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**“DAMN THE TORPEDOES! FULL SPEED
AHEAD”:* THE FCC’S DECISION TO
DEREGULATE MEDIA OWNERSHIP AND
THE THREAT TO VIEWPOINT DIVERSITY**

*Matthew Keller***

“The beliefs which we have most warrant for have no safeguard to rest on but a standing invitation to the whole world to prove them unfounded.”¹

“Do you know how much ‘Friends’ costs? Can you be a mom-and-pop operation and pay Jennifer Aniston the \$1 million an episode that produces that formula?”²

INTRODUCTION

On June 2, 2003, the Federal Communications Commission (FCC or Commission) voted to relax several of its media ownership regulations.³ One of the proposed changes would allow,

* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1044 (D.C. Cir. 2002), *modified by* 293 F.3d 537 (2002).

** Brooklyn Law School Class of 2005; B.S., Massachusetts Institute of Technology, 1997. The author wishes to thank his family for the enormous love and support that makes this possible, and especially Lauren, whose love makes it all worthwhile.

¹ JOHN STUART MILL, ON LIBERTY 20 (Hackett Publishing Co. 1978) (1859).

² FCC Chairman Michael K. Powell, on how shows like the popular sitcom *Friends* will be in jeopardy if giant media corporations are not allowed to own more television stations. Frank James, *FCC Chief Warns of Future Shock*, CHICAGO TRIBUNE, Sept. 07, 2003, at 11.

³ Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and

for the first time since 1975, a single entity to own both a newspaper and a television station in the same local market.⁴ A second proposal would greatly increase the number of regional markets in which a single owner could own two television stations and would allow common ownership of even three stations in large markets.⁵ A third proposed change would allow a single entity to own television stations having a combined reach of 45 percent of the national television audience.⁶

The proposed rule changes generated an outpouring of public disapproval.⁷ One United States senator commented that “the FCC’s action was one of the most complete cave-ins to corporate interests I’ve ever seen by what is supposed to be a federal

Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286 (Aug. 5, 2003) [hereinafter The 2003 Order].

⁴ *Id.* at 46,312. The original newspaper/broadcast cross-ownership rule prohibited “common ownership of a full-service broadcast station and a daily newspaper” in the same market. *Id.* at ¶ 230; 47 C.F.R. § 73.3555(d) (2002). The 2003 Order repealed this rule. *Id.* at ¶ 247. This change will, according to analysts, allow TV-newspaper mergers in approximately 180 local markets, in which about 98 percent of the U.S. population lives. COOPER, MARK, MEDIA OWNERSHIP AND DEMOCRACY IN THE DIGITAL INFORMATION AGE 192 (2003), available at <http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf> [hereinafter COOPER].

⁵ *Id.* at 46,294 ¶ 83. Under the old rules, TV duopolies (ownership of two local stations) were allowed in about 60 markets that covered about two-thirds of the national population. COOPER, *supra* note 4, at 192. The new rules would allow duopolies and even triopolies in over 160 markets covering 95 percent of the U.S. population. *Id.*

⁶ *Id.* at 46,328 ¶ 352. The previous limit was 35 percent. *Id.* This proposal has since been rejected by Congress and the limit has been set by statute at 39 percent. See Stephen Labaton, *Court Is Urged to Change Media Ownership Rules*, N.Y. TIMES, Feb. 12, 2004, at C14.

⁷ The reported number of public comments received by the FCC in response to the vote varied widely, but all estimates were large. See Chelie Pingree, *The Big Media Monopoly*, WASH. POST, Aug. 13, 2003, at A26 (reporting that the FCC received over 2 million public comments, nearly all against relaxing the rules); Anne C. Mulkern, *Senate: Overturn FCC Rule On Media Vote to Limit Ownership Defies Bush Veto Threat*, DENVER POST, September 17, 2003, at C-01 (reporting that “most” of the 750,000 comments the FCC received opposed the changes).

FCC DEREGULATION OF MEDIA OWNERSHIP 893

regulatory agency.”⁸ On September 16, 2003, the United States Senate collectively responded to the proposed changes. By a vote of 54-40, the Senate added a brief amendment to the appropriations bill that would fund the FCC for 2004.⁹ The amendment read as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress *disapproves the rule submitted* by the Federal Communications Commission relating to broadcast media ownership . . . and *such rule shall have no force or effect*.¹⁰

The FCC attempted to support its rule changes on two separate grounds. The Commission argued first that the changes were legally required by the Telecommunications Act of 1996.¹¹ Specifically, the FCC found itself constrained by the fact that the Court of Appeals for the D.C. Circuit had interpreted that Act to contain a “presumption in favor of repealing or modifying” media ownership rules.¹² Second, the FCC argued that the current level of regulation was no longer required due to changes in the media landscape.¹³

The rule changes adopted by the FCC on June 2 represent the broadest deregulation of media ownership in decades and severely limit the government’s ability to provide Americans with “the

⁸ Demetri Sevastopulof, *Senate In Move to Overturn New FCC Rules*, LONDON FIN. TIMES, Sept. 12, 2003, at 2 (quoting Senator Byron Dorgan (D-ND)).

⁹ S. J. Res. 17, 108th Cong. (2003); Stephen Labaton, *FCC Plan to Ease Curbs on Big Media Hits Senate Snag*, N.Y. TIMES, Sept. 16, 2003, at A1.

¹⁰ S. J. Res. 17, 108th Cong. (2003) (emphasis added). The House of Representatives had passed a similar amendment over a month earlier by a vote of 400-21. See Christopher Stern & Jonathan Krim, *House Votes to Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A01.

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹² *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002), *modified by* 293 F.3d 537 (2002).

¹³ See The 2003 Order, *supra* note 3, at 46,286 ¶ 52. The Order noted that, unlike the broadcast world in which the broadcast rules evolved, the modern world is “characterized not by information scarcity, but by media abundance.” *Id.*

widest possible dissemination of information from diverse and antagonistic sources.”¹⁴ Antagonistic and broad-ranging debate over questions of public importance has long been considered an indispensable element of a self-governing society. This idea has had a lively existence apart from American law, and was perhaps best expressed by John Stuart Mill in his classic treatise *On Liberty*.¹⁵ Although viewpoint diversity was probably not foremost in the Framers’ minds in 1776,¹⁶ it has come to be considered

¹⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (stating that “[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”).

¹⁵ See MILL, *supra* note 1, chapter II, Of the Liberty of Thought and Discussion. Mill discussed at length the historical, philosophical, and moral arguments against suppression of dissident ideas in a society. *Id.* Briefly, his argument can be summarized in three parts. First, Mill suggested that, because humans are fallible creatures, we can never know with absolute certainty whether any of our views are true. *Id.* at 50. Therefore, “if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true.” *Id.* Second, Mill noted both that “though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth,” and that “the general or prevailing opinion on any subject is rarely or never the whole truth.” *Id.* From this, he concluded, “it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.” *Id.* Finally, Mill argued that, even if the “general or prevailing opinion” is in fact the whole truth, it is necessary to frequently reaffirm that truth by testing it against dissident viewpoints. *Id.* Otherwise, Mill suggested, such truths would be held by the people “in the manner of a prejudice, with little comprehension or feeling of its rational grounds.” *Id.*

¹⁶ See Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U.L. REV. 401, 404 (1989). Emord argues that the Framers of the Constitution did not envision the First Amendment as a protector of viewpoint diversity. *Id.* The changed circumstances of public discourse since 1776, however, may in part explain the Supreme Court’s growing concern with protection of a diversity of views. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410-13 (1986) [hereinafter Fiss]. Fiss points out that we are no longer living in times where everyone has more or less equal access to public fora. *Id.* As he points out, “more is required . . . than a soapbox, a good voice, and the talent to hold an audience.” *Id.* For a general discussion of the Framers’ understanding of the First Amendment, see Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U.L. REV. 1156 (1986); Alexander Meiklejohn, *What Does*

FCC DEREGULATION OF MEDIA OWNERSHIP 895

“central” to the Supreme Court’s First Amendment analysis.¹⁷ In the United States Supreme Court’s jurisprudence, arguably the greatest (at least the most well-known) statement of the importance of public debate is Justice Holmes’ famous “marketplace of ideas” discussion in *Abrams v. United States*: “the best test of truth is the power of [a] thought to get itself accepted in the competition of the market.”¹⁸ Beyond Holmes, the Supreme Court has repeatedly reaffirmed the principle that the First Amendment protects broad public debate.¹⁹ The policy choices underlying the FCC’s deregulation on June 2 sell this First Amendment principle short in the pursuit of commercially successful entertainment.²⁰

This note attempts to provide some context for the FCC’s decision to deregulate on June 2 and offers a critique of that decision. Part I provides a brief history of media regulation. It tracks the emergence of two strands of regulation, one focusing on broadcast content and the other on structural regulation of media ownership. Fueled in part by emerging law and economics

the First Amendment Mean?, 20 U. CHI. L. REV. 461 (1953).

¹⁷ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994).

¹⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also Whitney v. California*, 274 U.S. 357 (1927). Justice Brandeis went further along these lines, pointing out not only the value but the citizen’s *duty* of public discussion in noting “that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

¹⁹ *See Turner Broad. Sys.*, 512 U.S. at 663 (“[A]ssuring that the public has access to a multiplicity of information sources is governmental purpose of the highest order, for it promotes values central to the First Amendment.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (stating that “[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”).

²⁰ COOPER, *supra* note 4, at 21. Cooper points out that the free-market model favored by the FCC’s new rules “favors entertainment at the expense of information.” *Id.* While such a model is “splendid” for providing goods and services such as entertainment, it fails to produce “the kind of debate that constantly renews the capacity of a people for self-determination.” *Id.* (citing Owen M. Fiss, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Why the State?*, 100 HARV. L. REV. 781 (1987)).

scholarship, broadcast regulation began to wane in the late 1970s and continued on a downward trend, culminating in the passage of the Telecommunications Act of 1996.²¹ Part II discusses the two major cases interpreting the section of the 1996 Act dealing with media ownership.²² It relates how the FCC took advantage of the deregulatory language of those opinions²³ by rushing through its rulemaking procedures, heedless of both public outcry and a judicial modification of its earlier deregulatory language. Part II concludes by summarizing the continuing battle in Congress and the courts following the June 2 vote.

In Part III, an analysis is offered which attempts to discredit the FCC's legal justification for its rule changes, and to attack the remaining policy justifications as misguided and focused on the wrong underlying interests. The analysis proposes that the D.C. Court of Appeals decisions in *Fox* and *Sinclair*, upon which the FCC relied heavily to justify its rule changes, may have given a deregulatory gloss to the media ownership portion of the 1996 Act that was not intended by Congress.²⁴ The court itself seemed to

²¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

²² *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1034 (D.C. Cir. 2002), *modified by* 293 F.3d 537 (2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

²³ *See Fox*, 280 F.3d at 1044. The title of this note is taken from the statement made, in dicta, in the *Fox* opinion that the deregulatory intent of the Telecommunications Act of 1996 could be likened to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Id.*

²⁴ *See* Statement of Chairman Michael K. Powell, 2002 *Biennial Regulatory Review*, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A3.doc (released July 2, 2003) [hereinafter Powell Statement]. The FCC Chairman's statement accompanying the rule changes repeatedly asserts that deregulation of the broadcast rules was mandated by the *Fox* and *Sinclair* courts. *Id.* In the statement's introduction, Chairman Powell claimed that "[k]eeping the rules exactly as they are, as some so stridently suggest, was not a viable option" and that "[w]ithout today's surgery, the rules would assuredly have met a swift death [in the courts.]" *Id.* at 1. The very next section of the Chairman's statement begins: "Critical to understanding our actions, is an understanding of *the court's view* of Congress' charge to the Commission in the 1996 Telecommunications Act." *Id.* (emphasis added). Later, the Chairman claims that "[r]ecent court decisions have established a high hurdle for the Commission

FCC DEREGULATION OF MEDIA OWNERSHIP 897

recognize this, later modifying the *Fox* decision by removing some of that opinion's deregulatory language.²⁵ The *Fox* and *Sinclair* opinions taken as a whole do not support the FCC's conclusion that those opinions required the comprehensive deregulation promulgated by the Commission on June 2, 2003. Part III thus concludes that the FCC's insistence that these opinions mandated further deregulation was unjustified. The opinions left the FCC with the broad discretion it has historically held to promulgate rules in the public interest. Therefore, the decision to further release the ownership of broadcast television stations to market forces was the FCC's alone. The analysis concludes that this decision unwisely risks substantial damage to the public discourse that is one of the essential foundations of our democracy. If the FCC's new rules are allowed to take effect, the resulting concentration of communicative power into a handful of giant for-profit media corporations will further weaken this foundation.

I. A BRIEF HISTORY OF MEDIA REGULATION

A scheme of government regulation of electronic broadcasting was originally established in the early 20th century to solve the novel technical problems raised by the new medium of radio.²⁶ State exertion of this power to guide the medium, however, soon began to take on political undertones. Rules soon appeared that dealt not with technical matters, but with both the structure of the marketplace of broadcasters and with the content of broadcasts.²⁷

to maintain a given broadcast ownership regulation." *Id.* at 2.

²⁵ *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002).

²⁶ *See National Broad. Co. v. United States*, 319 U.S. 190, 210-13 (discussing early efforts by government to deal with the new technical problems posed by radio technology).

²⁷ *See id.* at 216-17. The *NBC* case dealt with a broadcaster's challenge to "chain broadcasting" rules, discussed more fully in Part I.C, *infra*. Although the chain broadcasting rules could not be justified on technical grounds alone the Court nevertheless found them to be valid under Federal law, holding that the FCC's "licensing function cannot be discharged . . . merely by finding that there are no technological objections to the granting of a license." *Id.* at 216. The Court made the observation that, if limited to technical considerations, "how could the Commission choose between two applicants for the same facilities,

Both types of rules remained in effect until the early 1980s, after which a new administration with broad deregulatory proclivities began to dismantle the old regulatory regime.²⁸ Content regulations, which had raised First Amendment concerns from the beginning, were the first to go.²⁹ Structural ownership regulations remained, but were the subject of a rising level of scrutiny by those who favored greater marketplace control of the television and radio station market.³⁰ Deregulation continued into the nineties, culminating in the passage of the Telecommunications Act of 1996.³¹ The 1996 Act revised national telecommunications policy by encouraging greater competition and private investment in new technology through deregulation.³² The 1996 Act also included further deregulation of broadcast ownership, causing some to question the wisdom of market control of the core democratic function of dissemination of public information.³³

each of whom is financially and technically qualified to operate a station?" *Id.* at 216-17. *See infra* Part I.B for further discussion of this point.

