

1989

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Recommended Citation

Jonathan W. Emord, *The First Amendment Individuality of FCC Ownership Regulations*, 38 Cath. U. L. Rev. 401 (1989).

Available at: <https://scholarship.law.edu/lawreview/vol38/iss2/7>

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THE FIRST AMENDMENT INVALIDITY OF FCC OWNERSHIP REGULATIONS

*Jonathan W. Emord**

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions.¹

In *Syracuse Peace Council*,² the Federal Communications Commission (FCC or Commission) eliminated the Fairness Doctrine.³ It based its action

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1. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 160-61 (1973) (Douglas, J., concurring).

2. 2 FCC Rcd 5043 (1987), *aff'd*, Nos. 87-1516, 87-1544 slip op. (D.C. Cir. Feb. 10, 1989); *see also infra* note 247 (discussing affirmance by the United States Court of Appeals for the District of Columbia Circuit).

3. Under the Fairness Doctrine, broadcast licensees must fulfill a twofold editorial duty: (1) They must provide coverage to controversial issues of public importance; and (2) they must afford a reasonable opportunity for the airing of contrasting views on those issues. *See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985), *appeal dismissed*, 62 Rad. Reg. 2d (P&F) 86 (D.C. Cir. 1987) [hereinafter 1985 Fairness Report]. The Federal Communications Commission's (FCC or Commission) elimination of the Fairness Doctrine did not address two other provisions which mandate access to a broadcaster's licensed channel and thereby represent constitutionally suspect restrictions on the broadcaster's editorial discretion. *See* 47 C.F.R. § 73.1920 (1987) ("personal attack" rule); *id.* § 73.1930 (1987) ("political editorial" rule). These rules remain in effect. *See Syracuse Peace Council*, 3 FCC Rcd 2035 (1988); *see also Syracuse Peace Council*, 2 FCC Rcd at 5063

upon evidence of the Doctrine's chilling effect on the exercise of editorial discretion by broadcast journalists⁴ and upon the existence of a changed media marketplace—one in which a plethora of media outlets and programming choices was thought to render "spectrum scarcity" an obsolete rationale.⁵

The *Syracuse Peace Council* decision is destined to have a profound impact upon all regulation of the broadcast media. The Commission's invalidation of the spectrum scarcity rationale as a basis for content regulation cannot logically be limited to content alone.⁶ Spectrum scarcity serves as the essential underpinning of almost every FCC regulation and is the principal factor said to distinguish broadcasting from the print media.⁷

n.75 ("We need not—and do not—decide here what effect today's ruling will have on every conceivable application of the fairness doctrine"); Letter from Dennis R. Patrick, Chairman, FCC, to John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Sept. 27, 1987) (Commission's Fairness Doctrine decision did not encompass political broadcasting rules, although issues arising under them "may come within its precedential scope").

4. See *Syracuse Peace Council*, 2 FCC Rcd at 5049-50; 1985 Fairness Report, *supra* note 3, at 159-90 (discussing over 60 reported instances where the existence of the Fairness Doctrine dissuaded broadcasters from affording coverage to certain controversial issues); see also Comments of the National Association of Broadcasters, Gen. Docket No. 84-282, app. D (Sept. 6, 1984) (documenting 45 cases of a chilling effect attendant to the Fairness Doctrine's enforcement).

5. The Commission's 1985 review of the Fairness Doctrine had revealed "an explosive growth in both the number and types of [media] outlets in every market since the 1969 *Red Lion* decision [*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)]." *Syracuse Peace Council*, 2 FCC Rcd at 5051. The Commission concluded that "government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas." *Id.*; see also *infra* note 247.

6. In *Syracuse Peace Council*, the Commission not only abolished the Fairness Doctrine but carried its rationale for doing so to its logical extreme, laying precedent for the inclusion of the electronic media within the first amendment's full protective cover. The Commission explained that the functional similarities, rather than the physical differences, between the broadcast and print media should guide constitutional evaluation of broadcast content regulations. *Syracuse Peace Council*, 2 FCC Rcd at 5055. The persistent print/broadcast distinction is inextricably linked to a view of the licensed broadcaster as a custodian of an essentially public resource. As one leading proponent of the public trustee model of broadcasting regulation has written: "[T]he public trustee notion must be erased before a broadcast journalist can be guaranteed the same First Amendment rights as a newspaper journalist." Geller, *Broadcasting and the Public Trustee Notion: A Failed Promise*, 10 HARV. J.L. & PUB. POL'Y 87, 87 (1987). See also *infra* note 213.

7. The Supreme Court has often identified spectrum scarcity as the "prevailing rationale for broadcast regulation." See *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); see also *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775, 799 (1978). In *Red Lion*, the Supreme Court confirmed that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." 395 U.S. at 390. In *NBC v. United States*, 319 U.S. 190 (1943), Justice Frankfurter explained that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is

Spectrum scarcity has served not only as a basis for abridging broadcasters' rights to speak *freely* on matters of public importance, but also as a basis for denying certain entities a right to speak *at all*.⁸ This Article addresses FCC ownership regulation, one aspect of the FCC's scarcity-based regulatory regime, which imposes constitutionally suspect restrictions based not upon the nature or content of speech but upon characteristics of the speaker.⁹ If existing ownership rules and policies continue to serve as models for regulation of the new communications technologies, freedom of speech and press will become increasingly anachronistic. As society becomes ever more dependent upon audio and video technologies for access to information and opinion and ever less dependent upon the printed press, the compass of the first amendment's protective shield will shrink in scope, affording Americans less freedom to communicate and receive information.¹⁰ Accordingly, this Article recommends that the core values of the first amendment, embodied in the framers' original construct, be permitted to transcend all means of communication equally.

This Article begins by setting forth a summary history of FCC ownership restrictions, describing two distinct historical phases. The section discussing the Commission's first regulatory phase documents the adoption of a complex of ownership restrictions that affect various communications media. These restrictions were based primarily on fears of viewpoint monopoliza-

why, unlike other modes of expression, it is subject to government regulation." *Id.* at 226. The Commission also relies upon what has become known as the "impact rationale" for permitting certain kinds of broadcast regulation. See *Pacifica Found. v. FCC*, 438 U.S. 726 (1978) (upholding the FCC's authority to regulate "indecent" speech). The impact rationale focuses upon the pervasive presence and influential nature of the broadcast medium and suggests that this justifies regulation as a constitutional matter. See M. L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 67-118 (1986) for a critique of this rationale.

8. The constitutional basis for the FCC's power to deny broadcast opportunities to able and willing prospective licensees stems from Justice Frankfurter's oft-quoted dicta in *NBC*:

The [Communications] Act [of 1934] itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. . . . [T]he Act does not restrict the Commission merely to the supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic.

319 U.S. at 215-16.

9. See *Red Lion*, 395 U.S. at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write or publish."). It is clear, however, that the general antitrust laws applicable to the print media remain a constitutional and effective means of ending monopolistic practices in media ownership as they arise from time to time in specific cases. See *Associated Press v. United States*, 326 U.S. 1 (1945).

10. See I. POOL, *THE TECHNOLOGIES OF FREEDOM* 1 (1983); Sibary, *The Cable Communications Policy Act of 1984 v. The First Amendment*, 7 HASTINGS J. COMM. & ENT. LAW 381, 399 (1984).

tion and "private censorship" that never actually materialized. The Article then chronicles the second, or deregulatory, phase, involving the Commission's reevaluation of the extent to which the ownership restrictions actually served their regulatory objectives—a reevaluation that resulted in repeal of certain regulations. Although the deregulatory phase continues to this day, deregulation of broadcast ownership remains incomplete because the Commission has yet to repudiate, as constitutionally repugnant, all forms of governmentally enforced viewpoint diversity. The Article next turns to a critique of the spectrum scarcity rationale which has been used to support a diminished degree of first amendment protection for broadcasters and has served as the constitutional predicate for FCC ownership regulations, showing that the rationale is based on defective premises, and is, in any event, obsolete in the current information marketplace. The Article then notes the increasing disappearance of functional distinctions between the broadcast and print media, and suggests that, absent the scarcity rationale, no principled justification exists for distinguishing between the two media for purposes of measuring the constitutionality of media ownership restrictions. To demonstrate the bankruptcy of any print/broadcast distinction, this Article traces the emergence of the first amendment, discussing the dominant conception of individual speech and press liberty enshrined in it, a conception which demands that the government act as protector of a private communications reserve rather than a guarantor of viewpoint diversity. Next, it shows that the FCC's assumption of a role as the guarantor of viewpoint diversity in the broadcast media is premised upon a misconception of the values operating in the first amendment. The framers of the Constitution intended the first amendment to serve as a barrier against governmental interference with speech liberty in order to foster the development of a private marketplace of ideas, not as a device for authorizing government-mandated diversity in that marketplace. This Article contends that the erroneous notion, advanced by Professor Jerome Barron and others, that the government not only may, but should, enforce a diverse "mix" of voices in the marketplace, drastically shrinks the scope of the first amendment's protection of individual expression and places the government in the dangerous position of regulating ideological commerce. The Article notes that the courts have rejected Barron's thesis in the print media context, yet have embraced it in the broadcast media context. The Article contains a proposal for affording the broadcast press full first amendment protection, essentially through recognition of a property rights approach to spectrum ownership. Finally, the Article concludes by advocating repeal of the FCC's structural regulations as an essential predicate to completing the current salutary movement toward affording the broadcast press the same degree of constitutional protec-

tion as its print counterpart. This Article contends that antitrust restraints (which now operate to preclude print media market domination) are the only *constitutional* form of structural regulations that may be applied to the electronic media.

I. A HISTORY OF FCC OWNERSHIP REGULATIONS¹¹

In 1924, at the third National Radio Conference, President Calvin Coolidge warned that, over time, the burgeoning new technology of radio could become controlled by a select few who, by virtue of their exclusive right to use this most influential medium, could determine what information the public would receive.¹² Fear of future thought control by "media barons"¹³ obsessed the original advocates of radio regulation, including the vocal Representative Johnson of Texas. In hearings preceding the adoption of the Radio Act of 1927,¹⁴ Representative Johnson expressed the view that without strong federal legislation, "American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a Republic. . . ."¹⁵

These fears of ownership concentration led to the creation of regulatory barriers to market entry into broadcasting. These barriers have delimited broadcasters' rights to free speech in markets across the country without any specific proof of anticompetitive practices in the marketplace.¹⁶ Such

11. Given the great number and variety of FCC ownership regulations, an article designed to present an overall history and critique of the rules must necessarily selectively exclude some rules from assessment. This history does not exhaustively explore the case precedent underlying the various ownership rules; nor does it address in any depth the telephone company-cable television cross-ownership rules, the program exclusivity rules, the syndicated exclusivity rules, the cable network non-duplication rule, or the broadcast non-network territorial exclusivity rule. These subjects would require more detailed analysis than is appropriate for a single article and are therefore left for another day.

12. See STAFF OF SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 98TH CONG., 1ST SESS., *PRINT AND ELECTRONIC MEDIA: THE CASE FOR FIRST AMENDMENT PARITY* 25-26 (Comm. Print 1983).

13. See Johnson, *Media Barons and the Public Interest*, ATLANTIC, June 1969, at 43-51; Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COMM. B. J. 1, 67 (1974) (discussing Johnson, *supra*).

14. Ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064.

15. 67 CONG. REC. 5557, 5558 (1926); see also *To Regulate Radio Communication: Hearings on H.R. 7357 Before the Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 8 (1924) (statement of Herbert Hoover, Secretary of Commerce). In a 1924 House of Representatives hearing, Secretary of Commerce Herbert Hoover warned: "We cannot allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public. . . ." *Id.*

16. In significant respects, the entire licensing system was designed to promote diversified ownership of mass communications; indeed, as the Supreme Court explained in *FCC v. Potts-*

broadly prophylactic regulations must be viewed as governmental restrictions on freedom of speech which, absent a "scarcity" underpinning, lack the narrow tailoring needed to serve the government's interest in competition.¹⁷ Consequently, the FCC's ownership regulations appear well situated for constitutional challenge.

A. The Regulatory Phase

Since its inception in 1934, the Commission has construed its licensing mandate to require the use of broadcast channels in a manner calculated to foster maximal competition among broadcast licensees.¹⁸ The Commission supports government-mandated competition as a means of promoting programming diversity.¹⁹ It assumes that each new media owner will offer a new and different "voice" in the marketplace of ideas.

1. The Chain Broadcasting Rules

In an effort to extend its procompetitive policies to the nation's broadcasting networks and their affiliates, the FCC, on May 2, 1941, issued its *Report on Chain Broadcasting*.²⁰ This report contained eight separate regulations.²¹

ville Broadcasting Co., 309 U.S. 134 (1940), "Congress moved [in enacting the Communications Act of 1934] under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Id.* at 137. The Commission derives its authority to regulate broadcast licensee ownership structures largely from §§ 303(r) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(r), 309(a) (1982). See *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 193 (1956).

17. In the area of broadcast regulation of *content*, the Supreme Court has determined that FCC regulations will withstand scrutiny only if they are "narrowly tailored to further a substantial governmental interest." See *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). This intermediate level of scrutiny is premised upon the spectrum scarcity rationale. *Id.* at 377.

18. See *Telegraph Herald*, 4 F.C.C. 392 (1937), *rev'd sub nom. Sanders Bros. Radio Station v. FCC*, 106 F.2d 321 (D.C. Cir. 1939), *rev'd*, 309 U.S. 470 (1940); see also *Telegraph Herald*, 8 F.C.C. 322 (1940); FEDERAL COMMUNICATIONS COMM., REPORT ON CHAIN BROADCASTING 80-87 (1941); *aff'd*, *NBC v. United States*, 319 U.S. 190 (1943), *amended by Report, Statement of Policy, and Order*, 63 F.C.C.2d 674 (1977) [hereinafter 1941 CHAIN BROADCASTING REPORT].

19. See *Spartanburg Advertising Co.*, 7 F.C.C. 498 (1939); see also *Telegraph Herald*, 8 F.C.C. at 324.

20. 1941 CHAIN BROADCASTING REPORT, *supra* note 18.

21. The chain broadcasting rules appeared originally at 47 C.F.R. §§ 3.101-108 (1941). In 1945, the rules were applied to television and additionally appeared at 47 C.F.R. §§ 3.631-.638 (1945). In 1977, recognizing that radio networking had become comprised of only periodic and limited news and informational programming, the FCC repealed most of the original chain broadcasting rules as they applied to radio, retaining them for television. See Report, Statement of Policy, and Order, Review of Commission Rules and Regulatory Policies Con-

The regulations were designed to limit the power of the three national networks: the National Broadcasting Company (NBC), then a subsidiary of Radio Corporation of America,²² the Columbia Broadcasting System, Inc. (CBS), then controlled by William S. Paley and Associates,²³ and the Mutual Broadcasting System, Inc., then controlled by the Chicago Tribune and R. H. Macy & Co.²⁴

The Commission accepted as a paramount policy objective the need for government to foster "the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service."²⁵ It designed the chain broadcasting rules to end perceived anticompetitive practices and to eliminate certain pro-network clauses in network affiliation contracts.²⁶

cerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, 63 F.C.C.2d 674 (1977) (deleting 47 C.F.R. §§ 73.131, 73.133-.138, 73.231, 73.233-.238). The chain broadcasting rules have since been recodified and appear at 47 C.F.R. § 73.658 (1987). The term "chain broadcasting" appears in § 3(p) of the Communications Act of 1934, 47 U.S.C. § 153(p)(1982), and is defined as the "simultaneous broadcasting of an identical program by two or more interconnected stations." *Id.* The term "chain broadcasting" is now subsumed within the modern regulatory definition of the terms "network" and "network organization" in 47 C.F.R. § 73.658 (1987). Section 73.658(a) reads in pertinent part: "The term 'network organization' as used in this section includes national and regional network organizations. . . ." *Id.* § 73.658(a) (citation omitted). Section 73.658(j)(4), pertaining to network syndication and program practices, provides that:

For the purposes of this paragraph and paragraph (k) of this section the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.

Id. § 73.658(j)(4).

Section 73.658(l)(1)(v) defines "network" as "a national organization distributing programs for a substantial part of each broadcast day to television stations in all parts of the United States, generally via interconnection facilities." *Id.* § 73.658(l)(1)(v). For a concise yet informative history of chain broadcasting, see NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMM., FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION II-2 to II-13, II-32 to II-38 (1980)[hereinafter NETWORK ENTRY REPORT].

22. See 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 9. As of 1938, NBC had 161 affiliates, 10 licensed facilities of its own, and two national networks: the "Red" and the "Blue." *Id.* at 15-16.

23. *Id.* at 21-22. As of 1938, CBS had 113 affiliates and eight licensed facilities of its own. *Id.* at 23.

24. *Id.* at 26. As of 1939, Mutual had 107 affiliates. *Id.* at 27.

25. *Id.* at 47.

26. See Notice of Proposed Rulemaking, Review of Rules and Policies Concerning Network Broadcasting by Television Stations; Elimination or Modification of Section 73.658(c) of the Commission's Rules, FCC 89-89, adopted Mar. 16, 1989, released Apr. 7, 1989 (deleting the rule in its entirety) [hereinafter Network Term Elimination NPRM].

The Commission prohibited "network exclusivity," denying a license or license renewal to any prospective or present licensee having an arrangement with a network organization whereby the licensee agreed not to broadcast the programming of any other network organization.²⁷ The Commission also prohibited "territorial exclusivity," denying a license or license renewal to any prospective or present licensee having an arrangement with a network organization whereby the network would agree not to permit its programming to be broadcast by any other station serving substantially the same area.²⁸ The Commission intended its network and territorial exclusivity rules to encourage the networks to sell the programming rejected by their affiliates to their affiliates' local competitors.²⁹

The Commission also limited the term of network affiliation contracts to two years.³⁰ This rule was intended to encourage the development of new networks.³¹ The Commission also precluded networks from requiring broadcast licensees to make available a broadcast day or time segment for the mandatory carriage of network programming.³² This rule was designed to promote the development of local programming services.³³

Another provision prohibited network affiliation contracts that limited a licensee's discretion to reject programming which the licensee deemed "un-

27. See 47 C.F.R. § 3.101 (1941), *recodified at id.* § 3.631 (1945), *current version at id.* § 73.658(a) (1987).

28. See 47 C.F.R. § 3.102 (1941), *recodified at id.* § 3.632 (1945), *current version at id.* § 73.658(b) (1987).

29. See *NBC v. United States*, 319 U.S. 190, 199-201 (1943); see also 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 57, 59, 91; Cable Television Report and Order, Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; Inquiry Into the Development of Communications Technology and Services To Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 36 F.C.C.2d 143 (1972) (currently codified at 47 C.F.R. pt. 76 (1987)) (establishing syndicated exclusivity rules); Report and Order, Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980) (deleting 47 C.F.R. §§ 76.63, 76.151-76.161) (abolishing the syndicated exclusivity rules); Report and Order, Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299 (1988) (to be codified at 47 C.F.R. §§ 73.658, 76.5-76.163) (reimposing a modified form of program exclusivity rules); Further Notice of Proposed Rule Making, Amendment of Parts 73 and 76 of the Commission's Rules, Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 6171 (1988).

30. See 47 C.F.R. § 3.103 (1941), *recodified at id.* § 3.633 (1945), *current version at id.* § 73.658(c) (1987).

31. See *NBC*, 319 U.S. at 199; see also 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 62, 91-92; *supra* note 26.

