Radio Corp.*, 12 F.2d 614, 617 (N.D. Ill. 1926); *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1006 (D.C. Ct. App. 1923).

104. *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943).

105. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994) (declining to abandon "the scarcity rationale" underlying cases such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)); William N. Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539, 562 (1978) (arguing that allocating rights to broadcast in an inherently scarce electromagnetic spectrum would winnow "the field of otherwise eligible applicants strictly according to their ability to pay" and would eliminate "those who lack dollars to put in an effective bid"); cf. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 57-58 (1993) (arguing more generally that the failure to regulate speech, especially in contexts marked by scarcity, favors the rich and skews an already imperfect marketplace of ideas in favor of the preferences of the privileged).

comparative licensing proceedings.<sup>106</sup> The so-called *Ashbacker* right to comparative licensing is premised on the idea that awarding any license necessarily precludes the use of the same frequency in the same area by another broadcaster.<sup>107</sup> The mutual exclusivity of applications to broadcast on one frequency reinforces the perception of scarcity, in stark contrast with regulatory settings where the granting of a license may injure a competitor but does not perforce exclude it from the marketplace.<sup>108</sup> But comparative licensing of broadcast rights could not of its own force tame the sprawling mass communications industry. Although the Court prescribed the comparative hearing as the method for resolving exclusive applications, it did not define the substantive standards by which the FCC was to compare applicants. In a field crowded with fit, willing, and able applicants,<sup>109</sup> the FCC wove a complex web of factors for resolving licensing disputes.

The fixation on comparative hearings obscured the possibility of alternative means for distributing broadcasting entitlements. The Commission's flirtation with lotteries as a method for allocating new AM, FM, and television frequencies suggested the feasibility of auctions in the 1980s,<sup>110</sup> and Con-

106. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945). *But cf.* *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) (entitling an applicant who met the requirements of the Radio Act of 1927 to be licensed even if the Federal Radio Commission had neither heard nor considered later applications).

107. See *Ashbacker*, 326 U.S. at 330, 332-33; *cf.* *FCC v. National Broadcasting Co.*, 319 U.S. 239, 243-44, 247 (1943) (allowing an incumbent licensee to intervene in another licensee's application to increase transmission power and expand hours of operation if such changes would cause "electrical interference").

108. See, e.g., *Federal Home Loan Bank Bd. v. Rowe*, 284 F.2d 274, 279 (D.C. Cir. 1960) (sustaining a savings and loan charter granted without a comparative hearing, on the reasoning that the charter did not bar the competitors from the home lending business); *cf.* *Pennsylvania R.R. Co. v. Dillon*, 335 F.2d 292, 294-97 (D.C. Cir. 1964) (using similar reasoning in railroad regulation).

109. *Cf.*, 49 U.S.C. § 10,922(a)(1)-(2) (1994) (requiring the late Interstate Commerce Commission to find that a would-be motor carrier is "fit, willing, and able properly to perform the service proposed").

110. See *Selection from Among Competing Applicants for New AM, FM, & Television Stations by Lottery*, 54 Fed. Reg. 11,416, 11,416 (FCC Mar. 20, 1989); *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, & Television Stations by Random Selection (Lottery)*, 4 F.C.C.R. 2256 (1989); *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, & Television Stations by Random Selection (Lottery)*, 5 F.C.C.R. 4002 (1990).

gress in 1993 gave the FCC the long-awaited authority to conduct competitive bidding.<sup>111</sup> The recent auction of spectrum space for narrowband and broadband personal communication services and interactive video and data services portends greater use of market-oriented techniques.<sup>112</sup> As far back as 1959, Ronald H. Coase weighed the FCC's public interest method of allocating spectrum and found it wanting. Coase argued that an open market could resolve potential conflicts over electromagnetic interference.<sup>113</sup> Harvey Levin contemporaneously proposed that the FCC auction all new licenses and collect annual royalties in order to finance noncommercial stations, minority programming, and other underserved broadcasting interests.<sup>114</sup>

Thomas Hazlett offers an even more explicitly market-oriented perspective. He asserts that FCC regulation in the "public interest" preserved the original broadcasters' "priority-in-use" system of allocating rights at the expense of a more rational auction.<sup>115</sup> This view regards the earliest broadcasters as "spectrum squatters" who parlayed their superior political prowess into a legal scheme that treated them as homesteaders.<sup>116</sup> Regardless of this dispute's historical significance, its prescriptive implications remain the same: switch to a market-based system of broadcast rights forthwith and allow ordinary forces of entry and exit to allocate scarce spectrum.<sup>117</sup>

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111. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (codified at 47 U.S.C. § 309(j) (1994)).

112. See Implementation of Sections 3(n) and 322 of the Communications Act—Regulatory Treatment of Mobile Services, 59 Fed. Reg. 28,042 (May 31, 1994) (proposed rule); Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 59 Fed. Reg. 44,272 (Aug. 26, 1994) (final rule to be codified at 47 C.F.R. § 1.2101-1.2111); see also New Personal Communications Services: Pioneer's Preference Review, 59 Fed. Reg. 42,521 (Aug. 18, 1994) (requiring recipients of "pioneer's preferences" for new communications services or technology to pay for licenses awarded without competition from mutually exclusive applications).

113. See R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14-31 (1959).

114. See Harvey J. Levin, *Regulatory Efficiency, Reform and the FCC*, 50 GEO. L.J. 1, 3-4 (1961).

115. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 171-72 (1990).

116. Cf. MARION CLAWSON, *UNCLE SAM'S ACRES 69-70* (1951) (describing how "sooners" snatched the best lands before the 1889 "Oklahoma Opening" of the former Indian Territory to white settlement).

117. For a recent discussion of the relative merits of comparative hearings, lotteries, and auctions, see Licensing Policies & Procedures, Satellite Communications, 59 Fed. Reg. 53,294, 53,303-04 (Oct. 21, 1994). Unlike auctions,

Competition, contrary to widespread belief, is entirely consistent with the regulatory enterprise. Under well-established regulatory principles, a legal commitment to licensing in the public interest does not require an agency to ignore reduced prices or other manifestations of superior performance. Indeed, "[t]he ability of one mode of [service] to operate with a rate lower than competing types of [service] is precisely the sort of 'inherent advantage' that must be examined under a mandate to regulate in the public interest."<sup>118</sup> Such solicitude for lower price applies directly to traditional telecommunications settings such as local access and transport or interexchange carriage, and inevitably will affect broadcast media as technological changes continue to blur the boundary between telephony and mass communications.

The FCC's institutional culture, however, historically has favored incumbent protection over competition. Although the Communications Act itself "contains no express command" directing the FCC to "consider the effect of competition," the Commission has loosely cobbled its competition policy from "the purpose of the Act and the specific provisions intended to effectuate that purpose."<sup>119</sup> The classic statement of the FCC's responsibility to consider factors *besides* competition, especially backward-looking concerns over previous licensees' sunk investments, comes from a 1953 case involving radio-telegraph

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"lotteries attract speculators—individuals who have no relevant experience and no serious intention to construct and operate" a mass communications network. Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Serv. and in the Instructional Television Fixed Serv. and Implementation of Section 309(j) of the Communications Act, 1995 FCC LEXIS 3972, \*9 (June 15, 1995) (MM Docket No. 94-131 & PP Docket No. 93-253) (Ness, Comm'r, dissenting in part). Among other side effects, a commitment to licensing in the public interest requires the FCC to restrict traffic in previously granted broadcasting rights. *See, e.g.,* Crowder v. FCC, 399 F.2d 569, 573 & n.25 (D.C. Cir.), *cert. denied*, 393 U.S. 962 (1968) (denying a license to an applicant who had been "trafficking" in broadcast licenses—acquiring and operating stations for quick resale); 47 C.F.R. § 1.597 (1995) (presuming that a new licensee who transfers his or her license within three years is engaging in "trafficking").

118. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 91 (1957); *accord* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 293 (1974); *United States v. Dixie Highway Express, Inc.*, 389 U.S. 409, 411-12 (1967) (*per curiam*); *cf. United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945) (permitting an agency to decide whether "the public interest requires that future . . . needs be assured rather than left uncertain").

119. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473-74 (1940).



facilities. In *FCC v. RCA Communications, Inc.*,<sup>120</sup> the Commission approved a proposal to lay two new transatlantic circuits linking the United States with Portugal and the Netherlands. On judicial review, RCA argued that the then-existing network of 104 overseas circuits (including sixty-five owned and operated by RCA) obviated the need for "duplicate circuits."<sup>121</sup> The Supreme Court vacated the FCC's decision, demanding that the agency and the winning applicant demonstrate some "tangible benefits" that would offset the public burden of financing duplicate facilities and the private injury to incumbent communications licensees: "Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough."<sup>122</sup>

This hostile attitude toward competition has not always dominated mass communications law. During the Golden Age of Radio, *FCC v. Sanders Brothers Radio Station*<sup>123</sup> expressly held that "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a [broadcast] license."<sup>124</sup> Under *Sanders Brothers*, the law looked quite favorably upon new entry into the broadcast arena. Based on this case alone, one might draw the following conclusions about broadcast regulation:

- There is at most a limited scarcity problem in broadcasting. The electromagnetic spectrum is scarce, not in the absolute sense that it can be exhausted over time, but only in the limited sense that the potential for crowding at any moment undermines the unregulated market's ability to allocate rights rationally.<sup>125</sup>
- Broadcasting never was a natural monopoly in the sense that costs of production decline over all relevant ranges of production. Nor does the Communications Act authorize broadcast regulation on a monopoly rationale. Broadcast facilities do not function as common carriers and

120. 346 U.S. 86 (1953).

121. *Id.* at 87-88.

122. *Id.* at 97; *accord* *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

123. 309 U.S. 470 (1940).

124. *Id.* at 476.

125. *See id.* at 474 ("The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. . . . The fundamental purpose of Congress . . . was the allocation and regulation of the use of radio frequencies . . .").

are not licensed as such.<sup>126</sup>

- Broadcast licensing presumptively follows the model of "free competition."<sup>127</sup> There is no expectation that competition will fail to materialize altogether or that competition, once triggered, will self-destruct and lead eventually to natural monopoly. The FCC has neither the responsibility nor the authority to set rates or to engage in other forms of price or income regulation.<sup>128</sup>

- The FCC should do little more than ensure that license applicants and proposed license transferees are fit, willing, and able to exploit their share of scarce spectrum. In this highly competitive market, regulation need not and should not displace business judgment. Congress, in short, "intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public."<sup>129</sup> Perhaps even more important, the FCC should not regulate programming content or viewpoint, the nonprice means by which the industry competes.<sup>130</sup>

- A broadcast license is by terms temporary. Licensees cannot and should not expect renewal.<sup>131</sup>

Under these assumptions, the FCC has a very limited mission. If technological change ever enabled the industry to circumvent the bottleneck of finite broadcasting frequencies, the FCC, thus deprived of its *raison d'être*, would have to wither away. In *Sanders Brothers*, as in other decisions during the twilight of the New Deal,<sup>132</sup> the Supreme Court firmly "assert-

126. See 47 U.S.C. § 153(h) (1994) ("[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."); FCC v. WNCN Listeners Guild, 450 U.S. 582, 589 n.14 (1981) (noting that radio broadcasters are not common carriers); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940). Compare 47 U.S.C. §§ 301-335 (1994) (provisions relating to radio broadcasting, including television), as amended by Telecommunications Act, *supra* note 2, with 47 U.S.C. §§ 201-228 (1994) (provisions relating to common carriers), as amended by Telecommunications Act, *supra* note 2.

127. *Sanders Bros.*, 309 U.S. at 474-75.

128. *Id.* at 474 (noting the absence of the hallmarks of railroad regulation and other forms of traditional public utility regulation—comprehensive regulation of entry, "wasteful practices," and "rates and charges").

129. *Id.* at 475.

130. Cf. 47 U.S.C. § 326 (1994) ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech . . .").

131. See *id.* § 309(h)(1) ("The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof"); *Sanders Bros.*, 309 U.S. at 475 ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

132. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Associated Indus. of N.Y., Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

ed that competitive harm as a consequence of agency action was not a sufficient basis for standing to challenge agency decisions.<sup>133</sup> Contemporaneous observers hailed *Sanders Brothers* as the "collapse of the public utility analogy" in federal communications law.<sup>134</sup> As late as 1957, the Commission declared itself powerless to consider the economic effect of a new broadcast license on existing licensees.<sup>135</sup>

But broadcast licensing after *Sanders Brothers* followed a far different path.<sup>136</sup> Indeed, later decisions systematically dismantled every aspect of *Sanders Brothers* and introduced an element of incumbent protection contrary not only to the Communications Act,<sup>137</sup> but also the First Amendment.<sup>138</sup>

## B. INCUMBENCY HAS ITS PRIVILEGES

How did federal communications law come to treat broadcast licensing as though it carried enormous significance for the industrial organization of mass media markets? The answer lies in the equating of *program quality* and *diversity* (factors at the heart of the FCC's regulatory mission) with *broadcaster identity* (a factor that is arguably *ultra vires* but not expressly banned by the Communications Act). In practice, such a focus on broadcaster identity falls naturally on the broadcaster likeliest to be before the Commission: an incumbent.

True to their traditional role as vindicators of individual rights, but not necessarily faithful to the true meaning of the "public interest" standard, the courts have taken special care to safeguard incumbent licensees. In *Carroll Broadcasting Co. v.*

133. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1269 (1986).

134. Paul M. Segal & Harry P. Warner, "Ownership" of Broadcasting Frequencies: A Review, 19 ROCKY MTN. L. REV. 111, 118 (1947); see also Note, *Economic Injury in FCC Licensing: The Public Interest Ignored*, 67 YALE L.J. 135, 136 n.5 (1957) (condemning *Sanders Bros.* as an abdication of the Commission's mandate to regulate entry on a public interest model).

135. See *In re Southeastern Enters.*, 22 F.C.C. 605, 610-12 (1957); H.R. REP. NO. 1297, 85th Cong., 2d Sess. 64-99 (1957).

136. See generally Harvey J. Levin, *Federal Control of Entry in the Broadcasting Industry*, 5 J.L. & ECON. 49 (1962).

137. See 47 U.S.C. § 309(h)(1) (1994).

138. JOHN H. ELY, DEMOCRACY AND DISTRUST 106 (1980) ("[I]ns have a way of wanting to make sure the outs stay out."); cf. Lillian BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1074-76 (1985) (arguing that restraints on campaign contributions and expenditures favor incumbents).

FCC,<sup>139</sup> the D.C. Circuit reintroduced the idea that the FCC could *and should* consider economic injury to existing broadcasters. The court's rationale was a classic restatement of the excessive competition argument that had been perfect in transportation law:

[T]he question whether a station makes \$5,000, or \$10,000, or \$50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be improved by competition. But, if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.<sup>140</sup>

Eventually, perceiving a public economic interest in preserving incumbent's sunk investment-backed expectations, Congress and the courts engineered an even more spectacular reversal of *Sanders Brothers'* disdain for static market structure. The FCC's first-ever denial of a renewal application in 1965<sup>141</sup> touched off a series of legislative and administrative efforts to codify an explicit "renewal expectancy" in contested licensing proceedings.<sup>142</sup> Despite initial resistance,<sup>143</sup> the D.C. Circuit eventually acceded in an administrative presumption favoring incumbents in comparative renewal proceedings.<sup>144</sup> The otherwise deregulatory Telecommunications Act of 1996 has expressly codified a renewal expectancy in broadcast licensing.<sup>145</sup>

139. 258 F.2d 440 (D.C. Cir. 1958).

140. *Id.* at 443.

141. See *In re WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

142. See generally Louis L. Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

143. See *Citizens Communication Center v. FCC*, 447 F.2d 1201, 1214 (D.C. Cir. 1971), *vacating* Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970); see also *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 51 (D.C. Cir. 1978) (chastising the FCC for creating a *de facto* presumption of renewal), *vacating In re Cowles Fla. Broadcasting, Inc.*, 60 F.C.C.2d 372 (1976), *cert. dismissed*, 441 U.S. 957 (1979).

144. See *Central Fla. Enters., Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). For a thumbnail history of this policy, see *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 782-83 & n.5, 805-07 (1978).

145. See Telecommunications Act, *supra* note 2, § 204(a), 110 Stat. at 112-13 (adding 47 U.S.C. § 309(k) and amending 47 U.S.C. § 309(d)).

The *RKO General* litigation, an epic struggle spanning nearly two decades,<sup>146</sup> illustrates the extraordinary nature of a renewal application denial. In 1980, the FCC finally acted on a renewal application filed by RKO General, Inc., for WNAC-TV in Boston.<sup>147</sup> Describing a broadcast license as a valuable privilege, the FCC denied the renewal application based on a substantial record of misconduct by the licensee and its parent company, General Tire.<sup>148</sup> The misconduct included reciprocal trade practices consisting of anticompetitive ties between General Tire sales and advertising on RKO stations, improper political contributions, fraud against other corporate affiliates, improper payments to foreign officials, the filing of misleading financial reports, and a "lack of candor" in FCC proceedings.<sup>149</sup> The D.C. Circuit affirmed the denial, but solely on the "lack of candor" ground.<sup>150</sup> The court then remanded the FCC's decision to deny renewal of RKO's Los Angeles and New York licenses, on the theory that those stations might "deserve different treatment."<sup>151</sup> On remand, the FCC renewed what had been the New York license after RKO agreed to move its station to northern New Jersey.<sup>152</sup>

The historical trend is clear: given any opportunity to do so, the FCC will favor established licensees on the assumption that their expertise or, more accurately, the stability attained by avoiding involuntary changes in ownership, will outweigh any gains from an infusion of new economic actors, new capital, or new technology. Today, one can measure the limited success of the FCC's regulatory strategy by either of two gauges: First,

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146. See *RKO Gen., Inc. v. FCC*, 670 F.2d 215, 218-21 (D.C. Cir. 1981) (tracing the procedural history of the case), *cert. denied*, 456 U.S. 927 (1982), 457 U.S. 1119 (1982), 469 U.S. 1017 (1984); *Fidelity Television Inc. v. FCC*, 515 F.2d 684, 688-93 (D.C. Cir. 1975) (providing a history of the *RKO General* litigation), *cert. denied*, 423 U.S. 926 (1975).

147. See *In re RKO Gen., Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980).

148. *Id.* at 3 (concluding that RKO General would not operate its station in a "proper and law-abiding fashion consistent with the public interest").

149. *Id.* at 3-5.

150. Cf. *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946) (upholding the FCC's refusal to renew a radio license belonging "to an applicant guilty of a systematic course of deception"). Compare *RKO Gen., Inc.*, 670 F.2d at 228-36 (rejecting the FCC's other grounds for denying the renewal application) with *id.* at 221-28 (upholding the FCC's "lack of candor" findings).

151. *RKO Gen., Inc.*, 670 F.2d at 237.

152. See *In re RKO Gen., Inc.*, 53 Rad. Reg. 2d (P & F) 469 (1983), *aff'd sub nom. Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984).

broadcast television is constantly losing audiences to competing providers of audiovisual programming, such as cable, pay-per-view, direct broadcast satellite, and even video rentals. Second, traditional television programming, whether supplied by the networks or by local affiliates is simply dreary. In this regard, "57 Channels (and Nothing On)" is more than a rock 'n' roll anthem.<sup>153</sup> It is a bitter indictment of federal mass communications law. We're bored, *bored* in the U.S.A.<sup>154</sup>

### C. LOCALISM AND LETDOWN

For many years, the FCC's predominant, but by no means exclusive, method for shaping content and viewpoint diversity through broadcast licensing was its localism policy.<sup>155</sup> As far back as *FCC v. Pottsville Broadcasting Co.*,<sup>156</sup> a 1940 Supreme Court decision handed down in the same Term as *Sanders Brothers*, the Commission denied applications on the grounds that a particular "applicant did not sufficiently represent local interests in the community which the proposed station was to serve."<sup>157</sup> Fifteen years later, in *FCC v. Allentown Broadcasting Corp.*,<sup>158</sup> the Court expressly held that the "distribution of a . . . license to a community in order to secure local competition for originating and broadcasting programs of local interest" fell "within the [Commission's] allowable area of discretion"<sup>159</sup> to make "a fair, efficient, and equitable distribution of radio service" among different localities.<sup>160</sup>

During the golden age of localism, FCC policy on broadcast licensing focused on no fewer than four distinct objectives, all thought to be mutually reinforcing: (1) local ownership and control, (2) viewpoint diversity in programming, (3) public service, and (4) competitive market structure, defined as the dispersion of ownership and the avoidance of industrial concen-

153. *Hear BRUCE SPRINGSTEEN, 57 Channels (and Nothing On)*, on HUMAN TOUCH (Columbia 1992).

154. *Hear BRUCE SPRINGSTEEN, Born in the U.S.A. on BORN IN THE U.S.A.* (Columbia 1984).

155. *See, e.g.*, *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360 (1955).

156. 309 U.S. 134 (1940).

157. *Id.* at 139.

158. 349 U.S. 358 (1955).

159. *Id.* at 362.

160. 47 U.S.C. § 307(b) (1994), *quoted in Allentown Broadcasting*, 349 U.S. at 360 n.1, 362 n.4.

tration.<sup>161</sup> In practice, however, these objectives clashed. Even before new avenues for mass communications emerged, the FCC's localism policy flopped. Early criticism focused on the economic realities of program production costs and advertising revenues.<sup>162</sup> Despite local ownership, VHF stations tended to become affiliates of the national networks, while technologically inferior UHF stations turned to nationwide syndication of reruns and movies.<sup>163</sup> Local advertising generated a small share of local stations' revenues and, in any event, bore no relation to the origin of the programming. If anything, there may have been a negative correlation. Entertainment and athletic talent of national or international magnitude attracts more viewership and generates more advertising revenue.<sup>164</sup> Moreover, production costs for local programming are prohibitively high,<sup>165</sup> with the salient exception of local news broadcasts.<sup>166</sup> Local audiences simply are not profitable enough to offset the loss-of-scale economies in program production.

