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Ownership Controls in the New Entertainment Economy: A Search for Direction

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INTRODUCTION

1. The markets for delivery of televised media are undergoing dramatic changes these days. Outlets for distribution appear to be multiplying. In most markets, one can choose whether to subscribe to satellite or cable, or whether to stick with good old free, over-the-air broadcast television. New programming networks keep springing up and there is even talk of convergence between television and the Internet. There appears to be a good degree of consolidation between distributors and program suppliers, but these companies are rapidly deploying new technologies. Meanwhile, Congress and the courts are directing the Federal Communications Commission ("FCC" or "Commission") to reevaluate its regulatory controls over mass media ownership. Traditionally, FCC regulation in mass media was designed to protect the interests of competition, diversity, and localism. While regulatory concerns overlap with the economics concerns of the antitrust laws, the primary objective of communications regulation is to serve the "public interest." As new technologies and services emerge, regulation must account for technological changes in a fashion that serves the public interest by accelerating their deployment.

2. At issue in this context is how the traditional media controls should be modified to best accommodate the continuing development of advanced media services. Are high levels of competition more appropriate to the development of high quality programming and distribution services, or do restrictions on consolidation in the industry hinder innovation in mass media services? The optimal policy to promote the development of advanced services will likely involve a balance of consolidation and competition. As such, the argument of this article is that the best policy maneuver for the near term is to liberalize ownership controls in mass media, while continuing to apply many of the traditional behavioral controls that purportedly serve the regulatory objectives of diversity, competition, and the preservation of local interests.

3. The process of change underway in the markets for televised media is far from complete. New digital transmission modes are vastly increasing channel capacity for cable providers, broadcasters, and direct broadcast satellite service ("DBS"). Expanded channel capacities offer great opportunities for program producers, whose works can potentially fill those channels and increase the value of the systems. In a related development, the market for Internet services is becoming increasingly advanced. The deployment of broadband connections is creating opportunities for more sophisticated content development over the Internet. The paths of the Internet and the televised media are in fact set to cross through the deployment of interactive television ("ITV"), which allow Internet services, "interactive content," and traditional video programming to be bundled into one package and offered through a set-top box that connects to the television. Finding the necessary corporate synergies to take advantage of these new technologies has already involved substantial restructuring in the entertainment industries. Some of this will occur by trial and error; companies with good ideas on the verge of collapse might sustain their product development if they are free to accept capital infusions from larger firms. Ailing broadcast networks in some local markets might similarly benefit by merging

with group owners or networks. Ownership controls should not prevent these types of transactions.

4. The objective of ownership controls was to protect local interests and to maintain ease of entry in the markets for video program production and distribution. By capping the ownership of one company's cable holdings at 30 percent of the total nationwide market, the FCC could guarantee that there would always be at least four cable companies to which independent program networks could market their channels. By similarly capping ownership of one company's broadcast stations at 35 percent of the national market, the FCC ensured that the national networks could not lock up all the local markets and that some local control could be preserved. As the FCC reviews the ownership caps, it is challenged by the courts to either justify them or get rid of them.

5. Broadcasters and cable operators enjoy the unique privilege of having expressive activity as their business; whenever regulation surfaces, so do First Amendment rights.[1] Pursuant to the traditional mode of treating broadcasters as public trustees in receipt of a scarce public resource—known as the "scarcity doctrine," the standard for First Amendment analysis is lower. The scarcity doctrine is merely one example of why the First Amendment analysis applied to mass media is currently in disarray. While the scarcity doctrine continues to provide a relaxed standard for broadcast regulation, the idea of scarcity is outdated in an era characterized by ever-multiplying media outlets. Meanwhile the case law is conflicting on the degree of First Amendment protection offered in the context of economic regulations that do not directly affect editorial discretion.

6. The challenges of developing workable approaches for the regulation and First Amendment standards to be applied to mass media industries are illustrated in two recent opinions issued by the Court of Appeals for the D.C. Circuit. In *Time Warner v. FCC*, the court addressed both the cable ownership caps and the "channel occupancy" provisions, which limit the number of channels that a cable operator can fill with programming networks with which it is affiliated.[2] The court invalidated these rules, finding that the FCC failed to adequately justify them. The D.C. Circuit found that the ownership rules, because they did not meet the standard of "intermediate scrutiny" required by the First Amendment, violated the cable operators' free speech rights.[3] In a related case, *Fox Television v. FCC*, the court vacated the rules prohibiting common ownership of a broadcast television station and cable system in the same market.[4] The *Fox* court also remanded to the FCC the broadcast ownership cap rule, which limits the number of broadcast stations a single entity can own to 35 percent.[5] Pursuant to the First Amendment tradition of treating broadcasters under a lesser standard of constitutional scrutiny, the *Fox* court invalidated the FCC's decision to retain the caps as "arbitrary and capricious."[6] These D.C. Circuit decisions represent only a starting point in the challenging process of bringing

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[1] The importance of the First Amendment to the broadcast and cable industries has become increasingly important as a "first line of defense" to any regulatory initiative. *See* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 943-946 (1997).

[2] Time Warner v. FCC, 240 F.3d 1126, 1144 (D.C. Cir. 2001).

[3] *Id.*

[4] Fox Television Stations, Inc. v. FCC, No. 00-1222, 2002 U.S. App. LEXIS 2575, at *4 (D.C. Cir. Feb. 19, 2002).

[5] *Id.*

[6] *Id.*

regulatory and constitutional doctrine up to date as it relates to structural regulations of the mass media.

7. The FCC's ownership caps have traditionally operated in the context of a host of other regulations affecting ownership and contracting behavior in mass media. These include, *inter alia*, regulations to require cable operators to give non-discriminatory access to programming, to force cable operators to carry broadcast stations, to require broadcast stations to deliver local programming, and to grant network affiliates the right to preempt network programming. In an ideal world, these rules are designed to complement one another. For example, one concern of regulators is the danger of anticompetitive behavior where a cable operator is vertically integrated with a programming network. That cable operator would have an incentive to refuse to allow their programming network to be carried on a DBS system that competes for the same viewers. The "program access" rules require the vertically integrated cable operator to sell its programming to the competing provider in this instance, and thus protects the interests of competing multichannel video programming distributors ("MVPDs"). A related concern is the protection of independent (or unaffiliated) program suppliers against monopoly MVPDs who could erect barriers to entry by refusing the independent program suppliers carriage on its cable system. The ownership rules ensure that a cable operator cannot own enough systems to deny a program supplier a viable market. In this respect, the program access rules and cable ownership caps complement one another. In principle, this is a sound approach. Considering the trade-offs, however, these rules should only go as far as absolutely necessary to accomplish their purpose.

8. In Section I, this article provides the reader a background on the regulatory policies governing the production and distribution of video programming. The Section begins with an historical analysis of early heavy-handed antitrust approaches toward the content-distribution relationship in the film industries, highlighting how the application of the antitrust laws has changed over time. The Section then explores the foundations of broadcast and cable regulation, outlining the basic framework of the regulations and highlighting key disputes for later analysis. Section II addresses the recent judicial conflicts over ownership controls, from both a regulatory and a constitutional law perspective. The Section outlines the alternatives to the cable ownership caps and argues that a substantially liberalized ownership cap is preferable to case by case analysis. The Section also argues that the broadcast caps should be eliminated. As an ancillary matter, Section II argues that the First Amendment should not be used as a basis to eliminate the broadcast ownership cap. Section III addresses the challenges faced by regulators in dealing with converging technologies such as ITV. The Section analyzes the wave of media mergers and concludes that consolidation may be very useful for the deployment of ITV. In this respect, Section III reinforces the main point of this article that the ownership controls should be substantially relaxed. Section III also concludes that many of the cable regulations should apply in the ITV context.

9. In conclusion, this article will argue that the potential advancement in the technological aspects of the mass media environment require a liberalized approach in the realm of ownership controls compared to what has been found in the past. In this respect, vertical and horizontal ownership synergies will likely contribute to the development of both traditional and interactive programming by means of advanced broadband delivery platforms. To ensure that the market for programming remains competitive, however, traditional program access requirements should continue to be applied even in an environment of interactive television.

10. The mass media market for the most part is a national market. In that market are a variety of very large players, including AOL Time Warner, Viacom, News Corp., and Disney. In the market for the production of video programming, there are an infinite number of producers if you count small-scale independents. The fear in the regulatory context is largely that one of the major players will succeed in capturing the market distribution and thus become the final arbiter not only of what the public sees, but who survives as a program/content provider. Adapting the regulatory system to accommodate the development of new mode of delivery advances and convergent, interactive services requires a continued attention to these fears without impeding innovation by regulatory overkill. To approach the new media, it is necessary to understand and account for the traditional values and debates surrounding regulatory objectives and practices. In developing a new paradigm for regulation, some traditional areas of regulation will need to be preserved while other are substantially relaxed or eliminated.