32. See 47 C.F.R. § 3.104 (1941), *recodified at id.* § 3.634 (1945), *current version at id.* § 73.658(d) (1987).

33. See *NBC*, 319 U.S. at 203; see also 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 65, 92.

satisfactory or unsuitable or contrary to the public interest."³⁴ By this rule, the Commission hoped to prevent its licensees from ceding to the networks control over ultimate program decisionmaking.³⁵

The Commission prohibited the grant of any license to a network organization that already owned a broadcast station covering the same area to be served by the new network-owned station, or that proposed service to a locality in which other existing stations would be competitively disadvantaged to a substantial degree by the introduction of the new network-owned station.³⁶ The FCC's purpose was to open the nation's "most powerful and desirable" markets to other networks.³⁷

The chain broadcasting rules initially prohibited a broadcast station affiliate of a network organization that maintained more than one network from obtaining a second broadcast license if there would be substantial overlap in the territories served by the network-affiliated stations. However, within months of promulgating this rule, the Commission suspended it indefinitely.³⁸ Although the rule was not imposed upon radio broadcast stations, it was applied to television stations.³⁹

The Commission also prevented the networks from requiring broadcast licensees to establish advertising rates in accordance with the network's desired rates for non-network air time.⁴⁰ With this prohibition, the Commission sought to encourage competition between affiliates and the networks for advertising accounts.⁴¹

Considered collectively, these rules were broadly prophylactic, designed not to end specific instances of proven antitrust violations, but to prevent possible future media concentrations. The Commission understood its au-

34. See 47 C.F.R. § 3.105 (1941), *recodified at id.* § 3.635 (1945), *current version at id.* § 73.658(e) (1987).

35. See *NBC*, 319 U.S. at 206; see also 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 66, 92.

36. See 47 C.F.R. § 3.106 (1941), *recodified at id.* § 3.636 (1945), *current version at id.* § 73.658(f) (1987). This rule forced NBC to divest itself of "one of its two networks and one station in each market where it operated two outlets." Howard, *supra* note 13, at 6. NBC sold its "blue network" and some of its stations to candy manufacturer Edward J. Noble on October 12, 1943. *Id.* at 7. The NBC "blue network" later became the American Broadcasting Company, more commonly known as ABC.

37. See *NBC*, 319 U.S. at 206-07; see also 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 68-69.

38. See 47 C.F.R. § 3.107 (1941).

39. See 47 C.F.R. § 3.637 (1945), *current version at id.* § 73.658(g) (1987).

40. See 47 C.F.R. § 3.108 (1941), *recodified at id.* § 3.638 (1945), *current version at id.* § 73.658(h) (1987).

41. See *NBC*, 319 U.S. at 209; see also 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 75, 92.

thority to reach *beyond* the limits of the antitrust laws to practices having a *potential* for undesirable concentration. The Commission explained:

While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities.⁴²

The United States Supreme Court stamped this understanding with an imprimatur of constitutionality in *NBC v. United States*.⁴³ NBC attacked on first amendment grounds the Commission's assumption of sweeping authority to structure the broadcasting marketplace and dictate the business relationships of licensees. It argued that the chain broadcasting regulations unduly restricted the free speech rights of licensees.⁴⁴ According to NBC, the regulations constituted a pervasive intrusion into the business affiliations and programming decisions of broadcasters, tantamount to unconstitutional governmental control over licensed frequencies.⁴⁵ Justice Frankfurter, writing for the Court, rejected this argument. He concluded that the regulations essentially consisted of conditions upon the grant of a license to use a finite and unique public resource: the scarce electromagnetic spectrum, which could be occupied by only a limited number of people.⁴⁶ Because the Commission had statutory authority to license uses of scarce spectrum according to its conception of the public interest, it could constitutionally decide the nature of those uses and the composition of spectrum users.⁴⁷ Moreover, because denial of a license under the chain broadcasting rules was not predicated upon illegitimate considerations such as the applicants' political, social, or economic views, but upon activities and associations which the Commission believed to be inconsistent with the public interest, discrimination against those applicants, in Frankfurter's view, neither abridged their free speech rights nor exceeded the Commission's statutory and constitutional authority.⁴⁸ Despite the fact that the Commission based its regula-

42. 1941 CHAIN BROADCASTING REPORT, *supra* note 18, at 83.

43. 319 U.S. 190 (1943).

44. *Id.* at 226.

45. See Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 VAND. L. REV. 1249, 1319 (1979).

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

47. *Id.* at 226-27.

48. *Id.*

tions upon little more than predictive judgment, with no evidence of actual present or probable detriment to the public interest, the *NBC* decision encouraged the FCC to frequently resort to entry barriers as a means of countering perceived dangers of market concentration.⁴⁹

2. *The Duopoly and One-to-a-Market Rules*

Six months after the Court handed down its decision in *NBC*, the Commission adopted its first so-called "duopoly" rule. This rule prohibited any licensee from owning a standard (AM) broadcast station in substantially the same area as, and having overlapping primary service contours with, the licensee's existing AM station.⁵⁰

In 1940, among its rules affecting the new FM and TV broadcast services, the Commission included a proscription against duopoly ownership.⁵¹ Between 1940 and 1969, the Commission changed its duopoly rules only once.⁵² In 1964, the Commission enacted more restrictive standards to govern prohibited duopoly ownership. Those standards prohibited ownership, operation, or control of two AM or two FM stations in the same area if the existing and predicted primary service contours of the stations overlapped.⁵³

49. *See id.* at 224. For an insightful critique of the *NBC* decision, see Lee, *supra* note 45, at 1315-22.

50. *See* Rules Governing Standard and High Frequency Broadcast Stations, Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16,065 (1943) (currently codified at 47 C.F.R. § 73.3555(a) (1987)), amended by First Report and Order, Amendment of Section 73.3555, The Broadcast Multiple Ownership Rules, FCC 88-343 (Feb. 22, 1989). In Rules Governing Standard and High Frequency Broadcast Stations, Multiple Ownership of Standard Broadcast Stations, 9 Fed. Reg. 3860 (1944), the Commission required existing standard broadcast licensees to divest themselves of stations held in violation of the new duopoly rule. From 1938 to 1941, the FCC had employed a presumption against the grant of any new standard broadcast license that would produce an ownership duopoly. *See* *Genesee Radio Corp.*, 5 F.C.C. 183, 186 (1938). A "cross-interest" policy developed in Commission precedent to extend the reach of the duopoly rules and prevent individuals from having "meaningful" interests as owners, officers, or managers "in two broadcast stations, or a daily newspaper and a broadcast station, or a television station and a cable television system serving substantially the same area." *See* Notice of Inquiry, Reexamination of the Commission's Cross-Interest Policy, 2 FCC Rcd 3699 (1987) [hereinafter Cross-Interest NOI].

51. 6 FCC ANN. REP. 68 (1940).

52. For a history of legislative and administrative proposals concerning ownership during this period, see Notice of Proposed Rulemaking, Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 95 F.C.C.2d 360, 361-72 (1983)[hereinafter Seven-Station Modification NPRM]; Howard, *supra* note 13, at 7-46.

53. Report and Order, Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964) (currently codified at 47 C.F.R. § 73.3555(a) (1987)), amended by First Report and Order, Amendment of Section 73.3555 of the Commission's Rules, The Broadcast Multiple Ownership Rules, FCC 88-343 (Feb. 22, 1989).

The Commission also prohibited ownership, operation, or control of two television stations in the same area if the existing and predicted secondary service contours of the stations overlapped.⁵⁴

In 1970, the Commission amended its duopoly rules to prohibit future interservice ownership in the same market: the so-called "one-to-a-market" rule. This rule precluded existing AM, FM, and TV licensees from acquiring other broadcast facilities in other services in the same market.⁵⁵ Specifically, the new rule prevented any radio licensee from acquiring a TV station if the licensee's AM or FM station service contours encroached upon the television station's community of license.⁵⁶ Similarly, the rules prevented any television licensee from acquiring a radio station if the licensee's television primary service contours encroached upon the AM or FM station's community of license.⁵⁷ In 1971, the FCC liberalized its initial exception to its new rule by permitting AM-FM combinations in the same market and by permitting existing radio licensees to acquire UHF stations in the same market.⁵⁸

3. *The Cross-Interest Policy*

In 1940, in an effort to extend the reach of the early duopoly rule, the Commission began, on a case-by-case basis, to prohibit "cross-interests" in the same service in the same market area.⁵⁹ The general purpose of the policy was to require individuals possessing attributable ownership interests in a broadcast station to maintain arms' length relationships with other stations

54. *Id.*

55. First Report and Order, Amendment of Section 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 306 (1970) (currently codified at 47 C.F.R. § 73.3555(b) (1987), as amended by Memorandum Opinion and Order, 28 F.C.C.2d 662 (1971), amended by Second Report and Order, Amendment of Section 73.3555 of the Commission's Rules, The Broadcast Multiple Ownership Rules, FCC 88-407 (Feb. 23, 1989) [hereinafter *One-to-a-Market Report and Order*].

56. *Id.*

57. *Id.* The Commission excluded from consideration under the rule class IV AM stations in communities with populations under 10,000 by permitting such AM stations to own FM stations in the same market, "provided the FM station was not serving the same market as a commonly-owned television station." Howard, *supra* note 13, at 61. Daytime-only AM station licensees were also permitted to own FM stations in the same market, provided the FM did not serve the same market as a commonly owned television station. FM station licensees were not afforded a similar rule exemption. *Id.*

58. See Memorandum Opinion and Order, Amendment of Sections 73.35, 73.240 and 73.236 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 28 F.C.C.2d 662 (1971) (currently codified at 47 C.F.R. § 73.3555 note 4 (1987)); *One-to-a-Market Report and Order*, *supra* note 55, at 306, 318-19.

59. See, e.g., *Macon Broadcasting Co.*, 10 F.C.C. 444 (1945).

in the same area and service. The policy prohibited a station owner from having a joint business relationship, with competing media in that owner's market area, that had a potential for impairing competition.⁶⁰ Over time, Commission decisions sanctioned an expansion in the policy to cover a wide variety of positional cross-interests⁶¹ and to extend to interservice cross-interests.⁶²

4. *The Multiple Ownership Rules*

In 1940, the Commission introduced another set of ownership regulations: the multiple ownership rules. The first multiple ownership rules required a single licensee who sought to own, operate, or control more than three television and six FM stations nationwide to prove that such ownership would encourage competition.⁶³ In 1944, the Commission raised its three-station limit in the television service to five stations.⁶⁴ In its 1946 *Sherwood B. Brunton* decision,⁶⁵ the Commission denied a CBS application for an eighth standard broadcast station, effectively creating a seven-station limit for the AM service.⁶⁶

In 1953, the Commission concluded a rulemaking initiated in 1948⁶⁷ by

60. See, e.g., *Shenandoah Life Ins. Co.*, 19 Rad. Reg. (P&F) 1 (1959).

61. See, e.g., *Martin Lake Broadcasting Co.*, 21 F.C.C.2d 180 (1970) (AM owners prohibited from serving as general manager and sales manager in another AM station in the same market); *Golden West Broadcasters*, 16 F.C.C.2d 918 (1969) (advertising sales company with ownership interest in one station prohibited from representing another station in same market and same service), *rev'd*, Report and Order, 87 F.C.C.2d 668, 682-83 (1981); *Guy S. Erway*, 48 Rad. Reg. 2d (P&F) 829 (Rev. Bd. 1980) (individual with managerial position at one station prohibited from serving as consultant to other station in the same market).

62. See, e.g., *Cleveland Television Corp. v. FCC*, 732 F.2d 962, 966 (D.C. Cir. 1984) (radio and television cross-interests prohibited); *News International, PLC*, 97 F.C.C.2d 349 (1984) (cable television system and television station cross-interest prohibited); *Lexington County Broadcasters, Inc.*, 42 F.C.C.2d 581 (Rev. Bd. 1973); *Macon Television Co.*, 43 F.C.C. 1173 (1952) (AM and FM station cross-interest prohibited).

63. See 47 C.F.R. § 4.226 (Supp. 1944); 47 C.F.R. § 3.640 (Supp. 1945); Rules Governing Standard and High Frequency Broadcast Stations, Multiple Ownership of Standard Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940), *amended by* 9 Fed. Reg. 5442 (1944), *amended by* Report and Order, 18 F.C.C. 288 (1953), *amended by* Report and Order, 43 F.C.C. 2797 (1954), *amended by* Report and Order, 100 F.C.C.2d 17 (1984), *amended by* Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985) (currently codified at 47 C.F.R. § 73.3555(d) (1987)).

64. Rules Governing Broadcast Services Other Than Standard Broadcast, Multiple Ownership, 9 Fed. Reg. 5442 (1944), *amended by* Sixth Report and Order, 18 F.C.C. 288 (1953), *amended by* Report and Order, 43 F.C.C. 2797 (1954), *amended by* Report and Order, 100 F.C.C.2d 17 (1984), *amended by* Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985) (currently codified at 47 C.F.R. § 73.3555(d) (1987)).

65. 11 F.C.C. 407 (1946).

66. See *Seven-Station Modification NPRM*, *supra* note 52, at 362.

67. See Notice of Proposed Rulemaking, Amendment of Sections 3.35, 3.240, and 3.636 of

adopting new multiple ownership rules that specified a seven FM, five TV, and seven AM station limit.⁶⁸ Although the Commission did not (and perhaps could not) adequately and precisely explain why its chosen numerical limits were maximally conducive to either economic competition or viewpoint diversity, it proclaimed that these dual concerns were central underpinnings of the new rules.⁶⁹ The Commission subsequently altered its television station limitation to make adjustments for the slowly growing and less desirable UHF service,⁷⁰ by permitting a single individual or entity to own, operate, or control a total of seven television stations, no more than five of which could be VHF facilities.⁷¹

5. *The Top 50 Policy*

In 1964, fearing ownership concentration in the nation's top television markets, the Commission adopted an "interim top 50 policy."⁷² This policy required the Commission to conduct a hearing when presented with any applicant seeking a second VHF station in any of the top 50 markets. The Commission permitted an exemption from its top 50 policy if the applicant could meet a "compelling public interest" standard by showing that undue concentration would not result from joint operation of the two VHF stations.⁷³

In 1965, the Commission recommended transforming its top 50 policy

the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 13 Fed. Reg. 5060 (1948).

68. See Report and Order, The 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 Broadcasting Stations, 18 F.C.C. 288 (1953) (currently codified at 47 C.F.R. § 73.3555(d) (1987)), amended by Report and Order, 43 F.C.C. 2797 (1954), amended by Report and Order, 100 F.C.C.2d 17 (1984), amended by Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985) [hereinafter Multiple Ownership Report and Order].

69. The Commission explained that it favored "diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." *Id.* at 292-93. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Court determined that the FCC's establishment of numerical ownership limits was a legitimate exercise of the Commission's regulatory authority. *Id.* at 203-04.

70. Report and Order, Amendment of Section 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 F.C.C. 2797 (1954) (currently codified at 47 C.F.R. § 73.3555(d) (1987)), amended by Report and Order, 100 F.C.C.2d 17 (1984), amended by Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985).

71. *Id.*; see also 47 C.F.R. § 73.636(a)(2) (1979).

72. Public Notice, Commission to Designate for Hearing Applications to Acquire Interests in a Second VHF Station in Major Markets, 45 F.C.C. 1851 (1964).

73. Public Notice, Interim Policy Concerning Acquisition of Television Broadcast Stations, 5 Rad. Reg. 2d (P&F) 271 (1965).

into a new ownership rule that proscribed the acquisition of more than three television stations or two VHF stations in any of the top 50 markets.⁷⁴ In 1968, the Commission rejected the proposed rule, but issued a new top 50 policy that required each licensee seeking a fourth television station or a third VHF station in any of the top 50 markets to meet a compelling public interest standard for the proposed transfer, and to identify how the proposed benefits of the transfer exceeded the diversity disadvantages.⁷⁵ In 1979, the Commission abandoned its top 50 policy, concluding that predictions of concentration of ownership had not come to pass,⁷⁶ despite the fact that every requested waiver of the interim top 50 policy had been granted.⁷⁷

6. *The Broadcast Television/CATV System and the National Network/CATV System Cross-Ownership Rules*

In 1970, the Commission adopted a rule prohibiting television broadcast station owners from owning, operating, controlling, or having an interest in a cable (CATV) system if that system's service area would overlap the station's predicted secondary service contour.⁷⁸ In addition, the Commission adopted a rule prohibiting the national television networks from owning, operating, controlling, or having any interest in cable television systems.⁷⁹ These two rules expanded the Commission's involvement in structuring the marketplace to further its policy of diversity of control over communications media.⁸⁰ The Commission also adopted a series of rules prohibiting a telephone company from owning, operating, or controlling a cable television

74. *Id.* at 272.

75. Report and Order, Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of TV Broadcast Stations, 12 Rad. Reg. 2d (P&F) 1501 (1968), *repealed by* Report and Order, 75 F.C.C. 2d 585 (1979).

76. Report and Order, Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), 75 F.C.C.2d 585 (1979), *aff'd sub nom.* NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982); *see also* L. POWE, JR., FCC DETERMINATIONS ON NETWORKING ISSUES IN MULTIPLE OWNERSHIP PROCEEDINGS 60-72, 87-95 (Network Inquiry Special Staff, Preliminary Report on Prospects for Additional Networks) (1980).

77. *See* Howard, *supra* note 13, at 55.

78. *See* Second Report and Order, Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 23 F.C.C.2d 816 (1970) (currently codified at 47 C.F.R. § 76.501 (1987)) [hereinafter Second CATV Cross-Ownership Order]; *see also* FEDERAL COMMUNICATIONS COMM'N, POLICY ON CABLE OWNERSHIP 51-56 (Staff Report) (1981) [hereinafter POLICY ON CABLE OWNERSHIP]. The rule is also codified in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613, 98 Stat. 2779, 2785 (codified at 47 C.F.R. § 533(a) (Supp. III 1985)).

79. *See* Second CATV Cross-Ownership Order, *supra* note 78; *see also* POLICY ON CABLE OWNERSHIP, *supra* note 78, at 107-24.

80. *See* Second CATV Cross-Ownership Order, *supra* note 78.

system operating in its service area.⁸¹

7. *The Newspaper-Broadcast Cross-Ownership Rules*

In 1975, the FCC adopted its newspaper-broadcast cross-ownership rules.⁸² These rules banned the future acquisition of a broadcast station by any individual or entity that owned, operated, or controlled a daily newspaper whose place of publication would be entirely encompassed by the primary AM, FM, or TV broadcast station's contours.⁸³ The Commission found these rules "in furtherance of [its] long standing policy of promoting diversification of ownership of the electronic mass communications media."⁸⁴

The Commission concluded that the prospective ban on cross-ownership advanced the public interest, as reflected in its concept of the goal of the first amendment: promoting dissemination of information from diverse viewpoints.⁸⁵ To avoid detrimental disruptions in service, the rules "grandfathered" existing newspaper/broadcast combinations in the same community, i.e., permitted their continued existence.⁸⁶ However, in communities where one owner held the only radio station and only newspaper, or the only newspaper and only television station, the rules required the owner to divest either the newspaper or the broadcast facility unless grounds for waiver could be demonstrated.⁸⁷ In contrast to the prospective owner-

81. See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307 (1970) (currently codified at 47 C.F.R. §§ 63.54-63.58 (1987)), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971). These provisions have generally been codified in the Cable Communications Policy Act of 1984 at 47 U.S.C. § 533(b) (1)-(4) (Supp. III 1985).

82. See Second Report and Order, Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, 50 F.C.C.2d 1046 (1975) (currently codified at 47 C.F.R. § 73.3555(c) (1987)), *aff'd sub nom.* FCC v. National Citizens Comm. for Broadcasting (NCCB), 436 U.S. 775 (1978) [hereinafter Second Newspaper-Broadcast Cross-Ownership Report and Order].

83. *Id.*

84. *Id.* at 1048.

85. See *id.* at 1049, 1050-51; see also *infra* notes 198-212 and accompanying text (discussing Commission's positivist perspective of the first amendment).

86. Second Newspaper-Broadcast Cross-Ownership Report and Order, *supra* note 82, at 1049.

87. *Id.* at 1080-84. Temporary waivers of the divestiture rule may be granted, see, e.g., Metromedia Radio and Television, Inc., 102 F.C.C.2d 1334, 1353 (1985), *aff'd sub nom.* Health and Medicine Policy Research Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986), if the owner can demonstrate that the facility would have to be sold at a distress price, if a broadcast station and newspaper in the same locality cannot be supported under separate ownership, or if the Commission concludes that the rule's purpose would be better served by continued joint ownership. Second Newspaper-Broadcast Cross-Ownership Report and Order, *supra* note 82,

ship ban, which expressed the Commission's first amendment policy objectives, the divestiture provision was aimed at avoiding undue economic concentration by breaking up local media monopolies, and was fundamentally rooted in antitrust concerns.⁸⁸

Newspaper and broadcast owners challenged the rules on constitutional, statutory, and procedural grounds. Upon review by the Supreme Court, the first amendment issues involved the constitutionality of conditioning receipt of a broadcast license on forfeiture of the right to publish a newspaper, and upon the Commission's disparate treatment of newspaper owners as against other broadcast license applicants.⁸⁹ Broadcasters argued that the effect of the rules was to restrict the speech of certain media owners in order to enhance the speech of other applicants.⁹⁰

As in *NBC*, the Supreme Court relied upon the "physical limitations" of the broadcast media (spectrum scarcity), and the Commission's accepted

at 1085; see also *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988). Permanent waivers are more difficult to obtain. *Id.* at 804; *Field Communications Corp.*, 65 F.C.C.2d 959 (1977) (only instance in which the Commission has ever granted a permanent waiver).

