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Media Ownership Regulation, the First Amendment, and Democracy's Future

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Media Ownership Regulation, the First Amendment, and Democracy's Future

Adam Candeub*

Unprecedented consolidation has swept the media industries. At the same time, court rulings have savaged the Federal Communication Commission's (FCC) limits on corporate control of radio, television, and newspapers, leading to stacks of proceedings languishing at the FCC. These rulings have fomented a vocal political struggle between consumer groups advocating ownership restrictions and the media industry pressuring for deregulation.

This Article argues that the FCC's regulations have failed because they have misconstrued their goal, viewing media ownership as a sort of antitrust law for the "marketplace of ideas." The FCC attempts to find the "optimal number" of independently owned media outlets, which it assumes will create a sufficient diversity of voices and viewpoints. As this Article shows, using this antitrust metaphor to guide policy confuses social and economic goals, creating an incoherent regulatory standard ripe for judicial reversal.

Rather than attempting to identify the optimal number of media outlets, the FCC should strengthen the vital function the media plays in a democratic society: decreasing citizens' costs in monitoring government. By reading the newspaper or watching the news, citizens can learn about available government benefits and detect elected officials' inappropriate

* Associate Professor, Michigan State University College of Law. Thanks to the participants of the Wharton Colloquium on Media and Communications Law at the University of Pennsylvania for their commentary on an earlier draft of this paper, in particular Ellen Goodman, Gerry Faulhaber, Monroe Price, Christian Sandvig, Kevin Werbach, and Christopher Yoo. Thanks also to Steve Wildman, Peter Alexander, Barbara Bean, and Keith Brown. Thanks to H.W. Candeub and Lara Leaf for their editing, and to the tremendous library research staff at MSU College of Law. In the interest of disclosure, I worked on several of the media ownership proceedings discussed in this Article while an attorney at the Federal Communications Commission. *Pro Julia omnibus operibus perfectibus.*

behavior without incessantly watching C-SPAN or making endless FOIA requests. The FCC's regulations, therefore, should maximize the output of news about politics, rendering the agency relationship between citizens and politicians more effective.

Rather than use direct subsidies, a policy response many have urged but which presents significant problems, the FCC should alter the quantity and nature of news production through its regulation of media industry's ownership and geographic structures. New economic and social science research has shown that these structural features strongly influence news output and content. For instance, the greater degree of overlap between media markets and political jurisdictions increases the amount of political news coverage. Media ownership regulation must utilize these insights to maximize output of political news.

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INTRODUCTION

In recent years, unprecedented consolidation has swept the media industries. The number of independent television station owners has dropped 40% since 1995.¹ The number of commercial radio station owners has declined by 34% since 1996, and a nationally dominant radio station group, Clear Channel Communications, has emerged.² These consolidations have led to a handful of media conglomerates determining what programming Americans watch and hear. Tom Wolzien of Bernstein Research, a noted media industry analyst,

¹ S. REP. NO. 108-141, at 2-3 (2003), as reprinted in 2003 U.S.C.C.A.N. 145, 155-59.

² *Id.*

observes that five media conglomerates control “about a 75% share of prime-time viewing,” and if current trends continue, will control “the same percentage of TV households in prime time as the three net[work]s did 40 years ago.”³ This dramatic change has generated tremendous public interest, with many in what can be dubbed the “anti-big media” political movement calling upon the Federal Communications Commission (“FCC” or “Commission”) to maintain or expand ownership restrictions.⁴

At the same time, recent judicial decisions have savaged the FCC’s media regulations, which since the New Deal have controlled media consolidation by limiting the size and extent of corporate ownership of radio, television, and newspapers.⁵ These rulings have led to a quagmire of unresolved media ownership proceedings that currently languish before the FCC. In addition, the Supreme Court’s fractured pluralities in *Turner Broadcasting System, Inc. v. FCC (Turner I)* and *Turner Broadcasting System, Inc. v. FCC (Turner II)* have placed many of the FCC’s media ownership regulations under stricter First Amendment scrutiny.⁶

Media ownership limits have failed because the FCC has insufficiently analyzed their underlying purpose. Uncritically adopting the “marketplace of ideas” as a guiding metaphor for the First Amendment, the FCC treats media ownership regulation as an antitrust regime governing this marketplace. The FCC aims to ensure enough independent voices and viewpoints so as to “achiev[e] ‘the widest possible dissemination of information from diverse and antagonistic sources.’”⁷ The FCC therefore pursues an inherently

³ Tom Wolzien & Mark MacKenzie, *Returning Oligopoly of Media Content Threatens Cable’s Power*, BERNSTEIN RESEARCH, (Sanford C. Bernstein & Co., N.Y., N.Y.), Feb. 7, 2003, at 3, available at http://www.creativevoices.us/cgi-upload/news/news_article/Bernsteinstudy.pdf.

⁴ For an excellent analysis of the current struggle, see ERIC KLINENBERG, *FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA’S MEDIA* 17-36, 294 (2007). For an even more recent report of the current state of affairs, see Amy Schatz, *Nonprofit Takes on Big Media*, WALL ST. J., Mar. 7, 2007, at A2.

⁵ See, e.g., *Prometheus Radio Project v. FCC*, 373 F.3d 372, 386 (3d Cir. 2004) (rejecting most of 2003 Biennial Media Ownership Order); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (remanding FCC’s local broadcast ownership rules); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (remanding FCC’s national broadcast ownership limits); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (remanding FCC’s national cable limits).

⁶ 520 U.S. 180 (1997) (*Turner II*); 512 U.S. 622, 669 (1994) (*Turner I*). In both *Turner I* and *Turner II*, no one opinion garnered five votes. Rather, in both decisions, a concurring justice decided the case.

⁷ *Nat’l Citizens Comm. for Broad. v. FCC*, 555 F.2d 938, 949 (D.C. Cir. 1977)

vague, even meaningless, regulatory inquiry into how many “voices” exist in a given media market. Courts, in rejecting virtually every FCC media ownership regulation in recent years, have recoiled at the FCC’s inconsistent, unprincipled answers.⁸

Rather than protect the number of “media voices,” the FCC should protect the essential function the media serves in a democracy — to minimize the difficulties citizens face in monitoring government. By reading the newspaper or watching the news, citizens can learn about available public benefits and detect inappropriate behavior of public officials without having to read the Federal Register, make Freedom of Information Act (“FOIA”) requests, or watch C-SPAN incessantly. Media regulation should create ownership structures that maximize the amount of political news, making it easier for citizens to monitor government.⁹

The FCC can do this because it regulates the ownership and geographic structure of the media industry, both of which affect news content and quantity. Economic structure determines and constructs, to a real and quantifiable degree, political and social media coverage. Recent scholarship shows (1) increased exposure to news media will increase voter turnout and the ability of those voters exposed to news-rich media to obtain government benefits, (2) the high fixed-cost/low marginal-cost structure of media production leads to political news

(quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1944)). The FCC has explicitly based its media ownership regulation on this judicial understanding. See, e.g., *In re 2002 Biennial Regulatory Review — Review of the Comm’n’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996*, 18 F.C.C.R. 13,620, 13,627 (2003) [hereinafter 2002 Biennial] (relying on and quoting this language).

⁸ Part III examines the FCC’s inconsistencies in determining what constitutes a voice. Compare *Prometheus Radio Project*, 373 F.3d at 403 (“The Commission determined that broadcast television, daily and weekly newspapers, radio, and Internet (via cable connection and DSL, dial-up, or other connections) are the relevant contributors to viewpoint diversity in local markets.”), with *Sinclair*, 284 F.3d at 164 (“[T]he Commission . . . limit[ed] ‘voices’ to broadcast television involving the ‘unresolved questions about the extent to which [non-broadcast] alternatives are widely accessible and provide meaningful substitutes to broadcast stations.’” (quoting *Review of the Comm’n’s Regulations Governing Television Broad.*, 14 F.C.C.R. 12,903, 12,919 (1999))).

⁹ This Article distinguishes between “local news” and “local political news.” For instance, human interest stories do not further core political First Amendment values. Indeed, local news’ seeming obsession with crime may harm public discourse and democratic function, as Jerry Kang has forcefully and creatively argued. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495 (2005) (“[T]he FCC has recently redefined the public interest so as to encourage the production of programming that makes us more biased.”).

aimed at the media market's median taste,¹⁰ and (3) the degree to which media markets are contiguous with particular geographic and political boundaries can determine the level of output of political news.¹¹ While this type of research is still in its infancy, it must guide FCC regulation.

This Article aims to add the insights of political economy to the academic commentary about media ownership. On one side of the current debate are commentators who advocate "democracy-based" or "social value" regulation and support ownership regulation to enhance democratic values. Opposing them are market-based commentators who argue that the media should carry content that most appeals to viewers as measured by market behavior and who see no need, beyond antitrust enforcement, for media ownership regulation.¹² If people

¹⁰ Peter J. Alexander & Keith Brown, *Policy Making and Policy Tradeoffs: Broadcast Media Regulation in the United States*, in *THE ECONOMIC REGULATION OF BROADCASTING MARKETS* 255, 258-59, 272 (Paul Seabright & Juergen von Hagen, eds., Cambridge Univ. Press 2007) ("[M]edia firms face large up-front fixed costs and constant (and often low) marginal costs. Any given program or content therefore required an audience large enough to cover these up-front fixed costs" (citing Michael Spence & Bruce Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q.J. Econ. 103 (1977))).

¹¹ See *infra* Part IV.

¹² Compare PETER HUBER, *LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOM* 3-9, 206 (1997) ("In the telecom . . . commission law leads society down the road to serfdom From markets and common law, by contrast, there emerges spontaneous order that is rational, efficient, and intelligent."), THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 45 (1994) ("[W]e doubt the wisdom and utility of these diversity-based roles for the FCC's implementation of the public interest standard. In our judgment, arguments that the Commission should assume such roles underestimate the values served by competition among broadcasters, overestimate the FCC's capacity for wisdom and beneficence, and sanction dangerous degrees of government control over the flow of information."), Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207, 230-33 (1982) ("[M]arketplace forces can and indeed do, affect the success or failure of television programming"), Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 *MICH. ST. L. REV.* 671, 698 ("[A]ntitrust merger enforcement in economic markets for advertising and other media services will tend to stop ownership concentration long before it becomes a threat to competition in the broader marketplace of ideas. Moreover, even if the FCC believed, erroneously, that the popularity of a given medium should be given weight in assessing competition in the marketplace of ideas, antitrust enforcement already accomplishes this."), Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 *HARV. J.L. & PUB. POL'Y* 503, 521-23 (2001) (advocating "the rewards of deregulation" and claiming that FCC "has closed its eyes to economic reality and continued to cling to the past"), Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 *S. CAL. L. REV.* 669, 673 (2005) (noting

want yet another degrading reality dating show, it is not the government's job to give them *The NewsHour with Jim Lehrer*.¹³ Democracy-based commentators tend to see ownership restrictions as an end unto themselves and fail to connect them to any quantifiable social or political goal.¹⁴ They therefore do not offer prescriptions as to the size and nature of ownership restrictions and often seem to argue for media deconcentration and viewpoint diversity for their own sake. At the same time, market-based commentators treat media consumption as any other good, failing to recognize the role it plays in effective democracy. Viewing regulation as a tool to improve the agency relationship between citizens and elected officials connects quantifiable social goals to an economic framework.¹⁵

Last, this Article's prescriptions apply to today's media, one that will still be with us for a decade or so, but which will transform in the face of blogs, YouTube, and increasingly pervasive and powerful Internet applications. The Internet changes the cost structure and geographic shape of media, creating an entirely different set of regulatory

"FCC's structural regulations . . . tend to reduce the overall quantity and quality of media programming"), and Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 276-77 (2003) (same) [hereinafter Yoo, *Rise and Demise*] (arguing that FCC's media-specific regulation constituted incoherent approach to First Amendment in addition to being inefficient), with ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, & DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935*, at 6 (1993) ("The nature of the control and structure of the mass media is an explicitly political issue that should be the subject of public discussion."), CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 151 (1993), C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 734-39 (2005) (FCC's structural regulation furthers "fairer, more democratic allocation of communications power"), and Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 27-28 (2004) (arguing for "new class of cyberlawyers, who understand the import of technological design on free speech"), Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace Of Ideas*, 2000 U. ILL. L. REV. 813 (2000) (arguing that deconcentration of media best protects ideological diversity), Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 582-94 (2000) (demonstrating that FCC's deregulatory agenda coexists with regulatory counterweight including self-regulation).

¹³ Some have recognized the need for dialogue between the camps. Robert Entman & Steven Wildman, *Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the "Marketplace of Ideas,"* 42 J. COMM. 5, 14 (1992).

¹⁴ See, e.g., SUNSTEIN, *supra* note 12, at 23-27.

¹⁵ This project is akin to that outlined by Lili Levi to "experiment with structural regulations designed to promote journalistic values." Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1323 (2007).

challenges. The new Internet media may cater to more individualized and fractured tastes, ignore local, state, and federal political institutions, and be even more beholden to the goals of advertisers who, of course, constitute broadcasters' revenue source.¹⁶ Faced with this media dystopia, Professor Cass Sunstein and others have suggested direct government subsidies for news production.¹⁷ To avoid the politicization of news reporting, which direct government subsidies might easily induce, this Article suggests that the government should encourage political news coverage by treating it as a charitable or artistic activity, with tax exemptions for entities that produce such news services and tax deductions for those who subscribe to these services.

The Article proceeds as follows. Part I briefly outlines the FCC's current ownership regulation. Part II analyzes its endemic failures before the U.S. Courts of Appeals. It argues this failure stems from the intractability of "viewpoint diversity" as a regulatory concept which, in turn, stems from a "Holmesian" vision of the First Amendment. Part III examines why diversity fails as a regulatory concept. Part IV presents a new basis for media ownership regulation: agency theory and monitoring costs. It briefly reviews the social scientific evidence connecting media industry structure with media output and political activity. Part IV also shows how some of these insights can be applied to ownership regulatory questions. Part V argues for a unified standard of review of media ownership regulation, one that recognizes

¹⁶ For an analysis of how advertiser-driven media can affect media content, see C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 341 (1997). For an analysis of how conglomeration can affect local broadcasters power and control, see Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting is Good for the Country*, 46 WM. & MARY L. REV. 439, 443 (2004).

¹⁷ See, e.g., C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 94, 121 (W. Lance Bennett & Robert M. Entman eds., 2002); SUNSTEIN, *supra* note 12, at 86, 114-18 (discussing the "aggressive strategy . . . to impose a tax on advertising proceeds from the newspaper or broadcasting industry as a whole and to use the proceeds to subsidize programming"); CASS SUNSTEIN, *REPUBLIC.COM* (2001); C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 902-13 (2002) [hereinafter Baker, *Media Concentration*]; C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998) [hereinafter Baker, *Media That Citizens Need*]; Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1391-92, 1461-65 (2004) ("The use of subsidies, in the form of cash or non-cash incentives, permits government to pursue media political goals across all media and with far less formidable First Amendment constraints."). For a discussion of this intellectual divide, see Howard A. Shelanski, *Antitrust Law and Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 372-74 (2006).

its inherently political, rather than economic, nature. Finally, Part VI looks to the future — a media future with economic incentives very different from today's.

I. THE FCC'S REGULATION OF MEDIA OWNERSHIP: A BRIEF HISTORY AND INTRODUCTION

The Communications Act of 1934 requires the FCC to distribute rights to use the broadcast spectrum in a manner that serves “the public interest, convenience, and necessity.”¹⁸ The public interest standard is the “touchstone for the exercise of the Commission's authority.”¹⁹ Pursuant to this authority, the FCC has restricted media ownership in radio almost since the agency's inception over seventy years ago, preventing one individual or firm from owning “too many” radio stations.²⁰ The FCC nearly always considered furthering diversity in ownership as a goal in awarding radio licenses, and later applied this principle to television broadcast licenses.²¹ The history of these limits is one of convoluted political accommodations rather than theorized regulation. The following is not intended to be an exhaustive account of each turn and wriggle in this regulatory history, but rather a brief introduction to the significant regulatory trends, setting forth the current state of important media regulations.

One of the FCC's earliest efforts to restrict media ownership illustrates the haphazard and politicized nature of media ownership regulation. In a note to his FCC chairman, James L. Fly, President Roosevelt wrote simply: “Will you let me know when you propose to have a hearing on newspaper ownership of radio stations.”²² Roosevelt carried an animus against newspapers in general, which he believed

¹⁸ Communications Act of 1934, 47 U.S.C. § 310(d) (2000).

¹⁹ *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

²⁰ See generally Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1485 (2004) (FCC acknowledging that “limiting horizontal consolidation of ownership . . . is the most reliable means of promoting ‘viewpoint diversity’”); Loy A. Singleton & Steven C. Rockwell, *Silent Voices: Analyzing the FCC “Media Voices” Criteria Limiting Local Radio-Television Cross-Ownership*, 8 COMM. L. & POL'Y 385, 387 (2003) (“At its inception, the Communications Act of 1934 provided the [FCC] with authority to regulate concentrations of [media] ownership in the public interest.”).