I. REGULATING OWNERSHIP IN MASS MEDIA

11. Controls over ownership in mass media are exercised either through antitrust merger review or as a result of regulatory policy, under the jurisdiction of the FCC. As a normative matter, the FCC regulates not in the interests of antitrust, but rather in the "public interest, convenience, and necessity"[7] with the aim of promoting source diversity, outlet diversity, and viewpoint diversity.[8] While the FCC has promulgated many regulations to protect the interests of television program suppliers,[9] in the past it has not hesitated to curb the power of those same entities. The jurisdiction of the FCC and Federal Trade Commission ("FTC") overlap in many merger review cases, and they have been known to apply the same standards to mergers.[10] The Department of Justice can also enforce the antitrust laws to prevent anticompetitive behavior. In the context of the entertainment industry, however, antitrust concerns about consolidation have waxed and waned over time.[11]

A. EARLY APPROACHES TO ENTERTAINMENT: VERTICAL INTEGRATION IN THE FILM INDUSTRIES

12. Traditionally, the copyright industries were concerned with media such as publishing, radio, television, and motion pictures.[12] In recent years, copyrights on computer software programs have changed the calculus of the copyright law, so that we now add computer software to the list of copyright industries.[13] The advent of new computer technologies ironically threatens the

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[7] Communications Act of 1934, 47 U.S.C.A. § 309(a) (West 2001).
[8] F.C.C. Notice of Inquiry, 63 Fed. Reg. 15353 (Mar. 31, 1998) (to be codified at 47 C.F.R. ch. 1).
[9] Despite the compulsory licensing scheme which requires program suppliers to license their programming for cable retransmission (17 U.S.C.A. § 111(c) (West 2001)), the FCC reinstituted syndicated exclusivity rules to allow program suppliers to contract with a broadcast station that the station shall be the exclusive presenter of the program in its local broadcast area. *See* United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).
[10] Ilene Knable Gotts, *The Competitive Analysis of Communications and Entertainment Mergers*, 1060 PLI CORP. 27, 31-32 (1998).
[11] For analysis of how a changing political landscape may lead to less antitrust enforcement, see Kraig G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505 (1992).
[12] *See* JOSEPH TAUBMAN, COPYRIGHT AND ANTITRUST (1960).
[13] *See, e.g.,* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided court*, 516 U.S. 233 (1996).

importance of the old copyright industries, creating mechanisms by which works of authorship can be duplicated easily and sent over the Internet.[14] Rather than diminish the importance of traditional copyright protection, advocates are scrambling to enforce copyrights in cyberspace, recognizing that we cannot have a successful information infrastructure "if there is no *content*."[15] The mirror image of this dilemma is that posed by the dominant entertainment industries, the content providers, who may have an unfair advantage in outfitting the new information outlets with their programming. While broadcast, cable, and satellite television are regulated under the jurisdiction of the FCC, the historical antitrust treatment of the film industry provides a useful illustration of how regulation of entertainment media has evolved under the ambit of antitrust law.

13. The traditional model for total market control in the motion picture industry was complete vertical integration—control over producing, distributing, and exhibiting films.[16] The basic idea in such an arrangement is that a producer's control over an exhibitor is equivalent to the ability to exclude competing producers or distributors from entering the market. Aggressive acquisition and contracting strategies on the part of movie producers and distributors eventually led to antitrust action against the industry. In 1949, the Supreme Court in *United States v. Paramount Pictures* ordered the major motion picture producers and distributors to divest their theater holdings and instituted non-discriminatory safeguards so that the distributors would license their films on a "picture-by-picture" basis.[17]

14. The anticompetitive practices discussed in *Paramount Pictures* shed light on the power of the entertainment copyright as it applies to entertainment business practices. Block-booking, a practice of licensing feature films on the condition that the exhibitor will also license other features, was condemned by the court as impermissible.[18] The practice is essentially a type of tying arrangement wherein a protected monopoly product is used to leverage market power into a downstream market, analogous to the use of the patent to force sales in non-patented items.[19] The structural remedy of *Paramount Pictures* was not a result of any inherent evils of vertical integration, but rather a combination of the anticompetitive practices of the producer-distributors and the fact that the integration was both the means and end of monopolizing activities.[20] Whether contract-based or structural, the lingering antitrust principle from *Paramount Pictures* and the ensuing television regulations was a concern for the harms of vertical integration.[21] In the context of the film industry, however, this concern would taper off over time.

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[14] *See, e.g.,* U.M.G. Recordings, Inc. v. Mp3.com, 109 F. Supp. 2d 223 (S.D.N.Y. 2000); A& M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).

[15] INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 11 (1995).

[16] United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 (1948). *See also* Fox, *supra* note 11; MICHAEL F. MAYER, THE FILM INDUSTRIES 109 (1978) ("The thrust of production-distribution was to acquire or control the nation's key theater outlets.").

[17] Paramount Pictures, 334 U.S. at 161. The new restrictions were embodied in a series of consent decrees and a lower court ruling on remand. *See* United States v. Paramount Pictures, Inc., 85 F. Supp. 881 (S.D.N.Y 1949).

[18] 334 U.S. at 158.

[19] *See, e.g.,* United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa. 1913).

[20] 334 U.S. at 173-174.

[21] In antitrust law, vertical integration is subject to a rule of reason standard of analysis. United States v. Columbia Steel, 334 U.S. 495 (1948).

15. A change in antitrust policy under the Reagan administration, coupled with new video aftermarkets and a low Hersch-Herfindahl Index ("HHI") measurement for motion picture exhibitors, led to a lifting of the *Paramount Pictures* consent decrees and an ultimate reintegration of producers and distributors.[22] Block-booking arrangements remained illegal despite the allowance of vertical integration.[23] The waning concern for vertical integration in the antitrust context of the film industry, however, belies the regulatory activity concerning vertical integration in the broadcast and cable industries. During the late 1980's and 1990's, Congress and the FCC developed a robust regulatory regime that imposes fairly stringent requirements to prevent downstream foreclosure in the television industries. However, regulation in those industries appears to be coming full circle with the relaxed attitudes toward vertical integration under the antitrust laws in the film industries. In a deregulatory era in which a wide variety of entertainment media are available, the FCC is being forced by Congress and the courts to take a serious look at its regulations affecting ownership and behavior in the media industries.

B. BROADCAST REGULATIONS: LEGAL AND PRACTICAL FOUNDATIONS

16. Broadcasting involves the transmission of television programming over the air through a piece of the publicly controlled electromagnetic spectrum allotted for specific geographic territories.[24] The typical broadcasting outlet is the local television station, which transmits the broadcast signal and serves as the "locus of market forces that control economic potential" for the distribution of programming and generation of advertising revenue.[25] The local station, if independently owned, will generally operate as an "affiliate" of a national network, which provides the bulk of programming to the local station.[26] The licensing scheme established for the broadcast television industry in the mid-twentieth century allots spectrum in geographic units so as to provide stations with the opportunity to serve local communities and metropolitan areas.[27] In turn, national networks developed in order to provide "chain [network] broadcasting"[28] of programming that would air national programs simultaneously through local, affiliated outlets. In the words of Justice Felix Frankfurter, chain broadcasting "makes possible a wider reception" and provides, "a strong incentive to advertisers to finance the production of expensive programming."[29]

17. The chain broadcasting relationship also raises the specter of anticompetitive behavior in the networks' control over their local distribution outlets. Broadcasting regulations generally affect the relationship between affiliates and networks, between networks and program suppliers (e.g., Hollywood studios), and among broadcasting outlets within a given market. Historically, these

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[22] United States v. Loew's, Inc., 882 F.2d 29, 31 (2d Cir. 1989).
[23] *Id.* at 32.
[24] Under the 1927 Radio Act, it was resolved that there could be no private ownership of the airwaves. 44 Stat 1162, codified at 47 USC § 81 et seq (1927), repealed by § 602(a) of the Federal Communications Act of 1934, 48 Stat 1064, 1102, codified at 47 U.S.C, § 602(a) (1988).*See generally* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 1-27 (1995).
[25] JAMES R. WALKER & DOUGLAS A. FERGUSON, BROADCAST TELEVISION INDUSTRY 48 (1998).
[26] *See generally* BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 153 (1992).
[27] *See* Sixth Report and Order, 41 F.C.C. 148, ¶ 15 (1952) (discussing the importance of meeting local needs in the promulgation of a national system of broadcast spectrum allotment).
[28] Chain broadcasting is the "simultaneous broadcasting of an identical program by two or more interconnected stations." 47 U.S.C.A § 153(9) (West 2001).
[29] NBC, Inc. v. United States, 319 U.S. 190, 198 (1943).

regulations aimed to curb the market power of networks vis-à-vis program suppliers and local television stations. In regulating these relationships, the statutory aim of the FCC has been to promote competition and diversity and to protect local interests.[30]

18. The broadcast industry is poised for a substantial upgrade of services through the acquisition of a new band of spectrum, over which the stations can provide digital television ("DTV") services.[31] Congress authorized the distribution of additional spectrum to broadcasters so that they can upgrade their services to digital while maintaining their traditional analog service.[32] DTV will allow broadcasters a substantial increase in transmission capacity that will allow a substantial improvement in services. If the broadcaster chooses, it can upgrade its signal quality to high definition ("HDTV") or it can use the capacity to transmit additional programming on supplementary channels.[33] The broadcasters can also use the capacity to transmit data, known as datacasting. In short, the broadcasters will have the opportunity to enhance their program offerings. There have been some problems keeping the DTV conversion on track for its 2006 deadline, including financial problems for station upgrades and so forth.[34] A more realistic estimate is that DTV services will become ubiquitous by around 2010.

i. Regulating Behavior: Chain Broadcasting Rules

19. Over the years, the FCC enacted a series of regulations to promote independent programming and to enhance competition among the various players in the broadcast industries. An important category of these regulations involves control of the behavior of the networks vis-à-vis their affiliates. The first set of regulations in the broadcasting industry, known as the "chain broadcasting rules," applied to both radio and television.[35] The development of broadcast television programming and affiliate relations largely resembled that which had already taken place in the radio industry.[36] The chain broadcasting rules conditioned the granting of broadcast licenses on certain restraints in the network-affiliate relationship. For example, the rules allowed affiliates to contract with multiple networks for the broadcast of programming,[37]

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[30] *See* Report and Order, The Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM, and Television Broadcasting Stations, 18 F.C.C. 288, 292-293 (1953) (currently codified at 47 C.F.R. § 73.3555(d) (1987)), *amended by*, Report and Order, 43 F.C.C. 2797 (1954), *amended by*, Report and Order, 100 F.C.C.2d 17 (1984), *amended by*, Memorandum Opinion and Order, 100 F.C.C.2d 74 (1985) (discussing the importance of maintaining diverse viewpoints and preventing undue concentration of economic power contrary to the public interest).