This combination of low revenue and high cost in local programming converted the FCC's modest success in ensuring local ownership into a lethal weapon against its other objectives. Viewer choice in broadcast television programming dwindled as locally owned stations aired programs originated at the national level. Networks and programming syndicates tightened their grip on local stations.<sup>167</sup> And to the extent a notion of public service depends on responsiveness to a particular geographic audience, localism did not appear to fulfill this mandate.

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161. See ROGER G. NOLL ET AL., *ECONOMIC ASPECTS OF TELEVISION REGULATION* 99 (1973).

162. See generally *id.* at 98-120.

163. See *id.* at 101-04, 187.

164. See *id.* at 110; cf. *NCAA v. Board of Regents*, 468 U.S. 85, 93 (1984) (describing the NCAA fee schedule for collegiate football broadcasts under which "national telecasts [were] the most valuable, regional telecasts [were] less valuable, and Division II or Division III games command[ed] a still lower price").

165. See, e.g., *National Ass'n of Indep. Television Producers & Distribs. v. FCC*, 516 F.2d 526, 533 (2d Cir. 1975).

166. See NOLL ET AL., *supra* note 161, at 111 (explaining that local news is profitable because it draws viewership and is cheap to produce); cf. Volokh, *supra* note 31, at 1833 (describing "talk shows, talking heads shows such as the *McLaughlin Group*, stand-up comedy, and some kinds of sporting events" as types of "video programming [that] costs relatively little to produce").

167. See generally *National Broadcasting Co. v. United States*, 319 U.S. 190, 196, 224 (1943) (upholding the FCC's authority to adopt regulations affecting relationships with broadcast networks and their local affiliates).

Although the FCC “did not even attempt to maximize the number of television stations available to American households,” the localism policy did succeed in “placing at least one transmitter in as many . . . [congressional districts] as possible.”<sup>168</sup>

Similarly, the FCC’s efforts to deconcentrate local broadcast ownership has had at best a marginal impact on program diversity. Historically, the FCC permitted a very limited degree of multiple ownership of broadcast stations—“[n]o more than seven AM, seven FM, and seven TV stations” in the one owner’s hands—“as a reluctant abandonment . . . of the objective of completely local ownership.”<sup>169</sup> Faced with the market dominance of the broadcast networks in the pre-cable era, however, group stations achieved no greater success in program acquisition or development than their individually owned counterparts.<sup>170</sup>

Eventually, the same economic pressures that dissipated the localism initiative led the FCC to relax its traditional “Rule of Seven.” A new “Rule of Twelve,” adopted in 1984, allowed any one owner to hold an interest in as many as twelve stations reaching no more than twenty-five percent of the national television audience.<sup>171</sup> Contrary to the original premises of broadcast regulation, the FCC grudgingly conceded that group ownership may well enhance program diversity by allowing a group of affiliated stations to pool their resources for program development or acquisition, or even for the establishment of a miniature “network.”<sup>172</sup>

Communications law reform has taken the Commission’s retreat from multiple ownership restrictions to its logical conclusion. The Telecommunications Act of 1996 has lifted all ceilings on “the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.”<sup>173</sup> A single entity may own or control an unlimited number of

168. Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1736 (1995).

169. NOLL ET AL., *supra* note 161, at 104.

170. See Harvey J. Levin, *Competition, Diversity, and the Television Group Ownership Rule*, 70 COLUM. L. REV. 791, 794-805 (1970).

171. See 47 C.F.R. § 73.3555(e)(1)-(2) (1995).

172. See Multiple Ownership of AM, FM & Television Broadcast Stations, 100 F.C.C.2d 17, 31-37 (1984).

173. Telecommunications Act, *supra* note 2, § 202(a), 110 Stat. at 110.



broadcast television stations,<sup>174</sup> as long as those stations reach no more than thirty-five percent of the national audience.<sup>175</sup>

Multiple ownership rules are but one device for ensuring diversity, and a rather crude one at that. The closely related duopoly and one-to-a-market rules are similarly flawed. The FCC's duopoly rule limits the amount of overlap between signals of commonly owned TV, AM, or FM stations.<sup>176</sup> The one-to-a-market rule restricts any ownership group to one broadcast outlet of each type in a single market.<sup>177</sup> Like the former Rule of Seven, the one-to-a-market rule has relaxed in response to the emergence of highly diverse, highly competitive local information markets. Under its original twenty-five markets/thirty voices standard, the FCC routinely entertained requests to waive the one-to-a-market rule in the twenty-five largest media markets if the market at issue had at least thirty different broadcast "voices," defined as distinct owners of broadcasting facilities.<sup>178</sup> The Telecommunications Act of 1996 now directs the FCC to "extend this waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity."<sup>179</sup>

Problems of definition carve a substantial loophole in this body of broadcast ownership restrictions. The recently repealed Rule of Twelve, the duopoly rule, and the one-to-a-market rule do not apply unless the facilities in question can "be attributed to their holders."<sup>180</sup> Time and again, media conglomerates have evaded these rules by manipulating the Commission's "attribution rules." A conglomerate wishing to annex new broadcast holdings has every incentive to enter joint ventures with smaller firms, which can claim formal ownership of an FCC-licensed broadcast facility. Although the Commission attempts to monitor "actual working control in whatever manner

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174. See *id.* § 202(c)(1)(A), 110 Stat. at 111 (eliminating restrictions on the number of television stations that one person or entity may own).

175. See *id.* § 202(c)(1)(B), 110 Stat. at 111 (increasing the national audience reach limitation for television stations to 35%).

176. See 47 C.F.R. § 73.3555(b) (1994).

177. See *id.* § 73.3555(c).

178. See § 73.3555(c) n.7(l); Broadcast Multiple Ownership Rules, 4 F.C.C.R. 1741 (1988).

179. Telecommunications Act, *supra* note 2, § 202(d), 110 Stat. at 111.

180. 47 C.F.R. § 73.3555 n.2 (1995). See generally Report & Order, 97 F.C.C.2d 997 (1984) (reviewing and revising standards for attributing interests in broadcast, cable television, and newspaper properties under the FCC's multiple ownership and cross-ownership rules).

exercised,<sup>181</sup> the flexible, fact-intensive nature of the attribution inquiry<sup>182</sup> effectively invites television moguls to expand their empires, one partially owned but "unattributed" station at a time. Faced with the increasing unworkability of its attribution rules, the FCC has launched a comprehensive review.<sup>183</sup> In a hotly contested proceeding, the FCC recently attributed ownership of a Green Bay, Wisconsin, television station to Savoy Pictures Entertainment, Inc., rather than Fox Television Stations, Inc., an affiliate of Fox Broadcasting Company and a holder of eight television licenses.<sup>184</sup> The FCC declined to attribute the Green Bay station to Fox, a "finding [that] could [have] potentially affect[ed] Fox's compliance with the Commission's multiple ownership rules,"<sup>185</sup> but reserved the right to revisit this decision after reviewing the attribution rules.<sup>186</sup>

Moreover, during the ascendancy of multiple ownership regulation, the FCC was willing to sacrifice its multiple ownership restrictions to the extent that the Rule of Twelve obstructed the competing goal of advancing minority broadcasters. The Rule of Twelve was actually a Rule of Fourteen: A single owner could command fourteen "minority-controlled" television stations reaching as much as thirty percent of the national audience.<sup>187</sup> Evidently the Commission believed that the marginal increase in racial diversity outweighs the risk that greater concentration in station ownership would further homogenize television programming.<sup>188</sup> When combined with the attribution rules,

181. 47 C.F.R. § 73.3555 n.1 (1995).

182. See, e.g., *In re Univision Holdings*, 7 F.C.C.R. 6672, 6675 (1992) (focusing on the circumstances surrounding a newly formed joint venture); *In re Stereo Broadcasters, Inc.*, 87 F.C.C.2d 87, 95-96 (1981) (examining a minority shareholder's ability to direct a joint venture's financial, personnel, and programming decisions); *In re Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975) (requiring a study of all "special circumstances presented").

183. *In re Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 F.C.C.R. 3606, 1607 (1995).

184. *In re BBC License Subsidiary L.P. & SF Green Bay License Subsidiary, Inc.*, 10 F.C.C.R. 7926, 7928, 7931-32 (1995).

185. *Id.* at 7932.

186. *Id.* at 7933; see also *In re Paramount Stations Group of Philadelphia, Inc. & Fox Television Stations, Inc.*, 10 F.C.C.R. 10,963, 10,963 (1995) (declining to reexamine *Green Bay's* conclusion that Fox holds no attributable interest in stations owned by the Fox-Savoy joint venture).

187. 47 C.F.R. § 73.3555(e)(1)(ii), (e)(2)(i) (1995).

188. See *In re Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities*, 10 F.C.C.R. 2788, 2796 (1995) (asserting that further

the FCC's solicitude for minority broadcasters gave media conglomerates yet another opportunity to evade and thereby to dilute multiple ownership and anticoncentration rules. The FCC has proposed a rule that would eliminate attribution of ownership to any other participant in a joint venture as long as "a minority or female individual or entity or group of individuals or entities holds more than 50 percent of the voting stock of a corporate broadcast licensee . . . with at least 15 percent of the company's equity."<sup>189</sup> Under this proposal, one media giant, Tribune Broadcasting Company, acquired minority-controlled television stations in Atlanta and New Orleans even though recognition of an "attributable interest in [those] stations would [have] place[d] Tribune in violation of the . . . duopoly rule in both markets."<sup>190</sup>

The localism, multiple ownership, one-to-a-market, and duopoly policies all rest on the assumption that mere deconcentration will enhance program diversity. Perhaps counterintuitively, economic analysis of broadcasting has long recognized that monopoly control of all channels in any locality might well lead to more diverse and qualitatively "better" programming.<sup>191</sup> A monopoly owner of multiple television stations in one market might broadcast different programs on each channel merely to deter entry by would-be competitors for viewers' scarce time,<sup>192</sup> but the result is comparable. Regardless of the broadcaster's motivations, the audience receives a more diverse palette of viewing options. This positive correlation between concentration and diverse programming testifies to the unpredictability of regulatory strategies that aim to offset

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consolidation of station ownership would not harm competition in the industry or threaten viewpoint diversity).

189. *Id.* at 2794. In its ongoing review of its attribution rules, the Commission has invited additional proposals for increasing minority and female ownership. *In re Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 F.C.C.R. 3606, 3614 (1995).

190. FCC Report No. MM 95-117, 1995 WL 736785 (FCC Conditionally Grants the Applications for Acquisition of Television Stations by Qwest Broadcasting L.L.C.) (Dec. 12, 1995).

191. See generally Spitzer, *supra* note 64, at 304-19; Peter O. Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 219-21 (1952).

192. Cf. Richard Schmalensee, *Entry Deterrence in the Ready-to-Eat Cereal Industry*, 9 BELL J. ECON. & MGMT. SCI. 305 (1978) (arguing that dominant firms sometimes create or continue unprofitable product lines to keep would-be competitors from entering and eroding profitable markets).

uneven levels of market power in distinct sectors of a coordinated industry. Therein lies the inherent instability of any strategy rooted in countervailing power, an economic prescription known to be "indeterminate with a vengeance."<sup>193</sup>

There are two additional reasons to lessen our fear of concentration. First, a monopolist may have deeper pockets (or at least cheaper access to credit) and can therefore afford to buy more expensive talent. The presence of such a developmental war chest is exceedingly important in the risk-driven world of entertainment program development—or any enterprise where "there is little more relation between the investment and the results than in a game of poker."<sup>194</sup> Second, and more importantly, competing broadcasters will tend to duplicate popular programming in an effort to capture their share of the mainstream audience. By contrast, a monopolist would never duplicate programming in any locality, preferring instead to air shows that attract audiences not served outside the mainstream.<sup>195</sup>

In an increasingly diverse landscape of leisure options,<sup>196</sup> only concentrated broadcasters can attain the scale needed to garner and market high-quality programming. The same diversification of viewers' tastes and viewers' options also disciplines broadcasters—monopolists and nonmonopolists alike—into satisfying audience demand. (Broadcast television's loss of market share has improved the quality of network television, "if only because with any given episode there's so much less at stake financially.")<sup>197</sup> In 1995, in the shadow of impending legislative reform, the FCC announced plans to review, perchance to overhaul, the multiple ownership, duopoly, and one-to-a-market rules that have aided and abetted the fifty-year flirtation with localism.<sup>198</sup> Thanks to the new Telecom-

193. F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 519 (3d ed. 1990).

194. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 649 (1944) (separate opinion of Jackson, J.).

195. See sources cited *supra* note 191.

196. See generally HAROLD L. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS* (2d ed. 1994) (documenting drastic changes in consumer uses of leisure time between 1970 and 1990).

197. Charles McGrath, *The Triumph of the Prime-Time Novel*, N.Y. TIMES MAG., Oct. 22, 1995, at 52; see also *id.* at 52-53 ("Television can afford to take chances, and often enough it does.")

198. *In re Review of the Commission's Regulations Governing Television Broadcasting*, 10 F.C.C.R. 3524, 3526-29 (1995).

munications Act, such comprehensive review of the broadcast ownership rules is now a statutory obligation.<sup>199</sup>

#### D. ACROPHOBIA AND VERTIGO

##### 1. Big as Hell<sup>200</sup>

Perhaps the most astonishing aspect of the failed localism initiative was its hidden impact on the structure of the television industry's transmission sector. Between the end of World War II and the birth of Fox Broadcasting Company's "fourth" network,<sup>201</sup> the localism policy effectively fixed the number of national television networks at three.<sup>202</sup> Although the FCC's own studies demonstrated the feasibility of a six-channel nationwide television system,<sup>203</sup> the Commission's obsession with local ownership foreclosed a policy that would have doubled the number of viewing options during the pre-cable era.

Even more puzzling, as the FCC was pursuing its self-defeating localism policy, it simultaneously was cultivating a separate, contradictory sphere of jurisdiction. Well before the obsession with localism reached fever pitch in *Allentown Broadcasting*,<sup>204</sup> the FCC recognized that an increasing amount of programming was not being locally produced, but

199. See Telecommunications Act, *supra* note 2, § 202(c)(2), 110 Stat. at 111 (directing the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market"); *id.* § 202(h), 110 Stat. at 111-12 (ordering the FCC to review "all of its ownership rules biennially" to "determine whether any of such rules are necessary in the public interest as a result of competition"); *id.* § 402(a), 110 Stat. at 129 (adding 47 U.S.C. § 161, which requires a biennial FCC review of "all regulations issued under [the Communications] Act" to "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").

200. *Watch NETWORK* (United Artists 1976) ("I'm mad as hell, and I'm not going to take it anymore!").

201. See *infra* text accompanying notes 247-254 and 462-478 (discussing the birth of Fox Broadcasting as a full-fledged network).

202. STANLEY M. BESEN ET AL., MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC 14-15 (1984); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 88, 283-84 (1995); Krattenmaker & Powe, *supra* note 168, at 1736.

203. See, e.g., FEDERAL COMMUNICATIONS COMM'N, THIRTY-FIFTH ANNUAL REPORT, FISCAL YEAR 1969, at 135, 137 (1969); NOLL ET AL., *supra* note 161, at 118-20.

204. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

purchased from national syndicates. After the Commission promulgated its first rules regulating "chain broadcasting"—the "simultaneous broadcasting of an identical program by two or more connected stations"<sup>205</sup>—CBS and NBC immediately challenged this extension of the FCC's jurisdiction.<sup>206</sup>

In a landmark decision, *National Broadcasting Co. v. United States*,<sup>207</sup> the Supreme Court upheld the "chain broadcasting" rules. Those regulations eventually evolved into today's familiar rules regarding network affiliation<sup>208</sup> and station ownership,<sup>209</sup> territorial exclusivity,<sup>210</sup> the division of the broadcast day,<sup>211</sup> and network influence over programming and advertising decisions.<sup>212</sup> The decision also marked the birth of the ABC network, as NBC divested its Blue network in the face of the FCC's rule against dual network operation.<sup>213</sup> In a striking mirror image of the Court's later strategy in *Phillips Petroleum*

205. 47 U.S.C. § 153(p) (1994); *see also id.* § 303(i) (authorizing the FCC to issue "special regulations applicable to radio stations engaged in chain broadcasting"); *National Broadcasting Co. v. United States*, 319 U.S. 190, 194 n.1 (1943) ("In actual practice, programs are transmitted by wire . . . from their point of origination to each station in the network for simultaneous broadcast over the air."); *cf.* DAVID BOWIE, *Station to Station, on STATION TO STATION* (RCA 1976) ("[Y]ou drive like a demon from station to station.").

206. *See Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 408 (1942) (challenging the FCC's authority to issue "chain broadcasting" rules); *National Broadcasting Co. v. United States*, 316 U.S. 447, 448 (1942) (same).

207. 319 U.S. 190, 224-27 (1943).

208. *See* 47 C.F.R. § 73.658(a) (1995) (exclusive affiliation of stations).

209. *See id.* § 73.658(f) (network ownership of stations). At one time, the FCC also banned cross-ownership of a broadcast network and a cable system. *See id.* § 76.501 (cross-ownership). The Telecommunications Act of 1996 has lifted that restriction. *See Telecommunications Act, supra* note 2, § 202(f), 110 Stat. at 111.

210. *See* 47 C.F.R. § 73.132 (1995) (AM radio); *id.* § 73.232 (FM); *id.* § 73.658(b) (TV); *cf. id.* § 73.3555(a) (duopoly rule).

211. *See id.* § 73.658(d) (station commitment of broadcast time); *cf. id.* § 73.658(k) (prime-time access rule).

212. *See id.* § 73.768(e) (right to reject programs); *id.* § 73.768(h) (network control of affiliates advertising rates).

213. ABC grew out of NBC's Blue Network. The original Red network became what we today know as NBC. *See* LEONARD H. GOLDENSON & MARVIN J. WOLF, *BEATING THE ODDS: THE UNTOLD STORY BEHIND THE RISE OF ABC 96-97* (1991); STERLING QUINLAN, *INSIDE ABC: AMERICAN BROADCASTING COMPANY'S RISE TO POWER 20* (1979); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 208 (1943) (declining to review the FCC's dual network rule because NBC's divestiture of its Blue network had eliminated any "immediate threat of [the rule's] enforcement"); *National Broadcasting Co. v. United States*, 44 F. Supp. 688, 691 (S.D.N.Y.) (Hand, J.) (noting NBC's divestiture of its second network), *rev'd*, 316 U.S. 447 (1942).

*Co. v. Wisconsin*,<sup>214</sup> which thrust the Federal Power Commission into the business of regulating natural gas prices at the wellhead,<sup>215</sup> the *NBC* decision leveraged the FCC's jurisdiction over local broadcasters into a vastly wider mandate to curb network power.

*NBC* represented the high-water mark of the FCC's offensive against vertical integration and coordination in mass communications. The Court's rejection of *NBC*'s First Amendment argument proved especially enduring; Justice Frankfurter's description of "the limited facilities of radio" as over-the-air broadcasting's "unique characteristic"<sup>216</sup> would eventually ossify into the "scarcity" rationale used to justify extraordinary suppression of speech on the airwaves.<sup>217</sup> Since 1943, however, laws designed to curb network activities and influence have beat a constant and rather humiliating retreat. One of the most dramatic examples is the rule against dual network operation.<sup>218</sup> The only chain broadcasting rule that *NBC* did not contest before the Supreme Court has fallen to the deregulatory razor of communications reform.<sup>219</sup>

To the extent that the other rules at issue in *NBC* have survived, they serve primarily as devices for controlling television networks. Network programming in commercial radio has gradually dwindled from formerly comprehensive control to the provision of spot news and information segments. Persuaded that restrictive regulation of radio networks had become outdated, the FCC in 1977 eliminated all rules regarding

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214. 347 U.S. 672 (1954).

215. See generally STEPHEN G. BREYER & PAUL W. MACVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 56-59 (1974) (describing the Federal Power Commission's regulation of natural gas producers after *Phillips Petroleum*).

216. *NBC*, 319 U.S. at 226.

217. E.g., *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

218. See 47 C.F.R. § 73.658(g) (1994).

219. See Telecommunications Act, *supra* note 2, § 202(e), 110 Stat. at 111 (directing the FCC to revise its dual network rule); see also *Joint Explanatory Statement of the Committee of Conference*, H. CONF. REP. NO. 458, 104th Cong., 2d Sess. 163, reprinted in 1996 U.S.C.C.A.N. 124, 176 (March 1996) [hereinafter Conference Report] (explaining that the relaxation of the dual network rule retains regulatory barriers to simultaneous or geographically coordinated operation of "(1) two or more of the four existing networks (ABC, CBS, NBC, FOX) or, (2) any of the four existing networks of the two emerging networks[] (WBTV, UPN)").

exclusive affiliation, term of affiliation, option time, program rejection, and network control over station rates in radio.<sup>220</sup> The only rules in effect for radio networks restrict territorial exclusivity.<sup>221</sup> If there is centralized control of radio programming today, such control rests in the hands of BMI, ASCAP, and other "clearinghouses" organized to coordinate the licensing of musical copyrights.

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,<sup>222</sup> the Supreme Court took a far more sanguine view of the scale economies realized by phonorecord clearinghouses. Impressed by the efficiencies attained by BMI and ASCAP, the Court declined to hold that "blanket licensing" of all copyrights handled by these organizations constitutes illegal price-fixing under section one of the Sherman Act.<sup>223</sup> The so-called *per se* rule of *United States v. Socony-Vacuum Oil Co.*<sup>224</sup> crumbles when it collides with economic efficiency; antitrust liability for price-fixing evaporates when collective marketing and pricing appear to be the most effective means for delivering a product or service.<sup>225</sup> The economic wisdom of *BMI* decision casts grave doubt on the case for continued FCC regulation of network activities.