²¹ See LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 68-74, 78 (1987).

²² *Id.* at 72.

opposed and effectively undermined much of his New Deal legislation. Thus, he hoped to limit newspaper ownership of radio stations.²³

Fly never achieved the goal of explicitly prohibiting newspaper acquisition of broadcast stations (a prohibition that had to wait for President Nixon, another chief executive who had issues with newspapers). Rather, the FCC used diversification of ownership informally on a case-by-case basis, laying the groundwork for adoption of an across-the-board rule. In general, the FCC's rules, as the following section briefly describes, followed a tortuous path of unofficial licensing practices that developed into formal rules and then changed again under various political pressures.

A. *The Origins of Radio and Television Limits*

In 1938, the FCC imposed a strong, informal presumption against granting licenses that would create radio duopolies within the same market and service band (FM or AM).²⁴ This presumption against local duopoly ownership became an absolute in 1940 when the Commission adopted the rule prohibiting common ownership of two FM stations²⁵ and, in 1943, two AM stations with similar service areas.²⁶ At the same time that the FCC adopted FM limits, it limited the infant television industry by restricting the number of stations under common ownership to three.²⁷

²³ ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES* 170 (1968).

²⁴ *Genesee Radio Corp.*, 5 F.C.C. 183, 186 (1938); see also Herbert H. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COMM. L.J. 1, 4 (1974).

²⁵ See *In re* Amendment of Section 73.3555 of Comm'n's Rules Relating to Multiple Ownership of AM, FM & Television Broad. Stations, 100 F.C.C.2d 17, 19-23 (1984) [hereinafter *Multiple Ownership*] (describing history of limits); see also *In re* Revision of Radio Rules & Policies, 7 F.C.C.R. 2755, 2761 (1992) (Final Report and Order); *In re* Amendment of Sections 73.35, 73.240 & 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations, 22 F.C.C.2d 339, 346 (1970) (First Report and Order).

²⁶ See 1944 FCC TENTH ANNUAL REPORT 10-11 (1944); *In re* Amendment of Sections 3.35, 3.240 & 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM & Television Broad. Stations, 18 F.C.C. 288, 295-96 (1953) (Report and Order). Typically, television and radio spectrum is allocated geographically by "community." These allocation correspond to the Nielsen Company's "Designated Market Areas" ("DMAs"), which broadcasters and advertisers use to sell airtime.

²⁷ See *Multiple Ownership*, 100 F.C.C.2d at 21-22.

In 1941, the FCC passed the first national ownership limits, the Chain Broadcasting Rules.²⁸ These rules were some of the FCC's earliest media regulations. Upheld in a landmark case, *National Broadcasting Co. v. United States*,²⁹ the Chain Broadcasting Rules mostly regulated the large national radio networks, CBS and NBC, in their behavior with regard to local stations, in particular, the networks' control of individual broadcasters' decisions. These regulations also included a structural ownership rule limiting a radio network from owning more than one broadcast station within a market area, reflecting the Commission's earlier presumption that a single entity holding more than one broadcast license in the same community contravened public interest.³⁰

On the heels of the Supreme Court's decision in *National Broadcasting Co.*, the FCC passed further structural regulations limiting national ownership of radio. The FCC prohibited FM radio station owners from owning more than six stations nationally in order to "obviate possible monopoly, and encourage local initiative."³¹ In 1946, the Commission placed a de facto national limit of seven on the ownership of AM stations by denying a CBS application for an eighth AM station.³² In the 1950s, the FCC, building on this informal practice and expanding it to the new technology of television, adopted what became known as the "Rule of Seven," which limited common ownership to seven FM, seven AM, and seven TV stations nationally (up to five of which could be VHF stations).³³ The Rule of Seven remained in place for roughly thirty years until the FCC liberalized the limit to twelve in the 1980s.³⁴

²⁸ Federal Comm'n. Comm'n, Report on Chain Broadcasting 65 (1941); 41 C.F.R. §§ 3.101-.108 (1941).

²⁹ 319 U.S. 190, 206-08, 224-27 (1943). These rules also prohibit one firm owning two networks. *Id.*

³⁰ See *Genesee Radio Corp.*, 5 F.C.C. 183, 186-87 (1938).

³¹ *Multiple Ownership*, 100 F.C.C.2d at 21 (quoting FEDERAL COMMUNICATIONS COMMISSION, SIXTH ANNUAL REPORT 68 (1940)); see also FEDERAL COMMUNICATIONS COMMISSION, SEVENTH ANNUAL REPORT 34 (1941) (limiting TV stations under common ownership to three).

³² *In re Sherwood B. Brunton*, 11 F.C.C. 407, 413 (1946).

³³ *In re Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broad. Stations*, 18 F.C.C. 288, 294, 297 (1953) (adopting ownership limit on AM stations). In this order, the limit was set at five television stations. One year later, it was changed to seven. See Report and Order, 43 F.C.C. 2797, 2798, 2800-01 (1954).

³⁴ *Multiple Ownership*, 100 F.C.C.2d at 55 (adding additional requirement that 12-station group reach no more than 25% of national audience).

B. Cross-Ownership Restrictions

In addition to national and local limits on the number of stations one entity could control, the FCC continued to impose various cross-ownership rules limiting one entity's ownership or control of more than one type of media within a local market. In 1970, the FCC adopted its prohibition of cross-media ownership between FM radio stations and television stations within the same market.³⁵ The FCC under the Nixon Administration prohibited newspaper cross-ownership of radio or television stations.³⁶ When the Commission adopted the rule, it grandfathered newspaper/broadcast combinations in many markets, forcing divestitures only in highly concentrated markets. As a result, approximately seventy grandfathered newspaper/broadcast combinations continue to exist today.³⁷

Until the early 1990s, the FCC entirely prohibited common ownership of multiple AM or FM stations within the same market. In 1989, the FCC adopted a presumptive waiver policy to permit certain radio/TV combinations.³⁸ In 1999, the FCC further relaxed its rule, allowing radio/TV combinations under certain conditions primarily involving the existence of at least eight independently owned media voices.³⁹

C. Deregulation, Local and National Caps, and the Introduction of Audience Caps

This regulatory patchwork remained largely intact until Chairman Mark Fowler, a Reagan appointee, initiated numerous liberalizations. Under Fowler's leadership, the Commission relaxed both the local limits and the national caps. In 1984, the FCC raised the station cap for FM, AM, and television from seven to twelve stations with the stated intent to eventually eliminate it altogether, an intention not fully realized to date.⁴⁰ The FCC balanced this deregulation, however,

³⁵ *In re* Amendment of Sections 73.35, 73.240 & 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM & Television Broad. Stations, 22 F.C.C.2d 306, 309 (1970) (First Report and Order).

³⁶ See 47 C.F.R. § 73.3555(c) (2007).

³⁷ S. REP. NO. 108-141, at 5 (2003).

³⁸ *Id.*

³⁹ See *id.*; 47 C.F.R. § 73.3555(c) (2007).

⁴⁰ *Multiple Ownership*, 100 F.C.C.2d at 17, 55. The 12-station limit was intended as a transitional regulation until the limitation was eliminated entirely. However, Congress blocked the FCC's efforts for complete elimination, leaving the 12-station limit in place. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1034 (D.C.

with new types of restrictions — limits on the size of the audience that any one media firm could reach. Specifically, when the Commission raised the limit on television, FM, and AM radio common ownership to twelve each, it also prohibited any one entity from owning or controlling television stations that in total reached 25% of the national audience.⁴¹

D. Statutory Revision

In the 1990s, Congress began to legislate particular media ownership limits, some deregulatory, others regulatory. Cable television, whose reach the FCC had limited to protect broadcasting, gained much greater penetration by the late 1980s and attracted regulatory attention. Pursuant to the 1992 Cable Television Consumer Protection and Competition Act, the FCC limited any one cable system's reach to 30% of national cable ownership and restricted the degree of integration with program providers.⁴²

The 1996 Telecommunications Act⁴³ signaled Congress's even deeper involvement in setting media ownership limits.⁴⁴ The Act eliminated the twelve television station rule, raising the number of television stations one entity could control to 35% of national cable ownership. Second, it eliminated the national cap on radio ownership.⁴⁵ Third, it instructed the Commission to conduct biennial rulemaking proceedings "to determine whether to retain, modify, or eliminate its limitation on the number of television stations that a person may own in . . . the same television market."⁴⁶ This led to several attempts by the FCC to revise all of these caps and numerous challenges to these efforts, in particular the *Sinclair*, *Fox Television*, and *Prometheus Radio* cases discussed below. As a result of these

Cir. 2002).

⁴¹ *In re* Amendment of Section 73.3555 of the Comm'n's Rules Relating to Multiple Ownership of AM, FM & Television Broadcast Stations, 100 F.C.C.2d 74, 76 (1984). The 12-station limit was intended as a transitional regulation until the limit was removed entirely. Congress blocked the FCC's efforts at complete elimination, leaving the 12-station limit.

⁴² Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 533(f)(1)(A) (2000); 47 C.F.R. § 76.503 (2007).

⁴³ 47 U.S.C. § 202(c)(1)(B) (2000).

⁴⁴ Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56.

⁴⁵ 47 U.S.C. § 202(a), 202(c)(1)(B) (2007).

⁴⁶ 47 U.S.C. § 202(c)(2). Note that Congress has since modified this provision to call for quadrennial as opposed to biennial reviews. See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100.

cases, most of these regulations remain in flux on remand to the FCC for further consideration.

E. Current Status of Rules

The most important restrictions either currently in force or involved in a remand before the FCC include:

- The national television multiple ownership rule, which caps the number of television stations a single entity may own nationwide;⁴⁷
- The national cable ownership rule, which limits the size of cable systems and their degree of integration with program providers;⁴⁸
- The local television multiple ownership rule, which limits the number of stations a single entity may own in a local viewing market;⁴⁹
- The radio/television cross-ownership rule, which limits joint holdings among those media within a given media market subject to the 1999 thresholds;⁵⁰
- The dual network rule, which prohibits combinations among the four major TV networks;⁵¹
- The newspaper/broadcast rule, which limits cross-ownership of television stations and daily newspapers within the same local media;⁵² and
- The local radio ownership rule, which governs the amount of consolidation permissible in a local listening market.⁵³

⁴⁷ See 47 C.F.R. § 73.3555(e) (2007) (overruled by Congress, Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100.

⁴⁸ Communications Act of 1934 § 613(f)(1)(A), (47 U.S.C. § 533(f)(1)(A) (2000)); 47 C.F.R. § 76.503, reprinted in 47 U.S.C. § 533(f)(1)(B) (2000).

⁴⁹ See 47 C.F.R. § 73.3555(b).

⁵⁰ See *id.* § 73.3555(c).

⁵¹ See *id.* § 73.658(g) (2007). Analysis of this rule is beyond the scope of this Article.

⁵² See *id.* § 73.3555(c).

⁵³ See *id.* § 73.3555(a). See generally CHARLES B. GOLDFARB, FCC MEDIA OWNERSHIP RULES: CURRENT STATUS AND ISSUES FOR CONGRESS (2006), available at <http://italy.usembassy.gov/pdf/other/RL31925.pdf> (describing rule and various rule

Of course, the development of these rules did not occur solely within the FCC and Congress. They have also responded to judicial review and analysis. As discussed below, the judicial reaction to these rules is particularly important, given that virtually all of them have been vacated or remanded to the FCC. Any set of rules the FCC now creates must respond to these judicial critiques.

II. JUDICIAL REVIEW OF THE FCC'S MEDIA OWNERSHIP ORDERS: THE LONG LIFE, BUT INEVITABLE FAILURE, OF THE HOLMESIAN METAPHOR

For the half century demarcated by two cases — *National Broadcasting Co.* in the 1940s⁵⁴ and *National Citizens Committee for Broadcasting*⁵⁵ in the 1970s — media ownership rules remained uncontroversial and unchallenged. These cases gave the FCC great discretion in setting limits on media ownership and accepted its justification that such limits furthered diversity in political discourse. Further, as examined below, these cases recognized any restriction that furthered diversity, even in marginal ways or with little evidence, as rational or reasonable.

Perhaps more importantly, they created a powerful metaphor: viewing media regulation as the antitrust law of the marketplace of ideas. In *National Citizens Committee for Broadcasting*, the Court, quoting the pivotal antitrust case of *Associated Press v. United States*, stated:

Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. "[T]he 'public interest' standard necessarily invites reference to First Amendment principles," and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources."⁵⁶

While not specifically citing Holmes's vision of the First Amendment as a marketplace of ideas,⁵⁷ the Court's reference to

changes).

⁵⁴ *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 224 (1943).

⁵⁵ *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978).

⁵⁶ *Id.* at 795 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973); and *Associated Press v. United States*, 326 U.S. 1, 20 (1944)).

⁵⁷ This was famously set forth in *Abrams v. United States*, 250 U.S. 616, 630

“diverse and antagonistic” sources seems to reference that concept.⁵⁸ Other cases involving media regulation are more explicit. For instance, in *Red Lion Broadcasting Co. v. FCC*,⁵⁹ Justice White wrote:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. “Speech concerning public affairs is more than self-expression; it is the essence of self-government.” It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.⁶⁰

Indeed, the FCC’s own statements about the purpose of viewpoint diversity and media regulation explicitly reference this metaphor. In its 2003 Biennial Review Order, the FCC cites *Associated Press*:

Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy. Consequently, “it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” This policy is given effect, in part, through regulation of broadcast ownership.⁶¹

(1919) (Holmes, J., dissenting).

⁵⁸ Contemporaries recognized the power and likely influence of Holmes’s marketplace of ideas metaphor. Felix Frankfurter wrote, “It is not reckless prophecy to assume that his famous dissenting opinion in the *Abrams* case will live as long as English prose retains its power to move.” FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 54-55 (1938). The role of the metaphor has been recognized in media ownership, though never questioned. See Robert B. Horwitz, *On Media Concentration and the Diversity Question*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 9, 12 (Philip Napoli ed., 2007).

⁵⁹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Contemporary legal commentary certainly viewed media ownership regulation as informed by antitrust principles. See, e.g., Emmanuel Cellar, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROBS. 549, 570 (1957) (arguing that antitrust principles argue for media ownership restriction and certain behavioral remedies).

⁶⁰ *Red Lion Broad. Co.*, 395 U.S. at 389-90 (internal citations omitted).

⁶¹ 2002 Biennial, 18 F.C.C.R. 13,620, 13,627 (2003). Most of the work for the 2002 Biennial was, in fact, conducted in 2002, but the Order was passed in 2003.

Philip Napoli has analyzed the FCC's extensive use of the metaphor in its decision making in a study examining every FCC use of the metaphor over the last sixty years in rulemaking, orders, and other administrative promulgations.⁶² He concluded that it "remains one of the most prominent metaphors in communications policy . . . [that] has factored into the decisions of the Federal Communication Commission"⁶³ He showed that the FCC has used the metaphor in particular for ownership decisions, justifying both regulatory and deregulatory efforts.⁶⁴

The marketplace of ideas metaphor most likely has had such power because, it might be reasoned, just as inefficient firms do not survive, bad ideas are also discarded. Certainly, in science, bad theories are abandoned as they are falsified. Similarly, though perhaps depending upon one's philosophical commitments, one might see moral and legal progress in the same way. After all, we have abandoned the bad ideas of the divine right of kings, slavery, and disenfranchisement of women in favor of the good ideas of democracy, human rights, equality between the sexes and among the races.

The metaphor collapses, however, when applied to media ownership regulation. This regulation creates a sort of antitrust regime of the marketplace of ideas or viewpoints that aims to guarantee "enough" voices so as to create a well-performing market of ideas. The market's normative standards simply do not work well with the production of viewpoints. The market's primary normative standard, the allocative efficiency standard, identifies the ideal level of output given aggregate demand and total willingness to produce.⁶⁵ Monopoly is to be avoided because it creates conditions of suboptimal output. A market "performs" well when its output approaches the output achieved under ideal competitive conditions.⁶⁶

Identifying an optimal output in viewpoints is a far more fraught endeavor. It seems absurd to talk about a "well-performing" marketplace of ideas. While more viewpoints are perhaps better than

⁶² PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 110 (2001).

⁶³ *Id.* at 121.

⁶⁴ *Id.* at 121-23.

⁶⁵ Allocative efficiency is therefore a central norm for public policy with utilitarian moral commitments. Competitive markets with numerous firms most often achieve this norm, though it can occur in markets with few firms in situations characterized by Bertrand equilibrium or contestable markets. LUÍS M. B. CABRAL, INTRODUCTION TO INDUSTRIAL ORGANIZATION 26-27 (2000).