The waiver policy recently lay at the heart of an interesting controversy among media owner Rupert Murdoch, Congress, and the Commission. An affiliate of News America Publishing, Inc. had acquired television stations in Boston and New York, cities in which News America owned newspapers. News America had obtained temporary waivers of the requirement that it divest either the daily papers or the broadcast licenses in those cities. See *Metromedia*, 102 F.C.C.2d at 1353 (New York); *Twentieth Holdings Corp.*, 1 FCC Rcd 1201 (1986) (Boston). In January 1988, News America sought extensions of the waivers. *News America*, 844 F.2d at 804. However, in the FCC salaries and expenses provision of the continuing appropriations legislation for fiscal year 1988, Congress buried an obscure provision forbidding the Commission from extending any "current grants" of temporary waivers. H.R. REP. NO. 498, 100TH CONG., 1ST SESS. 34 (1987). The only "current grants" in effect at that time were News America's Boston and New York waivers. *News America*, 844 F.2d at 805. Before the United States Court of Appeals for the District of Columbia Circuit, Murdoch challenged the law as "uniquely discriminatory," in violation of the first and fifth amendments and the bill of attainder prohibition of the Constitution. Reviewing evidence of the amendment's sponsors' animus against News America, which had petitioned the Commission for repeal of the newspaper-broadcast cross-ownership policy, see *supra* notes 82-86 and accompanying text, and Murdoch personally, the court seemed unimpressed with News America's claims of focused congressional ill-will. *News America*, 844 F.2d at 810. It did, however, agree that the "Hollings Amendment str[uck] at Murdoch with the precision of a laser beam," forbidding waiver extensions only to him, and not to any other prospective applicants. *Id.* at 814. Without a sufficiently close fit between the purported objectives of the amendment and the congressionally chosen means, the provision was grossly underinclusive, denying Murdoch equal protection under the law in violation of the Constitution. *Id.* at 815. The court vacated the Commission's order denying News America's requests for waivers. *Id.*

88. Second Newspaper-Broadcast Cross-Ownership Report and Order, *supra* note 82, at 1049.

89. See *FCC v. Nat'l Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775, 798-802 (1978).

90. *Id.* at 799.

power to choose the basis upon which to grant and deny broadcast licenses, to uphold the regulations.⁹¹ Based on the authority of *NBC* and its progeny, the Court was willing to subordinate the individual first amendment rights of publishers to a systemic public interest in receiving diverse and antagonistic viewpoints, while recognizing that such an approach would offend the Constitution if applied to the print media.⁹²

8. *The Regional Concentration of Control Rule*

In 1977, the FCC adopted its regional concentration of control rule.⁹³ This rule prohibited any licensee from owning, operating, or controlling three broadcast stations if two of them were within 100 miles of the third and the primary service contours of any two overlapped.⁹⁴ The Commission applied this rule prospectively to further its diversification policy.

These numerous regulations, which created legal barriers to entry into local media markets and delimited the overall intraservice and interservice ownership potential of broadcast licensees, epitomize the FCC's regulatory approach to attaining economic competition and viewpoint diversity. Without proof of specific antitrust violations or of a diminution in programming choices, the FCC nevertheless has elected to circumscribe the right of broadcasters to exercise their freedoms of speech and press. The Commission has implemented a general policy in favor of ownership diversity in the expectation that this policy best ensures maximal viewpoint diversity. Until recently, it has not attempted to determine if *in fact* its preference for single rather than multiple broadcast station ownership has actually produced more varied programming choices than would be present if market forces were permitted to determine the programming presented. Under the currently prevailing marketplace approach to broadcast regulation,⁹⁵ the Com-

91. *Id.* at 775.

92. Institutionalization of this view of the first amendment for the broadcast media fundamentally misconceives the role of the government in fostering free speech as envisioned by the framers of the Constitution, as will be demonstrated *infra* in notes 287-361 and the accompanying text.

93. See Report and Order, Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 63 F.C.C.2d 824 (1977), *repealed by* Report and Order, 101 F.C.C.2d 402 (1984) [hereinafter *Regional Concentration of Control Report and Order*]. In 1984, the Commission abolished these rules. Report and Order, Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules, 101 F.C.C.2d 402 (1984) (to be codified at 47 C.F.R. § 73.3555(d)-(f)) [hereinafter *Regional Concentration of Control Repeal Order*].

94. *Regional Concentration of Control Report and Order*, *supra* note 93, at 828.

95. See generally Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

mission has questioned its former assumption that government ownership policies beget viewpoint diversity and has begun to prefer self-regulating market forces as the best mechanism to promote a multiplicity of voices in the marketplace of ideas.

B. *The Deregulatory Phase*

The movement away from structural barriers to market entry into broadcasting began in earnest in the late 1960's. In a 1969 study conducted for the National Association of Broadcasters, George H. Litwin and William H. Wroth offered proof that FCC efforts to maximize economic competition and viewpoint diversity could, at times, be mutually exclusive.⁹⁶ The Litwin/Wroth study revealed that multiple-media owners generally afforded the public more diverse news and informational programming than did single station owners.⁹⁷ The study found that multiple owners were less dependent upon wire services and the networks for programming than were single-station owners, and that multiple owners tended to create more of their own locally originated programming, in greater quantity and of higher quality, than single station owners.⁹⁸ The Litwin/Wroth study questioned the FCC's aversion to any form of media concentration and its ceaseless quest to add new media owners to the marketplace. It warned that enhancing market competition could well come at the expense of programming quality and viewpoint diversity.⁹⁹

1. *The Network Inquiry and Office of Plans and Policy Staff Reports*

In 1980, the Commission's staff began to turn against the ownership rules. In an exhaustive survey of the duopoly, one-to-a-market, regional concentration of control, and network practices rules, the Commission's Network Inquiry Special Staff (Special Staff) found that the forty years of FCC ownership regulation had produced almost no public interest benefits.¹⁰⁰ After a thorough assessment of the ownership rules' economic impact, the Special Staff concluded that no causal nexus existed between the rules and the goals of competition and viewpoint diversity that the rules were designed to foster.¹⁰¹

96. See G. LITWIN & W. WROTH, *THE EFFECTS OF COMMON OWNERSHIP ON MEDIA CONTENT AND INFLUENCE: A RESEARCH EVALUATION OF MEDIA OWNERSHIP AND THE PUBLIC INTEREST* (1969).

97. *Id.* at 9-1.

98. *Id.* at 9-2.

99. *Id.*

100. NETWORK ENTRY REPORT, *supra* note 21.

101. The Network Inquiry Special Staff (Special Staff) wrote:

The Commission's rules respecting the number of communications outlets one firm

The Special Staff also concluded that the chain broadcasting rules were largely superfluous, adding nothing to the competitive environment.¹⁰² Further, the Special Staff found that the Commission's own spectrum allocation plan for television stood as the principal impediment to the addition of new broadcast networks, noting that the "plan seriously handicaps a fourth and additional networks by limiting their coverage and forcing them to affiliate with UHF stations in markets with many viewers."¹⁰³ Moreover, the Special Staff found the Commission's concern about network dominance exaggerated and its appreciation of the value of networks inadequate.¹⁰⁴

The Special Staff's report generally recommended eliminating the ownership rules, even as they pertained to network ownership of cable facilities, noting that feared concentration by broadcast networks seemed an unlikely event given the cable television market position of such "large and highly diversified firms . . . as Time, Westinghouse, Hughes and Warner."¹⁰⁵ Overall, the Special Staff determined that continued reliance upon entry barriers was a counterproductive exercise and that an unbridled market would be the best means to fulfill Commission objectives of economic competition and viewpoint diversity. The Special Staff encouraged the Commission to promote an open entry policy.¹⁰⁶

In 1981, the Commission's Office of Plans and Policy (OPP) issued a re-

may own within a single local market and, even more especially, its rules limiting the number of television stations one firm may own throughout the nation are arbitrary and capricious. They frequently impose uniform numerical limitations that have no apparent relationship to the distinct conditions of competition and diversity among the several services, and in the many markets, affected by these rules As currently construed, these rules often may serve only to impair the realization of efficiencies in the use of television outlets. Certainly, they should not serve as a model for Commission regulation of outlets employing new technologies.

Id. at III-167.

102. The Special Staff stated flatly that the rules did "nothing to promote competition," had not given the public more viewing options, and did not foster the Commission's goal of increased diversity. *Id.* at IV-47 to IV-48.

103. *Id.* at IV-3.

104. *Id.* at IV-21. The report stated:

[N]etworks perform . . . important functions in the wider system of developing and broadcasting television programs. More resources can be expended on program production if those costs are spread over a large number of outlets and viewers. More funding for a national distribution system can be achieved if a national market in the sale of commercial time is established. Television networks . . . are indispensable organizers of a nationwide system of television broadcasting.

Id.

105. *Id.* at III-159.

106. The Special Staff concluded that excessive government oversight hampered the ability of the marketplace to respond flexibly to technology and consumer preferences, and that open competition would operate more efficiently. *Id.* at III-35.

port entitled *FCC Policy on Cable Ownership* which reexamined the broadcast television/CATV system and the national network/CATV system cross-ownership rules.¹⁰⁷ The OPP staff concluded that both rules should be rescinded in favor of reliance upon market forces, with resort to the antitrust laws to “remedy those few situations lacking in competition.”¹⁰⁸

In stark contrast to its earlier regulatory days, the Commission now operated under a different set of assumptions. It had come to question the validity of its earlier view that market entry barriers would enhance viewpoint diversity better than free market competition.¹⁰⁹ The Commission had also come to regard a plethora of new media and a great expansion in the number of radio and television outlets in local markets as rendering fears of harmful concentration groundless.¹¹⁰ The broad prophylactic prohibition against broadcast television/CATV system joint ownership was said to disserve the public interest in quality programming and, in some cases, in viewpoint diversity, without any provable corresponding public interest benefit.¹¹¹

In its review of the Commission’s ban on television network/CATV sys-

107. OFFICE OF PLANS AND POLICY, FEDERAL COMMUNICATIONS COMM., *FCC POLICY ON CABLE OWNERSHIP* (1981) (staff report) [hereinafter *FCC CABLE OWNERSHIP POLICY*].

108. *Id.* at 5.

109. Generally, the Commission had come to assume that the “marketplace approach” to broadcast regulation would best serve the public interest. Chairman Mark Fowler’s reorientation of the Commission shook the very foundations of the traditional trusteeship regulatory model. Wrote Chairman Fowler:

Put simply, I believe that we are at the end of regulating broadcasting under the trusteeship model. Whether you call it ‘paternalism’ or ‘nannyism,’ it is ‘Big Brother,’ and it must cease.

I believe in a marketplace approach to broadcast regulation. . . . Under the coming marketplace approach, the Commission should, so far as possible, defer to a broadcaster’s judgment about how best to compete for viewers and listeners, because this serves the public interest.

Fowler, *The Public’s Interest*, 61 FLA. B. J. 213, 213 (1982); see also Fowler & Brenner, *supra* note 95. In its report, the Office of Plans and Policy (OPP) recognized the Commission’s dual objectives of “increased competition in the economic marketplace” and “increased competition in the marketplace of ideas.” *FCC CABLE OWNERSHIP POLICY*, *supra* note 107, at 51 (citing Memorandum Opinion and Order, Amendment of Part 74 of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems; Inquiry into the Development of Communications Technology and Services to Formulate Deregulatory Policy and Rulemaking and/or Legislative Proposals, 39 F.C.C.2d 377, 391 (1973)). However, the OPP no longer assumed the propriety of regulatory structuring of either market, explaining: “[W]hen markets are workably competitive, the two Commission goals are better served by reliance on market forces than by Commission regulation.” *Id.* The OPP determined that the onus should be on the Commission to prove harms from market concentration rather than on broadcast licensees to disprove harms. “[F]ree entry is an important element in a well-functioning market system; limitations on entry should be imposed (or maintained) only if it is shown that substantial harm would result from entry.” *Id.* at 51-52.

110. *FCC CABLE OWNERSHIP POLICY*, *supra* note 107, at 80.

111. *Id.* at 79-81.

tem cross-ownership, the staff found the rules both unnecessary and inequitable.¹¹² With dozens of cable networks in competition with the broadcast networks, the OPP found it no longer necessary for the Commission to rely upon its regulations to encourage the development of new networks.¹¹³

The OPP realized that the viewing habits of the public were changing; an increasing number of Americans were turning from broadcast to cable television. The report observed that, by not affording broadcast licensees an opportunity to diversify into cable in their local markets and by denying television networks an opportunity to diversify into national cable markets, the Commission could, in effect, be rendering broadcasters electronic dinosaurs, competitively disadvantaged in a new world of media abundance.¹¹⁴

In 1982, the OPP shifted its focus to the merits of the multiple ownership rules in a staff report entitled *Measurement of Concentration in Home Video Markets*.¹¹⁵ As it had in its 1981 report, the OPP accepted as its basic premise "that both economic competition and diversity are best viewed as processes to be encouraged rather than results to be mandated."¹¹⁶ The OPP began to refine its earlier views on the benefits of economies of scale and on the diminishing returns commensurate with a policy of advancing diversity for diversity's sake.¹¹⁷ It found remiss the Commission's drive for "perfect competition" through constant efforts to erect market entry barriers, explaining that as long as no single firm had control over consumer choices, "workable competition" would suffice to prevent the perceived harms of concentration.¹¹⁸ The OPP, as it had in 1981, lauded many of the by-products of multiple ownership as beneficial to the public, finding that economies of scale derived from ownership concentration could result in more varied and responsive programming.¹¹⁹

The OPP identified numerous means by which market entry, and there-

112. *Id.* at 180-82.

113. *Id.* at 116.

114. *Id.* at 179-82.

115. OFFICE OF PLANS AND POLICY, FEDERAL COMMUNICATIONS COMM'N, MEASUREMENT OF CONCENTRATION IN HOME VIDEO MARKETS (1982) (staff report) [hereinafter FCC CONCENTRATION REPORT]. For an overview of staff action during this period, see Davis, *Eliminating the Network/Cable Cross-Ownership Ban: Does a Free Market Protect the Marketplace of Ideas?*, 6 HASTINGS J. COMM. & ENT. LAW 163 (1983).

116. FCC CONCENTRATION REPORT, *supra* note 115, at iii.

117. "[D]iversity has costs as well as benefits," explained the OPP, "simple maximization of diversity is not an appropriate goal." *Id.* at 10. While the OPP found "diversity of ownership" an important goal, it noted that "when several independent outlets are available, additional ones may add little to diversity." *Id.*

118. *Id.* at 13 (citing Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241-56 (1940)); see also *id.* at 32 ("[I]t appears that neither economic competition nor diversity of viewpoints is necessarily well served by maximum fragmentation of ownership.").

119. *Id.* at 55.

fore competition, had become possible through the advent of new technologies. These technologies, including subscription video services, cable television, subscription television, multipoint distribution service, low power television, satellite master antenna television systems, direct broadcast satellites, videocassette recorders, and videodisc players, augmented competition from existing media consisting of AM and FM radio, UHF and VHF television, newspapers, magazines, books, motion pictures, live theater productions, and phonograph records.¹²⁰ Opportunities to acquire sufficient market concentration to attain viewpoint predominance in this competitive environment seemed remote. Following a conservative study of the program distribution markets for television and cable, the Commission's staff found "the national video market" to be "extraordinarily unconcentrated."¹²¹ Based primarily upon these reassessments of policy, the Commission commenced a deregulation program that continues to this day.

2. The Movement Toward Elimination of the National Network/CATV System Cross-Ownership Rule

The first movement toward translating the OPP's conclusions into policy occurred on August 27, 1982, when the Commission released a Notice of Proposed Rulemaking concerning the national network/CATV system cross-ownership rule.¹²² The Notice proposed deletion of the rule, challenging its basic assumptions and noting that "changes in the video marketplace that have occurred . . . and will occur" rendered the rule unnecessary and counterproductive.¹²³

The Commission identified three "basic beliefs" as the foundation for the rules: that the networks would supply less desirable programming to their own cable systems in order to maintain their broadcast audience; that network-owned cable systems would hamper development of new cable networks by refusing to carry programming supplied by competing networks; and that networks would limit diversity by expanding their already dominant market positions as television suppliers.¹²⁴ In proposing deletion of the rule, the Commission repudiated each of these assumptions.

The Commission identified no economic incentives for the networks to

120. *Id.* at 41-42.

121. *Id.* at 90.

122. See Notice of Proposed Rulemaking, Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 91 F.C.C.2d 76 (1982).

123. *Id.* at 81-82.

124. *Id.* at 82.

restrict diversity on cable television systems they might come to own in order to maximize broadcast television viewing.¹²⁵ Rather, the FCC found the cable industry highly competitive, with programming diversity integral to cable's profitability.¹²⁶

The Commission now viewed its second assumption, that entry into cable would afford these networks power to restrict market entry by new networks, as questionable in light of the existence of significant obstacles to horizontal integration within the cable marketplace due to the industry's "persistent lack of concentration."¹²⁷ In addition, the Commission found that the multichannel nature of cable required cablecasters to consider a full range of alternative network programming in order to present enough channel viewing options to satisfy consumer demand.¹²⁸ The Commission observed that the cable marketplace was filled, not with a large number of marginal concerns, but with a "multiplicity of established cable networks, often operated by very substantial firms" that would "act . . . as yet another barrier to any attempt which network cross-owners might make to dominate the cable networking business."¹²⁹

As for the assumption that network ownership of cable would lead to a reduction in programming diversity, the Commission now suspected that some concentration of ownership could permit capital accumulation that would foster a greater quantity of video programming.¹³⁰ The Commission now assumed that economies of scale in the marketplace would enhance viewpoint diversity rather than diminish it.¹³¹

On September 6, 1988, six years after its initial Notice of Proposed Rulemaking in this proceeding, the Commission issued a Further Notice of Proposed Rulemaking.¹³² In this Further Notice, the Commission relied upon the findings of a recent National Telecommunications and Information Administration (NTIA) report¹³³ to conclude that changes in the video mar-

125. *Id.*

126. Only if the networks "were to achieve a position of dominant multiple system ownership" would there be a likelihood of intentional anticompetitive practices. *Id.* at 84-85. Given "the historically unconcentrated nature of the [cable] industry," the Commission perceived little chance of harmful concentration developing. *Id.* at 85.

127. *Id.*

128. *Id.* at 86.

129. *Id.*

130. *Id.*

131. *Id.*

132. Further Notice of Proposed Rulemaking, Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 3 FCC Rcd 5283 (1988) [hereinafter Further CATV-Network NPRM].

133. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, NTIA

ketplace warranted further reappraisal of the rule. Specifically, the Commission explained that "evidence of a growing concern that cable may now be the dominant video medium *vis a vis* broadcast television in many markets" established further grounds for concluding that "continuation of the ownership restrictions may be counterproductive to the public interest," actually "limiting competition for control of local outlets and imposing costs on the public in terms of potential lost efficiencies that might be realized by vertical integration."¹³⁴

3. *The Partial Elimination of the Multiple Ownership Rules*

On October 20, 1983, the Commission took its first major step toward a rollback of the multiple ownership rules. On that date, it issued a Notice of Proposed Rulemaking seeking public comment on a proposal to "modify" the then-existing "seven station rule."¹³⁵

The Commission extrapolated from empirical data in the trade press and its on-air station tallies to document a 466% increase in the number of operating television stations, a 92% increase in the number of operating AM stations, and a 561% increase in the number of operating FM stations, since the promulgation of the "seven station" rule in 1953.¹³⁶ It found that these increases, together with projected electronic media growth, suggested "that the potential for such national ownership concentration as would tend to monopoly or threaten diversity is far less a matter of concern today than might have been the case in 1953 and earlier years."¹³⁷

The Commission found the seven station rule arbitrary in its application, creating the same barriers to ownership for multiple owners in certain smaller markets nationwide, where no possibility for harmful concentration existed, as it did in certain larger markets nationwide, where a potential for harmful concentration was thought to exist.¹³⁸ The Commission indicated that with the passage of time and technological development, the seven station rule had become a relic.¹³⁹

On August 3, 1984, the Commission issued its Report and Order in the seven station rule proceeding.¹⁴⁰ The Commission eliminated the rule and

REPORT NO. 88-233, VIDEO PROGRAM DISTRIBUTION AND CABLE TELEVISION: CURRENT POLICY ISSUES AND RECOMMENDATIONS (1988).