²⁸ *See* PATRICIA AUFERHIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996, 26 (1999) ("The election of Ronald Reagan in 1980 was a watershed for deregulatory action."); *see infra* Part I.E (discussing the influence of Law and Economics on the Reagan administration and telecommunications policy in particular in the 1980s).

²⁹ *See, e.g., In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145 (1985) (repudiating the fairness doctrine, which required stations to broadcast competing viewpoints of public issues). *See infra* Part I.D for further discussion of the fairness doctrine and other content-based regulations.

³⁰ *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Fowler, a former FCC Commissioner, was an ardent and influential advocate for market control of broadcasting. *Id.* *See infra* Part I.E for further discussion of this point.

³¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³² *Id.* The stated purpose of the Act was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Id.*

³³ *See infra* Part II.B.4 (discussing adverse public, Congressional, and judicial reactions to broadcast deregulation).

FCC DEREGULATION OF MEDIA OWNERSHIP 899*A. Original Justifications for Regulation*

The initial motive for government regulation of radio was predominantly technical in nature; laws were needed to prevent the interference between, and resulting incoherence of, radio broadcasts transmitted on the same frequency.³⁴ Therefore, while newspaper publication has always been largely left to private competition in the market, from the very beginning the broadcast media evolved under what has been called a “trusteeship” model.³⁵ As large numbers of broadcasters began to use radio commercially, the increasing competition for the limited space on the airwaves resulted in chaos.³⁶ After appeals to broadcasters to regulate themselves to avoid interference went unheeded, several government officials, including then-President Calvin Coolidge, called upon Congress to solve the problem with appropriate legislation.³⁷

B. Technical Regulation Yields to Political Regulation

Congress established the nation’s first comprehensive regulatory scheme for broadcasting with the Radio Act of 1927.³⁸ The Radio Act established the Federal Radio Commission (FRC)

³⁴ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969) (“Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.”).

³⁵ Fowler & Brenner, *supra* note 30, at 216-17 (1982). “Governmental guidance in broadcast decision-making, the fundamental characteristic of the trusteeship model, sets it apart from a marketplace approach.” *Id.*

³⁶ *Red Lion*, 395 U.S. at 375.

³⁷ See *NBC v. United States*, 319 U.S. 190, 212 (1943). In a message to Congress delivered on December 7, 1926, President Coolidge warned that “the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value.” *Id.* Some writers have suggested that, unlike the press, early government regulation of radio was also tolerated because the technology was first used for military, safety, and rescue purposes, traditional areas of legitimate state control. See BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* 88 (1975); Fowler & Brenner, *supra* note 30, at 213.

³⁸ The Radio Act of 1927, 44 Stat. 1163 (1927).

and delegated to that body the responsibility of licensing broadcasters.³⁹ Licensing under the Radio Act sought to avoid interference,⁴⁰ and initially FRC regulation centered on this issue.⁴¹ Because licenses were issued to broadcasters by the FRC free of charge, however, the resulting demand for licenses quickly grew larger than the available radio frequency spectrum could accommodate.⁴² The Commission needed some way of determining who would receive the limited number of licenses and for how long they would hold them.⁴³ The standard provided in the Radio Act of 1927 to guide the Commission in these decisions was “as public convenience, interest, or necessity requires.”⁴⁴ This short, vague phrase added a discretionary political component to broadcast regulation that would later become the source of great power for the Commission.⁴⁵

³⁹ See The Radio Act of 1927, § 3 (establishing the Commission); § 4 (establishing criteria for issuing licenses).

⁴⁰ The Radio Act of 1927, § 4(f). “Interference” is defined by the FCC as “[t]he effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy.” 47 C.F.R. § 2.1 (2004).

⁴¹ OWEN, *supra* note 37, at 89 (“Initial concern was centered on technical questions of interference.”).

⁴² *Id.*

⁴³ *Id.*; The Radio Act of 1927 also established license application and renewal procedures. Licensees were required to renew their station licenses with the FRC periodically. See The Radio Act of 1927, §§ 9-14.

⁴⁴ The Radio Act of 1927, § 4.

⁴⁵ See Benjamin M. Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT L. J. 755, 758 (1995). “By far the most powerful six words in the history of [broadcast] regulation must be ‘the public interest, convenience, and necessity.’” *Id.*; FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (referring to the public-interest standard of the Radio and Communications Acts as “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy”); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 263 (5th ed. 2003) (“The authorization to the FCC to grant broadcast licenses based on a showing of ‘public interest, convenience, and necessity’ obviously leaves the agency a lot of room for deciding what these terms

FCC DEREGULATION OF MEDIA OWNERSHIP 901

Seven years later, the foregoing provisions of the Radio Act of 1927 were incorporated into the Communications Act of 1934.⁴⁶ The Communications Act of 1934 expanded the role of the FRC to include regulation of communication by wire and, as a result, the name of the Commission was changed to the Federal Communications Commission.⁴⁷ The Communications Act of 1934 did not, however, alter the “public interest” standard under which the FCC was to issue broadcast licenses.⁴⁸

C. Structural Regulation in the Public Interest

The history of the broadcast regulations promulgated by the FRC (and later the FCC) pursuant to authority granted by the Radio and Communications Acts can be separated into two categories: structural rules and behavioral rules.⁴⁹ Structural rules define “who may own outlets and how many they may own.”⁵⁰ The FCC has historically justified its structural rules on the grounds that diverse ownership of broadcast stations promotes viewpoint diversity.⁵¹ The Supreme Court in *FCC v. National Citizens Committee for Broadcasting* agreed that this justification was a

mean.”).

⁴⁶ The Communications Act of 1934, 48 Stat. 1064 (1934).

⁴⁷ The Communications Act of 1934, § 4.

⁴⁸ See The Communications Act of 1934, §§ 307, 309 (ordering the FCC to grant and renew broadcast licenses to applicants “if public convenience, interest, or necessity will be served thereby”).

⁴⁹ See Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1013 (1996). Brenner’s classification of media regulations into “structural” and “behavioral” categories is utilized throughout this note.

⁵⁰ *Id.* at 1015.

⁵¹ See Amendment of Sections 73.34, 73.240, and 73.636 of Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1050 (1975). “The significance of ownership from the standpoint of ‘the widest possible dissemination of information’ lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission’s concern with the public interest.” *Id.*

reasonable interpretation of the “public interest” standard.⁵²

One example of a long-standing structural rule is a national ownership limitation. From almost the beginning of broadcast regulation in this country, the FCC has, in one form or another, limited the total number of stations a broadcaster may own nationwide.⁵³ At the time it was originally promulgated, the stated purpose of the national ownership restriction “was twofold: (1) to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and (2) to safeguard against undue concentration of economic power.”⁵⁴

Other structural regulations have limited media ownership on a local level, either by prohibiting cross-ownership (defined as common ownership of either a radio station or a newspaper and a television station in the same community),⁵⁵ or by limiting the number of commonly-owned television stations in a local market.⁵⁶ So-called “chain broadcasting” regulations at one point went past limiting common ownership to prohibiting the ability of independent broadcasters to contract with one another in ways

⁵² 436 U.S. 775, 795 (1978). Indeed, the *NCCB* court made it clear that First Amendment concerns were an important consideration in the FCC’s interpretation of the public interest standard. “The ‘public interest’ standard,” the court noted, “necessarily invites reference to First Amendment principles.” *Id.* The Court further held that an individual’s right to speak does not trump the *collective* right of *all* Americans to speak. “[T]here is no unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” *Id.* at 799 (internal citations omitted).

⁵³ See C. Edwin Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839, 865 (2002) [hereinafter Baker]. “Regulation began in the 1940s, when the FCC explicitly limited [nationwide] ownership to six FM radio stations and three television stations.” *Id.*; see also *In the Matter of Amendment of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984) (giving a history of the national ownership restrictions) [hereinafter *The 1984 Order*].

⁵⁴ *The 1984 Order*, 100 F.C.C.2d at 17 ¶ 3.

⁵⁵ See, e.g., *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 F.C.C.2d 1046 (1975).

⁵⁶ See 47 C.F.R. § 73.3555(b) (1998). The name of the original local station ownership rule was the “duopoly rule.”

FCC DEREGULATION OF MEDIA OWNERSHIP 903

which limited their freedom to broadcast diverse programming.⁵⁷

Several of these structural rules have been challenged by licensees seeking to increase ownership. Those challenges that have reached the Supreme Court have been denied.⁵⁸ In 1943, the Court upheld chain broadcasting regulations in *NBC v. United States*.⁵⁹ The *NBC* decision construed the Communications Act as providing the FCC broad authority to regulate licensees in pursuit of the public interest.⁶⁰ The Court also explicitly held that the exercise of such authority to regulate broadcasters was not a First Amendment violation.⁶¹

In *FCC v. National Citizens Committee for Broadcasting*, several broadcasting and newspaper associations challenged the FCC's cross-ownership ban.⁶² The Supreme Court rejected the challenge, reaffirming the broad authority of the FCC to regulate in

⁵⁷ See *NBC v. United States*, 319 U.S. 190, 198-210 (1943) (summarizing eight of the FCC's "chain broadcasting" rules). "Chain broadcasting," defined in the Communications Act as "the simultaneous broadcasting of an identical program by two or more connected stations," became the subject of regulation after FCC studies revealed the extent to which the national networks (NBC, CBS, and Mutual) had used the practice to dominate the radio market. *Id.* at 198 (citing FCC studies that showed, inter alia, that "NBC and CBS together controlled more than 85% of the total night-time wattage, and [that] the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States"). The FCC, while recognizing that chain broadcasting provided "benefits and advantages to both the listening public and to broadcast station licensees," also asserted its responsibility "to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." *Id.*

⁵⁸ See, e.g., *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *NBC v. United States*, 319 U.S. 190 (1943).

⁵⁹ 319 U.S. 190 (1943).

⁶⁰ *Id.* at 219. "In the context of the developing problems to which it was directed, the [Communications] Act gave the Commission not niggardly but expansive powers." *Id.*

⁶¹ *Id.* at 227. "The standard [of the Communications Act] provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the [Communications] Act, is not a denial of free speech." *Id.*

⁶² *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

the public interest recognized in *NBC* and other cases.⁶³ In *National Citizens Committee*, one of the challenges made to the rule was that the prohibition of cross-ownership was unreasonable because the FCC had not sufficiently established that the rule contributed to an increased diversity of broadcast viewpoints.⁶⁴ The Court held that the FCC had acted rationally, notwithstanding the inconclusiveness of the rulemaking record, because “[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.”⁶⁵ The Court, quoting the FCC’s own rationale for believing that diverse ownership was a rational proxy for diversity of viewpoints, upheld and seconded the FCC’s judgment that structural regulations were necessary to maintain truly diverse viewpoints.⁶⁶

D. Behavioral Regulation in the Public Interest

As distinguished from structural regulations, behavioral media regulations have been defined as “controlling what’s communicated”⁶⁷ and necessarily involve direct government regulation of broadcast content.⁶⁸ Early attempts by the FRC (and later the FCC) to issue licenses pursuant to the “public convenience, interest, or necessity” standard occasionally required the Commission to make licensing decisions based on program content. For example, in *KFKB v. Federal Radio Commission*, a broadcaster appealed an FRC decision denying renewal of his

⁶³ *Id.* at 793-94.

⁶⁴ *Id.* at 796.

⁶⁵ *Id.* at 796-97.

⁶⁶ *See NCCB*, 436 U.S. at 785, 797. “In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that ‘it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.’” *Id.* at 797 (internal citations omitted).

⁶⁷ Brenner, *supra* note 30, at 1013.

⁶⁸ *Id.* at 1014; *see also* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

FCC DEREGULATION OF MEDIA OWNERSHIP 905

license on content-based grounds.⁶⁹ Specifically, the denial was based on a finding that the content of the broadcaster's programs was "inimical to the public health and safety, and for that reason was not in the public interest."⁷⁰ The D.C. Circuit Court of Appeals found on review that denial of license renewal on this basis was not rightly considered censorship, and was a valid execution of the Commission's statutorily-defined mandate to allocate licenses in the public interest.⁷¹

Behavioral regulation also provided the foundation for the "fairness doctrine," which for decades required licensed broadcasters to allow voices on all sides of important public issues to be heard.⁷² The fairness doctrine evolved from two interrelated strands of prior FRC and FCC "public interest" regulation: first, the requirement that broadcasters give adequate coverage to public issues⁷³, and second, that coverage on such issues be "fair" in the sense that it accurately reflect opposing views.⁷⁴

⁶⁹ *KFKB v. Fed. Radio Comm'n*, 47 F.2d 670, 671 (D.C. Cir. 1931).

⁷⁰ *Id.* *KFKB* involved an entrepreneurial physician who hosted a radio show in which listeners would inform the doctor of their ailments and ask for a diagnosis and suggested treatment. *Id.* As one might expect, the recommended remedy for the vast majority of these ailments was one of the doctor's own preparations. *Id.* Looking with disfavor upon this practice, the FRC declined the doctor's application for renewal of his license, stating that, "[w]hile it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee." *Id.*

⁷¹ *Id.* at 673 ("In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.").

⁷² *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (discussing the origin and history of the fairness doctrine); *see also* *Great Lakes Broad. Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929) (stating the FRC's view that "the public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public").

⁷³ *See Red Lion*, 395 U.S. at 377 (citing *United Broad. Co.*, 10 F.C.C. 515 (1945)).

⁷⁴ *See id.* (citing *New Broad. Co.*, 6 P & F Radio Reg. 258 (1950)). In 1985,

For years, the FCC used its power to award and deny licenses under the fairness doctrine as a way of shaping program content.⁷⁵ In 1946 the FCC issued a “Blue Book” outlining the Commission’s programming policy, recognizing the need for “broadcasters to air programs of community interest.”⁷⁶ The Blue Book stated that the FCC would give “particular consideration” to four types of content programming behaviors: (1) programs unsupported by advertising; (2) local live programs; (3) public issues discussions; and (4) efforts to limit hourly advertising.⁷⁷ In 1960, the FCC issued a Program Policy Statement that also defined several types of preferred programming content.⁷⁸

In 1967, the FCC promulgated rules requiring a station to offer free air time to political candidates and private citizens, affording both the opportunity to respond to campaign messages or personal attacks broadcast on that station.⁷⁹ As opposed to the general principles of the fairness doctrine, the 1967 rules specifically required broadcasters to involuntarily cede their broadcast facilities

the FCC described the fairness doctrine as requiring broadcast license holders “[1] to provide coverage of vitally important controversial issues of interest in the community served by the licensees, [and 2] to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.” Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985).