[31] *See generally* Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, xi (1998) (Gore Commission), *available at* http://www.ntia.doc.gov/pubintadvcom/pubint.htm.

[32] Telecommunications Act of 1996, 47 U.S.C. § 336 (1996) [hereinafter 1996 Act].

[33] *See generally* Ken Kerschbaumer, *The Continuing Move to Digital*, BROADCASTING & CABLE, Apr. 25, 2001, at 11. *See also* Fifth Report and Order, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 12 F.C.C. Rcd. 12809, 12811 (1997).

[34] *See, e.g.,* Michael Groticelli et al., *Trying Times for DTV: 8-VSB is the what, but the when is on a digital clock that's still hard to read*, BROADCASTING & CABLE, Apr. 25, 2001, at 6; Michael Groticelli & Karen Anderson Prikios, *DTV Dog Days*, BROADCASTING & CABLE, Aug. 20, 2001, at 26.

[35] 47 C.F.R. §§ 3.101-.108 (1939); 47 C.F.R. §§ 3.631-.638 (1945) (regarding its application to television).

[36] *See* WALKER & FERGUSON, *supra* note 25, at 23 ("much of the earliest network programming was radio with a video component").

[37] 47 C.F.R. § 3.631, *current version at* 47 C.F.R. § 73.658 (2001).

restricted the term on affiliate agreements to two years,[38] preserved freedom of action for affiliates with regard to program scheduling,[39] and gave affiliates the right to reject programming.[40] The rules also prohibited network ownership of more than one station within a service area,[41] building a foundation for ownership controls that would later emerge as a strong component of broadcast television regulation.

20. The Supreme Court upheld the FCC's broad regulatory authority over the structure and business relationships of the broadcasting industry in *NBC v. United States*.[42] The Court affirmed the authority of the FCC to act in the public interest, stating that "[m]ethods must be devised for choosing among the many who apply" for spectrum use licenses.[43] Supervising the "traffic" of broadcast spectrum use, according to the Court, gave some responsibility to the FCC to act on behalf of the public to "determin[e] the composition of that traffic."[44] The Court further rejected NBC's First Amendment challenge to the rules, noting the absurd implication of the argument that every person who was denied an application to operate a station would as a result be denied a constitutional right to speak.[45] "Unlike other modes of expression," the Court noted, "radio is not inherently available to all."[46] This basis for regulation of broadcasting later came to be known as the "scarcity doctrine," a basis for content, behavioral, and structural regulation of the broadcast industry rooted in the fact that the resource is scarce, i.e., that only a limited number of people can utilize the medium.

21. The "scarcity doctrine" was more firmly established by the Supreme Court in the 1969 decision *Red Lion v. FCC*[47] in the context of content-based regulation. At issue in *Red Lion* was the fairness doctrine, which required broadcasters to give adequate coverage to opposing views of public issues. *Red Lion* conceptualized broadcasters as public trustees, allowing content regulations "in favor of others whose views should be expressed on this unique medium."[48] The medium is scarce insofar as the broadcast spectrum is scarce; only limited numbers of licensees can use the airwaves for television broadcast. Those licensees were obligated to the interests of the public as a function of the privilege to use this economically scarce resource. While the fairness doctrine was ultimately abolished, the regulatory determination that the broadcaster is a public trustee remains a powerful factor in broadcast regulation. In the context of the expansive media offerings in today's marketplace, some commentators have suggested that the question is not "whether, but when and how *Red Lion* will be finally put to rest."[49] The

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[38] 47 C.F.R. § 3.103 (1941), *recodified at* 47 C.F.R.. § 3.633 (1945).
[39] *Id.* § 3.104 (1941), *recodified at* § 3.634 (1945).
[40] *Id.* § 3.105 (1941), *recodified at* § 3.635 (1945).
[41] *Id.* § 3.106 (1941), *recodified at* § 3.636 (1945).
[42] NBC, Inc. v. United States, 319 U.S. 190 (1943).
[43] *Id.* at 216.
[44] *Id*.
[45] *Id*. at 226.
[46] *Id*.
[47] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
[48] *Id*. at 390.
[49] ROBERT M. O'NEIL, *Dead or Alive: How Long Will the Red Lion Specter Haunt Free Speech and Broadcasting?*, *in* RATIONALES & RATIONALIZATIONS 19 (Robert Corn-Revere ed., The Media Institute 1997). O'Neil notes that Justice Breyer's plurality opinion in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) paid deference to the *Red Lion* scarcity doctrine, while also hinting at possible ideas for a departure from scarcity. *Id* at 34.

continuing application of the doctrine as a basis for the "public trustee" model of regulation is a source of substantial controversy.[50]

22. The chain broadcasting rules were eventually updated and remain in effect.[51] The current version of the rules is similarly designed to provide safeguards to local station owners via their network affiliation agreements. Thus, the rules allow stations to, *inter alia*, reject network programming,[52] to show the programming of other networks,[53] and to retain control over their advertising rates.[54] The "dual network rule" effectively prohibits the networks from owning each other, but more specifically prohibits a television station from affiliating with any entity that owns more than one of the four major networks (ABC, CBS, Fox, or NBC).[55] In recent years, the FCC has initiated some proceedings to review these rules.[56] While the preservation of local interests in the scheme of the broadcasting industry remains a regulatory objective of the FCC,[57] the objective of preserving local interests is the subject of a good deal of scholarly dispute.[58] In the actual marketplace, organized groups of affiliates, such as the Network Affiliated Stations Alliance ("NASA") remain a relatively vocal lobbying force. For example, in 2001, NASA filed a complaint with the FCC demanding enforcement of the chain broadcasting rules on behalf of 600 network affiliates.[59] The chain broadcasting rules are a substantial regulatory tool for the purpose of protecting the independent interests of network affiliates.

ii. Program Access Rules

23. Another rule enacted to promote diverse sources of programming was the FCC-enacted "Prime Time Access Rule" ("PTAR"). The PTAR, eliminated in 1995, prohibited networks affiliates in the top fifty markets from providing network programming for more than three hours per day

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[50] FCC Commissioner Furchtgott-Roth notes in a recent Notice of Inquiry that public interest regulation on the basis of a lessened First Amendment standard via spectrum scarcity will be highly problematic if, as a factual matter, spectrum scarcity is no longer a viable justification. Separate Statement of Commissioner Harold Furchtgott-Roth, In the Matter of Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C. Rcd. 21633, 21652 (1999). Similarly, Commissioner Powell states the need for a "solemn obligation to evaluate honestly the extent to which scarcity can still justify greater intrusions on broadcasters' First Amendment rights." Separate Statement of Commissioner Michael K. Powell, *id*. at 1.

[51] 47 C.F.R. § 73.658 (2001).

[52] *Id.* § 73.658(e).

[53] *Id.* § 73.658(a).

[54] *Id.* § 73.658(h).

[55] *Id.* § 73.658(g). The dual network rule was recently amended to allow the major networks to own smaller networks, such as UPN or WB. 66 Fed. Reg. 32,242, 32,248 (June 14, 2001) (to be codified at 47 C.F.R. § 73.658(g)).

[56] *See, e.g.,* Notice of Proposed Rulemaking, Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates 47 C.F.R. § 73.658(a), (b), (d), (e) and (g), 10 F.C.C. Rcd. 11951, 11958 (1995).

[57] *See, e.g.,* Press Release, FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group (Oct. 29, 2001), *at* http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124.html (establishing a working group on ownership controls in broadcasting "for the FCC to achieve its long-standing goals of promoting diversity, localism, and competition in the media").

[58] *See* Robinson, *supra* note 1, at 938-939 (asserting that policies of localism have resulted in "inefficient allocation of television channels and corresponding loss of viewing choices; constraints on competition in video delivery services; and wasted administrative energies").

[59] *See* Steve McClellan, *It's War!: Affiliates go to FCC with Attack on Networks,* BROADCASTING & CABLE, Mar. 12, 2001, at 6 (providing details of network affiliates complaint of network abuses filed with the FCC).

during prime time.[60] The PTAR was designed to provide a market for independently produced, non-network programming and to promote "a freer, more diversified television production and distribution process."[61] The PTAR represented "an indirect effort to promote program diversity by seeking to increase the variety of program sources (i.e., source diversity), and, as some parties argue, program distributors (i.e., outlet diversity)."[62] The PTAR arguably aided in the development of some independently produced programs, such as *Wheel of Fortune*, *Entertainment Tonight*, and *Current Affair*.[63] The development of an abundant market for independent programming and multiple outlets that could purchase such programs, however, would obviate the need for such a rule. In 1995, the FCC repealed the PTAR on the basis of its findings that there existed a larger market for programming and a greater diversity of program sources.[64]

24. The FCC has enacted other regulations to promote localism and diversity interests. Some of these are programming related, such as the requirement that broadcasters file quarterly reports that list the programs that serve local community interests.[65] In general, broadcasters have a public interest obligation to serve the needs of the local communities.[66] The FCC may take this factor into consideration when granting renewal of a broadcast license. In order to enhance the ability of television stations to serve the interests of their local communities, the FCC has also created a "main studio rule," requiring that a broadcast licensee maintain main studio facilities capable of originating local programming.[67] Having a "main studio" within a local geographic area is supposed to ensure that the studios have greater exposure to the local communities and that the communities have local access to voice their opinions to the broadcast station.[68] The viability of a broadcast industry component dedicated to serving local communities, along with its attendant regulations, faces considerable challenges in a global, multichannel marketplace.

