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PANEL III: INTERNATIONAL TRADE IN MEDIA PRODUCTS

COMMENTARY

GLOBALISM AND NATIONAL MEDIA POLICIES IN THE UNITED STATES AND CANADA: A CRITIQUE OF C. EDWIN BAKER'S *MEDIA, MARKETS, AND DEMOCRACY*

Jerome A. Barron[*]

I. INTRODUCTION

In democratic societies, Canada and Western Europe for example, enthusiasm for free trade quickly dissolves when the product involved is a media product.[1] The United States obviously has an advantage in insisting that free trade should embrace free trade in media content no less than with other commodities. To assist it, the U.S. can bring to bear its dominance in the business of producing and distributing media content. It can also rely on the rhetoric of American First Amendment

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1. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 217 (W. Lance Bennett & Robert M. Entman eds., 2002).

law.[2] Surely, the argument runs, if free trade should be applied anywhere, it is free trade in ideas. The marketplace of ideas should be untrammeled and national boundaries should be no barrier to the life of ideas. Professor C. Edwin Baker outlines in convincing detail the steadfastness with which the U.S. has maintained this position.

In his book *Media, Markets, and Democracy*,[3] Professor Baker, in a chapter entitled "Trade, Culture and Democracy," presents a subtle and sensitive discussion of the complexities inherent in considering the merits of free trade in media content. He warns us that yielding to arguments against American domination of the global market in media content may, in many countries, result in the substitution of government distortion for market distortion.[4] He warns, therefore, against the categorical exclusion by one country of media content originating in another country. That, he states, is not the solution for imbalances in the production quality and delivery of media content among the nations of the world. As he puts it, categorical exclusion of imported media content will "stunt discourse."[5]

Professor Baker, however, is keenly aware that the media marketplace is imperfect and subject to market failure.[6] This market failure has important consequences. The media products that prevail in the unregulated market often do not adequately serve the needs of smaller political and informational groups within society. Moreover, the unregulated media market fails because it does not appropriately identify, and is insufficiently egalitarian "in weighing people's desires for democratically relevant speech."[7] Furthermore, international trade in media content accelerates the dissipation of local media and weakens its centrality to the media's democratic functions.[8] On the whole, Baker doubts that unrestricted free trade in media content in the global media marketplace is supportive either of national or of global democracy.[9]

2. U.S. CONST. amend. I.
3. BAKER, *supra* note 1, at 245-75.
4. *Id.* at 254-55.
5. *Id.* at 255.
6. *See id.* at 246.
7. *Id.*
8. *See id.*
9. *See* BAKER, *supra* note 1, at 260-61.

This Book Review serves as a critique of Professor Baker's recent work, examining particular chapters as well as responding to his overall thesis. In Part II, the Review examines the chapter "Trade and Economics" and the impact of unrestrained global free trade upon local and national media content. Part III will address Baker's "culture of dialogue" and the need, or lack thereof, for its protection from unrestricted global free trade in media content. Part IV will explore Baker's suggestion that a "media specific" remedy may be available to resolve tensions between free international trade and globalization on the one hand, and the fostering of cultures of dialogue and the maintenance of local media institutions on the other. Part V will discuss the impact of the First Amendment on media regulation in the U.S., and how these regulations are being evaded in the name of the Constitution. Part VI will explore developments in Canadian media concentration, and how cross-ownership is actually being hailed as the stimulus for the economic health of that country's media enterprises.

II. FREE TRADE IN MEDIA CONTENT

In the chapter of his book entitled "Trade and Economics," Professor Baker undertakes an economic analysis of the impact of unrestrained global free trade on local or national media content. In light of this analysis, he contends that some forms of governmental intervention, such as subsidies, are necessary in democratic societies to preserve and nurture local media.[10] Moreover, subsidies are not the only means by which national governments can seek to assure that some minimum level of local content survives. Mandating "screen quotas" of locally produced movies by national movie theaters and "broadcast time quotas" mandating local or domestic programming for a certain percentage of the programming on the broadcast day are other favored alternatives.[11] In democratic societies, "robust *domestic media content*" is essential, and "[r]estraints on imports can protect and promote these essential domestic products."[12]

10. *See id.* at 232 ("This economic justification for subsidies applies uniquely to local media products disadvantaged by the free trade regime.").

11. *Id.*

12. *Id.* at 238 (emphasis added).

In the United States, the protection of local broadcast media content has historically been accomplished through government intervention. The "must-carry" rule is an example.[13] Local cable systems are required to allocate a certain percentage of their channel capacity to local over-the-air broadcasters.[14] Since most television viewers in the U.S. are cable subscribers, Congress provided for must-carry to preserve local over-the-air broadcasting. Local broadcasters contended that, without must-carry, their survival would be in economic jeopardy.[15] If broadcasters were limited to the over-the-air audience and deprived of the cable audience, the remaining broadcast audience would be too fragmented to financially support over-the-air "free" broadcasting.[16] The result would be a kind of information *apartheid*.

If local over-the-air broadcast stations were no longer economically viable, those who could not afford to subscribe to cable television would be deprived of free television altogether. Programming directed to issues and problems unique to the local community might be deprived of any television time at all. This is indeed what Professor Baker thinks occurs on the international level.[17] Baker is against absolute prohibitions on imports of foreign media content. On that issue he is a free marketer. On the issue of what control nation-states should have with respect to the protection of locally originated media

13. *See* Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534-535 (1994) [hereinafter Cable Act].

14. *Id.*

15. *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 634 (1994) [hereinafter Turner I] ("Congress concluded that unless cable operators are required to carry local broadcast stations . . . 'the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.'" (quoting H.R. REP. No. 102-628, at 74 (1992)).

16. *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180, 226 (1997) [hereinafter Turner II] (Justice Breyer, speaking for the plurality, justified must-carry as necessary in order to avoid "too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public.").

17. *See* BAKER, *supra* note 1, at 238 ("[I]mports often will replace domestic media products that are *more* oriented toward crucial local needs.") (emphasis added).

content and the limiting of foreign media content, he favors governmental intervention — at least in democratic societies.[18]

A theme that runs through Baker's chapter on "Trade and Economics" is that the market does not necessarily give people the media content that they want.[19] People can opt for the market, or opt for government restraints on that market. But free market rhetoric should not be allowed to trump the normal workings of democratic society: "People can get the media they want only if they have the right to adopt rules that determine how wants are identified and weighed. These decisions could show that people will obtain the media they want only through rules that interfere with free trade."[20]

III. A CULTURE OF DIALOGUE

Although Professor Baker is skeptical about whether free trade in media content will serve democratic societies, his discussion of this complex issue is quite nuanced. Indeed, he insists on a fundamental distinction between the kind of culture or media content which should be exempted from unrestricted free trade, and the kind of culture or media content which should not. In assessing the merits of global free trade in media content, he distinguishes between two kinds of media content involving two conceptions of national culture — the first being a culture of dialogue, the other an artifact or museum conception of culture.[21] This artifact or museum conception of culture is described as perceiving culture and cultural integrity as "relatively static, largely *backward*-looking, and very much

18. *See id*. at 234. He states:

> At the stage of final choice, liberal democracy must leave decisions in the hands of individuals. However, the choice of structures or legal frameworks is an inherently collective matter. . . . [R]ather than relying blindly on the market, the more appropriate response is for the parties most affected to reach a judgment through the only mechanism available to them to make structural decisions: residents of each country should express their judgments through their political order.

Id.

19. *Id.* at 222.

20. *Id.* at 242.