⁷⁵ See Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

⁷⁶ See Fowler & Brenner, *supra* note 30, at 215; Brenner, *supra* note 49, at 1013 n.27.

⁷⁷ Fowler & Brenner, *supra* note 30, at 215.

⁷⁸ See En Banc Programming Inquiry, 44 F.C.C. 2303 (1960); Fowler & Brenner, *supra* note 30, at 216. The statement mentioned the following as integral to the public interest: opportunity for local self-expression, development and use of local talent, children programming, religious programming, educational programming, public affairs programming, editorialization by licensees, political broadcasts, agricultural programming, news programming, weather and market services, sports programming, service to minority groups. Fowler & Brenner, *supra* note 30, n.44; see also Brenner, *supra* note 49, at 1013 (describing the practical application of the statement as “obligat[ing] a broadcaster to develop a diversity rich program environment—if the broadcaster expected to have its license easily renewed”).

⁷⁹ 33 Fed. Reg. 5362 (1967).

FCC DEREGULATION OF MEDIA OWNERSHIP 907

to others in certain situations.⁸⁰ Consequently, broadcasters challenged the rules as unconstitutional abridgements of the freedoms of speech and press.⁸¹ In one of the ensuing lawsuits, the Court of Appeals for the Seventh Circuit struck down the FCC rules as violations of the broadcasters' First Amendment rights.⁸²

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court reversed the Seventh Circuit's decision and upheld the FCC rules.⁸³ The Court held that the personal attack and political editorializing rules were merely more precise reiterations of the fairness doctrine.⁸⁴ As such, the rules were valid to the same extent as the doctrine itself.⁸⁵ The Court also reiterated the argument made in *NBC* that, because radio spectrum was limited, government regulation of the speech broadcast thereon was proper.⁸⁶ Therefore, given the limited spectrum of frequencies, the Court found that content-based rules requiring individual licensees to air viewpoints that they did not hold were constitutional.⁸⁷ This

⁸⁰ *Red Lion*, 395 U.S. at 378 (“[The 1967 rules] differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party’s side himself or choosing a third party to represent that side.”).

⁸¹ See *Red Lion Broad. Co. v. FCC*, 381 F.2d 908 (1967).

⁸² See *Radio Television News Directors Ass’n v. U.S.*, 400 F.2d 1002, 1020 (7th Cir. 1968) (“In view of the vagueness of the Commission’s rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the First Amendment.”).

⁸³ *Red Lion*, 395 U.S. at 375.

⁸⁴ *Id.*

⁸⁵ See *id.* (“Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the [rules at issue] are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional.”).

⁸⁶ *NBC v. United States*, 319 U.S. 190, 226 (1948). “Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.” *Id.*

⁸⁷ See *Red Lion*, 395 U.S. at 390 (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor

view, which came to be known as the “scarcity doctrine,” became the primary justification given for government regulation of broadcast content.⁸⁸

*E. Enter Law and Economics*⁸⁹

Law and economics scholarship has applied economic principles to media regulation.⁹⁰ The law and economics movement, grounded in ideas of personal freedom as a route to

of others whose views should be expressed on this unique medium.”).

⁸⁸ Fowler & Brenner, *supra* note 30, at 221 (“Spectrum scarcity always has been the cornerstone of the justification for . . . reducing First Amendment protection for broadcasters.”).

⁸⁹ See Charles K. Rowley, *Public Choice and the Economic Analysis of Law*, in *LAW AND ECONOMICS* 125 (Nicholas Mercuro ed., 1989). “Law and economics” can be defined as “the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions.” *Id.* Starting in the 1970s, law and economics scholars began disseminating articles on a wide variety of legal issues. See RICHARD A. POSNER, *OVERCOMING LAW* 438 (1995) (“The years since 1970 have witnessed an expanding torrent of scholarly writing across the full range of law and economics.”). By the end of the 1980s, the effects of this scholarship were palpable in a wide array of practice areas. See William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 *J. LAW & ECON.* 385, 386 (1993) (noting the many areas of law in which economic influences are “strong”); see also William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 *WAYNE L. REV.* 1413 (1990); Brenner, *supra* note 49, at 1019 n.66.

⁹⁰ See OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975). The law and economics perspective sometimes cuts against the grain of prevailing legal rules. Mr. Owen, an economist by vocation, apologizes in his foreword for not giving the “full sympathy to the weight of precedent and to the limits of judicial legislation” that a lawyer normally would. *Id.* at xix. Unfortunately, the practice of not giving due weight to precedent is not always limited to non-lawyers. Some prominent law and economics-minded jurists have been accused of the same fault. See Tracey E. George, *Court Fixing*, 43 *ARIZ. L. REV.* 9, 57 (2001) (discussing an amici curiae brief filed by twenty-one state attorneys general asking the Supreme Court to review a Seventh Circuit antitrust decision and arguing that the circuit, in cases decided by Judges Richard Posner and Frank Easterbrook, was ignoring Supreme Court precedent in order to find in favor of defendant businesses).

FCC DEREGULATION OF MEDIA OWNERSHIP 909

maximized social utility, ideally favors no government regulation of broadcasters at all.⁹¹ If any regulation must be tolerated, structural rules are preferred to content-based regulations.⁹²

In 1982 FCC Chairman Mark Fowler published an article calling for total deregulation of the broadcast media in favor of market control.⁹³ Fowler believed that the marketplace was a more reliable arena than the FCC for discovering the public interest.⁹⁴ Fowler's calls for complete deregulation were not successful, but the FCC clearly began to focus on the "public interest" from an economic efficiency perspective.⁹⁵ Reflecting this ideological shift, FCC analyses of media mergers began to take on the tone of antitrust proceedings, focusing more on preventing harmful economic consolidation in broadcasting and less on dictating content.⁹⁶ This was a marked break from its earlier, more

⁹¹ See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1861 n.48 (1987). Radin points out the similarities between modern day law-and-economics scholars and classical utilitarians. *Id.*

⁹² See OWEN, *supra* note 90, at xix (noting the difference between the traditional legislative and judicial tendency to "remedy inequities by imposing *behavioral* sanctions and constraints on the process by which decisions are reached" and the economist's focus on "seek[ing] an *organizational structure* that will provide internal incentives to decentralized decision makers, which will lead to actions having some desirable attributes such as efficiency and fairness." (emphasis added)).

⁹³ Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982). Chairman Fowler argued for the removal of public interest obligations from broadcasters. *Id.* at 209 ("Our thesis is that the perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants.").

⁹⁴ *Id.* at 209-10 ("Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace.").

⁹⁵ See PATRICIA AUFERHIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 27 (1999) (describing FCC actions in the early 1980s as "mov[ing] aggressively from a social equity to an economic efficiency objective").

⁹⁶ See Baker, *supra* note 53, at 856 ("The presently dominant approach to [broadcast] mergers . . . seems to be a Chicago School interpretation that focuses almost exclusively on economic, primarily efficiency, concerns."). As opposed to merger analysis from a "marketplace of ideas" perspective, antitrust analysis

qualitative “political” analyses.⁹⁷ The increasing dominance of structural analysis was highlighted when, in 1985, the FCC officially repudiated the fairness doctrine.⁹⁸ The FCC justified its abandonment of the fairness doctrine on the grounds that scarcity was no longer a problem in mass communications.⁹⁹ Although it took another fifteen years, the 1967 rules requiring free response time to personal attacks and political editorials, upheld in *Red Lion*, were judicially vacated in 2000.¹⁰⁰

In combination with the retreat from behavioral regulation and the increasing dominance of structural regulation, there was also a general relaxation of antitrust scrutiny in all industries throughout the 1980s under the Reagan administration.¹⁰¹ The overall result of these changes was that the public interest in broadcasting was increasingly placed into the “invisible hand” of the market.¹⁰²

is based on the “dominant, arguably exclusive, aim ‘that mergers should not be permitted to create or enhance market power or to facilitate its exercise’ in order to prevent ‘a transfer of wealth from buyers to sellers or a misallocation of resources.’” *Id.* (citing U.S. Dep’t of Justice and Federal Trade Commission Guidelines).

⁹⁷ See Brenner, *supra* note 49, at 1018 (“[S]ince the 1970s, there’s been a marked shift away from analysis that includes political considerations.”). It seems clear that the term “political” in this context means “non-economic.”

⁹⁸ *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 147 (1985) (“[W]e no longer believe that the fairness doctrine, as a matter of policy, serves the public interest.”).

⁹⁹ *Id.* at 197. “[W]e have witnessed explosive growth in various communications technologies. We find the information marketplace of today . . . provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary.” *Id.*

¹⁰⁰ See *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (directing the FCC to immediately repeal the personal attack and political editorial rules).

¹⁰¹ See Brenner, *supra* note 49, at 1020 (“The general view of antitrust enforcement during the Reagan years was to relax the merger and acquisition standards for all industries, including media.”); see also AUFERHIDE, *supra* note 95, at 26 (“The election of Ronald Reagan in 1980 was a watershed for deregulatory action.”).

¹⁰² ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book IV Chapter II, Of Restraints upon the Importation from Foreign Countries of Such Goods as Can Be Produced at Home (1776).

FCC DEREGULATION OF MEDIA OWNERSHIP 911*F. The Telecommunications Act of 1996*

The deregulatory movement in mass media regulation continued into the 1990s, highlighted by Congress' passage of the Telecommunications Act of 1996.¹⁰³ This Act took a deregulatory approach to all facets of federal communications policy.¹⁰⁴ Specifically, in terms of television ownership regulations, the Telecommunications Act of 1996 immediately relaxed several of the FCC rules then in effect. First, the Act eliminated the nationwide limit on station ownership and raised the national audience reach cap from 25 to 35 percent.¹⁰⁵ The Act also allowed for greater affiliation between independent stations and television networks.¹⁰⁶ Finally, the Act eliminated an FCC prohibition on cross-ownership of a broadcast network and a cable system.¹⁰⁷

In addition to these immediate changes, section 202(h) of the Act ordered the FCC to conduct reviews of all ownership rules every two years to "determine whether any of such rules are necessary in the public interest as the result of competition."¹⁰⁸ Section 202(h) ordered the Commission to "repeal or modify any regulation it determines to be no longer in the public interest."¹⁰⁹

Smith is credited with the idea that the public interest may best be served by a government policy of *laissez-faire*. Smith hypothesized that an "invisible hand" would cause private individuals' self-interested efforts to also benefit society. *Id.* ("He intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.").

¹⁰³ Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁰⁴ *Id.* The first line of the massive Act describes itself as "An Act To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Id.*

¹⁰⁵ Telecommunications Act of 1996 § 202(c)(1).

¹⁰⁶ Telecommunications Act of 1996 § 202(e).

¹⁰⁷ Telecommunications Act of 1996 § 202(f)(1).

¹⁰⁸ *See* Telecommunications Act of 1996 § 202(h).

¹⁰⁹ *Id.* The full text of § 202(h) stated:

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform

II. THE CONSEQUENCES OF THE TELECOMMUNICATIONS ACT OF 1996

In 1998, after the first “biennial” review conducted pursuant to section 202(h) of the 1996 Act, the FCC decided to substantially maintain three of its rules: the National Television Station Ownership (“NTSO”) rule,¹¹⁰ the Cable/Broadcast Cross Ownership (“CBCO”) rule,¹¹¹ and the Local Ownership Order (“LOO”).¹¹² In response, some of the nation’s largest TV broadcasters challenged these rules on the ground that the 1996 Act required them to be repealed.

A. Big Media¹¹³ Takes Advantage of the Act—The Fox and

review under § 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Id.

¹¹⁰ 47 C.F.R. § 73.3555(e) (2004). As described in *Fox Television Stations, Inc. v. FCC*, “[t]he NTSO rule prohibits any entity from controlling television stations the combined potential audience reach of which exceeds 35% of the television households in the United States.” *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1034 (D.C. Cir. 2002), *modified by* 293 F.3d 537 (2002).

¹¹¹ 47 C.F.R. § 76.501(a) (2004). “The CBCO rule prohibits a cable television system from carrying the signal of any television broadcast station if the system owns a broadcast station in the same local market.” *Fox*, 280 F.3d at 1035 (D.C. Cir. 2002).

¹¹² 64 Fed. Reg. 50,651 (Sept. 17, 1999). The Local Ownership Order relaxed the constraints of the “duopoly” rule, a long-standing FCC prohibition on common ownership of more than one television station in a local market. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 152-55 (2002). Under the Order, common ownership of local television stations was permitted, provided that two conditions were met: (1) “one of the stations is not among the four highest-ranked stations in the market,” and (2) “eight independently owned, full-power and operational television stations (commercial and noncommercial) will remain post-merger.” *Id.* at 155.

¹¹³ It is helpful at this point to briefly mention the fact that American broadcasting is dominated by five corporations: News Corporation (owner of Fox Network, 34 TV stations nationwide and other assorted media businesses), General Electric (owner of NBC, Telemundo, and Paxson networks, 14 TV stations, cable and other businsses), Disney (owner of ABC network, 10 TV

FCC DEREGULATION OF MEDIA OWNERSHIP 913

Sinclair Cases

Several major broadcasters, dissatisfied by the FCC's decision to maintain the NTSO, CBCO, and LOO, challenged the rules in court.¹¹⁴ The objections to the NTSO and CBCO rules were consolidated in *Fox Television Stations, Inc. v. FCC*.¹¹⁵ The challenge to the LOO was disposed of in *Sinclair Broadcast Group, Inc. v. FCC*.¹¹⁶ The *Fox* decision concluded that the Telecommunications Act of 1996 created a presumption of invalidity of FCC rules, thereby imposing on the FCC a greater burden of justification for keeping the rules in place.¹¹⁷ The FCC used *Fox* and *Sinclair* as primary support for its broad deregulatory vote on June 2, 2003.¹¹⁸ As the following analysis will show, however, these opinions were not as opposed to the legitimacy of broadcast regulation as the FCC later contended.

stations, 64 radio stations, and other assorted businesses), Viacom (owner of CBS and UPN networks, 39 TV stations, 176 radio stations, cable (MTV), book publishing and other media businesses), and Time Warner (owner of the WB network, large holdings in book publishing, cable, movie and TV production and distribution, music, and internet (AOL) businesses). See Columbia Journalism Review, "Who Own's What" at <http://www.cjr.org/tools/owners/> (last visited Apr. 1, 2004) (listing major media owners and their holdings).