The FCC's own staff has concluded that the network activity rules have done little to enhance local control of television programming or to enhance diversity in viewer choice.<sup>226</sup> In

220. Review of Commission Rules & Regulatory Policies Concerning Network Broadcasting by Standard (AM) & FM Broadcast Stations, 40 Radio Reg. 2d (P & F) 80, at 97 (FCC 1977).

221. See 47 C.F.R. §§ 73.132, 73.232 (1995) (covering territorial exclusivity of AM and FM respectively); see also Telecommunications Act, *supra* note 2, § 202(b), 110 Stat. at 110-11 (allowing a single entity to own, operate, or control as many as eight commercial stations in any one radio market).

222. 441 U.S. 1 (1979).

223. 15 U.S.C. § 1 (1994).

224. 310 U.S. 150, 224 n.59 (1940).

225. See *Broadcast Music*, 441 U.S. at 9, 16, 19-20 (stating that a practice that effectively increases economic efficiency should not automatically be invalidated under the *per se* rule); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226-28 (D.C. Cir. 1986) (Bork, J.) (same), *cert. denied*, 479 U.S. 1033 (1987); see also National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 103 (1984) ("*Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive.").

226. See generally FEDERAL COMMUNICATIONS COMM'N, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 467-85 (Final Report of the Network Inquiry Special Staff, Oct. 1980).



any event, by reducing the profitability of centralized program development, the rules have perversely deterred entry by new networks. This loss falls disproportionately on markets too small to sustain cable and other subscription services. Indeed, the real complaint with network activity regulation arguably stems from the long history of FCC decisions, rooted in the localism initiative, that kept the number of viable national networks at three.<sup>227</sup> Viewer choice would be enhanced by *maximizing* the number of national networks, even at the expense of reducing local control over programming.

## 2. Mighty Morphin Power Networks

The fate of the FCC's rules governing network participation in program production provides further support for across-the-board deregulation. The financial interest and syndication rules,<sup>228</sup> affectionately known as "finsyn," prohibited television networks from (1) acquiring financial interests (other than the right to air a program) in independently produced programming, and (2) syndicating a program for off-network broadcast or holding an interest in any syndication arrangement. The rules arose out of a concern that the networks' financial entanglement in programming would pressure producers to subordinate artistic concerns to projected revenues.<sup>229</sup> As a practical matter, finsyn divided the enormous profits in program development between the networks and independent Hollywood producers.<sup>230</sup> The networks enjoyed first-run privileges, while independent film and video producers retain the often lucrative rights to the reruns. In this respect, finsyn achieved a happier compromise between the networks and the producers than did the celluloid conspiracies that "restrict[ed] 'first-run' pictures to downtown . . . theatres" and "confin[ed] . . . suburban theatre[s] to subsequent runs."<sup>231</sup>

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227. See sources cited *supra* note 202.

228. Report & Order, 23 F.C.C.2d 382, 383 (1970), *on reconsideration*, 25 F.C.C.2d 318 (1970), *aff'd sub nom.* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). The new temporary rules, Financial Interest & Syndication Rules, 58 Fed. Reg. 62,547 (1993), are codified at 47 C.F.R. § 73.660-73.664 (1995).

229. See *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1045-46 (7th Cir. 1992) (Posner, J.).

230. GINSBURG ET. AL., *supra* note 27, at 266.

231. *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 537 (1954).

In a brilliant 1992 opinion, Judge Richard Posner threw the finsyn rules into legal limbo.<sup>232</sup> By denying producers the ability to share risks with better financed networks, the rules effectively channeled production business into the hands of more established producers who could more readily ride out program failures and negotiate better syndication deals. It is hard, Judge Posner reasoned, to imagine how rules that actually retard entry into the fiercely competitive and highly risky program production sector can enhance diversity.<sup>233</sup> Having lost its effort to defend the old finsyn regime, the FCC in 1993 reevaluated and reformulated these rules.<sup>234</sup> After adopting regulations that expressly contemplated the eventual repeal of finsyn,<sup>235</sup> the FCC eliminated the finsyn rules in September 1995.<sup>236</sup>

The second FCC weapon is the prime time access rule (PTAR),<sup>237</sup> which limits the amount of network programming during prime hours. When coupled with the networks' historical practice of offering only 3½ hours of programming to affiliates between 7 and 11 p.m. Eastern or Pacific time on weekdays, PTAR reserved a half hour in this lucrative time slot for non-network programming on network-affiliated stations.<sup>238</sup> Since 1970, when PTAR emerged contemporaneously with finsyn, this cap on national programming during the most lucrative portion of the broadcast day sought to put cream-skimming networks on a low-fat diet, ostensibly to ensure a healthy supply of whole

232. See *Schurz*, 982 F.2d at 1055.

233. *Id.* at 1051-52.

234. See Financial Interest & Syndication Rules, 58 Fed. Reg. 62,547 (1993) (presenting FCC's modification of the finsyn rules); *In re* Evaluation of the Syndication & Financial Interest Rules, 8 F.C.C.R. 3282, 3284-85 (1993) (discussing the Commission's decision to relax the finsyn rules); Memorandum & Opinion on Reconsideration, 8 F.C.C.R. 8270, 8270 (1993) (describing the evaluation and eventual amendment of the finsyn rules), *aff'd sub nom.* Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994) (Posner, J.).

235. See Financial Interest & Syndication Rules, 58 Fed. Reg. 28,932 (1993) (codified at 47 C.F.R. §§ 73.659-73.662 (1995)); Financial Interest & Syndication Rules, 58 Fed. Reg. 62,555 (Nov. 29, 1993) (codified at 47 C.F.R. §§ 73.660, 73.661, 73.663 (1995)).

236. See Network Financial Interest & Syndication Rules, 60 Fed. Reg. 48,907 (Sept. 21, 1995) (eliminating 47 C.F.R. §§ 73.659-73.661, 73.663 immediately and ordering the elimination of § 73.662 on August 30, 1996).

237. 47 C.F.R. § 73.658(k) (1994); see National Ass'n of Indep. Television Producers & Distrib. v. FCC, 516 F.2d 526, 530-43 (2d Cir. 1975) (upholding most of PTAR against several challenges); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476-79 (2d Cir. 1971) (upholding PTAR against a First Amendment challenge).

238. *NAITPD*, 516 F.2d at 528-29.

milk for station owners and local programming interests.<sup>239</sup> From this perspective, PTAR was a hybrid of NBC's command-and-control approach to checking network authority and the countervailing power strategy of strengthening local broadcasters' programming capacity.

In practice, mandatory prime time access did nothing to improve the quality or diversity of broadcast television. Consider the following conundrum: if "game shows" are the answer, what is the question?<sup>240</sup> "All other things being equal, what programming will a network affiliate run on weekdays between 7:30 and 8:00 p.m. Eastern time?"<sup>241</sup> The FCC's own studies showed that game shows commanded 41.9% of the 2100 half-hour access slots programmed by 150 stations during the 1973-1974 television season.<sup>242</sup> A reviewing court lamented that prime time access followed "[a] kind of Gresham's law" that drove hapless local stations toward "game shows and animal shows."<sup>243</sup> As "the liveliest viewing available" to the underfinanced affiliates, game shows won the war for access time "by default."<sup>244</sup> After a quarter-century of failure, the FCC conceded that PTAR was "an imprecise, indiscriminate response" to the Commission's regulatory concerns<sup>245</sup> and prospectively repealed the rule, effective August 30, 1996.<sup>246</sup>

During their ascendancy, finsyn and PTAR defined and debased the content of broadcast television. Whereas finsyn channeled second-run shows toward independent outlets, PTAR

239. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 150 n.3 (1938) (extolling "the great importance to the public health of butter fat").

240. Cf. *JEOPARDY!* (Merv Griffin Productions 1995) (a game show in which contestants answer trivia questions in interrogative form); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 163 ("If Brandeis is the answer, what was the question?").

241. See Report & Order, 44 F.C.C.2d 1081, 1082 (1974) (fixing prime-time access to this slot in the Eastern and Pacific time zones and to 6:30-7:00 p.m. in the Central and Mountain zones).

242. Second Report & Order, 50 F.C.C.2d 829, 876 (1975).

243. *National Ass'n of Indep. Television Producers & Distrib.*, 516 F.2d 526, 533 (2d Cir. 1975).

244. *The Quiz Biz*, FORBES, Apr. 1, 1975, at 48, quoted in *NAITPD*, 516 F.2d at 533 n.16.

245. Radio Broadcast Services; Television Program Practices, 60 Fed. Reg. 44,773, 44,778-79 (Aug. 29, 1995).

246. See *id.* at 44,773, 44,780 (eliminating 47 C.F.R. § 73.658(k) (1994)); see also *id.* at 44,774 (justifying "a one-year transition period" in which "parties [could] adjust their programming strategies and business arrangements prior to the elimination of a regulatory regime that has been in place for 25 years").

set the terms on which network affiliates acquired their most visible programming. From a more explicitly economic perspective, the rules have curbed the networks' profitability, but regulatory effectiveness of this sort had its costs. Finsyn and PTAR plainly deterred entry by new networks. To create a fourth major television network, the Fox Broadcasting Company built a massive war chest for battle with the Big Three—\$1.8 billion between 1987 and January 30, 1990.<sup>247</sup> Even this was not enough. Fox also needed a waiver from finsyn and PTAR, whose financial burdens would fall much harder on an upstart network than well-established incumbents such as NBC.<sup>248</sup> A reluctant FCC agreed, but only after extracting a promise that Fox would direct "much of [its] proposed new programming . . . [toward] children."<sup>249</sup> In the end, the Mighty Morphin Power Rangers helped Fox vanquish the regulatory foe of liberated mass media markets.

The regulatory birth of Fox Broadcasting exposes a defect common to finsyn, PTAR, and other legal measures aimed at curbing network influence. Although restrictions on network activities may in the short run limit the networks' domination of their affiliates or of independent producers, over the long run they deter entry by hampering the profitability of the network business. Network regulation thus devolves into a form of protection for incumbent networks, much as entry and rate regulation degenerate over time into an effective shelter for a publicly franchised monopoly, even after the conditions that led to the emergence of a natural monopoly disappear.<sup>250</sup>

The collapse of finsyn and PTAR has spurred a flurry of activity in television. Two of the traditional broadcast networks (ABC and CBS) have become takeover targets, while two new networks (Warner and UPN) have joined Fox and the Big Three in the hunt for viewers and advertiser revenues. The simultaneous presence of conglomerate mergers and upstart entry testifies to the stifling influence that finsyn and PTAR had before their reform. ABC's and CBS's new owners, Disney and Westinghouse, both hold substantial interests in program

247. GINSBURG ET AL., *supra* note 27, at 263.

248. *In re Fox Broadcasting Co.*, 5 F.C.C.R. 3211, 3212 (1990).

249. *Id.* at 3212.

250. *Cf.* Posner, *supra* note 70, at 611-15.

production.<sup>251</sup> Thanks to the fall of finsyn and PTAR, media conglomerates will be able to profit directly from the first-run and subsequent broadcasts of shows produced in-house. Disney's acquisition of Capital Cities/ABC, Inc. is almost surely attributable to this regulatory change.<sup>252</sup>

At the opposite end of the network club, the new finsyn rules' explicit exemptions for "emerging networks"<sup>253</sup> have created the market niche now occupied by Warner and UPN—a niche that did not and could not exist until the Fox petition turned the 1990s into the decade of the upstart television network. Coupled with the traditional networks' retreat from market dominance, these new networks' success supplied the final push that toppled finsyn and PTAR.<sup>254</sup> The death of these rules will continue to spark the very sort of competitive change that escaped the regulatory imagination of the NBC decision.

#### E. REGULATION IS THE MIDWIFE OF INVENTION

Structural regulation of mass communications has accom-

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251. See David J. Jefferson & Lisa Bannon, *Disney's Growing Empire: After Bidding His Time, Michael Eisner Pounces*, WALL ST. J., Aug. 1, 1995, at B1 (discussing Disney's bid for Capital Cities/ABC Inc.); Laura Landro & Elizabeth Jensen, *All Ears: Disney's Deal for ABC Makes Show Business a Whole New World*, WALL ST. J., Aug. 1, 1995, at A1 (same); Raju Nariseti et al., *Westinghouse in Pact to Buy CBS*, WALL ST. J., Aug. 2, 1995, at A3.

252. See WALT DISNEY CO., NOTICE OF SPECIAL MEETING OF STOCKHOLDERS 25, 112-13 (Jan. 4, 1996) (numbering the repeal of finsyn and PTAR among "the most significant regulatory changes" that will enable Disney "to explore new areas of growth opportunities" after merging with Capital Cities/ABC) (on file with author).

253. See 47 C.F.R. §§ 73.659, 73.660, 73.661(e) (1994). An "emerging network" is an entity that did not "provid[e] on a regular basis more than fifteen (15) hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide," *id.* § 73.662(f), on June 6, 1993, but subsequently meets this definition. *Id.* § 73.662(g).

254. See Network Financial Interest & Syndication Rules, 60 Fed. Reg. 48,907, 48,911 (Sept. 21, 1995) (identifying Fox's success and Warner and UPN's apparent viability as factors undermining the "claim that the established networks have bottleneck power over the broadcast television distribution system"); Radio Broadcast Services; Television Program Practices, 60 Fed. Reg. 44,773, 44,774 (Aug. 29, 1995) ("[N]either the networks nor their affiliates dominate video programming distribution or the video programming production market."); *id.* at 44,778 ("The Commission does not believe that repeal of PTAR will create the grounds for failure of newly-launched television networks nor for significant slowing in their development.").

plished nothing except to preserve former economic advantages attained by an incumbent technology. Intermodal competition—the emergence of a technologically feasible, economically practicable alternative—has time and again exposed this legal flaw. Half a century ago, dissenting Supreme Court Justices could still be heard to decry the transmogrification of “chain broadcasting” from “a problem of technical interference” into a full-blown pretext for network regulation.<sup>255</sup> Since then, Congress has ordered the FCC to patrol virtually every communications technology bit for bit, byte for byte. From print journalism<sup>256</sup> to direct broadcast satellites,<sup>257</sup> no form of mass media can elude the Commission’s regulatory grip. The ever-widening circle of federal communications law that emanates from its 1934 statutory core is the regulatory equivalent of “protective jurisdiction”:<sup>258</sup> having once undertaken to regulate one form of technology, the federal government must shape each succeeding communications medium according to the model of the older market, lest a novel technology unravel the regulators’ meticulous handiwork.<sup>259</sup>

### 1. The Wired Nation<sup>260</sup>

The regulatory struggle between broadcast television and “cablecasting” provides a telling case study. Cable technology

255. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 235-36 (1943) (Murphy, J., dissenting).

256. See 47 C.F.R. § 73.3555(d) (1994) (prohibiting the grant of a television broadcast license to a party that owns or controls a daily newspaper in the same service area). *But see* *News Am. Publishing, Inc. v. FCC*, 844 F.2d 800, 815 (D.C. Cir. 1988) (striking down the television/newspaper cross-ownership rule as applied to Australian media magnate Rupert Murdoch).

257. See 47 U.S.C. § 335 (1994) (requiring the FCC to regulate video programming by direct broadcast satellites); Telecommunications Act, *supra* note 2, § 205(b), 110 Stat. at 114 (amending 47 U.S.C. § 303 to give the FCC “exclusive jurisdiction to regulate the provision of direct-to-home satellite services”). *But see* *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8-10 (D.D.C. 1993) (striking down certain provisions of 47 U.S.C. § 335 as unreasonable infringements of free speech).

258. *Cf.* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J. concurring); Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 184-85 (1953).

259. This phenomenon is sometimes called the “tar-baby effect” of economic regulation. James W. McKie, *Regulation and the Free Market: The Problem of Boundaries*, 1 BELL J. ECON. & MGMT. SCI. 6, 8-9 (1970).

260. See generally RALPH L. SMITH, *THE WIRED NATION* (1972) (reporting on the early days of cable as a rival of broadcast television); Ralph L. Smith, *The Wired Nation*, 210 NATION 582 (1970) (same).

emerged in the 1940s as a way "to bring broadcast television signals to remote or mountainous communities."<sup>261</sup> "The purpose was not to replace broadcast television but to enhance it."<sup>262</sup> By the 1960s, though, cable had transformed itself into a bona fide competitor of over-the-air television.

In *United States v. Southwestern Cable Co.*,<sup>263</sup> several community antenna television (CATV) systems retransmitted Los Angeles broadcast signals into the San Diego area. Midwest Television, a television station based in San Diego, obtained an FCC order limiting the CATV systems' service to those areas they had conquered by February 15, 1966.<sup>264</sup> The Supreme Court upheld the order.<sup>265</sup> The Court's putative holding—that the FCC's jurisdiction over "all interstate and foreign communication by wire or radio"<sup>266</sup> encompassed CATV—seemed too easy and too obvious. The Court all but confessed the policy's real purpose: checking the "unregulated explosive growth of CATV"<sup>267</sup> to stem the flow of revenues away from UHF and educational television broadcasters—the foundations of "an appropriate system of local broadcasting."<sup>268</sup> Within four years, the cable industry negotiated a "consensus" tailored to appease the broadcast networks and their local affiliates.<sup>269</sup>

The negotiated peace did not last. The first fifteen years after *Southwestern Cable* witnessed several further skirmishes, none decisive, between broadcasting and cablecasting. But the Court had already endorsed a profoundly anticompetitive agenda. As in *NBC*, a new communications powerhouse menaced the interlaced market structure that the FCC had woven; nascent CATV empires in 1968 were on the verge of reviving the threat that broadcast networks posed in 1943.

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261. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2451 (1994).

262. *Id.* See generally DANIEL L. BRENNER & MONROE E. PRICE, *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY* § 1.02 (1992) (explaining the early history and purposes of cable television).

263. 392 U.S. 157 (1968).

264. *Id.* at 160.

265. *Id.* at 181.

266. 47 U.S.C. § 152(a) (1994).

267. H.R. REP. NO. 1635, 89th Cong. 2d Sess. 7 (1966).

268. 392 U.S. at 174; see also H.R. REP. NO. 1635, *supra* note 267 at 7 (describing the regulation of cable as essential to the preservation of traditional telecasters' revenues).

269. See generally Stanley M. Besen, *The Economics of the Cable Television "Consensus"*, 17 J.L. & ECON. 39, 43-46 (1974) (discussing how the cable consensus limited cable programming, especially in the top 50 markets).

*Southwestern Cable* accordingly ratified the FCC's efforts to regulate CATV's carriage of broadcast signals across boundaries between existing television license territories. The pungent odor of incumbent protection permeated *Southwestern Cable*, much as it did in the cases that gutted *Sanders Brothers* and created a "renewal expectancy" in broadcast licensing.<sup>270</sup>

Days after deciding *Southwestern Cable*, however, the Supreme Court delivered the cable industry a potential bonanza when it ruled that CATV retransmission did not constitute "performance" of copyrighted audiovisual works.<sup>271</sup> When Congress amended the Copyright Act in 1976 to include cable retransmission within a compulsory licensing scheme,<sup>272</sup> it redefined the broadcasting-cablecasting struggle in two significant ways. First, by forcing cablecasters to pay retransmission royalties, it ended the brief era during which cable operators could free-ride off program packaging services performed by local broadcasters. Second and more significant, the creation of a compulsory licensing system eliminated the possibility that broadcasters could withhold their signals from cable competitors. Settlement of the copyright issue consequently enhanced the significance of the continuing battle between broadcasting and cablecasting.

Despite having fallen within the federal government's regulatory reach, cablecasting enjoyed some significant victories in the fifteen years after *Southwestern Cable*. Although the FCC in 1969 successfully adopted a rule requiring cable systems with more than 3500 subscribers to originate local programming,<sup>273</sup> virtually every other effort to reshape cable in the image of television floundered. The FCC itself retracted the mandatory origination rule in 1974, reasoning that cable operators' self-interest in maximizing subscription revenues proved more effective than regulatory dictate as a motivation to produce locally oriented programs.<sup>274</sup> In *FCC v. Midwest Video Corp.*,<sup>275</sup> the Supreme Court repelled a far more intrusive

270. See *supra* text accompanying notes 141-144.

271. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968).

272. See Copyright Act of 1976, Pub. L. No. 94-533, tit. I, § 101, 90 Stat. 2541, 2550 (codified as amended at 17 U.S.C. § 111(d)).

273. *United States v. Midwest Video Corp.*, 406 U.S. 649, 653-54, 673-74 (1972).

274. See Report & Order, 49 F.C.C.2d 1090, 1105-06 (1974).

275. 440 U.S. 689 (1979).



assault; the Court struck down a battery of access channel requirements as an unlawful attempt by the FCC to impose common carrier status on large cable systems.<sup>276</sup>

Meanwhile, the FCC repealed its distant signal and program exclusivity rules.<sup>277</sup> Those rules limited the number of signals cable operators could carry from outside a 35-mile local community.<sup>278</sup> They also enabled local broadcasters to delete syndicated, non-network programming from signals retransmitted by "distant" cable operators.<sup>279</sup> Whereas the invalidated access channel requirements forced cable systems to share their limited channel capacity with competitors in the video distribution business, the distant signal and program exclusivity rules restrained cablecasting's ability to duplicate (and eventually to supplant) broadcast television as the primary source of video programming for the home.

Resisting the notion that cablecasting had to serve as handmaid to broadcasting rather than to stand as a peer, the D.C. Circuit invalidated the FCC's 1975 rules giving television broadcasters a right of first refusal over feature films and sporting events that cable operators wanted to offer at premium prices.<sup>280</sup> Significantly, in determining the free speech rights of cable operators, the court of appeals squarely refused to apply a First Amendment test diluted by the presumed scarcity of the broadcast spectrum. Instead, the Court observed that "an essential precondition of [the scarcity] theory—physical interference and scarcity requiring an umpiring role for government—is absent."<sup>281</sup>

As of 1984, therefore, the cable industry had survived no fewer than four FCC initiatives designed to cabin the explosive growth of cablecasting: (1) mandatory origination, (2) access channel requirements, (3) distant signal and program exclusivity, and (4) the rule against the "siphoning off" of attractive feature films and sports events into premium cable venues.