21. *See id.* at 249-51.

content-oriented."[22] Free trade threatens the content of the museum conception of culture. But there is no merit in insulating this conception of culture from the consequences of global free trade in media content. The implication is that if free trade in media content erodes or destroys a museum conception of culture, then so be it.

The culture of dialogue, however, merits a much greater degree of protection from unrestricted global free trade in media content. In a helpful explanation of what he means by a culture of dialogue, Baker identifies the aspects of a culture of dialogue which merit protection.[23] The watchwords of a culture worth protecting are characterized by "pluralism, diversity, citizen opportunity, choice, creativity and participation."[24] These characteristics of a culture of dialogue have an obvious affinity with both First Amendment theory and First Amendment tradition. Professor Baker further describes the culture of dialogue as:

> Discourse or dialogue makes participants, rather than content, central to culture. In discourse, it matters who the speaker and who the audience are. The speaker and audience typically struggle with the same concerns. . . . In this dialogic conception, culture is necessarily a living practice. Like all practice, discourses of identity and value require a context, which makes a cultural heritage crucial. Thus, [the dialogic] conception treats culture as the integration of a specific heritage into a current behavioral discourse. Addition, development, and, sometimes, rejection of particular cultural content are inherent in this dialogic conception of culture. [25]

This explanation is an appeal, and a worthy one, for a nonnationalist use of the past. But it also suggests many connections with a museum conception of culture. The explanation seems to blur rather than sharpen the distinction.[26] Baker

22. *Id.* at 250.

23. *See* BAKER, *supra* note 1, at 250.

24. *Id.* at 253.

25. *Id.* at 250-51.

26. Later on in discussing and extolling the culture of dialogue, Professor Baker says: "Dialogues oriented to forging and understanding 'national' identity (or identities), whatever the current depth of these identities, are crucial for a democratic political order." *Id.* at 257. In application, it would be very difficult to clearly distinguish dialogue oriented to forging national identity from "backward-looking" content.

presents a kind of Manichean divide between the artifact or museum concept of culture and the dialogue concept of culture.[27] The artifact concept of culture should be subjected to the ravages of free trade in media products; it does not merit protection or protectionism. The dialogic conception of culture, however, can be properly shored up by government intervention such as subsidies. National identity can hardly be forged without some reference to a nation or a people's past and a corresponding effort to preserve the culture that the past reflects. This line between an artifact concept of culture and a culture of dialogue is too imprecise. For that reason, I will use the neutral term "media content." Whatever the merits of the distinction between national media policies or cultures — the culture of dialogue which merits defense from trade and the artifact or museum concept of culture which does not — I think one must take into account the view of a media critic who feels that national media policies, of whatever character, are increasingly at risk and subject to erosion and capture.[28] An outspoken proponent of this view is Professor Richard McChesney of the University of Wisconsin. Consider his assessment:

> [T]he impetus behind the global media system is far more corporate and commercial expansion than national geopolitics . . . . [T]he system is moving away from direct attachment to a particular nation-state. . . . [T]he always dubious notion that the product of the corporate media firms represents the essence of U.S. culture appears ever less plausible as the media system is increasingly concentrated, commercialized, and globalized. . . . There is no discernible difference in the firms' content, whether they are owned by shareholders in Japan or

27. *See id.* at 250-51. He states:

> In the artifact view, culture and cultural integrity are relatively static, largely *backward*-looking, and very much *content*-oriented. . . . Contrast this artifact conception with a second one, which I referred to as the "discourse" or "dialogic" conception of culture. Discourse or dialogue makes participants, rather than content, central to culture.

Id.

28. *See* ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 103-04 (Robert W. McChesney & John C. Nerone eds., 1999).

> Belgium or have corporate headquarters in New York or Sydney.[29]

There is an implication in Professor Baker's analysis that a national media policy — a culture of dialogue — can effectively resist the emerging global media culture. Professor McChesney is much more pessimistic in this regard.[30] Whether local media, national cultures and national media policies will survive is a matter about which I, like Professor Baker, am more hopeful. In this regard, I think Baker's proposed preservation of a culture of dialogue provides a needed goal.

IV. A MEDIA ANTIDOTE FOR GLOBALISM?

As an advocate of national media policies which foster cultures of dialogue in democratic countries, it is not surprising to find that Professor Baker says that he is "skeptical of international trade specifically and [of] globalization generally."[31] But he is optimistic about the possibilities of national commercial media at least if some degree of governmental intervention is permitted.[32] He suggests that there may be a "media-specific" remedy for economic globalization.[33]

Is it possible that free trade in media content may counteract rather than reinforce "economic globalization?"[34] When one speaks about relying on the national media as a counterpoise to global domination by multinational corporations, it is best to recognize that the most powerful media corporations are themselves multinational corporations. Here, again, Professor McChesney provides some harsh truths. He argues that national commercial media should not be regarded "as some sort of oppositional or alternative force to the global market."[35] By virtue of media consolidation and concentration, media conglomerates dominate "regional and national markets" the

29. *Id.*

30. *See id.* at 104 ("[T]he notion that the transnational media conglomerates will ultimately fail because people tend to prefer their local media and cultures appears wide of the mark.").

31. BAKER, *supra* note 1, at 261.

32. *Id.*

33. *Id.*

34. *Id.*

35. MCCHESNEY, *supra* note 28, at 107.

world over.[36] In McChesney's view, these national and regional media firms aspire either to be bought up by the multinational media giants or at least to participate in joint ventures with them. As an incentive for their acquisition, they cheerfully offer "the 'local' aspect of the content" and their expertise in dealing with the local politicians.[37]

Professor Baker is hardly unaware of arguments such as those made by Professor McChesney. Indeed, he probably agrees with McChesney's overall assessment. Nonetheless, out of a sense of balance and fairness, Baker sets forth some of the salient points, pro and con, in the argument that there may be a media specific remedy for economic globalization.[38] Since the engines of economic globalization are the multinational corporations that generate more revenue than the domestic products of most nation-states, and since unregulated economic entities often turn lawless, only legal regulation, preferably from democratic governments, can successfully channel corporate power to more socially beneficial uses. Nonetheless, one must also recognize that many countries are less powerful than the multinational corporations they might seek to constrain. The result is that "[i]n many respects, these corporations are the world's new sovereigns."[39]

One possible remedy for the sovereign state dwarfed by the power of multinational corporations is the development of global government institutions. Multinational institutions should govern multinational corporations. The problem, however, is that existing international global institutions such as the World Bank, the International Monetary Fund and the World Trade Organization lack transparency and fail to be democratically responsive.[40] How can we, in these circumstances, develop a "global public sphere?"[41] The mass media is the critical tool necessary to forge a global public sphere. Arguably, the inevitability of economic globalization underscores the need for free trade in media products and the "need for global

36. *Id.* at 106.
37. *Id.*
38. *See* BAKER, *supra* note 1, at 261-66.
39. *Id.* at 262.
40. *See id.*
41. *Id.*

media and global circulation of media."[42] The creation of public opinion through global media will preserve democratic discourse. But Baker is not optimistic that the creation of a global public sphere and of global institutions to counteract economic globalization could be successful.[43] Unlike Professor McChesney, he believes that "the more democratic structure of nation-states" will make resistance to economic globalization more feasible.[44] This, of course, immediately presents the question: Don't the same factors which lead to economic globalization find a parallel on the nation-state level? The reference here is to the centrifugal contra-local pressures driven by technological advancement and economic concentration.