⁶⁶ ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91-101 (1993).

fewer, the market's efficiency standard does not tell you when there are "enough" viewpoints, given that both their cost of production and utility is obscure. Some economists, when examining research and development, attempt to isolate the ideal levels of investment for new products or scientific discovery, but their insights do not apply well to viewpoints.⁶⁷ The value of scientific or commercial innovations applicable to commercial products has an identifiable value: decrease in production cost or increase in consumers' willingness to buy a product that incorporates these innovations. An additional viewpoint, however, has no such recognizable value. Thus, the price (or y-axis in the typical supply and demand curve) cannot be defined for the marketplace of ideas. Further, given the difficulty of quantifying viewpoints, it is impossible to define optimal output. Therefore, the "antitrust" of the marketplace of ideas is a project that will never get off the ground. In other words, the output (or x-axis in the typical supply and demand curve) cannot be defined for the marketplace of ideas.

Not surprisingly, the precedents of *National Broadcasting Co.* and *National Citizens Committee for Broadcasting*, while never officially overruled, have bowed under the weight of their contradictions. The dam began to crack with Judge Richard Posner's 1993 opinion in *Schurz v. FCC*, which struck down the FCC's financial syndication rules.⁶⁸ As discussed below, Posner was the first to question the relationship, axiomatically accepted by earlier courts, between diversity of ownership and diversity of viewpoint. More important, his approach to the reasonability standard of the Administrative Procedure Act ("APA") also pointed to a new direction.⁶⁹ Rather than uphold a regulation that attempted to further diversity of viewpoint on the basis of questionable assumptions and vague economic theory, Posner demanded actual proof that a given ownership restriction would lead to a more diverse output.⁷⁰

Section 202(h) of the 1996 Telecommunications Act led to further judicial questioning of these regulations. This section required the

⁶⁷ See, e.g., Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002, 1002-04 (1986) (exploring, from theoretical perspective, optimal investment in research).

⁶⁸ *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1055 (7th Cir. 1992).

⁶⁹ Under the Administrative Procedure Act, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷⁰ *Schurz*, 982 F.2d at 1050 ("[T]he Commission's articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked . . .").

FCC to review and defend its broadcast ownership limits every two years.⁷¹ Broadcasters appealed the resulting “Biennial Reviews,” which for the most part defended and maintained the regulations, to the Court of Appeals for the District of Columbia, which at that time was dominated by judges appointed by Republican presidents. Like *Schurz*, these opinions — *Fox Television Stations v. FCC*⁷² and *Sinclair Broadcasting Group v. FCC*⁷³ — never questioned the First Amendment principles in *National Broadcasting Co.* and *National Citizens Committee for Broadcasting*, typically ruling that the FCC regulations were acceptable under the First Amendment.⁷⁴ Rather, they struck down these regulations under the APA’s arbitrary and capricious standard, finding unacceptable the FCC’s assumption that any regulation that de-concentrates ownership axiomatically furthers diversity.⁷⁵

The FCC consolidated the remands of these cases, along with several other proceedings, in its 2003 Biennial Ownership Regulation Order. Under the leadership of Michael Powell, the FCC attempted to use the order as an opportunity not to defend, but to liberalize these rules. *Prometheus Radio v. FCC* rejected those efforts and remanded for further consideration, largely using the same type of analysis in *Fox Television* and *Sinclair*.⁷⁶ It ruled that the FCC failed to use coherent definitions of viewpoint diversity, but this time rejected the FCC’s liberalization, not its defense, of ownership regulations. The *Prometheus Radio* remand is currently before the FCC.⁷⁷

Contrary to the bulk of scholarship on these cases, the growing disfavor with which courts view the FCC’s orders do not stem primarily or exclusively from a conservative use of the First Amendment to limit government regulation.⁷⁸ While it is true that

⁷¹ Telecommunications Act of 1996 § 202(h), Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in 47 U.S.C. § 161 (2000)).

⁷² *Fox Television Stations v. FCC*, 280 F.3d 1027, 1045-47 (D.C. Cir. 2002).

⁷³ *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 167-69 (D.C. Cir. 2002).

⁷⁴ *Id.* at 169; *Fox*, 280 F.3d at 1047.

⁷⁵ *Sinclair*, 284 F.3d at 165; *Fox*, 280 F.3d at 1045.

⁷⁶ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004).

⁷⁷ *In re 2006 Quadrennial Regulatory Review — Review of the Comm’n’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 21 F.C.C.R. 8834 (2006).

⁷⁸ Balkin, *supra* note 12, at 27-28 (2004) (“We are living through a Second Gilded Age, which . . . comes complete with its own reconstruction of the meaning of liberty and property. Freedom of speech is becoming a generalized right against economic regulation of the information industries.”); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP.

appellate panels consisting of Republican appointees have ruled in most of these cases, this conventional wisdom is hard to maintain in light of *Prometheus Radio*, in which two judges appointed by Democratic presidents attacked the FCC's diversity analysis to strike down liberalizations of media regulation. These regulations do not fail exclusively because of courts' ideologies, but rather because of the FCC's notion of viewpoint diversity, which is simply too malleable and vague a standard. This standard functions as a useful target for courts that want to strike down either the FCC's defense of media ownership regulation or its liberalization.

A. *Making the Metaphor: National Broadcasting Co., Red Lion, and National Citizens Committee for Broadcasting*

At first blush, the Constitution would seem to bar the federal government's efforts to restrict ownership of radio and television broadcast stations, because such regulations limit the freedom of the press and speech. However, two cases separated by almost forty years — *National Broadcasting Co. v. United States* and *FCC v. National Citizens Committee for Broadcasting* — set forth the reasoning, at least ostensibly accepted to this day, for why these regulations survive First Amendment scrutiny.⁷⁹

In upholding the various restrictions of the Chain Broadcasting Rules, the Supreme Court in its 1941 decision in *National Broadcasting Co.* reasoned that the ability to broadcast is not a First Amendment right. Rather, Congress requires that broadcast licensees serve the public interest, convenience, and necessity.⁸⁰ The Court stated that “in the absence of governmental control the public interest might be

PROBS. 173, 201 (2003) (“As the information economy and society have moved to center stage, the First Amendment is increasingly used to impose judicial review on all regulation of this sphere of social and economic life.”); Michael J. Burstein, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1032 (2004) (arguing that “such *Lochner*-like scrutiny is inappropriate in media regulation cases”); Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1443 (2005) (“The shield protecting ordinary economic regulation from First Amendment scrutiny has worn thin. The doctrinal distinction may not withstand the sheer amount of money in contemporary communications.”); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 944 (1998) (“[T]he First Amendment has become the first line of challenge for virtually all forms of regulatory initiatives . . .”).

⁷⁹ *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 798-803 (1978); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226-27 (1943).

⁸⁰ 47 U.S.C. §§ 307(a), 310(d), 312 (2000).

subordinated to monopolistic domination in the broadcasting field.”⁸¹ The Court characterized the FCC’s role as “encourag[ing] the larger . . . use of radio in the public interest [by] mak[ing] special regulations applicable to radio stations engaged in chain broadcasting.”⁸²

Faced with a First Amendment challenge to these broadcast regulations, the Court reasoned that the heightened judicial scrutiny of regulation of speech should not apply because there is no First Amendment right to use the broadcast spectrum.⁸³ The Court accepted the goal of reducing monopolistic control and encouraging diversity of ownership as a reasonable condition for the use of the spectrum and treated this type of regulation as primarily economic and therefore entitled to a deferential standard of review.⁸⁴ The Court upheld the regulation because it found that restricting network ownership in this fashion was a reasonable way to further this goal.⁸⁵

The next major challenge to media ownership regulation occurred thirty years later in 1974. Chairman Fly had enforced the FCC’s newspaper cross-ownership prohibition informally on a case-by-case basis until the 1970s. During license application proceedings, the FCC simply applied an unofficial policy of withholding licenses from publishers who sought to diversify their holdings into broadcasting.⁸⁶ This informal policy of refusing to award TV licenses to newspapers was challenged at least once, but was upheld.⁸⁷

The Department of Justice’s (“DOJ”) actions in 1973 motivated the FCC’s formal adoption of the cross-ownership prohibition — a story that illustrates well how politics affects media ownership decisions.⁸⁸

⁸¹ *Nat’l Broad. Co.*, 319 U.S. at 219 (quoting *FCC v. Pottsville Broad. Corp.*, 309 U.S. 134, 137 (1940)).

⁸² *Id.* at 217 (quoting 47 U.S.C. § 303 (2000)).

⁸³ *Id.* at 226-27 (“[T]he right of free speech does not include, however, the right to use facilities of radio without a license.”).

⁸⁴ *Id.* at 227.

⁸⁵ *Id.* at 225.

⁸⁶ Howard, *supra* note 24, at 15-17, 19-20 (“A bitter controversy raged over the tendency of the FCC to withhold TV permits from publishers who sought to diversify their investments into the broadcasting field.”).

⁸⁷ See *McClatchey Broad. Co. v. FCC*, 239 F.2d 15, 19 (D.C. Cir. 1956).

⁸⁸ In 1973, the Antitrust Division brought numerous challenges to broadcast license renewals of stations cross-owned with daily newspapers. It signaled its intentions in a letter. Letter from U.S. Deputy Assistant Att’y Gen., Antitrust Div., to Sec’y, FCC (Nov. 28, 1973). Subsequently, it challenged numerous licenses. For a listing of those challenges, see Posting of Elliot Parker, 3ZLUFUR@CMUVM.BITNET, to AEJMC@CMUVM.BITNET (Aug. 19, 1994), <http://list.msu.edu/cgi-bin/wa?A2=ind9408c&L=aejmc&P=302> (“Petition to Deny Renewal Application in the Matter of

For years, several midlevel attorneys at the DOJ, known in regulatory circles as “the mad dogs,” had supported the idea of restricting cross-ownership without success.⁸⁹ Sinclair Gearing, an attorney in the general litigation section of the antitrust division, reportedly said, “At lunch sometimes when I have a couple of drinks, I say that we’re going to bust up cross-ownerships.”⁹⁰ Cross-ownership restrictions, however, remained a bureaucratic prandial reverie.

In 1974, the DOJ surprised the Washington regulatory establishment (and perhaps Mr. Gearing as well) when it petitioned the FCC to deny broadcast licenses to certain corporate entities that owned newspapers.⁹¹ In response, the FCC adopted formal rules prohibiting cross-ownership.⁹² According to the *Washington Post*, there was no evidence of direct manipulation by the White House. In other words, the *Post* was left asking “Who let the mad dogs out?” Nonetheless, numerous figures, including FCC commissioners, claimed that the rules resulted from the Nixon Administration’s interference — that they were motivated by the Administration’s

Cowles Communications, Inc., Des Moines, Iowa, for Renewal of Licenses of Stations KRNT, KRNT-FM, and KRNT-TV, Des Moines, Iowa, File Nos. BR-515, BRH-2813, and BRCT-246, 1/2/74. Petition to Deny Renewal Applications in the Matter of Pulitzer Publishing Co., St. Louis, Missouri, File Nos. BRCT-30 and BR 641, and Newhouse Broadcasting Corp., St. Louis, Missouri, for Renewal of License of KTVI(TV), St. Louis, Missouri, File No. BRCT-520, 1/2/74. Petition to Deny Renewal applications in the Matter of Midwest Radio-Television, Inc., Minneapolis, Minnesota, for Renewal of Licenses of Stations WCCO, WCCO-FM, and WCCO-TV, File Nos. BR-659, BRH-2496 and BRCT-49, Before the FCC, 3/1/74. Petition to Deny Renewal Applications in the Matter of Stauffer Publications, Inc., Topeka Kansas, for Renewal of Licenses of Stations WIBW, WIBW-FM and WIBW-TV, File Nos. BR-573, BRH-1316 and BRCT-181, 5/1/74. Petition to Deny Renewal Applications in the Matter of KSL, Inc., Salt Lake City, Utah, for Renewal of Licenses of Stations KSL, KSL-FM and KSL-TV, 9/3/74. Petition to Deny Renewal Applications in the Matter of McClatchy Newspaper for Renewal of Licenses of Stations KMJ, KMJ-FM and KMJ-TV, Fresno, California, File Nos. BR-7, BRH-538 and BRCT-166, 11/1/74. Petition to Deny Renewal Applications in the Matter of KHQ, Inc. for Renewal of Licenses of KHQ, KHQ-FM and KHQ-TV, Spokane, Washington, File Nos. BR-76, BRH-117 and BRCT-147, 1/2/75.”).

⁸⁹ See Susanna McBee, *Justice Department Move on Media Surprised White House*, WASH. POST, Jan. 21, 1974, at A2.

⁹⁰ Susanna McBee, *Breaking Up Media: Justice Department Action Nonpolitical*, WASH. POST, Jan. 20, 1974, at A1.

⁹¹ See *supra* note 88.

⁹² *In re* Amendment of Sections 73.34, 73.240, & 73.636 of the Comm’n’s Rules Relating to Multiple Ownership of Standard, F.M., & Television Broad. Stations, 50 F.C.C.2d 1046, 1074 (1975) (Second Report and Order).

hostility toward the press and its desire to punish newspapers for their role in the Watergate scandal.⁹³

Regardless of the peculiarities of their genesis, these rules were challenged before the Supreme Court in *National Citizens Committee for Broadcasting*. The Court reviewed them under the rational basis standard.⁹⁴ Quoting *Associated Press*, Justice Marshall continued and strengthened Frankfurter's characterization of media ownership restrictions as protecting the number of firms in the media industry to preserve the marketplace of ideas, just as antitrust law protects the existence of multiple firms within an industry to preserve competition.⁹⁵ Applying the rational basis standard applicable to run-of-the-mill economic regulation, the Court accepted the FCC's assumption that any regulation which increases the number of media firms is reasonable and rational because the firms contribute to diversity and antagonism of viewpoints.⁹⁶

Indeed, the Court appeared to hold that any regulation which furthered diversity of ownership, at least in broadcast, would satisfy the standard of review under the APA. Responding to the First Amendment challenge, the Court ruled that the First Amendment does not protect the right to use the scarce medium of broadcast. Therefore, "efforts to enhanc[e] the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be."⁹⁷

Further, the Court set forth a highly deferential standard for reviewing future FCC ownership regulation, requiring little proof to show that a given rule "enhance[s] the volume and quality of coverage," stating that the "possible benefits of competition do not lend themselves to detailed forecast."⁹⁸ In addition, it did not require conceptual clarity.⁹⁹

⁹³ McBee, *supra* note 90; Editorial, *The FCC's Ghost from Watergate*, WASH. TIMES, Aug. 7, 2003, at A18.

⁹⁴ *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 802-03 (1978) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-16 (1971)).

⁹⁵ *Id.* at 795 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973); *Associated Press v. United States*, 326 U.S. 1, 20 (1944)).

⁹⁶ *Id.* at 796 ("[N]otwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints.").

⁹⁷ *Id.* at 800 (internal citations omitted).

⁹⁸ *Id.* at 797 (quoting *FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86, 96 (1953)).

⁹⁹ *Id.* at 796-97 ("Diversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." (quoting *Nat'l Citizens Comm. for Broad.*)).

B. *The Metaphor Collapses: Schurz, Time Warner, and the 1996 Telecommunications Act Cases*

Starting with *Schurz v. FCC* in 1993, appellate courts began to apply a stricter approach in every major review of media ownership orders, while ostensibly following the holdings in *National Broadcasting Co.* and *National Citizen Committee for Broadcasting*. Abandoning the logic of these cases that any regulation which limits ownership furthers viewpoint diversity, these more recent opinions required media ownership regulation to define viewpoint diversity with specificity and show how any given ownership limit would, in fact, lead to a greater number of viewpoints.¹⁰⁰ This significantly raised the bar for the FCC. Adding an additional hurdle for the FCC, these post-*National Citizen Committee for Broadcasting* courts often require that the FCC compare the cost of their ownership rule with the value of an increased number of viewpoints within the media, a difficult proposition given the inherent vagueness of defining viewpoint.

1. *Schurz Communications, Inc. v. FCC*

In *Schurz Communications, Inc. v. FCC*,¹⁰¹ an opinion authored by Judge Richard Posner, the Seventh Circuit reviewed the FCC's financial interest and syndication ("FinSyn") rules, a set of rules that prohibited a television network from licensing its own programs for rebroadcast by independent stations or from purchasing syndication rights from independent producers.¹⁰² The regulations required networks to sell syndication rights to an independent syndicator.¹⁰³ The FCC feared that the networks would leverage their control of programming distribution into control of programming production. In 1991, an FCC order revised and promulgated these regulations

v. FCC, 555 F.2d 938, 961 (D.C. Cir. 1977)).

¹⁰⁰ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 402-03 (3d Cir. 2004); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002).

¹⁰¹ *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

¹⁰² *Id.* at 1045.