25. Behavioral regulations, such as the preservation of local bargaining and decision-making powers and mandated investments in local programming needs, continue to carve out a niche for the local broadcast licensee in the market for free, over-the-air broadcast television. Broadcast television represents a point at which national tastes and local interests convene. With abundant network programming, framed by local news and the occasional local program preempting the usual national programs, broadcast television on the surface appears to reflect a

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[60] Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382, 384 (1970) [hereinafter 1970 Order].
[61] *Id.* at 387.
[62] Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, 11 F.C.C. Rcd. 546, 551 (1995).
[63] WALKER & FERGUSON, *supra* note 25, at 79.
[64] Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, 11 F.C.C. Rcd. 546, 547-48 (1995).
[65] 47 C.F.R. §§ 3526(a)(8)(i), 3527(a)(9) (1997).
[66] *Id. See generally* 3 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 14.5(B)(1), (1999) (discussing affirmative programming mandates of broadcast licensees).
[67] 47 C.F.R. § 73.1125 (2000); Memorandum Opinion and Order, Application for Review of Jones Eastern of the Outer Banks, Inc., 6 F.C.C.R. 3615, ¶ 9, 69 Rad. Reg. 2d (P & F) 18 (1991); *see generally* David M. Silverman & David N. Tobenkin, *The FCC's Main Studio Rule: Achieving Little for Localism at a Great Cost to Broadcasters*, 53 FED. COMM. L.J. 469 (2001) (arguing that the main studio rule should be eliminated).
[68] Report and Order, Review of the Commission's Rules Regarding the Main Studio and Local Pub. Inspection Files of Broad. Television and Radio Stations, 13 F.C.C.R. 15691, ¶ 2, 13 Communications Reg. (P & F) 123 (1998), *revised in part on reconsideration*, Memorandum Opinion and Order, 14 F.C.C.R. 11113, 15 Communications Reg. (P & F) 1158 (1999).

proper balance of these diverse interests. Under the surface, however, there is conflict about which regulations, if any, are the best means of achieving this balance.

iii. Structural Regulations: Ownership Controls

26. Ownership controls, which regulate who can own how many and what type of media outlets, have arisen in multiple forms. In the 1940's, the FCC restricted the number of radio stations a single entity could own in a single market.[69] In the 1960's, the FCC adopted a "one-to-a-market" rule, prohibiting the ownership of more than one broadcast station in a single market.[70] The FCC also adopted rules restricting a single entity from owning more than seven broadcast stations nationwide,[71] an ownership cap whose most recent manifestation restricted a single entity to owning no more stations than reach 35 percent of the national audience.[72] The 35 percent ownership cap was recently remanded to the FCC for better justification or elimination by the D.C. Circuit in *Fox Television v. FCC*.[73]

27. In 1975, the FCC initiated a ban on cross-ownership of newspapers and broadcast stations in the same market,[74] a ban that is also under Commission review for possible elimination.[75] Cross-ownership of a cable system and broadcast station within the same market was also prohibited[76] until recently, when the *Fox* court invalidated the rule.[77] In the past, the FCC also implemented ownership rules at the vertical levels, forbidding networks from holding permanent financial interest in production studios, known as the financial/syndication or "Fin-Syn" rules.[78] Underlying these regulations are the dual purposes of preventing a concentration of power in the broadcasting industry and promoting a diversity of voices.[79] In the words of the FCC's newspaper-broadcast cross-ownership ban rulemaking proceeding, these rules were designed to promote the public interest objective of achieving "the widest possible dissemination of information from diverse and antagonistic sources."[80]

28. Ownership regulations faced an important constitutional challenge in 1978 when a group of broadcasters challenged the ban on newspaper-broadcast cross-ownership in *FCC v. National Citizens Committee for Broadcasting*.[81] In upholding the rule, the Supreme Court reaffirmed the FCC's authority to pursue the regulatory purpose of promoting diverse viewpoints within

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[69] Rules Governing Standard and High Frequency Broadcast Stations, § 3228(a), 5 Fed. Reg. 2382, 2384 (1940).
[70] Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1467 (1964).
[71] Report and Order, *supra* note 30.
[72] 1996 Act, § 202, *supra* note 32.
[73] Fox Television Stations, Inc. v. FCC, No. 00-1222, 2002 U.S. App. LEXIS 2575, at *4 (D.C. Cir. Feb. 19, 2002).
[74] *See* Second Report and Order, Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, 50 F.C.C.2d 1046 (1975) (codified at 47 C.F.R. § 73.3555(c) (1987)). The rule was challenged and upheld by the Supreme Court in FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).
[75] Order and Notice of Proposed Rulemaking, Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, 2001 FCC LEXIS 4994, (Sept. 20, 2001).
[76] 47 C.F.R. § 76.501(a) (2001).
[77] *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *4.
[78] The Fin-Syn, or Financial Interest and Syndication Rules, were intended to moderate the networks' buying power by forbidding them to engage in domestic syndication and prohibiting them from acquiring permanent financial interest in program suppliers. 47 C.F.R. § 73.658(j)(1) (1990).
[79] Multiple Ownership of Standard, FM and Television Broadcast Stations, *supra* note 70, at 1467-1477. *See also* 1996 Act, *supra* note 32.
[80] Second Report and Order, *supra* note 74, at 1048, (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
[81] FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775.

the broadcasting industry. With the legitimacy of this purpose in mind, the Court found that "so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority [of the Commission]."[82] The Court rejected the application of any special standard of scrutiny based on a First Amendment argument, noting that the regulations serve the interests of promoting free speech over a medium that is scarce in its availability to potential speakers.[83] The primary concern of the Court in this context was to apply a rational basis test, i.e., to determine whether the Commission acted "rationally" in its adoption of the rules.[84] Conceding that judgments on how diversity would be enhanced by the rule were inherently qualitative, the Court found that 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…'."[85] Whether any government agency was qualified to define just what "true diversity" means was not a question before the Court. In any case, the historical Supreme Court jurisprudence on broadcasting regulations, under the auspices of the scarcity doctrine, is highly deferential to regulatory efforts to promote a "marketplace of ideas" that is both diverse and responsive to the needs of local communities.

a. *Why Content is King: The Abolition of the Fin-Syn Rules*

29. One important facet of broadcast ownership controls has been the goal of preventing networks from exercising so much control over programming that independent or unaffiliated program suppliers would be unable to market their products. The networks' role as brokers to local stations—developing national program packages that will be aired by the stations—gives them a high degree of control over the selection of programs that will ultimately air at the local and national levels.[86] This concern plays out on both vertical and horizontal levels. On the vertical level, if the networks have a strong financial interest in certain production studios, they will tend to favor the selection of those studios in developing their programming packages, thus foreclosing independent suppliers.[87] At the horizontal level, a high degree of national concentration, i.e., network ownership over local stations, theoretically limits the available outlets for non-network programming.[88]

30. The most substantial ownership controls designed to prevent program foreclosure at the vertical level were the Fin-Syn rules, which were abolished in 1995. The Fin-Syn rules prohibited the networks from engaging in syndication and from acquiring any financial interest in television

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[82] *Id.* at 796.
[83] *Id.* at 801 ("Here the regulations are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it.").
[84] *Id.* at 796.
[85] *Id.* at 797 (quoting Second Report and Order, *supra* note 74, at 1079-1080).
[86] *See* WALKER & FERGUSON, *supra* note 25, at 48.
[87] *See* 1970 Order, *supra* note 60, at 394 (finding that "network judgment in choosing new programs is substantially influenced by their acquisition of subsidiary interests in the programs chosen.").
[88] Since the FCC's network rules prohibit "all-or-nothing" contracts between affiliates for the clearance of programming, the local affiliates, if independently owned, can freely purchase programming from independent sources for local broadcast. *See* OWEN AND WILDMAN, *supra* note 26, at 170-172 (describing the contracting dynamics between networks and affiliates in the context of program selection).

programming.[89] In large part, the Commission was worried about the networks exercising monopsony control over program suppliers, that is, exercising undue control over the upstream market for programming sales through the use of its dominance at the downstream level of distribution.[90] The Fin-Syn rules arguably allowed for the emergence of dominant, independent firms in the market for syndication and production of programming, such as *King World* and *Viacom*.[91] The Fin-Syn rules had deprived the networks of any financial gain from viewing old network fare as well as barring them from supplying the expanded cable market via syndication. The networks thus faced marginalization as program brokers and distributors as compared to their cable station counterparts. Ironically, when the Fin-Syn rules were abolished,[92] Hollywood producers purchased the broadcast networks, contrary to the long-feared prospect that the networks would buy up the production studios, e.g., Disney/ABC, Viacom/CBS, and Westinghouse/CBS.[93] The primacy of the content providers in these purchasing arrangements demonstrates the adage much spoken in the context of the Internet that "content is king." Despite the fact that vertical integration of program suppliers, networks, and syndicators is now common, competition in a multichannel marketplace seems to have fueled program diversity substantially.[94] Despite declining market share, the broadcast networks, as of the beginning of 2000 accounted for a 50 percent share of prime time television viewing for all television households.[95]

b. Horizontal Ownership Controls: Curbing the Power of the Networks

31. The horizontal station ownership restrictions in broadcasting operate at both the local and the national levels. At the local level, common ownership of more than one station within the same market is generally prohibited.[96] At the national level, no single entity can own more stations than reach 35% of the national audience.[97] This percentage cap was adjusted up from 30 percent in 1996, when Congress also directed the FCC to review the rules every two years in order to determine whether or not they should be retained.[98] In *Fox Television v. FCC*, the D.C. Circuit recently held that the FCC's failure to modify or repeal the rule in its biannual