Professor Baker makes the following observations in response to these developments: "[U]nadorned reliance on markets has been inadequate for the public spheres democratically required by traditional nation-states. Democracy within a country is better served by appropriate government interventions in the media order."[45] I next propose to examine this approach by analysis of government media interventionist polices in the U.S. and Canada.

V. MEDIA POLICY IN THE UNITED STATES

In the United States, government interventions in the economic structure of the media order already exist. Despite increasing concentration of the media, however, even the fairly weak existing regulatory controls in the U.S. on the economic structure of media organizations are not only under assault, they are in danger of being completely scrapped. Ironically, this assault is undertaken in the name of the First Amendment.

The broadcasting system of the United States was founded on the idea that the local broadcaster is the trustee for his community.[46] Since all could not be licensed, the licensee was

42. *Id.*

43. *See id.*

44. BAKER, *supra* note 1, at 263.

45. *Id.* at 265.

46. *See* Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367 (1969). Justice White summarized the trusteeship role of the local broadcast licensee for the Court in *Red Lion*:

entrusted for a limited period with a portion of the airways. The license was granted to the licensee on condition that the licensee performs in the public interest.[47] This public interest obligation, grounded in the licensee's duty to serve its community, obliged it to broadcast the issues and ideas that were important to the community covered by the license. Many of the Federal Communication Commission's ("FCC") long established regulatory policies are based at least in part on the importance of assuring diversity of expression by reducing the control that any one media company can have over the national opinion process.[48] Illustrative are the current fortunes of one such

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> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Id. at 389. Justice White further observed:

> It does not violate the First Amendment to treat broadcast licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of these constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.

Id. at 394.

47. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943). Justice Frankfurter summarized for the Court the rationale of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-614 (1994) [hereinafter Communications Act], as regards broadcast regulation, stating that: "[T]he 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'" *Id.* at 216 (quoting 47 U.S.C. § 303(g)). He goes on to state:

> The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts."

Nat'l Broad. Co., 319 U.S. at 216 (quoting Fed. Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)).

48. *See* Time Warner Entm't Co. v. Fed. Communications Comm'n, 240 F.3d 1126, 1131 (D.C. Cir. 2001) [hereinafter Time Warner II]. Judge

regulatory policy here in the U.S. In broadcasting and cable we have what are called "national audience caps."[49] These caps limit the share of the national audience that any one company may capture. Audience caps do not directly limit the extent of a media company's holdings, but they do so indirectly by limiting the size of the audience any one company can reach. These restrictions do not have their source in a desire to censor. Instead, in an age of ever increasing media concentration, they have their origin in a desire to curtail the influence any one media company may have over the national opinion process.

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") directs the FCC to limit the number of cable subscribers a cable company may reach.[50] The FCC responded to this directive by establishing a rule that no one company may reach more than 30% of the national cable audience.[51] The statute permitting the FCC to establish this rule was challenged by the Time Warner Entertainment Co. ("Time Warner") on First Amendment grounds. The United States Court of Appeals for the District of Columbia upheld the

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Stephen Williams summarized the FCC's long-established policy on this point, stating:

> The [FCC] is on solid ground in asserting authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow. Statutory authority flows plainly from the instruction that the [FCC's] regulations "ensure that no cable operator or group of cable operators can unfairly impede, either because of *the size of any individual operator* or because of joint actions of operators of sufficient size, the flow of video programming from the video programmer to the consumer."

Id. (quoting Cable Act, 47 U.S.C. § 533(f)(2)(A) (1994)).

49. *See* 47 U.S.C. § 533(f)(1); Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(c)(1)(B), 110 Stat. 56, 111 (1996) (codified at 47 C.F.R. § 73.3555(e)(1) (2001)).

50. 47 U.S.C. § 533(f)(1)(A) ("In order to enhance effective competition, the Commission shall . . . conduct a proceeding . . . to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable interest.").

51. The FCC cable audience cap imposed a 30% limit on the number of subscribers that may be served by a multiple system cable operator. *See* 47 C.F.R. § 76.503 (2001); Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, 14 F.C.C.R. 19,098, 19,127-28, ¶¶ 71-73 (1999) [hereinafter Third Report].

constitutional validity of the 1992 Cable Act provision directing the FCC to establish audience caps for the cable industry.[52] The court of appeals rejected the effort of the cable companies to dress their cause in the imagery and standards of the First Amendment.[53]

Is it reasonable for Congress to conclude that concentration of ownership is a threat to "the diversity of information available to the public?"[54] Judge Douglas Ginsberg of the D.C. Circuit stated the rationale for an audience cap in the cable industry: concern about increasing concentration of ownership in the cable industry.[55] The concentration placed diversity and competition in jeopardy.[56] Therefore, it was reasonable to conclude that caps would reduce the level of concentration, thereby increasing the degree of diversity of programming sources.[57]

In analyzing national responses to the phenomenon of global media issues, Professor Baker has adopted Professor Oliver Goodenough's distinction between "'strong protection'" which

52. *See* Time Warner Entm't Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) [hereinafter Time Warner I]. The cable companies contended that they had a First Amendment right to speak to any audience that they would otherwise be able to reach. *Id.* at 1321. By restricting the number of subscribers a cable company could reach, the government was limiting their right to speak. *Id.* Actually, what was being curtailed was the cable company's right to sell. No single denominator describes the program of content of large multiple system cable operators. Program content is more likely driven by economics — the result of negotiation between the cable system and the cable programmer. Government regulation such as audience caps should be viewed less as content-based speech or even as content neutral speech but instead as regulation that is indifferent to content. Basically, this latter view is the one the court accepted. *See id.*

53. The court had quite a different take on the policy behind audience caps. Judge Douglas Ginsberg expressed the court's view quite succinctly. In authorizing caps in the cable industry, Congress was not valuing one speaker over another, or even one category of speech over another, but instead simply insisting that there be multiple speakers. *Id.* at 1318. "[I]ts concern [of Congress in enacting audience caps] was not with what a cable operator might say, but that it [the cable operator] might not let others say anything at all." *Id.*

54. *Time Warner I*, 211 F.3d at 1320.

55. Senate Report 102-92 accompanying the 1992 Cable Act noted that by 1990, the five largest operators served almost half the country's cable subscribers. *See id.* at 1319; S. REP. NO. 102-92, at 32 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1165.

56. *See Time Warner I*, 211 F.3d at 1320.

57. *Id.* at 1322.

has an exclusionary goal, and "'weak protection'" which is designed to promote choice by keeping domestic products in existence.[58] In a sense, in the domestic sphere one can look at the audience cap as a regulatory mechanism which allows a great deal of concentration but still keeps smaller media companies in business as a form of weak protectionism. In addition, it should be kept in mind that audience caps, like other FCC regulations, may be waived at the discretion of the FCC on petition of the parties.[59] The audience cap constraint therefore is not inflexible. One could therefore say that the cable audience cap is the kind of government intervention in the media order that Baker would favor.

However, one should be cautious about the durability of these and other media regulatory regimes. On March 2, 2001, the First Amendment case against audience caps got new life when the D.C. Circuit struck down the FCC imposed 30% limit on the audience reach any one cable company can have.[60] Although the court of appeals stood by its previous ruling upholding the statutory authority of the FCC to impose an audience cap on the cable industry, the court struck down the FCC's audience cap for cable on the grounds that the 30% limit failed to meet the standard of review usually used in cable cases.[61] The

58. BAKER, *supra* note 1, at 267 (quoting Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 202, 209-210 (1998)).

59. In a case dealing with a cable audience cap, the FCC stated that its waiver authority was based on 47 C.F.R. § 1.3, which states that FCC rules may be waived for good cause shown but that the waiver applicant faces a "high hurdle." *See* Applications for Consent to the Transfer of Control of Licensees and Section 214 Authorizations From MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, 15 F.C.C.R. 9816, 9846-49, ¶¶ 65-70 (2000).