¹¹⁴ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1034 (D.C. Cir. 2002), modified by 293 F.3d 537 (2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The *Fox* decision discussed *infra* was actually a response to five consolidated petitions by national networks. *Fox*, 280 F.3d at 1033. In addition to Fox Television Stations, Inc., the other four petitioners were National Broadcasting Company, Inc., CBS Broadcasting, Inc. (and parent company Viacom), and Time Warner Entertainment Company, L.P. *Id.* The petitioner in *Sinclair*, while not one of the "Big Five" itself, is a broadcast network affiliated with a large number of stations owned by the major networks. See *infra* note 229 (relating Sinclair's television holdings).

¹¹⁵ 280 F.3d 1027 (D.C. Cir. 2002).

¹¹⁶ 284 F.3d 148 (D.C. Cir. 2002).

¹¹⁷ *Fox*, 280 F.3d at 1048. The *Sinclair* opinion, handed down less than two months later, followed this holding. *Sinclair*, 284 F.3d at 152.

¹¹⁸ See *supra* note 24 and accompanying text.

1. The Fox decision

In *Fox*, several major U.S. broadcasters sued the FCC for failing to revise the NTSO and CBCO rules during its first biennial review pursuant to section 202(h) of the 1996 Act.¹¹⁹ Fox claimed that the FCC's decision not to repeal the rules during its 1998 review was "arbitrary and capricious" and violated Congress' mandate in section 202(h) of the 1996 Act.¹²⁰ Fox also contended that the NTSO rule violated the First Amendment.¹²¹

The FCC defended the rules under the 1996 Act as being necessary in the public interest, dividing its arguments into three categories: "competition," "diversity," and "localism."¹²² Fox's first argument in response was that, since section 202(h) of the 1996 Act only mentioned "competition," the FCC was unable to regulate "in the name of diversity alone."¹²³ The court disagreed, holding that "nothing in section 202(h) signals a departure from [the] historic scope [of diversity in broadcast regulation]."¹²⁴

Nevertheless, the Chief Judge for the D.C. Circuit, writing for the majority, agreed with Fox that the decision to maintain the

¹¹⁹ *Fox*, 280 F.3d at 1033 (D.C. Cir. 2002). More precisely, the petitioners challenged the FCC rules as a violation of both the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, and The Telecommunications Act of 1996. *Id.* at 1033-34. Since the focus of this note is on telecommunications law and policy under The Telecommunications Act of 1996, discussion of the administrative law issues posed by the case will not be discussed.

¹²⁰ *Fox*, 280 F.3d at 1040, 1049.

¹²¹ *Id.* at 1033.

¹²² *Id.* at 1041. This definition of the "public interest" as being composed of "diversity" and "competition" interests is consistent with the FCC's 1984 Order. See *supra* note 54 and accompanying text. The *Fox* court apparently looked at "localism" justifications as a subset of "diversity." See *id.* at 1042 ("In the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity (as well as localism) . . .") (citing *FCC v. Nat. Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978)). The remaining discussion of the *Fox* and *Sinclair* cases will use the D.C. Court of Appeals convention of not distinguishing between diversity and localism interests.

¹²³ *Fox*, 280 F.3d at 1042.

¹²⁴ *Id.*

FCC DEREGULATION OF MEDIA OWNERSHIP 915

rules was unjustified in light of section 202(h).¹²⁵ Regarding the NTSO rule, the court found that the FCC had not sufficiently justified the rule as necessary to further competition.¹²⁶ The FCC's diversity-based justification that the rule was necessary to maintain the bargaining power of local affiliates with large networks was also rejected because it did not have "sufficient support in the present record."¹²⁷ Finally, the FCC's argument that the rule should be maintained so that the effects of other recent deregulatory changes could be independently studied was rejected as being inappropriate in light of the 1996 Act.¹²⁸ The court held that the decision to retain the NTSO rule was arbitrary and capricious.¹²⁹ Even though the court decided it had the power to vacate the rule rather than remand, it decided to remand to the FCC for further consideration.¹³⁰

Fox's First Amendment challenge to the NTSO rule was based primarily on the argument that "in today's populous media marketplace the 'scarcity' rationale . . . 'makes no sense' as a reason for regulating ownership."¹³¹ This argument was rejected on the grounds that the Supreme Court's decisions in *NBC* and *NCCB* were still good law and that, therefore, minimal judicial scrutiny was the proper standard of review.¹³² The court found that the NTSO rule survived minimal scrutiny, reaffirming the constitutional foundation of the FCC's traditional commitment to viewpoint diversity.¹³³

¹²⁵ *Id.* at 1045 (holding that "the decision to retain the NTSO Rule was . . . contrary to § 202(h) of the 1996 Act."); *Id.* at 1049 (holding that "the retention [of the CBCO] was . . . contrary to § 202(h)").

¹²⁶ *Id.* at 1042.

¹²⁷ *Id.* at 1043.

¹²⁸ *Id.* at 1042. "The Commission's wait-and-see approach cannot be squared with its statutory mandate promptly—that is, by revisiting the matter biennially—to 'repeal or modify' any rule that is not 'necessary in the public interest.'" *Id.* (citing § 202(h) of The Telecommunications Act of 1996).

¹²⁹ *Fox*, 280 F.3d at 1044.

¹³⁰ *Id.* at 1048-49.

¹³¹ *Id.* at 1045.

¹³² *Id.* at 1046.

¹³³ *Id.* at 1047 (holding that "it is not unreasonable—and therefore not unconstitutional—for the Congress to prefer having in the aggregate more

Using the same criteria of competition and diversity to evaluate the FCC's justifications of the CBCO rule under the 1996 Act, the court concluded that that rule could not be justified as a result of either.¹³⁴ Rather than remanding to the FCC for further consideration as it had done with the NTSO rule, the court vacated the CBCO outright.¹³⁵

The court gave two reasons for the disparate treatment. First, the court repeatedly referred to the fact that, in 1999, the FCC had promulgated rules allowing a single entity to own two local television stations under certain circumstances.¹³⁶ In support of the 1999 rules, the FCC had concluded that "common ownership of two broadcast stations in the same local market need not unduly compromise diversity."¹³⁷ The court found that this conclusion contradicted the FCC's current argument before the court that the CBCO was necessary to protect diversity and that, because the FCC had made "no attempt to harmonize [these] seemingly inconsistent decisions," its diversity rationale was "woefully inadequate."¹³⁸ Second, whereas "the intervenors [on behalf of the FCC had] presented plausible reasons for thinking the NTSO rule [might] be necessary to further competition," neither the FCC nor the intervenors had done so with respect to the CBCO rule.¹³⁹

The *Fox* opinion chastised the FCC several times for making

voices heard"). In making this determination, the court acknowledged that maintaining viewpoint diversity may result in greater inefficiencies in the television station market. *Id.* The court nonetheless concluded that "Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency." *Id.*

¹³⁴ *Id.* at 1051-52.

¹³⁵ *Fox*, 280 F.3d at 1049, 1053. On the one hand, the court found that "the probability that the Commission will be able to justify retaining the NTSO rule is sufficiently high that vacatur of the [NTSO] [r]ule is not appropriate." *Id.* at 1049. On the other, "[b]ecause the probability that the Commission would be able to justify retaining the CBCO rule is low and the disruption that vacatur will create is relatively insubstantial, we shall vacate the CBCO rule." *Id.* at 1053.

¹³⁶ *Id.* at 1051-52.

¹³⁷ *Id.* at 1052.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1052-53.

FCC DEREGULATION OF MEDIA OWNERSHIP 917

decisions in the absence of a sufficiently fact-laden record.¹⁴⁰ The implicit mandate to the FCC was that, in order to maintain rules in light of section 202(h), the Commission would have to come up with some “analytical or empirical” reasons for doing so.¹⁴¹

2. The Sinclair Decision

The second case, *Sinclair Broadcast Group, Inc. v. FCC*, followed soon after *Fox*.¹⁴² Sinclair, a broadcaster, challenged the FCC’s Local Ownership Order (LOO), which established certain conditions precedent before a broadcaster would be allowed to purchase more than one television station in any local market.¹⁴³ Sinclair specifically took issue with the FCC requirement that “eight . . . television stations . . . remain” after the transaction.¹⁴⁴ Sinclair alleged that the number eight had been “plucked . . . out of thin air” and that the inclusion of only broadcast television stations in the count was inconsistent with another FCC rule dealing with television-radio cross-ownership.¹⁴⁵ That rule, in calculating the total number of media voices in a local market for purposes of allowing cross-ownership, included “certain local newspapers and cable television stations” in the count, while the LOO counted only broadcast television stations towards the total.¹⁴⁶ Sinclair alleged that these inconsistencies rendered the LOO arbitrary and capricious.¹⁴⁷ Sinclair also challenged the Order on First

¹⁴⁰ *Id.* at 1044 (calling the record “woefully inadequate”); *id.* at 1044-45 (“The Commission may, of course, change its mind, but it must explain why it is reasonable to do so.” (citation omitted)).

¹⁴¹ *Id.* at 1048.

¹⁴² *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The two decisions were handed down less than two months apart. *Id.*; *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1034 (D.C. Cir. 2002), *modified by* 293 F.3d 537 (2002).

¹⁴³ *See supra* note 112 (providing a more detailed description of the LOO).

¹⁴⁴ *See id.*

¹⁴⁵ *Sinclair*, 284 F.3d at 158-59.

¹⁴⁶ *Id.* at 155, 159.

¹⁴⁷ *Id.* at 158.

Amendment grounds.¹⁴⁸

The court explicitly stated that it was reviewing the Local Ownership Order in light of the *Fox* holding that “section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.”¹⁴⁹ Finding the inconsistent definitions of media “voices” the dispositive issue,¹⁵⁰ the *Sinclair* court held that the Order was arbitrary and capricious and remanded it for further consideration.¹⁵¹ Aside from this one flaw in the LOO, however, all of the other arguments *Sinclair* had made in support of overturning the Order were resolved in favor of the FCC.¹⁵²

3. A Possible Retreat?

In a further development, four months after the *Fox* opinion was issued, the court modified the opinion after the FCC moved for a rehearing.¹⁵³ Following the rehearing, the court agreed to modify a portion of the opinion that could be read to hold the FCC to a higher standard of justification for its rules in light of section 202(h).¹⁵⁴ The first *Fox* opinion had stated that “[The Telecommunications Act of 1996] is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.”¹⁵⁵ The court decided to modify its opinion in order to leave open the question of “what section 202(h)

¹⁴⁸ *Id.* at 152.

¹⁴⁹ *Id.* (citing *Fox*, 280 F.3d at 1048).

¹⁵⁰ See *Sinclair*, 284 F.3d at 160 (“But for our conclusion in Part III.C [discussing the inconsistency between the two rules] the Commission adequately explained how the local ownership rule furthers diversity at the local level and is necessary in the ‘public interest’ under § 202(h) of The Telecommunications Act of 1996.”).

¹⁵¹ *Id.* at 169.

¹⁵² *Id.* at 162 (passing over the argument against the selection of “eight” as the proper number of voices); *id.* at 165 (rejecting all of *Sinclair*’s arguments against certain grandfathering provisions of the Order); *id.* at 167 (rejecting *Sinclair*’s First Amendment challenges to the Order).

¹⁵³ *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002).

¹⁵⁴ *Id.* at 541.

¹⁵⁵ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002).

FCC DEREGULATION OF MEDIA OWNERSHIP 919

means”¹⁵⁶ The court explained its decision not to give section 202(h) a definitive interpretation by noting that such an interpretation “was unnecessary to the outcome of the case at hand but might have had ill-considered implications for future cases.”¹⁵⁷ This modification of the *Fox* opinion leaves the “presumption” of invalidity of FCC rules under section 202(h) in doubt.

B. The Aftermath of Fox and Sinclair: The FCC Responds and the Mayhem Begins

The FCC responded quickly to the *Fox* and *Sinclair* decisions, indicating that it would consider changes to the remanded rules as part of its 2002 biennial review.¹⁵⁸ In an attempt to generate a more adequate record from which to make decisions, the FCC held a number of public events to gather comments.¹⁵⁹ To stimulate public comment, the Commission also released to the public twelve independent studies it had commissioned on American media.¹⁶⁰

¹⁵⁶ *Fox*, 293 F.3d at 540.

¹⁵⁷ *Id.* at 540. The second *Fox* opinion explained that the decision in the first *Fox* opinion to remand the NTSO and vacate the CBCO did not turn on whether § 202(h) imposed upon the FCC the heightened standard of “necessary in the public interest” or simply the traditional standard of “in the public interest.” *Id.* According to the court, “[i]t was clear the Commission failed to justify the NTSO and the CBCO Rules under either standard.” *Id.*

¹⁵⁸ William LaRue, *Owners to Get All Clear From FCC*, THE POST-STANDARD, Apr. 26, 2003, at E1.

¹⁵⁹ See Fed. Communications Comm’n, Transcript of Richmond En Banc Hearing on Broadcast Ownership, February 27, 2003 [hereinafter Richmond Hearing], at <http://www.fcc.gov/ownership/richmond022703.html>; Public Hearing on Media Ownership, Columbia University (excerpts available at <http://www.fcc.gov/ownership/documents.html>).