134. Further CATV-Network NPRM, *supra* note 132, at 5283.

135. Seven-Station Modification NPRM, *supra* note 52.

136. *Id.* at 373-74.

137. *Id.* at 376.

138. *Id.* at 381.

139. *Id.* at 382.

140. Report and Order, Amendment of Section 73.3555, of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 17

replaced it with an interim twelve station rule that was to remain in effect until 1990, at which time it would be automatically rescinded.¹⁴¹

Based upon numerous formal comments, the Commission decided that the rule had failed to effect any discernable increase in local market viewpoint diversity.¹⁴² It found that "group owners do not impose monolithic viewpoints on local media outlets"¹⁴³ and that "group owners may be able to devote more resources to newsgathering and other activities which improve the quality of programming presented."¹⁴⁴

As to the economic competitiveness objective of the rule, the Commission found that the seven station rule did not foster more competition in local markets.¹⁴⁵ Applying the U.S. Department of Justice Merger Guidelines (i.e., the Herfindahl-Hirschman Index) in order to test market concentration, the Commission concluded that low levels of concentration were present in the national broadcast media marketplace.¹⁴⁶

Within days of the Report and Order's issuance, several congressmen requested that the Commission suspend implementation of the rule changes pertaining to multiple ownership of television stations.¹⁴⁷ Responding to this pressure, the Commission unilaterally stayed the effectiveness of its order until the date when review on reconsideration had been completed or April 1, 1985, whichever occurred later.¹⁴⁸ Congress also enacted a moratorium on implementation of the Report and Order.¹⁴⁹

On February 1, 1985, the Commission completed its reconsideration and released its Memorandum Opinion and Order.¹⁵⁰ In that document, the Commission confirmed the conclusions underlying its Report and Order.¹⁵¹

(1984) (currently codified at 47 C.F.R. § 73.3555(d) (1987)) [hereinafter Seven-Station Modification Report and Order].

141. *Id.* at 54-55; see also Gardner, *December 19, 1984—A Big Day in Telecommunications*, 34 CATH. U.L. REV. 625, 629 (1985) (discussing merger activity planned by certain multiple owners in anticipation of the relaxation of the seven station rule).

142. Seven-Station Modification Report and Order, *supra* note 140, at 19.

143. *Id.* at 37.

144. *Id.* at 38.

145. *Id.* at 42.

146. *Id.* at 42-43.

147. See Order, Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 56 Rad. Reg. 2d (P&F) 887 (1984).

148. *Id.*

149. Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984).

150. Memorandum Opinion and Order, Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 74 (1985) (codified at 47 C.F.R. § 73.3555(d) (1987)).

151. *Id.* at 76.

Perhaps due to expressions of congressional disfavor with abandonment of the policy, however, it withdrew several of its proposed regulatory changes and even adopted some new regulations. The Commission deleted the six-year sunset provision of the new twelve station rule.¹⁵² It added a new regulation to prohibit multiple ownership of television stations that would afford the multiple owner in question access to more than twenty-five percent of the national audience, calculated as a percentage of all Arbitron Area of Dominant Influence (ADI) television households.¹⁵³ To promote UHF development, the Commission ordered that UHF station owners be attributed with only fifty percent of their actual ADI audience reach.¹⁵⁴ Finally, to advance its minority ownership policies, it excepted group owners having at least two minority-controlled stations from the twelve station limit, permitting them to own fourteen total stations in a single service.¹⁵⁵ The new twelve station rule remains unchanged as of the date of this writing.

4. *The Elimination of the Regional Concentration of Control Rules*

On May 1, 1984, the Commission eliminated its regional concentration of control rule.¹⁵⁶ Finding that the "dramatic growth in the number and variety of media outlets" automatically enhanced viewpoint diversity and economic competition, the Commission could identify no justification for maintaining restrictions on regional multiple ownership.¹⁵⁷ The competitiveness of regional media markets was found to be such that regional multiple ownership would not likely permit owners to attain "sufficient economic power to permit anticompetitive behavior."¹⁵⁸ Consequently, the rule was abolished.¹⁵⁹

5. *The Relaxation of the Duopoly and One-to-a-Market Rules*

On February 20, 1987, the Commission released a Notice of Proposed Rule Making, advocating "relaxation" of the rule prohibiting overlap of the broadcast contours of co-owned commercial AM and FM stations in the same broadcast service and of the rule prohibiting common ownership of commercial radio and television stations in the same market.¹⁶⁰

152. *Id.* at 96.

153. *Id.* at 90-91.

154. *Id.* at 93.

155. *Id.* at 94.

156. Regional Concentration of Control Repeal Order, *supra* note 93.

157. *Id.* at 408-10.

158. *Id.* at 410.

159. *Id.* at 416.

160. Notice of Proposed Rulemaking, Amendment of Section 73.3555 of the Commission's Rules, The Broadcast Multiple Ownership Rules, 2 FCC Rcd 1138 (1987).

The Commission chronicled the history of growth in broadcast outlets and in the new communications technologies.¹⁶¹ In particular, it noted the extent to which growth in media outlets had become not merely a phenomenon restricted to the largest markets, but one affecting large and small markets alike.¹⁶² "Under these circumstances," explained the Commission, "we do not see the need for continuing to apply restrictions on radio-television cross-ownership in these markets where there appears to be an abundance of competition and viewpoint diversity."¹⁶³

Furthermore, the Commission found common ownership in local markets beneficial. Salary cost savings of as much as 35% and programming cost savings in excess of 30% (due to simulcasting) could enable broadcast licensees to invest in better program service.¹⁶⁴ The Commission also noted that without one-to-a-market impediments to joint ownership, financially sound licensees could activate vacant commercial UHF and VHF television channels or could keep troubled television stations on the air.¹⁶⁵ Last, the Commission expressed its confidence that common ownership could enhance program diversity as a result of the common owner's greater resources.¹⁶⁶

On February 22, 1989, the Commission issued Reports and Orders modifying its duopoly and one-to-a-market local concentration rules.¹⁶⁷ The Commission changed the geographic scope of the proscription on common ownership of two or more commercial radio stations in the same service. Under the old duopoly rule, same-service common ownership was impermissible if the two stations' *primary* service contours overlapped. Under the new rule, same-service common ownership would only be impermissible if the two stations' *principal city* contours overlapped.¹⁶⁸ The Commission accepted the rationale articulated in its 1987 Notice of Proposed Rulemaking as the basis for the rule changes.¹⁶⁹

161. *Id.* at 1140.

162. *Id.*

163. *Id.*

164. *Id.* at 1140-41.

165. *Id.* at 1141.

166. *Id.*

167. First Report and Order, Amendment of Section 73.3555 of the Commission's Rules, The Broadcast Multiple Ownership Rules, FCC 88-343 (Feb. 22, 1989) (to be codified at 47 C.F.R. § 73.3555(a)) [hereinafter *Duopoly Report and Order*]; Second Report and Order, Amendment of Section 73.3555 of the Commission's Rules, FCC 88-407 (Feb. 23, 1989) (to be codified at 47 C.F.R. § 73.3555(b)) [hereinafter *Second One-to-a-Market Report and Order*].

168. *Duopoly Report and Order*, *supra* note 167, at 1.

169. *Id.* at 3-5. In its 1989 *Duopoly Report and Order*, *supra* note 167, the FCC, while still adhering to its dual economic and viewpoint diversity goals, found that the growth of media outlets, the benefits of common ownership attendant to economies of scale, and the profound lack of concentration in local media markets justified relaxation of the radio duopoly rule. In particular, the Commission concluded that "the *potential* risks of undue concentration are far

In modifying the one-to-a-market rule, the Commission introduced a new waiver policy applicable in certain circumstances. The new policy, adopted in light of the FCC's growing recognition of a lack of concentration in local broadcast media markets, and that the scale economies of common radio-television ownership could result in better service, affords "favorable" review to rule waiver requests from licensees in the top twenty-five markets, or, in other markets, to those licensees which can demonstrate the existence of "failed" broadcast stations in those markets.¹⁷⁰

6. *The Movement Toward Deregulation of the Chain Broadcasting Rules*

On September 23, 1988, the Commission issued a Notice of Proposed Rule Making advocating the abolition of the term of affiliation rule, a minor aspect of the chain broadcasting rules that limits the terms of television broadcast affiliation contracts to two years.¹⁷¹ The Commission expressed its view that the rule had not fulfilled, but instead had hampered, promotion of the development of new national networks.¹⁷²

In particular, the Commission expressed its belief that deletion of the rule "may serve to strengthen the network-affiliate system" at a time when the broadcast networks are losing their market shares to the burgeoning new media technologies.¹⁷³ The Commission also perceived potential benefits in contracts of longer duration, including the possibility of extended financial planning by both new and existing networks.¹⁷⁴

7. *The Relaxation of the Cross-Interest Policy*

On June 5, 1987, the Commission issued a Notice of Inquiry concerning

less from a competition standpoint than they may have been in 1964 when the current version of the radio duopoly rule was adopted. . . ." *Id.* at 5 (emphasis added). However, the Commission continued to recognize that "potential" risk rather than actual incidents of anticompetitive behavior would concern it: "Our concerns in this area have not been based on any evidence that group ownership would necessarily lead to anticompetitive practices in local markets . . . but upon the *potential* for such practices to occur." *Id.* at 2. The FCC thus continues to impose regulatory restrictions absent any proof of harm from common ownership. Even under the intermediate scrutiny constitutional standard currently applicable to broadcast regulation, *see supra* note 17, the entire complex of prophylactic structural regulation, which is based on "phantom harm," appears vulnerable to a first amendment challenge. *See Quincy Cable TV v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985); *infra* note 284 (discussing *Quincy*).

170. Second One-to-a-Market Report and Order, *supra* note 167, at 11 & n.82.

171. *See* Network Term Elimination NPRM, *supra* note 26; *see also* 47 C.F.R. § 73.658(c) (1987). On Apr. 7, 1989, the commission issued a Report and Order abolishing the term of affiliation rule. *See supra* note 26.

172. Network Term Elimination NPRM, *supra* note 26, at 5683.

173. *Id.*

174. *Id.*

its Cross-Interest Policy.¹⁷⁵ The Commission found, *inter alia*, that the “*ad hoc* nature of the policy” caused by case-by-case adjudication rendered it “uncertain and unpredictable.”¹⁷⁶ The Commission also found the policy to impose “significant costs on our regulatees,”¹⁷⁷ for it precluded transactions that presented no real “threat to competition,”¹⁷⁸ but could enhance economies of scale in station operation.¹⁷⁹ The Commission found the competitive broadcast market sufficiently vigorous to permit greater reliance upon unchecked market forces as a self-regulating, pro-competitive mechanism.¹⁸⁰

In a Policy Statement released February 28, 1989, the Commission eliminated its cross-interest policy as it pertained to consulting arrangements, time brokerage arrangements, and advertising agencies.¹⁸¹ However, the Commission retained the policy as it pertained to “joint ventures,” “key employees,” and “nonattributable equity interests,” preferring to address these areas in a simultaneously issued Further Notice of Proposed Rulemaking with a view toward a possible new blanket rule to replace the case-by-case adjudicatory approach.¹⁸²

The Commission reduced the scope and applicability of the rule because it believed an abundance of media services and viewpoints in the marketplace of ideas stripped the rule of its full legitimacy and warranted the creation of a more narrowly tailored rule.

8. *The Petition to Repeal the Newspaper-Broadcast Cross-Ownership Rules*

On November 6, 1987, the Freedom of Expression Foundation (FEF), a private membership corporation consisting of publishers of daily newspapers, broadcast licensees, print and broadcast trade associations, and other corporate entities,¹⁸³ petitioned the Commission to conduct a rulemaking

175. Cross-Interest NOI, *supra* note 50.

176. *Id.* at 3700.

177. *Id.*

178. *Id.* at 3701.

179. *Id.*

180. *Id.* at 3701-02.

181. Policy Statement, Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154 (FCC, released Feb. 28, 1989).

182. Further Notice of Proposed Rulemaking, Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154 (FCC, released Feb. 28, 1989).

183. Media entrepreneur Rupert Murdoch's News America, Inc., is a member of the Freedom of Expression Foundation (FEF). News America also filed separate comments in support of the FEF petition and was the petitioner in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988). The United States Court of Appeals for the District of Columbia Circuit invalidated Congress' recent attempt to remove the FCC's authority to extend Murdoch's temporary waivers of the newspaper-broadcast cross-ownership rule which permitted Murdoch to

proceeding to repeal the newspaper-broadcast cross-ownership rule.¹⁸⁴ FEF contended that continued enforcement of the rule was unwarranted because the rule's stated goal of promoting media diversity had been achieved.¹⁸⁵ Under these circumstances, the rules' effect of forcing broadcasters and newspaper owners to choose only one medium of expression in a particular market was an intrusion into their rights of free expression, unsupported by a substantial government interest, and therefore unconstitutional.¹⁸⁶ The petition is still pending before the Commission.

II. THE COMMISSION'S FAILURE TO EXTEND THE *SYRACUSE PEACE COUNCIL* RATIONALE FROM THE CONTENT TO THE STRUCTURAL REGULATORY CONTEXT

The preceding regulatory history chronicles the Commission's extensive action in the 1980's toward delimiting or eliminating the barriers to market entry it had so painstakingly erected for over forty years. However, in all its deregulatory efforts, the Commission has not written one word concerning the constitutional validity of its structural regulations. While the Commission has justified its substantial rollback of ownership restrictions by acknowledging that the rules have contributed little toward accomplishment of its primary regulatory goals, promotion of viewpoint diversity and economic competition, it has yet to begin questioning the first amendment implications of those conclusions.¹⁸⁷

This has not been the case with content-based regulations. In *Syracuse Peace Council*, the Commission repudiated spectrum scarcity as a legitimate basis for regulating the content of broadcast programming.¹⁸⁸ It discovered a changed media marketplace, one replete with an enormous number of media outlets and a large variety of voices. The Commission found the spectrum scarcity rationale, deemed constitutional in *NBC* and its progeny, to be not only obsolete in light of these changes, but an unreasonable basis upon which to limit the free speech rights of broadcasters. Yet, through either an excess of political caution or sheer inertia, the Commission has not acted

hold newspapers and broadcast stations in New York and Boston. *Id.* at 815; see *supra* note 87 (discussing *News America* case).

184. See Petition of Freedom of Expression Found. for Rulemaking, RM-6155 (FCC Nov. 6, 1987).

185. Comments of Freedom of Expression Found. in Support of Petition for Rulemaking, RM-6155, at 10-15 (FCC Dec. 30, 1987).

186. *Id.* at 16-17.

187. See *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985) (FCC's "mere abstract assertion of a government interest is insufficient to justify the subordination of First Amendment freedoms"), *cert. denied*, 476 U.S. 1169 (1986).

188. See *supra* notes 2-7 and accompanying text; see also *infra* note 247.

upon this realization in the context of structural regulations even though the very same scarcity rationale serves as the constitutional foundation for FCC ownership restrictions.

Justice Frankfurter's opinion in *NBC* marks the genesis in constitutional jurisprudence of the questionable premise that the unique characteristics of the broadcast medium, i.e., spectrum scarcity, justify a more expansive government regulatory role than would ever be countenanced for any other medium of expression.¹⁸⁹ Notably, although this rationale was later exported to the programming content regulation context in *Red Lion Broadcasting Co. v. FCC* to uphold the authority of the Commission to determine *what* will be said on a licensed frequency, its theoretical roots lie in *NBC*'s affirmance of the Commission's means of selecting *who* will be permitted to use the broadcast medium. *NBC* stands as the bulwark upon which the Commission's entire edifice of structural regulation is constructed. It established the constitutionality of the Commission's authority to enforce viewpoint diversity by erecting barriers to entry into broadcasting.

From the start, Justice Frankfurter's melding in *NBC* of the constitutional issues surrounding the chain broadcasting rules to the legitimacy of Commission decisions to grant or deny licenses was an exercise in misleading reductionism.¹⁹⁰ The Court has consistently compounded this error by upholding other ownership regulations under the same rationale, thereby accreting additional precedent upon a shaky constitutional foundation.

In *FCC v. National Citizens Committee for Broadcasting (NCCB)*,¹⁹¹ the Court expounded upon the constitutionality of a particularly intrusive set of FCC ownership regulations: the newspaper-broadcast cross-ownership rules. The Court understood the constitutionality of the Commission's entire ownership diversification policy to be an outgrowth of the spectrum scarcity rationale upheld in *NBC*. The crux of the *NCCB* decision was the Court's recognition that, so long as spectrum scarcity remained the constitutional predicate for regulation according to the Commission's concept of the "public interest" generally, there could be no question as to the constitutionality of the FCC's policy of enforcing ownership diversification.

The Court saw no inconsistency with free speech values in the fact that the FCC's ownership restrictions established a favored class of speaker—those with no other media interests—and forced newspaper owners wishing to use a broadcast frequency in their community to forfeit their right to

189. See *infra* notes 195-220 and accompanying text (describing the scarcity rationale).

190. See Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 37 (1967); Lee, *supra* note 45, at 1320.

191. 436 U.S. 775 (1978).

publish. Again referring to the "unique characteristics" of the broadcast media, the Court noted that the ownership regulations were not related to the content of speech.¹⁹²

Yet the entire system of ownership regulations proceeds from the Commission's unsubstantiated presumption of a close nexus between the identity of the broadcaster and the viewpoints expressed by that broadcaster through his choice of programming.¹⁹³ If regulation in the public interest justifies the promotion of desirable viewpoints through restricting ownership of broadcast facilities by those with other mass media interests, the claim that such regulations are not "content-based" ignores their fundamental purpose.¹⁹⁴

Having eschewed spectrum scarcity as a basis for the content-based Fairness Doctrine in *Syracuse Peace Council*, the Commission must now recognize that the questionable validity of the rationale which caused it to deem regulatory limitations on *what* may be said to be unconstitutional must compel the Commission to deem regulatory limitations on *who* may speak to be unconstitutional. Lack of a uniform extension of *Syracuse Peace Council's* fundamental premise cannot be maintained forever if the Commission is to avoid arbitrary and capricious decisionmaking. Rather, the Commission and the courts should explicitly recognize that the repudiated scarcity rationale can no longer serve as a foundation for ownership regulations.

III. SPECTRUM SCARCITY AND THE FCC'S CONSTITUTIONAL IMPERATIVE OF VIEWPOINT DIVERSITY IN BROADCAST MEDIA

Premised solely upon the supposedly limited nature of usable spectrum, the Supreme Court has permitted federal governmental restraints upon the rights of broadcasters to communicate via the radio wave. The government need only submit proof that such restrictions are "narrowly tailored to further a substantial governmental interest"¹⁹⁵ for the regulation to pass muster under the first amendment. By contrast, the Court broadly prohibits governmental restraints on journalists' use of the print medium.¹⁹⁶ Without

192. *Id.* at 800-01.

193. *See infra* notes 213, 215-16 and accompanying text.

194. *See News America Publishing, Inc. v. FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988) (noting that Supreme Court and commentators "recognize ambiguities in the content/structure dichotomy").

195. *See FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

196. *See New York Times v. United States*, 403 U.S. 713 (1971) (*per curiam*); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public

precisely analyzing the similarities and dissimilarities inherent in the print and broadcast modes of communication, the Court has nevertheless determined that, generally speaking, "[d]ifferences in the characteristics of news media justify differences in the First Amendment standards applied to them."¹⁹⁷ *NBC* established that the first amendment is abridgeable in the broadcast context because "[u]nlike other modes of expression, radio inherently is not available to all."¹⁹⁸ Conceptually, spectrum scarcity has at least two permutations: physical scarcity and economic scarcity. The Court has identified "physical limitations" and "economic limitations" in the broadcast media¹⁹⁹ which cause "the broadcast media [to] pose unique and special problems not present in the traditional free speech case."²⁰⁰ On the basis of these purported differences, the Court has determined that in the broadcast context "regulation . . . may be permissible where similar efforts to regulate the print media would not be."²⁰¹

Proponents of the scarcity-based regulatory regime allege that laissez-faire allocation of frequencies will result in permanent exclusion of many who wish to use the medium²⁰² or will result in a cacophonous collision of voices on the airwaves.²⁰³ Technical and market forces necessarily limit opportunities for speech. Economic scarcity, it is said, makes frequencies costly, denying access to all but the wealthy. The physical scarcity of available frequencies makes it possible to avoid undesirable interference only by au-

officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id.; cf. *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973) (commercial speech receives a lesser degree of first amendment protection).

197. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

198. *NBC v. United States*, 319 U.S. 190, 226 (1943).

199. In *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775 (1978), the Court summarized its long-established rationale for the disparate treatment of the broadcast and print media:

Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized.

Id. at 799.

In *Red Lion*, the Court seemed to find economic scarcity, i.e., the higher marginal cost associated with a less than universally available good, to create cause for regulation. In dicta, the Court noted that "[o]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio." 395 U.S. at 388.

200. *Buckley v. Valeo*, 424 U.S. 1, 49-50 n.55 (1976).

201. *NCCB*, 436 U.S. at 800.

202. See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

203. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

thorizing one entity to operate upon a single frequency at a single time in a single area.

These forms of scarcity present in the broadcast media are said to stigmatize broadcasting with "unique and special problems."²⁰⁴ At root, these are problems of access. The need to establish a basis upon which to choose among the many wishing to use this powerful medium has resulted in circumscription of speakers' traditional rights to communicate freely. Under the Communications Act of 1934, these essentially subjective judgments are made according to the Commission's concept of the "public interest".²⁰⁵

Under the rubric of scarcity, the Commission's concept of the public interest has embraced a perspective of the first amendment that subordinates the traditional need for protection of the individual speaker's unabridgeable right to utter his favored views to a systemic need to *guarantee* to the listening and viewing public the "widest possible dissemination of information from diverse and antagonistic sources."²⁰⁶ Sanctioning this positivist approach, the Court has found that "[i]t is the [constitutional] right of the viewers and listeners, not the right of the broadcasters, which is paramount."²⁰⁷ Therefore, only in the broadcast context is "the Government permitted to put restraints on licensees in favor of others whose views *should* be expressed in this unique medium."²⁰⁸ The Commission's ownership regulations—indeed, its entire regulatory program—manifest this affirmative constitutional imperative by expressing two overarching goals: the attainment of viewpoint diversity and economic competition in the broadcasting marketplace, with both accomplished by discouraging ownership concentration.

A. *The Viewpoint Diversity Component*

Red Lion not only made the rights of viewers and listeners paramount to the rights of speakers in the broadcast context; it also defined as a part of this superior "right to hear" a corresponding right to viewpoint diversity. The Court has recognized this approach as constitutional, finding that "the purpose of the First Amendment" was "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."²⁰⁹ However, the Court found protection of that marketplace of ideas not to require a prohibition of

204. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

205. *See* 47 U.S.C. § 303 (1982).

206. *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775, 795 (1978) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

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

208. *Id.*

209. *Id.*

state involvement in the free exercise of speech, but to mandate an affirmative state obligation to ensure "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences."²¹⁰ The Court, in complicity with the Commission, has thereby transformed the first amendment in the broadcast context from the *guardian* of a marketplace of ideas into the *guarantor* of a marketplace of ideas. The FCC has traditionally fulfilled this constitutional mandate in favor of viewpoint diversity through regulations promoting diversification of ownership, presuming that each new broadcast media owner will add a different voice to the marketplace of ideas.

B. *The Economic Competition Component*

In addition to the "viewpoint diversity" component, the Commission's concept of the public interest, as reflected in its barriers to entering the broadcast marketplace, demands a "maximum diffusion of control of the media of mass communications."²¹¹ The Commission advances this objective by structuring the market so as to achieve a maximum level of competition.²¹² In one sense, measures to assure maximum levels of competition operate to advance the goal of viewpoint diversity, for the Commission has historically presumed a close nexus between maximum ownership diversity and maximum viewpoint diversity.²¹³ The Supreme Court in *NCCB*, while

210. *Id.*

211. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). This presumption has been recognized as dubious by the Commission itself in its Network Inquiry Report. *See supra* note 102 and accompanying text.

212. *See, e.g., Telegraph Herald*, 8 F.C.C. 322, 324 (1940). Competition and deconcentrated ownership is thought to promote improvements in the quality of broadcast service. "[C]ompetition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers." *Id.* (quoting *Spartanburg Advertising Co.*, 7 F.C.C. 498 (1939)).

213. *See Steele v. FCC*, 770 F.2d 1192, 1195 (D.C. Cir. 1985) ("Diversification seeks not only to avoid undue concentration of media outlets in the hands of a few individuals or entities, but also to promote diversity of programming and viewpoint.").

The Commission's presumed nexus between ownership diversity and viewpoint diversity is fictive or exceedingly tenuous and of almost no utility. This understanding is apparently shared by D.C. Circuit Judges Silberman and MacKinnon. In separate opinions in a case that marks the first movement toward expansion of the *Syracuse Peace Council* rationale to the structural regulatory context, these judges recently noted that market forces, as opposed to the ownership composition of licensees, principally determine programming content decisions. *See, e.g., Shurberg Broadcasting, Inc. v. FCC*, No. 84-1600, slip op. at 42-43, 50 (D.C. Cir. March 31, 1989) (Silberman, J.); *Shurberg*, No. 84-1600, slip op. at 13 n.21 (MacKinnon, J., concurring). *But see Shurberg*, No. 84-1600, slip op. at 23 (Wald, J., dissenting).

In *Shurberg* the D.C. Circuit held unconstitutional under the fifth amendment equal protection clause the Commission's minority preference distress sale policy. Established in 1978, the policy created an exception to the general rule that a noncomparative revocation hearing must

acknowledging that the record before it showed little evidence demonstrating that prospective ownership barriers would operate to enhance viewpoint diversity, recognized the presumption as constitutional.²¹⁴

To further assure economic deconcentration through barriers to market entry, the Commission relies not only upon its ownership regulations, but also upon its comparative hearing process to select among competing applicants for a broadcast license.²¹⁵ Ownership of other media of mass communication often results in the assessment of a conclusive demerit in comparative broadcast hearings that precludes acquisition of a new broadcast license.²¹⁶

But if, as the Commission submits, a tremendous multiplicity of media outlets and competing voices now exists,²¹⁷ then the central underpinning of the Commission's diversification policy, a need to promote maximal competition in the media marketplace to ensure maximal competition in the mar-

be held whenever serious doubts arise as to the basic legal qualifications of an existing licensee. That exception permitted a licensee designated for a revocation hearing to assign the license to a "qualified" assignee. "Qualified" assignees were those either controlled by minority owners, or comprised of minority owners holding in excess of 50% of the assignee's equity. See Policy Statement and Notice of Proposed Rulemaking, Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 851 (1982); Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979, 983 (1978); see also *Shurberg*, No. 84-1600, slip op. at 3.

Judge Silberman understood the minority preference distress sale policy to be an outgrowth of two distinct FCC regulatory objectives: 1) to remedy past discrimination, and 2) to promote viewpoint diversity. *Shurberg*, No. 84-1600, slip op. at 1. Although the court was unable to reach a consensus on the constitutionality of the viewpoint diversity objective, Judge Silberman attacked FCC policy concerning the diversity objective in dicta, noting that "it seems passing strange that a policy purporting to promote diversity should itself rest on a racial generalization." *Id.* at 40. Most critically for purposes of this article, Judge Silberman viewed existing marketplace diversity and the plethora of non-spectrum based alternatives to broadcasting, as the Commission found in *Syracuse Peace Council*, to vitiate any basis for continuation of the FCC's diversity policy. *Shurberg*, No. 84-1600, slip op. at 38-39. But see *Winter Park Communications, Inc. v. FCC*, Nos. 85-1755, 85-1756, slip. op. (D.C. Cir. Apr. 21, 1989) (minority preferences in initial licensing no violation of equal protection). The *Winter Park* opinion makes no attempt to distinguish or address the points raised in *Sherburg*. Obviously, an en banc panel of the D.C. Circuit must reconcile these conflicting opinions.

214. *FCC v. National Citizens Comm. for Broadcasting* (NCCB), 436 U.S. 775, 795 (1978).

215. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) ("We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications.")

216. See, e.g., *Caldwell Broadcasting Corp.*, 100 F.C.C.2d 115 (Rev. Bd. 1985); *Chapman Radio & Television Co.*, 19 F.C.C.2d 157 (Rev. Bd. 1969); *RKO General, Inc. (WRKO)*, 60 Rad. Reg. 2d (P&F) 1215 (ALJ 1986), *vacated as moot*, 65 Rad. Reg. 2d (P&F) 837 (1988).

217. See *Syracuse Peace Council*, 2 FCC Rcd 5043, 5051 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989); see also *supra* note 5.

ketplace of ideas,²¹⁸ no longer exists.²¹⁹ Under these circumstances, no constitutional rationale remains for denying the broadcast media first amendment protection equivalent to that enjoyed by the print media. In fact, in the current era of wide-open intermedia competition, very few functional differences between the print and broadcast media exist. What few functional differences that may remain certainly do not warrant maintaining the double constitutional standard that now prevails.²²⁰

IV. THE PROGRESSIVE CONVERGENCE OF THE PRINT AND ELECTRONIC MEDIA

In the early decades of the twentieth century, the economic and physical distinctions between the print and broadcast media that underlie the Commission's "diversification" policies and rules purportedly were numerous and seemingly self-evident. The number of broadcast outlets nationwide was far fewer than the number of print media outlets.²²¹ Only broadcast media relied upon long distance electronic transmission of information and opinion to reach the public. However, with the passage of time, the number of electronic media outlets has come to exceed the number of newspaper outlets,²²² and now both the broadcast and print media rely upon long distance electronic transmission of information and opinion to reach the public.²²³ This

218. See *supra* notes 18, 19, 209-16.

219. See *infra* notes 253-74 and accompanying text.

220. See *supra* notes 197-201 and accompanying text.

221. In 1934, there were 583 AM stations in the United States. See Stern, Krasnow, & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 563 (1983). By comparison, in 1934 there were 1,929 total daily newspapers in the United States. See U. S. BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES SERIES R 224-231, NEWSPAPERS—NUMBER AND CIRCULATION OF DAILY AND SUNDAY NEWSPAPERS: 1920 TO 1970, at 809 (1976).

222. In 1960, there were 4,133 radio stations on the air in the United States. See TELEVISION AND CABLE FACTBOOK C-309 (1988). There were also 559 television stations on the air in the United States. *Id.* at C-299. By comparison, in 1960 there were 11,315 newspapers in the United States. See 1988 STATISTICAL ABSTRACTS OF THE UNITED STATES 528 [hereinafter 1988 STATISTICAL ABSTRACTS].

In 1987, there were approximately 10,244 radio stations operating in the United States. See BROADCASTING/CABLECASTING YEARBOOK 1988 at A-2 [hereinafter BROADCASTING/CABLECASTING YEARBOOK]. There were also 1,342 television stations operating in the United States. *Id.* There were an additional 7,900 cable systems operating in 1987. TELEVISION AND CABLE FACTBOOK, *supra*, at C-358. By comparison, in 1987 there were 9,031 newspapers in the United States. See 1988 STATISTICAL ABSTRACTS, *supra*, at 528; see also P. VESTAL, AN ANALYSIS OF MEDIA OUTLETS BY MARKET, app. II (1987) (prepared for the Research and Planning Department, National Association of Broadcasters) ("The average market has access to 36 cable channels with a 48.8% penetration rate, 10 over the air television signals, 20.4 AM and 19.5 FM radio signals, 15.9 newspapers, 11.8 magazines each with subscription rate figures of at least five percent, and a VCR penetration rate of 48.7%").

223. R. DUCEY, THE FAIRNESS DOCTRINE IN AN AGE OF CONVERGING MEDIA (1984)

trend toward physical convergence of the broadcast and print media seems destined to continue.

Additionally, the public's progressive movement away from the print and toward the electronic media²²⁴ has encouraged dramatic change in the media environment that has significantly undermined the factual predicate for affording the broadcast media less constitutional protection than the print media.

A. *The Merging of the Print and Electronic Press*

The nation's major newspapers and magazines, including *USA Today*, the *Wall Street Journal*, the *New York Times*, and *Time*, rely upon satellite, telecommunication, and computer technologies to transmit news and information across the globe.²²⁵ Teletext (an electronic publishing service that permits the viewer to receive pictographic and textual information from his viewing screen), videotex (a two-way communication service by telephone or cable for electronic mail, home-to-office data retrieval and transmission, home banking, etc.), home computers, and interactive cable technologies all permit data which historically appeared only in print now to occupy a video screen.²²⁶ By June of 1984, one in eight U.S. and Canadian daily newspapers were either "operating, planning, or considering videotex or teletext ventures."²²⁷ The National Association of Broadcasters, relying upon trade industry data, projects that by the year 2000, 75% of American households will have access to teletext, 60% to videotex, 65% to home computers, and 48% to interactive cable.²²⁸ CBS, NBC, and cable superstation WTBS offer teletext signals nationwide.²²⁹ Several local television stations offer similar services.²³⁰ This evidence compels one ineluctable conclusion: The print and electronic media are merging into new hybrid forms that do not lend themselves to the broadcast/non-broadcast distinctions of the past. It is therefore imperative that the courts develop a uniform legal standard to address this world of converging media.²³¹

(prepared for Nat'l Ass'n of Broadcasters), *reprinted in* Comments of Nat'l Ass'n of Broadcasters, FCC Gen. Docket No. 84-282, app. B (Sept. 6, 1988).

224. Sixty-six percent "of the U. S. public turns to TV as the source of most of its news, and . . . 55.9% [rank] it as the most believable news source." BROADCASTING/CABLECASTING YEARBOOK 1988, *supra* note 222, at A-2.

225. See R. DUCEY, *supra* note 223, at 3.

226. See generally Stern, Krasnow, & Senkowski, *supra* note 221.

227. R. DUCEY, *supra* note 223, at 2.

228. *Id.* at 5.

229. *Id.* at 6.

230. *Id.*

231. In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987), Judge Bork affirmed the Commission's decision not

B. The Comparative Scarcity of the Print and Electronic Press

The number of newspapers published in this country has declined from 11,400 in 1975 to 9,031 in 1987.²³² Newspapers are a current daily, weekly, or semi-weekly source to which the public can turn in addition to or in lieu of radio and television for timely news and information. The number of broadcast media outlets, including AM and FM radio and UHF and VHF television stations, has increased from 8,697 in 1975 to 11,715 in 1988.²³³ In that same period, the number of operating cable systems has increased from 3,506 to 8,500.²³⁴ In simple numerical terms, the electronic media have become the media of abundance and the print media have become increasingly scarce—reversing the essential premise of the broadcast scarcity rationale.

Moreover, in economic terms, the market barriers to entry into newspaper publishing are significantly greater than those for entry into broadcasting. A 1984 comparative analysis of economic barriers to entry into the newspaper and broadcast industries, conducted by Michael O. Wirth for the National Association of Broadcasters, reached the following conclusions:

Far less capital is required to start a new television station or radio station than to start a new daily newspaper. For example, starting a 250,000 circulation daily newspaper is estimated to be seven times more expensive than starting a Top 50 market television station. . . .

On average, entrepreneurs pay much less, per unit of average daily circulation purchased, for television and radio stations than they pay for daily newspapers. For example, the average 250,000 circulation daily newspaper sold for three times more per unit of daily circulation than the average Top 50 market television station.

The costs of operating a daily newspaper are considerably higher than the costs of operating either a television or a radio station. For example, a typical 250,000 circulation newspaper costs five times more to operate than a typical Top 50 television station.

. . . .
 Convincing consumers and advertisers to adopt a new media firm's product, when the new firm is in competition with one or more existing media firm [sic] of the same type, is a more difficult propo-

to apply the Fairness Doctrine to teletext. This precedent is a major judicial step toward unifying the broadcast and print media constitutional standards. See Zaragoza & Emord, *Electronic Media May Get Same Protection as Print Journalists*, *Legal Times*, Mar. 9, 1987, at 15-17.

232. See 1988 STATISTICAL ABSTRACTS, *supra* note 222, at 528.

233. See TELEVISION AND CABLE FACTBOOK, *supra* note 222, at C-299, C-309; *By the Numbers*, *Broadcasting*, Oct. 3, 1988, at 16.

234. See TELEVISION AND CABLE FACTBOOK, *supra* note 222, at C-358; *By the Numbers*, *Broadcasting*, Oct. 3, 1988, at 16.

sition for a daily newspaper than for either a television or a radio station.²³⁵

The empirical data underlying these conclusions strongly suggest that in simple economic terms, it is now far more costly to enter the newspaper publishing business than to enter broadcasting, despite the FCC's regulatory barriers to entry into the radio and television industry.

V. THE CHANGED MEDIA MARKETPLACE AND THE EROSION OF THE SPECTRUM SCARCITY RATIONALE

A. *The Tell-Tale Heart*²³⁶ of Red Lion Nears Arrest

Among the progeny of *NBC*,²³⁷ *Red Lion Broadcasting Co. v. FCC*²³⁸ has served as the most formidable precedent for preservation of the scarcity rationale underpinning broadcast regulation. Consequently, the continuing validity of the facts and assumptions underlying *Red Lion* are of great significance to the future utility of the scarcity rationale and the regulatory construct that the rationale supports.

In *Red Lion*, the Supreme Court assessed the "state of commercially acceptable technology" as it existed in 1969.²³⁹ The Court found that in 1969 "only a tiny fraction of those with resources and intelligence" could "hope to communicate [intelligibly] at the same time."²⁴⁰ Specifically, the Court observed the existence of a broadcast environment wherein VHF frequencies were "almost entirely occupied" and alternative audio and video means of

235. M. WIRTH, ECONOMIC BARRIERS TO ENTRY: DAILY NEWSPAPERS VS. TELEVISION STATIONS VS. RADIO STATIONS: A PRELIMINARY ANALYSIS ii (1984) (prepared for the Nat'l Ass'n of Broadcasters), reprinted in Comments of Nat'l Ass'n of Broadcasters, FCC Gen. Docket No. 84-282, app. C (Sept. 6, 1988) [hereinafter ENTRY BARRIERS]. In particular, Dr. Wirth found that:

[S]tarting a large market television station is one-seventh as expensive as starting a 250,000 circulation daily newspaper; starting a medium market television station is almost one-fourth as expensive as starting a 65,000 circulation daily newspaper; and starting a small market television station is almost one-half as expensive as starting a 20,000 circulation daily newspaper.

Id. at 10-11. Applying the newspaper comparison to radio, Dr. Wirth found that "large market radio stations are one-eighteenth as expensive to start, medium market stations are one-twentieth as expensive to start, and small market radio stations are almost one-fourteenth as expensive to start." *Id.* at 11.

236. See Poe, *The Tell-Tale Heart*, in THE UNABRIDGED EDGAR ALLEN POE 799 (T. Mossman ed. 1983). Like the old man in Poe's *Tell-Tale Heart*, *Red Lion* will not die peacefully. Unlike the old man's, *Red Lion*'s passing will be justifiable homicide rather than murder.

237. 319 U.S. 190 (1943).

238. 395 U.S. 367 (1969).

239. *Id.* at 388.

240. *Id.*

communication were not yet viable.²⁴¹ In *CBS v. Democratic National Committee*,²⁴² the Court agreed that the FCC's content regulations, formerly appropriate under the first amendment, might not be constitutional in the future, recognizing that technological change could affect the delicate balance of private and state interests struck by the Court's prior rulings.²⁴³

In *FCC v. League of Women Voters*,²⁴⁴ the Court again expressed its willingness to reassess its traditional acceptance of *Red Lion*'s scarcity rationale if Congress or the FCC sent a "signal" "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."²⁴⁵ In *Syracuse Peace Council*,²⁴⁶ the Commission sent the Court just such a signal. Persuaded by extraordinary growth in mass media outlets since 1969, the Commission concluded that *Red Lion*'s lessened degree of constitutional scrutiny could no longer be justified, stating boldly:

We . . . believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.²⁴⁷

241. *Id.* at 398.

242. 412 U.S. 94 (1973).

243. The Court wrote:

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Id. at 102.

244. 468 U.S. 364 (1984).

245. *Id.* at 376 n.11.