60. *See* Time Warner II, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

61. *Id.* Judge Williams, in *Time Warner II,* applied the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Supreme Court had applied the *O'Brien* test to the must carry obligations imposed by Congress on the cable industry in *Turner II*. *See* Turner II, 520 U.S. 180, 189 (1997). Judge Williams described the test as follows: "[A] governmental regulation subject to intermediate scrutiny will be upheld if it 'advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" *Time Warner II*, 240 F.3d at 1130 (quoting *Turner II*, 520 U.S. at 189). Unlike the must-carry rules which the Supreme Court upheld applying the *O'Brien* test, Judge Williams found that the FCC's 30% cable audience cap

FCC's basis for setting a 30% standard was held to be entirely conjectural and, therefore, burdened substantially more speech than was necessary.[62] The judicial invalidation of the 30% limit shows that the media industry can effectively use the First Amendment to overturn economic judgments of government that affect their industry. The use of the First Amendment in this case to strike down the limit is reminiscent of economic substantive due process of the *Lochner* era.[63]

Audience caps have been applied to broadcasting as well. The Telecommunications Act of 1996 actually sets a 35% audience cap in broadcasting.[64] Recent mergers, particularly the CBS Corporation-Viacom Inc. merger,[65] have greatly increased the pressure on the FCC to abolish the 35% cap, increase the cap or grant liberal waivers. Obviously, the success of the cable industry in getting a court to strike down the 30% audience cap in cable has energized the broadcast industry's effort to do likewise with respect to the 35% cap in broadcasting. Recently, these efforts have yielded some success. The United States Court of Appeals for the District of Columbia has re-

rule failed the *O'Brien* test since the FCC had failed to make a record demonstrating the basis for a 30% cap. *Id*.

62. *Time Warner II*, 240 F.3d at 1137.

63. *See generally* Lochner v. New York, 198 U.S. 45 (1905). Time Warner made two First Amendment challenges to the validity of the audience cap in the cable industry. The First Amendment challenge to the statute directing the FCC to set an audience cap for the cable industry is a good example of current corporate media use of the First Amendment. Clearly, in this case, Time Warner's purpose was to protect and dominate industry markets and not in any way to express a point of view. In this context, media industry First Amendment protections have a kind of cynical ring to them. In the case of the statute, the First Amendment ploy did not work. *See generally* Time Warner I, 211 F.3d 1313 (D.C. Cir. 2000). But in the case of the First Amendment challenge to the 30% limit established by the FCC, the First Amendment ploy was eminently successful. *See Time Warner II*, 240 F.3d at 1126.

64. Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(c)(1)(B), 110 Stat. 56, 111 (1996) (codified at 47 C.F.R. § 73.3555(e)(1) (2001)).

65. *See* Verlyn Klinkenborg, *The Vision Behind the CBS-Viacom Merger*, N.Y. TIMES, Sept. 9, 1999, at A28; Press Release, Viacom Inc., Viacom and CBS to Complete Merger Tomorrow (May 3, 2000), *available at* http://www.viacom.com/press.tin?ixPressRelease=45002243.

manded the 35% audience cap rule in broadcasting to the FCC so that it may determine whether to repeal or modify the rule.[66]

In his chapter on "Trade, Culture and Democracy," Professor Baker argues that the achievement of global democracy requires "national capacity to restrain and supplement free trade [by] . . . interventions designed to assure vigorous domestic media serving national, cultural, and political discourse functions."[67] Audience caps serve that objective. Unfortunately, examination of the current status and future of existing regulatory constraints such as audience caps indicates, to say the least, that their future is not bright.

Audience caps are not the only regulatory constraint on media concentration in the United States. The U.S., unlike its neighbor Canada, has a rule prohibiting cross-ownership. In 1975, the FCC set forth the cross-ownership rule prohibiting the prospective or future licensing or transfer of a broadcast station to a company that owned a newspaper in the same community.[68] This rule left the greatest number of cross-ownership situations in the U.S. unaffected. Existing cross-ownership combinations were essentially grandfathered.[69]

In 1978, those challenging the FCC's cross-ownership rule sought to use the First Amendment as a sword to strike the rule down. The Supreme Court responded to their efforts by relying on the First Amendment as a *justification* for the regulation.[70] The objective of the cross-ownership rule is to achieve

66. *See* Fox Television Stations, Inc. v. Fed. Communications Comm'n, 280 F.3d 1027, 1033 (D.C. Cir. 2002). The court of appeals explained that it did so because, inter alia, the FCC's decision to retain the rule was "arbitrary and capricious." *Id.* The FCC failed to provide an adequate rationale for its decision. The court of appeals held further that the 35% broadcasts audience cap did not violate the First Amendment. The court also declined to vacate the rule as the networks had requested. *Id*.

67. BAKER, *supra* note 1, at 266.

68. *See* Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *as amended* Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 53 F.C.C.2d 589 (1975) (codified at 47 C.F.R. §§ 73.34, 73.240, 73.636 (1976)).

69. *Id.*

70. *See* Fed. Communications Comm'n v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 801-02 (1978). The FCC was the federal agency charged with regulating broadcasting in the public interest and its judgment that the issu-

the culture of dialogue Professor Baker seeks. Justice Thurgood Marshall, writing the cross-ownership opinion, rationalized its validity on the basis of First Amendment policy rather than antitrust policy.[71] The cross-ownership rule reflects a certain leap of First Amendment faith, based on the underlying notion that a larger number of smaller and independently owned media in a community are more likely to yield diverse and original voices.[72] Clearly, regulatory policies such as audience caps and the cross-ownership rule fall under the rubric of what Baker styles "appropriate governmental interventions into the media order."[73]

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ance of cross-ownership rule would stimulate free and diverse expression did not violate the First Amendment. *Id*. at 794-95. The decision upholding the cross-ownership rule in the Supreme Court has been quite influential. It still stands as a leading precedent to justify government regulation of the structure of media ownership against First Amendment challenge. The cross-ownership rule assumes that the more diverse the ownership of broadcast stations within a community, the more diverse and participatory the content of broadcast programming will be. *Id*. at 784.

71. *Id.* at 810.

72. In May 2000, the FCC, in a report dealing with a number of its ownership policies, concluded that it should, as a general proposition, retain the cross-ownership rule "because it continues to serve the public interest by furthering the important public policy goal of viewpoint diversity." 1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 F.C.C.R. 11,058, 11,061, ¶ 4 (2000). Does a national media ownership policy like the cross-ownership make sense as a communications policy? Former FCC Chairman William Kennard said he believed that the newspaper/broadcast cross-ownership rule served the public interest. *Id.* at 11,127. At the same time, he suggested there were situations when it should not apply. Diversity and competition would not be threatened, for example, if a single radio station in a large market were allowed to combine with small suburban newspaper. *Id.* Former Commissioner Susan Ness's comments about the cross-ownership policy were even more direct. Commissioner Ness said that sometimes the rule worked against, rather than for, diversity and competition in local markets. *Id.* at 11,129. She recalled the media world as it existed when the cross-ownership rule was adopted in 1975: "Back then, there were only three commercial broadcast networks; today, there are six or seven. . . . Then the rule was adopted, the big boom in cable franchising had not yet begun; today, cable television passes more than 97% of households of which approximately two-thirds subscribe." *Id*. at 11,129-30. She went on to point out that satellite broadcasting had not arrived in 1975. *Id*. Today it has more than 10 million subscribers in the U.S. Of course, the Internet, with its millions of subscribers, was unknown.