¹⁶⁰ As the following list shows, the twelve studies, most of which were released during the fall of 2002, covered a broad range of topics in broadcast policy: (1) FCCA Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000, (2) Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign, (3) Consumer Substitution Among Media, (4) Consolidation and Advertising Prices in Local Radio Markets, (5) Program Diversity and the Program Selection Process on Broadcast Network Television,

The FCC voted on the 2002 biennial report on June 2, 2003.¹⁶¹ In a 3-2 vote, the Commission adopted the report, which further deregulated the broadcast industry by weakening the ownership rules.¹⁶² The vote was split strictly along party lines.¹⁶³ The major changes to the television ownership rules included: (1) the elimination of the two local cross-ownership bans on common ownership of (a) daily newspapers and broadcast outlets and (b) radio and television outlets; (2) the revision of the local television multiple ownership rule, and; (3) the modification of the national television ownership cap from a 35 percent national audience reach

(6) A Theory of Broadcast Media Concentration and Commercial Advertising, (7) The Measurement of Local Television News and Public Affairs Programs, (8) Consumer Survey on Media Usage, (9) Radio Market Structure and Music Diversity, (10) On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales, (11) Radio Industry Review 2002: Trends in Ownership, Format, and Finance, and (12) Broadcast Television: Survivor in a Sea of Competition. The studies can be viewed in their entirety on the FCC's website. *See Media Ownership Working Group Studies*, at <http://www.fcc.gov/ownership/studies.html>.

¹⁶¹ The FCC received eight separate letters from Congress requesting that the vote be delayed. *See* Fed. Communications Comm'n, Chairman Michael K. Powell Responds to Members Regarding Upcoming Biennial Review of Media Ownership, at http://www.fcc.gov/commissioners/powell/chairmans_response (last visited April 1, 2004). One of the letters urged the FCC to "ensure that Congress and the public have a full opportunity to review and comment on any specific changes." Letter to Chairman Powell from Senators Snow, Allard, and Collins, March 19, 2003, at http://www.fcc.gov/commissioners/powell/chairmans_response/Snowe_March19.pdf. In addition, FCC Commissioner Adelstien warned his colleagues that "the FCC must proceed with caution Further media consolidation can't easily be undone. Once the toothpaste is out of the tube, it's going to be difficult, if not impossible to put it back in." Richmond Hearing, *supra* note 135, at 37.

¹⁶² Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286 (Aug. 5, 2003) [hereinafter the 2003 Order].

¹⁶³ Neil Roland, *FCC Expected to Loosen Media Ownership Today*, CHICAGO SUN-TIMES, June 2, 2003, at 63. As expected, the three Republican commissioners (Abernathy, Martin, and Chairman Powell) voted to relax the rules. *Id.* The two Democratic commissioners (Adelstien and Copps) dissented. *Id.*

FCC DEREGULATION OF MEDIA OWNERSHIP 921

limit to 45 percent. The Order containing the rule changes also restated the Commission's belief that scarcity (and apparently any regulation justified thereby) was an obsolete concept.¹⁶⁴

1. The New Cross-Ownership Rules

The 2003 Order replaced the newspaper-TV station cross-ownership ban and radio-TV cross-ownership ban (both of which prohibited cross-ownership in all local markets nationwide) with a complex set of cross-media limits based on market size.¹⁶⁵ These limits were calculated using a new metric, called the "Diversity Index," designed to "provide [the FCC's] media ownership framework with an empirical footing."¹⁶⁶ In the time since the 2003 Order was released, opponents of the new rules, and one United States Circuit Court of Appeals, have expressed doubt as to the reliability of the Diversity Index and any cross-media limits derived therefrom.¹⁶⁷

¹⁶⁴ See The 2003 Order, *supra* note 162, ¶ 52. The Order noted that, unlike the broadcast world in which the scarcity rationale evolved, the modern world is "characterized not by information scarcity, but by media abundance." *Id.*

¹⁶⁵ *Id.* at 46,312-26 ¶ 229-332. After an exhaustive review of the comments and data, the FCC concluded that neither cross-ownership ban was "necessary in the public interest." *Id.* at 46,312 ¶ 229. Various cross-media limits are prescribed, with perhaps the most significant change being that in large markets, defined as those having nine or more TV stations, the FCC imposed no cross-media restrictions at all. *Id.* at 46,325 ¶ 327.

¹⁶⁶ *Id.* at 46,316 ¶ 263. The desire to provide a more "empirical" foundation for the rules seems to be a direct response to the *Fox* court's requirement of a higher standard of rule justification. See *supra* notes 140-41 and accompanying text. Based on a consumer survey conducted by the FCC in which members of the public were asked what types of media they used to obtain local news, the Diversity Index (DI) attempts to give relative "weights" to different types of media (newspapers, broadcast television, radio, and the Internet) for the purposes of calculating the level of viewpoint diversity in a given market. *Id.* The science behind the DI comes from the Herfindahl-Hirschmann Index (HHI), used by anti-trust agencies to calculate the expected loss of competition in an industry from a proposed merger. *Id.* ¶ 267.

¹⁶⁷ See MARK COOPER, MEDIA OWNERSHIP AND DEMOCRACY IN THE DIGITAL INFORMATION AGE 191-212 (2003), available at <http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf>. Cooper's major attack on

2. *The New Local Television Ownership Rule*

The FCC also modified the Local Ownership Order at issue in *Sinclair*.¹⁶⁸ The new rule would allow common ownership of “two television broadcast stations in markets with 17 or fewer television stations, and up to three stations in markets with 18 or more television stations.”¹⁶⁹ Responding to the inconsistency pointed out by the *Sinclair* court that other FCC rules included non-broadcast media in the calculation of media voices in a given market, the FCC fashioned its new local television ownership limits on the premise that “media other than television broadcast stations contribute to viewpoint diversity in local markets.”¹⁷⁰

3. *The New NTSO Rule*

The NTSO rule was relaxed so that a broadcaster could own stations reaching 45 percent of the national audience.¹⁷¹ This change was made despite the *Fox* court’s belief that “the probability that the Commission will be able to justify retaining the NTSO Rule is sufficiently high”¹⁷² FCC Chairman Michael

the DI is that, in giving each media *type* a particular weight in terms of viewpoint diversity, it ignores the vast disparities in weights among different *firms* within each media type. *Id.* at 194. Cooper points out several odd results that obtain when the DI is applied to a given market. *Id.* For example, the DI concludes that the owner of the Dutchess Community College TV station (a small local college broadcaster) has more weight than the New York Times. *Id.* at 193. Moreover, the Third Circuit Court of Appeals used this same example during oral argument in a case dealing with the new ownership rules, *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. 2003), indicating that the Court is, in the words of the lead public-interest attorney in that case, “very concerned that the diversity index is flawed.” See Media Access Project, Report on Oral Argument in Media Ownership Court Challenge in *Prometheus Radio Project v. FCC* (last visited Apr. 1, 2004) at <http://www.mediaaccess.org/MAPOralArg02-12-04.pdf>.

¹⁶⁸ See The 2003 Order at 46,294 ¶ 81.

¹⁶⁹ *Id.* ¶ 83.

¹⁷⁰ See *id.* ¶ 82.

¹⁷¹ The 2003 Order at 46,328 ¶ 351.

¹⁷² *Fox*, 280 F.3d at 1049.

FCC DEREGULATION OF MEDIA OWNERSHIP 923

K. Powell explained this change in part by recognizing that national networks needed to own more stations if they were to be able to satisfy “the public interest benefit of keeping high quality programming on free over the air TV.”¹⁷³

After the vote, Chairman Powell attempted to explain his failure to heed the many calls for more time to consider the changes.¹⁷⁴ He argued that the *Fox* and *Sinclair* decisions gave the FCC no option but to modify the rules¹⁷⁵ and that only Congress had the power to maintain the rules as they were.¹⁷⁶

4. *Opposition in Congress and the Courts*

Members of Congress, some of them especially upset by the FCC vote, acted quickly to reverse the rule changes by adding amendments to the appropriations bill funding the FCC for 2004.¹⁷⁷ After the June 2 FCC vote, several networks and public-interest organizations brought separate challenges to the new rules in federal court, and these challenges were consolidated before the Third Circuit Court of Appeals.¹⁷⁸ On September 3, 2003, the court granted a stay order that prevented the FCC’s new rules from

¹⁷³ See Statement of Chairman Michael K. Powell, *2002 Biennial Regulatory Review*, at 10, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A3.doc (released July 2, 2003) [hereinafter Powell Statement].

¹⁷⁴ See *id.* at 1.

¹⁷⁵ *Id.* On the first page of his statement, Chairman Powell stressed the “irreducible” point that “[k]eeping the rules exactly as they are, as some so stridently suggest, was not a viable option. Without today’s surgery, the rules would assuredly have met a swift death.” *Id.* In all of his citations to the *Fox* decision, Chairman Powell only included the original citation, failing to note the modification the court later made to some of the more deregulatory-minded language in the original opinion. *Id.*

¹⁷⁶ *Id.* “Leaving things unaltered, regardless of changes in the competitive landscape, is a course that only Congress can legitimately chart.” *Id.*

¹⁷⁷ See *supra* notes 6-8 and accompanying text; see also The Consolidated Appropriations Act, 2004, H.R. 2673, 108th Cong. (2004). Congress was ultimately successful only in repealing the NTSO and setting a statutory national cap of 39 percent. *Id.*

¹⁷⁸ *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. 2003).

going into effect pending the outcome of the litigation.¹⁷⁹ A few weeks later, the Third Circuit denied the networks' request to transfer the venue of their case to the D.C. Circuit, which had taken a deregulatory position in the *Fox* and *Sinclair* decisions.¹⁸⁰ Although the networks made a strong case favoring the propriety of transfer,¹⁸¹ two of the three judges on the panel held that the June 2 FCC rule changes were not sufficiently close to the *Fox* and *Sinclair* decisions to warrant transfer to the court that had issued those decisions.¹⁸²

III. ANALYSIS

The FCC gave both legal and policy justifications for relaxing media ownership rules on June 2, 2003. The legal justification, simply put, was that the *Fox* and *Sinclair* decisions were a judicial ultimatum to the FCC that unless the rules were relaxed or rescinded the Court would itself vacate the rules.¹⁸³ The policy justifications centered around two general ideas: first, that the vast increase in sources of information resulting from the rise in popularity of cable and the internet rendered fears of oligopolistic media control baseless,¹⁸⁴ and second, that deregulation was required to maintain high-quality entertainment on free, over-the-air television.¹⁸⁵

¹⁷⁹ Order of September 3, 2003, *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. 2003).

¹⁸⁰ Order of September 16, 2003, *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. 2003).

¹⁸¹ *See id.* (Scirica, C.J., dissenting).

¹⁸² *Id.* at 4.

¹⁸³ *See* Powell Statement, *supra* note 173, at 1. According to Chairman Powell's view, "[w]ithout today's surgery, the rules would assuredly have met a swift death." *Id.*

¹⁸⁴ *See* The 2003 Order, *supra* note 3, ¶ 52 (finding that, unlike the broadcast marketplace in the past, today's communications market is "characterized not by information scarcity, but by media abundance").

¹⁸⁵ *See* The 2003 Order, *supra* note 3, at 46,329 ¶ 352 (raising the NTSO cap from 35 percent to 45 percent on the grounds that allowing broadcasters to reach larger audiences "will help networks compete more effectively with cable and [satellite] operators and will promote free, over-the-air television by

FCC DEREGULATION OF MEDIA OWNERSHIP 925

The legal justifications given by the FCC for their decision to deregulate broadcast media ownership on June 2 were unsound and reflect an inappropriately broad interpretation of the *Fox* and *Sinclair* decisions. As such, the FCC's decision to deregulate must be judged primarily on the Commission's policy choices. These choices fundamentally misjudge the implications of the changing media landscape and seriously miss the appropriate balance between the value of popular television entertainment and the maintenance of a wide diversity of viewpoints in public discourse. The June 2 rule changes risk serious harm to the public interest that the FCC is mandated to pursue in its exercise of rulemaking authority under both the Communications Act of 1934 and the Telecommunications Act of 1996. Specifically, it is likely that viewpoint diversity will suffer if the new rules deregulating broadcast ownership are allowed to take effect. Therefore, since the FCC did in fact have more authority to shape its rules than it chose to exercise, the Commission should assume responsibility for the folly of its decision.

A. Did the D.C. Court of Appeals Go Too Far?

One possible explanation of Congress' adverse reaction to the FCC's June 2 vote is that the D.C. Circuit Court of Appeals misread congressional intent when it interpreted the 1996 Act to create a presumption of invalidity of FCC rules. The FCC based its decision to deregulate to a large extent on this judicial gloss on the 1996 Act.¹⁸⁶ Perhaps the Congressional backlash to the FCC's decision is an expression that the court got it wrong.

On its face, section 202(h) merely requires the FCC to re-evaluate the rules every two years and modify or repeal those rules it determines are no longer in the public interest.¹⁸⁷ For the *Fox*

detering migration of expensive programming to cable networks").

¹⁸⁶ See *supra* note 24 and accompanying text.

¹⁸⁷ The Telecommunications Act of 1996 §202(h). "The Commission shall review . . . all of its ownership rules biennially . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.* The *Fox* opinion's interpretation of § 202(h) in

court to derive a presumption of invalidity from this review requirement, it could have analyzed the Congressional record surrounding the 1996 Act; however, in the *Fox* opinion there is a conspicuous lack of consideration of the legislative history relating to section 202(h).¹⁸⁸ The court merely reiterated several deregulatory provisions of the 1996 Act¹⁸⁹ and, without more, imputed to section 202(h) a “presumption in favor of repealing or modifying the ownership rules.”¹⁹⁰

There is evidence that motives other than deregulation for the public interest were behind section 202(h). For example, large corporate broadcasters, preferring deregulation for economic reasons, lobbied heavily to obtain favorable legislation.¹⁹¹ In

some respects gives the FCC *more* discretion to maintain its rules than is apparent on the face of the statute. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002). Whereas § 202(h) only mentions “competition” as a basis for determining whether a rule is “necessary in the public interest,” the *Fox* court held that “[i]n the context of the regulation of broadcasting, the public interest has historically embraced diversity (as well as localism), and nothing in section 202(h) signals a departure from that historic scope.” *Fox*, 280 F.3d at 1042.

¹⁸⁸ The *Fox* court *did* refer to the Congressional Record relevant to The Telecommunications Act of 1996 at one point in its opinion, but it was to refute the FCC’s argument that the NTSO’s 35 percent limit should be maintained in deference to the comments of the ranking member of the relevant House subcommittee. The court concluded that “[t]his legislative history is no basis whatever for the [FCC’s] decision.” *Fox*, 280 F.3d at 1043.

¹⁸⁹ *See Fox*, 280 F.3d at 1033.

¹⁹⁰ *Id.* at 1048.