¹⁰³ *Id.* (distinguishing between licensing of programming, which would entail ongoing revenues for network and be prohibited under regulations, and outright sale of programming, which would not give network interest in later revenues and was permitted).

again, and a broadcaster subsequently challenged that order.¹⁰⁴ Posner rejected the rules, stating:

The concern behind the rules was that the networks, controlling as they did through their owned and operated stations and their affiliates a large part of the system for distributing television programs to American households, would unless restrained use this control to seize a dominating position in the production of television programs. That is, they would lever their distribution “monopoly” into a production “monopoly.” . . . The rules would strengthen the independent stations (and so derivatively the outside producers, for whom the independent stations were an important market along with the networks themselves) by securing them against having to purchase reruns from their competitors, the networks.¹⁰⁵

The FCC’s justification for the FinSyn rules was analogous to that for the Chain Broadcasting Rules and involved broadcasters’ or radio networks’ purported ability to use their market power to limit the types of programming they use by foreclosing independent providers. In particular, just as limiting ownership of national radio networks would limit networks’ ability to dictate programming decisions to independent radio stations, the FinSyn rules would prevent the networks from using their bargaining power to demand syndication rights from independent television programming producers. In *National Broadcasting Co.*, Justice Frankfurter simply accepted the justification that limits on networks’ bargaining power were acceptable in the name of fostering competition in the media industry, thereby creating more viewpoint diversity.¹⁰⁶

Posner disagreed. First, with a healthy Chicago School skepticism of antitrust foreclosure stories, he found it unlikely that networks would use their dominance in distribution to starve their competitors. He stated: “If the networks . . . refused to syndicate independent stations, they would be getting nothing in return for the money they had laid out for syndication rights except a long-shot chance —

¹⁰⁴ Syndication & Financial Interest Rules, 56 Fed. Reg. 26,242 (Fed. Comm’n June 6, 1991), *reconsidered and aff’d* by 56 Fed. Reg. 64,207 (Dec. 9, 1991) (amending 47 C.F.R. §§ 73.622, 73.659, 73.3526 (1991)).

¹⁰⁵ *Schurz*, 982 F.2d at 1045-46.

¹⁰⁶ *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 217-19 (1943).

incidentally, illegal under the antitrust laws — to weaken the already weak competitors of network stations.”¹⁰⁷

Further, he saw as inefficient any rule that limits the possibility of contract between producers and networks, arguing that such rules would prohibit beneficial agreements and that certain shows would not be profitable to produce at all if networks could not contract for a portion of the syndication rights. He wrote:

If forbidden to buy syndication rights, networks would pay less for programs, so the outside producers would not come out clear winners — indeed many would be losers. Production for television is a highly risky undertaking, like wildcat drilling for gas and oil. . . . The sale of syndication rights to a network would enable a producer to shift risk to a larger, more diversified entity presumptively better able to bear it. The resulting reduction in the risks of production would encourage new entry into production and thus give the independent stations a more competitive supply of programs. Evidence introduced in this proceeding showed that, consistent with this speculation, networks in the pre-1970 era were more likely to purchase syndication rights from small producers than from large ones.¹⁰⁸

Posner concluded: “[T]he new rules . . . appear to harm rather than help outside producers . . . by reducing their bargaining options. It is difficult to see how taking away a part of a seller’s market could help the seller.”¹⁰⁹

Finally, Posner rejected the notion that diversity of ownership is an end unto itself, questioning whether strengthening independent programmers and stations would, in fact, lead to more diverse programming.¹¹⁰ He pointed out, trotting out the famous Hotelling/Steiner¹¹¹ economic argument, that more concentrated

¹⁰⁷ *Schurz*, 982 F.2d at 1046.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1051.

¹¹⁰ *Id.* at 1054.

¹¹¹ The Hotelling and Steiner models both address, from varying vantage points, the effect that market concentration has on choice. For a more detailed discussion of both models, consider Harold Hotelling, *Stability in Competition*, 39 *ECON. J.* 41 (1929), and Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 *Q.J. ECON.* 194 (1952).

markets produce greater diversity, i.e., fewer owners lead to more views.¹¹²

It must be pointed out that Posner made theoretical economic arguments to counter the FCC's theoretical arguments. Neither side presented empirical evidence. Posner did not consider the alternate but possible mechanisms under which the FinSyn rules might do some good. For instance, he was no doubt correct that the FinSyn rules, by preventing the sale of syndication to the networks, might discourage independent production. However, he did not consider the possibility that networks' monopsonistic market position in relationship to producers might give them an undesirable degree of bargaining power. This power is exacerbated by the "hold up": the problem that content producers must incur significant sunk costs to create pilot shows, with no guarantee of recouping these costs, simply to market their programs to networks.¹¹³ Such bargaining power might allow networks to force prices for syndication rights so low that independent producers' profits would suffer. This in turn might lead to fewer independent producers and possibly less content or lower quality programming. Producers, or indeed society as a whole, might do

¹¹² He continued:

It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity. If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group. For that would be the strategy that maximized the size of the station's audience. Suppose, as a simple example, that there were only two television broadcast frequencies (and no cable television), and that 90 percent of the viewers in the market wanted to watch comedy from 7 to 8 p.m. and 10 percent wanted to watch ballet. The monopolist would broadcast comedy over one frequency and ballet over the other, and thus gain 100 percent of the potential audience. If the frequencies were licensed to two competing firms, each firm would broadcast comedy in the 7 to 8 p.m. time slot, because its expected audience share would be 45 percent (one half of 90 percent), which is greater than 10 percent. Each prime-time slot would be filled with "popular" programming targeted on the median viewer, and minority tastes would go unserved. Some critics of television believe that this is a fair description of prime-time network television. Each network vies to put on the most popular programs and as a result minority tastes are ill served.

Schurz, 982 F.2d at 1054-55.

¹¹³ For a sophisticated game theory analysis, see Nodir Adilov & Peter J. Alexander, *Horizontal Merger: Pivotal Buyers and Bargaining Power*, 91 *ECON. LETTERS* 307 (2006).

better if only syndication firms and not networks could purchase these rights.

Posner, while paying lip service to *National Broadcasting Co.* and *National Citizens Committee for Broadcasting*, failed to follow their deferential standard. After all, it would be possible to envision a monopsonist story in which independent producers' bargaining power would increase if networks were barred from owning syndication rights. Posner's rational basis analysis required the FCC to justify its regulations in a way that he would find superior to other justifications.¹¹⁴ While it may very well be that Posner's preferred theory or economic scenario is more likely or probable, that does not mean the FCC was irrational.

2. *Time Warner Entertainment Co. v. FCC*

In *Time Warner Entertainment Co. v. FCC*,¹¹⁵ the District of Columbia Circuit reviewed the FCC's national caps for cable ownership.¹¹⁶ Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),¹¹⁷ requires the FCC, inter alia, to set "limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest."¹¹⁸ Pursuant to the statute, the FCC prevents cable companies from having more than 30% of subscribers nationwide.¹¹⁹ The Commission supported this limit on the grounds that it "maximizes" the number of cable systems. "More MSOs [Multivideo System Operators, i.e., cable companies] making purchasing decisions [will] increas[e] the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public."¹²⁰

¹¹⁴ Indeed, Posner recognizes that his theory is just that, stating, "[T]his analysis and its bearing on competition in the program industry is speculative, theoretical, and may for all we know be all wet." *Schurz*, 982 F.2d at 1051.

¹¹⁵ 240 F.3d 1126 (D.C. Cir. 2001).

¹¹⁶ *Id.* at 1128.

¹¹⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 533 (2000)).

¹¹⁸ 47 U.S.C. § 533(f)(1)(A) (2000). The vertical limits are not discussed here. See § 533(f)(1)(B).

¹¹⁹ *Time Warner*, 240 F.3d at 1129 (citing Implementation of Section 11(c) of Cable Television Consumer Prot. & Competition Act of 1992, 14 F.C.C.R. 19,098, 19,119 ¶ 55 (1999)).

¹²⁰ *Id.* at 1134-35 (citing Implementation of Section 11(c) of Cable Television

The cable companies, Time Warner and AT&T, challenged the limit as exceeding statutory authority, unconstitutionally infringing on their freedom of speech, and resulting from arbitrary and capricious decision-making in violation of the APA.¹²¹ Agreeing with Time Warner and AT&T, the court rejected these limits, finding, *inter alia*, that the FCC's understanding of diversity was too flimsy.¹²²

While the court sidestepped the issue of how much value the marginal voice has when weighed against the First Amendment, it ruled that under the applicable statute, diversity means a programmer is guaranteed only two possible outlets.¹²³ The court remanded to the FCC on the grounds that ownership caps could be justified by the excess bargaining power they gave cable operators.¹²⁴

3. *Sinclair Broadcast Group v. FCC*

Sinclair Broadcast involved the FCC's long-standing ban on one entity controlling more than one broadcast station in a particular media market. In the 1998 Local Ownership Order, the FCC relaxed this prohibition under certain conditions, including the existence of eight independently owned television stations within such a media market.¹²⁵ In counting this eight-voice exception, the Commission

Consumer Prot. & Competition Act of 1992, 14 F.C.C.R. 19,098, 19,119 ¶ 54 (1999)).

¹²¹ *Id.* at 1128.

¹²² *See id.* at 1135 (citing Implementation of Section 11(c) of the Cable Television Consumer Prot. & Competition Act of 1992, 14 F.C.C.R. 19,098, 19,119 ¶ 54 (1999)).

¹²³ The court reasoned,

[W]e have some concern how far such a theory [of diversity] may be pressed against First Amendment norms. Everything else being equal, each additional 'voice' may be said to enhance diversity. And in this special context, every additional splintering of the cable industry increases the number of *combinations* of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest. Is moving from 100 possible combinations to 101 'important'? It is not clear to us how a court could determine the point where gaining such an increment is no longer important.

Id.

¹²⁴ *Id.* at 1144.

¹²⁵ *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 155 (D.C. Cir. 2002) (citing Review of the Commission's Regulations Governing Television Broad., 64 Fed. Reg. 50,622 (Sept. 17, 1999) (Report and Order) (codified at 47 C.F.R. § 73.3555(b)

determined that only broadcast television should count because “there remain unresolved questions about the extent to which [non-broadcast television, i.e., cable] alternatives are widely accessible and provide meaningful substitutes to broad[cast] stations.”¹²⁶ The Commission adopted a different counting approach for exceptions to the radio-television cross-ownership rule in which it does count local newspapers and cable television stations.¹²⁷ The plaintiffs in *Sinclair Broadcast* challenged the rule on the grounds that eight was an arbitrary number of voices and that there was no reason to exclude non-broadcast voices.¹²⁸

The D.C. Circuit, while reciting the language of deference in *National Citizens Committee for Broadcasting*, remanded on the ground that the Commission irrationally excluded cable from its eight-voice count.¹²⁹ While the Commission correctly stated that broadcast was more important than cable in providing local news, it never presented a theory or any data as to why broadcast, but not cable, should constitute a “voice.”¹³⁰

By defining diversity in terms of the number of independently owned outlets in a given market, the FCC has avoided the difficult problem of counting the viewpoints expressed in media markets. Clearly, not every participant in the media market counts equally — the *New York Times* is not the *Upper East Side Weekly Gazette* — but the FCC has never developed an approach for understanding what diversity in the media means. It is certainly true that some cable systems, while providing their own national news programming like CNN and CNBC, provide little local programming.

Judge Sentelle, who dissented in part on the grounds that the diversity rules should be vacated, not simply remanded, further needled the FCC on its imprecision in defining its regulatory terms. He attacked the Commission for claiming that eight voices ensure an appropriate level of diversity but then failing to provide evidence to that effect.¹³¹ While agreeing that an agency has broad discretion to draw lines, Sentelle pointed out that “there are no meaningful limits to the diversity rationale offered. . . . [T]here is no suggestion as to how

(2002)).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 158-59.

¹²⁹ *Id.* at 169.

¹³⁰ *Id.* at 163.

¹³¹ *Id.* at 169-72.

much diversity is enough, how much is too little, or how much is too much.”¹³²

4. *Fox Television Stations v. FCC*

In the 1998 Biennial Review Report, the FCC retained the cable/broadcasting cross-ownership prohibition and the 35% limit on the total number of broadcast stations one entity can control nationwide.¹³³ This order was challenged, and the D.C. Circuit vacated the FCC’s action on the cable/broadcast cross-ownership in *Fox Television Stations v. FCC*.¹³⁴ In doing so, the court rejected the FCC’s diversity justification primarily on the grounds that it failed to consider the large number of new television stations that had emerged since 1970.¹³⁵ As in *Sinclair*, the court did not defer to the FCC’s judgment about what constitutes an additional voice for diversity purposes. Remanding the order for further consideration, it required the FCC to examine the incremental effect of an additional independently owned media outlet in a changing media environment.¹³⁶

With respect to the national broadcast ownership cap, the court again rejected the FCC’s diversity analysis. The court looked to earlier FCC orders that stated national diversity is not an important goal.¹³⁷ A 1984 FCC report stated that media ownership at the national level need not — and given the Commission’s local ownership rules, cannot — reduce local diversity.¹³⁸ Again, the FCC’s inability to define consistently what constitutes a voice for diversity purposes proved fatal.

¹³² *Id.* at 170.

¹³³ On May 26, 2000 the Commission announced its decision (by a 3-2 vote) to retain the National Television Station Ownership Rules (“NTSO”) and Cable Broadcast Cross Ownership Rules (“CBCO”), and to repeal or modify certain other of its ownership rules. A few weeks later the Commission issued a written report in which it explained its actions. *In re* Local Radio Ownership Rule, 47 C.F.R. § 76.501(a) (2007); Nat’l Television Multiple Ownership Rule, 47 C.F.R. § 73.3555(e) (2007); 1998 Biennial Regulatory Review — Review of the Comm’n’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996.

¹³⁴ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

¹³⁵ *Id.* at 1052.

¹³⁶ *Id.* at 1053.

¹³⁷ *See* Multiple Ownership, 100 F.C.C.2d 17, ¶¶ 14, 16 (1984) (Report and Order).

¹³⁸ *Id.* ¶ 43.

5. *Prometheus Radio Project v. FCC*

The FCC consolidated the remands in *Fox Television* and *Sinclair*, as well as several other proceedings, into the 2003 Biennial Media Ownership Order.¹³⁹ Unlike the previous reviews by the FCC challenged in *Fox Television* and *Sinclair*, which largely defended the rules, the 2003 Biennial Media Ownership Order significantly liberalized the media ownership rules. Interestingly, on appeal to the Third Circuit Court of Appeals, the majority (composed of Democratic appointees) rejected these liberalized policies but did so using the legal playbook honed by conservative courts in striking down the media limits.¹⁴⁰

a. *Cross-Ownership and the Diversity Index*

In the 2003 Biennial Media Ownership Order, the FCC eliminated both the radio/television and television/newspaper cross-ownership prohibitions.¹⁴¹ In their stead, the FCC allowed unlimited ownership in large media markets, retained limits in the smallest markets, and relied on a “Diversity Index” (DI) to determine whether other markets were “at risk” and subject to further regulation. The FCC modeled the DI after the Herfindahl-Hirschman Index (HHI) in antitrust law, which measures the degree of concentration in markets for antitrust purposes.¹⁴² The HHI is a calculation that squares each market participant’s share.¹⁴³ The higher the HHI, the more concentrated the market, and the more potential there is for market participants to exercise market power.¹⁴⁴

Analogously, the DI attempts to measure “viewpoint diversity” concentration. It weighs various media (newspapers, radio, etc.) by their market share in the total media market.¹⁴⁵ But the DI does not weigh the market share of each media firm.¹⁴⁶ Rather, within a given

¹³⁹ 2002 Biennial, 18 F.C.C.R. 13,620, 13,626-28 (2003).

¹⁴⁰ See generally *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (questioning validity of basis for several FCC rules and requiring better justification).

¹⁴¹ 2002 Biennial, 18 F.C.C.R. at 13,623.

¹⁴² *Id.* at 13,777-78.

¹⁴³ *Id.* at 13,789; see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 12(4)(a)(2) (3d ed. 2005).

¹⁴⁴ See generally 2002 Biennial, 18 F.C.C.R. at 15,620; HOVENKAMP, *supra* note 143 (describing HHI and its use in modern antitrust enforcement).

¹⁴⁵ *Prometheus Radio*, 373 F.3d at 403.

¹⁴⁶ See *id.* at 404.

medium, each firm counts equally regardless of its market share.¹⁴⁷ Thus, to arrive at a DI, the FCC calculates a percentage market share for each medium and divides that share by the number of firms in the medium. It would then square this result and add the results for each firm to obtain the DI.