73. BAKER, *supra* note 1, at 265.

The FCC is presently rethinking both the cable audience cap and the newspaper/broadcast cross-ownership rule.[74] The present FCC Chairman, Michael Powell, has expressed doubts about the wisdom of retaining them.[75] On the other hand, the current Chairman of the Senate Commerce Committee, Senator Ernest Hollings, is supportive of them.[76] Of course, even if

74. On September 13, 2001, the FCC began a rulemaking proceeding to consider revisions to its newspaper/broadcast cross-ownership rule. *See* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, 16 F.C.C.R. 2997 (2001). On September 13, 2001, the FCC also initiated an inquiry into whether the regulatory approach reflected by subscriber limits or audience caps was "still appropriate." Third Report, *supra* note 51, at 19,100. The cross-ownership rule at a minimum is likely to be calibrated to a greater degree than is presently the case as a result of the FCC's inquiry. As for the future of an FCC-imposed audience cap in cable, it was initially anticipated that the audience caps would be abandoned altogether as a consequence of the FCC's inquiry. It is possible, however, that Enron Corp. and related scandals may now halt the deregulatory juggernaut.

75. In a February 6, 2001 press conference, Chairman Powell was asked whether he would try to eliminate the 35% audience cap in broadcasting. His response was basically negative on the audience cap issue and yet equivocal at the same time:

> If competition were the only issue, I would most strenuously suggest that the cap has no purpose. But there are other goals embedded in the Telecom Act, like diversity of viewpoints, that are much more visceral. I'm skeptical that caps benefit consumers in the form of greater and more diverse products. We have to be able to justify regulatory intervention on something more than sentiment.

The Chairman Elucidates, BROADCASTING & CABLE, Feb. 12, 2001, at 34, 34. On September 13, 2001, the FCC announced an inquiry into the 30% audience cap rule in the cable industry in the light of the court of appeals decision setting it aside. *See* Time Warner II, 240 F.3d 1126 (D.C. Cir. 2001); *Implementation* of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, 16 F.C.C.R. 17,312 (2001). On September 13, 2001, the FCC also announced an inquiry into whether the cross-ownership rule barring common ownership of a broadcast station and daily newspaper in the same market should be revised. *See* Cross-Ownership of Broadcast Stations and Newspapers, 16 F.C.C.R. 17,283 (2001). The tenor of both inquiries indicates that the existing cable audience cap and the existing broadcast newspaper cross-ownership rule will at a minimum undergo substantial revision if they survive at all.

76. *See* Paige Albiniak, *Flip-Flop, Fritz: Senate Shift Returns Hollings to the CenterSeat on Commerce*, BROADCASTING & CABLE, May 28, 2001, at 5. As a result of the defection of Senator Jeffords of Vermont from Republican ranks and the resultant Republican loss of control of the Senate, Senator Fritz Hollings (Dem.-S.C.) has become Chairman of the Senate Commerce Committee. Senator Hollings is expected to try to restrain network efforts to

these rules are retained in some form, one should be aware that they are susceptible to waiver or modification by the FCC. In short, existing structural rules have some force, but they are often evaded and their future is quite uncertain.

VI. MEDIA POLICY IN CANADA

Media concentration has recently undergone a period of massive expansion in Canada. In 2000, the Canadian Radio-Television and Telecommunications Commission ("CRTC") approved an application by BCE Inc. ("BCE"), Canada's largest telecommunications company, for the acquisition of one of Canada's largest television broadcasters, CTV Inc. ("CTV").[77] Besides giving BCE an even greater presence in Canadian telecommunications, the acquisition also presented serious cross-ownership issues. Prior to the CRTC hearing, there were press reports that BCE intended to acquire one of the country's leading newspapers, *The Globe and Mail* of Toronto.[78] Despite these issues, the CRTC approved the acquisition because of a "benefits package" offered by BCE which included expenditures of CA$230 million over a seven year period to benefit Canadian programming. The CRTC noted that this sum included CA$140 million to be spent solely on developing "prime time Canadian programs of consistently high quality and in sufficient quantity to attract significantly larger audiences and

abolish ownership regulations as well as deregulatory efforts by the new Chairman of the FCC, Michael Powell: "While all observers say Hollings has a good relationship with Powell, they also say the two have very different views. Powell is a champion of allowing market forces to operate; Hollings believes the big hand of government occasionally should be put to work." *Id.* at 6.

77. *See* 1406236 Ontario Inc. on behalf of CTV Inc., Decision CRTC 2000-747 (Dec. 7, 2000), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DB2000-747.htm [hereinafter CRTC 2000-747]. CTV held licenses to a number of television stations and pay and specialty services, including The Sports Network Inc., Le Reseau des Sports Inc., The Discovery Channel, The Comedy Network, CTV NewsNet Inc., and Outdoor Life. *Id.* ¶ 1. For its part, BCE and its subsidiaries provide its customers with a wide mix of communication services including in part local and long distance telephone services, wireless services, satellite communications, terrestrial broadcasting distribution undertakings and Internet access. *See id.* ¶¶ 3, 13, 16, 17 & 19.

78. *See Canadians Need Diversity of Voices*, TORONTO STAR, Sept. 20, 2000, at A26.

revenues."[79] *The Globe and Mail*, BCE and CTV are all now part of a giant conglomerate, Bell Globemedia.

In July 2000, Hollinger, Inc., which is controlled by Canadian media magnate Conrad Black, sold thirteen major city daily newspapers plus half its share of the *National Post* to CanWest Global Communications Corporation ("Global"), which owns CanWest, the third largest English language television network in Canada.[80] In August 2001, the CRTC granted approval to the license renewal applications of television stations controlled by Global. When the CRTC renewed Global's television licenses, it also renewed the television licenses of CTV. Global has a potential audience reach of 97.6% of the English language television market in Canada. The CRTC granted approval despite the troubling cross-ownership issues involved in the applications for renewal.[81] The CRTC did express concern, however, that ultimately there might be complete integration of the newspaper and television operations in the cities where Global had a cross-ownership situation, with the result that in some communities there would only be a single media editorial and news stance for both the electronic and print media.[82]

79. CRTC 2000-747, *supra* note 77, ¶ 30. The purpose of this funding would be to "demonstrate to other broadcasters that Canadian entertainment programming can be successful and self-sustaining." *Id.* As a condition of approval, the CRTC required BCE to comply with rigorous annual reporting requirements to assure that the benefits package was "incremental to all existing and outstanding requirements." *Id.* at pmbl.

80. *Conrad Black Sells 13 Dailies, Half-share in National Post*, AGENCE FRANCE-PRESS, July 31, 2000, LEXIS, News Library, News Group File.

81. *See generally* License Renewals for the Television Stations Controlled by Global, Decision CRTC 2001-458 (Aug. 2, 2001), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DB2001-458.htm. In the Vancouver-Victoria, British Columbia area, Global owns two television stations and three daily newspapers. *Id.* ¶ 8. In Calgary, Alberta and Ottawa, Ontario, Global owned one of the two major daily newspapers in each city. In Regina and Saskatoon, Saskatchewan, Global owned the only major daily newspaper in each city as well as a television station in each city. *Id.* ¶ 106.