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[89] 47 C.F.R. § 73.658(j) (1970). *See also* 1970 Order, *supra* note 60, 397-99. For a history of the Fin-Syn rules, *see* Marc L. Herskovitz, Note, *The Repeal Of The Financial Interest And Syndication Rules: The Demise Of Program Diversity And Television Network Competition?*, 15 CARDOZO ARTS & ENT. L.J. 177 (1997).
[90] *See, e.g.*, 1970 Order, *supra* note 60, at 387.
[91] *See* WALKER & FERGUSON, *supra* note 25, at 80 (discussing the effect of the Fin-Syn rules upon the broadcasting industry).
[92] After years of debate, the 7th Circuit remanded a modified version of the rules to the FCC, finding that there was no support for the conclusion that diversity and the public interest were advanced by the rules. *See* Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992). *See also* Report and Order, Review of the Syndication and Financial Interest Rules, Section 73.659-73.663 of the Commission's Rules, 10 F.C.C. Rcd. 12165 (1995).
[93] "*The Demise of Fin/Syn*," BROADCASTING & CABLE.
[94] Steve McClellan, *The Fin-Syn X Files: How Axing the Program Ownership Rules Changed TV Forever*, BROADCASTING & CABLE, Jan. 24, 2000, at 30.
[95] Annual Assessment of the Status of Competition in Market for the Delivery of Video Programming, 16 F.C.C. Rcd. 6005, ¶ 99 (2001).
[96] 47 C.F.R. § 73.3555(b) (1997). The requirement may be waived in the case of very large markets and a high number of independent competitors. *See, e.g.*, Capital Cities Communications, Inc. 59 Rad. Reg.2d (P & F) 451, 464-465 (1985). *See generally* ZUCKMAN ET AL., *supra* note 66, at § 14.4 (1999).
[97] 1996 Act, *supra* note 32, at § 202(c)(1)(B).
[98] *Id*. at § 202(h).

review was lacking in analytical support under an arbitrary and capricious standard.[99] The court's opinion in *Fox Television* will require the FCC to take a serious look at whether these ownership rules continue to serve the public interest.

32. The percentage cap on national ownership of broadcast stations evolved from earlier numerical limits, such as the "Seven Stations Rule," prohibiting a single entity from owning more than seven television stations.[100] In 1984, the FCC produced a report highly critical of the ownership limit and ordered that the national ownership limits should sunset within six years.[101] In reaching its conclusion, the FCC noted that the limit on national ownership of stations bore little connection to concerns of program diversity and competition in local markets. The Commission noted that "viewers in San Francisco, St. Louis, and Philadelphia each judge viewpoint diversity by what is available to them, not by whether those same or other ideas are available in other markets."[102] Congress reacted negatively to this and imposed a moratorium on the FCC's 1984 order.[103] On reconsideration, the FCC retreated from the sunset provision, while raising the numerical limit for station ownership to twelve and introduced a percentage ownership cap of 25 percent.[104] The plaintiff broadcasters in *Fox Television v. FCC* made sure to draw the attention of the court to the FCC's formerly negative views about the percentage cap in their arguments before the D.C. Circuit.[105]

33. The national ownership limits were revisited and modified to their most recent manifestation in the Telecommunications Act of 1996 ("1996 Act").[106] In the 1996 Act, Congress eliminated the numerical limit and raised the percentage limit to 35 percent.[107] The controversial element of this legislation, however, was Congress' directive that every two years the FCC should evaluate market conditions to determine whether any of its ownership limits continue to be "necessary in the public interest as the result of competition."[108] Despite the fact that the 1996 Act set the 35 percent national ownership cap, the explicit requirement of a review process at the very least permits the FCC to eliminate the rules. The court reviewing a challenge to this piece of legislation noted from the bench that this was a "bizarre statute" on the basis of its short review periods.[109] The FCC's inability to adequately address the issues of competition within the two year legislative time frame has ultimately sent the Commission back to the drawing board to determine what, if any, ownership limits are valid in today's marketplace.

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[99] *Fox Television Stations, Inc*., 2002 U.S. App. LEXIS 2575, at *50.
[100] 47 C.F.R. § 73.636(a)(1) (1982).
[101] Report and Order, Amendment to Section 73.3555, 100 F.C.C.2d 17, ¶ 110 (1984) (imposing a transitional six year period prior to the sunset in which the ownership cap would be set at twelve stations per entity).
[102] *Id.* at ¶ 32.
[103] Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984).
[104] Memorandum Opinion and Order, Amendment of Section 73.3555, 100 F.C.C.2d 74, ¶ 3 (1984).
[105] *See* Opening Brief of Petitioners Fox Television Stations, Inc., NBC, Inc., Viacom Inc., and CBS Broad. Inc. at 4-7, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000)) [hereinafter Petitioners' Brief].
[106] 1996 Act, *supra* note *32*, at § 202(c)(1).
[107] *Id.*
[108] *Id*. at § 202(h).
[109] Transcript of Proceedings, Sept. 7, 2001, at 34, Fox Television v. FCC, No. 00-1222. In its final opinion the court likened the Congressional directive to "Farragut's order at the battle of Mobile Bay ("Damn the torpedoes! Full speed ahead.")." *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *36.

C. CABLE REGULATIONS

34. Cable television is a type of multichannel video programming distribution ("MVPD") capable of providing hundreds of channels to subscribers who pay for the service.[110] Cable television was originally deployed as a method of delivering television programming to markets that were too small to support a local television station or areas where reception was poor.[111] In the 1960's, cable operators engaged in "distant signal importation" as a method of providing a wider range of programming to local markets.[112] Under the then existing copyright laws, cable operators were not required to pay royalties to the stations then originating those signals.[113] Since then, a complex system of regulation has arisen to protect the interests of broadcasters and program suppliers in a market in which cable service is available to the vast majority of Americans.

35. Cable systems are generally operated under franchise agreements with state or municipal authorities[114] and subject to a requirement that rates be "reasonable."[115] Most cable operators are owned by multiple cable system operators ("MSOs"), like Comcast Cable or AOL Time Warner, companies that have substantial cable system holdings. Much like the broadcasting industry, federal laws and regulations affect the contracting and ownership behavior of cable system operators and program suppliers. Cable regulations serve the purposes of protecting the interests of, *inter alia*, the broadcasting industry, the promotion of diversity in the programming supply market, and the prevention of unfair competition.

36. The Cable Television Act of 1992 ("1992 Cable Act")[116] was enacted out of a concern for "concentration of the media in the hands of a few who may control the dissemination of information."[117] The Act sought to prevent high degrees of horizontal concentration and vertical integration in the cable industry, while at the same time leaving room to "account for any efficiencies and other benefits that might be gained through increased ownership or control."[118] In order to prevent cable operators from engaging in "unfair methods of competition or unfair or deceptive practices,"[119] the cable regulations are rife with restrictions on the content-distribution relationship. Ranging from channel occupancy, must-carry obligations, and subscriber limits to restrictions on business practices, these regulations ostensibly serve as preventive medicine for potential antitrust violations in the cable industry. Whether they go too far is the subject of continuing debate. The regulations are constantly

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[110] A cable "system" is defined by Congress as, "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C.A. § 522 (West 2001) (the definition goes on to exclude certain types of video distribution services).
[111] ZUCKMAN ET AL., *supra* note 66, at § 13.1.
[112] OWEN & WILDMAN, *supra* note 26, at 214.
[113] *See, e.g.,* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).
[114] Under the federal authority of 47 U.S.C.A. § 54 (West 2001).
[115] *See generally* ZUCKMAN ET AL., *supra* note 66, at § 13.3 (discussing the evolution of rate regulation in cable television).
[116] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (incorporated in the Communications Act of 1934, 47 U.S.C. § 325 (West 2001) [hereinafter 1992 Cable Act].
[117] S. Rep. No. 92, 102d Cong. 1st Sess. 32 (1991) As of June 2000, 80 percent of MVPD subscribers received video programming from a cable operator. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 16 F.C.C. Rcd. 6005, ¶ 5 (2001) [hereinafter Seventh Annual Report].
[118] 1992 Cable Act, *supra* note 116, at § 11.
[119] *Id*. at § 628.

under attack as violations of the First Amendment or as arbitrary.[120] When First Amendment arguments do not succeed, the underlying question becomes whether or not the regulations effectively serve the interests of competition, diversity, and the public interest.

i. Protecting the Broadcaster: Non-Duplication and Must-Carry

37. One strong objective of regulations affecting the cable industry is to protect the viability of broadcasters. When cable first emerged as an attractive service for the provision of television programming, both regulators and the broadcast industry viewed it as a threat to free, over-the-air service. Thus, as regulation of the cable industry developed, many of the rules would take on a protective character on behalf of the broadcasting industry.[121] These rules generally operate on two fronts, one is to protect the program integrity of broadcasters with respect to the programming offered via cable, and the other is to ensure that broadcasters' signal is carried by cable systems. These regulations represent a form of market failure prevention, grounded not necessarily in the actual collapse of the broadcasting industry, but rather in the fear that the MSOs will drive the broadcasters out of business by refusing carriage and attempting to undermine their program integrity.

38. The market for television program distribution is fluid; many programs that air on broadcast network television may also be syndicated and available for purchase to cable networks that could conceivably air the same programming at the same time in the same market.[122] These practices potentially dilute the audience for a given program, thus reducing the potential for advertising revenues to the broadcast network.[123] Originally, this problem was a result of the cable system's distant signal importation, which allowed the importation of differing broadcast signals that were airing the same broadcast fare from different stations. As cable networks developed, the possibility of airing syndicated programming in competition with cable networks also grew.