246. 2 FCC Rcd 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

247. *Id.* at 5053. In affirming the Commission's *Syracuse Peace Council* decision, the D.C. Circuit found that the Commission had adequately supported its policy judgment that Fairness Doctrine enforcement no longer served the public interest, and that the FCC could have repealed the Doctrine even if it had not concluded that the Doctrine was unconstitutional. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989). Although the FCC had argued that its constitutional and policy rationale were "inextricably intertwined," Judge Williams, writing for the court, consciously avoided the core constitutional question. He wrote: "[I]f we are persuaded that the Commission would have found that the fairness doctrine did not serve the public interest even if it had foregone its ruminations on the constitutional issue, we must end our inquiry without reaching that issue." *Id.* at 657.

Judge Starr, in an intriguing concurring opinion, disagreed, writing "[i]t . . . cannot success-

B. *The Bankruptcy of Economic Scarcity*

With far more audio and video outlets than print outlets in small and large markets,²⁴⁸ and with the cost of acquiring and operating newspaper outlets far in excess of the same cost for comparable broadcast outlets,²⁴⁹ the notion of "uniqueness" inherent in the scarcity rationale is now anachronistic. It is simply no longer true that opportunities to own print outlets of mass communication are more abundant or more easily attainable than are opportunities to own audio or video means of communication. In both contexts, cost, not the scarcity of ownership opportunities, is the primary factor delimiting access.

However, the cost of access alone cannot form the reason for affording a lesser degree of first amendment protection to the electronic press if the amendment is to retain its historical integrity in the print media context. The fact that only some Americans in the new nation could afford to own and operate a printing press was not deemed by the framers as a proper ground for circumscribing freedom of the press.²⁵⁰

fully be maintained that the [Fairness Doctrine] Order is based, either exclusively or alternatively, on public interest grounds. . . . There is no escaping this cold, hard fact: in the wake of the generously worded *Meredith* remand, the Commission has rendered a *Red Lion* decision. It has switched gears from three years ago and gone beyond the less heroic, public interest reach of the 1985 [Fairness] Report." *Id.* at 675 (Starr, J., concurring). In questioning the correctness of the majority's reticence to review whether the FCC had properly interpreted constitutional precedent, Judge Starr touched upon the continued vitality of the spectrum scarcity rationale underlying the print/broadcast constitutional distinction. Judge Starr believes that "spectrum scarcity, without more, does not justify regulatory schemes which intrude into First Amendment territory." *Id.* at 683. In identifying appropriate scarcity considerations, he believes that "the constitutionality of the Fairness Doctrine is closely related to the incapacity of the communications marketplace to give expression to diverse voices," *id.*, and not to the fact that demand for broadcast frequencies exceed supply, a fact upon which the *Syracuse Peace Council* petitioners based their conception of the *Red Lion* scarcity rationale. *Id.* at 682. Under current marketplace conditions, Judge Starr noted, because "individual members of the listening or viewing public . . . may express their viewpoints on controversial issues in any number of ways that do not involve applying for and receiving a broadcasting license, it seems odd (and inaccurate) to equate scarcity in licenses with scarcity in the marketplace of ideas." *Id.* at 683. Judge Starr's approach to judicial review of FCC decisions which involve a constitutional conclusion by the agency would require a reviewing court to 1) determine whether the FCC had correctly interpreted the *Red Lion* constitutional standard, a question over which the court would have plenary review authority; and 2) review the FCC's findings of fact, which would be subject to a much narrower standard of review. *Id.* at 679. Applying these principles, Judge Starr concluded that the FCC's repeal of the Fairness Doctrine was "based on reasonable factual findings and embodies a correct statement of applicable constitutional principles." *Id.* at 680.

248. See *supra* notes 232-35 and accompanying text.

249. See *supra* note 235 and accompanying text.

250. Nevertheless, even if cost is deemed a significant factor, it has been shown that the cost of entering the print media business greatly exceeds the cost of entering the broadcast media business, despite government licensing of the broadcast press. See *supra* note 235.

Spectrum scarcity, if ever it was a sound basis for affording lessened protection to the electronic press, is not now in any way different from the scarcity associated with all other economic goods in our society. Consequently, economic scarcity cannot serve as a meaningful basis for distinguishing the electronic press from the print media.²⁵¹ In addition, the present abundance of substitutes for spectrum-based communications media renders the physical scarcity rationale superfluous.²⁵²

C. The Advent of Competitive Audio and Video Media Not Dependent Upon Broadcast Spectrum

In an age of electronic media abundance and wide-ranging non-spectrum-based media alternatives, spectrum scarcity has become an outmoded concept, no longer tied to certain technological barriers to the propagation and dissemination of electronic audio and video messages. Non-spectrum-based outlets for information and ideas are potentially limitless in the number of viewing and listening options they offer to the public.

Cable television, most prominent among these newer media, now reaches over 52.8% of the 88.6 million television households in America.²⁵³ By all accounts, it presents direct and significant competition to broadcast television, with dozens of alternative networks catering to diverse segments of the viewing public.²⁵⁴ In addition to the traditional broadcast networks, among the great variety of new cable networks delivered by satellite to the headends of cable systems nationwide are: The Nashville Network, The Disney Channel, Showtime, Spanish International Network, Cable News Network (CNN), CNN Headline News, ESPN, The Movie Channel, Christian Broadcasting Network, Home Box Office (HBO), Cinemax, Galavision, USA Network, Discovery, Home Shopping Network, C-SPAN, and Nickelodeon.²⁵⁵

In 1988, 67.3% of cable systems offered their subscribers from 20 to 50 or more channels.²⁵⁶ The median cable system offers between 30 and 53 chan-

251. As Judge Bork astutely observed in *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987):

All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.

Id. at 508.

252. *See infra* notes 253-75 and accompanying text.

253. *See By the Numbers*, *Broadcasting*, Oct. 3, 1988, at 16.

254. *See Zoglin, The Big Boy's Blues*, *Time*, Oct. 17, 1988, at 56-61.

255. *Facts and Figures*, *Multichannel News*, June 6, 1988, at 49.

256. JOINT NAB/CAB/CIRT MEETING REPORT, Sept. 25-27, 1988 (available from the Nat'l Ass'n of Broadcasters' Research and Planning Dep't).

nels.²⁵⁷ Pay cable is now in 24 million households, reaching 28.3% of all television households.²⁵⁸ Cable may well replace broadcast television as the medium of choice in the next century. Satellite Master Antenna Television, a form of cable system that is largely unregulated and operates exclusively on private property, typically as a multichannel service to apartment dwellers, is also not spectrum-dependent.

Videocassette recorders (VCR's), another non-spectrum-based competitor to both cable and broadcast television, remove viewing time sensitivity, permitting the viewer to record on a different channel than the one being viewed.²⁵⁹ This enhances opportunities for competitive selection and sampling of various media options. In 1987, 48 million VCR's were in use in the United States.²⁶⁰ These devices are now found in 58% of television households.²⁶¹ It is predicted that by 1992 VCR's will be in 80% of television households.²⁶² Compact disc players, a non-spectrum-based alternative to radio, are now in approximately four million households and are being offered as optional equipment in new automobiles.²⁶³ Such means of receiving news and information, that do not depend upon spectrum and offer myriad viewing and listening options, not only enhance the competitive media environment, but also virtually eliminate any prospect of the feared "mind control by media barons" that led the Commission's first regulators to create barriers to broadcast entry.²⁶⁴

1. Viewpoint Diversity Now Proliferates

The emergence of a wide range of viewing and listening options, together with relatively open entry into new electronic media markets, makes it highly unlikely that the Commission's fears of economic and viewpoint monopolization will materialize, either now or in the future. Virtually every media market in the country is filled with a great variety of video images and radio voices, all competing for the public eye and ear. In a 1987 study, Peter Vestal of the National Association of Broadcasters' Research and Planning Department found that the average market (from among those tracked by the A.C. Nielsen Company) had "access to 36 cable channels . . . , ten over-the-air television signals, 20.4 AM and 19.5 FM radio signals, 15.9 newspa-

257. *Id.*

258. *Id.*

259. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

260. See TELEVISION AND CABLE FACTBOOK, *supra* note 222, at C-300.

261. JOINT NAB/CAB/CIRT MEETING REPORT, *supra* note 256, at fig. 1.

262. See O'Brien, *Pay Penetration of 30% Likely by 1992: Report*, Multichannel News, July 11, 1988, at 33.

263. JOINT NAB/CAB/CIRT MEETING REPORT, *supra* note 256, at 9.

264. See *supra* notes 12-15 and accompanying text.

pers, 11.8 magazines each with subscription rate figures of at least five percent, and a VCR penetration rate of 48.7%.”²⁶⁵

2. *Economic Competition is Now Legion*

Analyzing 209 of A.C. Nielsen's Designated Market Areas (DMA's), Vestal found that in the nation's top 25 DMA's, on average there were 13.4 television stations, 29.8 AM stations, 29.2 FM stations, 2.8 newspapers, and 12 magazines; in addition, 44% of the television households were receiving 41.9 cable channels, and 54.1% of the television households had VCR's.²⁶⁶ Among the markets in the top 25 DMA's are New York; Los Angeles; Chicago; Philadelphia; San Francisco-Oakland-Santa Monica; Boston; Detroit; Dallas-Fort Worth; Washington, D.C.; Cleveland-Akron; Houston; and Atlanta.

In DMA's 26 through 50, there were 7.6 television stations, 15.8 AM stations, 13.4 FM stations, 2.5 newspapers, and 11.1 magazines; 50.5% of the television households were receiving 32.9 cable channels, and 42.5% of the television households had VCR's.²⁶⁷ Among the markets in DMA's 26 through 50 were San Diego; Milwaukee; Cincinnati; Nashville; Charlotte; New Orleans; Buffalo; Oklahoma City; Columbus, Ohio; Raleigh-Durham; Salt Lake City; and San Antonio.

In DMA's 101 through 125, there were 5.6 television stations, 7.6 AM stations, 8.1 FM stations, 2.6 newspapers, and 11.1 magazines; 53.7% of the television markets were receiving 26.7 cable channels, and 41.8% of the television households had VCR's.²⁶⁸ Among the markets in DMA's 101 through 125 were Sioux Falls-Mitchell, South Dakota; Ft. Wayne, Indiana; Ft. Myers-Naples, Florida; Peoria-Bloomington, Illinois; Lansing, Michigan; Augusta, Georgia; Charleston, South Carolina; Savannah, Georgia; Lafayette, Louisiana; Santa Barbara-Santa Maria, California; Rockford, Illinois; Wilmington, Delaware; Columbus, Georgia; Terre Haute, Indiana; and Corpus Christi, Texas.

In DMA's 176 through 200, there were 2.8 television stations, 3.6 AM stations, 3.8 FM stations, 1.8 newspapers, and 11.7 magazines; 60.4% of the television households were receiving 25.9 cable channels, and 38.1% of the television households had VCR's.²⁶⁹ Among the markets in DMA's 176 through 200 were Ada-Ardmore, Oklahoma; Roswell, New Mexico; Biloxi-Gulfport, Mississippi; Parkersburg, West Virginia; Cheyenne-Scottsbluff,

265. P. VESTAL, *supra* note 222, at 1.

266. *Id.* at 6-7, 9, 11-12.

267. *Id.*

268. *Id.*

269. *Id.*

Wyoming; Alexandria, Minnesota; Butte, Montana; Jackson, Tennessee; Ottumwa-Kirkville, Iowa; San Angelo, Texas; Lima, Ohio; Bowling Green, Kentucky; Laredo, Texas; and Zanesville, Ohio.

In DMA's 201+, there were 3.1 television stations, 2.5 AM stations, 3.3 FM stations, 0.7 newspapers, and 11.3 magazines; 51.4% of the television households were receiving 20.9 cable channels, and 42.9% of television households had VCR's.²⁷⁰ The markets in DMA's 200+ included Presque Isle, Maine; Victoria, Texas; Twin Falls, Idaho; Bend, Oregon; Fairbanks, Alaska; Helena, Montana; Alpena, Michigan; North Platte, Nebraska; and Glendive, Montana.

The smallest markets were found to have a cable penetration rate that exceeded the national average. From the largest to the smallest markets studied, no market was identified as being limited to just one media source of news, information, and entertainment.²⁷¹

A 1987 market concentration study conducted by Mark R. Fratnik, Director of Financial and Economic Research at the National Association of Broadcasters, measured the top 259 Arbitron radio markets using the Department of Justice Merger Guidelines.²⁷² The study took into account *only* radio stations, rather than radio's broader range of competitors, including compact disc players, videocassette recorders, record players, and cable network Music Television. The study data revealed that under the Herfindahl-Hirschman Index (HHI), 47.9% of the 259 markets were "unconcentrated," 38.6% were "moderately concentrated," and 13.5% were "highly concentrated."²⁷³ Larger markets tended to have lower concentration levels than smaller markets.²⁷⁴

It is no longer true that transmission of audio and video messages can occur only via the use of a scarce resource that is somehow unique among all other communication outlets. Thus, the basis for ownership restrictions—indeed, for the entire FCC regulatory labyrinth—no longer exists. Carefully considered, spectrum scarcity, if ever it was a sound basis for a reduced degree of constitutional protection for broadcasters, should now be abandoned by the Supreme Court as obsolete in the new media age. Moreover, an anal-

270. *Id.*

271. *Id.*

272. M. FRATNIK, AN UPDATED EXAMINATION OF MARKET CONCENTRATION IN RADIO MARKETS 1-2 (1987) (prepared for the Nat'l Ass'n of Broadcasters). The Justice Department Antitrust Division applies a formula known as the Herfindahl-Hirschman Index to measure relative market concentration to determine if a particular business combination poses a threat to competition. *Id.* at 2; *see infra* notes 360-61.

273. M. FRATNIK, *supra* note 272, at 4.

274. *Id.*

ysis of viewpoint and economic diversity in the current market reveals that the feared "one voice" to the exclusion of all others is a myth.

D. The Constitutional Invalidity of Ownership Regulations Absent Scarcity

Radio, television, cable, and all the new media technologies share profound commonalities and largely insignificant dissimilarities with the traditional printed press. These media all communicate news, information, and/or entertainment to audiences. They all compete for the attention of viewers and listeners and lose their audiences to competing media to the extent that they carry non-useful or undesirable messages. All media perform an informational function, using pictures, images, sounds, or combinations of the three, in an effort to leave a lasting impression that will cause audiences to become loyal spectators or listeners. Over time, the media have come increasingly to share the same means of transmitting information.

Despite almost 200 years of evolution under the first amendment, the mass communications media is today, even in its present variety of forms, perhaps no more or less significant to the typical modern American than the printed press of 1791 was to the citizens of the new republic. To the American in the early period of our nation, the public presses carried precious bits of commercial and political information.²⁷⁵ Modern man looks for the same commercial and political content from the electronic press. In the end, then as now, the ultimate power of reason in each individual determines the comparative value of each idea expressed. This value reflects itself in audience size for any particular medium, which in turn determines the longevity of any company in the media business. Rather than being a business whose spokespeople dictate to the public what will be the national orthodoxy, the media, since colonial times, have tended to reflect popular concerns and to respond to popular passions, or they simply have not survived. Without the scarcity identified in *NBC*, and its progeny, as producing a legitimate government interest in differentiating media, only these profound commonalities that bind together the various speech forms remain.

1. No Justification Exists to Deny Broadcast Media Full Print Model Protection

In media law, aside from the obscenity and indecency area,²⁷⁶ only the scarcity rationale exists as precedential support for affording the electronic

275. See, e.g., Botein, *Printers and the American Revolution*, in *THE PRESS AND THE AMERICAN REVOLUTION* 17, 19-20 (1980).

276. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Miller v. California*, 413 U.S. 15 (1973).

press less than full first amendment protection. Therefore, if the scarcity rationale is abandoned, as it should be, print model cases such as *Miami Herald Publishing Co. v. Tornillo*²⁷⁷ must be applied to test the constitutionality of governmental restraints on broadcasting. Under such precedent, government would be denied the power to interfere with the editorial judgment of broadcasters.²⁷⁸ Government would also be denied the power to prevent "private censorship" i.e., the decision of a broadcast media owner to air his desired viewpoints to the exclusion of all others.²⁷⁹ The government would have no power to restrict even the most strident articulation of biased viewpoints.²⁸⁰

Furthermore, the government could not delimit the private speech of some voices in the broadcast marketplace, such as multiple owners, in order to enhance the voices of others, such as new media entrants.²⁸¹ Nor could the government compel broadcasters to turn over programming time to special interest groups in order for these groups to express their views.²⁸² The government could have no right to regulate the national marketplace of ideas in order to foster a certain preferred level of viewpoint diversity, for broadcasters would be free to decline to foster such diversity.²⁸³

2. *Print Model Constitutional Requirements Preclude Reliance on Barriers to Entry*

The broadcast ownership regulations and policies of the FCC, without exception, depend upon broad prophylactic rules to proscribe local and national ownership concentrations. Additionally, the rules seek to preclude monopolization of both the economic marketplace and the marketplace of ideas. The prophylactic nature of the ownership rules and policies makes them applicable regardless of the actual level of economic concentration

277. 418 U.S. 241 (1974).

278. *Id.* at 258.

279. *See, e.g.*, *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 153 (Douglas, J., concurring) ("Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the Government is the censor, administrative fiat, not freedom of choice, carries the day.").

280. *See* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978); *infra* text accompanying note 334.

281. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *see also infra* note 286.

282. *See, e.g.*, *Pacific Gas & Electric Co. v. Public Util. Comm. of California*, 475 U.S. 1, 9 (1986) (invalidating a public utility commission's order requiring utilities to allow third parties to use the utility's billing envelopes to disseminate their ideas) ("Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.").

283. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (invalidating state statute requiring motorists to display the state motto on their license plates).

present, thereby severely impinging upon the speech rights of broadcasters by placing upon them an arbitrary limitation.²⁸⁴ Under the print model of constitutionality, which prohibits government enhancement of some voices and delimitation of others, a court would find this type of regulation unconstitutional. The viewpoint-fostering element of the rules and policies, imposed on conduct that does not rise to the level of an antitrust law violation,²⁸⁵ also unconstitutionally infringes upon freedom of the press.

All of the ownership rules and policies create barriers to market entry that are applied in a manner that prohibits speech by multiple broadcast owners in favor of speech by new market entrants.²⁸⁶ These rules and policies are applied without proof of antitrust law violations but rather to prevent the *possibility* of future undesirable market concentration. By silencing the voices of some to enhance the voices of others, and by endeavoring to foster a certain preferred level of viewpoint diversity, the government impermissibly trenches upon the freedom of the press under the print model standard.

VI. TOWARD A UNIFIED THEORY OF FIRST AMENDMENT JURISPRUDENCE UNDER THE PRINT MODEL

With the exception of the broadcast regulatory context, the Court has repeatedly construed the first amendment with a view toward its intended meaning,²⁸⁷ although differences of opinion exist as to precisely what that meaning is.²⁸⁸ In the broadcast context, however, the Court has avoided the

284. In *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), the court, in invalidating an FCC regulation requiring cable television systems to carry certain local broadcast signals, noted that the Commission's predictive judgment, that in the absence of the regulation competitive harm to the broadcast stations would result, did not satisfy the "substantial government interest" component of the intermediate scrutiny standard of first amendment review. *Id.* at 1454.

285. See *Associated Press v. United States*, 326 U.S. 1 (1945).

286. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). In *Buckley*, the Supreme Court, in holding invalid certain provisions of the Federal Election Campaign Act, which limited expenditures by individuals or groups seeking to influence the outcome of elections, observed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* But see *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775, 799 (1978) (distinguishing *Buckley* based on the "special problems" posed by broadcast communications).

287. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 271, 273-77 (1964).

288. See D. Teeter, *A Legacy of Expression: Philadelphia Newspapers and Congress During the War for Independence* (1966) (unpublished dissertation, The University of Wisconsin, Madison; Ph.D., School of Journalism); see also M. Yodelis, *Boston's Second Major Paper War: Economics, Politics and the Theory and Practice of Political Expression in the Press, 1763-1775* (1971) (unpublished dissertation, The University of Wisconsin, Madison; Ph.D., School of Journalism). Compare L. LEVY, *EMERGENCE OF A FREE PRESS* (1985) with J. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* (1988); Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

traditional philosophical bases for the amendment and has thereby denied the first amendment its full protective compass.