82. *See id.* ¶¶ 102-7. This integration could eventually result in a reduction in diversity of the information presented to the public and of the diversity of distinct editorial voices available in the markets served. For example, under a fully integrated structure, the same editor could decide what matters would be investigated and what stories would be covered by a commonly owned television station and newspaper. Under such an integrated structure, the television station and the newspaper may no longer compete and might present a single editorial position and approach.

Therefore, the CRTC approved Global's license renewal applications on the condition that Global keep the news management for its television stations separate from the news management of its newspapers. This condition was part of a Statement of Principles and Practices that the CRTC imposed on Global as a condition of license.[83] The Statement also required Global to establish an impartial Monitoring Committee that would serve as a complaint mechanism for both the public and Global's employees.[84] Not surprisingly, the increase in cross-ownership in Canada is being hailed by Canadian media representatives as a reason for the economic health of the country's media enterprises.[85]

There is a much greater degree of cross-ownership in Canada than in the U.S. During the past two years in Canada, two Canadian television networks, Global and CTV, have become parts of media corporations that own newspaper properties.[86] But the situation is somewhat relieved by the fact that in many Canadian cities where Global owns a television station and a daily newspaper, at least one other daily newspaper is operating. In short, the one newspaper town is much less common in Canada than in the U.S. In addition, in all Canadian cities, there is competition in radio and television.

In still another cross-ownership development, Quebecor, Inc. ("Quebecor"), a Canadian media corporation, has acquired Groupe TVA Inc. ("TVA"), a French language network.[87] Quebecor owns such daily newspapers as *Le Journal de Montréal* as well as *The Toronto Sun*, *The Ottawa Sun* and *The Edmonton Sun*. In order to quell the controversy its cross-ownership of newspaper and television properties generated, Quebecor itself developed a remarkably strict code of ethics which provides that its newspaper and television reporters "can't work in [the] same building, communicate in person, by phone, fax or

83. *Id.* at app. 1.

84. *Id.*

85. Tom Cohen, *Convention Highlights Differences Between U.S., Canadian Newspaper Businesses*, ASSOCIATED PRESS NEWSWIRES (May 6, 2001), *at* http://wire.ap.org.

86. *See Commons Committee Launches 18-month Study to Amend Broadcasting Act*, CANADIAN PRESS, May 10, 2001, 2001 WL 21163929.

87. *See Cross-Ownership is Issue in Canada*, TELEVISION DIGEST, May 7, 2001, 2001 WL 7882002.

Internet, or share equipment."[88] Quebecor's new code, separating the newsrooms of its newspaper and television properties, is another example of the Canadian approach to cross-ownership and media concentration. Quebecor will also establish a committee to monitor the separation between its newspapers and television stations.[89]

New media mergers in Canada during the past two years have understandably occasioned a great deal of interest in the problem of cross-ownership in Canada. On December 7 and 8, 2000, I spoke at a conference held in Montreal that was sponsored by the Laval University Center of Media Studies. The Center was asked by Heritage Canada and the CRTC "to study the impact of current trends in media cross-ownership in the contexts of the mergers and strategic alliances of large media groups."[90] I was struck by the distinctively Canadian approach to the cross-ownership issue. In the initial paper circulated to the participants, one of the questions the participants were asked to address particularly characterized this Canadian perspective: "Short of requiring structural separation or forbidding cross-ownership between broadcasters and print media, what mechanisms or safeguards could be put in place to promote or foster the diversity and plurality of editorial voices?"[91]

The working paper setting forth the issue stated that, although the issue of cross-ownership could certainly be addressed on the basis of an economic analysis, the conference would be directed to discussing the problem of cross-ownership "from a democratic or political angle."[92] In this respect, of course, such a vantage point has been taken in the U.S. As mentioned previously, the cross-ownership prohibition in the U.S. was upheld by the Supreme Court on the basis of First Amendment values rather than an economic analysis. But what is uniquely Canadian is that an actual cross-ownership prohibition, while not off the table, was *not* the focal point of

88. *Id.*

89. *See id.*

90. LAVAL UNIV. CTR. OF MEDIA STUDIES, MEDIA CROSS-OWNERSHIP: ISSUES AND ARGUMENTS (2000) (on file with Journal). The conference was held at the École des Hautes Etudes Commercial, Montreal, Quebec, Canada on December 7-8, 2000.

91. *Id.*

92. *Id.*

the conference. Yet, there was a great deal of interest in the cross-ownership prohibition in the U.S. by the audience at the conference's open meeting when I explained the cross-ownership rule in the United States. I emphasized the need, if the rule is retained, to calibrate it more sensitively so that it makes sense when applied in quite differing cross-ownership situations. I was interviewed by Canadian Broadcasting Corporation ("CBC") radio on the American cross-ownership prohibition and asked whether Canada should adopt an across-the-board cross-ownership prohibition.[93] It was a strange question. There was no likelihood that such a prohibition would be adopted in Canada. The reason for this, of course, is obvious — it is too late. The mega-mergers are, in large part, done deals. The cross-ownerships are already in place. Therefore, to propose a cross-ownership rule in Canada would be to discuss locking the barn door after the horse has been stolen. Why is there no general cross-ownership rule in Canada? The answer probably has a great deal to do with preservation of Canadian culture and the maximizing of Canadian content in the Canadian media. The rationale is that if media concentration, including cross-ownership, is allowed to take place, the Canadian media will be financially strong enough both to resist foreign — or perhaps more specifically — American media competition, and to develop Canadian content. Indeed, at license renewal hearings for Canada's two private commercial television networks, CTV and Global, the networks explained the case for media concentration to the CRTC.[94] In light of competition from television stations along the U.S. border, the development of new specialty channels and the emergence of the Internet, they argued it is essential that Canadian television networks become larger markets if they are to compete and survive.[95]

The contemporary Canadian solution to the cross-ownership problem is separation of the newsrooms and editorial offices of newspaper and television properties owned by the same com-

93. *École des Hautes Etudes Commerciales* (CBC radio broadcast, Dec. 8, 2000).

94. *See generally* License Renewals for the Television Stations Controlled by Global, Decision CRTC 2001-458 (Aug. 2, 2001), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DB2001-458.htm.

95. *See Cross-Ownership is Issue in Canada*, *supra* note 87.

pany. As we have seen, the CRTC has conditioned approval of mergers involving cross-ownership on newsroom separation of television stations and newspapers. This has generated a good deal of criticism in Canadian media circles. Anthony Wilson-Smith, Editor of *Maclean's,* argued that this proposal may make sense to bureaucrats but doesn't make much sense elsewhere: "If you outlaw potential synergies and resultant efficiencies in news-gathering operations, that makes these properties even less desirable as a business proposition."[96] In the U.S., approving cross-ownership on condition of newsroom separation might give rise to First Amendment-based challenges alleging impermissible government intervention into editorial autonomy and journalistic judgment.

Generally, Canada has dealt with concentration of ownership problems on an ad hoc basis.[97] Professor Baker argues that capture of global media by a few multinational media conglomerates may be resisted by making domestic media stronger.[98] The case of Canada is instructive in this regard. On March 24, 2000, a majority of the members of the CRTC approved an application that would permit CTV, a commercial English television network reaching 99% of English-speaking households in Canada, to acquire an 80% interest in NetStar Communications, Inc. ("NetStar"), provided CTV met certain conditions.[99]

96. Anthony Wilson-Smith, *The CRTC vs. Free Speech (?),* MACLEAN'S, May 14, 2001, at 2, 2.

97. *See* Matthew Fraser, *We're About to Find Out if Big Really is Beautiful: Hearings to Review License Renewals of CTV, Global TV,* NATIONAL POST, Apr. 2, 2001, at C2. "The CRTC does not have an explicit media concentration and cross-ownership policy." *Id.* Professor Florian Sauvageau informs me that Canada did briefly have a cross-ownership policy. During the 1980's following the Royal Commission on Newspapers, the government of Prime Minister Pierre Trudeau and his Liberal Party issued a directive to the CRTC that it should not grant or renew broadcast licenses to applicants who controlled daily newspapers in the same market. This directive was withdrawn by the subsequent Conservative Party government of Prime Minister Brian Mulroney. Interview with Professor Florian Sauvageau, Director, Laval University, Center of Media Studies, in Quebec, Canada (Sept. 14, 2001).