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276. *See id.* at 701-02, 708-09.

277. *See Malrite T.V. v. FCC*, 652 F.2d 1140, 1152 (2d Cir. 1981) (declining to set aside the FCC's repeal of distant signal carriage and syndicated program exclusivity rules), *cert. denied*, 454 U.S. 1143 (1982).

278. *See id.* at 1144-45 (explaining 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), and 76.63 (1980)).

279. *See id.* at 1145 (explaining 47 C.F.R. §§ 76.151-76.161 (1980)).

280. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

281. *Id.* at 45.

Ironically, some private parties were less visionary than even the FCC in anticipating cable's profitability. The professional sports leagues, for example, opposed rescission of the distant signal and program exclusivity rules in the belief that cablecasts of sporting events would diminish team profits by reducing live attendance.<sup>282</sup> This opposition is astonishing in retrospect, given the vast profits that professional and collegiate sports teams have reaped from cable.

That very year, however, the FCC resurrected the common carrier model of cable regulation by adopting a battery of mandatory carriage, or "must-carry," rules requiring cable operators to transmit every over-the-air television signal that was "significantly viewed in the community."<sup>283</sup> Applying the intermediate First Amendment test set out in *United States v. O'Brien*,<sup>284</sup> the D.C. Circuit invalidated the 1984 must-carry rules as a "grossly overinclusive" and indiscriminate protection of local television broadcasters under the guise of preserving cable subscribers' access to local television broadcasts.<sup>285</sup> In 1986, the FCC again tried to impose must-carry obligations.<sup>286</sup> Concerned that cable subscribers tend to dismantle their over-the-air antennas, the Commission also required cable operators to provide subscribers with an A/B switch and to educate subscribers about the possibility of receiving over-the-air signals not carried on the cable system.<sup>287</sup> The D.C. Circuit invalidat-

282. See *Malrite T.V. v. FCC*, 652 F.2d 1140, 1150 (2d Cir. 1981); cf. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 115-17 (1984) (describing how a rule restricting telecasts of college football was—unpersuasively—justified as a way to protect live attendance).

283. 47 C.F.R. §§ 76.57-76.61 (1984).

284. 391 U.S. 367, 377 (1968) (permitting the regulation of communicative conduct "if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential").

285. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

286. See *In re Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C.R. 864 (1986) (adopting a two-part program to eliminate the need for mandatory signal carriage regulation), modified in part, 2 F.C.C.R. 3593, rev'd sub nom. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

287. *Id.* An A/B switch allows a television set to receive a signal from two different sources, such as cable and over-the-air broadcasting. See H.R. REP. NO. 628, 102d Cong., 2d Sess. 54 (1992).

ed the new must-carry rules.<sup>288</sup> The court expressed grave disbelief at the FCC's assumption that consumers would need five years to digest the essential message of the A/B switch and consumer education rules—that a cable connection does not preclude reception of over-the-air signals.<sup>289</sup>

Thus, between 1984 and 1992, the FCC's only means for retarding cable's corrosion of broadcast television's viewer base were impotent rules requiring cable operators to offer subscribers an A/B switch and to inculcate subscribers on the virtues of local broadcasting.<sup>290</sup> An informal FCC survey showed just how weak these rules were: thirty-one percent of broadcast television stations reported that they had lost or been denied carriage on at least one cable system.<sup>291</sup> Others were "lost" in a sea of cable channels when reassigned a cable channel number not corresponding to the over-the-air frequency. For the moment, cable was trouncing television in the monumental battle for mass media dominion.

## 2. Give Me Carriage or Give Me Death

These developments set the stage for direct congressional intervention. In 1984 and again in 1992, Congress enacted statutes subjecting the cable industry to precisely the sort of regulation that the FCC could not justify during the fifteen-year Golden Age of Cable. The intricacies of local rate and entry regulation of the cable industry have received extensive attention, most of it critical.<sup>292</sup> Moreover, the Telecommunications Act has consigned cable rate regulation to the waste incinerator

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288. *Century Communications Corp. v. FCC*, 835 F.2d 292, 304-05 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

289. *Id.* at 304.

290. Even these rules were legally suspect in the wake of the *Century Communications* decision until the D.C. Circuit, at the FCC's request, confirmed their vitality. See 4 F.C.C.R. 4552 (1989); see also 2 F.C.C.R. 3593 (1987) (easing the rules in response to widespread complaints from cable operators).

291. See FEDERAL COMMUNICATIONS COMM'N, MASS MEDIA BUREAU, CABLE SYSTEM BROADCAST CARRIAGE SURVEY REPORT (1988).

292. See generally *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 161-205 (D.C. Cir. 1995); Donald J. Boudreaux & Robert B. Ekelund, Jr., *The Cable Television Consumer Protection and Competition Act of 1992: The Triumph of Private over Public Interest*, 44 ALA. L. REV. 355 (1993); David J. Saylor, *Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour Through the Maze*, 12 CARDOZO ARTS & ENT. L.J. 321 (1994).

of legal history.<sup>293</sup> For present purposes, it suffices to identify two structural provisions, one each from the Cable Communications Policy Act of 1984 ("1984 Act")<sup>294</sup> and the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").<sup>295</sup> Constitutional crisis befell the 1992 Act first. Whereas the must-carry provisions of the 1992 Act explicitly protect television as an older technology in eclipse, the cable-telco cross-ownership provision of the 1984 Act came under attack only when technological evolution brought the mass communications market into direct conflict with the law.

Congress in 1992 finally imposed the must-carry obligations with which the FCC had been flirting since *Southwestern Cable*. Sections 4 and 5 of the 1992 Act subjected cable operators to stringent rules that were arguably more onerous than the FCC's ill-fated 1984 and 1986 "must-carry" regulations. The 1992 Act effectively placed common carrier obligations on cable operators *vis-à-vis* their broadcast television competitors. Under section 4, a cable operator must carry the signals of "local commercial television stations"—that is, all full-power television broadcasters besides "noncommercial educational" stations—within its market.<sup>296</sup> The Act required cable systems with more than twelve active channels and more than 300 subscribers to set aside as much as a third of their capacity for commercial stations that request carriage.<sup>297</sup> Cable systems with more than 300 subscribers, but only twelve or fewer active channels, must carry three commercial broadcast signals.<sup>298</sup> In markets that lack sufficient full-power broadcast stations to fill the reserved channels, cable systems must carry either one or two qualified low-power stations.<sup>299</sup> Section 5 required cable

293. See Telecommunications Act, *supra* note 2, § 301(b), 110 Stat. at 114-15 (amending 47 U.S.C. § 543).

294. Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered portions of 47 U.S.C. (1994)).

295. Pub. L. No. 102-385, 106 Stat. 1460 (1994) (codified in scattered portions of 47 U.S.C. (1994)).

296. 47 U.S.C. § 534(b)(1)(B), (h)(1)(A) (1994); see also 47 C.F.R. § 73.3555(e)(3)(i) (1994) (defining a cable system's local television market); cf. 47 U.S.C. § 534(h)(1)(C) (1994) (authorizing the FCC to redefine a cable system's local television market upon the request of a broadcast television competitor).

297. See 47 U.S.C. § 534(b)(1)(B) (1994).

298. *Id.* § 534(b)(1)(A).

299. *Id.* § 534(c)(1) (requiring a cable operator with as many as 35 channels to carry one qualified low-power station and an operator with more than 35 channels to carry two low-power stations). Low-power television stations

operators to carry "noncommercial educational television stations"—that is, public television stations.<sup>300</sup> Depending on system size, a cable operator must carry at least one such station and might be required to carry every local public broadcast station that requests carriage.<sup>301</sup>

All signals covered by the must-carry rules must be transmitted on a continuous, uninterrupted basis<sup>302</sup> and be assigned the same channel as the carried station's over-the-air frequency.<sup>303</sup> Generally speaking, a cable operator may not charge for requested carriage (although the operator may charge carried commercial stations "the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system").<sup>304</sup> An operator need not "substantially duplicate" commercial or educational signals (including signals from multiple affiliates of the same national television network)<sup>305</sup> but may credit such carriage toward its must-carry obligations.<sup>306</sup>

Between 1984 and 1994, all must-carry rules, whether issued by the FCC or by Congress, languished in constitutional limbo. Earlier decisions had never firmly settled cable's First Amendment status.<sup>307</sup> In one opportunity to examine the

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broadcast over a limited area and are licensed on the condition that they do not interfere with full-power stations' signals. *Id.* § 534(h)(2); 47 C.F.R. pt. 74 (1994).

300. 47 U.S.C. § 535(a) (1994); *see also id.* § 535(l)(1) (defining a "[n]oncommercial educational television station" as one that is either (1) licensed as a "noncommercial educational television broadcast station" and therefore eligible for Corporation for Public Broadcasting grants or (2) owned and operated by a local government for the "predominant[]" purpose of transmitting "noncommercial programs").

301. A system with 12 or fewer stations must carry one public broadcasting station. *Id.* § 535(b)(2)(A). A cable system with more than 12 but fewer than 37 channels must carry between one and three public broadcasting stations. *Id.* § 535(b)(3)(A). Larger systems must carry every local public broadcaster that requests carriage. *Id.* § 535(b)(3)(D).

302. *Id.* § 535(b), (g)(1).

303. *Id.* §§ 534(b)(3), 535(g)(5).

304. *Id.* § 534(b)(10).

305. *Id.* §§ 534(b)(5), 535(b)(3)(B).

306. 47 U.S.C. § 534(b)(5) (1994).

307. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495-96 (1986). *Compare Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir. 1981) (concluding that cable's "economic monopoly" warrants a deferential "scarcity" approach to the constitutionality of cable regulation), *cert. denied*, 456 U.S. 1001 (1982) and *Berkshire Cablevision v. Burke*, 571 F. Supp. 976, 986 (D.R.I. 1983) (same), *vacated as moot*, 773 F.2d

issue, the Supreme Court merely noted in passing that “[c]able television partakes of some of the aspects of speech . . . as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers.”<sup>308</sup> Simultaneously, the Court compared cable to “wireless broadcasters,” whose “First Amendment interests” traditionally have been “found to be outweighed by the government interests in regulating by reason of the scarcity of available frequencies.”<sup>309</sup> One point of agreement did seem to emerge: the Court recognized the constitutional significance of a cable operator’s editorial discretion in selecting and organizing programs.<sup>310</sup> The renewed constitutional controversy over “must-carry” at long last promised a clear resolution.

The Court’s answer, delivered in *Turner Broadcasting System, Inc. v. FCC (Turner I)*,<sup>311</sup> was disappointing.<sup>312</sup> The Court did acknowledge, finally, that physical differences between broadcast and cable media warranted a suspension of the suspect “scarcity” rationale.<sup>313</sup> The Court nevertheless declined to adopt strict scrutiny as the appropriate standard of

382, 386 (1st Cir. 1985) with *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1331 (E.D. Cal. 1987) (awarding full free speech rights to cable operators). See generally Elizabeth A. Cowles, Note, *Must-Carry and the Continuing Search for a First Amendment Standard of Review for Cable Regulation*, 57 GEO. WASH. L. REV. 1248 (1989).

308. *Preferred Communications*, 476 U.S. at 494; see also *id.* at 496 (Blackmun, J., concurring) (“Different communications media are treated differently for First Amendment purposes.”); cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (“Each method [of communication] tends to present its own peculiar problems.”).

309. *Preferred Communications*, 476 U.S. at 494-95.

310. See *id.* at 494; cf. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (acknowledging that cablecasters exercise “a significant amount of editorial discretion regarding what their programming will include”).

311. 114 S. Ct. 2445 (1994) (plurality opinion) [hereinafter *Turner I*].

312. Cf. Bhagwat, *supra* note 73, at 159 (criticizing *Turner* for “fail[ing] to articulate” a “clear theory of what constitutes content-based regulation” as an “essential” element of “a coherent First Amendment doctrine”).

313. Compare, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (upholding the FCC’s “fairness doctrine”) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down an analytically indistinguishable state statute requiring newspapers to offer a right of reply) and *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 797 (1988) (following *Tornillo* in striking down a statute mandating certain disclosures in solicitations for charitable donations). See also *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir.) (“[S]carcity is a universal fact.”), *cert. denied*, 482 U.S. 919 (1987).

review.<sup>314</sup> Rejecting the cablecasters' argument that must-carry obligations favor "broadcasters over cable programmers based on the content of programming each group offers," the Court described must-carry as a measure premised "on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."<sup>315</sup> The Court adopted the intermediate standard of review ordinarily applied to content-neutral regulation<sup>316</sup> and remanded for further evidentiary development regarding the threat that suspension of must-carry would pose to local broadcasters.<sup>317</sup>

In light of the expected and real impact of market structure on the content of mass speech in general and on mass speakers' programming mix in particular,<sup>318</sup> it is hard to swallow the Court's conclusion that Congress did *not* intend "to promote speech of a favored content."<sup>319</sup> The entire project of structuring mass communications markets is premised on its ability to alter the content of mass speech. Absent such an effect, laws regulating the industrial organization of mass communications risk being exposed as normatively unjustifiable jobs programs for economically inept but politically powerful broadcasters.

By adopting intermediate scrutiny and remanding the case, *Turner I* virtually invited the court below to rubber-stamp the must-carry policy. On remand, a deeply divided three-judge district court<sup>320</sup> accepted that invitation and upheld the 1992 must-carry rules.<sup>321</sup> Judge Stanley Sporkin's majority opinion

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314. See *Turner I*, 114 S. Ct. at 2466.

315. *Id.* at 2467.

316. See *id.* at 2469; *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

317. See 114 S. Ct. at 2470-72; *id.* at 2475 (Stevens, J., concurring in part and concurring in the judgment) (disagreeing with the Court's application of intermediate scrutiny but acquiescing "in the judgment vacating and remanding for further proceedings"). For a thorough review of the fractured positions in *Turner I*, see Marc Peritz, Comment, *Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules*, 3 WM. & MARY BILL RTS. J. 715 (1994).

318. See, e.g., Spitzer, *supra* note 69, at 1382-84.

319. *Turner I*, 114 S. Ct. at 2461.

320. See 47 U.S.C. § 555(c)(1) (1994) (requiring any challenge to "the constitutionality of [47 U.S.C. §§ 534, 535] or any provision thereof [to] be heard by a district court of three judges convened pursuant to" 28 U.S.C. § 2284 (1994)).

321. See *Turner Broadcasting v. FCC (Turner II)*, 910 F. Supp. 734 (D.D.C. Dec. 12, 1995), *prob. juris. noted*, 116 S. Ct. 907 (1996).

in *Turner II* emphasized the ability of the “increasingly horizontally concentrated and vertically integrated” cable industry<sup>322</sup> to inflict “financial harm and possible ruin” on broadcasters who are denied cable carriage.<sup>323</sup> *Turner I*’s observation that “rapid advances in fiber optics and digital compression technology” may soon eliminate any “practical limitation on the number of speakers who may use the cable medium”<sup>324</sup> became the basis for *Turner II*’s conclusion that must-carry imposes no more than a *de minimis* burden on cable operators.<sup>325</sup> Judge Sporkin then summarily rejected five alternative measures that cable industry plaintiffs offered in an effort to show the improper tailoring of the must-carry remedy: restoration of the FCC’s 1986 must-carry rules, private deployment of A/B switches, direct governmental subsidies to economically distressed over-the-air broadcasters, imposition of charges for carriage, and ad hoc resort to antitrust remedies against cable operators.<sup>326</sup>

In dissent, Judge Stephen Williams disputed the existence of a “threat to the continued viability of broadcast television, either now in existence or looming on the horizon.”<sup>327</sup> In his view, the government’s “conclusory assertions” regarding the economic injury suffered by broadcasters denied cable carriage bore no relation to a coherent regulatory interest and in any event had been met “with substantial contradictory evidence.”<sup>328</sup> Judge Williams favored either of two less restrictive alternatives to must-carry: greater use of A/B switches<sup>329</sup> or the adoption of rules requiring cable operators to offer nondiscriminatory access, similar to “standard regulatory tools” used “[i]n industry after industry” to ensure “accommodation of would-be users of a bottleneck.”<sup>330</sup> Judge Thomas Penfield Jackson cast the tiebreaking vote, siding with Judge Sporkin’s decision

322. *Id.* at 740.

323. *Id.* at 743.

324. *Turner I*, 114 S. Ct. 2445, 2457 (1994).

325. 910 F. Supp. at 746-47.

326. *Id.* at 747-49.

327. *Id.* at 755 (Williams, J., dissenting).

328. *Id.* at 756.

329. *Id.* at 785-88.

330. *Id.* at 783-84 (citing, *inter alia*, *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 411-12 (1912) (railroads); *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982) (local telephone exchange), *aff’d mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)); FERC Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992) (interstate natural gas pipelines, *codified at* 18 C.F.R. at 284 (1995)).



to grant summary judgment for the government despite his "own inclination . . . [to] set this case for trial."<sup>331</sup>

*Turner II*'s temporary resolution of the must-carry controversy destroys an important opportunity to reexamine the factual and theoretical justifications for the structural regulation of mass communications. Two of the three important interests that Congress asserted in adopting must-carry rules—"promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming"<sup>332</sup>—are demonstrably *disserved* by a policy that equates content and viewpoint diversity with the sheer number of programmers. This much is clear from a critical look backward at the FCC's experience with comparative licensing, broadcast ownership restrictions, and network regulation. At the very least, Judge Williams's proposal to require nondiscriminatory access to a cable system deserved much closer consideration.<sup>333</sup>

The government's third regulatory interest, "preserving the benefits of free, over-the-air local broadcast television,"<sup>334</sup> all but cries out for the subsidies that Judge Sporkin dismissed out of hand in *Turner II*.<sup>335</sup> If local over-the-air broadcasts provide essential services not supplied by other video programming, they can be bought with a targeted fiscal appropriation.<sup>336</sup> As a structural alternative to direct subsidies, must-carry is a blunt and remarkably inaccurate instrument. Not every station requesting mandatory carriage supplies valuable programming that would evaporate in an unregulated market. Nor does mandatory carriage guarantee survival for stations that receive it. Finally, instead of drawing subsidies from a public treasury funded (mostly) through progressive income taxes, must-carry implicitly taxes one form of speech in order to finance another.

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331. *Id.* at 752 (Jackson, J., concurring).

332. *Turner I*, 114 S. Ct. 2445, 2469 (1994); *Turner II*, 910 F. Supp. at 747; see also S. REP. NO. 92, 102d Cong., 1st Sess. 58 (1991); H.R. REP. NO. 6, 102d Cong., 2d Sess. 28, 63 (1992).

333. Parts IV.D. & IV.E., *infra*, explore this very issue.

334. *Turner I*, 114 S. Ct. at 2469; *Turner II*, 910 F. Supp. at 747.

335. See *Turner II*, 910 F. Supp. at 748-49.

336. Any economist could reduce this solution to four words: "Public goods? Let's subsidize!" Jim Chen, *The Constitutional Law Songbook*, 11 CONST. COMMENTARY 263, 264 (1994).

er.<sup>337</sup> Every station requesting mandatory carriage eliminates an alternative source of programming, thereby reducing the freedom of cable operators and viewers alike in order to confer an unknown measure of wealth on a local telecaster.

In this sense, the *Turner* litigation effectively reverses American constitutional law's implicit preference for direct wealth transfers over trade restraints.<sup>338</sup> Ironically, merely ten days before deciding *Turner I*, the Supreme Court issued what may have been its strongest expression of this principle in *West Lynn Creamery, Inc. v. Healy*,<sup>339</sup> a decision overturning a Massachusetts scheme to preserve its "local [dairy] industry by protecting it from the rigors of interstate competition" and enhancing in-state dairy prices through a "tariff . . . borne primarily by local consumers" rather than a tax-financed subsidy.<sup>340</sup> Among barriers to free trade, must-carry is arguably more legally obnoxious than the protective tariff condemned by the Dormant Commerce Clause; unlike judicial protection of interstate commerce,<sup>341</sup> judicial protection of free speech is expressly commanded by the Constitution.

Having noted probable jurisdiction in *Turner II*,<sup>342</sup> the Supreme Court will have a chance to revisit must-carry. Unless the Court thoroughly rethinks its approach, the *Turner* litigation will have accomplished little except proving again that structural regulation of mass communications serves no purpose except to protect incumbents on the verge of technological and economic

337. Cf. Posner, *supra* note 51 (re-examining entry and rate regulation of public utilities through the lens of public finance).

338. See, e.g., Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1404-07 (1994) (discussing the extraordinary protection normally provided to free trade).

339. 114 S. Ct. 2205 (1994).

340. *Id.* at 2217; see also *id.* at 2214 n.15 (declining to "squarely confront[] the constitutionality of subsidies"); cf. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (noting that "[d]irect subsidization of domestic industry does not ordinarily run afoul" of the Dormant Commerce Clause).

341. See, e.g., *West Lynn*, 114 S. Ct. at 2219-20 (Scalia, J., concurring in the judgment) (noting the absence of textual support for the Supreme Court's Dormant Commerce Clause jurisprudence). See generally Farber & Hudec, *supra* note 338, at 1407-11 (describing and deflecting challenges to the legitimacy of Dormant Commerce Clause review).

342. See *Turner Broadcasting v. FCC*, 116 S. Ct. 907 (1996), *noting prob. juris. over* 910 F. Supp. 734 (D.D.C. 1995).

extinction.<sup>343</sup> Between *Southwestern Cable* and *Turner I*, cable grew from a communications weakling, with low-capacity CATV systems penetrating a mere nine percent of the viewership market in 1970, to a twenty billion dollar giant whose multi-channel cable systems had reached ninety percent of all American households by the 1990s.<sup>344</sup> Cable has become a victim of its own success. Each level of regulation breeds the next: Television broadcasters, once the primary subjects of FCC regulation, eventually became the regulatory wards shielded by the Cable Acts of 1984 and 1992. In due course, we may expect the cablecasting industry to follow suit.