To move the broadcast press within the print model in a manner that will not diminish the protective value of existing print model precedent, it is necessary to abide by the core values of the first amendment. These values stem directly from the founding era and can best be understood by comprehending the philosophical views supporting the concept of freedom of expression as it existed in 1791. By endeavoring to preserve the integrity and vitality of the first amendment through the ages, the Court ensures the people that their fundamental liberties will not be compromised.

A. *Lessons From the Past: The Framers' Construct*

The first amendment is the product of an age of intense public awareness of the rights of mankind and the need to protect these rights from deprivation at the hands of misguided governors.²⁸⁹ To understand the philosophical underpinnings of the amendment requires an appreciation of the historical context within which it arose.

The Bill of Rights and, more particularly, the first amendment, grew out of the political contest to attain ratification of the Constitution of 1787. In an effort to appease anti-Federalist opponents of the Constitution, and perhaps to secure his own election to the first Congress, James Madison shifted away from his earlier opposition to a Bill of Rights²⁹⁰ and embraced the ten amendments, pledging to secure their adoption in the first Congress.²⁹¹

Of the amendment recommendations submitted by the various states, Madison "drew heavily" from George Mason's Virginia Declaration of

289. See, e.g., Paine, *Common Sense*, in *THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE* 4 (P. Foner ed. 1974).

290. From October 27, 1787, until August 16, 1788, James Madison, Alexander Hamilton, and John Jay wrote 85 letters in favor of the Constitution proper in New York City newspapers. See *THE FEDERALIST* at viii (C. Rossiter ed. 1961) (editor's introduction). In *THE FEDERALIST* No. 84, Hamilton argued that a Bill of Rights was "not only unnecessary" but "would even be dangerous." *THE FEDERALIST* No. 84, at 513 (A. Hamilton) (C. Rossiter ed. 1961). "[W]hy declare that things shall not be done which there is no power to do?" he queried. "Why . . . should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *Id.* at 513-14.

291. See, e.g., R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 194-96 (1955), which quotes a letter from James Madison to a campaign worker in Madison's congressional district:

[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants

Id. at 195-96.

Rights,²⁹² which Madison had helped to draft. Although the Virginia Declaration included a freedom of the press provision, it lacked a freedom of speech provision.²⁹³ The anti-Federalist George Mason had incorporated, into the Virginia Declaration of Rights, not the typical language associated with the crabbed Blackstonian definition of press liberty,²⁹⁴ but rather the lay “Bulwark of Liberty” language that mirrored the verbiage employed by two of the 18th century’s most famous radical Whigs.²⁹⁵ These Whigs (known as coffeehouse radicals),²⁹⁶ John Trenchard and Thomas Gordon, were greatly renowned in America for their 138 provocative essays on liberty republished in a compendium entitled *Cato’s Letters*.²⁹⁷ Mason’s choice of the “Bulwark of Liberty” language from Cato’s Letter No. 15 was likely no coincidence, for it is known that Mason was familiar with *Cato’s Letters*.²⁹⁸ Madison came to rely upon that language in one of his proposals to amend the Constitution of 1787.

On June 8, 1789, James Madison finally succeeded in acquiring the attention of the House of Representatives long enough to introduce his amendments.²⁹⁹ The amendments were designed to satisfy the concerns of the anti-Federalists who clung to the view that the Constitution did not adequately protect their natural, inalienable rights from deprivation by the encroaching

292. T. SHUMATE, INTRODUCTION TO THE FIRST AMENDMENT: THE LEGACY OF GEORGE MASON 66-67 (1985).

293. R. RUTLAND, *supra* note 291, at 202, 231-33.

294. Sir William Blackstone’s definition of the press liberty was the antithesis of the radical Whig concept. Nevertheless, by the mid-eighteenth century the Blackstone view was the law of the land in England and in the colonial courts. It provided that:

The liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

4 W. BLACKSTONE, COMMENTARIES *151-52.

295. See 1 J. TRENCHARD & T. GORDON, CATO’S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96, 100 (1971 reprint) (originally in vol. I). Trenchard and Gordon submit that “Freedom of Speech is the great Bulwark of Liberty” and explain that free speech and liberty “prosper and die together.” *Id.*

296. See, e.g., B. BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 28-29 (1965).

297. First published serially in *The London Journal* from 1720 to 1723, Cato’s Letters were subsequently published in four volumes that, due to their renown, “went through six editions between 1723 and 1755.” L. LEVY, *supra* note 288, at 109. Historian Clinton Rossiter has noted that “[n]o one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato’s Letters* rather than Locke’s *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period.” C. ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953).

298. See T. SHUMATE, *supra* note 292, at 72.

299. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1006 (1971).

power of the new central state.³⁰⁰ Madison noted on the floor of the House that “a great number of our constituents” opposed the Constitution but would likely support it if Congress were to “expressly declare the great rights of mankind secured.”³⁰¹ Among the amendments Madison introduced was one to protect the freedoms of speech, writing, publishing, and the press:

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.³⁰²

The radical “Bulwark of Liberty” language of *Cato’s Letters* thus appeared. In addition to this proposed amendment, Madison offered another one specifically directed at the states:

No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.³⁰³

Madison explained that the necessity for the amendments was due in part to the fact that under the English common law (in the case of speech and press, the Blackstonian concept), “[t]he freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded.”³⁰⁴ In support of his amendment to incorporate the speech and press protection to the states, Madison stated that he wished “to extend this interdiction . . . because it is proper that every Government be disarmed of powers [to] trench upon those particular rights.”³⁰⁵

Following the limited discussion of the proposed amendments, the House referred them to a Committee of the Whole.³⁰⁶ On July 21, 1789, Congress sent the proposed amendments to a select committee.³⁰⁷ In the select committee, Madison’s language was revised.³⁰⁸ Due to the absence of a select committee record, it is not possible to tell whether the edits made to the speech and press language were merely stylistic or whether they hold some

300. In a letter from Samuel Adams to Richard Henry Lee, that veritable son of liberty and anti-Federalist voiced his concern about the Constitution of 1787: “The Seeds of Aristocracy . . . spring even before the Conclusion of our Struggle for natural Rights of Men, Seeds which like a Canker Worm lie at the Root of free Governments.” R. RUTLAND, *supra* note 291, at 145.

301. 1 B. SCHWARTZ, *supra* note 299, at 1024.

302. *Id.* at 1026.

303. *Id.* at 1027.

304. *Id.* at 1028.

305. *Id.* at 1033.

306. *Id.* at 1042.

307. Anderson, *supra* note 288, at 478.

308. *Id.*

substantive meaning.³⁰⁹ The committee version read:

The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for the redress of grievances, shall not be infringed.³¹⁰

On August 15, 1789, the House adopted the select committee's version of the amendment.³¹¹ On August 24, 1789, the House formally proposed that the amendments become a part of the Constitution.³¹²

On September 3, 1789, the Senate took up the amendment on speech and press liberty.³¹³ The Senate proceedings were not recorded, so it is impossible to ascertain the senators' intentions. However, on September 4, 1789, the Senate agreed to the following version of the amendment:

The Congress shall make no law, abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.³¹⁴

On September 9, 1789, the Senate combined the speech and press clauses with the religion clauses to form a new amendment.³¹⁵ This version was adopted by the Senate and submitted to the House. In a conference committee, the amendment was reformed to its current wording:³¹⁶

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³¹⁷

From James Madison's remarks introducing the Bill of Rights to the First Congress, and in the absence of any other public basis for its submission, the first amendment must be presumed to have been designed to satisfy the anti-Federalists' demands. The anti-Federalists, such as George Mason, adhered to the Radical Whig view of the rights of man. In the areas of speech and press, the essence of that view is best captured in the early eighteenth-century writings of John Trenchard and Thomas Gordon to which, therefore, one must turn for a more complete understanding of the first amendment.

309. See B. SCHWARTZ, *supra* note 299, at 1050.

310. Anderson, *supra* note 288, at 478.

311. *Id.* at 478-79.

312. *Id.* at 480.

313. *Id.*

314. *Id.* at 481.

315. *Id.* at 481-82.

316. *Id.* at 482.

317. U.S. CONST. amend. I.

1. Radical Whig Conceptions of Free Speech and Press

Four of Trenchard and Gordon's letters on liberty were dedicated to speech and press freedoms.³¹⁸ Trenchard and Gordon understood "Freedom of Speech" to be the right "of every Man, as far as by it he does not hurt and controul the Right of another." This check would be its only limitation.³¹⁹ In words that carry much the same meaning conveyed in John Milton's *Areopagitica*,³²⁰ Trenchard and Gordon called for government to tolerate all manner of opinion.³²¹

Trenchard and Gordon condemned governors who cast judgment upon the people based upon the people's spoken "Intentions," for interpretations of these intentions by the authorities makes men subject "to the Caprices, to the arbitrary and wild Will, of those in Power."³²² Trenchard and Gordon argued for freedom to engage in criticism against governors and decried governmental interference with that freedom, explaining that to deny the public even the right to speak "wrongly, irreligiously, or seditiously" will in the end lead to a "servile Submission" by the people to their governors and to a "most Stupid Ignorance."³²³ In this Radical Whig philosophy lies an essential premise: The federal government can have no proper role in regulating the spoken or printed word.³²⁴ In the words of Trenchard and Gordon:

318. 1 J. TRENCHARD & T. GORDON, *supra* note 295, at 96 (Letter No. 15, "Of Freedom of Speech; That the Same is inseparable from publick Liberty," Feb. 4, 1720) (originally in vol. I); *id.* at 246 (Letter No. 32, "Reflections upon Libelling," June 10, 1721) (originally in vol. I); 2 J. TRENCHARD & T. GORDON, *supra* note 295, at 292 (Letter No. 100, "Discourse upon Libels," Oct. 27, 1722) (originally in vol. III); *id.* at 300 (Letter No. 101, "Second Discourse upon Libels," Nov. 3, 1722) (originally in vol. III).

319. 1 J. TRENCHARD & T. GORDON, *supra* note 295, at 96.

320. See J. MILTON, *AREOPAGITICA* (1644), quoted in M. HUGHES, *JOHN MILTON COMPLETE POEMS AND MAJOR PROSE* 746 (1957).

321. 2 J. TRENCHARD & T. GORDON, *supra* note 295, at 295 (originally in vol. III). Trenchard and Gordon wrote:

Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out; and even, if they be all restrained, common sense will often get the better: but to give one Side Liberty to say what they will, and not suffer the other to say any thing, even in their own Defence, is comprehensive of all the Evils that any Nation can groan under

Id.

322. *Id.* at 301.

323. *Id.* at 296-97.

324. For the view that the writings of Trenchard and Gordon did not form an expansive free speech and press liberty theory at the founding, see Note, *The Founding Fathers and Political Speech: The First Amendment, the Press and the Sedition Act of 1798*, 6 ST. LOUIS U. PUB. L. REV. 395 (1987); see also L. LEVY, *supra* note 288; Kurland, *The Original Understanding of the Press Provision of the First Amendment*, 55 MISS. L.J. 225 (1985); cf. SMITH, *PRINTERS AND PRESS FREEDOM* (1988); Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439 (1987); Anderson, *supra* note 288; Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 444-50 (1983).

“[i]n those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any thing else his own.”³²⁵

2. *A Private Communications Reserve*

James Madison understood the Bill of Rights to “raise barriers against all power in all forms and departments of Government.”³²⁶ In particular, the first amendment was to disarm government of powers to trench upon a free press.³²⁷ The first amendment created a guarantee that in matters of speech and press, no federal government presence would be tolerated.³²⁸ In this manner, the speech and press liberties would be secured. Neither the prior restraint of licensors nor the sanction of laws designed to curb speech after publication were to be tolerated in this republic.³²⁹

In effect, the first amendment was erected as a virtually impenetrable shield, guarding speech and the press from the government; it was to foster the free development of a private reserve of communication in which the choice of what to say and how to say it would be left to the resourcefulness of the individual, unaided and unencumbered by government.

B. The Original Conception of the Marketplace of Ideas

The essential “marketplace of ideas” concept articulated by Trenchard and Gordon has its most famous modern expression in the dissent of Justice Holmes in *Abrams v. United States*:³³⁰

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is

325. 1 J. TRENCHARD & T. GORDON, *supra* note 295, at 96 (originally in vol. I).

326. 2 B. SCHWARTZ, *supra* note 299, at 1029.

327. *Id.* at 1033.

328. The First Amendment was to serve as “a denial to Congress of all power over the press.” See Madison, *Report on the Virginia Resolutions, House of Delegates Session of 1799-1800*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION 569 (J. Elliot ed. 1987 reprint).

329. *Id.* at 569-70. Madison wrote:

Under [the British government], an exemption of the press from previous restraint by licensors appointed by the King, is all the freedom that can be secured to it. . . . In the United States, the case is altogether different. . . . [Here the] security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensors but from the subsequent penalty of laws.”

Id.

330. 250 U.S. 616 (1919).

better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.³³¹

It must be remembered that Justice Holmes' dissent was written in response to the Court's decision to affirm the conviction of a group of alleged Bolsheviks under the Sedition Act of 1918.³³² The Bolsheviks had urged workers in ammunition plants to strike in order to preclude American military involvement in the Russian Revolution.³³³

Therefore, the marketplace of ideas concept relied upon by Justice Holmes was designed to deny government the power to interfere with the private propagation of ideas and opinion. This prohibition would thereby permit the free evolution of speech in the marketplace of ideas. Government would play no role in determining the composition of the communications bazaar. Whether one idea merchant or one hundred were present in the "marketplace" at a particular time was not to be a concern of government. The choice of what to say and how to say it would be in the province of free agents. Disparities in voice levels and persuasiveness would not be counteracted, but would be equally protected from the state. In this way, even with the risk present that some methods of communication and some methods of delivery or chosen messages may reach a larger audience and may be more persuasive, the ultimate determination of worth would be entrusted to each individual and not government. Or, as the Supreme Court has put it: "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . But if there be any danger that the people cannot evaluate the information and arguments . . . it is a danger contemplated by the Framers of the First Amendment."³³⁴

C. *The Modern Conception of the Marketplace of Ideas*

Two years before *Red Lion* was handed down by the Court, Professor Jerome A. Barron wrote an article that was to help define a new role for the marketplace of ideas concept.³³⁵ Historically, that concept had been relied upon by the Supreme Court metaphorically, as descriptive of the govern-

331. *Id.* at 630 (Holmes, J., dissenting).

332. *Id.* at 616 (majority opinion).

333. *Id.* at 620-21.

334. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

335. See Barron, *Access to the Press—a New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

ment-free, laissez-faire communications environment intended by the framers of the first amendment. In the framers' construct, the first amendment served as *the people's guardian against the State*. Professor Barron used this concept to invert its historical premise. He surmised that the marketplace of ideas was an environment *guaranteed* by the first amendment. In Professor Barron's construct, the first amendment *afforded the State power over private speech to ensure a fair mix of diverse views in society and to guard against viewpoint domination by advocates of majoritarian views*. Suddenly, an amendment designed to deprive the government of power over speech had become an amendment that mandated government policing of the content of speech to ensure a preferred mix of ideological viewpoints. The government, of course, would choose which views must be represented to attain the *preferred* mix. The essential basis of Professor Barron's construct, a right of access by members of the public to means of mass communication in private hands, would be adopted by the Court in *Red Lion* for application in the broadcast media context and would be rejected by the Court in *Tornillo* for application in the print media context.³³⁶ Consequently, comprehension of Professor Barron's thesis is essential to understanding how the first amendment has been transformed in broadcast jurisprudence.

1. *The First Amendment as Guarantor of Diversity*

In his 1967 article, Professor Barron argued that the "marketplace of ideas," once freely accessible to the public, had become foreclosed to all but wealthy media moguls.³³⁷ Speech power had come to rest in the hands of a few. This disparity created an inequality of media access that Professor Barron believed could not be tolerated without depriving the public of a meaningful opportunity to participate in the system of free expression.³³⁸ To

336. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (regulation requiring right of access by candidates who had suffered a "personal attack" held constitutional) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (similar Florida right-of-reply law applicable to print media held unconstitutional).

337. Barron, *supra* note 335, at 1643.

338. *Id.* at 1655-56. Professor Barron explained:

The avowed emphasis of free speech is still on a freeman's right to "lay what sentiments he pleases before the public." But Blackstone wrote in another age. Today ideas reach the millions largely to the extent that they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant.

Id.

ensure equal access to speech power, Professor Barron favored judicial intervention and government regulation. Professor Barron feared the threat of censorship by government less than he feared censorship by private media owners.³³⁹ Professor Barron found "commercial considerations" of the private media to lead to a repression of ideas and insisted that "these media . . . not be allowed to resist *controls* designed to promote vigorous debate and expression."³⁴⁰ To establish "state action" necessary for application of the first amendment to private suppression of speech, Professor Barron called for a "public function" theory whereby newspapers would be deemed public entities, answerable to the state.³⁴¹

By believing the greatest dangers to free expression to lie in the hands of media entrepreneurs rather than the government, and by construing media of mass communication as imbued with a quasi-public status, Professor Barron was able to create a justification for the transformation of the first amendment into an affirmative tool of the state. In Professor Barron's mind, the state could be trusted to regulate access to the media and ensure "vigorous debate and expression."³⁴² He saw in this concept no abridgement of the speaker's rights, but only an enhancement of the public's right of access.³⁴³ The Barron thesis has acquired many adherents, albeit of varying degrees of commitment,³⁴⁴ and few detractors.³⁴⁵

339. *Id.* at 1662. Professor Barron noted:

If dissemination of books can be prohibited and punished when the dissemination is not for any saving "intellectual content" but for "commercial exploitation," it would seem that the mass communications industry, no less animated by motives of "commercial exploitation," could be legally obliged to host competing opinions and points of view.

Id.

340. *Id.* at 1663 (emphasis added).

341. *Id.* at 1669. Barron wrote:

A right of access to the pages of a monopoly newspaper might be predicated on Justice Douglas's open-ended "public function" theory. . . . Such a theory would demand a rather rabid conception of "state action," but if parks in private hands cannot escape the stigma of abiding "public character," it would seem that a newspaper, which is the common journal of printed communication in a community, could not escape the constitutional restrictions which quasi-public status invites. If monopoly newspapers are indeed quasi-public, their refusal of space to particular viewpoints is state action abridging expression in violation of . . . the first amendment.

Id.

342. *Id.* at 1663.

343. *Id.* Professor Barron explained: "[W]hat is suggested here is merely that legal steps be taken to provide for the airing and publication of 'minority tastes or viewpoints,' not that the mass media be prevented from publishing their views." *Id.*

344. Professor Owen M. Fiss is the latest, and perhaps the most strident, advocate of the Barron thesis. See Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). Dissatisfied with laissez-faire allocation of speech power in a capitalist society, where speech opportunities are distributed unequally, Professor Fiss, like Barron, values propagation of

2. *The State as Regulator of Ideological Commerce*

To attain his preferred mixture of views and information, Professor Bar-

"worthy" views more highly than autonomous selection of the content of messages by speakers who currently occupy media fora. According to his construct, government should intervene to assure speakers with messages that "enrich public debate" access to fora:

The power of media to decide what it broadcasts must be regulated because . . . this power always has a double edge: It subtracts from public debate at the very moment that it adds to it. . . . To date we have ambivalently recognized the value of state regulation of this character on behalf of speech . . . [b]ut these regulatory measures are today embattled, and in any event, more, not less, is needed. . . . A commitment to rich public debate will allow, and sometimes even require, the state to act in these ways, however elemental and repressive they might at first seem. Autonomy will be sacrificed, and content regulation sometimes allowed, but only on the assumption that public debate might be enriched and our capacity for collective self-determination enhanced.

Id. at 1415. At root, both Fiss and Barron despise *inequalities* in speech power. The equality principle has been fully developed by Professor Kenneth L. Karst. See Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

Other commentators have fallen short of endorsing the entire Barron thesis, but have perceived a role for government enhancement of certain favored speakers' rights to communicate. See, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970) ("A limited right of access to the press can be safely enforced. But any effort to solve the broader problems of monopoly press by forcing newspapers to cover all newsworthy events and print all viewpoints under the watchful eyes of petty public officials is likely to undermine such independence as the press now shows without achieving any real diversity."); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 676 (1978) ("the right to know . . . carries the implication that government, while it may not close the market [place of ideas], may move to correct its defects and regulate its incidental consequences"); A. MEIKLEJOHN, *POLITICAL FREEDOM* 19 (1960) ("Congress is not debarred from all actions upon freedom of speech. Legislation which abridges that freedom is forbidden but not legislation to enlarge and enrich it.").