Despite this arithmetic complexity, the DI only really counts the number of participants in a market, not the diversity and dissemination of viewpoints.¹⁴⁸ Thus, unlike the HHI, which is tied to market performance in some general way, i.e., the greater number of firms will *ceteris paribus* lead to less market power and more efficient pricing, it is not clear what the DI attempts to measure. It does not measure diversity; it measures market share and the number of market participants.¹⁴⁹ Thus, a market with fifty independent radio stations all saying the same thing would rank higher in the DI than an NPR and Fox News duopoly. There is no demonstrated relationship, however, between viewpoint diversity and the number of market participants. As Steven Wildman states: "Implicit in the construction of the FCC-DI is a belief that . . . all outlets in a market make equal contributions to diversity. Unfortunately, no empirical support was offered on behalf of this assumption."¹⁵⁰ Indeed, some empirical evidence suggests that, at least for coverage of local news, there is a diminishing return, with each additional media outlet in a given market being less likely to produce new and different news.¹⁵¹

Remanding the FCC restrictions for reconsideration yet again, the *Prometheus Radio* court rejected the DI, and the FCC's elimination of the cross-ownership rules, largely because they failed to coherently count heads in order to provide a meaningful estimate of media diversity.¹⁵² The DI weighed media firms by market share but then it counted firms within each medium as equal. Thus, as the court observed, "the Dutchess Community College television and the stations owned by ABC" received equal weighting.¹⁵³ The Court also rejected the Commission's inclusion of Internet news but exclusion of cable news in its diversity calculation.¹⁵⁴ The FCC was on shaky

¹⁴⁷ *Id.*

¹⁴⁸ *Cf. id.*

¹⁴⁹ 2002 Biennial, 18 F.C.C.R. at 13,789.

¹⁵⁰ Steven Wildman, *Indexing Diversity*, in MEDIA DIVERSITY AND LOCALISM, *supra* note 58, at 151, 163-64.

¹⁵¹ *Id.* at 164 (internal citations omitted).

¹⁵² *Prometheus Radio*, 373 F.3d at 409.

¹⁵³ *Id.* at 408.

¹⁵⁴ *Id.* at 408-09.

grounds because it attempted to pick and choose which outlets to count rather than observe consumer behavior and the nature of news coverage.

b. Local Television Cap

The 2003 Biennial Media Ownership Order relaxed the local television cap, permitting a single firm to own two or three television stations in certain markets. Specifically, the order permitted triopolies in markets of eighteen stations or more and duopolies in markets of seventeen or fewer, provided that in no case would there be common ownership in the four most-watched stations.¹⁵⁵

The FCC, therefore, treated ownership of the fifth, sixth, and seventh most-watched stations equivalent to that of the sixteenth, seventeenth, and eighteenth.¹⁵⁶ It was designed to ensure that most markets would have six firms because six equal-sized firms would create an HHI index below 1800.¹⁵⁷ Of course, the FCC simply assumed that the firms would be equal-sized, and the court had no problem finding this assumption irrational.¹⁵⁸ Again, the FCC's insistence that mere head counting adequately reflects diversity led to its indefensible result.

c. Local Radio Caps

The ownership order retained the existing limits of local radio ownership, which are tiered to the size of the market.¹⁵⁹ Its most restrictive limit was to allow common ownership of up to five commercial radio stations in the smallest markets, while allowing greater common ownership in larger markets.¹⁶⁰ The FCC designed this rule to guarantee five firms in all markets. The Commission primarily relied on DOJ merger guidelines and two articles on game theory, fifteen and thirty years old respectively, for its claim that five firms would lead to a competitive market.¹⁶¹ The Court found the

¹⁵⁵ 2002 Biennial, 18 F.C.C.R. 13,620, 13,639 (2003).

¹⁵⁶ *Cf. id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 13,668.

¹⁶⁰ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 409 (3d Cir. 2004).

¹⁶¹ Reinhard Selten, *A Simple Model of Imperfect Competition Where Four Are Few and Six Are Many*, in 2 INT'L J. GAME THEORY 141 (1973). This model is presented more intuitively in LOUIS PHILIPS, *COMPETITION POLICY: A GAME-THEORETIC PERSPECTIVE* 23-38 (1995). See also Timothy F. Bresnahan & Peter C. Reiss, *Entry and*

Commission's reliance irrational because the Commission contradicted the DOJ's merger guidelines elsewhere, and the DOJ's policy contradicted these articles' claims as well. Finally, the court also found illogical that five voices, regardless of market share, contributed meaningfully to diversity.¹⁶²

III. WHY THE METAPHOR FAILED: DIVERSITY IN THE MARKETPLACE OF IDEAS

The previous Part discussed the problems with treating media regulation as a sort of antitrust regime governing the marketplace of ideas. This approach is fundamentally flawed because one cannot establish a value (or cost) for each additional viewpoint, particularly if the value of media diversity is characterized by such vague terms as "robust" or "contentious." Thus, while more viewpoints are perhaps better than fewer, the market efficiency standard does not tell you when there are enough viewpoints, given that both their cost of production and value are obscure. The *Time Warner* opinion expressed this idea when it asked whether at some point an incremental increase in diversity would not constitute an "important" government interest.¹⁶³

Underlying this problem is the lack of any system to quantify the optimum level of viewpoint diversity.¹⁶⁴ The FCC does not quantify viewpoint diversity; it uses diversity of ownership as a proxy for diversity of viewpoint. As Posner pointed out, this may not be a rational proxy. Concentrated market structures may produce output that caters to more tastes. The question of quantification, therefore, becomes central.¹⁶⁵

Measuring diversity directly is a fraught exercise. Indeed, the *National Citizens Committee for Broadcasting* Court called diversity an "elusive" concept — language that the FCC has quoted in every one of

Competition in Concentrated Markets, 99 J. POL. ECON. 997, 998-1001 (1991).

¹⁶² *Prometheus Radio*, 373 F.3d at 432-33.

¹⁶³ *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1135 (2001).

¹⁶⁴ Indeed, the FCC may be overlooking the most important type of diversity — "exposure diversity" — in the media that individuals actually consume. Philip Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7, 24-25 (1999).

¹⁶⁵ Krotoszynski & Blaiklock, *supra* note 12, at 820 (citing J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1230 (1993)) (defending use of diversity against Sidak's charge that only "Panglossian" could believe that FCC could arrive at neutral definition of diversity). See generally Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415 (1996) (examining retreat from extensive regulation of broadcast media).

its major media ownership rulemakings.¹⁶⁶ Why is viewpoint diversity so elusive? Media, whether broadcast or newsprint, do not express meanings, ideas, or viewpoints in simple ways. Rather, media, like all communication, engages in an obscure process by which words “refer or are correlated according to some system with certain physical or conceptual entities.”¹⁶⁷ If one could delineate what these references and correlations are, one could count them and have a handle on viewpoint diversity. However, it borders on impossible to achieve an objective handle on the number of viewpoints, ideas, or perspectives because every individual no doubt employs different references or correlations. The best one can do is to achieve some sort of rough statistical mean of the references and correlations most people within a community would use. This process is admittedly circular because “disagreements about interpretations ultimately rest on conflicting intuitions.”¹⁶⁸

As a result of this limitation of measurement, diversity of viewpoint does not fit well into established social scientific methodologies. The late Milton Friedman provided a classic methodological statement of “positive economics.”¹⁶⁹ His version of economics — a version that

¹⁶⁶ Not surprisingly, the FCC has been quite fond of describing media diversity as “elusive,” for the term renders the Commission’s judgment somehow more deserving of deference. See 2002 Biennial, 18 F.C.C.R. 13,620, 13,790 ¶ 432 (2003); 1998 Biennial Regulatory Review — Review of the Comm’n’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, 15 F.C.C.R. 11,058, 11,101 ¶ 81 (2000); Review of the Comm’n’s Regulations Governing Television Broad.: Television Satellite Stations Review of Policy & Rules, 14 F.C.C.R. 12,903, 12,915 n.49 (1999); Evaluation of Syndication & Fin. Interest Rules, 6 F.C.C.R. 3094, 3234 (1991) (James H. Quello, Comm’r, dissenting to overall result, and concurring in part); *In re* Amendment of Sections 73.35, 73.240, and 73.636 of the Comm’n’s Rules Relating to Multiple Ownership of AM, FM and Television Broad. Stations, 95 F.C.C.2d 360, ¶ 51 n.112 (1983).

¹⁶⁷ Claude E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECHNICAL J. 379, 379 (1948).

¹⁶⁸ Michael Martin, *Taylor on Interpretation and the Sciences of Man*, in READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE 259, 259 (Michael Martin & Lee C. McIntyre eds., 1994). Reflecting this notion, Justice Stewart wrote in his famous *Jacobellis* concurrence that although he could not define the term, he knew pornography when he saw it. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Similarly, then-FCC Commissioner Michael Powell said, “[D]iversity is very hard to define, and is at some level a visceral concept.” *In re* Review of the Comm’n’s Regulations Governing Television Broad.; Television Satellite Stations Review of Policy & Rules, 14 F.C.C.R. 12,903, 12,987 (1999) (Report and Order) (separate statement of Commissioner Michael K. Powell).

¹⁶⁹ Milton Friedman, *The Methodology of Positive Economics*, in READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE, *supra* note 168, at 649-53. The two main approaches in social sciences have been, and continue to be: (1) the naturalistic/positivistic,

places the field firmly in the domain of the empirical sciences — requires theory to abstract “essential features” that can be described in particular categories. The validity of economic theory turns on a “comparison of its predictions with experience” and must be rejected if “its predictions are contradicted.”¹⁷⁰ In other words, economics, like any positive social science, must provide confirmable hypotheses about essential features, i.e., things in reality which are clearly and uncontroversially defined.

To create clear, uncontroversial enumerations of media diversity would be extremely difficult, time-consuming, and expensive because what constitutes a distinct viewpoint does not seem to be what Friedman would call an essential feature. Consider an important study of media diversity, the Berry and Waldfogel analysis of the relationship between industry concentration and the availability of different radio formats.¹⁷¹ To determine what constitutes a radio format, Berry and Waldfogel used Duncan.¹⁷² Duncan, a service for radio advertisers, uses eighteen formats to categorize all radio stations nationwide.¹⁷³

Berry and Waldfogel are likely justified in relying upon Duncan. After all, it is in Duncan’s economic interest to accurately measure diversity and difference. However, suppose someone disagrees with Duncan, claiming that there are eight radio formats; Berry and

asserting that “the social sciences should approach the study of social phenomena in the same way that the natural sciences approach the study of natural phenomena — that the social sciences should have as their goals prediction and nomological [law-like] explanations”; and (2) the interpretive method, asserting that there are no laws in social science but rather social scientists should use *Verstehen* or interpretive and empathetic understanding to comprehend the meanings and significance of social processes from the subject’s perspective. *Introduction to READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE*, *supra* note 168, at xv-xvi. The notion of interpretive understanding as the goal for social science probably originates with the work of Wilhelm Dilthey and Max Weber. Weber defines sociology as “that science which aims at the *interpretive understanding* (*Verstehen*) of social behavior in order to gain an explanation of its causes, its course, and its effects.” LEWIS A. COSER, *MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT* 220, 231 (Robert K. Merton ed., 2d ed. 1977). Not surprisingly, positivism is the dominant approach in economics today. See Lawrence A. Boland, *Current Views on Economic Positivism*, in *COMPANION TO CONTEMPORARY ECONOMIC THOUGHT* 88, 88 (David Greenaway et al. eds., 1991) (“Positive economics is now so pervasive that every competing view (except hard-core mathematical economics) has been virtually eclipsed.”).

¹⁷⁰ Friedman, *supra* note 169, at 650.

¹⁷¹ Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety?*, 2001 Q. J. ECON. 1009, 1014.

¹⁷² See *id.*

¹⁷³ See DUNCAN’S RADIO MARKET GUIDE (1997).

Waldfoegel provide no criteria for determining difference in format, and thus would have no response to such criticism. Therefore, their analysis probably fails Friedman's confirmability and predictability criteria. Any rules or theories that might emerge from Berry and Waldfoegel's work have the potential to be predictive, but only if one agrees that there are precisely eighteen radio formats. In fact, the FCC explicitly decided that there are fewer radio formats than those found in Duncan!¹⁷⁴

Because radio format probably does not count as one of Friedman's essential features, deciding whether the more "correct" radio format taxonomy includes only Adult Contemporary (as the FCC Media Ownership Working Group research paper maintains) or includes Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/New Rock, and Adult Contemporary Oldies (as Berry and Waldfoegel assumed) requires surveying thousands of radio listeners to arrive at a definitive categorization, if any indeed exists. This is a rather expensive procedure and utterly impossible considering all the potential terms of media diversity and the FCC's limited budget. All

¹⁷⁴ The FCC noted,

A number of commenters cite a recent study by Berry and Waldfoegel that found that reductions in the numbers of owners in radio markets led to an increase in radio format labels. . . . The evidence presented in MOWG ["MOWG" refers to the Media Ownership Working Group, the FCC taskforce that assisted in assembling agency research for the *Biennial Media Ownership Order*] Study No. 11, however, suggests that the number of formats across radio markets has remained flat since the passage of the 1996 Act. The discrepancy between these two studies is due to the different classification of format used in each study. MOWG Study No. 11 uses the most general type of classification available in the BIA database [BIA is a leading provider of financial intelligence and investment information about the media and technology industries], while Berry and Waldfoegel uses the finer classification formats available in Duncan [another provider of media industry analysis]. An example will illustrate the difference. One radio format Adult Contemporary taken from the BIA can be broken down into five different subformats under Duncan's system: Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/New Rock, and Adult Contemporary Oldies. While we agree that the Duncan formats allow a somewhat richer portrayal of the variety of music than the more general format categories, we are not certain how substantial the difference between many of these minor subcategories within the major categories of format are. We therefore question how well the increases in radio formats reported by Berry and Waldfoegel imply increases in radio program diversity.

2002 Biennial, 18 F.C.C.R. 13,620, 13,740 ¶ 310 (2003).

this suggests that regulation based on successfully counting diversity of voices is unlikely to succeed.

IV. FROM THE AGORA TO AGENCY: A NEW APPROACH TO MEDIA OWNERSHIP REGULATION

This Part defines the agency approach to media ownership and compares it to both the democratic-social value approach (which aims to use media to encourage democratic discourse) and the economic efficiency approach (which views media like any other industry and looks to economic efficiency as its guiding principle). The agency approach responds to many of the concerns of the democratic-social value approach, but allows for a more workable regulation, namely, the democratic-social value approach fails to set quantifiable regulatory goals, while the agency approach can. At the same time, the agency approach's quantifiable alternative goal — the effectiveness of the agency relationship — offers a rigorous alternative to the economic approach, which seems blind to non-economic ends that people see media as serving. Finally, this Part discusses the idea of “idiosyncratic foreclosure,” a problem with legislative, not regulatory, solutions.

A. *Defining an Agency Approach to Media Ownership Regulation*

Professor Richard Pierce states: “The Constitution is premised on the belief that government should act as the agent of the people. . . . [P]ublic law doctrines [should be] designed to maximize the power of the people to control their agents.”¹⁷⁵ Conceiving the relationship of the citizenry and the elected officials as that of principal and agent creates a standard for judging the effectiveness of the relationship. The relationship succeeds if the agent follows the principal's wishes without engaging in opportunistic behavior by using the trust placed in him for his own gain, rather than the principal's.

This understanding of the relationship between voters and elected officials underscores the importance in monitoring government. Unless citizens keep tabs on elected officials, they may spend tax revenues inappropriately, vote themselves extravagant salaries, divert public funds or contracts to favorites, or simply pass policies not desired by the majority. The media facilitates this monitoring by

¹⁷⁵ Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1239 (1989).

providing citizens with the information they need to manage and control their agents, the elected officials.

As Oliver Williamson's transaction-cost and institutional economics recognize, the cost of monitoring plays a central role in determining the degree to which an agent can engage in opportunistic behavior.¹⁷⁶ Consider the efforts (i.e., monitoring) that employers make to ensure that employees do not steal (i.e., engage in opportunistic behavior). These include expensive video equipment or costly cashier "break downs" in which employees are paid to account for everything sold that day and make comparisons against revenue received. The more expensive these monitoring costs are, the less effective the agency relationship typically becomes.

The media plays a vital role in reducing monitoring costs and ensuring that government officials act in the interest of their principals, the People. Rather than conduct their own investigations of politicians' activities or scan the Federal Register to learn of important government actions, people can simply read the newspaper or watch TV. Even in the age of C-SPAN and government Internet websites, through which there is a huge amount of available information about government activities, the media can serve the function of rendering such a mass of information accessible and interesting. In this way, the media's ability to lower monitoring costs in fact increases in the Internet age, where the sheer amount of information is staggering.

Further, viewing media ownership as reducing citizen's monitoring costs is consistent with the First Amendment, in particular with interpretations that see its purpose as furthering political speech. Taking aim at the Holmesian marketplace of ideas, Alexander Meiklejohn has written that the "First Amendment, then, is not the guardian of unregulated talkativeness;" rather, its purpose is to facilitate self-government, to render the "voters . . . as wise as possible."¹⁷⁷ As such, Meiklejohn rejected the First Amendment's role as protecting the manifold of ideas found in Holmes's marketplace. Rather, "the right of 'private' speech [is] liable to such abridgments as

¹⁷⁶ OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 47-48, 222-29 (1996).