98. *See* BAKER, *supra* note 1, at 261-66.

99. *See* CTV Inc. on Behalf of The Sports Network Inc. (TSN), Le Réseau des Sports (RDS) Inc., and 2953285 Canada Inc. Operating as the Discovery Channel, Decision CRTC 2000-86 (Mar. 24, 2000), *available at* http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DB2000-86.htm. The CRTC described NetStar as a "pioneer and leader in Canadian specialty television" and listed its holdings as follows:

One of the conditions demanded by the CRTC was that CTV divest itself within a year of its 40% interest in CTV SportsNet, Inc. ("SportsNet").[100] CRTC Commissioner David McKendry wrote a dissenting opinion denying that CTV's acquisition of NetStar would raise "significant competition issues."[101] More importantly, he made a strong case *for* concentration of ownership in Canada by *Canadian* media, stating:

> We are in transition to an environment of virtually unlimited global choices for entertainment and information. The policy and regulatory challenge is to facilitate the availability of Canadian choices in this environment. Once the transition is complete, the opportunity for Canadian broadcasters who are not strong may be at risk in a world where the Internet knows no borders. The Commission voiced this concern with respect to new media when it announced its decision not to regulate the Internet: "The CRTC is concerned that any attempt to regulate Canadian new media might put the industry at a competitive disadvantage in the global marketplace." The Commission defined new media services "to be those [services] that are delivered by means of the Internet."
>
> As Global Television Network stated in the Commission's hearing to consider CTV's application, "All of us, our company, the CTV group, all of us are trying find our way in a new environment. This environment requires strong Canadian broadcasters with the resources to provide Canadians with Canadian choices in an entertainment and information world that is increasingly without borders. [102]

Canada has acquiesced in cross-ownership and in concentration of ownership at the national level. But has it led to the

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> NetStar owns, directly or through a subsidiary, 100% of The Sports Network (TSN) and le [sic] Réseau des Sports (RDS) inc. [sic] (RDS), an 80% interest in the Discovery Channel (Discovery), as well as a non-controlling interest of 24.95% in Viewer's Choice Canada Inc. (Viewer's Choice), a company involved in pay and pay-per-view television services.

Id.

100. *Id.* The rationale for requiring CTV to divest itself from SportsNet is that, as a result of CTV's acquisition of NetStar, CTV was acquiring the most popular sports channel in Canada, The Sports Network, Inc., as well as other specialty channels. *Id.*

101. *Id.*

102. *Id.*

creation of a culture of dialogue? Of course, there is some diversity of ownership and content within the Canadian media. As already pointed out, competition in the intra-city daily newspaper market still exists. In addition, Canadian public broadcasting is an important source of diverse programming. CBC has 10% of the English-speaking television audience and Radio Canada has 20% of the French-speaking television audience.[103] The Canadian dilemma has been well expressed by a Canadian critic, Richard Stursberg. There is a "trade off between diversity of voice within the country versus diversity of voice in a North American context."[104] In order to be able to protect Canadian media products, concentration of media ownership in Canada has been tolerated to an even larger extent than is the case in the U.S.

The Canadian media experience is a good laboratory for some of Baker's ideas. An examination of recent Canadian experience shows that resistance to globalism may be at the expense of true dialogue. The recent acceleration in patterns of concentration of ownership of the media in Canada will perhaps prevent the Canadian media from being dominated by either American or global media concerns. But it is hard to see how the concentration of most of the print and electronic media in Canada in the hands of two or three companies can be expected to support or create the culture of dialogue sought by Professor Baker.

VII. CONCLUSION

In his chapter on "Trade and Economics," Professor Baker argues that one way to measure market preferences would be to "identify the media people would choose in the market if

103. *See* Canadian Broadcasting Corporation, *Annual Report: English Television*, *at* http://cbc.radio-canada.ca/htmen/6_2_2_3_00.htm (last visited Apr. 21, 2002); Canadian Broadcasting Corporation, *Annual Report: French Television, at* http://cbc.radio-canada.ca/htmen/6_2_2_4_00.htm (last visited Apr. 21, 2002); Canadian Broadcasting Corporation, *Annual Report: English Television*, *at* http://cbc.radio-canada.ca/htmen/6_2_2_3_99.htm (last visited Apr. 21, 2002); Canadian Broadcasting Corporation, *Annual Report: French Television*, *at* http://cbc.radio-canada.ca/htmen/6_2_2_4_99.htm (last visited Apr. 21, 2002).

104. *See* Canada by Design, *Telecable Communications: Home Wired*, *at* http://www.candesign.utoronto.ca/wk4txt.html (last visited Apr. 10, 2002).

they all had equal wealth."[105] Basically, the approach to the market that Baker advocates is an approach which, as he puts it, gives priority to the political: "A democratic one-person-one-vote criterion is obviously a much more egalitarian criterion than is the market's willingness-and-ability-to-pay."[106] He would not apply this egalitarian oriented governmental intervention approach to individual preferences for all media goods.[107] For example, he would not apply such an approach to entertainment content. But, he believes "a more egalitarian weighting" is appropriate for cultural and educational products.[108] Egalitarian weighting of individual preferences can justify appropriate governmental intervention to preserve or increase diversity beyond that which the market could, or can be expected to provide.[109] Regulation of the domestic media content market is justified to nourish "domestically relevant news and local cultural materials."[110]

National media policies, Baker argues, should be developed to avoid domination of the media, whether on the global or national level, by "elites, whether corporate, technical, or governmental."[111] The idea here is that the capture of local or national media by global or multinational media corporations can be resisted by national regulation of the domestic media content market in order to nourish "domestically relevant news and local cultural materials."[112] The problem with this is that the types of government intervention in media structure Baker favors are under siege or in retreat. I have referred earlier to structural restrictions on ownership in the U.S. in order to show how restrictions, albeit "weak" ones, have been developed in the U.S. The present outlook does not indicate that these restrictions will be expanded. On the contrary, the future they confront is substantial modification or repeal altogether.

105. BAKER, *supra* note 1, at 243.
106. *Id.*
107. *Id.* at 243-44.
108. *Id.* A policy of egalitarian-oriented government intervention is most applicable to "media goods most related to matters such as education, the vote, and maybe the creation of cultural contexts in which people can develop the capacity for autonomous choice." *Id.* at 243.
109. *See id.* at 243-44.
110. BAKER, *supra* note 1, at 244.
111. *Id.* at 266.
112. *Id.* at 244.

Domestic media, if properly structured by national governments, may serve as an effective antagonist to global dominance by multinational corporations and whatever harms they may pose to the emergence or maintenance of a culture of dialogue in democratic societies. Still, one problem remains. In Western democracies, the national media is dominated by an increasingly small number of media organizations that are multinational corporations themselves.[113] In both the U.S. and Canada, real efforts are being made to halt or limit the scope of these developments, but success is hardly certain.