39. In order to prevent the simultaneous airing of duplicative network programming over the same cable system, a broadcaster can make use of network non-duplication rules.[124] These rules require cable networks to block out duplicative broadcast network programming.[125] In order to prevent cable networks from airing syndicated programming that broadcasters have contracted for exclusively within a geographic zone, broadcasters and programmers can invoke the syndicated exclusivity rules to require a cable operator to delete that programming within the zone.[126] The network non-duplication and syndicated exclusivity rules are important tools for broadcasters to protect their program integrity in an MVPD marketplace.

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[120] *See* Robinson, *supra* note 1, at 943-946.
[121] *See* OWEN & WILDMAN, *supra* note 26, at 213-215 (discussing protectionist character of FCC policies during the development of the cable industry).
[122] *See generally id.,* at Chapter 2 (discussing the various elements of the market for the supply of television programming).
[123] Amendment of Subpart L, Part 11, To Adopt Rules and Regs. to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna System, 38 F.C.C. 683, 713 (1965) (discussing the threats of cable television program duplication to broadcasters' revenues).
[124] 47 C.F.R. §§ 76.92-76.163 (2001). *See generally* ZUCKMAN ET AL., *supra* note 66, at § 13.4(A)(4) (discussing in detail the provisions of the network non-duplication and syndicated exclusivity rules).
[125] 47 C.F.R. § 76.92(a) (West 2001).
[126] *Id.* §§ 76.151, § 73.658.

40. The advent of widespread cable subscription also posed the likelihood that cable operators would refuse carriage to broadcast stations, thus providing themselves with greater opportunities for their own affiliated programming to achieve greater market shares. With some evidence that broadcast market share was on the decline, Congress sought to enact a version of "must-carry" legislation that could withstand constitutional scrutiny. The must-carry rules require cable operators to carry the signals of local television stations, and thus their programming packages. The must-carry rules are a classic example of protectionism for broadcast television consumers, created in the interest of promoting the availability of "free television programming, especially for viewers who are unable to afford other means of receiving programming."[127]

41. Under the must-carry rules, cable systems must-carry a number of local commercial broadcast stations that is proportional to the number of usable channels on the cable system.[128] Generally, a cable system is required to carry up to one-third of its channel capacity.[129] Local commercial television stations are given priority for must-carry, followed by low power stations.[130] The must-carry channels must also be provided on the same channels as they are in over the air broadcast[131] and must be provided on the cable system's basic service tier,[132] so as to be available to all subscribers. The flip side of the must-carry rules is that no cable system can carry the signal of a broadcast station unless that signal is a must-carry signal.[133] A broadcaster can also elect to assert the right of retransmission consent, in which case the cable operator must obtain consent from the broadcast station before transmitting its signal over the cable system. Under these provisions, the broadcast network must elect either must-carry or retransmission consent in three year intervals.[134] Under provisions similar to the must-carry rules, cable systems are required to carry non-commercial educational channels[135] and may be required by local franchise authorities to designate channel capacity for public, educational, or governmental use.[136] Despite having been struck down as unconstitutional in an earlier manifestation,[137] in 1997, the must-carry regime was upheld as constitutional in *Turner II*.[138]

42. The litigation over the must-carry rules illustrates that the regulation of the business dealings of cable systems is subject to a higher degree of First Amendment scrutiny than that found in the broadcasting industry. In *Turner I*,[139] the Supreme Court found that the must-carry regulations were content-neutral regulations of speech, and therefore need to past muster under "intermediate" constitutional scrutiny.[140] The standard of intermediate scrutiny requires that the legislation "advances important governmental interests unrelated to the suppression of free

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[127] 47 U.S.C.A. § 521(a)(12) (2001).
[128] *Id.* § 534(b)(1).
[129] *Id.* § 534(b)(1)(A).
[130] *Id.* § 534(b)(2)(A).
[131] *Id.* § 534(b)(6); 47 C.F.R. § 76.57(a).
[132] *Id.* § 534(b)(7); 47 C.F.R. § 76.56(d)(1).
[133] *Id.* § 325(b).
[134] *Id.* § 325(b)(3)(B).
[135] *Id.* § 535.
[136] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 611, 98 Stat. 2782 (1984) (codified as amended at 47 U.S.C. § 531 *et seq.* (2001)).
[137] *See, e.g.,* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).
[138] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).
[139] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).
[140] *Id.* at 662.

speech and does not burden more speech than necessary to further those interests."[141] In *Turner I*, the Court found that there was insufficient evidence in the record to support the must-carry rules and remanded the case for further proceedings to develop a more substantial factual record. In *Turner II*, the Court upheld the rules, finding a more developed evidentiary record to support Congress' predictive judgment that the rules were designed to counteract a "real threat" to broadcasters.[142]

43. The underlying governmental interests in the *Turner* cases included "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[143] *Turner I* established that "differential treatment" of the cable medium, the application of immediate as opposed to strict scrutiny, was justified by the "bottleneck monopoly power exercised by cable operators."[144] Thus, where broadcasters receive differential treatment as a result of the scarce spectrum resources, cable operators receive a relaxed First Amendment standard (though not as relaxed as that found in broadcasting) because of their role as a gatekeeper to the audience base. The three norms that enable the regulations to resist constitutional scrutiny are those cited above, the preservation of a public good, the promotion of speech from diverse sources, and the antitrust goals of preventing unfair competition. On the economic front, the Court does not attempt a serious antitrust analysis, failing to discuss the influence of essential facilities theories or refusals to deal.[145] The fear of a product's failure at the hand of a newly developed, superior product that attracts consumers would be in and of itself insufficient to merit antitrust action.[146] The interest in the economic health of the broadcasting industry is thus rooted in a federal policy that "has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[147]

ii. Behavioral Controls: Program Access Rules

44. Vertically integrated cable operators are also subject to a host of behavioral restrictions under Section 628 of the 1992 Cable Act.[148] Known as the "program access" provisions, these rules are designed to prevent any behavior on the part of programming vendors and cable operators that might inhibit the development of competition among distributors.[149] These requirements

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[141] 520 U.S. at 189 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).
[142] *Id.* at 196-7 ("Evidence indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel.").
[143] *Id.* at 189.
[144] 512 U.S. at 660-661.
[145] The essential facilities doctrine is only mentioned once in the *Turner* cases, in a concurrence to *Turner I*. *Id.* at 670 (Stevens, J. concurring) ("Cable operators' control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media."). Justice Breyer goes so far as to reject the economic purpose as a factor in upholding the rules, agreeing with the majority only that the first two of the three cited statutory purposes are sufficient to uphold the must-carry rules. 520 U.S. at 226.
[146] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (stating that monopoly power as a result of "growth or development as a consequence of a superior product, business acumen, or historic accident" is not actionable).
[147] 520 U.S. at 194.
[148] 1992 Cable Act, *supra* note 116, § 548.
[149] 1992 Cable Act, *supra* note 116, § 2(a)(5); SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, S. REP. NO.102-92, at 25-26 (1991). The program access rules apply to satellite delivered affiliated programming, as opposed

ensure that the market for programming remains fluid, i.e., that program supply won't be locked into one particular mode of distribution. The vertically integrated program supplier has not only an interest in selling programming, but also in marketing an MVPD service. For example, if the losses of withholding programming from a competing service are outweighed by the benefits of diminishing the value of that service (e.g., satellite service), then the vertically integrated supplier would have an economic incentive to refuse to sell. The 1992 Cable Act regime is designed to prevent such a scenario from transpiring, in this context serving the interests of new entrants in the MVPD market.

45. Under the 1992 Cable Act regime, exclusive arrangements between a vertically integrated program vendor and a cable operator that grants the operator exclusive rights to distribute the programming within its franchise area require FCC approval.[150] The Commission is directed by Congress to examine a variety of factors to determine whether such an exclusive contract is "in the public interest."[151] The FCC has been very reluctant to grant waivers to the exclusive contract provision, generally following what it views as the congressional policy to "disfavor such exclusive contracts."[152] A typical scenario involving an exclusive contract dispute is as follows: USA networks ("USA") sought to enforce a contract provision giving Cablevision the exclusive right to air the Sci-Fi channel, one of USA's cable networks, on its local cable systems.[153] USA was part-owned by Paramount, which was fully owned by Viacom, a company that owns subsidiary cable systems.[154] As a result, USA was considered by the Commission to be a "vertically integrated programming vendor."[155] A competing cable company in one of Cablevision's franchise areas filed for the right to carry the Sci-Fi channel, triggering Cablevision and SciFi's petition before the FCC to enforce their exclusive contract.[156] The FCC denied enforcement of the exclusive contract provision, noting that such contracts "directly constrain[ ] the development of competition in the local distribution markets at issue."[157]

46. The prohibition on exclusive contracts is scheduled to sunset on October 5, 2002, unless the Commission finds "that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[158] At this writing, the

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to terrestrially delivered, e.g., local programming delivered via terrestrial lines, which represents the majority of the programming supplied by cable operators. *See generally* OWEN & WILDMAN, *supra* note 26, at 257-258 (discussing the role of satellite delivery in the cable industry).

[150] Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992—Development of Competition and Diversity in Video Programming, Distribution and Carriage, 8 F.C.C. Rcd. 3359, 3386 (1993).

[151] 47 U.S.C.A. §§ 548(c)(4)(A)-(E) (West 2001); 47 C.F.R. § 76.1002(c) (West 2001).

[152] Memorandum Opinion and Order, Time Warner Cable, Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of Courtroom Television, 9 F.C.C. Rcd. 3221, 3229 (1994). *See generally* ZUCKMAN ET AL., *supra* note 66, § 13.5(C).

[153] Memorandum Opinion and Order, Cablevision Industries Corporation and Sci-Fi Channel, Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4) Relating to the Exclusive Distribution of the Sci-Fi Channel, 10 F.C.C. Rcd. 9786 (1995).

[154] *Id*. at 9787.

[155] *Id*.

[156] *Id*.