¹⁹¹ *See* Bethany M. Burns, *Reforming the Newspaper Industry: Achieving First Amendment Goals of Diversity Through Structural Regulation*, 5 COMM. LAW CONCEPTS 61, 68 n.91 (1997) (discussing strong lobbying by large media corporations during deliberations on The Telecommunications Act of 1996); John McCain, *Telecom Ownership Needs To Be Diversified*, THE HILL, October 20, 1999, at 23. McCain, Republican Senator from Arizona, called the Telecommunications Act of 1996 a “lemon,” pointing out that during negotiations over the Act, “special interests had a seat at the table, but consumers, in whose name the bill was advanced, did not.” *Id.* Such lobbying efforts by Big Media have historically pervaded broadcast regulation. *See* ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR CONTROL OF U.S. BROADCASTING, 1928-1935 *passim* (1993).

FCC DEREGULATION OF MEDIA OWNERSHIP 927

addition, Professor Thomas Krattenmaker, a telecommunications law authority of some note,¹⁹² made statements at one of the FCC's public hearings that raise the possibility that another powerful interest group, the Telecommunications Bar, had an independent, vested interest in the biennial review provisions of the 1996 Act.¹⁹³

*B. The Fox and Sinclair Decisions Did Not Leave the FCC
With No Other Choice*

The *Fox* and *Sinclair* courts certainly contain language interpreting section 202(h) as charting a hasty deregulatory course for broadcast ownership.¹⁹⁴ The FCC's June 2 vote, however, went significantly beyond *Fox* and *Sinclair*. Not only did the 2003 Order modify rules that were not before the court in those cases, but the FCC's reliance on those cases to relax the rules at issue in *Fox* and

¹⁹² Mr. Krattenmaker, who once clerked on the Supreme Court for Justice Harlan, has had a long career in telecommunications law and policy spanning government work, private practice, and academia. See Richmond Hearing, *supra* note 159, at 37.

¹⁹³ Professor Krattenmaker, who moderated a public FCC media ownership hearing in Richmond, Virginia in February, 2003, noted the vast pecuniary gain the Telecommunications Bar would reap from § 202(h) of the 1996 Act. See Richmond Hearing, *supra* note 159, at 43-44. Discussing the biennial review process, and the work created for lawyers by each review, Krattenmaker stated, "[t]alk about the communication lawyers perpetual guaranteed income act. I join with all other members of the Federal Communications Bar Association in expressing our undying gratitude to Congress for having dug this very deep trough at which we may feed for years on end" *Id.* There is precedent for the ability of organized industry lawyers' associations to mold legislation to help their legal practices. See DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA*, 44-46 (discussing the influence of the nascent bankruptcy bar on federal bankruptcy legislation in the early twentieth century); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1939-40 (1998) (citing several sources for the proposition that the influence of the corporate bar "has made Delaware law indeterminate and litigation-oriented in order to generate demand for legal services").

¹⁹⁴ See *Fox*, 280 F.3d at 1044. "[T]he mandate of § 202(h) might better be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.') than to the wait-and-see attitude of the Commission." *Id.*

Sinclair ignored several portions of those opinions that left the FCC the option to both keep the rules and satisfy the *Fox* court's requirement of more "analytical or empirical" evidence to keep them.¹⁹⁵ The June 2 vote relaxed both the newspaper-TV and radio-TV cross ownership bans, yet neither of these rules was at issue in *Fox* and *Sinclair*.¹⁹⁶ Of the three rules considered in the *Fox* and *Sinclair* cases, only one, the CBCO, was vacated; the other two were simply remanded for further consideration.¹⁹⁷ Moreover, the Local Ownership Order at issue in *Sinclair* was remanded on narrow grounds; all but one of the arguments against that rule were resolved in favor of maintaining it.¹⁹⁸ These facts seem to belie Chairman Powell's assertions that the rules as previously written would "assuredly have met a swift death" in the courts.¹⁹⁹

Contrary to Chairman Powell's reading of *Fox* and *Sinclair* to create a vice-like grip on the FCC's rulemaking discretion, a more realistic interpretation of those opinions might have led the Commission merely to conclude that section 202(h) of the 1996 Act raised the standard of FCC justification and that a better factual predicate for retention of the rules would be required. The two dissenting members of the FCC adopted this view in their statements accompanying the vote.²⁰⁰ Commissioner Copps read the *Fox* and *Sinclair* opinions to require better justifications, not

¹⁹⁵ *Id.* at 1048.

¹⁹⁶ See The 2003 Order, *supra* note 3, at 46,312-26 ¶ 229-332.

¹⁹⁷ See *supra* notes 130 (remanding the NTSO), 135 (vacating the CBCO), 151 (remanding the LOO) and accompanying text.

¹⁹⁸ See *supra* note 152 and accompanying text. As discussed *supra*, the LOO was remanded to the FCC on the sole ground that an earlier FCC rule defined the term "media voices" more broadly than did the LOO. *Id.* In repealing the LOO, the FCC never considered the possibility of modifying the earlier rule's definition of "voices" to be consistent with the LOO, an option that would have equally answered the *Sinclair* court's objection to that rule.

¹⁹⁹ See Powell Statement, *supra* note 173, at 1.

²⁰⁰ See Statement of Commissioner Michael J. Copps, Dissenting, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A5.doc [hereinafter Copps statement]; Statement of Commissioner Jonathan S. Adelstien, Dissenting, at 3, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A7.doc [hereinafter Adelstien statement].

FCC DEREGULATION OF MEDIA OWNERSHIP 929

outright deregulation.²⁰¹ Copps believed that the factual record amassed by the FCC adequately justified maintaining the rules under the two decisions.²⁰² Commissioner Adelstien echoed these sentiments in his statement.²⁰³ The Third Circuit Court of Appeals adopted this more reasonable interpretation of the *Fox* and *Sinclair* opinions as well.²⁰⁴

Moreover, to the extent the FCC's decision was based on a view that the scarcity doctrine no longer justifies ownership regulations, the *Fox* and *Sinclair* decisions certainly did not remove any of the long-standing authority of the FCC to promulgate rules in the public interest. To do so would have been to ignore the consistent holdings of the Supreme Court in *NBC* and its progeny that the FCC has broad authority to promulgate rules in the exercise of its special expertise on the public interest as it applies to broadcasting.²⁰⁵ As both the *Fox* and *Sinclair* opinions recognized, the Supreme Court has never indicated that the FCC's authority in this realm has diminished, despite the many calls from Big Media that technological advances have rendered the scarcity doctrine obsolete.²⁰⁶

²⁰¹ See Copps statement, *supra* note 200, at 8. “[Under *Fox* and *Sinclair*] we are obligated to present reasoned rationales with more compelling explanations than we have thus far presented. But we are *not* instructed to radically restructure the rules.” (emphasis in original). *Id.*

²⁰² *Id.* “The evidence we have amassed points to the need for maintaining existing media concentration protections.” *Id.*

²⁰³ See Adelstien statement, *supra* note 200, at 3. “The *Fox* and *Sinclair* courts sent the rules back to us for justification, not for evisceration.” *Id.*

²⁰⁴ Order of September 16, 2003, *Prometheus Radio Project v. FCC*, No. 03-3388 at 4-5 (3d Cir. 2003). “The D.C. Circuit Court simply instructed the FCC to justify its rules on media ownership with an eye to the public interest.” *Id.*

²⁰⁵ See *supra* notes 60, 63 and accompanying text.

²⁰⁶ See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002), *modified by* 293 F.3d 537 (2002). The court rejected Fox's First Amendment argument that the scarcity doctrine should no longer apply because of new technologies, holding that “[t]he Supreme Court has already heard the empirical case against [the scarcity] rationale and still ‘declined to question its continuing validity.’” *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994)); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 169 (D.C. Cir. 2002) (rejecting Sinclair's argument that the scarcity doctrine should no

Finally, even assuming that Chairman Powell's reading of *Fox* and *Sinclair* is tenable, his belief that maintaining the rules was not an option after those decisions assumes that every possible reviewing court would agree with the opinion of the D.C. Court of Appeals. But the Third Circuit made it clear, in refusing to transfer the venue of the challenges to the FCC's rule changes, that the D.C. Circuit did not have exclusive jurisdiction over such challenges.²⁰⁷

C. *Sinclair on the Diversity Prong of The Public Interest*

In addition to those aspects of the *Fox* and *Sinclair* opinions suggesting that those opinions did not significantly constrain the FCC's rulemaking authority, one other idea discussed in *Sinclair* concerning diversity and its relationship to the public interest merits attention.²⁰⁸ It will, however, be helpful to briefly review the place of diversity in the hierarchy of traditional notions of the

longer apply on the grounds that "nothing in the subsequent decisions of the [Supreme] Court has called the constitutional validity of the [NCCB] doctrine into question." (quoting *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998)). Other sections of the *Fox* and *Sinclair* opinions do not take as deferential a stance to Supreme Court precedent. To the extent that *Fox* and *Sinclair* require the FCC to provide more of an empirical or analytical justification of their rules, they are ignoring the Supreme Court's observation in *NCCB* that "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured . . ." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796-97 (1978). As is characteristic of many public goods, the public benefits derived from diverse ownership of the tools of mass communication simply cannot be measured to the same degree of accuracy as can the economic benefits of consolidation. If *Fox* and *Sinclair* indeed require this degree of accuracy, the D.C. Court of Appeals is simply asking the impossible. Such a requirement would be tantamount to judicial appropriation of power traditionally held by the FCC.

²⁰⁷ Order of September 16, 2003, *Prometheus Radio Project v. FCC*, No. 03-3388 at 5 (3d Cir. 2003). "[I]f Congress had meant to give the D.C. Circuit Court exclusive jurisdiction over such appeals, it would have explicitly done so . . ." *Id.* The Third Circuit also pointed out that, even if the D.C. Circuit Court were to assume jurisdiction over the current case, a different panel of judges than those who issued the *Fox* and *Sinclair* decisions would hear it. *Id.*

²⁰⁸ *Sinclair*, 284 F.3d at 161.

FCC DEREGULATION OF MEDIA OWNERSHIP 931

public interest.

Debates over the meaning of the public interest have always swirled around two main concepts: competition (the undue concentration of economic power) and diversity.²⁰⁹ This note contends that the public interest in the broadcasting context cannot be adequately protected by rules based on competition (i.e. antitrust) grounds alone. Rather, to protect viewpoint diversity, a greater degree of regulation is required than merely that amount necessary to ensure against undue concentrations of economic power.²¹⁰ The following analysis of a portion of the *Sinclair* opinion discussing diversity highlights the need for greater

²⁰⁹ See *supra* note 54 and accompanying text (discussing competition and diversity in broadcast regulation). The FCC has traditionally viewed “diversity” as being comprised of four distinct categories. See In the matter of 2002 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, 17 F.C.C. Rcd 18503, 18516 (2002). These four categories are (1) viewpoint diversity, (2) outlet diversity, (3) source diversity, and (4) program diversity. Viewpoint diversity “ensures that the public has access to a wide range of diverse and antagonistic opinions and interpretations,” and “has been the touchstone of the Commission’s ownership rules and policies.” *Id.* Outlet diversity is “the control of media outlets by a variety of independent owners.” *Id.* Source diversity “ensures that the public has access to information and programming from multiple content providers” *Id.* Program diversity refers to “a variety of programming formats and content” *Id.*

²¹⁰ See Brenner, *supra* note 49, at 1018-19. Brenner refers to this added degree of scrutiny specific to media mergers as “antitrust-plus.” *Id.* Robert Pitofsky, a former chairman of the Federal Trade Commission, articulated the rationale for antitrust-plus scrutiny in broadcasting. Testifying before the Senate Judiciary Subcommittee on Antitrust, Monopolies, and Business Rights, he said, “Concern about concentrated economic power should be given added weight where the merger (or a wave of mergers) concerns companies involved in the communication of ideas. In those industries, there is more at stake than high prices or low quality to consumers - there is a more fundamental issue of avoiding centralized control over access to the marketplace of ideas.” *Id.* at n.64. In the 2003 Order, the FCC partially accepted this view that economic-based regulations would not in all cases protect viewpoint diversity. See the 2003 Order, *supra* note 3, at 46,289 ¶ 35 (noting that “our analysis of the record leads us to conclude that preserving competitive markets will not, in all cases, adequately protect viewpoint diversity.”). The FCC, however, incorrectly limited this conclusion to “smaller markets.” *Id.*

government regulation to protect this interest.²¹¹

The “public convenience interest, convenience, and necessity” has traditionally been a catch-all phrase that has been used to validate a wide range of regulatory philosophies.²¹² During the first fifty years of broadcast regulation, the FRC and, later, the FCC determined that satisfying the public interest required both behavioral and structural regulation.²¹³ From the late 1970s until the present, changing notions of the public interest have led to a virtual abandonment of behavioral regulations and have left a mix of market control and an increasingly impotent regime of structural regulations.²¹⁴ This progressive deregulation of broadcasting is the product of a laissez-faire perspective that the market is a better provider for the public interest in most cases than a rule regime maintained by government.²¹⁵ Because the public interest clearly

²¹¹ This statement assumes that “competition” as applied to public interest analysis means solely economic competition - the *Fox* and *Sinclair* decisions made this assumption. See *Fox*, 280 F.3d at 1041 (equating “competition” concerns with concerns of “undue market power”); *Sinclair*, 284 F.3d at 160 (referring to the FCC’s justifications on grounds of “economic competition”). A non-economic conception of competition, that is, fair competition in the “marketplace of ideas,” is roughly equivalent to the concept of viewpoint diversity. See Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 DET. C.L. REV. 671 (2003) (equating “the FCC’s traditional concern with competition in the marketplace of ideas and information” with “diversity”). The remainder of this note will use the term “competition” to refer to solely economic competition, while the term “viewpoint diversity” will encompass any form of non-economic competition. Suffice it to say that this author believes that a lack of clarity and common understanding in the use of such terms as “competition” and “diversity” is a major factor in the obscurity of the underlying interests involved.

²¹² See *supra* note 45 and accompanying text (discussing the broad “public interest” standard). An early commentator may have been exercising a great deal of precognition when he stated, “[the public interest means] about as little as any phrase that the drafters of the [Radio] Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.” Fowler, *supra* note 78, at 214-215 (quoting Louis Caldwell, *The Standard of Public Interest, Convenience, or Necessity as Used in The Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930)).