Professor Bollinger has tried to have the best of both worlds, endeavoring to embrace the perceived benefits of the traditional *and* the access approaches, and to distance himself from their attendant detriments—thus raising profound questions as to whether such a "schizophrenic" effort could ever be workable. See Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976). Bollinger wrote:

The central problem in this area results from the complexity of the access issue. The truth of the matter is, as the Court's opinions so plainly, if unintentionally, demonstrate, that there are good first amendment reasons for being both receptive to and wary of access regulation. This dual nature of access legislation suggests the need to limit carefully the intrusiveness of the regulation in order to safely enjoy its remedial benefits. Thus, a proper judicial response is one that will permit the legislature to provide the public with access *somewhere* within the mass media, but not throughout the press. The Court should not, and need not, be forced into an all-or-nothing position on this matter; there is nothing in the first amendment which forbids having the best of both worlds.

Id. at 27.

345. To date, among the critics of the Barron thesis, Professors David L. Lange, Louis L. Jaffe and Matthew L. Spitzer have contributed the most well-developed counterarguments. Professor Lange capably explodes many of the assumptions underlying Barron's construct, particularly doubting that regulators may be trusted to promote anything but banal and cen-

ron called for "a contextual approach" and "a purposive view of the first amendment."³⁴⁶ Essentially, under Professor Barron's system, by focusing upon the content of the press, the government could determine when to invoke the "marketplace of ideas" rubric to require a delimitation of a broadcaster's or editor's freedom of speech in order to permit an expanded right of access for an underrepresented individual or group. Professor Barron's system renders broadcasters and editors beholden and accountable to government. The government is empowered to intrude upon the discretion of broadcasters and editors who fail to present a certain desired composite of views and information by affording representative groups a right of nondiscriminatory access in order to voice their viewpoints.³⁴⁷ Professor Barron would have the legislature impose "the modest requirement" that newspapers be able to provide "rational grounds" for denying access to their fora.³⁴⁸ He does not understand these restrictions to violate the first amendment. Rather, his "basic premise . . . is that a provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced."³⁴⁹ For Professor Barron, "the first amendment is read to state affirmative goals" and "Congress is empowered to realize them."³⁵⁰ Professor Barron does not share the framers' distrust of state governance over speech, but instead embraces the state as his desired means to foster a structured composite of ideas in the ideological marketplace.³⁵¹

trist speech, rather than the robust and antagonistic debate envisioned by access proponents. See Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C.L. REV. 1, 72-91 (1973). Professor Jaffe succinctly and cogently attacks the paternalistic faith of the Barron thesis in the capacity of government regulators to better know what is in the viewing and listening interests of the American people than the public itself, and the assumption that private censorship affecting but one news source is somehow more deleterious than government censorship. See Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 786-87 (1972). Professor Spitzer demonstrates the impracticability of Bollinger's argument for partial access. M. L. SPITZER, *supra* note 7, at 43-66.

346. Barron, *supra* note 335, at 1666.

347. *Id.* at 1667.

348. *Id.* at 1670.

349. *Id.* at 1676.

350. *Id.*

351. Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766, 782 (1970).

Barron wrote:

Economic and technological factors have become such constraints on the life of ideas that the *laissez faire* Millsian approach to freedom of expression that was the natural accompaniment of the liberal free market economics of the nineteenth century is now a hopeless anachronism. But the democratic faith in reason—in judgments made by individual citizen decision-makers on the basis of information and reflection—is still the basic assumption of our institutions. Unless we are ready to

Professor Barron's view of the first amendment grants the state supereditorial authority. The Commission's complex of ownership restrictions, designed to enforce viewpoint diversity by creating barriers to entry by disfavored speakers, establishes as law a similar positivist perspective of the first amendment.³⁵² It completely transforms the marketplace of ideas from one uninhibited by state regulation in which anyone, whether his means be humble or great, may voice an opinion, into a "marketplace" carefully monitored and checked by state censors. In Professor Barron's world, only the soapbox speaker can communicate freely. As one accedes to means of communication that reach more people, one must accept state supervision and, to a degree, state editorial control.

Once this perspective is accepted, our traditional understanding of "free speech" is at an end. If free speech is denied to those who have become media giants as a result of their satisfaction of public demand, then only those who confront the public with views and information the public does not value will receive full first amendment protection.

3. *The Resulting Loss in Personal Speech and Press Liberty*

The framers viewed free speech as a critical check on maladministration in government.³⁵³ Independent of government censors, a free press could cause, in the words of the First Continental Congress, "oppressive officers [to be] shamed or intimidated, into more honourable and just modes of conducting affairs."³⁵⁴ The focus of the speech liberty was understood to rest in the individual speaker, not in the listeners or readers. The First Continental Congress explained: "The enjoyment of liberty, and even its support and preservation, consists in every man's being allowed to speak his thoughts, and lay open his sentiments."³⁵⁵

With the passage of time, the vital need to maintain the integrity of the framers' intended private communications reserve has increased. Faced with a central government of expansive size and virtually all-encompassing regulatory scope, the private press remains one of the few institutions capable of challenging the authority of the state and ensuring the responsiveness

discard this faith, we should give considerable attention to the idea of access and to attempts to realize that idea through new legislation and more intensive and sympathetic uses of existing law.

Id.

352. See *supra* notes 209-16 and accompanying text.

353. See, e.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529-38.

354. 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 108 (1968).

355. *Id.* at 110.

and integrity of governmental officials.³⁵⁶

In this environment, Professor Barron's view that government should be entrusted with supereditorial authority over speech and press is a grave one indeed. It fundamentally shifts the marketplace of ideas from its private, unregulated, and interactive context to one within the compass of state control, making the marketplace ultimately responsible to government for determinations as to the choice of content expressed.

Professor Barron fails to appreciate the full significance of his transformation of the marketplace of ideas concept. A truly free and unrestricted marketplace of ideas does not guarantee the speaker access to another's private property to propound a message.³⁵⁷ Rather, the "marketplace" is a metaphor for the denial of government power over speech and abdication of government control over part or all of a private forum.³⁵⁸ The marketplace's function is not to guarantee that the speaker's chosen message will be appreciated or understood.

In the final analysis, Professor Barron's thesis fails. It presumes the impossible—that one individual or regulatory body can arrive at a "proper mix of views and information" on matters as subjective as viewpoints on issues. It also presumes that one individual or regulatory body can make such an authoritative selection without discouraging private speech. Authoritative selection varies from regulator to regulator, and it ultimately chills speech. Even if authoritative selection could be made without a chilling effect, it would nevertheless fail to satisfy the public better than market forces, for the public prefers to make its own selections.

No one in a free state can be forced to view, listen, or read undesired ideas

356. Blasi, *supra* note 353, at 538. In the words of Professor Blasi:

The central premise of the checking value is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people. There are several reasons why misconduct by government officials may be regarded as different in kind from misconduct by private persons. First, and perhaps most important, the potential impact of government on the lives of individuals is unique because of its capacity to employ legitimized violence. This means not only that in most cases government can achieve a higher degree of compliance with its decisions than can private bodies, but also that public officials control the resources which, if misused, can do the maximum amount of harm.

Id.

357. *Cf.* *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)) (opening of a private shopping center to public does not create first amendment rights in public beyond those existing under applicable law).

358. *See, e.g., Pacific Gas & Electric Co. v. Public Util. Comm. of California*, 475 U.S. 1, 9 (1986). The Court emphatically stated that "[c]ompelled access like that ordered [by the Public Utilities Commission] . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id.*

or news.³⁵⁹ Even in an unfree state, such ideas and news cannot be melded into a human mind averse to them. Ultimately, free choice drives the system contemplated by the framers of the first amendment. Free selection and interpretation of news by competing media and spokespeople ensures responsiveness to society's informational needs.³⁶⁰ Any governmental tampering with this system transforms the marketplace of ideas from an "uninhibited, robust and wide-open" one³⁶¹ into an inhibited, insipid, and delimited one. The result is a profound loss of the liberties of speech and press.

VII. CONCLUSION: TOWARD INCLUSION OF THE BROADCAST PRESS WITHIN THE FIRST AMENDMENT'S FULL PROTECTIVE COMPASS

The American system of broadcast regulation abridges the first amendment.³⁶² James Madison's first amendment was designed to deny the state power over speech and the press. Free speech and a free press were to reside in a private sphere of human communication which the state would be prohibited from regulating. The Communications Act of 1934 rests atop a false premise—that the state can determine, consistent with the first amendment, *who* may use a communications medium and *what* may be said upon that medium. The government, through the FCC, consciously intends, by structuring the market and selecting who may speak, to shape the content of the composite message disseminated over the broadcast media. Under the traditional concept of the first amendment, the state has no such power.

359. Professor Jaffe utterly rejects the notion that the people of America are lay dupes of sophisticated media moguls, and doubts that the citizenry are in need of federal guidance on what to watch, listen to, or read:

The implication that the people of this country—except the proponents of the [Baron] theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American people.

Jaffe, *supra* note 345, at 787.

360. Professor Jaffe again succinctly captures the point:

The proposition that the threat of government censorship is much less than that of private censorship cannot survive the lesson of the government's attempt to suppress publication of the Pentagon Papers. An argument of this sort can only be made by one who, not having lived under a system of governmental censorship, appears to have no idea what it really means. If one private person suppresses a fact there are many others who may publish. Not so if the government forbids!

Id. at 786.

361. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

362. See, e.g., Lively, *Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue*, 66 N.C.L. REV. 963 (1988).

In the print media context, this has been the prevailing constitutional understanding. In the broadcast media context, government control has been deemed a necessity due to spectrum scarcity. Without a private right of ownership, each user of spectrum is forced to remain beholden to the state for its right of access to that spectrum. With the advent of *Syracuse Peace Council*, spectrum scarcity no longer serves as a legitimate basis for applying differing constitutional standards to the print and broadcast press. An entirely new system must come to replace the current broadcast regulatory construct.

A free system of content-neutral, market allocation of broadcast property rights would best comport with the first amendment. Such a system would mirror the environment in which the print media has historically operated. A property rights approach to private ownership of broadcast spectrum would ensure the initiation of a new, fully deregulated, and maximally protected broadcast press. Although the specifics of such a proposal are beyond the scope of this Article, many individuals have established the feasibility of the property rights alternative.³⁶³

A. *Elimination of Structural Regulations as an Essential First Step*

The movement toward affording the broadcast press full first amendment protection under the print model cannot continue unless the Commission removes not only its content but also its structural regulations. As this Article has attempted to show, the "content/structural" dichotomy is a meaningless distinction, for both regulatory regimes exist to enforce programming viewpoint diversity and are aimed ultimately at controlling *what* is said and *who* may speak. Denying a broadcaster the opportunity to speak *ab initio* in any particular region of the country or on a nationwide basis, absent proof of an antitrust violation, constitutes a direct government deprivation of the speech and press liberties. The FCC's ownership rules are designed to prevent incipient undesirable concentrations in media markets without proof of any undesirable effects. No basis exists for so weighty a decision as the one

363. See, e.g., Coase, *The Federal Communications Commission*, 2 J.L. & ECON., Oct. 1959, at 1, 25-35. DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J.L. & ECON. 221 (1975); see also M. Mueller, *Property Rights in Radio Communications: The Key to the Reform of Telecommunications Regulation* (Cato Institute, Policy Analysis No. 11, 1980); M. Mueller, *Privatization of the Airwaves* (Reason Foundation Issue Paper, 1980); D. WEBBINK, FREQUENCY SPECTRUM DEREGULATION ALTERNATIVES (prepared for FCC Office of Plans and Policy, Federal Communications Comm'n, 1980).

to foreclose the opportunity to speak through the coercive power of the State.

By eliminating the ownership rules, the Commission will not only protect the speech and press liberty, but will in many instances provide viewers and listeners with more diverse programming. Elimination of the rules will also permit media consumers to gain access to programs potentially superior to those already offered in local markets. In short, elimination of the ownership rules will enable market demand to dictate in a more direct way the type and quality of programs offered via the airwaves.

B. DOJ Antitrust Law Enforcement Remains a Sufficient and Constitutional Safeguard Against Undue Media Concentration

Accepting the premise that promoting content diversity through regulatory structuring of media markets offends the Constitution (or even that the weight of the government's interest in enforcing viewpoint diversity is no longer sufficient to overcome the first amendment interests of multiple-media owners), the only legitimate remaining objective of FCC structural regulation is to prevent monopolization, if a monopoly can indeed be found in the current media marketplace. The FCC has a specific statutory mandate to enforce federal antitrust policies.³⁶⁴ Section 7 of the Clayton Act prohibits an acquisition when "the effect of such acquisition . . . may be substantially to lessen competition or to tend to create a monopoly."³⁶⁵ While the thrust of the antitrust laws is preventive, to forestall incipient threats to competition, the FCC's policies have operated as a prior restraint,³⁶⁶ prospectively denying certain entities opportunities to speak in a misguided effort to structure the content of the aggregate message of American broadcasting, in the absence of even a likelihood of monopolization.

In the abstract, the problem of loss of competition posed by common ownership of multiple media outlets is principally one of attainment of market

364. 47 U.S.C. § 314 (1982) (prohibiting acquisition or control of communications facilities when the purpose or effect "may be to substantially lessen competition or to restrain commerce . . . or unlawfully to create monopoly in any line of commerce"); *id.* § 313(b) (1982) (directing the FCC to refuse station licenses to persons adjudged to have violated federal antitrust laws). This mandate is separate and distinct from the FCC's general charge to regulate in what it conceives to be the public interest, convenience and necessity, the standard which the Commission has traditionally invoked to justify its policy of enforced viewpoint diversity. *See supra* notes 195-220 and accompanying text.

365. 15 U.S.C. § 18 (1982). Section 314 of the Communications Act of 1934, as amended, closely parallels this language. 47 U.S.C. § 314; *see also supra* note 364.

366. For a good working definition of prior restraints on speech, see Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648 (1955) ("The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication.").

power by a few dominant firms through horizontal integration.³⁶⁷ To determine whether the effect of a particular combination may be "substantially to lessen competition," the Antitrust Division of the United States Department of Justice examines the degree of concentration within the relevant market.³⁶⁸ The Justice Department employs the Herfindahl-Hirschman Index (HHI) to identify the extent of ownership concentration within a particular market, and will take action to enforce the antitrust laws if a proposed consolidation renders that market unduly concentrated.³⁶⁹

In applying its Merger Guidelines, the Department of Justice seeks to promote economic efficiency by avoiding the exercise of market power by dominant firms. Unlike the Justice Department, the FCC has traditionally used forced "competition" as an instrument of social policy, to promote access to media outlets by entities likely to be barred by unfettered operation of the market.³⁷⁰ Reliance on the Justice Department's quantitative model of de-

367. Broadly defined, a horizontal merger is one in which the producer of a product acquires the stock or assets of a competing firm serving the same geographical market. See 4 P. AREEDA & D. TURNER, *ANTITRUST LAW* 1 (1980). As used here, "market power" means the ability of one or more firms to maintain prices at a level above that which would exist in a perfectly competitive market. See United States Department of Justice Merger Guidelines, 47 Fed. Reg. 28,493, 28,494 (1982) [hereinafter Merger Guidelines]. For the sake of brevity and clarity, this Article focuses upon horizontal merger, avoiding other issues presented by media market structure, such as vertical integration through common ownership of programming sources, channels of distribution and outlets presented by the prospect of network/cable combinations. See *supra* notes 122-34.

368. See Merger Guidelines, *supra* note 367, at 28,497; Cohen & Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453, 458 (1983). See generally Symposium: 1982 Merger Guidelines, 71 CALIF. L. REV. 280 (1983).

369. The Herfindahl-Hirschman Index (HHI) of market concentration is the sum of the squares of the individual market shares of all the firms included in the market under the Justice Department's market definition standards. 1982 Merger Guidelines, *supra* note 367, at 28,497. In evaluating horizontal consolidations, the Department of Justice employs the following rules: if a merger produces an HHI below 1000, the market is characterized as unconcentrated, and the prospect of anticompetitive effects is considered to be unlikely; if the resultant HHI is between 1000 and 1800, the market is moderately concentrated, and the risk of harm is considered to be greater; if the post-merger HHI is above 1800, the market is highly concentrated, and the Department of Justice may challenge the consolidation. *Id.* at 28,497-98.

370. See Cohen & Sullivan, *supra* note 368 at 457-58. While both the Justice Department and the FCC have interests in addressing concentration of media ownership, the FCC has used its authority to promote diversity of content through diversity of ownership, while the Justice Department has focused exclusively on anticompetitive concerns. See B. COMPANIE, *WHO OWNS THE MEDIA?* 310-11 (1982). These divergent regulatory interests have in the past placed the Justice Department and the FCC at cross purposes in specific cases. For example, in 1968, the Justice Department began challenging FCC decisions to grant broadcast licenses to newspaper owners. Pressure from the Justice Department eventually manifested itself in the form of the FCC's newspaper-broadcast cross-ownership rules, which have had the ironic effect of reducing media voices. *Id.* at 319-20.

fining detrimental ownership concentration in local, regional, and national markets would better comport with the FCC's present regulatory pursuit of economic efficiency, and with its growing recognition of the questionable constitutionality of regulating, directly or indirectly, programming content.³⁷¹ This delimitation on power secures the potential broadcaster's right to speak, provided that in exercising that right, the broadcaster does not purposefully foreclose opportunities for competitive speech in the marketplace of ideas. This comports with the philosophical basis for freedom of speech. As John Trenchard and Thomas Gordon put it, the "Freedom of Speech [is the right] of every Man, as far as by it he does not hurt and control the Right of another."³⁷² Indeed, the Supreme Court has recognized that "[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."³⁷³

Because the Justice Department has in place a content-neutral institutional mechanism to detect undue ownership concentration, and because it does not share the FCC's history of precedent supporting regulations of *who* may speak, the Justice Department is better suited to focus specifically on anticompetitive effects. Because of its propensity to confuse its goal of promoting competition with its goal of promoting diversity of voices, the FCC should abandon all prospective attempts to structure media markets in favor of reliance upon Justice Department enforcement.³⁷⁴ The retreat from

371. In its 1989 modification of the duopoly rule, *see* Duopoly Report and Order, *supra* note 167, the Commission relied, in part, on a Nat'l Ass'n of Broadcasters market concentration study which employed the Justice Department's HHI, finding "that local radio markets have HHI's well below the levels which trigger antitrust concerns under DOJ's *Merger Guidelines*." *Id.* at 5. Similarly, the FCC adopted its 1989 one-to-a-market waiver policy, Second One-to-a-Market Report and Order, *supra* note 167, in reliance upon a CBS study employing the HHI, which supported the Commission's finding that local markets were unconcentrated. The Commission wrote: "based on these studies, we conclude that the increased availability of broadcast outlets in large local markets has reduced the potential risk of harm to competition that would be caused by relaxing or modifying the radio-television cross-ownership rule in such markets." *Id.* at 6. Nevertheless, in both of these rulemakings, the Commission assiduously adhered to its traditional objectives, explaining that its new duopoly "approach best serves the public interest by fostering our continuing goals of promoting economic competition and diversification of programming and viewpoints . . ." Duopoly Report and Order, *supra* note 167, at 1. The commission emphasized that, in its new one-to-a-market waiver policy, it was "retaining its traditional concern for encouraging diversity of programming and viewpoints" by encouraging diversity in the ownership of broadcast stations. Second One-to-a-Market Report and Order, *supra* note 167, at 3.

372. 1 J. TRENCHARD & T. GORDON, *supra* note 295, at 96.

373. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

374. Such action by the Commission would not be without precedent. *See, e.g.*, Report, Order and Policy Statement, Character Qualifications of Broadcast License Applicants, 102 F.C.C.2d 1179 (1986). In 1986, the Commission severely delimited the scope of its review of

structural enforcement of viewpoint diversity policies should not continue to occur in piecemeal fashion, but through a sweeping reevaluation of the constitutionality of the FCC's fundamental regulatory approach which carries the lessons of *Syracuse Peace Council* to their logical conclusion.

the character qualifications of prospective broadcast licensees by announcing that it would no longer inquire into allegations of anticompetitive conduct by an applicant until presented with proof of an adjudicated violation of state or federal antitrust laws. *Id.* at 1201.