¹⁷⁷ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948). In a similar but more radical vein, Owen Fiss has argued that the First Amendment must provide avenues to groups deemed insufficiently audible in the public debate, and that it must serve the function of making citizens question their views and opinions. OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 9-31, 151-58 (1996).

the general welfare may require.”¹⁷⁸ Only speech related to citizens’ role as “makers of the laws” is entitled to “an absolute freedom.”¹⁷⁹

A political interpretation of the First Amendment is consistent with viewing it as tolerating regulation that reduces monitoring costs. If the purpose of the First Amendment is, as Meiklejohn says, to make the voters “wise,” regulation that creates more political news can only further the interests of the First Amendment. In contrast, the Holmesian “marketplace of ideas” metaphor supports regulation that attempts to control or guarantee a sufficient number of voices, a result that has led the FCC down a fraught regulatory road.

If the function of media ownership regulation is to further political news reporting, the question becomes how to accomplish that goal. As Part V discusses, the structure of media markets, in fact, largely determines the content of news coverage. Due to the cost structure of media production, firms will generally create output that caters to its market’s median tastes and political interests.¹⁸⁰ Geography largely determines political interest. Individuals are interested in the political jurisdictions, such as state, county, and city, in which they reside or do business.

On the other hand, media geographic markets are not defined by political jurisdiction. They are defined largely by federal and state law through spectrum allocation and cable franchise. If a media market is contiguous with a political jurisdictional boundary, it will be more likely to produce news about that jurisdiction, because all of its audience will have a similar interest in that jurisdiction. If the media market is split between political jurisdictions, there is less incentive to produce news about either jurisdiction. In this way, law and regulation play a central role in determining the effectiveness of media’s political monitoring ability.

Consider the Philadelphia broadcast television and radio market. FCC television regulation distributes spectrum to the Philadelphia area, including parts of Pennsylvania, New Jersey, Delaware, and Maryland.¹⁸¹ There is no clear “median taste” for state news in this

¹⁷⁸ MEIKLEJOHN, *supra* note 177, at 95.

¹⁷⁹ *Id.* at 89.

¹⁸⁰ David Strömberg, *Mass Media Competition, Political Competition, and Public Policy*, 71 *REV. ECON. STUD.* 265, 265-67 (2004) (citing Barry Litman, *Microeconomic Foundations*, in *PRESS CONCENTRATION AND MONOPOLY: NEW PERSPECTIVES ON NEWSPAPER OWNERSHIP AND OPERATION* 3, 17-34 (Robert G. Picard et al. eds., 1988)).

¹⁸¹ See *In re* Revision of Procedures Governing Amendments to FM Table Allotments & Changes of Cmty. of License in the Radio Broad. Servs., 21 *F.C.C.R.* 14,212, 14,234 tbl. (2006) (Report and Order); Amendment of the Comm’n’s Rules

market area because its audience contains individuals with disparate tastes in state news. Compare this with the television market area of Harrisburg, which is wholly contained within one state, Pennsylvania. State news would interest a greater number of individuals in the Harrisburg market area. In this way, geographical structure dictates media content.

Regulating geographic and ownership structure to maximize news output offers a much more workable alternative to regulating to maximize “viewpoint.” As discussed in detail in the following section, the FCC should look to economic theory and empirical evidence to identify those structures that are likely to produce the most news in a given region. Unlike the “voices” analysis, this regulatory analysis, on the empirical side, would involve counting the amount of time devoted to political news that various market structures produce. This inquiry — time consuming, but hardly impossible — requires researchers to watch news stations and identify political news. Indeed, many researchers have done this to examine media content.¹⁸² Armed with these insights, the FCC could make reasoned decisions about whether given mergers, or given media ownership restrictions, would be in the “public interest” in that they maximize the incentives for the production of political news.

*B. Agency, Democratic-Social Value, and Economic Approaches to
Media Ownership Regulation and the Problem of Idiosyncratic
Foreclosure*

The agency approach to media ownership regulation elides the difference between the economic and democratic-social approach to media ownership. Recalling the dispute between Bentham’s claim that “poetry is as good as push pin” and Mill’s position that there are “higher goods” and “lower goods,”¹⁸³ democracy- or social-value based

Regarding Modification of FM & TV Authorizations to Specify a New Cmty. of License, 4 F.C.C.R. 4870, 4870-71, 4872-75 (1989), *reconsideration granted in part*, 5 F.C.C.R. 7094 (1990).

¹⁸² See, e.g., PETER ALEXANDER & KEITH BROWN, FCC, OWNERS DELIVER MORE LOCALISM (2004), available at <http://www.fcc.gov/ownership/materials/already-released/doownersdeliver070004.pdf> (employing 1998 database of 4078 news stories from 60 local television stations collected over five-day period).

¹⁸³ Bentham reportedly said, “[P]ush-pin is as good as poetry.” JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, AND ESSAY ON BENTHAM 123 (1962). Push-pin was a sort of mechanical pinball game popular in the nineteenth century and boasted the youth-wasting reputation that video games enjoy today. Mill responds that push-pin is not equal to poetry because some pleasures are “higher” than others, a position he captured in the well-known apothegm: “It is better to be a human being dissatisfied

commentators find the economic arguments reductionist and counter that media markets undervalue civil concerns.¹⁸⁴ Howard Shelanski sums up the difference between the democracy-social value and economics/market-based camps as follows:

Proponents of deregulation [the “economic-based commentators”] define the public interest, often implicitly, in terms of fostering a market that does the best possible job of satisfying consumers’ programming preferences. This version of the public interest aims for an efficient market, where efficiency means that media companies take consumer preferences as given and produce as much content as people want, in the varieties they want, as cost effectively as possible. Even if “better” programming or content choices might exist . . . decisions about what to consume and supply are for individuals and media companies, not policy officials, to make. . . . Opponents of deregulation [the “democracy-based” or “social value” commenters], on the other hand, typically define the public interest in terms of fostering constitutional and social values of quality and diversity, as well as preserving an effective forum for informed public debate. In this model, what the economic market would dictate gives way at some point to what is necessary to achieve an open and broadly representative marketplace of ideas.¹⁸⁵

1. The Democracy-Social Value Approach

Consider the justifications for media ownership regulation put forth by its “democracy” advocates. Drawing on the work of John Dewey, Cass Sunstein argues that the purpose of media should be to develop a “deliberative democracy.”¹⁸⁶ This rationale requires the “considered judgments of a democratic polity” proceeding from “a shared civic culture” and a “degree of commonality among the citizenry.”¹⁸⁷ For

than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.” *Id.* at 260.

¹⁸⁴ See, e.g., Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 501 (2000) (“There is a large difference between the public interest and what interests the public. This is so especially in light of the character and consequences of the communications market. One of the central goals of the system of broadcasting, private as well as public, should be to promote the American aspiration to deliberative democracy . . .”).

¹⁸⁵ Shelanski, *supra* note 17, at 383-84.

¹⁸⁶ SUNSTEIN, *supra* note 12, at 18.

¹⁸⁷ *Id.* at 72, 76.

such a consensus to develop, the media must be diverse, and at the same time it must foster a shared vocabulary and common intellectual heritage.¹⁸⁸ Similarly, drawing on the work of Jürgen Habermas, Professor C. Edwin Baker argues in his theory of “complex democracy” for a contentious media with plural conceptions of what is good for society. The ideal media speech exposes citizens to difference; at the same time that difference is exposed in speech. According to this conception, the ideal marketplace attracts a varied public with a wide range of wares, inviting comparisons between the known and the unknown.¹⁸⁹

The democratic media theorists must agree, as a first step, that to pursue their goals, media ownership regulation should increase information about government. One cannot gain a consensus about essential political aims, as Sunstein might urge, without having knowledge about politics. One cannot expose oneself to different views about politics, as Baker might want, without having information about politics. Ideal democratic involvement — whether civic republican, Habermasian, or whatever political normative standard — requires knowledge about the polity. Any vision of a deliberative democracy that furthers commonality and contemplation of difference must have facts about *how* democratic leaders and government function. In this way, the agency approach is completely consistent with the democratic approach.

This is not to ignore the genuine difference between the agency- and democracy-based approaches. Advocates of democracy-based regulation might prefer not to view citizens as self-interested consumers of government services.¹⁹⁰ They would see the purpose of media as cultivating higher tastes, i.e., poetry, not push-pin. The agency model of media ownership does not argue that media should change or elevate taste. Rather, it argues that citizen’s political desires, preferences, and aims must be considered as important as their economic desires, preferences, and aims: that FCC policy must

¹⁸⁸ *Id.* at 18-19.

¹⁸⁹ Baker, *supra* note 12, at 760; see also Isolde Goggin, *Spectrum Management and the Achievement of Policy Goals — an Independent Regulator’s Perspective*, in COMMUNICATIONS — THE NEXT DECADE: A COLLECTION OF ESSAYS PREPARED FOR THE UK OFFICE OF COMMUNICATIONS 235, 244 (Ed Richards et al. eds., 2006), available at <http://www.ofcom.org.uk/research/commsdecade/section4.pdf> (questioning “how to balance market mechanisms with the need to ensure that spectrum is available for services of general economic or social interest, while ensuring efficient utilisation”).

¹⁹⁰ SUNSTEIN, *supra* note 12, at 72 (“There is reason to be extremely cautious about the use, for constitutional and political purposes, of the notion of ‘consumer sovereignty.’”)

recognize both *homo economicus* and *homo politicus*. In other words, if people choose to have democratic institutions, they must also choose to have them function properly. Only a citizen/elected official agency relationship informed by a rich diet of political news can ensure this.

Further, pro-democracy commentators tend to see ownership restrictions as ends unto themselves, advocating limits without specifying how any particular limits can be set.¹⁹¹ An agency approach would examine the likelihood that a merger or a spectrum allocation would produce more or less news about relevant political institutions. It would permit mergers or ownership structures that have no effect on the output of news; it would be indifferent to mergers or ownership structures that would have a small impact on the output of news.

Finally, the democracy-based advocate might still argue that diversity of ownership, for its own sake, must be a policy goal. For instance, consider C. Edwin Baker's six justifications for media de-concentration:

- (1) Local owners will likely be more concerned about quality than out-of-town conglomerates.
- (2) One media interest, allied with a political interest, may exercise an excessive control over a democracy's civil discourse.
- (3) Decentralized control performs a watchdog or checking function — correcting the errors and mistake of any one source of information.
- (4) Decentralized ownership prevents control of the media by corporate interests outside of media — interests that may skew reporting.
- (5) Concentrated ownership can lend itself to co-option by one particular approach to the news, such as Rupert Murdoch's.
- (6) Concentrated media structures can create unwelcome synergies with other corporate interests.¹⁹²

None of Baker's concerns involves media robustness. Rather, they involve media control and the fear that media will be used, not to further civil discourse, but to further private corporate interests or personal political or financial interests of media owners. This type of "idiosyncratic foreclosure," in which owners of media fail to cover stories hostile to their interests or political or cultural ideology, seems

¹⁹¹ See, e.g., Baker, *supra* note 12, at 734-35.

¹⁹² Baker, *Media Concentration*, *supra* note 17, at 902-14.

especially dangerous in rural areas with few media outlets. In fact, these outlets may have close financial and even personal connections to the political and business establishments.

While those subscribing to an economic perspective may dismiss this fear on the grounds that a profit-maximizing media firm will provide the views and content the market wants and not the idiosyncratic views of its owner, this response can ring a bit hollow, particularly given the extraordinary degree to which large media firms are held by individuals or families rather than publicly traded corporations.¹⁹³ Even the most diehard advocate of efficiency-based regulation would admit that if a firm engaged in idiosyncratic foreclosure, it would take time for the market to correct and discipline such a firm. Consider the case of *The New York Times*. Its critics have long alleged that it has left-wing or politically correct bias. Its ownership structure, however, gives management control to members of the Ochs-Sulzberger family. Despite *The New York Times'* disappointing business performances, ownership and management has appeared resistant to change.¹⁹⁴

The regulatory solution for this problem is difficult because it is unclear at what point the chance of idiosyncratic foreclosure becomes so great that ownership restriction is necessary. The FCC cannot state that the risk of idiosyncratic foreclosure is eliminated at any point, because there is no metric for such a contingency. Without such a metric, courts are unlikely to accept any answer based solely on the

¹⁹³ See Belen Villalonga & Raphael Amit, *How Do Family Ownership, Control and Management Affect Firm Value?*, 80 J. FIN. ECON. 385, 405-06 (2006) (showing how multigenerational family ownership decreases firm value and mentioning *New York Times*); Leon Lazaroff, *New York Times Families Withdraw Morgan Stanley Funds (Update7)*, BLOOMBERG, Feb. 2, 2007, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aqdZ.2T2x2xc&refer=home> (explaining mechanics of Sulzberger control of *New York Times* ownership structure).

On a different ideological coin stands the Murdoch family, and in between are the Roberts of Cablecast, EchoStar's Charlie Ergen, and the protective share classes of the McClatchy family's ownership. As of the time of writing, the Tribune Co. and Clear Channel, Inc. are in negotiation to return to private hands. Indeed, rigorous empirical investigation has revealed that next to government, family-owned businesses dominate media ownership worldwide. See Simeon Djankov et al., *Who Owns the Media?*, 46 J.L. & ECON. 341, 341, 357 (2003) ("We examine the patterns of media ownership in 97 countries around the world. We find that almost universally the largest media firms are owned by the government or by private families.").

¹⁹⁴ Seth Sutel, *Shareholders Plan Proxy Fight at NYT: Investors Plan to Name Their Own Slate of 4 Directors at N.Y. Times Co.*, YAHOO, Jan. 28, 2008, http://biz.yahoo.com/ap/080128/ny_times_shareholders.html?v=11.

grounds that more voices decrease the risk of foreclosure in some unspecified amount.

The appropriate solution to the problem is to allow Congress to set simple limits. This approach would establish clear business expectations and would receive a deferential rational basis review in court. Politicians have an interest in avoiding idiosyncratic foreclosure because it reduces their ability to communicate with voters. For instance, President Clinton, a media consolidation opponent, used to tell people there were only two major media outlets in Arkansas, one owned by a detractor. If the detractor owned both, Clinton claimed that neither he nor any other progressive would ever get his message across.¹⁹⁵ Indeed, Congress is already addressing this problem. For instance, when the 2003 Biennial Media Ownership Order lowered the national television cap, a Republican Congress, in an unusual, pro-regulation reversal, raised it.¹⁹⁶

2. The Economic Approach

An agency approach to media ownership responds to the economic critique of media regulation. Professor Howard Shelanski, a former FCC chief economist, has summed up the critique as follows:

Advocates of deregulation often portray ownership rules as unproductive relics out of step with the realities of modern media markets. They view the rules as remnants of competition policy implemented to deal with markets in which broadcasters were far more powerful than they are in today's increasingly digital environment of competing cable, satellite, Internet, and broadcast platforms. From this perspective, the policy objective behind ownership rules should be to ensure that media markets respond efficiently to consumer demand.¹⁹⁷

The economic critique suggests that the FCC should not regulate at all because markets can best respond efficiently to consumer demand. Advocates of this approach argue for the elimination of virtually all

¹⁹⁵ Eric Boehlert, *Former FCC Chairman: Deregulation Is a Right-Wing Power Grab*, SALON, May 31, 2003, <http://dir.salon.com/story/news/feature/2003/05/31/fcc/index.html>.

¹⁹⁶ Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004); Frank Ahrens, *Compromise Puts TV Ownership Cap at 39%*, WASH. POST, Nov. 25, 2003, at A19.

¹⁹⁷ Shelanski, *supra* note 17, at 382.

ownership rules.¹⁹⁸ Any harm that increased media concentration could cause would be purely economic. They therefore rely upon antitrust law to regulate media ownership. They see little need for media ownership regulation to further diversity because the market can best be relied upon to provide media that people want. They tend to see democratic theorists as foisting their views onto others.¹⁹⁹

The agency approach avoids this debate. It does not argue that media robustness is a good that the market provides inadequately or that the market can best respond to individuals' desires. Rather, it argues that the application of agency theory to media ownership regulation implies that media ownership regulation must render the agency relationship between the citizen and elected official more effective by lowering monitoring costs. Just as the media satisfies our consumer desires *qua* our roles as *homo economicus*, so it should satisfy our political goals *qua* our roles as *homo politicus*. Given that the government taxes us significantly, we want them to spend that money according to our wishes. Media ownership regulation should make information about the government more available so as to ensure that politicians do as we wish.

Of course, the economics-based advocate might critique this agency approach by arguing that if people really cared about how their taxes were spent, the markets would cater to that interest and would provide all the information adequate to monitor government. To “pay” more for taxes in the form of potentially inefficient media government regulation is therefore absurd. This argument misses the mark.