²¹³ See *supra* Part I.C-D.

²¹⁴ See *supra* Part I.E-F.

²¹⁵ See, e.g., Brenner & Fowler, *supra* note 93, at 210.

FCC DEREGULATION OF MEDIA OWNERSHIP 933

means different things to different people, however, a discussion on the merits of these competing philosophies is meaningless unless a more precise definition (or definitions) of the public interest is identified.²¹⁶

The *Sinclair* opinion recognized this confusion and, in bringing it to light, suggested a course by which the FCC could have adequately justified the remanded rules. The court pointed out a miscommunication between the parties concerning their respective definitions of “diversity.” The court noted that the FCC’s arguments in support of the Local Ownership Order focused largely on “*viewpoint* diversity,” defined as “station owners bringing unique points of view to the selection of material they air.”²¹⁷ The networks, on the other hand, argued against the rule on grounds of “*programming* diversity,” which the court defined as “the number of different types of programs on the air, regardless of whether they reflect differing editorial viewpoints.”²¹⁸ This distinction complicated the debate over the Local Ownership Order because the broadcasters argued that the rule was irrational as a means to promote “programming diversity,” while the FCC defended the rule as a rational means to protect “viewpoint diversity.”²¹⁹ In highlighting the different definitions of “diversity” utilized by the parties, the *Sinclair* opinion also stated that broadcaster Sinclair’s arguments “overstate[d] the burden” on the FCC to justify the rule.²²⁰ The court recognized that it could not require the FCC to predict harms to viewpoint diversity with greater particularity or precision without being unfaithful to current Supreme Court scarcity doctrine.²²¹ Dissenting in the *Sinclair* court’s judgment, Judge Sentelle reiterated the conflicting

²¹⁶ Compare *id.* (advocating a market-controlled broadcast policy because “[t]he public’s interest, then, defines the public interest”) with Cass R. Sunstien, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 501 (1999) (“There is a large difference between the public interest and what interests the public.”).

²¹⁷ *Sinclair*, 284 F.3d at 161 (emphasis added).

²¹⁸ *Id.* (emphasis added).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 161 (rejecting broadcaster’s argument that changes in the media market place a higher burden of justification on the FCC).

definitions of diversity relied upon by the parties and suggested that, in order to maintain the rule, “the Commission should define its diversity goal, and in doing so explain the distinctions (and interaction) between programming diversity and viewpoint diversity, rather than simply quoting boilerplate on the ‘elusiveness’ of diversity.”²²²

These discussions further suggest that, had a majority of the FCC been so inclined, the Commission could have adequately justified the NTSO rule and the Local Ownership Order following remand by the *Fox* and *Sinclair* courts, not to mention those rules which were not before the court in those cases, by emphasizing the primary importance of viewpoint diversity and stressing the need for strong ownership rules to preserve viewpoint diversity and the benefits it bestows upon public discourse in our nation.

D. Further Media Ownership Deregulation Is Dangerous and Unwise Policy

The foregoing arguments reveal the shaky foundation on which the FCC based its legal justification for the requirement of further media deregulation. The FCC continues to hold broad powers to promulgate broadcast ownership rules in the public interest. As such, the FCC’s decision to relax its rules on June 2, 2003 was not a product of external judicial coercion, but rather a discretionary choice not to exercise such power.

That is not to say the FCC’s decision was illegitimate; just because the FCC once thought rules were necessary in the public interest does not prevent it from eventually changing its mind.²²³ In this case, however, the voluntary decision by the FCC to deregulate dangerously fails to provide for the public interest, particularly the public’s interest in viewpoint diversity. Even if greater concentration of broadcast ownership is, as the FCC maintains, required to maintain the “high” quality of current over-

²²² *Sinclair*, 284 F.3d 148, 170 (D.C. Cir. 2002) (Sentelle, J., dissenting).

²²³ See *Pinellas Broad. Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir. 1956). “[A] Commission’s view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes.” *Id.*

FCC DEREGULATION OF MEDIA OWNERSHIP 935

the-air broadcasting,²²⁴ arguments to that effect fail to give due weight to the potential effects of further deregulation on viewpoint diversity. There may indeed be some public benefits gained from allowing media corporations to own more television stations.²²⁵ These potential benefits, however, do not justify the risks involved and, in any event, sufficient safeguards are not in place to effectively guard against the public harms consolidation is likely to cause. The fact that these harms are difficult to measure makes them no less dangerous.²²⁶ Indeed, it may make them more so.

*1. The New Rules Will Lead to Further Consolidation of
Broadcast Ownership*

There is strong evidence that the new rules adopted by the FCC on June 2, which raise the number of television stations a single company can own locally and completely eliminate the corresponding national cap, will lead to further consolidation of broadcasting power in the hands of fewer owners. First, deregulation in other industries often has the effect of consolidation.²²⁷ Second, media commentators have historically

²²⁴ Reference to the current state of broadcast television quality as “high” reflects the operating ideology of the FCC and the networks (and some viewers, no doubt), and in no way reflects the personal opinion of the author.

²²⁵ See Brenner, *supra* note 49, at 1026-27. Brenner gives some examples of benefits he thinks might flow from allowing media companies to grow larger, including the ability to: (1) “finance start-up content activity that smaller entities cannot afford”; (2) “combat government censorship and support First Amendment freedoms,” and; (3) “expand speech diversity” by expanding into niche markets. *Id.*

²²⁶ See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 796-97 (1978) (“Diversity and its effects are . . . elusive concepts, not easily defined let alone measured. . .”). It is not hard to understand why it is difficult to measure and report a *lack* of viewpoint diversity in broadcasting. In addition to all the common problems generally involved in proving a negative, in this instance one so inclined has the added burdens of identifying voices that are not being heard and then making the result of this effort itself heard above the din of commercial media.

²²⁷ See Alison Harcourt, *The European Commission and Regulation of the Media Industry*, 16 *CARDOZO ARTS & ENT L.J.* 425, 429-30 (1998) (discussing media deregulation causing ownership consolidation in the European Union);

noted that in the search for larger audiences, media companies naturally expand.²²⁸ Third, the Telecommunications Act of 1996, which called for an immediate and severe deregulation of the radio industry, resulted in an “orgy of consolidation” in the three years following enactment.²²⁹ Less quantitative, but perhaps equally probative, is the fact that the majority of the petitioners in the lawsuits challenging the FCC regulations under the 1996 Act are large corporations already possessing a significant number of stations and seeking to possess even more.²³⁰

Richard D. Cudahy, *The FERC's Policy on Electric Mergers: A Bit of Perspective*, 18 ENERGY L. J. 113 (1997) (in energy provider markets); PAUL S. DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 146-49 (1987) (in the airline industry).

²²⁸ See, e.g., ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS Vol. II 617 (1947) (concluding that, due to economic pressures to expand, “bigness in the press is here to stay, whether we like it or not”). Chafee’s arguments were directed at the radio industry—then the dominant form of broadcasting. They apply with equal force, however, to television today.

²²⁹ Baker, *supra* note 53, at 868 (citing Ronald J. Krotoszynski, Jr. & Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 815 n.7 (2000)). Baker gives as an example the statistic that “at the time of The Telecommunications Act of 1996, the largest radio ownership group consisted of less than forty stations. By September 2000, a single owner held over 1,000 of the country’s 12,600 stations.” *Id.* at n.154 (citations omitted); see also George Williams & Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* (2002) at 3, at hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc. This FCC-sponsored study found that, between March 1996 and March 2002, there was an increase in the number of commercial radio stations of 5.4 percent. *Id.* During the same period, the number of radio owners declined by 34 percent. *Id.*

²³⁰ For example, a brief search on an internet financial information database reveals the vast holdings of the two main petitioners in the *Fox* and *Sinclair* cases. “Fox Television Stations owns and operates 35 full-power stations located in nine designated market areas. Fox has 188 affiliated stations, including 25 full-power television stations that are owned by subsidiaries of the Company.” Yahoo! Finance, available at <http://finance.yahoo.com/q/pr?s=FOX> (last visited April 1, 2004); “Sinclair’s television group includes 20 FOX, 19 WB, 6 UPN, 8 ABC, 3 CBS, 4 NBC affiliates and 2 independent stations and reaches approximately 24% of all U.S. television households.” Sinclair homepage, available at <http://www.sbgi.net/business/television.shtml> (last visited April 1,

FCC DEREGULATION OF MEDIA OWNERSHIP 937

This is not to say that the FCC's deregulatory mission should be halted just because it will result in consolidation. Indeed, the FCC emphatically pointed to certain results from its research that indicated that more consolidation might actually benefit the public interest.²³¹ Other commentators have also suggested that certain facets of the public interest, such as program diversity, are enhanced by allowing large media corporations to amass greater broadcasting capability.²³²

These possible benefits, however, must be weighed against the risks deregulation poses to viewpoint diversity. Commentators have pointed to several potential harms media consolidation may engender.²³³ In one way or another, all of the foregoing risks flow from decreased viewpoint diversity, regardless of whether the

2004).

²³¹ See Powell statement, *supra* note 173, at 9 (“We found the national cap restrains the networks from serving additional communities with more local news and public affairs programming.”); Editorial, *The ‘Friends’ Factor at the FCC*, ST. LOUIS POST-DISPATCH, Sept. 18, 2003, at 25 (paraphrasing FCC chairman Michael Powell’s warning that, unless the national ownership cap was lifted, big networks like NBC might not be able to continue to afford the high production costs of sit-coms like *Friends* and other shows of “that quality”). *Id.*

²³² See Brenner, *supra* note 49, at 1026-27 (giving several examples of increased “diversity” that may occur if companies are allowed to grow larger).

²³³ The thesis of this note is that viewpoint diversity should be an overriding interest in broadcast regulation regardless of the benefits media consolidation may bring. Therefore, detailed criticism of the merits of deregulation offered by its proponents is beyond the scope of this note. Briefly, however, the following arguments might be made: (1) The FCC concluded that the NTSO cap should be raised because commonly-programmed (i.e. network-affiliated) stations actually produce more local news programming than independent stations. See the 2003 Order, *supra* note 3, at 46,339 ¶ 425. More local news, however, does not necessarily mean better local news, especially if the increased “local” news is dictated by management far away, thus removing the true “local” nature of the viewpoints presented; (2) As to the list of benefits proffered by Brenner (*supra* note 225), he mentions the increased ability large corporations have to “combat government censorship and support First Amendment freedoms.” Brenner, *supra* note 49, at 1026-27. This benefit might shine less brightly when held next to the potential glare of corporate censorship; (3) As for Chairman Powell’s threats that the failure to allow consolidation might result in a loss of popular free, over-the-air situation comedy, the risks of popular revolution if *Friends* goes off the air are left to the reader to calculate.

viewpoints are presented as news, editorial, or entertainment programs.

There are several problems associated with concentrated corporate control of news production.²³⁴ First, concentration of media power poses a risk of deterioration of the overall quality of news coverage.²³⁵ Second, consolidation risks the important role a private media plays as a “watchdog” of government.²³⁶ Third, a system of few owners of media outlets makes it easier for the powerful to influence them all.²³⁷ Fourth, to the extent that large media corporations have non-media property interests, vesting them with greatly disproportionate media control “creates opportunities and incentives to mold content to serve the firm’s overall corporate interests.”²³⁸ Finally, evidence from the deregulation of radio in the 1990s suggests that further consolidation in television may also result in decreased program originality in favor of profit-maximizing programming

²³⁴ Some of the factors militating against consolidation discussed herein are treated more comprehensively in Baker, *supra* note 53, 902-13.

²³⁵ See Richmond Hearing, *supra* note 159, at 21 (citing evidence that past consolidation has led to “far less coverage of news and public interest programming”). Some have argued that news provided by large for-profit ventures has already become so dominant in society that it is mistakenly perceived today to be “objective.” Brenner, *supra* note 49, at 1029 n.119 (citing BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 216-18 (4th ed. 1992)).

²³⁶ Baker, *supra* note 53, at 906 n.275 (discussing the benefits of dispersed media power in regard to the “Fourth Estate” function of the press). For a general discussion of this “watchdog” role of a free press, see Justice Potter Stewart, *Or of the Press*, 26 *HASTINGS L. J.* 631, 634 (1975).

²³⁷ Baker, *supra* note 53, at 907 (“Control or corruption is likely to be easier the fewer media entities [those with political or economic power] need to control.”). Baker also discusses the risks of external media co-option when large media conglomerates also have significant non-media holdings. *Id.* at 908. Powerful outside groups, both governmental and private, may then exert economic pressure on these non-media businesses in order to control editorial decisions in the broadcast divisions. *Id.* (giving several historical examples of such coercion).

²³⁸ See Baker, *supra* note 53, at 909 (discussing reports that Rupert Murdoch promised then-president Jimmy Carter the support of Murdoch’s New York Post in exchange for favorable licensing decisions for an airline Murdoch was trying to start).

FCC DEREGULATION OF MEDIA OWNERSHIP 939

strategies.²³⁹

In addition to these specific risks, it is simply a legitimate goal in a democratic society to disperse “the organs of public opinion formation” in a way that gives all groups a “real” share of communicative power.²⁴⁰ It was these concerns that motivated the FCC in years past to impose strong national ownership restrictions.²⁴¹ These “organs of public opinion formation” are not limited to news and editorial programs. Some commentators have argued that even programs commonly viewed as entertainment carry a social message important to public debate.²⁴² What

²³⁹ See Richmond Hearing, *supra* note 159, at 21 (citing a multi-year study by a group called the Future of Music Coalition which found a “homogenization of music that gets air play” and concluded that “radio seems to serve now more to advertise the products of vertically integrated conglomerates than to entertain Americans with the best and most original programming”).

²⁴⁰ Baker, *supra* note 53, at 905-06 (“Dispersal of media power, like dispersal of voting power, is simply a key attribute of a system considered to be democratic.”). *Id.*

²⁴¹ See *id.* at 906; see also *Fox*, 280 F.3d 1027, 1034 (stating purpose of NTSO rule as being “to promote diversification of ownership in order to maximize diversification of program and service viewpoints” and “to prevent any undue concentration of economic power”).