[157] *Id*. at 9791.

[158] 47 U.S.C. § 548(c)(5). *See also* Bill McConnell, *Program Access or Excess?: DBS fights to keep requirements; cable argues they are no longer justified*, BROADCASTING & CABLE, Oct. 8, 2001, at 16.

Commission is considering whether or not to retain the prohibition on exclusive contracting.[159] The idea of allowing the exclusive dealing provisions to sunset was rooted in the congressional hope that at some point the market would be sufficiently competitive so these rules would not be necessary.[160] In its review proceedings, the FCC notes that the development of the cable market since 1992 is characterized by consolidation and clustering, along with substantial vertical integration.[161] These factors might seem to indicate that exclusive dealing would be a greater threat to potential new entrants in the market for distribution than it was in the past. On the other hand, the Commission notes that the ability to make exclusive arrangements is a valuable competitive tool for MVPDs.[162] The Commission sites the example of DirecTV's exclusive arrangements with the NFL for generous football programming as an important means of attracting customers.[163] Whether or not the FCC retains the program access provisions may depend in part on the final outcome in their proceedings to review the recently struck down structural rules involving ownership.[164] If the new rules permit more consolidation, the exclusive contracting prohibition may retain continued importance.

47. Regardless of the outcome of the exclusive dealing provisions of the program access rules, there are other program access restrictions that will remain intact. The 1992 Cable Act also prevents vertically integrated programming vendors from unreasonably refusing to sell programming to competitors.[165] In order to enforce this provision, the FCC adopted rules that more specifically prevent vertically integrated program suppliers from discriminating against competitors in prices, terms or conditions in the sale of video programming.[166] These rules prevent non-price discrimination, giving competing MVPDs recourse against vertically integrated programming vendors who "unreasonably" refuse to sell programming.[167] If vertically integrated program suppliers charge different prices to different distributors, a complainant can require the program vendor to justify that the price differential is cost-related.[168] For example, if the owner of a cable network charges different prices to similarly situated MVPD providers, the injured party can compel the owner of the cable network to justify the price differential and potentially compel a re-negotiation of the contract.[169]

48. Some commentators have criticized the program access rules, noting that MVPDs may have incentives for exclusive contracting, regardless of whether the program provider is vertically integrated, a factor that suggests an illogical difference in treatment of vertically integrated as

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[159] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, 2001 FCC LEXIS 5645 (Oct. 18, 2001).
[160] *Id.* at ¶ 5.
[161] *Id.* at ¶ 9.
[162] *Id.* at ¶ 4.
[163] *Id.* at ¶ 10.
[164] *See* discussion *infra* Part IIA.
[165] 1992 Cable Act, *supra* note 116, § 628(c)(2)(B) (codified as amended at 47 U.S.C. § 548(c)(2)(B) (2001); 47 C.F.R. § 76.1002(b) (1997).
[166] Report and Order, *supra* note 150, at 3412; 47 C.F.R. § 76.1002(b).
[167] A "reasonable" refusal to sell could be the result of, *inter alia*, an impasse over contract terms, a buyer's history of default, or refusal to sell outside of the geographic area of a regional network. Report and Order, *supra* note 150, at 3377. *See generally* ZUCKMAN ET AL., *supra* note 66, at § 13.5(A).
[168] Report and Order, *supra* note 150, at 3405; 47 C.F.R. § 76.1002(b).
[169] *See generally* ZUCKMAN ET AL., *supra* note 66, at § 13.5(C).

opposed to non-vertically integrated program providers.[170] The more general provision of Section 628 of the Cable Act applies to MVPDs and program providers regardless of whether they are vertically integrated. Section 628(b) prohibits, as a general matter, "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[171]

49. Methods of doing business normally the subject of more flexible antitrust laws are clarified as per se violations under the 1992 Cable Act regulatory scheme.[172] These behavioral restrictions limit the contractual importance of vertical integration in cable firms, largely forbidding refusals to deal that might leave potential entrants at a loss for marketable programming. The program access rules go a long way to ensure that the market for the supply of video programming remains fluid and, by extension, that programming will be available to potential MVPD competitors. Considering the role of the program access rules in preserving a dynamic video programming market, the extent to which a comprehensive regime of structural controls is necessary remains an open question. Although the program access rules force the vertically integrated program providers to sell programming, it does not protect the interests of program providers by forcing MVPDs to buy programming. Without actually forcing MVPDs to purchase from competitive programming sources, the FCC has traditionally relied on structural controls to preserve an open market for program providers.

iii. Structural Controls: Channel Occupancy and Subscriber Limits

50. The primary tools in preventing vertical integration in the cable industry until recently have been the channel occupancy and subscriber limits. In the early days of cable, a Cabinet Committee formed by President Nixon recommended that complete divestiture be required between cable operators and programming sources.[173] The fear at the time was the same fear that permeates regulation over the content-distribution relationship, namely that vertically integrated program suppliers with a monopoly over distribution would unfairly discriminate against unaffiliated program providers.[174] Although total vertical divestiture would never come to pass, the 1992 Cable Act introduced the evolution of a complex array of ownership controls and program supply limitations to control the structure of the cable industry at both horizontal and vertical levels.

51. The channel occupancy rules and the subscriber limits are at this writing the most disputed cable regulations. The channel occupancy rules limit the number of channels that a cable operator can fill with its affiliated programming, prohibiting a cable operator from carrying its

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[170] *See* DAVID WATERMAN & ANDREW A. WEISS, VERTICAL INTEGRATION IN CABLE TELEVISION 15 (1997) ("Vertical integration does not in itself motivate such anticompetitive behavior; cable systems must have an incentive to restrict program access to alternative video distributors, even in the absence of vertical integration."). *See also id.* at 148-50.
[171] 1992 Cable Act, *supra* note 116, § 628 (codified as amended at 47 U.S.C. § 548(b) (2001)); Report and Order, *supra* note 150, at 3372. Waterman and Weiss take some consolation in this fact, favorably reviewing an FCC case that prohibited exclusivity contracts with non-vertically integrated program providers under the more general provisions. *See* WATERMAN & WEISS, *supra* note 170, at 150.
[172] Statutory remedies for violations of the federal regulations do not bar antitrust action. However, many of the practices restricted in the 1992 Cable Act have withstood antitrust scrutiny. *See generally* ZUCKMAN ET AL., *supra* note 66, §13.5(D).
[173] *See generally* WATERMAN & WEISS, *supra* note 170, at 1.
[174] *Id.*

affiliated programming on "more than 40 percent of its activated channels."[175] The rule is adjusted to channel capacity, insofar as the limit is capped at 75 channels.[176] The subscriber limits effectively restrict the number of cable systems that an MSO can own by putting a cap on the national audience reach of any one owner. Shortly after their enactment in the 1992 Cable Act, these provisions were challenged in a federal district court in *Daniels Cablevision v. United States*.[177] The court invalidated the provisions underlying the subscriber limits on First Amendment grounds.[178] In *Time Warner I*, the Court of Appeals reversed the district court on this count, and upheld the challenged provisions of the Act as constitutional.[179] In *Time Warner II*, however, the Court of Appeals had a more hostile view of the FCC's actions taken pursuant to the 1992 Cable Act, invalidating the subscriber limits and channel occupancy provisions.[180] Some background on these provisions is in order.

52. At the vertical level, the 1992 Cable Act required the FCC to adopt channel occupancy rules limiting the number of channels that can be used on a cable system by channels in which the cable operator has an attributable interest.[181] Congress' stated concern in this regard was that cable operators "could make it more difficult for non cable-affiliated programmers to secure carriage on cable systems because cable operators have the incentive and ability to favor their affiliated programmers."[182] The channel occupancy limits were supposed to represent a balance between the potential benefits and dangers of vertical integration. On the side of benefits, Congress and the FCC acknowledged that vertical integration benefits consumers "by allowing efficiencies in the administration, distribution, and procurement of programming."[183] In formulating its channel occupancy rules, Congress explicitly directed the FCC to take into account "any efficiencies and other benefits that might be gained through increased ownership or control," as well as to prevent unfair impediments to the flow of programming.[184] To the extent that the aims of both capitalizing on efficiencies and restricting the dangers of vertical integration are conflicting, the FCC was faced with a serious challenge in developing justifiable rules. According to the D.C. Circuit Court of Appeals in *Time Warner II*, the Commission failed at its task.[185]

53. The 40 percent channel occupancy limit was not based on a precise economic formula that could predict the effects of minor differences in the percentage limitation. Rather, it was based on a consensus that some limit is necessary in order to prevent entry barriers to programmers and analysis suggesting that vertically integrated cable programmers have strong incentives to discriminate against unaffiliated program providers.[186] In their challenge to the channel occupancy rules, Time Warner argued that cable operators have no incentive to discriminate

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[175] 47 C.F.R. § 76.504(a).
[176] *Id.* § 76.504(b).
[177] 835 F. Supp. 1 (D.D.C. 1993).
[178] *Id*. at 8.
[179] Time Warner v. United States, 211 F.3d 1313, 1323 (D.C. Cir. 2000).
[180] Time Warner v. FCC, 240 F.3d 1126, 1144 (D.C. Cir. 2001).
[181] 47 U.S.C.A. § 533(f)(1)(B) (West 2001).
[182] Cable Communications Policy Act of 1984, *supra* note 136, § 2(a)(5), 98 Stat. 2782 (codified as amended at 47 U.S.C. § 521 (2001).
[183] Second Report and Order, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits, 8 F.C.C. Rcd. 8565, 8568 (1993).
[184] 47 U.S.C. § 533(f)(2)(D).
[185] 240 F.3d at 1134.
[186] SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, S. REP. NO.102-92, at 25-26 (1991).