### 3. Mollycoddling Monopolists

Indeed, existing law already shelters cablecasting from some forms of intermodal competition. For example, Congress's refusal to exclude certain satellite master antenna television (SMATV) facilities from the 1984 Act's private cable exemption<sup>345</sup> grew out of a fear that SMATV systems serving separately owned and managed buildings could undercut coaxial cable services and thereby destabilize local cable franchising.<sup>346</sup> By repelling a challenge by SMATV operators to this provision in *FCC v. Beach Communications, Inc.*,<sup>347</sup> the Supreme Court swept yet another class of mass communicators into the 1984 Act's regulatory scheme. The new Telecommunications Act has effectively overruled *Beach Communications* by extending the private cable exemption to any facility "that serves subscribers without using any public right of way."<sup>348</sup>

For the moment, however, cable reigns supreme. SMATV's minor legislative victory over *Beach Communications* scarcely loosens cable's grip on the multichannel video programming

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343. The same can be said for the agricultural protectionism at issue in *West Lynn*. See Chen, *supra* note 20, at 872 (describing certain elements of contemporary dairy policy as "a battle waged by economically endangered entities against the rest of society"); Jim Chen, *The Agroecological Opium of the Masses*, CHOICES, 4th Q. 1995, at 16, 19 (same).

344. See *In re Telephone Co.-Cable Television Cross-Ownership Rules*, 7 F.C.C.R. 5781, 5848 & n.352 (1992).

345. See 47 U.S.C. § 602(7)(B) (1994), amended by Telecommunications Act, *supra* note 2, § 302(a)(2), 110 Stat. at 114.

346. See *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2103-04 & n.8 (1993).

347. 113 S. Ct. 2096 (1993).

348. Telecommunications Act, *supra* note 2, § 302(a)(2), 110 Stat. at 114 (amending 47 U.S.C. § 602(7)(B)).

distribution (MVPD) market. In September 1995, cable subscription rolls boasted 61.7 million households, while all of cable's MVPD competitors *combined* served only 5.8 million homes.<sup>349</sup> Traditional cable thus holds a ten to one edge over all other MVPD providers put together, a technologically elite club that includes SMATV, direct broadcast satellite, home satellite dishes, and multichannel multipoint distribution service.<sup>350</sup>

Another group of competitors, the Bell operating companies poses a far more formidable threat to cable. In 1970, the FCC prohibited telephone common carriers from "directly or indirectly" engaging in the furnishing of CATV.<sup>351</sup> The FCC justified its rule on two grounds. First, telephone companies might deny access or charge discriminatory fees for access to their utility poles.<sup>352</sup> Second, telephone companies might cross-subsidize their cable ventures with telephone revenues.<sup>353</sup> Although the FCC's own staff expressed second thoughts,<sup>354</sup> Congress adopted a ban on "video programming" by telephone common carriers as part of the Cable Communications Policy Act of 1984.<sup>355</sup> The 1984 Act thus excluded telephone companies from providing the type of video programming that incumbent cablecasters supplied in 1984.<sup>356</sup>

349. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC Order No. 95-491, 1995 WL 733714 (Dec. 11, 1995); see also *id.* appendix G, tab. 1. This document is the FCC's second annual report to Congress on the status of competition in video programming delivery market.

350. See *id.*

351. 47 C.F.R. § 64.601 (1970), as amended, 47 C.F.R. § 63.54 (1995).

352. See *General Tel. Co. v. United States*, 449 F.2d 846, 856-57 (5th Cir. 1971) (noting that telephone companies "have a natural monopoly over the means required to conduct a [cable] operation, i.e., the poles"), *affg* Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Sys., 21 F.C.C.2d 307 (1970).

353. See *id.*

354. See FEDERAL COMMUNICATIONS COMM'N, FCC POLICY ON CABLE OWNERSHIP: A STAFF REPORT 177-78 (1981) (speculating on the long-run necessity for a rule barring telephone companies from cablecasting).

355. Pub. L. No. 98-549, § 613, 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (1994), *repealed by* Telecommunications Act, *supra* note 2, § 302(b)(1), 110 Stat. at 124); see H.R. REP. NO. 934, 98th Cong., 2d Sess. 57 (1984) (expressing congressional intent to prohibit "a common carrier from selecting or providing the video programming to be offered over a cable system").

356. See *In re* Amendment of Parts 1, 63 & 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, 18,644 (May 2, 1985) (interpreting the 1984 Cable Act's definition of video programming to include "broadcast stations, superstations,

In 1994 and 1995, no fewer than five lower federal courts struck down the 1984 Cable Act's ban on "video programming" by telephone companies as an unconstitutional infringement of free speech.<sup>357</sup> But phone companies, however, had already penetrated the mass communications market. Shortly after the Bell breakup, telephone companies began to distinguish between basic voice carriage and "enhanced" services.<sup>358</sup> In 1993, the Bell operating companies were given leave to offer interactive information and data processing services.<sup>359</sup> More significantly, in 1992, the landmark Video Dialtone Order allowed telephone companies to transport video programming selected and provided by nonaffiliated companies.<sup>360</sup>

The Video Dialtone Order sharpened the legal and economic issues raised by cable-telco cross-ownership. The Order limited the range of interests that the federal government could plausibly invoke in defense of the 1984 Act's cable-telco rule. The government could no longer complain that telephone companies might cross-subsidize their entry into and participation in the video transport business. The Video Dialtone Order expressly permitted this activity. Rather, what the government feared was "domination of the video *programming* market," accomplished by the leveraging of local exchange profits into the fiercely competitive programming market.<sup>361</sup> This regulatory concern is indistinguishable from the objective underlying the old finsyn rules before their invalidation in *Schurz Communications* and their subsequent repeal.<sup>362</sup> If one equates "common

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satellite-delivered cable networks and pay cable").

357. See cases cited *supra* note 11.

358. See *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

359. See *United States v. Western Elec. Co.*, 993 F.2d 1572, 1578-80 (D.C. Cir.) (reviewing the removal of restrictions on the Bell operating companies' entry into information services), *cert. denied*, 114 S. Ct. 487 (1993).

360. See *In re Telephone Co.-Cable Television Cross-Ownership Rules*, 7 F.C.C.R. 5781 (1992) ("Video Dialtone Order"), *terminated by Telecommunications Act*, *supra* note 2, § 302(b)(3), 110 Stat. at 124. See generally Robert L. Pettit & Christopher J. McGuire, *Video Dialtone: Reflections on Changing Perspectives in Telecommunications Regulation*, 6 HARV. J.L. & TECH. 343 (1993).

361. *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 200 (4th Cir. 1994) (emphasis added), *vacated*, 116 S. Ct. 1036 (1996).

362. See *supra* Part III.D.2. (discussing, *inter alia*, the invalidation of the finsyn rules in *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (Posner, J.), and their ultimate repeal in *Network Financial Interest & Syndication Rules*, 60 Fed. Reg. 48,907 (Sept. 21, 1995)).

carrier" with broadcast "network," the difference between finsyn and the cable-telco rule becomes thin indeed.

In retrospect, the federal government's most grievous error lay in its failure to implement alternatives to a draconian ban on telephone company provision of video programming. For example, in its capacity as a common carrier regulator, the FCC has extensive experience with antidiscriminatory cost-allocation rules<sup>363</sup> and price level regulation.<sup>364</sup> Both measures combat cross-subsidization by natural monopolists capable of competing in a diverse array of regulated and unregulated markets,<sup>365</sup> a description that perfectly suits local telephone companies. Before 1996's reform of communications law, the FCC agreed that similar measures would be "adequate to forestall cross-subsidy of the video programming activity."<sup>366</sup> The courts and the FCC noted one further alternative to an outright ban: Congress might limit the number of cable channels on which a telephone company could provide video programming and require the telephone company to lease all other channels to independent programmers on a nondiscriminatory basis.<sup>367</sup>

In repealing both the 1984 Cable Act's cable-telco rule and

363. See generally *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378, 1379-80 (D.C. Cir. 1990) (reviewing asset transfers between a regulated telephone company and its nonregulated affiliate).

364. See generally *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-81 (D.C. Cir. 1993); *American Tel. & Tel. Co. v. FCC*, 836 F.2d 1386, 1388-89 (D.C. Cir. 1988).

365. See JORDAN JAY HILLMAN & RONALD R. BRAEUTIGAM, PRICE LEVEL REGULATION FOR DIVERSIFIED PUBLIC UTILITIES 15-16 (1989) (discussing the FCC's cost-allocation rules); *id.* at 64-65 (discussing the FCC's price level regulation). A discussion of the actual operation and relative efficacy of these regulatory devices lies well beyond the scope of this Article. Suffice it to say that these techniques lie at the heart of a heated debate.

366. *In re Telephone Co.-Cable Television Cross-Ownership Rules*, 10 F.C.C.R. 4617, 4637 (1995), *terminated by Telecommunications Act*, *supra* note 2, § 302(b)(3), 110 Stat. at 124; see also *Reconsideration & Third Further Notice of Proposed Rulemaking*, FCC No. 94-269, ¶¶ 179-82 (Nov. 7, 1994) (detailing the FCC's reasoning); *cf.* *California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) (holding that the FCC had adequately explained how less radical alternatives to an outright ban on ownership or participation could adequately prevent telephone companies from improperly cross-subsidizing enhanced services with profits from basic services); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580-81 (D.C. Cir.) (same), *cert. denied*, 114 S. Ct. 487 (1993).

367. See, e.g., *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 202 & n.34 (4th Cir. 1994), *vacated*, 116 S. Ct. 1036 (1996); *In re Telephone Co.-Cable Television Cross-Ownership Rules ("Video Dialtone Order")*, 7 F.C.C.R. 5781 (1992) (same), *terminated by Telecommunications Act*, *supra* note 2, § 302(b)(3), 110 Stat. at 124.

the Video Dialtone Order,<sup>368</sup> the Telecommunications Act of 1996 has resolved this battle in favor of telephone company entry. The Act contemplates four basic models of telco involvement in cablecasting. First, a local telephone company may "provide video programming to subscribers using radio communication,"<sup>369</sup> in all likelihood some form of multipoint distribution service.<sup>370</sup> Second, as it could under the Video Dialtone Order, a telephone company may provide "transmission of video programming on a common carrier basis."<sup>371</sup> Neither of these models represents a substantial advance from pre-1996 law.

The Telecommunication Act's third and fourth models, however, permit full-blown telco entry. A telephone company not confining itself to video programming distributed via radio frequencies or to mere common carriage will be regulated like traditional wireline cablecasters.<sup>372</sup> The key distinction lies between telephone companies that are certified as "open video systems" and those that are not. To secure open video system certification, an operator must comply with special antidiscrimination rules designed to curb self-preference and cross-subsidization,<sup>373</sup> including a rule limiting the "operator . . . and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on [the] system" whenever "demand exceeds the [system's] channel capacity."<sup>374</sup>

In exchange for compliance with these restrictions, open video systems enjoy reduced regulatory burdens. In particular, a certified open video system operator is freed from the Communication Act's rules limiting cable system channel capacity, subjecting operators to local franchising, and restricting exit

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368. See Telecommunications Act, *supra* note 2, § 302(b)(1), 110 Stat. at 124 (repealing 47 U.S.C. § 533(b)); *id.* § 302 (b)(3), 110 Stat. at 1124 (terminating FCC "regulations and policies with respect to video dialtone requirements issued in CC Docket No. 87-266").

369. Telecommunications Act, *supra* note 2, § 302(a), 110 Stat. at 118 (adding 47 U.S.C. § 651(a)(1)).

370. For a discussion of this technology and its use by telephone companies, see *infra* text accompanying notes 383-392.

371. Telecommunications Act, *supra* note 2, § 302(a), 110 Stat. at 118-19 (adding 47 U.S.C. § 651(a)(2)).

372. See *id.*, 110 Stat. at 119 (adding 47 U.S.C. § 651(a)(3)).

373. See *id.*, 110 Stat. at 121-23 (adding 47 U.S.C. § 653(a), (b)).

374. *Id.*, 110 Stat. at 122 (adding 47 U.S.C. § 653(b)(1)(B)).

from the cable business within the first three years of entry.<sup>375</sup> On the other hand, the Telecommunications Act expressly provides that open video systems must comply with the must-carry obligations imposed by the 1992 Cable Act.<sup>376</sup>

The Telecommunications Act does presumptively ban one model of telco entry into cablecasting: the cable-telco merger. A telephone company may not acquire "more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service" in the same service area.<sup>377</sup> The reverse is also true; no cable operator may acquire a comparable stake in a telephone company within its franchise area.<sup>378</sup> The Act also bans cable-telco joint ventures.<sup>379</sup> Cable-telco mergers and joint ventures are legal, *inter alia*, in rural areas and in markets defined as "competitive" ones.<sup>380</sup>

Although it is premature to forecast the success of these new provisions, the Telecommunication Act offers video consumers another weapon against entrenched cable system operators: in nearly all communities served by cable, the coaxial octopus is unchallenged.<sup>381</sup> Now that the law has now unshackled cable's most menacing rival, we may finally witness genuine competition in the video distribution market.

#### F. A TALE OF TWO AUCTIONS<sup>382</sup>

As 1995 ended and a battle-weary 104th Congress slumped toward comprehensive communications law reform, a morality play was unfolding. The first act involved multipoint distribution service (MDS), a cluster of thirteen microwave channels often combined with excess capacity on instructional television

375. *See id.*, 110 Stat. at 123 (adding 47 U.S.C. § 653(c)(1)(C)).

376. *See id.* (adding 47 U.S.C. § 653 (c)(1)(b)).

377. *Id.*, 110 Stat. at 119 (adding 47 U.S.C. § 652(a)).

378. *See id.*, (adding 47 U.S.C. § 652(b)).

379. *See id.*, 110 Stat. at 119-20 (adding 47 U.S.C. § 652(c)).

380. *See id.*, 110 Stat. at 120-21 (adding 47 U.S.C. § 652(d)), which also provides exceptions for small cable systems in nonurban areas and whenever the FCC waives the general prohibition against cable-telco mergers and joint ventures).

381. *See Turner II*, 910 F. Supp. 734, 740 n.10 (D.D.C. 1995) (reporting that 99 percent of all communities served by cable have only one cable provider), *prob. juris. noted*, 116 S. Ct. 907 (1996); Thomas W. Hazlett, *Predation in Local Cable TV Markets*, 40 ANTITRUST BULL. 609, 611 (1995) ("[O]nly about 2% of U.S. cable subscribers hav[e] a choice between firms.").

382. *Cf. CHARLES DICKENS, A TALE OF TWO CITIES* 1 (Buccaneer Books, Inc. 1987) (1859) ("It was the best of times, it was the worst of times . . .").



fixed service (ITFS) channels to provide "wireless cable."<sup>383</sup> Although the need for "a line-of-sight path between the transmitter or signal booster and the receiving antenna" imposes severe technological limitations on wireless cable, this "heavily encumbered service" has nevertheless spawned "approximately 170 operating . . . systems," "almost entirely in large and medium-sized cities."<sup>384</sup> Despite—or perhaps because of—MDS's low channel capacity and inability to "reach over buildings or mountains,"<sup>385</sup> the law has raised few regulatory barriers to entry into wireless cable. The 1992 Act and accompanying FCC rules formally barred cable operators from owning or leasing an MDS station within their franchise areas,<sup>386</sup> but Congress provided for routine waivers of these rules.<sup>387</sup> The Telecommunications Act expressly permits cable operators "subject to effective competition" to acquire MDS capabilities.<sup>388</sup> Unencumbered by legal barriers, telephone companies have also plunged into wireless cable.<sup>389</sup>

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383. See *In re* Amendment of Parts 1, 2, 21 & 43 of the Commission's Rules to Provide for Licensing & Regulation of Common Carrier Radio Stations in the Multipoint Distribution Serv., 45 F.C.C.2d 616, 616 (1974) [hereinafter Amendments] (establishing two MDS channels in frequencies formerly used for point-to-point rather than point-to-multipoint communications); Report & Order, 94 F.C.C.2d 1203, 1206 (1983) (reallocating eight of 28 ITFS channels for MDS use and authorizing ITFS licensees to lease excess capacity to wireless cable operators using MDS channels); Second Report & Order, 6 F.C.C.R. 6792 (1991) (expanding further the number of channels available for wireless cable services).

384. See *In re* Amendment of Parts 21 & 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service (MDS Report and Order), 10 F.C.C.R. 9589, 9593-94 (1995).

385. *Bidding Starts for Wireless Cable Rights*, N.Y. TIMES, Nov. 14, 1995, at C4.

386. See 47 U.S.C. § 533(a)(2) (1994) (barring "a cable operator" from "hold[ing] a license for multichannel multipoint distribution service . . . in any portion of the franchise area served by that cable operator's cable system"); 47 C.F.R. § 21.922 (1995) (same).

387. See 47 U.S.C. § 533(a)(2)(A) & (B) (1994) (ordering waivers of the ban on cable-MDS cross-ownership in some circumstances and authorizing waivers in other circumstances); Second Report & Order, 6 F.C.C.R. 6792, 6800 (1991) (issuing a blanket waiver for joint cable-MDS operations and agreements in place as of Feb. 8, 1990). See generally Amendments, *supra* note 383.

388. See Telecommunications Act, § 202(i), 110 Stat. at 112 (amending 47 U.S.C. § 533(a)).

389. See *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC Order No. 95-491, 1995 WL 733714 (Dec. 11, 1995) (observing that "three [local exchange companies made] major investments in two wireless operators" in 1995).

During the summer of 1995, the FCC laid down rules for an MDS auction.<sup>390</sup> By September the Commission formally announced the auction.<sup>391</sup> On November 13, the FCC auctioned MDS authorizations in 493 basic trading areas across the United States. The first round's highest bid came in at \$188,750<sup>392</sup>—a trifling sum in the high-stakes world of communications. So ended the wireless cable auction, almost as quietly as it began.

This morality play's second act presented a far different story. Advanced television, a blanket term for "any television technology that provides improved audio and video quality or enhances the current NTSC television system,"<sup>393</sup> became a flashpoint that threatened the communications law reform in its entirety. In 1987, the FCC declared that it would seek to promote advanced television services that would enhance the visual and aural clarity of broadcast television.<sup>394</sup> By 1990, the Commission directed its advanced television efforts toward the provision of "high definition television" (HDTV),<sup>395</sup> which "offers approximately twice the vertical and horizontal resolution" available under current technology—in other words, "a picture quality approaching 35 millimeter film" and "sound quality approaching that of a compact disc."<sup>396</sup> Envisioning advertiser-financed, over-the-air digital HDTV broadcasts, the FCC declared in 1991 that it would limit eligibility for advanced television licenses to parties who already had received or applied for analog broadcast licenses as of that date.<sup>397</sup> The Commission's new-found authority to conduct spectrum auctions warranted no reconsideration of this decision, for Congress

390. MDS Report & Order, 10 F.C.C.R. at 9589. The FCC's statutory authorization to allow competitive bidding for licenses comes from 47 U.S.C. § 309(j) (1994). See generally *supra* text accompanying notes 110-114.

391. See FCC Announces Auction of Multipoint Distribution Service, 10 F.C.C.R. 10,729 (1995).

392. See *Bidding Starts for Wireless Cable Rights*, *supra* note 385 at C4.

393. Third Report & Order, 7 F.C.C.R. 6924, 6925 n.1 (1992). NTSC, the acronym of the National Television System Committee, refers to the current, analog television system based on the monochrome standard developed between 1940 and 1941 and the color standard developed between 1950 and 1953. See *In re Advanced Television Systems & Their Impact upon the Existing Television Broadcast Serv.*, 10 F.C.C.R. 10,540, 10,540 n.3 (1995).

394. Notice of Inquiry in MM Docket No. 87-268, 2 F.C.C.R. 5125, 5127 (1987).

395. First Report & Order, 5 F.C.C.R. 5627 (1990).

396. Advanced Television Notice, 10 F.C.C.R. at 10,540 n.2.

397. Second Report & Order, 7 F.C.C.R. 3340 (1992).

specifically limited competitive bidding to "principal use[s] of [the] spectrum [that] will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers."<sup>398</sup>

Before the congressional debates over the Telecommunications Act began, the FCC had already determined the two most important issues regarding advanced television. First, the Commission had committed that one of the most valuable remaining stretches of the electromagnetic spectrum would be used to expand advertiser-financed television—what the FCC extols as "[f]ree, over-the-air, universal broadcast television."<sup>399</sup> Second, the FCC had decided to give these frequencies free of charge to incumbent broadcasters, who would use them during a fifteen-year transition between analog and digital television standards.<sup>400</sup> At the end of that period, the Commission would recover the old analog licenses and reallocate them.<sup>401</sup> In 1995, the summer of the Disney/Capital Cities/ABC and Westinghouse/CBS mergers, the FCC reaffirmed its decision to give advanced television licenses to incumbent broadcasters.<sup>402</sup>

As it entered conference, the communications bill ratified the FCC's advanced television policy. The Senate version directed the Commission to allow future licensees "to make use of the advanced television spectrum for the transmission of ancillary or supplementary services if the licensees provide without charge to the public at least one advanced television program service."<sup>403</sup> The House version explicitly limited the initial eligibility for [advanced television] licenses to persons that [already] are licensed to operate a television broadcast station or hold a permit to construct a station (or both).<sup>404</sup>

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398. 47 U.S.C. § 309(j)(2) (1994); *see also* Advanced Television Notice, 10 F.C.C.R. at 10,545 (citing this limit on competitive bidding to justify adhering to the FCC's original decision to limit eligibility for new advanced television licenses to incumbent broadcasters).