First, the question is not whether one would wish to pay more to the government in the form of media regulation. The question is, since we already pay taxes — a situation not likely to change any time soon²⁰⁰ — do we want a portion of those taxes spent on reducing monitoring costs and thus guaranteeing that such money is spent according to our wishes?²⁰¹ Second, the cost of this type of media regulation is trivial. It would involve bumping marginally interesting

¹⁹⁸ See, e.g., Yoo, *Architectural Censorship*, *supra* note 12, at 730-31 (suggesting that proper First Amendment scrutiny would “safeguard free speech values against these dangers” of “unintentionally degraded . . . quantity, quality, and diversity of programming availability.”).

¹⁹⁹ See *supra* notes 13, 17.

²⁰⁰ See BENJAMIN FRANKLIN, Letter to Jean-Baptiste Le Roy (Nov. 13, 1789), reprinted in *THE WRITINGS OF BENJAMIN FRANKLIN* 69 (Albert H. Smyth ed., 1907) (“[I]n this world nothing can be said to be certain, except death and taxes.”).

²⁰¹ I am indebted to Peter J. Alexander for this insight.

entertainment-type news for more serious political news.²⁰² Given the contempt that most people express about local news' obsessions with inane human interest stories and endless crimes and fires, this seems at least *ex ante* a price most would pay. Third, if government distributes spectrum or creates cable franchises, it is already engaged in structural regulation. At the very least, it must be cognizant of how its existing structural regulation affects the political process.

V. APPLYING AN AGENCY APPROACH TO MEDIA OWNERSHIP
REGULATION: THE IMPORTANCE OF GEOGRAPHIC MARKET STRUCTURE

The need to intervene in media markets stems from the importance of political news about government. The next question is, therefore, how media ownership regulation can do this. There are two main ways in which government could influence the production of political news: subsidization or structural regulation.

Many prominent legal academics have called for subsidies. For instance, Sunstein states that the public interest goals of communications policy can “promote the aspiration to deliberative democracy.”²⁰³ He recommends several means to achieve this end, including mandatory public disclosure of information about public interest broadcasting, economic incentives to encourage worthwhile discourse, and voluntary self-regulation, as through a code of appropriate conduct, to be created and operated by the industry itself.²⁰⁴ Professor Ellen P. Goodman argues for subsidies to encourage public service media and other types of media that markets are likely to underproduce.²⁰⁵

Government subsidies, however, tend to become political footballs, with the specter of political imperatives affecting news coverage. With the possible exception of the Corporation for Public Broadcasting, our nation has been hesitant to directly involve government in the production of news. Given the government's tendency to abuse mass media — as evidenced by such phenomena as *The Triumph of the Will*, the genocidal Serbian radio and television under Slobodan Milosevic, or even the constant irritating debate about whether National Public

²⁰² In addition, to the extent current media markets mirror communities, which may share demographic and consumptive characteristics, changing these media markets may impose costs on advertisers.

²⁰³ Sunstein, *supra* note 184, at 503.

²⁰⁴ *Id.* at 504.

²⁰⁵ Goodman, *supra* note 17, at 1393.

Radio is a tool of the cultural left — Americans seem wise to hesitate over government subsidies in this area.

Robert Post has provided a critique of state-supported speech. He argues that when the government assumes the role of civics teacher to inform and educate citizens, the government aspires to “an Archimedean point that stands outside of the processes of self-determination” that all its citizens undergo.²⁰⁶ In other words, when the state assumes the role of teacher, it assumes that it has the right answers. Even if the state has the right answers, however, Post argues that “citizens engaged in collective self-determination through participation in public discourse are not students to be taught, but autonomous masters of their fate. They are adults, not pupils.”²⁰⁷

Yet, even adults require raw information about politicians’ activities in order to judge them. Using structural regulation simply to provide greater incentives to independent firms to produce more news does not render citizens into puerile students of the state. Rather, it makes them more empowered, intelligent citizens. Because structural regulation does not require the government to make content-based decisions, even on the funding level, it does not place the government in a superior position with the charge to enlighten the populace. Indeed, the decision to use structural regulation to increase the output of political news is, in and of itself, an artifact of collective self-determination. As a group, citizens decide to order their markets in such a way so as to produce a result — more political news — that better serves their political aspirations. In this way, government is not a teacher of the citizenry, government is simply the citizens’ tool. While an objective Archimedean point might not exist, citizens need the tools to build their own scales and to discover their own balance.

Turning to the tool — structural regulation of the media — this Article does not argue that current understanding of the relationship between industry ownership and geographic structure provides a blueprint for maximizing political activity and information. Current knowledge is far too rudimentary. Rather, current research suggests, as discussed below, certain regulatory questions and concerns.

²⁰⁶ Robert Post, *Constitutional Law: Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1538 (1997) (reviewing FISS, *supra* note 177).

²⁰⁷ *Id.*

A. *Media Structure, Media Content, and Political Behavior: A Brief Survey of the Current Literature*

News production is an industry characterized by high fixed cost and low incremental cost. Producers, therefore, aim to produce news items of interest to the greatest number of consumers within their markets, *ceteris paribus*, because every additional sale (or added eyeball watching a program) translates into higher profits or higher advertising rates.²⁰⁸ What constitutes news interesting to the greatest number of consumers is a function of the media industry's structure and geographic boundaries. A medium, like television, with a national audience will have a different "median audience" than a newspaper with a purely local audience. Similarly, a media conglomerate that owns numerous newspapers in different markets will also have a different median audience than independent, locally owned media outlets.

Recent scholarship in economics, political science, and communications demonstrates a strong relationship between media industry ownership structure (e.g., who owns the media, how large media firms are, and the size and shape of media geographic markets) and various types of political behavior.²⁰⁹

1. *Media Structure and Political Participation*

A growing body of research demonstrates the relationship between access to media and political participation. Interestingly, these studies tend to show that access per se does not increase voting; rather, access to media that is likely to cover political news increases political participation. Moreover, these studies conclude that media structure plays a key role in determining whether a particular medium covers political news.

Matthew Getzkow showed that consumer substitution away from newspaper and radio and towards television led to the well-known,

²⁰⁸ Alexander & Brown, *supra* note 10, at 23 ("Many media products incur up-front fixed costs and constant (and often low) marginal costs. Consequently, media firms will only produce content that appeals to enough people to cover their fixed costs."); Strömberg, *supra* note 180, at 265 ("One feature is that mass media operate under increasing-returns-to-scale. For example, once a TV programme has been produced, the extra cost of an additional viewer is quite small. For a newspaper, the cost of producing the first newspaper is high. But once this fixed cost has been borne, the variable cost of selling additional newspapers is just the cost of printing and delivering.").

²⁰⁹ See *infra* Part V.A.1-4.

precipitous drop-off in participation in elections from the 1940s to the 1970s.²¹⁰ He showed that the dispersion of television in the late 1940s and 1950s dramatically decreased voter turnout, primarily because television contained more entertainment and less news compared to the then-dominant media, newspaper and radio. Getzkow argued that television caused substitution away from newspapers and radio, and showed that television provided less political information than either of these other media. His work also demonstrated that the gap was larger for information about congressional races, resulting in less knowledge about politics and lower turnout in voting.²¹¹

Television's effect on political participation and knowledge is quite significant. Television reduced off-year turnout in an average county by 2% per decade.²¹² The introduction of television explains half of the total off-year decline in turnout since the 1950s.²¹³ The effect on presidential-year turnout is smaller, accounting for roughly a quarter of the total decline.²¹⁴

Getzkow demonstrated a structural relationship between media markets and political knowledge. He showed how the amount of information about local congressional races affects voter turnout. He hypothesized that the more congressional districts into which one media market is divided, the more congressional races are taking place within that media market in a given election year, and the less coverage local stations can provide for any one race. He showed that the degree to which media markets are contiguous with political boundaries effects turnout in off-year congressional elections (but not, of course, presidential elections, as all media markets would be interested in national events).²¹⁵

Similarly, Scott Althaus and Todd Trautman showed that geographic structure of media markets affects political behavior. They showed that all areas contained within larger markets — urban, suburban, and rural alike — tend to have lower levels of voter turnout than urban, suburban, and rural areas within smaller markets.²¹⁶ They concluded

²¹⁰ See generally Matthew Getzkow, *Television and Voter Turnout*, 121 Q.J. ECON. 931 (2006).

²¹¹ See *id.* at 967.

²¹² See *id.* at 933.

²¹³ See *id.*

²¹⁴ See *id.*

²¹⁵ See *id.* at 934.

²¹⁶ See Scott L. Althaus & Todd Trautman, *The Impact of Television Market Size on Voter Turnout in American Elections*, (Univ. of Ill., Working Paper No. 3, 2006) (“[T]he size of local television markets is closely related to aggregate turnout levels.”).

that the size of local broadcast markets determines how much localized political information an area receives — larger markets will have less information about discrete political jurisdictions contained within them.²¹⁷

Finally, Lisa George and Joel Waldfogel in *Does The New York Times Spread Ignorance and Apathy?*²¹⁸ showed that increased local penetration by *The New York Times* decreases local newspapers' penetration, thereby reducing local news content and participation in local elections. They suggest that *The New York Times* contains less local news, and thus as consumers read it more, they become less knowledgeable about, and involved with, local news and issues.

2. Media Structure and Political Knowledge

Research has shown the relationship between media market structure and citizens' knowledge about government. Markus Prior demonstrated that different structures of media markets produce different levels and, in particular, different distributions of political knowledge. For instance, the rise of cable television and Internet access increases consumer choice and increases divergence in political knowledge. These new media allow individuals with preferences for political information to gain more.²¹⁹ At the same time, individuals with aversions towards political information and preferences for entertainment can more easily avoid political information and, in fact, the new media facilitates such individuals' ignorance about politics.²²⁰

Prior has also shown that television, which provides generally favorable news about incumbents, strengthens the incumbency effect in elections. He showed that the incumbent effect increased during the 1960s along with the rapid dispersion of televisions. He showed that political knowledge increased with television in general, but most markedly among those who had the lowest levels of political knowledge. Such individuals received most of their information from television, and therefore formed views favorable to incumbents.²²¹

²¹⁷ *Id.*

²¹⁸ Lisa M. George & Joel Waldfogel, *The New York Times and the Market for Local Newspapers*, 96(1) AM. ECON. REV. 435-47 (2006).

²¹⁹ See MARKUS PRIOR, *THE INCUMBENT IN THE LIVING ROOM: THE RISE OF TELEVISION AND THE INCUMBENCY ADVANTAGE IN U.S. HOUSE ELECTIONS* 657-71 (2002).

²²⁰ *Id.*

²²¹ Markus Prior, *Efficient Choice, Inefficient Democracy? The Implications of Cable and Internet Access for Political Knowledge and Voter Turnout*, in COMMUNICATIONS POLICY AND INFORMATION TECHNOLOGY: PROMISES, PROBLEMS, PROSPECTS 143, 143-45 (Lorrie Faith Cranor & Shane Greenstein eds., 2002).

In a similar study, concentrating on geographic market structure, Snyder and Stromberg showed how congruence between congressional districts and local media markets leads to greater political knowledge about Congress and other locally elected officials. They strongly suggest that the media will produce information that caters to the median consumers' taste, and that such a median, when it comes to political news, is affected by political boundaries.²²² These studies suggest that regulators should look closely at the relationship between geographic markets, media, and political behavior.

3. Media Dispersion and Receipt of Government Benefits

David Strömberg showed how increased radio penetration increased voter turnout during the New Deal. Further, he showed that areas with greater radio penetration were more likely to receive federal money distributed by the state governor for unemployment relief. Stromberg argued that increased radio penetration led to more information about government, allowing individuals to better monitor government activity, or at least monitor it in a way more compatible with their own interests.²²³

His research provided an interesting riposte to the widely accepted view that mass media has little effect upon individuals' opinions. For instance, citing the famous work of Elihu Katz and Paul F. Lazarsfeld, Bruce Owen argued that the media do not truly influence individuals. Rather "communication with friends, family and co-workers, and opinion leaders dominates in the diffusion and acceptance of ideas."²²⁴ More recent research shows the limited role the media plays in forming opinion. Some studies show that consumers use media from fewer sources even as the number of sources available to them increases.²²⁵ Philip Napoli states that the "empirical evidence . . . is less than compelling" that "citizens take advantage of the diversity of sources and content available to them to become the well-informed decision makers that a well-functioning democracy requires."²²⁶

²²² JAMES M. SNYDER & DAVID STRÖMBERG, *MARKETS' IMPACT ON POLITICS* (Sept. 2008), available at http://americandemocracy.nd.edu/speaker_series/files/SnyderPaper.pdf

²²³ *Id.*

²²⁴ Owen, *supra* note 12, at 682.

²²⁵ See NAPOLI, *supra* note 62, at 151; SUNSTEIN, *supra* note 12, at 59-84; Philip M. Napoli, *Access and Fundamental Principles in Communication Policy*, 2002 L. REV. MICH. ST. U. DETROIT C.L. 797, 800 (2002).

²²⁶ Napoli, *supra* note 225, at 802 (2002).

This may all be true. However, when it comes to helping individuals obtain available benefits from government, mass media appears to play a role. Research shows a relationship between media availability and improved access to government aid and subsidies. For instance Timothy Besley and Robin Burgess showed that areas in India with higher penetration of mass media received greater aid during famine and nature disasters.²²⁷

4. Ownership Structure and Likelihood to Produce Local News

Recent research also suggests some relationship between the extent of local ownership of television stations and the likelihood of local news coverage. Alexander and Brown showed that there is a relationship between the amount of local news produced by a broadcast station and whether the station is locally owned.²²⁸ Their research indicated that locally owned stations produced significantly more local news. Another study repeated this striking result, showing a more elaborate relationship between local ownership and the production of local news, and demonstrating a positive relationship between local ownership and the length of local news stories.²²⁹

In somewhat different findings, Yan and Napoli tested the oft-asserted notion that allowing cross-ownership will increase local news and public affairs programming.²³⁰ They found that cross-ownership is not related to the quantity of local news or public affairs provided.²³¹ This result is consistent with Wirth and Wollert, who found no relationship between group ownership and the provision of news or public affairs programming.²³² Napoli and Yan, however, found evidence that station owner size, as measured by percentage of the national television audience reached, was positively related to a

²²⁷ Timothy Besley & Robin Burgess, *The Political Economy of Government Responsiveness: Theory and Evidence from India*, 117 Q.J. ECON. 1415, 1415-16 (2002) ("We are able to demonstrate a robust link between the development of mass media, political factors, and government responsiveness.").

²²⁸ See ALEXANDER & BROWN, *supra* note 182, at 1, 13-16.

²²⁹ Nodir Adilov, Peter J. Alexander & Keith Brown, *From Many, One: Cross-Media Ownership, Scope, and Scale: Story Choice in Local Broadcast News* (Indiana-Purdue Univ., Feb. 15, 2007), available at http://www.peterjalexander.com/images/ScaleScopeCrossOwn_Feb_15_2007_.pdf.

²³⁰ Michael Yan & Philip Napoli, *Market Competition, Station Ownership, and Local Public Affairs Programming on Broadcast Television*, 56 J. COMM. 795, 795-97, 807-09 (2006).

²³¹ *Id.*

²³² Michael O. Wirth & James A. Wollert, *Public Interest Programming: Taxation by Regulation*, 23 J. BROAD. 319, 326 (1979).

station's decision whether to air local public affairs programming, but was unrelated to the quantity of such programming aired.²³³

B. *The Current State of Knowledge and Policymaking*

The current state of knowledge concerning the relationship between media structure and content is still too rudimentary to provide clear policy prescription. For instance, no one can state with precision the exact effect of local ownership limits or national cable subscriber caps on media content or media firms' likelihood to cover political issues. Despite these limitations, current research does give regulators some insights and reliable generalizations concerning the relationship between media structure and content.

First, regulators must take into account the relationship among geographic media markets, the legal creation of these markets, and content. Theory and empirical analysis strongly suggest that media firms will seek stories, *ceteris paribus*, of interest to the median tastes of their market. To the degree media markets and political boundaries are contiguous, one will see more political news.²³⁴ Second, availability of media tends to increase political knowledge.²³⁵ To the degree that media structures tend to produce less political news, one will see a less informed citizenry. Third, the availability of media, while not necessarily changing people's opinions or views, does appear to make them cognizant of available government benefits.²³⁶

Recall how media regulation currently works. The FCC attempts to promote competition, diversity, and sometimes, localism.²³⁷ It does not, in fact, measure viewpoint diversity, but simply asserts that diversity of ownership will produce viewpoint diversity. It then selects in a largely arbitrary way the number of independently owned media in a given market. Regulation focused on the relationship between media structure and news output would avoid the problems diversity presents. Above all, it provides workable metrics. The number of news stories and amount of news are easily measurable. Further, it would allow regulators a clear goal and purpose with which to examine the subtleties of media markets. The section below

²³³ Yan & Napoli, *supra* note 230, at 808.

²³⁴ See *supra* Part V.A.1.

²³⁵ See *supra* Part V.A.2.

²³⁶ See *supra* Part V.A.3.