²⁴² See Fiss, *supra* note 16, at 1411 (1986). “The viewpoint of an organization such as CBS . . . is not confined to the announced ‘Editorial Message,’ but extends to the broadcast of *Love Boat* as well. In the ordinary show or commercial a view of the world is projected, which in turn tends to define and order our options and choices.” *Id.* This view is echoed by Mark Cooper, the Director of Research for the Consumer Federation of America. Cooper relates an interview with FCC Chairman Powell in which Powell derided the view that entertainment could have a political component. See COOPER, *supra* note 4, at 17. In that interview Chairman Powell stated that “the overwhelming amount of programming we watch is entertainment, and I don’t know what it means for the owner to have a political bias. When I’m watching *Temptation Island*, do I see little hallmarks of Rupert Murdoch?” COOPER, *supra* note 4, at 17 (citing Davidson, Paul, *FCC Could Alter Rules Affecting TV, Telephone, Airwaves*, USA Today, February 6, 2002). In response, Cooper notes that “[t]he decision of what is entertaining and what values are promoted in society is clearly embodied in the commercial decision underlying “*Temptation Island*.” It stands for the proposition that paying people money to put their relationships in jeopardy under a voyeuristic lens constitutes good programming.” COOPER, *supra* note 4, at 17.

broadcast deregulation offers is the concentration of this power to convey ideas and opinions, to “select, to edit, and to choose the methods, manner and emphasis of presentation,” into a smaller group of large media conglomerates.²⁴³ The FCC’s decision to deregulate, therefore, indirectly places a large portion of the public marketplace of ideas into the hands of corporate entities whose primary interest in providing profitable popular entertainment is far removed from those interests identified by the Supreme Court as important to a democratic society.²⁴⁴ Under their control, a narrowing range of public discourse is likely to result.²⁴⁵ John Stuart Mill, discussing the importance of debate in a free society, noted:

Unless opinions favorable to democracy and to aristocracy, to property and to equality, to co-operation and to competition, to luxury and to abstinence, to sociality and individuality, to liberty and discipline, and all the other standing antagonisms of practical life, are expressed with equal freedom and enforced and defended with equal talent and energy, there is no chance of both elements obtaining their due; one scale is sure to go up, and the other down.²⁴⁶

²⁴³ FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775, 785 (1978) (listing some of the powers attendant upon ownership of television stations).

²⁴⁴ See *supra* notes 17-19 and accompanying text (citing relevant Supreme Court cases).

²⁴⁵ COOPER, *supra* note 4, at 21. Cooper discusses the ability of the free market to provide popular entertainment relative to its ability to provide viewpoint diversity. *Id.* While the marketplace is “splendid” for providing goods and services such as entertainment, it fails to produce “the kind of debate that constantly renews the capacity of a people for self-determination.” *Id.* (citing Owen M. Fiss, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Why the State?*, 100 HARV. L. REV. 781 (1987)). The FCC’s current position elevates the kind of entertainment provided under a marketplace model of regulation over the “[u]nique perspectives provided by different institutions.” *Id.* at 20. It caters to the public’s demand for entertainment rather than “the net increase in consumer welfare from having many competing news sources and editorial voices.” *Id.* (citing Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 n.140 (2001)).

²⁴⁶ See Mill, *supra* note 1, at 45-46.

FCC DEREGULATION OF MEDIA OWNERSHIP 941

It would be absurd to suggest either that contemporary views on these “standing antagonisms of practical life” are not formed, at least in part, by what we watch on television or that the views of the broadcasters who decide what we see (and what we do not) on television are not a factor which bears upon what they choose to broadcast.²⁴⁷ These two realities alone advise an extraordinary degree of caution in governmental decisions on which institutions should hold the power of the mass media.²⁴⁸

Finally, the FCC’s assurances that these threats to viewpoint diversity are irrational because of the “abundance” of voices populating today’s media marketplace are misleading.²⁴⁹ Dissenting from the June 2 vote, FCC Commissioner Copps pointed out that an increase in the raw number of channels does not serve the end of viewpoint diversity if the most widely-used of these new channels are owned and programmed by the same handful of owners who currently dominate broadcasting.²⁵⁰

²⁴⁷ See COOPER, *supra* note 4, at 17-18 (citing examples of broadcaster exclusion of certain disfavored political viewpoints from their broadcasts).

²⁴⁸ See the 2003 Order, *supra* note 3, at 46,319 ¶ 281. This point takes its significance from the fact that television is the primary source by which most Americans obtain their news on current issues. *Id.* Viewpoint diversity would be much easier to come by if diverse speakers had equal access to the public’s attention. See also Fiss, *supra* note 16, at 1410-1413 (discussing the differences between the modern, mass-media-dominated marketplace of ideas, and that of the past, where virtually every speaker could gain access to a public forum).

²⁴⁹ The FCC used the argument that increasing broadcast capacity renders the scarcity doctrine obsolete both to repudiate the fairness doctrine in 1985, see *supra* note 99, and to justify the June 2 deregulation, see *supra* note 164. The Supreme Court, however, has yet to repudiate the doctrine. See *supra* note 206.

²⁵⁰ See Copps statement, *supra* note 200, at 3. Commenting on the majority’s argument that the scarcity rationale was rendered obsolete by the arrival of cable and the internet, Copps stated:

What about the vaunted 500-channel universe of cable TV saving us? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable systems. More channels are great. But when they’re all owned by the same people, cable doesn’t protect localism, editorial diversity, or competition. And those who believe the Internet alone will save us from this fate should realize that the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers, and cable. So, how

2. *There Has Not Been Sufficient Preparation for Dealing with the Risks Involved*

The foregoing arguments show that there are both benefits to be realized and potential dangers to be avoided in a deregulated media industry. Even if the FCC's elevation of entertainment over diversity did not misjudge the hierarchy of interests appropriate in a democracy, it would be foolish policy to plunge into deregulation without establishing at least minimal safeguards of viewpoint diversity. Several of the dangers mentioned above relate to possible deleterious effects of consolidation on the role of the media in investigative journalism.²⁵¹ A large media company with an investigative reporting division relatively free from corporate control may pose less of a risk to this function. This independence might be granted by the corporation in exchange for a preference from the FCC in licensing decisions.²⁵² Of course, the funding for any such investigative division would have to be either continuously supplied by the parent corporation or subsidized by the government. Investigative reporters will not investigate too hard if what they find will result in the loss of their jobs or even a reduction in their salaries.²⁵³ The government might use the

does it promote localism, diversity and competition to allow, as we will allow by our action today, more media concentration in the more than 175 markets with over 90 percent of the American population?

Id.

²⁵¹ See *supra* notes 233-37 and accompanying text.

²⁵² See Fowler & Brenner, *supra* note 93, at 217-18 (discussing the FCC licensing practice in the past of considering to what extent management of a television station will be directly supervised by its owners). Whereas the FCC used to look at centralized control by ownership as an indicator of viewpoint diversity, the changed circumstances of media ownership today might require the opposite; viewpoint diversity might be best advanced by requiring station owners (frequently large national and international corporations) to let local station management retain editorial control of the station.

²⁵³ The effects of the ability to terminate or otherwise determine compensation on the performance of one's job are almost too obvious to need citation. See *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (noting that "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of

FCC DEREGULATION OF MEDIA OWNERSHIP 943

revenue supplied by spectrum license auctions to subsidize these functions (or to fund independent, non-commercial, non-governmental investigative journalism entities).²⁵⁴ Until these or other preventative measures have been discussed and provided for, however, there is no compelling reason to risk these dangers.

E. The Next Step

It seems clear that the FCC's refusal to exercise its broad discretion to maintain broadcast ownership rules can be traced to a laissez-faire perspective among a majority of the Commission. Commissioner Abernathy, in her statement explaining her decision to support the deregulatory June 2 decision, gave other reasons for her refusal to support the existing regulations.²⁵⁵ She stated that, while she recognized that those opposing deregulation had valid arguments,²⁵⁶ she was unwilling to oppose deregulation based on unsubstantiated "fears" that dangerous levels of media consolidation would result.²⁵⁷ This low valuation of the threat to viewpoint diversity posed by consolidation is consistent with the view that regulation of broadcast ownership should be placed to a

independence against the latter's will"); Mill, *supra* note 1, at 31 ("[M]en might as well be imprisoned as excluded from the means of earning their bread.").

²⁵⁴ See Fowler & Brenner, *supra* note 78, at 242-44 (discussing spectrum auctions as a means of awarding broadcast licenses in a deregulated media environment); COOPER, *supra* note 4, at 19 (including "government subsidized noncommercial media" [i.e. public broadcasting] in a suggested system of diverse media organizations).

²⁵⁵ See Statement of Commissioner Kathleen Q. Abernathy (June 2, 2003), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A4.doc.

²⁵⁶ *Id.* at 4 (stating that "we should recognize that these are in fact issues on which reasonable people may disagree," referring to differing viewpoints on what level of regulation is required).

²⁵⁷ *Id.* Commissioner Abernathy boldly asserted that "[the FCC's] decisions were based on facts rather than fears," and that she was not very concerned of the deleterious effects of deregulation on viewpoint diversity because, "it is simply not possible to monopolize the flow of information in today's world. Indeed, the fall of Communism in the 1980's and of military dictatorships in the 1990's shows that diverse viewpoints cannot be suppressed even by authoritarian governments, much less by private media companies." *Id.*

large extent in the hands of a free market.²⁵⁸

But limiting government involvement in broadcast regulation to merely preventing levels of concentration that violate antitrust concerns will not provide the level of viewpoint diversity to which the public is entitled. Therefore, because Commissioner Abernathy's priorities currently govern the FCC's thinking, redress of any concerns over the threat deregulation poses must be sought elsewhere.

It is possible for citizens to petition Congress, and indeed, congressional opposition to the June 2 vote was motivated at least in part by the unprecedented outcry from the public.²⁵⁹ The latest developments, however, seem to indicate that Congress will largely fail in its resolve to fully reverse the new FCC rules.²⁶⁰ Nevertheless, the public may yet find redress in the courts. In upholding the Local Ownership Order against a challenge on First

²⁵⁸ See *supra* Part I.E-F (discussing the law and economics school and its effects over the past twenty years on broadcast regulation). Whether because of an unbounded faith in the free market (like former FCC Commissioner Fowler), *supra* note 30, or because of the lack of definitive proof of harms likely to flow from media consolidation (like current Commissioner Abernathy), it is evident that some people will not be convinced of the dangers of media consolidation until such consolidation occurs and harms therefrom are present in our everyday lives. Such a view is unfortunate, especially from those in public service, in light of the recognized difficulty in undoing consolidation once it has occurred. See Richmond Hearing, *supra* note 159, at 37. "Further media consolidation can't easily be undone. Once the toothpaste is out of the tube, it's going to be difficult, if not impossible to put it back in." *Id.*

²⁵⁹ See Paul Davidson, *FCC Media Rule Changes Still in Flux*, USA TODAY, June 2, 2003, at 1B ("The FCC has gotten an unprecedented 500,000 or so comments, mostly from critics.").

²⁶⁰ See Stephen Labaton, *Court Is Urged to Change Media Ownership Rules*, N.Y. TIMES, Feb. 12, 2004, at C14. Originally, Congress had attached a provision to one of its 2004 spending measures that set the national audience reach cap from the 45 percent ordered by the FCC on June 2 back to 35 percent, the pre-June 2 level. See *supra* note 6 and accompanying text. After negotiations with the Bush administration, however, the measure was passed allowing a national audience reach of 39 percent. Labaton, *supra*, at C14. This agreed-upon 39 percent level is indicative of the influence the major networks wield in Washington; it represents the current reach of the two largest networks, CBS and Fox. *Id.*

FCC DEREGULATION OF MEDIA OWNERSHIP 945

Amendment grounds, the *Sinclair* court found itself bound by the Supreme Court's recognition in *NCCB* that FCC ownership rules "significantly further the First Amendment interest in a robust exchange of viewpoints."²⁶¹ While the Supreme Court has thus far fallen short of establishing an affirmative duty under the First Amendment requiring government to prevent the decay of viewpoint diversity in broadcast media,²⁶² the Court continues to provide a forum of last resort for those seeking to vindicate the public's interest in viewpoint diversity. The *Fox* decision, in acknowledging that the arguments of intervenors on behalf of the FCC formed part of the court's decision to remand the NTSO rule rather than vacate it, suggests that citizen participation in lawsuits of this type can make a difference.²⁶³

CONCLUSION

Since its establishment in 1934, the FCC has held a great deal of power to manage the airwaves in the interests of the American public. Nothing in the recent D.C. Court of Appeals decisions in *Fox* and *Sinclair* removed any of this power. Nevertheless, a deregulatory-minded FCC used these decisions as something of a judicial scapegoat to hook its laissez-faire political agenda to. At

²⁶¹ *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168 (2002). See *supra* note 206 and accompanying text (discussing the recognition in *Fox* and *Sinclair* that the scarcity doctrine is alive and well).

²⁶² Although an affirmative duty to provide some minimum level of viewpoint diversity has never been raised by the Supreme Court, it has been discussed in legal scholarship. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). Fiss argues that the growing influence of the dominant economic actors in society on public debate might become destructive to the public's interest in rich public debate. *Id.* at 1410. In that event, Fiss contends, the First Amendment might require the Supreme Court "to do all that it can possibly do to support and encourage the state in efforts to enrich public debate. . .if need be, even to require the state to continue and embark on programs that enrich debate." *Id.* at 1424.

²⁶³ See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1052-53 (D.C. Cir. 2002) (citing intervenors' arguments in favor of maintaining the NTSO rule as one of the reasons for not vacating the rule); see *supra* note 139 and accompanying text.

most, *Fox* and *Sinclair* represent the view of one United States Court of Appeals that the Telecommunications Act of 1996 holds the FCC to a higher standard of justification for their rules. But the cases do not reflect, as the FCC suggests, an outright reduction of the broad authority the FCC has traditionally held to protect important public interests such as viewpoint diversity in broadcast TV regulation. By elevating entertainment over information dissemination, the new rules unwisely put the public interest at risk in exchange for benefits that are speculative and, even were they certain, not worth the likely harms to our democracy. It now remains for citizens, individually and collectively in civic organizations, to remind the FCC of its seemingly forgotten duty to promulgate rules that protect our society's requirement of broad, robust, and antagonistic public debate. This admittedly amorphous but nonetheless essential characteristic of our democracy should not be further sacrificed in the name of corporate media's profits. If necessary, *Friends* should be sacrificed first.