399. Advanced Television Notice, 10 F.C.C.R. at 10,540.

400. *See* Third Report & Order, 7 F.C.C.R. 6924 (1992)

401. *See id.*

402. Advanced Television Notice, 10 F.C.C.R. at 10,541, 10,544-45.

403. Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong., 1st Sess., § 206(a)(1)(A), 141 Cong. Rec. at 9964-65 (1995); *see also* S. REP. NO. 23, 104th Cong., 1st Sess. 41 (1995) ("The broadcaster must provide at least one free, over-the-air advanced television broadcast service on [the new] spectrum.")

404. Communications Act of 1995, H.R. 1555, 104th Cong., 1st Sess., § 301(a)(1), 141 Cong. Rec. 9954, 9995 (1995).

The Telecommunications Act adopted the House's more protective stance.<sup>405</sup> The Act asks little in return of the incumbent broadcasters who will enjoy exclusive access to advanced television frequencies. An advanced television licensee may be asked to return as little as its original license to broadcast under an electronic standard dating back to World II.<sup>406</sup> Congress left "to the Commission the determination of when such licenses [should] be returned and how to reallocate returned spectrum."<sup>407</sup> These provisions represent an undiluted boondoggle for incumbent broadcasters.

It was the least of auctions; it was the greatest of giveaways. One of these two pieces of electromagnetic real estate is worth between \$25 million and \$100 million; the other, perhaps as much as \$70 billion. One was auctioned as a routine matter; the other has been given away free of charge to federal mass communication law's oldest and most gently pampered wards. It is a far, far better thing we do, than we have ever done, when we *sell* access to the airwaves rather than *sell out* the public. The \$70 billion that the federal government will not net from an advanced television auction would be enough to replace all 211 million television sets in the United States with brand new \$330 models *and* to pay a \$370 million bonus to the virtuous citizen who proposed the idea.<sup>408</sup> What price "free television"? Thanks to this tale of two auctions, thanks to the contrast between wireless cable and advanced television, we at last are approaching a quantifiable answer.

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405. See Telecommunications Act, *supra* note 2, § 201, 110 Stat. at 107-10 (adding 47 U.S.C. § 336); Conference Report, *supra* note 219, at 161, *reprinted in* 1996 U.S.C.C.A.N. 124, 173-74.

406. See Telecommunications Act, *supra* note 2, § 201, 110 Stat. at 108 (adding 47 U.S.C. § 336(c), which directs the FCC to "require that *either* the [advanced television] license *or* the original license . . . be surrendered" after some period (emphases added)).

407. Conference Report, *supra* note 219, at 161, *reprinted in* 1996 U.S.C.C.A.N., 124, 173-74.

408. See STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 571 tbl. 897 (115th ed. 1995). Alternatively, if each television set in this buyout plan were merely \$30 cheaper, the federal government would net \$6.7 billion, enough to pay two-thirds of a typical year's on-budget agricultural price and income supports or to give 250 million Americans a one-time tax rebate of roughly \$27 per head.

#### IV. THE COMMUNICATIONS PARADOX: A REGULATORY POLICY AT WAR WITH ANTITRUST

##### A. ANTITRUST AS ANTIDOTE<sup>409</sup>

The entire project has crumbled. In the six decades between the Communications Act of 1934 and the Telecommunications Act of 1996, Congress, the courts, and the Commission turned virtually every premise of mass communications law on its head. In defiance of elementary economics, the FCC has pursued untenable policies favoring local ownership and hampering the development of broadcast networks. Regulatory preoccupation with the perceived limits of the broadcast spectrum has made a mockery of the Commission's "public convenience, interest, or necessity" mandate.<sup>410</sup> More often than not, measures designed to enhance program "diversity" actually suppress it. Contrary to the Communications Act, mass communications law routinely imposes common carrier obligations on broadcasters<sup>411</sup> and compromises licensees' statutory and constitutional right to freedom from censorship.<sup>412</sup> The preoccupation with broadcaster identity as the exclusive means of ensuring program diversity has warped the First Amendment precept that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>413</sup> Federal mass communications regulation has become a jobs program for favored broadcasters, and those broadcasters' rights are, in practice, the only entitlements that the courts and the Commission bother to guard.

In sum, existing law does not "quickly allocate[] spectrum to wireless technologies, . . . promote[] efficient resource allocation, [or] minimize[] government intrusion into electronic speech."<sup>414</sup> Unless an intellectual revolution matches the technological

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409. Cf. ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

410. See 47 U.S.C. §§ 301, 303, 307(a), 309(a), 310(d) (1994).

411. See *id.* § 153(h) ("[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.").

412. See *id.* § 326 (prohibiting FCC censorship of radio and television broadcasts).

413. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

414. Sidak, *supra* note 1, at 1213.

revolution already afoot,<sup>415</sup> the information superhighway will collapse under protective legislation that preserves obsolete investments at the expense of technological innovation. There might not be a more debilitating attitude in a body of law putatively dedicated to facilitating the exchange of novel ideas.

J. Gregory Sidak has proposed a large-scale reconception of communications law according to "the antitrust laws' goal of maximizing consumer welfare by promoting competition in the markets for goods and services."<sup>416</sup> Such a proposal is consistent not only with the letter of the Communications Act,<sup>417</sup> but also its spirit. Sidak's call to action exposes the dreadful failure of current mass communications policy to heed pertinent analogies in antitrust law and the law of regulated industries.

The multiple failings of mass communications law can be traced to an appalling neglect of antitrust principles. Although one commentator has facetiously asked why cable can't be more like broadcasting,<sup>418</sup> the law in fact has assumed that broadcasting is more like cable. The law treats broadcasting as though it exhibits the monopolistic tendencies usually associated with wired communications technologies. (Cable, after all, was supposedly a natural monopoly.)<sup>419</sup> Mass communications law

415. Cf. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1063 (1994) ("Rather than resting upon ever-changing technologies to justify government regulation of the electronic media, First Amendment analysis should strip away the technological characteristics of the media.").

416. Sidak, *supra* note 1, at 1238.

417. See 47 U.S.C. § 313(a)-(b) (1994) (directing the FCC to revoke licenses and refuse licensing to applicants found to have violated the antitrust laws with respect to trade in "radio apparatus and devices"); *id.* § 314 (conforming the FCC's licensing process to the "incipiency" model of trade regulation articulated in the Clayton Act); *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-24 (1943) (interpreting the FCC's obligations under 47 U.S.C. § 313); cf. *United States v. Radio Corp. of Am.*, 358 U.S. 334, 350-51 (1959) (holding that § 313 does not obligate the Justice Department to intervene in licensing proceedings or to appeal the grant of a license whenever an applicant is suspected of violating the antitrust laws).

418. Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 212 (1987).

419. See, e.g., *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 125-26 (7th Cir. 1982) (Posner, J.); cf. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2104 (1993) (noting that the first SMATV operator to "gain[] a foothold" in a cluster of buildings "could connect additional buildings for the cost of a few feet of cable, whereas any competitor would have to recover the cost of his own satellite headend facility"). *But see* Daniel L. Brenner, *Was Cable Television a Monopoly?*, 42 FED. COMM. L.J. 365, 410-11 (1990)

repeatedly flouts the statutory command that "radio broadcasting shall not . . . be deemed a common carrier."<sup>420</sup> The sun has finally set on the ill-starred "fairness doctrine,"<sup>421</sup> but the Supreme Court has issued no clear statement regarding the exact contours of a putative "right of access" for political speakers.<sup>422</sup> Far from collapsing, the public utility analogy in mass communications law was reborn, phoenix-like, after its apparent death in *Sanders Brothers*<sup>423</sup> and has very effectively reasserted itself. Indeed, one class of modern broadcasters (cable operators) has been forced to submit to traditional public utility regulation,<sup>424</sup> and another (telephone common carriers) has been banned from competing because it was presumably impossible to regulate.<sup>425</sup>

"Trade restraints . . . aimed at the destruction of competition[] tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system."<sup>426</sup> Nothing is more frustrating than this simple conclusion about today's mass media markets: The principal restraints

(suggesting that cable television was never the natural monopoly that its regulators thought it to be); Hazlett, *supra* note 47, at 1370 (arguing that "the existence of monopoly" in the cable television industry "is not by itself evidence contradicting the consumer advantages of free competition").

420. 47 U.S.C. § 153(h) (1994).

421. See, e.g., *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-61 (D.C. Cir. 1989) (holding that the fairness doctrine no longer serves the public interest), *cert. denied*, 493 U.S. 1019 (1990); cf. *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 513 (D.C. Cir. 1986) (declining to extend the fairness doctrine to teletext service providers), *cert. denied*, 482 U.S. 919 (1987). See generally Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 708-14 (1994); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 151-52 (calling for the repeal of the "incoherent and unworkable" fairness doctrine).

422. Compare *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 132 (1973) (upholding a broadcast licensee's right to refuse political advertisements) with *CBS, Inc. v. FCC*, 453 U.S. 367, 386 (1981) (upholding the FCC's power to punish a licensee for failing to provide "reasonable access" to candidates for federal office, as required by 47 U.S.C. § 312(a)(7) (1994)).

423. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); see *supra* text accompanying notes 123-138 (discussing *Sanders Brothers'* embrace of a competitive model of broadcast licensing).

424. See 47 U.S.C. §§ 541-547 (1994) (authorizing state and local governments to franchise, tax, and regulate cable rates).

425. See *id.* § 533(b)(1) (barring common carriers providing wire communications from the cable programming business), *repealed by* Telecommunications Act, *supra* note 2, § 302(b)(1), 110 Stat. at 122.

426. *Associated Press v. United States*, 326 U.S. 1, 13-14 (1945).

of trade come not from the monopolists, but in the guise of benign regulation authorized by the Communications Act of 1934.

In an intellectual setting devoid of antitrust reasoning, structural regulation of federal mass communications law has generated four basic fallacies. First, program diversity is and should be equated with broadcaster identity. Second, the broadcast spectrum is scarce, and that scarcity justifies harsh regulation contrary to the ordinary rules of free enterprise and free speech.<sup>427</sup> Third, broadcast licensing at the level of scarcity—that is, local distribution of mass speech—will be effective. And finally, regulating every mass communications medium according to the model of perfect competition will ensure efficient distribution and diverse speech. Each of these propositions is demonstrably false and deserves to be jettisoned.

## B. ALL BROADCASTERS GREAT AND SMALL

Who shall broadcast? The fault may lie in the very posing of this regulatory question, for “[t]he way a question is asked limits and disposes the ways in which any answer to it—right or wrong—may be given.”<sup>428</sup> Federal communications law has focused on broadcaster identity, and that focus alone has given rise to great mischief. Structural regulation of mass communications has failed because the law has become unduly obsessed with broadcaster identity.

### 1. Communications Policy for a Nation of Shopkeepers

The longstanding regulatory tension between structural regulation and presumptive reliance on competition corresponds roughly with the “broadcast”<sup>429</sup> and “print”<sup>430</sup> models of the

427. For a compelling argument that free enterprise and free speech are identical phenomena despite legal academics' best efforts to insist otherwise, see R. H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389 (1974), reprinted in RONALD H. COASE, *ESSAYS ON ECONOMICS AND ECONOMISTS* 64 (1994); cf. E. G. West, *The Political Economy of American Public School Legislation*, 10 J.L. & ECON. 101 (1967) (explaining why educators' views on public school legislation should never be trusted).

428. SUSANNE K. LANGER, *PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART* 3 (3d ed. 1967).

429. See, e.g., *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969) (upholding the “fairness doctrine” as a means of ensuring “suitable access to social, political, aesthetic, moral and other ideas and experiences”).



First Amendment.<sup>431</sup> Whereas the "broadcast" model puts its faith in command-and-control techniques and in structural regulators' ability to choose the best communicator, the print model shields private editorial privilege and entrusts the market to discipline renegade editors. As implemented by the FCC, the broadcast model assumes that the identity of the broadcaster will dictate the nature of broadcast speech.

A vast amount of federal communications policy can be traced to the misplaced belief that diversity in programming necessarily follows deconcentration and broadened ownership. There may be no other way to explain the FCC's historic obsession with local ownership, minority ownership, and network influence. The "small shopkeeper" theory underlying the Robinson-Patman Act and other New Deal regulatory legislation provides a useful point of comparison,<sup>432</sup> as do federal and state-law statutes favoring family farm ownership.<sup>433</sup> Though contrary to the principle that antitrust and allied fields of law protect "*competition*, not *competitors*,"<sup>434</sup> the "shopkeeper" approach counsels the protection of "diversity" through diffuse ownership of broadcast facilities. Expression supposedly follows ownership: Maintaining small firm size in a zero-sum marketplace ensures a greater number of entrepreneurs and, accordingly, a wider range of expression.

If the antitrust laws serve as a boon for small businesses, they do so for purely "distributive, rather than efficiency, considerations;" the Congress that enacted the Sherman Act intended "to assist small businesses as an end in itself, not as a

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430. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a state right-of-reply statute as applied to newspaper).

431. See Krattenmaker & Powe, *supra* note 168, at 1721-24.

432. See generally THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS (E. Thomas Sullivan ed., 1991); Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299 (1983); Daniel J. Gifford, *Primary-Line Injury Under the Robinson-Patman Act: The Development of Standards and the Erosion of Enforcement*, 64 MINN. L. REV. 1 (1979).

433. See generally Chen & Adams, *supra* note 21 (discussing the structural regulation of specific markets); Chen, *supra* note 23, at 810-16, 875 n.353 (surveying legal preferences favoring farmers).

434. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original); *accord*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990).

means of increasing total economic output."<sup>435</sup> Bitterly we may regret how competition "driv[es] out of business the small dealers and worthy men whose lives have been spent therein," but such personal "misfortunes" are "the inevitable accompaniment of change and improvement."<sup>436</sup> In like fashion, structural regulation of mass communications has dispersed managerial jobs without improving the diversity or quality of broadcast speech.

Indeed, treating mass communications as the domain of shopkeepers has severely damaged First Amendment ideals. In adopting the metaphor of the "marketplace of ideas,"<sup>437</sup> much of the Supreme Court's free speech jurisprudence confirms the economic criticism of the "enhancement theory." "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>438</sup> Broadcast regulation, however, favors the competitor-based view of speech over the marketplace model. From the traditional practice of favoring local broadcasters<sup>439</sup> to more recent controversies over ethnic and gender preferences,<sup>440</sup> the FCC routinely assumes that broadcaster identity dictates (or at least influences) program selection. When viewed as obligations based primarily on size or putative monopoly status, rules such as PTAR, finsyn, and must-carry "begin[] to resemble more a penalty for a few of the largest [speakers] than an attempt to favor struggling smaller

435. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 104 (1982), reprinted in *THE POLITICAL ECONOMY OF THE SHERMAN ACT*, supra note 432, at 71, 83.

436. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897).

437. *E.g.*, *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2518 (1995); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

438. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*). See generally Jeffrey Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983) (discussing the dichotomous structure of the First Amendment); L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243 (arguing that the enhancement theory violates the First Amendment).

439. See, *e.g.*, *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *NOLL ET AL.*, supra note 161, at 198-120 (comparing the localism policy with FCC goals).

440. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-66 (1990) (upholding distress sale and comparative licensing programs favoring minority-owned broadcasting firms); *Lamprecht v. FCC*, 958 F.2d 382, 398 (D.C. Cir. 1992) (Thomas, Circuit Justice) (striking down similar programs favoring female-owned firms).

enterprises."<sup>441</sup> At bottom, every policy favoring dispersed ownership of broadcasting resources echoes the promise of *competition* based on a variety of *competitors*. In a sea of puny, anonymous mass communicators, no single voice can drown out others seeking their own niches in a segmented speech market.<sup>442</sup>

Although virtually all of mass communications law has grossly mismatched regulatory objectives and market realities,<sup>443</sup> has failed most spectacularly at its base: comparative radio and television licensing. This failure stems from the FCC's historical mismanagement of its "public convenience, interest, and necessity" mandate. Its obsession with individual broadcast licensees has blinded the Commission to the deep structures of mass media markets. As a result, the FCC's stated commitment to "diverse" programming within "scarce" media has belied the Commission's systematic sacrifice of listener and viewer concerns in favor of incumbent broadcasters' economic well-being.

The apparent obviousness of this economic analysis begs the question that Donald McCloskey has posed of all seemingly self-evident hypotheses: "If you're so smart why ain't you rich?"<sup>444</sup> If the network is "where it's at," why has the FCC—after the fashion of a legally twisted Wee Willie Keeler—aimed communications law "where they ain't"?<sup>445</sup> Part of the reason stems

441. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

442. *Cf. Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (describing certain seditionists as "poor and puny anonymities").

443. *Cf. Stephen G. Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979) (describing mismatches between economic problems and legal tools as the greatest source of regulatory failure).

444. DONALD N. MCCLOSKEY, *IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE* 111 (1990). *But cf. MILTON FRIEDMAN, PRICE THEORY: A PROVISIONAL TEXT* 146-47 (rev. ed. 1962) (arguing that an academic economist is unlikely to whip profit-driven managers into discovering and exploiting novel business opportunities); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 920 (1986) ("[I]f a brilliant theory is true, it should have been discovered in the marketplace; because it has not been discovered—or else it would not now be considered brilliant—it is very likely false.").

445. Wee Willie Keeler amassed an impressive batting average by hitting the ball "where they ain't." GEOFFREY C. WARD, *BASEBALL: AN ILLUSTRATED HISTORY* 52 (1994); *see also Flood v. Kuhn*, 407 U.S. 258, 262 (1972) (principal opinion of Blackmun, J.) (listing Keeler among the "many names . . . that have sparked the diamond and its environs and have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season").

from familiarity. Because licensing centers on individual stations, individual broadcasters dominate the regulatory stage. Licensing is necessarily chummier than "an impersonal, competitive market": "the regulator knows and inevitably feels responsible for the firms he regulates."<sup>446</sup> Hence the ease with which the law accommodates a "renewal expectancy" that gravely offends every value held dear in classical economics.

## 2. The Road Warriors

Perhaps the focus on over-the-air broadcasting can be justified after all. Television still matters.<sup>447</sup> As goes television, so goes every other mass communications industry. Even as cable continues to drain viewers away from broadcast television,<sup>448</sup> media conglomerates up the bidding for traditional over-the-air networks. In a single week in August 1995, larger media giants wooed and won both ABC and CBS.<sup>449</sup> As a practical matter, a very limited number of firms can amass sufficient capital to acquire, organize, deliver, and promote the constant stream of new programming needed to satisfy an easily bored public. Notwithstanding the explosive growth in wireless and wired communications technologies, much of that public is still watching conventional television.

At the same time, concentration and consolidation are real. The mid-1990s may be witnessing the second coming of the merger and acquisition fever of the 1980s.<sup>450</sup> We may disagree over whether to blame such concentration on the forces of an "unregulated" market with tendencies toward "natural monopoly" or the coercive presence of regulation.<sup>451</sup> By virtually any

446. STEPHEN BREYER, *REGULATION AND ITS REFORM* 213 (1982).

447. See *In re Review of the Commission's Regulations Governing Television Broadcasting*, 10 F.C.C.R. 3524, 3603 (1995) (statement of Ness, Comm'r) ("To paraphrase Mark Twain, reports of the demise of broadcast television proved to be greatly exaggerated.")

448. See, e.g., Lawrie Mifflin, *Cable TV Continues Its Steady Drain of Network Viewers*, N.Y. TIMES, Oct. 25, 1995, at B1.

449. See text accompanying *supra* notes 251-253.

450. See, e.g., Stephanie Strom, *This Year's Wave of Mergers Heads Toward a Record*, N.Y. TIMES, Oct. 31, 1995, at A1 (noting "a feverish pace of global business consolidation that during 1994 and 1995 could see as many companies swallowed up as during the last three years of the 1980's, the decade of the takeover").

451. Compare *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1046 (7th Cir. 1992) (Posner, J.) (describing the "octopus-like" prospect that television networks could leverage their position in program transmission into dominance

empirical measure, however, we must concede that only a handful of firms control the entire, highly lucrative market for advertiser-financed broadcast television. So it is with every other major mass communications medium: accelerating technology, deepening capitalization, increasing concentration.

These are the ominous realities that lurk beneath the soothing veneer of the Information Age. A technological revolution is building the information superhighway that promises to transform every facet of life. (To match the lilt and swagger of the age, let's use a much catchier term, such as "I-Way"<sup>452</sup> or "infobahn."<sup>453</sup>) The empires built on newsprint in the nineteenth century and on broadcast frequencies in the twentieth surely will rise on electronically transmitted binary digits in the twenty-first. The "observ[ation] that telecommunications technologies and media are converging" has become little more than "a trivial ritual."<sup>454</sup> What is seldom understood (and even more rarely explained) is that the crucial entrance ramps onto tomorrow's I-Way will rest in private hands, and very few hands at that.

Technological change promises to exacerbate economic concentration in the mass communications marketplace. Although the networks that built radio's "empire of the air"<sup>455</sup> have yielded to today's diversified telecommunications giants, the specter of scale remains. No less today than during the golden age of radio, mass communications regulation races "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination."<sup>456</sup> The fear is instinctive and profound: She who controls the networks of the future shall control the terms of speech. She who owns the superhighway

over all other aspects of broadcasting) *with* Fox Broadcasting, Inc., 5 F.C.C.R. 3211 (1990) (acknowledging that the FCC's restrictions on network structure and activities may retard the formation of new television networks) and Multiple Ownership of AM, FM & Television Broadcast Stations, 100 F.C.C.2d 17 (1984) (making the same observation with regard to rules restricting multiple ownership of licensed broadcast facilities, 47 C.F.R. § 73.3555 (1995)).

452. *Paving the I-Way*, WALL ST. J., Nov. 3, 1995, at A14; *I-Way Detours*, WALL ST. J., Dec. 27, 1995, at A10.