²³⁷ 2002 Biennial, 18 F.C.C.R. 13,620, 13,623 ¶ 5 (2003) (setting forth these three goals as purpose of media ownership regulation).

considers how this approach resolves various regulatory questions currently before the FCC.

1. The Cross-Ownership Prohibitions: Localism and Agency

The newspaper/broadcast rule limits cross-ownership of television stations and daily newspapers within the same local media market, as well as radio and television stations within the same local media market.²³⁸ In the 2003 Biennial Media Ownership Order, the FCC eliminated the rule, but in “at-risk” areas, the FCC applies its Diversity Index — an approach the Third Circuit rejected — to determine whether there is sufficient “viewpoint diversity.”²³⁹ The FCC justified its decision to eliminate the cross-ownership prohibitions primarily on the grounds that allowing mergers between newspapers and television and radio would introduce economies of scale into local markets, thereby increasing the output of local news. Subsequent empirical research failed to support this.²⁴⁰

This Article’s suggested approach to media ownership provides a clearer regulatory analysis for determining whether cross-ownership would be permitted within a given media market. First, the regulator would examine the state jurisdictions in the area involved. The regulator would see whether there were numerous state jurisdictions, like the Chicago media market which includes Illinois, Indiana, and Wisconsin, or whether there was only one state jurisdiction, like the Los Angeles media market. Second, the regulator would examine the nature of the local political jurisdiction to determine if there is one major political jurisdiction, such as the City of Denver (in the Denver media market) or several like the Minneapolis market (including both the St. Paul and Minneapolis city governments). Third, one would examine existing media market boundaries. Television spectrum is distributed according to media market, determined by the FCC tables, while radio stations have greater freedom to choose their community of license.²⁴¹ Some radio stations conceivably could, therefore, have markets centered on certain political jurisdictions within a major media market. Similarly, newspapers could have geographic markets that might slice out a portion of the larger media market, e.g., a newspaper dedicated to Long Island news within the New York City media market.

²³⁸ See 47 C.F.R. § 73.3555(c) (2007).

²³⁹ *Id.*

²⁴⁰ Yan & Napoli, *supra* note 230, at 801-03.

²⁴¹ See *supra* note 181.

A regulator's job would be to ensure that geographic markets create incentives to produce news about relevant political institutions. For instance, a regulator might reasonably determine that a merger between a New Jersey newspaper and Philadelphia-based television station might result in less political news, particularly state and local, making such a merger suspect. Conversely, a merger between a Philadelphia newspaper and a Philadelphia-based television station would not prompt concern because the resulting media outlet would have the same incentives for producing state and local news. Similarly, if a radio station with a community of license (the community in which a radio station is located and in which it has authority to use spectrum) different from the television community of license were placed under joint ownership — say, a New York City area newspaper and a Long Island radio station — less political news might result, at least compared to a joint ownership or control of radio and television stations with identical footprints.

2. Television and Radio Local Limits

The 2003 Biennial Media Ownership Order relaxed both the television and radio local limits. The FCC's order permitted a single firm to own two or three television stations in certain markets.²⁴² The FCC continued to prohibit common ownership among the top four stations in any given market.²⁴³ This was designed to ensure that most markets would have six firms because six equal-sized firms would create an HHI index below 1800, and therefore, it was assumed, would present no competitive problems.²⁴⁴ The FCC simply presumed that the firms would be equal-sized, and the court had no problem finding this assumption irrational.²⁴⁵

The 2003 Biennial Media Ownership Order retained the existing limits of local radio ownership, which are tiered to the size of the market. This rule was designed to guarantee five firms in all markets. The Commission primarily relied on DOJ merger guidelines and two articles on game theory, fifteen and thirty years old respectively, for its claim that five firms would lead to a competitive market.

Just as with the cross-ownership limits, the degree to which any particular media outlet specializes in one jurisdiction would be significant in determining whether merger would be appropriate.

²⁴² 2002 Biennial, 18 F.C.C.R. at 13,668 ¶ 134.

²⁴³ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 412 (3d Cir. 2004).

²⁴⁴ *See id.* at 433-34.

²⁴⁵ *See id.* at 434.

Specifically, radio mergers between stations with different “home cities” would be more suspect than mergers between radio stations with the same “home cities.” If the proposed co-owned station had a service area that spanned different political boundaries, the merger would be particularly suspect.

Television station mergers would be much less suspect due to the peculiarities of television licensing. The FCC chooses the geographic scope of television licensing, and with rare exception it chooses the geographic scope of television licenses to be coterminous with a major metropolitan area.²⁴⁶ Radio stations, on the other hand, have greater freedom to determine the geographic boundaries of their market. They can choose which locality to serve.²⁴⁷ While most radio stations choose allotments coterminous with major metropolitan areas, they do not always. The difference in coverage can be very important in more rural areas. Therefore, merger of these radio stations can significantly affect the likelihood that certain types of news will be produced.

This effect can be found within media markets as well. Consider a media market that includes numerous political jurisdictions, for example, either cities or counties, with one jurisdiction much larger than the others. Such a media market will likely have news about the large jurisdiction to the exclusion of the others. Media markets that contain numerous political jurisdictions of the same size may in fact destroy incentives to cover news about these smaller political jurisdictions. Local news preferences would be too fractured to allow firms to profitably cater to each of them.

This “substitution effect” may not affect the total quantity of local news, but rather its content, substituting serious political reportage for news with negative externalities. Because preferences in local news are fractured among the various smaller jurisdictions, news that interests the entire community but with negative externalities, such as incessant stories about crime and fires, may dominate local news. Thus, by including numerous smaller political jurisdictions, the geographic structure of media markets may affect the content of local news, explaining the documented phenomenon that crime stories are covered to a hugely disproportionate degree by local news.²⁴⁸ This

²⁴⁶ See *In re* Amendment of Section 3.606 Regarding Television Broad. Serv., 41 F.C.C. 148, 149-52 (1952) (Sixth Report and Order).

²⁴⁷ See *In re* Amendment of the Comm’n’s Rules Regarding Modification of FM & TV Authorizations to Specify a New Cmty. of License, 4 F.C.C.R. 4870, 4872 (1989).

²⁴⁸ ALEXANDER & BROWN, *supra* note 182.

likely has highly negative effects, furthering certain racial and ethnic stereotypes, as Jerry Kang has powerfully argued.²⁴⁹

3. Jurisdiction and Media Structure

Once it is established that media ownership regulation should decrease monitoring costs by encouraging market structures more likely to produce more news programming, a question emerges. In a multijurisdictional society like the United States, virtually every market structure favors one level of government over the other. For instance, to the extent a given community overlaps state boundaries, distributing spectrum locally according to a community might create geographic media markets that are less likely to cover state news. The degree to which media firms own outlets outside a given community also complicates production biases. Owners of firms that have outlets in numerous political jurisdictions may have an incentive to produce more news that would be interesting to consumers of all its media outlets. That would mean that such firms might produce more national news at the expense of local news.

VI. REGULATION OF POLITICS, REGULATION OF SPEECH

Media ownership regulation wed closely to its political effects ceases to be mere economic regulation and becomes much more akin to political regulation. Recognizing the links between media and political behavior reveals the FCC's public interest analysis as being concerned with what political discourse should be. Stripped of its faux antitrust veneer, media ownership regulation is political regulation, more akin to campaign finance or anticorruption measures than trade regulation.

This realization clarifies the confused, hoary minefield of the standard of review for media ownership regulation. Structural regulation concerning broadcast television and radio (and possibly other forms of media) still theoretically receives the deferential review found in *National Broadcasting Company* and *National Citizens Committee for Broadcasting*, yet lower courts do not seem particularly deferential.²⁵⁰ On the other hand, cable regulation receives intermediate scrutiny.²⁵¹ Given the inevitable technological convergence, in which content will be delivered indiscriminately on

²⁴⁹ Kang, *supra* note 9, at 1495.

²⁵⁰ See Part II.B.

²⁵¹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638-39 (1994).

mobile wireless devices, televisions, and computer screens, the media-specific regulation will collapse by the weight of its own anachronism.

This Article suggests, however, that in its place courts should apply a standard of review to media ownership that is appropriate for the regulation of elections. This follows from a view of media ownership regulation as political regulation aimed at creating a better agency relationship between elected officials and the citizenry. The aims of media ownership regulation under this view would be like those of campaign finance regulation — to make elected officials more responsive to voters. Both campaign finance and media ownership regulation limit free expression — the ability to contribute to a political candidate and the ability to own media outlets, respectively. Ironically, both aim to improve the functioning of democracy by limiting speech. In defense of this seemingly contradictory pursuit, the empirical evidence discussed above suggests that certain types of media structures will produce more political news. Therefore, as an empirical matter, democracy might be more effective if there are certain ownership regulations.²⁵²

There remains, however, the normative argument: Should we abridge the First Amendment rights of corporate ownership for the hope of a better functioning democracy? Ronald Dworkin, in his defense of campaign finance limits, has sketched out an answer. He observes that campaign finance regulation involves a trade-off between campaign contributors' First Amendment rights and the improved function of the democratic process through the elimination of improper influence, or at least the appearance of impropriety.²⁵³ This is the precise balance that media ownership regulation strikes between the First Amendment rights of those who own media and the improved function of the democratic process.

Dworkin points out that one cannot trade off rights, like free speech, in order to further other democratic goals. Further, such a trade-off, particularly if mandated by the government, is risky:

Our Constitution . . . should commit us to the prophylactic judgment that democracy is best served, in the long run, by a rule that forbids government any power to try to improve it . . . by compromising the freedom of people to say what they like. . . . Justice Scalia set out that argument in

²⁵² See discussion *supra* Part V.A.4.

²⁵³ See Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 63, 97-101 (E. Joshua Rozenkrantz ed., 1999).

characteristically vivid language in 1990. He referred to the idea that “too much speech is not an evil that the democratic majority can proscribe,” and he declared that the idea “is incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.”²⁵⁴

Dworkin responds to Scalia’s argument that while one cannot balance between free speech and a better functioning democracy, one can “discriminate” between regulation of speech that “appreciably damages either citizen sovereignty or citizen equality,” which is forbidden, and “regulations of political speech that improve democracy on some dimension when the defect that they aim to repair is substantial, and when the constraint works no genuine damage to either citizen sovereignty or citizen equality.”²⁵⁵

This normative argument can be applied to the structural regulation of media. There must be a “substantial” defect that exists within a media market to justify regulation. This might exist in a state like New Jersey with numerous media markets, but few media outlets have a strong economic incentive to cover state government. A similar situation may exist with a city or local government contained in a large media market with other, bigger local entities.

Given the similar values and trade-offs between media ownership regulation and campaign finance, it would seem that one way to resolve the confusion concerning the appropriate standard of review for structural regulation would be simply to adopt the standard for campaign finance regulation. Under the Supreme Court’s most recent holding on the regulation of campaign contributions, such laws receive something less than strict scrutiny but more than mere rational basis. The Court states that where

interests directly implicate the integrity of our electoral process, and . . . the successful functioning of that process . . . and [b]ecause the electoral process is the very “means through which a free society democratically translates political speech into concrete governmental action, . . . [t]he less rigorous standard of review we have applied to contribution limits (*Buckley*’s “closely drawn” scrutiny) shows proper deference to Congress’[s] ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It

²⁵⁴ *Id.* at 82-83.

²⁵⁵ *Id.* at 84.

also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.²⁵⁶

This seems, as well, to be the right answer for how courts should view structural media regulation. Before the FCC blocks a merger or limits ownership rights, it must be able to tell a fairly convincing story, either theoretically or empirically, showing that its regulations will substantially increase news output. Such a standard would provide a unity to the fractured standards of review the media now receive, with television and radio broadcast regulations reviewed under a nominal strict scrutiny,²⁵⁷ and cable and satellite receiving intermediate scrutiny.²⁵⁸

VII. THE FUTURE OF SPEECH AND ITS REGULATION

Media regulation, which traces its origin to the New Deal, assumes an industrial structure that is equally ancient — a structure dominated by broadcast television and radio. Yet, despite its age and anachronism, rumors of this structure's death have been exaggerated. Broadcast television stations are largely kept alive through generous support from Congress in the form of must-carry regulation — regulation that requires cable to carry their signals and shelters them from competition from nonlocal stations.²⁵⁹ Congress has imposed on direct broadcast satellite (“DBS”) providers similar duties to broadcast local stations.²⁶⁰ Broadcasters have also received gifts of free spectrum.²⁶¹ This Article is about media regulation as it exists and will likely exist for the next decade. Yet it must be recognized that the Internet is transforming media structure. As Rupert Murdoch states: “Power is moving away from the old elite in our industry — the editors, the chief executives and, let's face it, the proprietors.”²⁶² The

²⁵⁶ *McConnell v. FEC*, 540 U.S. 93, 136-37 (2003).

²⁵⁷ See *supra* note 7 and accompanying text.

²⁵⁸ See *supra* note 8 and accompanying text.

²⁵⁹ A discussion of the must-carry regulations are beyond this Article's scope. See JERRY KANG, *COMMUNICATIONS LAW AND POLICY: CASES AND MATERIALS* 480-82 (Robert C. Clark et al. eds., 2d ed. 2005).

²⁶⁰ See, e.g., *Satellite Home Viewer Act of 1988*, 17 U.S.C. § 119 (1994).

²⁶¹ See Bob Dole, *Giving Away the Airwaves*, N.Y. TIMES, Mar. 27, 1997, at A29.

²⁶² Owen Gibson, *Internet Means End for Media Barons, Says Murdoch*, THE GUARDIAN, Mar. 14, 2006, available at <http://media.guardian.co.uk/site/story/0,,1730382,00.html>.

cause of this shift relates to the way the Internet circumvents existing regulatory structure.

Specifically, the distribution of news via the Internet lacks many of the previously characteristic structural features of news production discussed above. First, it has no geographic boundaries. This creates an entirely new “median audience.” It is no longer the median of any media market, but quite literally the world. Further, the Internet transforms the high fixed cost/low marginal cost structure of the media. With blogs and YouTube, anyone can potentially attract, with minimal expense, an enormous audience for one’s news, articles, or videos. Thus, the structural drivers of media content — a geographic market set by FCC license assignments, and cost structure — will fade in importance. These changes suggest that the media dystopia of Cass Sunstein’s Republic.com, in which matters of public concern become minimized within the deadening weight of media choice, may not be too off the mark.²⁶³

Sunstein’s remedy, direct government subsidies, is hard to swallow. Direct government involvement in media production produces controversial results, as evidenced by the endless squabbles over the Corporation for Public Broadcasting. Rather than direct subsidies, political reporting perhaps should be treated as artistic and charitable institutions currently are. Change the tax code to allow political reporting to function as a charitable organization, perhaps on the condition that the organization refuse commercial funding. Subscriptions to these “charitable” political news services would be tax deductible “contributions,” and entities that conducted political news reporting would be nonprofit and tax-exempt. In other words, create more of a market for numerous “public media,” like National Public Radio or the Corporation for Public Broadcasting, which would respond to private, not governmental, demands.

Political reportage would move, therefore, into the world of art and other worthy activities, rather than matters for mass consumption. This is both comforting and disturbing. On the comforting side, news reporting bears a tremendous similarity to art or literature or scholarship in that these activities interest only a minority, but presumably have tremendous positive externalities, creating a more vibrant, dynamic society for everyone. Viewing political discussion

²⁶³ See generally SUNSTEIN, REPUBLIC.COM, *supra* note 17 (describing balkanization caused by filtering of information on Internet). This idea is “in the air.” On the day I presented this paper to the MSU Law School faculty colloquium, an editorial in the *Wall Street Journal* appeared calling for nonprofit status for newspapers. See Steven Rattner, *Red All Over*, WALL ST. J., Feb. 15, 2007, at A19.

and reporting as an elevated pursuit is reasonable and may, in fact, improve the behavior of politicians. On the disturbing side, the retreat of serious political discussion into certain enclaves marks a significant shift in the populist course that this country has taken since the presidency of Andrew Jackson. Knowledge is power. When political knowledge becomes concentrated within certain groups or factions the risk of opportunism and disenfranchisement increases.

CONCLUSION

For the last seventy years, the FCC has justified its media ownership regulation based on a metaphor: the antitrust law for the marketplace of ideas. This Article has shown that this misused metaphor has led to a regulatory bankruptcy with the FCC incapable of creating rules that courts will uphold. In contrast, this Article has suggested that media regulation must embrace its political nature, recognizing the function media plays in lowering the cost to citizens of monitoring their elected representatives. Media regulation must encourage industry structures that maximize news output. Research about the effects of industry ownership and geographic structure on the content of political news and political activity could guide this regulation. Setting media structure to maximize news output creates private incentive for certain types of media production but avoids government's direct involvement in content decisions. Even as current media structures shift, however, this Article argues the goal of maximizing political news output with minimal government oversight must guide regulation. With changing media industry structures, this maximization may involve using the tax exemption to encourage political reporting.