Professor Baker is a champion of the "culture of dialogue." So am I. But if one looks at the current state of American law in its regulation of the broadcast and cable industries, we find that many of the existing regulatory policies which were designed to maintain a culture of dialogue have been abandoned or greatly weakened. The "fairness doctrine," which required the balanced presentation of controversial ideas of public importance over the life of the broadcast license period has been abolished.[114] This doctrine was in effect from 1949 to 1987.[115] Although never enforced with particular fervor, the fairness doctrine by its very name suggested that dialogue and debate were appropriate goals for broadcasting. Indeed, the very symbolic character of the fairness doctrine in this regard made it a particular target of those within the broadcast industry who

113. The manner in which American media corporations have become global media giants was illustrated by the details of a deal between Fox Family World Wide and Disney Entertainment Corporation ("Disney"). Disney is reportedly paying $3.2 billion for the Fox Family Channel. *See* George Hager, *Disney to Purchase Fox Family for $3.2 Billion Deal Would Expand Cable Reach in USA, 50 Other Countries,* USA TODAY, July 23, 2001, at B1. Eighty million U.S. cable viewers subscribe to the Fox Family Channel. Fox Family Channel was owned by Rupert Murdoch's News Corporation of America and Haim Saban's Saban Entertainment. *Id.* On Monday, July 23, 2001, Disney announced that it would buy Fox Family World Wide, owner of the cable Family Channel and other cable properties. Acquisition of the Fox Family Channel will give Disney ownership of the Fox Kids International channels which operate in fifty countries in Europe and Latin America, or an additional thirty-four million cable subscribers. *Id.*

114. *See* Syracuse Peace Council, 2 F.C.C.R. 5043 (1987).

115. The fairness doctrine was set forth by the FCC in the *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949) and was abolished by the FCC in 1987 in *Syracuse Peace Council, supra* note 114. The FCC's decision was upheld in *Syracuse Peace Council v. Fed. Communications Comm'n*, 867 F.2d 654 (D.C. Cir. 1989).

denied that government could demand any obligation of broadcasters, save the single one of assuring them their licenses and thus freeing them from competition. The license renewal process — which examined at renewal time, among other things, whether the broadcast license has provided the community which it served with programming concerning the problems and issues of that community — has barely any teeth left.[116] The Telecommunications Act of 1996 virtually assures renewal to incumbent licensees since it is a rare licensee who will not be able to meet its bare public interest requirements.[117]

In his chapter on "Trade and Culture," Baker argues that "free trade [in media products] will not provide the media products that people in various countries desire or that their democracies require."[118] On the other hand, he is quite aware that free trade in media content is not a negative across the board, noting that free trade in media content may be particularly desirable in countries ruled by repressive regimes.[119] As mentioned above, Baker has been influenced by Professor Goodenough's distinction between "strong" protection of domestic media content, which is not favored, and "weak" protection of domestic media content, which is.[120] An example of the disfavored strong protection would be a national media policy, which excluded foreign media content altogether. Baker, however, is aware of the inevitability of disagreement about the application of such distinctions. Accordingly, he concludes that possibly the best solution for decision-making about free trade in media content, and the extent to which it should be restricted or regulated, would be to leave the entire area to "national discretion — that is, to exempt cultural materials from all free trade agreements."[121]

Professor Baker concludes his chapter on "Trade, Culture and Democracy" by suggesting that international human rights

116. *See generally* Mark D. Schneider, *Renewal Procedures and Expectancy Before and After the Telecommunications Act of 1996*, 14 COMM. LAW. 9 (1996).

117. *See* Communications Act, 47 U.S.C. § 309(K)(1)(A) (1994).

118. BAKER, *supra* note 1, at 266.

119. *Id.* at 235.

120. *See* Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 202, 209-10 (1998).

121. BAKER, *supra* note 1, at 270.

law might be developed to preclude strong protectionism and at the same time to nurture weak domestic regulation of media content.[122] At the same time, he is aware that the First Amendment has been manipulated to serve the interests of corporate media firms on the national level in this country and that a parallel manipulation could occur with respect to international human rights documents.[123]

Professor Baker prophesies that corporate media efforts to derail a just national media order through international human rights law will be as unsuccessful as corporate efforts in this country have been when they sought to set aside government regulation whose purpose was to protect and preserve local media.[124] Although, historically, efforts to throttle structural regulation of the media in the name of the First Amendment have generally been unsuccessful in the Supreme Court, they have met with a larger measure of success in more recent years in the federal courts of appeal.[125] Additionally, it is by no means certain that the Supreme Court's refusal thus far to adopt the position of the large media corporations will endure.

122. *Id.* at 274.

123. *Id.* at 271-73. Indeed, Baker provides an example of a response to an international report dealing with global communications that is not terribly supportive of any hope that international bodies or agreements support a culture of dialogue any time soon. He points to the example of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") sponsored MacBride Commission Report's conclusion that "in many parts of the world, government would need to play a significant role in promoting a better communications order." *Id.* at 272. This conclusion generated a good deal of criticism from both the American Bar Association and the U.S. State Department. Professor Baker suggests that the real source of the criticism was not in professed sorrow about damage to "First Amendment values." *Id.* Rather, the source was a visceral reaction to the MacBride Report's recommendation that in "expanding communication systems, preference should be given to non-commercial forms of mass communication" and that public funds should aid in this endeavor. *Id.* at 272-73. Indeed, the MacBride Report and similar expressions from UNESCO officials caught fire from critics who "seemed to equate corporate interests — free trade and corporate dominance — with the meaning of the First Amendment and international human rights." BAKER, *supra* note 1, at 273.

124. *Id.* at 273.

125. For a recent example, see, e.g., Time Warner II, 240 F.3d 1126 (D.C. Cir. 2001) (striking down the FCC's limit on the audience reach any one cable entity may have and remanding the issue of the appropriate audience reach to the FCC).

Justice Clarence Thomas, for example, has been very clear that the only interests the First Amendment protects are those of the owners of the media.[126] A majority of the Supreme Court has not endorsed this narrow conception of First Amendment protection, but it is not inconceivable that this position may gain more adherents on that Court.

National media in the U.S. has been quite successful in beginning to dismantle the existing structure of regulation. The national media is now itself a division of multinational companies. I think it is likely that these multinational media companies will play a similar dominant role on the global stage that their national units play on the national stage. If there is going to be a culture of dialogue and a more just and egalitarian communications order, I agree with Baker that the first and most appropriate stage of battle should be the national arena. My basic criticism of Professor Baker is that he underestimates the difficulties in preserving, never mind constructing, a national media order through government intervention in democratic societies that bears any real resemblance to his desired culture of dialogue.

In the U.S., a regulatory structure still exists for the older electronic media, but it is clearly under attack. In Canada, prospects for such a structure are even dimmer. *Media, Markets and Democracy* makes a valuable contribution in showing that free trade in media content is not invariably beneficial to the health of free societies although it might be very beneficial to societies that are not free. The book shows the importance of preserving governmental intervention in the national communications order. Baker has provided an unusually thoughtful

126. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Communications Comm'n, 518 U.S. 727, 816-17 (1996) (Thomas, J., concurring in part and dissenting in part). Justice Thomas stated:

> We implicitly recognized in *Turner* [*I*] that the [cable] programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion. Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted. . . . Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers.

Id. at 816-17.

and informed discussion of a subject — free trade in media content — where it is often concluded too quickly that simply to state the issue is to resolve it. In so doing, Professor Baker provides a rare and learned voice, which hopefully will be heard against the tide.