453. See Volokh, *supra* note 30, at 1806 & n.4 (attributing the coining of the word *infobahn* to Lynn Levine of Warren Publishing).

454. Krattenmaker & Powe, *supra* note 168, at 1719.

455. See generally LEWIS S.W. LEWIS, *THE EMPIRE OF THE AIR: THE MEN WHO MADE RADIO* (1st ed. 1991).

456. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

shall fetch whatever toll she demands.<sup>457</sup> I-Way robbery, indeed.

Come the Apocalypse, only a very few combatants in the mass communications marketplace will rule the infobahn. The superhighway has arrived, and the final battles have begun. Enter the Road Warriors. Superfirms such as television networks, consortia of local broadcasters, multiple cable system operators, local exchange companies, and interexchange carriers all have begun to stake their claims in the increasingly competitive mass communications industry.<sup>458</sup> They are rich. They are determined. They are merging. And most of all, they are loud. The explosive range and versatility of communications technology are creating a "cacophony of competing voices, none of which [can] be clearly and predictably heard."<sup>459</sup>

Trying to restructure broadcasting according to the model of perfect competition is neither possible nor desirable. Substantial economies of scale in mass communications do exist, and they preclude a market comprised entirely of atomistic, independent actors. Moreover, there is no good reason to believe that a monopolist would provide weaker, less diverse programming. Indeed, economic theory suggests a contrary conclusion: A monopolist would never duplicate programs and would therefore *increase* program diversity.<sup>460</sup> In a thoroughly accelerated and impatient world, only dominant megafirms can tap productive "advantages which, though not strictly unattainable" by smaller firms, "are as a matter of fact secured only on the monopoly level."<sup>461</sup> Paradoxically, permitting the Road Warriors to run roughshod over the information superhighway will improve the flow of traffic.

457. *Watch Tina Turner in MAD MAX II: BEYOND THUNDERDOME* (Warner Bros. 1985) ("Break a deal, face the wheel.").

458. *Cf. Bhagwat, supra* note 73, at 163 (describing the "primary players" in today's mass media markets as "economic entities . . . of very substantial size and economic might").

459. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969) (footnote omitted).

460. *See, e.g., Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1054-55 (7th Cir. 1992) (Posner, J.) ("It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity."); Steiner, *supra* note 191, at 194.

461. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 101 (1942).

### 3. You Sly Fox

To test the proposition that deregulation and any resulting concentration actually will improve program diversity, we need merely to reconsider the birth of Fox Broadcasting's "fourth" network. In its brief life,<sup>462</sup> *Metro Broadcasting, Inc. v. FCC*<sup>463</sup> stirred more passions over affirmative action<sup>464</sup> than that dreary debate deserves.<sup>465</sup> Communications law expert Matthew Spitzer has brought considerable talent to bear on the question of whether race- and gender-conscious<sup>466</sup> licensing actually increases the amount and quality of minority-oriented programming.<sup>467</sup> The answer, however, lies in Spitzer's almost casual observation: "Increasing the [total] number of [broadcasting] outlets reduces the cost to minority broadcasters of satisfying a taste for serving minority consumers."<sup>468</sup> In other words, increasing the aggregate amount of broadcasting by increasing the number of "channels" available by air or by wire will increase programming diversity even in the absence of race-conscious measures.

Justice William Brennan's last opinion—and arguably one of his most significant<sup>469</sup>—may have proved less effective than the deregulatory strategy of *reculer pour mieux sauter*: "[r]etreat

462. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2113 (1995) (overruling *Metro Broadcasting* after the five-year reign of that case).

463. 497 U.S. 547 (1990).

464. Compare *Charles Fried, Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990) (arguing that *Metro Broadcasting* departed from prior cases and thereby destabilized the law) with *Patricia Williams, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990) (defending *Metro Broadcasting* as an important step toward full legal protection of multiculturalism).

465. See Daniel A. Farber, *Missing the "Play of Intelligence"*, 36 WM. & MARY L. REV. 147, 159 (1994) ("[W]e seem to have worn deep grooves repeating the same basic arguments and counter arguments over and over."); Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 912-30 (1994) (documenting the decreasing relevance of affirmative action).

466. Gender-conscious broadcast licensing was not at issue in *Metro Broadcasting*, but the D.C. Circuit rejected it shortly afterward. See *Lamprecht v. FCC*, 958 F.2d 393, 393-98 (D.C. Cir. 1992) (Thomas, Circuit Justice).

467. See Spitzer, *supra* note 64; see also Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (presenting econometric evidence that increasing the number of minority-owned broadcasting stations increases the amount of minority-owned programming).

468. Spitzer, *supra* note 64, at 327.

469. Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990).

in order better to advance.<sup>470</sup> *Metro Broadcasting* may have been nothing more than the 1990's second most important legal development affecting minority programming. Seven weeks before the Supreme Court announced its affirmative action decision, the FCC already had rendered a true landmark decision in the field of minority programming. The Commission's waiver of the finsyn and prime time access rules allowed Rupert Murdoch—an Australian-born white man who has had his share of trouble getting on the air<sup>471</sup>—to paint Fox's prime time schedule in living color.<sup>472</sup> By the 1993-1994 television season, the "upstart fourth network" was airing five of the ten programs most popular among black viewers.<sup>473</sup>

Fox's footsteps soon could be felt far beyond the realm of minority-oriented programming. The new network snatched from CBS the rights to National Football Conference telecasts and proceeded to capture many former local CBS affiliates.<sup>474</sup> The transmission sector that *NBC* portrayed as unregenerately monopolistic suddenly became both competitive and diverse. And a rollback of FCC rules on vertical integration had served as the indispensable catalyst.

In a quirky way, the Fox parable shows that James Madison's vision was good not just for the budding American republic, but also for twentieth century media markets. Cast in the best possible light, the FCC has opposed "faction" whenever and wherever it might appear, vigilant against bands of marauding speakers, "united and actuated by common impulse of passion . . . adverse to . . . the permanent and aggregate

470. Fried, *supra* note 464, at 127 & n.118.

471. See, e.g., *News Am. Publishing, Inc. v. FCC*, 844 F.2d 800, 807-810 (D.C. Cir. 1988); *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1040 (D.C. Cir. 1986); cf. Daniel Peral & Elizabeth Jensen, *FCC Studies Plan to Force News Corp. to Reduce Control of Fox TV Stations*, WALL ST. J., April 24, 1995, at A3 (reporting an FCC staff proposal to force Murdoch's News Corporation to reduce its equity control of the eight television stations owned by Fox Broadcasting Company).

472. See *Fox Broadcasting Co.*, 5 F.C.C.R. 3211 (1990).

473. Paul Farhi, *A Television Trend: Audiences in Black and White; Viewers Split on Racial Lines as Networks Find Diversity Sells—But Critics See Cultural Risks*, WASH. POST, Nov. 29, 1994, at A20. See generally Chen & Gifford, *supra* note 3, at 1338-45 (describing Fox's impact on minority programming).

474. See Bill Carter, *Westinghouse Visits TV Land: Can It Put Juice into a Lemon?*, N.Y. TIMES, Oct. 30, 1995, at C1 (reporting how competition from Fox and a weak entertainment lineup has turned CBS into "a distressed property" within "the exclusive network neighborhood").



interests of the community" in open speech.<sup>475</sup> Rightly fearful of a regulatory design that would "giv[e] to every citizen the same opinions, the same passions, and the same interests,"<sup>476</sup> the Commission has treated content and viewpoint diversity as the appropriate benchmark for regulating communications in the public interest. The actual course of FCC regulation, however, has extinguished the very "liberty" that gives rise both to raucous "faction" and to vigorous broadcast speech.<sup>477</sup>

As in Madison's days, the proper solution lies in the creation of a large expressive society.<sup>478</sup> Just as a large republic accommodates multiple points of view without permitting the harmful emergence of a dominant strain of rhetoric or political thought, a large production, transmission, and distribution network permits a greater diversity of mass speakers to express themselves. It took an extraordinary season of nation-building to achieve Madison's republic. By contrast, the story of Fox Broadcasting shows how a single refusal to regulate the market structure of mass communications led to a parade of large, fiercely competitive networks.

### C. MAKING SCARCITY SCARCE

In statutory and constitutional cases involving radio and television, the Supreme Court has assumed that the scarcity of the broadcast spectrum justifies extraordinary restraint on free speech. As the Court proclaimed in upholding the original fairness doctrine: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."<sup>479</sup> By the Court's own admission, this distinction has given over-the-air broadcasters "the most limited First Amendment protection."<sup>480</sup> Warped by the scarcity rationale, the free speech principles that "protect[] newspaper publishers from being required to print the replies of those whom they criticize" can be distorted into an apology for

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475. THE FEDERALIST NO. 10, at 54 (James Madison) (Edward Meade Earle ed., 1937).

476. *Id.* at 55.

477. *Id.*

478. *See id.* at 60-61.

479. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

480. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

requiring broadcasters to "give free time to the victims of their criticism."<sup>481</sup> Despite wilting judicial<sup>482</sup> and academic<sup>483</sup> criticism, and despite its own recognition that decisions made under this assumption can hardly inform other species of free speech jurisprudence,<sup>484</sup> the Court has repeatedly refused to overturn the scarcity rationale.<sup>485</sup>

The principal harm of "scarcity" analysis is legal myopia. Its adherents inevitably stress the scarce nature of the specific medium that the law happens to regulate. Fixated on the obvious, bedazzled judges, legislators, and regulators overlook far more significant structural issues. Whether a particular medium is "scarce" in some abstract sense bears precious little relation to the project of identifying the mass communications market structure that maximizes overall consumer welfare.<sup>486</sup> Every medium is scarce in the sense that some willing speakers will lack the opportunity to speak. What matters far more than scarcity is the *total effect* of all feasible methods for transporting a particular piece of information from the speaker to a prospective audience.<sup>487</sup>

We can overcome our obsession with scarcity by consulting

481. *Id.* (contrasting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) with *Red Lion*, 395 U.S. at 390).

482. *See, e.g.*, *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986) (arguing that the scarcity rationale uses a universal fact as a distinguishing principle), *cert. denied*, 482 U.S. 919 (1987).

483. *See, e.g.*, LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 87-90 (1991); L.A. SCOTT POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-209 (1987); MATTHEW SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 7-18 (1986); Coase, *supra* note 113 at 12-27 (1959); Note, *supra* note 415, at 1072-74 (1994).

484. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.").

485. *See, e.g.*, *Turner I*, 114 S. Ct. 2445, 2457 (1994) (noting that fundamental technological differences between cable and broadcast media undermine criticisms of scarcity analysis); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) (noting that the Court is reluctant to abandon the scarcity rationale without congressional prompting).

486. *See generally* SCHERER & ROSS, *supra* note 193, at 411-47 (reviewing empirical appraisals of the correlation between market structure and overall economic performance).

487. *See, e.g.*, *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956) (defining the relevant product market for antitrust purposes by measuring or estimating the cross-elasticities of demand for all potential substitutes for a particular product); UNITED STATES DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, *HORIZONTAL MERGER GUIDELINES* § 1.1 (1992) (same).

an indispensable element of antitrust analysis: defining the relevant product market. This issue, so central to the battery of antitrust doctrines hinging upon proof of market or monopoly power,<sup>488</sup> is persistently ignored by communications lawyers who assume that a client's current technology represents the sole product in question.<sup>489</sup> Measures of market dominance in broadcast television mean nothing unless they account for the erosive potential of cable, video rental, and other competitors for consumers' scarce leisure time.<sup>490</sup> This wisdom is implicit in the distinction between a television program's "rating" and its "share," and we ought not forget it even as more advanced technologies shove broadcast television off the infobahn.

#### D. THE NETWORK AS BOULEVARD AND AS BOTTLENECK

##### 1. Bridging Economics and Communications Regulation

The law's misguided obsession with "scarcity" has diverted attention from the regulatory focus that is appropriate: networks and their competitors. Broadcasting networks, conventional cable systems, direct broadcast satellites, and the fiber-optic telecommunications networks are all poised to provide the next generation of home entertainment technology. No matter how it is accomplished, mass communications depends on a "network" in the sense of "a mixture of facilities and rules which allows 'primary' market competitors to exchange or share transactions, physical traffic, energy, electronic impulses, or information."<sup>491</sup>

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488. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (tying arrangements); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 44 (1977) (vertical nonprice restraints); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-97 (1974) (horizontal mergers); *Associated Press v. United States*, 326 U.S. 1, 9-12 (1945) (concerted refusals to deal); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427-28 (2d Cir. 1945) (L. Hand, J.) (monopolization). See generally William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

489. Cf. *United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964) (treating metal and glass containers as practically interchangeable and their manufacturers as effective competitors "even though some such uses have traditionally been regarded as the exclusive domain of the competing industry").

490. See, e.g., VOGEL, *supra* note 196, at 9 (estimating that American adults spent 44.6% of their leisure time in 1990 on broadcast and cable television, with network affiliates capturing 53.2% of this time, or 23.7% of all leisure time), summarized in *In re Review of the Commission's Regulations Governing Television Broadcasting*, 10 F.C.C.R. 3524, 3597 (1995).

491. Donald I. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 UTAH L. REV. 999, 1002.

There must be a centralized facility for gathering, organizing, and transmitting audiovisual programs.

The network is the greatest achievement of the Road Warriors. Indeed, it is their *raison d'être*. A network, to be sure, exhibits many of the traits of a natural monopoly.<sup>492</sup> A completed network permits the repeated transmission of information at minimal marginal cost. Like the national electric power grid or the natural gas pipeline system, a communications network enjoys enormous economies of scale and network externalities as each incremental expansion in audience size increases the network's potential revenue from advertisers or viewer fees. By permitting simultaneous voice, audiovisual, and data transmission, a broadband network confers economies of scope on its operator and enhances the value of all services provided. It is no wonder that networks past, present, and future have exhibited a strong tendency to integrate vertically; accumulated capital enables them to absorb risks in program production and to overcome high barriers to entry into program distribution.

Modern mass communications thus reintroduced Harold Hotelling's famous "bridge" conundrum in an age of expanding, accelerating technology. How can we finance the massive initial outlay to bridge a barrier without resorting to toll charges exceeding the trivial marginal cost of each additional use?<sup>493</sup> It does not matter whether the barrier is the Charles River or the gap between a broadcast facility and its potential audience. Public ownership is a theoretically plausible solution,<sup>494</sup> but

492. See William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171, 178-89 (1994) (formally describing the monopolistic tendencies of a network within the framework of the "efficient component-pricing rule").

493. See generally Harold Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242 (1938). Cf. William S. Vickrey, *Some Implications of Marginal Cost Pricing for Public Utilities*, 45 AM. ECON. REV. 605 (1955). Hotelling's bridge problem is based on a celebrated Supreme Court controversy, see *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), which has inspired an impressive and informative literature of its own. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 130-39 (1977); Donald I. Baker, *Competition and Regulation: Charles River Bridge Recrossed*, 60 CORNELL L. REV. 159, 165-77 (1975); Donald I. Baker, *The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries*, 11 B.C. INDUS. & COM. L. REV. 571, 588-91 (1970).

494. See, e.g., WILLIAM J. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* (1969); OSKAR LANGE & FRED M. TAYLOR, *ON THE ECONOMIC*

the periodic outbreak of legislative hostility toward the Corporation for Public Broadcasting testifies to the political impracticability of nationalizing the infobahn.<sup>495</sup>

To remedy this shortcoming, we might consider antitrust law's "essential facilities" doctrine and its applications in various areas of economic regulation.<sup>496</sup> In *United States v. Terminal Railroad Association*,<sup>497</sup> an awe-inspiring trust had acquired exclusive control of a St. Louis facility connecting railroads east of the Mississippi River with railroads to the west. As an alternative to forced divestiture, the Supreme Court endorsed a plan requiring equal access to the Terminal Association's bottleneck facility. Although the essential facilities doctrine meets substantial judicial hostility whenever it is couched as a cure for all monopolistic ailments,<sup>498</sup> it lies at the heart of the recently completed "unbundling" of the natural gas transmission market.<sup>499</sup> It also animates the increasingly popular economic theories embraced by the notion of "contestability."<sup>500</sup> The Telecommunications Act's "open video systems" model effectively adopts this solution by permitting telephone companies to carry video programming and relying on standard regulatory tools to patrol any discrimination or cross-subsidization that may take

THEORY OF SOCIALISM (1938); A. C. PIGOU, *THE ECONOMICS OF WELFARE* (1960).

495. See generally 47 U.S.C. § 396 (1994) (establishing the Corporation for Public Broadcasting). Cf. *id.* § 394 (establishing the National Endowment for Children's Educational Television); *id.* §§ 391-393a (authorizing federal appropriations for public telecommunications facilities).

496. For a cautionary introduction to this doctrine, see generally Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990) (noting that the essential facilities doctrine invites compulsory sharing).

497. 224 U.S. 383 (1912).

498. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985) (declining to endorse or reject the doctrine explicitly); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979) (declining to order an inventor of new color film to disclose information on the film for the benefit of firms that competed against the inventor for film developing business), *cert. denied*, 444 U.S. 1093 (1980); cf. *Associated Press v. United States*, 326 U.S. 1, 23-25 (1945) (Douglas, J., concurring) (suggesting the applicability of the essential facilities doctrine in an antitrust dispute involving print journalism).

499. See 57 Fed. Reg. 13,267, 13,268-77 (April 16, 1992) (codified at 18 C.F.R. pt. 284 (1994)).

500. See generally Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111 (1984); Elizabeth E. Bailey, *Contestability and the Design of Regulatory and Antitrust Policy*, 71 AM. ECON. REV. 178 (1981).

place.<sup>501</sup> Nondiscriminatory access likewise holds the key to the continuing *Turner* litigation; neutral access rules offer a less restrictive alternative to draconian must-carry obligations.<sup>502</sup>

## 2. Withering Heights

The FCC has similarly misregulated vertical integration in mass media. Like the failed localism initiative, the FCC's efforts to patrol multiple ownership of broadcast facilities floundered because of the Commission's reluctance to acknowledge enormous economies of scale and scope. Half a century ago, the FCC's successful war against NBC<sup>503</sup> proved for all time that the true locus of economic power in mass communications lay in the network, the intangible but essential transmission facility in a commercial marketplace of ideas. As if willfully blind, the FCC launched ill-starred attacks on network participation in program production and local program selection. From the cesarean section that yielded ABC<sup>504</sup> to the induced birth of Fox Broadcasting,<sup>505</sup> the FCC has served as a clumsy midwife to the mothers of inventive entertainment.

Oversimplified, the rationale for regulation of transmission targeted that sector's monopolistic tendencies: after amassing the large initial capital outlay needed to launch a new network, an entrant may experience increasing returns on scale and constantly declining marginal costs of production over the relevant range of output. Similar barriers to perfect competition have always plagued book and newspaper publishing. Fear of monopoly loomed even larger with innovations facilitating the farflung, nearly instantaneous exchange of information. The Communications Act of 1934<sup>506</sup> accordingly subjects wire carriers—that are compared to pipeline companies—to certifi-

501. See Telecommunications Act, *supra* note 2, § 302(a), 110 Stat. at 121-24 (adding 47 U.S.C. § 653).

502. See *Turner II*, 910 F. Supp., 734, 783-84 (D.D.C. 1995) (Williams, J. dissenting), prob. juris. noted, 116 S. Ct. 1036 (1996).

503. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943) (upholding the FCC regulations against abuses by broadcast networks); *supra* text accompanying notes 200-221 (discussing the FCC's offensive against vertical integration and coordination in mass communications).

504. See *supra* text accompanying notes 164-183 (discussing the failed localism initiative).

505. See *Fox Broadcasting Co. v. FCC*, 5 F.C.R. 3211, 3211-14 (1990) (granting Fox's request for a waiver of the definition of "network" for the purposes of applying finsyn and PTAR).

506. 47 U.S.C. §§ 151-612 (1994).

cates of "public convenience and necessity"<sup>507</sup> and to FCC review of "just and reasonable" charges.<sup>508</sup> By contrast, the FCC licenses local radio and television broadcasters—the local distributors of this industry—according to a rationale that sounds of land-use or zoning law. The Act does provide expressly that "radio broadcasting shall not . . . be deemed a common carrier."<sup>509</sup> Because the electromagnetic spectrum is far too narrow to accommodate all who would use it, the federal government allocates speech rights according to a "public interest" standard premised on the incurable scarcity spectrum.<sup>510</sup> Wherewith the tautology of mass communications regulation: we regulate broadcast speech because a spectrum is scarce, and broadcast diversity is scarce because we regulate speech.

As with natural gas, so with mass communications. The deregulation of the natural gas industry suggests a possible solution to the communications paradox.<sup>511</sup> Like most miraculous visions, however, this solution lies beyond the senses until the would-be beholder undergoes a thorough reassessment of beliefs and a complete rebirth of faith.

#### E. THE NEW COMPETITION: IMPERFECT AND INTERMODAL

*MISS MOSEY: Nobody wants to come to shows no more. Get baseball in the summer, television all the time . . .*

*DUANE: Won't be much to do in town when the picture show close . . .*

— *The Last Picture Show* (1971)<sup>512</sup>

So inspired, we can begin to see the contours of certain truths about communications regulation. Economic and social progress depends on laws that protect "competition, not competitors."<sup>513</sup> The countless voices crowding the mass communica-

507. *Id.* § 214(a).

508. *Id.* § 201(b); *cf.* 15 U.S.C. § 717 (1994) (regulating the interstate transportation of natural gas according to a "public convenience and necessity" standard and mandating "just and reasonable" rates).

509. 47 U.S.C. § 153(h) (1994)

510. *See id.* §§ 301, 303, 307(a), 309(a), 310(d).

511. *See* Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992) (restructuring regulations to encourage a competitive unbundled gas market (codified at 18 C.F.R. pt. 284 (1995)).

512. *Hear* Jessie Lee Fulton & Jeff Bridges in *THE LAST PICTURE SHOW*, *supra* note \*.

513. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

tions markets are hardly a menacing "cacophony."<sup>514</sup> Rather, they represent the birth cries of an information revolution. In all facets of a society built on speech and the free exchange of ideas, "verbal cacophony is . . . not a sign of weakness but of strength."<sup>515</sup> In mass media's apocalyptic future, nothing silences the beautiful, cacophonous clatter of competition like regulatory barriers to entry.

The economic realities of mass media and mass marketing have exposed the fundamental error underlying both federal mass communications law and traditional free speech jurisprudence. As the most lucrative segment of the marketplace of ideas, mass communications proves as nothing else can "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>516</sup> The marketplace metaphor serves as the rallying cry for "the most important surviving strand of a general plea for *laissez-faire* and limited government."<sup>517</sup> In touting this metaphor, both the Supreme Court<sup>518</sup> and libertarian commentators<sup>519</sup> implicitly assume that the marketplace consists of numerous, small enterprises, each too small to affect the overall social fabric of speech through unilateral action. Ironically, so do the "new speech regulators" who express no confidence "in the invisible hand [of] 'the marketplace of ideas.'"<sup>520</sup> Like most of their libertarian antagonists, left-of-center crusaders against pornography and hate speech<sup>521</sup> presume that freedom of speech flows

514. Cf. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2528 (1994) ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

515. *Cohen v. California*, 403 U.S. 15, 25 (1971).

516. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

517. Bhagwat, *supra* note 73, at 174; see also Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 952 (1995) ("Those who would deregulate both speech and economic markets distrust government equally in both spheres.").

518. See, e.g., *Rosenberger v. Rector & Visitors*, 115 S. Ct. 2510, 2518 (1995); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

519. See, e.g., Coase, *supra* note 427; Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964); Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 70 (1992).

520. Sullivan, *supra* note 517, at 954.

521. See generally, CATHARINE A. MACKINNON, *ONLY WORDS* (1993); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343



from a marketplace populated by numerous, small speakers. One side hails the puny pamphleteer; the other denounced the spirit-killing classroom heckler. The only difference is that the new speech regulators allege catastrophic market failure and prescribe the specific remedy of secure speech markets for the victims of rampant sexism and racism.

In short, virtually all of us, regardless of political predilection, have placed the "street corner speaker"<sup>522</sup> of such classic as *Schenck v. United States*,<sup>523</sup> *Abrams v. United States*,<sup>524</sup> and *Gitlow v. New York*<sup>525</sup> at the center of the speech marketplace. This image of diverse speech through diverse speakers is consistent with the market structure prescribed by perfect competition: numerous small firms freely entering and exiting a market through cost-cutting and price competition.<sup>526</sup> In the world of mass media, however, the real players are a far cry from the "poor and puny anonymities" of the First Amendment's marketplace of ideas.<sup>527</sup> Thanks to natural entry barriers and the economics of mass marketing, the channels for electronic speech are few indeed and likely to remain in the hands of the Road Warriors.<sup>528</sup> Nor do (or should) mass speakers deliver products even remotely comparable to those generated by perfect competitors, which are "perfectly homogeneous in the sense that no buyer distinguishes between the products of any two suppliers."<sup>529</sup>

To the extent that the law has decided who shall broadcast by reference to the model of perfect competition, it has failed. First Amendment doctrine and mass communications regulation have indulged a preference for shopkeepers at the expense of most speakers and consumers of the mass media. We must acknowledge the inevitability of imperfect and intermodal competition in mass communications. The only sensible solution

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(1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

522. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

523. 249 U.S. 47 (1919).

524. 250 U.S. 616 (1919).

525. 268 U.S. 652 (1925).

526. SCHERER & ROSS, *supra* note 193, at 15-18.

527. *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting).

528. Cf. Bhagwat, *supra* note 312, at 174 ("Speakers are not numerous, nor are they fungible . . .").

529. Bailey & Baumol, *supra* note 500, at 113.

is to permit open warfare within the small but formidable club of Road Warriors. Further regulatory resistance is probably harmful and surely futile. "We must not forget that regulatory measures are temporary expedients, not eternal verities—if indeed they are verities at all."<sup>530</sup> Confronted with a record of regulatory failure, we should do what the United States Army should have done long ago in Vietnam: declare victory and leave.<sup>531</sup> What we need in mass communications law is unilateral disarmament, conducted with enough aplomb to permit the regulatory state a graceful surrender.

The traditional distinction between broadcasting and telephony—a distinction rooted in technology,<sup>532</sup> reinforced by economics and regulation,<sup>533</sup> and codified in law<sup>534</sup>—has practically disappeared. But one constant remains: the deep structure of competition endures despite radical technological transformations. Once we understand the true nature of mass communications, many longstanding legal myths wither away. Contrary to judicial portrayals of broadcasting as an industry that consumes exceedingly scarce spectrum while delivering alarmingly nondiverse programming, FCC-regulated program-

530. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting).

531. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 21 n.20 (2d ed. 1995) (attributing this statement to Senator George Aiken (R-Vt.) and describing the statement as "advice that seems unimpeachable in retrospect").

532. See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 31 (1983) (observing that technological limitations historically determined the uses of radio and wire technology).

533. See KELLOGG ET AL., *supra* note 14, § 1.3.4, at 17-20 (describing the related but eventually separate trails by which AT&T came to dominate telephony and RCA came to dominate broadcasting). Compare *United States v. American Tel. & Tel. Co.*, 1 DECREE AND JUDGMENTS IN CIVIL FEDERAL ANTI-TRUST CASES 483, 485 (D. Or. 1914) (reprinting an early consent decree in which AT&T agreed to stop acquiring competing independent telephone companies) with *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (affirming FCC regulations that prompted NBC, an RCA subsidiary, to divest what eventually became the American Broadcasting Company).

534. Compare 47 U.S.C. §§ 201-228 (1994) (regulating telephone companies as common carriers) with 47 U.S.C. §§ 301-399b (1994) (regulating broadcasters and other users of frequencies for wireless communications). Compare also *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978) (justifying the suppression of George Carlin's "seven filthy words" soliloquy—because broadcast radio has a "uniquely pervasive presence" in homes with children) with *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124-27 (1989) (requiring the FCC to justify its dial-a-porn restrictions as the "least restrictive means" available because telephone audiotext services are not a "uniquely pervasive" medium).

mers supply merely one stream of information and entertainment in a broader market notable for an abundance of outlets and a stunning diversity of viewpoints.

Over-the-air television faces stiff competition from new technologies. Ever since community antenna television fired its opening volley against broadcast television,<sup>535</sup> cablecasting and over-the-air broadcasting have waged a legal war that has brutally scarred First Amendment jurisprudence. Far from ending peaceably, the epic struggle between the technological brainchild of the 1940s and the electronic upstart of the 1960s culminated in the 1984<sup>536</sup> and 1992 Cable Acts.<sup>537</sup> The Supreme Court's 1994 attempt to resolve the must-carry controversy<sup>538</sup> failed to stem a judicial attack on the last legal barrier to the telephone companies' full-scale entry into mass communications.<sup>539</sup> Now the Court must revisit must-carry, mere months after Congress heralded the new age of phone company involvement in video programming and distribution.

But even natural monopolies are not entirely immune from the disciplining effects of competition. Even as Supreme Court was pondering cable's regulatory fate in 1968,<sup>540</sup> Harold Demsetz recognized that "there is no clear or necessary reason for *production* scale economies to decrease the number of *bidders*."<sup>541</sup> Many would-be providers can offer to deliver a good or service; MCI's legendary and successful effort to loosen AT&T's grip on the long-distance telephone market illustrates how even an underfunded upstart can rattle the most en-

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535. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *supra* text accompanying notes 260-270 (discussing opening round in the regulatory struggle between television broadcasting and cable broadcasting).

536. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C. §§ 521-559 (1994) and other scattered sections of 47 U.S.C.(1994)).

537. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered portions 47 U.S.C. (1994)).

538. See *Turner I*, 114 S. Ct. 2445, 2451-73 (1994) (applying an intermediate level of scrutiny in testing the constitutionality of "must-carry" provisions).

539. See cases cited *supra* note 357.

540. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-81 (1968) (recognizing the FCC's authority under the Communications Act of 1934 to regulate CATV systems).

541. Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 57 (1968) (emphasis in original).

trenched of incumbent monopolists.<sup>542</sup> Absent collusion between monopolists and potential entrants, and absent prohibitive negotiation costs, potential buyers can pick among multiple providers.<sup>543</sup> Even during the ascendancy of strict entry and price regulation of the natural gas market by the old Federal Power Commission, large retail purchasers of natural gas could spur *geographic* competition by accepting service bids from different pipelines.<sup>544</sup> More recently, industrial gas consumers have successfully "bypassed" local distribution companies that (with the complicity of redistribution-minded state regulators) had previously staggered retail gas rates to subsidize residential consumers.<sup>545</sup>

In the mass communications context, Demsetz competition may take place either by regulatory fiat or by consumer choice. As an alternative to franchising cable operators, municipalities may simply allow competing cablecasters to bid for subscribers.<sup>546</sup> Most mass media consumers are already free to choose

542. See *Microwave Communications, Inc.*, 18 F.C.C.2d 953, 953-67 (1969) (granting MCI's application for construction permits to establish new microwave radio communication facilities in the Midwest); see also *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 367-80 (D.C. Cir. 1977) (allowing MCI's Execunet telephone service to compete against AT&T), *cert. denied*, 434 U.S. 1040 (1978); *Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1145 (9th Cir.) (opening the door for new specialized common carriers to compete with established carriers), *cert. denied*, 423 U.S. 836 (1975).

543. See Demsetz, *supra* note 67, at 57.

544. See, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 652-62 (1964) (blocking a frustrated pipeline's effort to acquire a pesky, smaller competitor that had underbid the acquiring pipeline in serving the lucrative California gas market).

545. See, e.g., *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1414-15 (10th Cir. 1992) (reviewing FERC's decision to authorize an industrial consumer to purchase gas directly from an interstate pipeline); *Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1296-99 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); cf. *Michigan Consol. Gas Co. v. Energy Regulatory Admin.*, 889 F.2d 1110, 1110-13 (D.C. Cir. 1989) (approving the importation of 25 billion cubic feet of gas from Canada to replace costlier gas previously supplied by a local distribution company). See generally Martin V. Kirkwood, Comment, *Distributor Bypass in the Deregulated Natural Gas Industry—Are Consumers Being Left in the Cold?*, 39 CATH. U. L. REV. 1157, 1181-85 (1990); Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 HARV. L. REV. 1306, 1314-17 (1990).

546. See Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy*, 7 YALE J. ON REG. 65, 66 (1990) (favoring greater competition in local cable markets); Oliver Williamson, *Franchise Bidding for Natural Monopolies—In General and with Respect to CATV*, 7 BELL J. ECON. & MGMT. SCI. 73 (1976).

among three "natural" monopolists for their primary supply of audiovisual home entertainment: broadcast television, cable television, and direct broadcast satellite services. Any couch potato armed with a universal remote control instinctively understands what the Supreme Court has confessed: "cable and satellite television" are effectively interchangeable media, since the "mixture of news, information, and entertainment" provided by cable television does not differ "systematically in its message from that communicated by satellite broadcast programming."<sup>547</sup> The corrosive effect of intermodal competition seriously constrains the market power of even the seemingly invincible, locally franchised cable operator.

The failure to recognize the Road Warriors as intermodal competitors is even more debilitating than the scarcity fallacy. Demsetz competition between Road Warriors wielding different technology keeps all potential monopolists at bay; the consumer's ability to choose among competing forms of mass media undermines any one technology's ability to monopolize the market. As befits a legal regime whose most celebrated adventure was the creation and eventual dismemberment of the Bell System,<sup>548</sup> federal communications law has repeatedly mismanaged the task of taming monopoly. Though fear of monopoly has theoretically justified the legal command to set "just and reasonable" charges for wire or radio communications performed by common carriers,<sup>549</sup> Congress and the FCC historically preferred coddling Ma Bell over commending the myriad competitors who sought to erode AT&T's monopoly power. Nothing shakes the cathedral of federal mass communications law like a "cacophony of competing voices,"<sup>550</sup> the cackle of upstarts who reject the Communications Act's faith in overly structured competition. The "great fear" that now grips the law on the eve of the technological revolution

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547. *Leathers v. Medlock*, 499 U.S. 439, 449 (1991); see also *Medlock v. Pledger*, S.W.2d 202, 204 (1990) (finding cable television and satellite broadcast services to be "substantially the same"), *aff'd in part and rev'd in part sub nom. Leathers v. Medlock*, 499 U.S. 439 (1991).

548. *Compare United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 226-27 (D.D.C. 1982) (Bell divestiture decree), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) with Telecommunications Act, *supra* note 2, §§ 101-151, 601, 110 Stat. at 61-107, 143-44 (new provisions on competition in local and long-distance telephony).

549. See 47 U.S.C. § 201(b) (1994).

550. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); accord *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980).

in communications is "a fear not of one but of many."<sup>551</sup>

A sensible antitrust-style approach to mass communications law thus prescribes a general attitude favoring deregulation.<sup>552</sup> We should permit all entrants to offer any service to any willing buyer, regardless of the entrant's regulated status or competitive prowess, whether realized or merely feared. The size of each competitor is no concern; the *number* of competitors matters even less. So long as freedom of entry and freedom of exit shall reign, the mass communications market will continue informing, educating, and entertaining the world. The only genuine regulatory concern that remains is fear of discrimination. In patrolling self-dealing by the owners of tomorrow's essential communications facilities, regulators addicted to the public utility model should heed the lessons of First Amendment jurisprudence and choose the least restrictive alternative available for minimizing potential discrimination.<sup>553</sup>

## V. THE CLARION CALL

Just when Congress and the courts thought that it was safe to regulate the nascent cablecasting monopoly, video programmers discovered that the existing network of telephone connections offered an alternative avenue into America's living rooms. The evolution of the network should be familiar by now. What began as the Union Pacific Railway between Sacramento and Omaha<sup>554</sup> became the railroad system and eventually the interstate highway system; the point-to-point mail delivery system became the second-class mass marketing machine; Guglielmo Marconi's wireless telegraph yielded eventually to

551. T.S. ELIOT, *MURDER IN THE CATHEDRAL* 19 (1935).

552. See SCHERER & ROSS, *supra* note 193, at 37 (describing a "third-best" regulatory approach of "choos[ing] among alternative *general* policies, trying to adopt the policy that *on average* has the most favorable resource allocation implications" (emphasis in original)); Chen & Adams, *supra* note 20 (urging the adoption of such "third-best" approaches in all laws affecting market structure and industrial organization).

553. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."); cf. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (requiring a state that burdens religiously motivated practices to show that its chosen legal tool "is the least restrictive means of achieving some compelling state interest"). *But see Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989).

554. See *Pacific Railway Act*, ch. 120, 12 Stat. 489, 490 (1962).

broadcast radio's empire of the air.<sup>555</sup> Now the independent Bell operating companies have fought to enter the mass communications market on two fronts. This final form of intermodal competition threatens to reshape the mass media markets in the image of the original communications monopoly, the Bell system.

At the moment, the Bell operating companies control most of the local and the short-haul telecommunications business in the United States. Unlike cable television, which can do no more than transport data from a central source downstream to subscribers, local exchanges are switched systems and can connect any subscriber on the network to any other.<sup>556</sup> The capacity to call anyone else who has a telephone implies the capacity to communicate interactively with the originator of data or video programming delivered within a local exchange. The gradual deployment of high-capacity optic fiber promises to give the titans of telephony a momentary technological edge over coaxial cable systems.

The heart of the old Bell System—Ma Bell itself, the recently rechristened and restructured AT&T, Inc.—stands poised to launch yet another offensive in the mass media wars: wireless services delivered through McCaw Communications.<sup>557</sup> Might this merger foreshadow the birth of new communications empires, spanning both traditional telephony and wireless networks as yet unforeseen?<sup>558</sup> In a span of days during January 1996, three of the biggest Road Warriors emphatically answered “yes”: as AT&T announced plans to enter the satellite

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555. See EDWARD A. DOERING, *FEDERAL CONTROL OF BROADCASTING VERSUS FREEDOM OF THE AIR* 4 (1939) (noting how Marconi thought of radio as a ship-to-shore messaging system and patented his invention accordingly as a “wireless telegraph”).

556. See *In re Telephone Co.-Cable Television Cross-Ownership Rules*, 7 F.C.C.R. 5781, 5821 (1992) (identifying interactivity as the key distinction between “one-way” cable television and video dialtone), *terminated by Telecommunications Act*, *supra* note 2, § 302(b)(3), 110 Stat. at 124.

557. See *Craig O. McCaw & American Tel. & Tel. Co.*, 9 F.C.C.R. 5836, 5839 (1994) (approving the McCaw-AT&T merger), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *cf. In re Craig O. McCaw & American Tel. & Tel. Co.*, 10 F.C.C.R. 11,786 (1995) (refusing to reconsider the FCC's approval of the McCaw-AT&T merger). See *generally SBC Communications*, 56 F.3d at 1488-90 (tracing the regulatory and judicial proceedings accompanying this merger); *United States v. Western Elec. Co.*, 46 F.3d 1198, 1201-02 (D.C. Cir. 1995) (same).

558. See *Sidak*, *supra* note 1, at 1224.

broadcasting business by acquiring DirecTV,<sup>559</sup> MCI and Rupert Murdoch's News Corporation won "a brief but spirited bidding war . . . for the [FCC's] last unclaimed orbital slot" designated for direct satellite broadcasts.<sup>560</sup> In search of comparable opportunities to expand old lines of business and conquer new ones, the interexchange carriers, the regional Bell operating companies, and cable conglomerates are all scrambling to acquire or be acquired in a frenzy of activity reminiscent of the mergers-and-acquisitions craze of the decade past.

Perhaps the most remarkable aspect of this story is what is *absent* from it. Far removed from their conventional role as the FCC's regulatory nemesis, the broadcast networks have contributed little or nothing to this struggle. The old players—networks, local broadcasters, and broadcasting conglomerates—have suddenly found themselves in the same position that many silent movie stars occupied after the invention of the "talkies." How strange a denouement to this story of imperfect competition and its regulation.<sup>561</sup>

Mass communications law's last picture show has depicted the close of a regulatory era—and perhaps the dawn of a new one. When cable's Golden Age had just begun to tarnish, the FCC opened the door to direct transmissions from communications satellites to viewers' homes.<sup>562</sup> The scarcity rationale that has dominated mass communications law is yielding to the

559. See Mark Landler, *AT&T Enters TV Business Via Satellite Broadcasting*, N.Y. TIMES, Jan. 23, 1996, at D1.

560. Edmund L. Andrews, *News Corp. and MCI Win Satellite Slot*, N.Y. TIMES, Jan. 26, 1996, at C1; see also Edmund L. Andrews, *A Cable Giant Drops Out of Satellite Auction*, N.Y. TIMES, Jan. 25, 1996, at C1 (reporting that cable giant Tele-Communications Inc. was abandoning its efforts to acquire the slot eventually awarded to News Corp. and MCI).

561. Cf. Posner, *supra* note 70, at 611-16 (criticizing the "natural monopoly" rationale that often obscures regulators' actual but unarticulated fear of excessive competition).

562. See *ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 756 (D.C. Cir. 1984) (holding that the Communications Satellite Act of 1962 gave the FCC "broad discretion" to permit a wholesaler of satellite services to sell its services directly to the public); Elletta S. Callahan, Note, *Cable Television vs. Direct Broadcast Satellites: Market Competition Replaces the FCC as the Guarantor of the Public Interest*, 34 SYRACUSE L. REV. 851, 868-86 (1983) (analyzing the FCC's passive regulation of direct broadcast satellites); Gary A. Lehman, Note, *New Wave Policy: Protection of Direct Broadcasting Satellite Transmission Under Section 605*, 14 SW. U. L. REV. 590, 601-11 (1984) (examining the applicability of former law developed under 47 U.S.C. § 605 to the then-emerging direct broadcast satellites).



problems of competitive excess. Instead of rationing allotments of scarce broadcasting frequencies, mass media regulators have already begun worrying about cream-skimming, excessive competition, and cross-subsidies. Price-sensitive subscription services have seized ever larger market shares in an industry formerly characterized by "free" broadcasts and nonprice competition. Three years ago, Bell operating companies celebrated a small victory in their quest to enter the information services market.<sup>563</sup> They now stand triumphant, having won a far greater battle to enter the long-distance and video programming markets.

The ultimate winner of the communications wars, at least for a very brief moment in this most volatile industry, may be neither broadcast television nor its frequent antagonist, cablecasting. In a perverse twist of fate, the gold-plated telephone network built during the Bell system's long tenure may give the Bell operating companies an insurmountable lead in the race to conquer tomorrow's mass media markets. The desire for private, person-to-person communications may already have had the incidental effect of financing the most sophisticated mass media facility ever imagined: interactive, "on-demand" information services and audiovisual programming delivered over phone lines.

Just as Marconi underestimated the communicative potential of his wireless telegraph, Alexander Graham Bell may have undersold the telephone. But one factor remains unsettled: Will the law continue to obstruct technological evolution and economic progress? Congress, the FCC, and the federal courts have always had the power either to permit or to block the completion of a circle that began with Bell's historic request for help, "Mr. Watson, come here, I want you."<sup>564</sup> The clarion call of competition has never sounded louder. The implementation of the Telecommunications Act of 1996 will soon tell us whether Bell truly succeeded in his grander project of educating the deaf.

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563. See *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir.) (finding reasonable the Department of Justice's conclusion that public interest required removal of restrictions on Bell operating companies engaging in information service businesses), *cert. denied*, 114 S. Ct. 487 (1993).

564. *KELLOGG ET AL.*, *supra* note 14, § 1.2.1.