against quality programming, or to run the risk of developing "less than optimal" programming packages when satellite providers could easily displace their business.[187] In their view, cable operators "*benefit* from entry by new programming services" as those services enhance the demand for cable service.[188] Commentators have also pointed out that the channel occupancy limits do little to prevent the most likely type of discrimination, i.e., replacing non-affiliated programming with similar affiliated programming.[189] For example, a cable company affiliated with News Corp., of which Fox Television is a subsidiary, might choose to deny carriage to the Disney Channel in favor of Fox Kids. As David Waterman and Andrew Weiss point out, the channel occupancy rules do not prevent this type of harm. A cable operator can still prefer its own programming by refusing to carry an unaffiliated channel; nothing in the channel occupancy rules prevents a cable operator from excluding an unaffiliated, competitive program provider in favor of a non-competitive, affiliated program provider.[190]

54. In striking down the FCC's channel occupancy limits, the *Time Warner II* court explicitly recognized the speech right of the cable providers at issue, namely "their right to exercise editorial control over a portion of the content they transmit."[191] The court again applied an intermediate standard of scrutiny to the limitations on the cable operator's speech right, suggesting that the limits would not have even passed muster under the lower administrative law "arbitrary and capricious" threshold. According to the court, the Commission "plucked the 40% limit out of thin air"[192] and made "no effort to link the numerical limits to the benefits and detriments depicted."[193] The court was particularly disappointed in the fact that the Commission failed to inquire into whether independent program providers "find greater success selling to affiliated or unaffiliated programming firms."[194]

55. At the horizontal level, the 1992 Cable Act required the FCC to promulgate regulations limiting the number of cable systems any particular entity could own.[195] Known as subscriber limits, the FCC's rules on this subject prevented any single entity from having an attributable interest in cable systems that together reach more than 30 percent of cable homes passed nationwide.[196] Similar to the channel occupancy limits, the subscriber limits are rooted in a concern for foreclosure of program supply, i.e., the dangers of "barriers to entry for new programmers and a reduction in the number of media voices available to consumers."[197] The FCC's subscriber limits are also similar to the channel occupancy rules insofar as they were struck down by the *Time Warner II* court as "in excess of statutory authority."[198]

56. The 30 percent ownership limit guaranteed that at least four cable operators would be in the national market and that no two cable operators could control more than 60 percent of the

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[187] Petitioners Opening Brief at 24, Time Warner v. FCC, No. 94-1035 (D.C. Cir. Filed March 7, 2000).
[188] *Id.* (citing "B. Owen, S. Wildman & R. Crandall *Video Economics* 235-236 (1992).").
[189] WATERMAN & WEISS, *supra* note 170, at 145.
[190] *Id.*
[191] *Time Warner*, 240 F.3d at 1129.
[192] *Id*. at 1137.
[193] *Id*. at 1138.
[194] *Id*.
[195] Cable Communications Policy Act of 1984, *supra* note 136, § 2(a)(5) (codified as amended at 47 U.S.C. § 533(f)(1)(A) (2001).
[196] Second Report and Order, *supra* note 183, at 8576-77
[197] 1992 Cable Act, *supra* note 116, § 2(a)(4).
[198] *Time Warner*, 240 F.3d at 1136.

market.[199] According to the Commission, "even if two operators, covering 60% of the market, individually or collusively deny carriage to a programming network, the network would still have access to 40% of the market, thereby giving it a reasonable chance of financial viability."[200] The 40 percent "open field" is premised on the Commission's finding that a program provider needs access to about 20 percent of the subscriber market to be viable and has a 50 percent chance of reaching those subscribers given this access.[201] The market in which cable operators compete was revised in 1999 to include all MVPDs, including, most importantly, satellite providers.[202]

57. The *Time Warner II* court invalidated the 40 percent subscriber limit, ruling that the FCC did not meet its burden under an intermediate scrutiny standard in developing the rule.[203] The court first took aim at the Commission's "collusion hypothesis," the theory that vertically integrated cable firms would have incentives to "reach carriage decisions beneficial to each other."[204] The court faulted the FCC for failing to supply any evidentiary record for its theories regarding collusion, noting that the Commission must do more than simply "posit the existence of the disease sought to be cured."[205] The court further noted that the 1992 Cable Act explicitly directed the FCC to promulgate these regulations "in order to enhance effective competition."[206] Thus, the court reasoned, proposing rules that were based primarily in the interest of promoting diversity, without adequate analysis of competitive conditions, was impermissible.[207] As a result, the mere fact that the 30 percent rule guarantees that at least four MSOs will be in the marketplace is not a justified result under the statutory scheme.[208]

58. According to the *Time Warner II* court, the task of the FCC on the subject of ownership controls is to "assess the determinants of market power in the cable industry and to draw a connection between market power and the limit set."[209] To this extent, the FCC failed to consider the issue of potential competition represented by the direct-broadcast-satellite ("DBS") industry. The exercise of market power, the court reasoned, depends in large part upon the "elasticities of supply and demand, which in turn are determined by the *availability* of competition."[210] The FCC's focus fell short in this respect because it only considered the importance of market share in the DBS industry, rather than taking into consideration the fact that, according to one FCC report, DBS "could be considered 'to pass every home in the country.'"[211] The *Time Warner II* court does concede that Congress had in mind the goal of

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[199] In late 2000, the ten largest cable operators served approximately 90 percent of U.S. cable subscribers. Seventh Annual Report, *supra* note 117, at § 15.
[200] Third Report and Order, Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits, 14 F.C.C. Rcd. 19098, 19119 (1999).
[201] *Id*. at 19115-18.
[202] *Id.* at 19119. In 1999, the market was redefined so as to include all MVPDs, thus incorporating for purposes of the subscriber limit percentages of satellite viewers as well. *Id.* at 19110-13.
[203] *Time Warner*, 240 F.3d at 1134.
[204] *Id*. at 1132 (quoting Third Report and Order, *supra* note 200, at 19116).
[205] *Id*. at 1133 (quoting *Turner*, 512 U.S. at 664).
[206] *Id*. at 1136 (quoting 47 U.S.C. § 533(f)(1)).
[207] *Id*.
[208] *Id*. at 1135-36.
[209] *Id*. at 1134.
[210] *Id*.
[211] *Id*. (quoting Third Report and Order, *supra* note 200, at 19107). The Commission decided not to use a homes-passed standard because "although DBS providers pass every home in the country, homes passed does not accurately reflect

preventing any single company from being in a position "single-handedly to deal a programmer a death blow."[212] To this extent, the court left open the continued use of something in the manner of an open field requirement. The court concluded, however, that absent evidence of collusion, a 60 percent limit would be sufficient to ensure the 40 percent open field that the FCC had promoted.[213] The FCC was sent back to the drawing board with a provisional 60 percent ownership cap.

D. DIRECT BROADCAST SATELLITE: MVPD COMPETITION BECOMES REALITY

59. The advent of ubiquitous satellite television service could have a dramatic effect on the market power of cable systems vis-à-vis program suppliers and consumers. Direct Broadcast Satellite is an MVPD service that provides video programming by satellite link directly to the home through a relatively low-cost, parabolic "dish" antenna.[214] DBS evolved out of the traditional satellite services that operated in a lower frequency band (C-band), which required larger and more expensive dishes for signal transmission.[215] The DBS signal operates in the Ku-band of the electromagnetic spectrum, a band of frequencies that allows a more focused and powerful signal to be transmitted to a smaller dish.[216] DBS providers obtain licenses to use these frequency bands through a competitive bidding process before the FCC.[217] At this writing, there are four companies licensed to provide DBS service.[218] Two of the largest of these companies, DirecTV and Echostar[219] (a.k.a. "The Dish Network") are in merger proceedings.[220] DBS is considered by the FCC to be the "principal competitor" to cable television.[221] In the middle of the year 2000, nearly 13 million homes subscribed to DBS and the numbers have been rapidly growing.[222] Both the Department of Justice[223] and the FCC[224] consider DBS as a substitute for cable when assessing MVPD competition.

60. There are a few important regulatory focal points that are shaping the development of the DBS industry. These concern the public interest obligations of DBS providers, DBS carriage of local broadcasting signals, and regulations concerning the availability of programming from vertically integrated competing cable MSOs. The 1992 Cable Act requires DBS operators to set aside four to seven percent of channel capacity for "public interest programming," more

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their market power because DBS providers only serve approximately 10% of MVPD subscribers." Third Report and Order, *supra* note 200, at 19109.

[212] *Time Warner*, 240 F.3d at 1131.

[213] *Id*. at 1136.

[214] *See* Seventh Annual Report, *supra* note 117, ¶ 60.

[215] *See* ZUCKMAN ET AL., *supra* note 66, § 14.3(b).

[216] *Id*.

[217] Report and Order, Revision of the Rules and Policies for the Direct Broadcast Satellite Service, 11 F.C.C. Rcd. 9712, 9715 (1995).

[218] These include DirecTV, EchoStar (marketed as the DISH Network), Dominion Video Satellite, Inc. (marketed as Sky Angel) and R/L DBS Company. *See* Seventh Annual Report, *supra* note 117, ¶ 62.

[219] *Id*. ¶ 14.

[220] Paige Albiniak, *Facing the Regulators: With little opposition in sight, DBS merger could squeeze by*, BROADCASTING & CABLE, Nov. 5, 2001, at 22.

[221] Seventh Annual Report, *supra* note 117, ¶ 63.

[222] *Id*. ¶ 8.

[223] *See* Seventh Annual Report, *supra* note 117, 6041, n.264, *citing* Complaint at 63, United States v. Primestar, Inc., No. 1:98CV01193 (D.D.C. Filed May 12, 1998) (noting that "consumers view [cable and DBS] as similar and to a large degree substitutable.").

[224] Third Report and Order, *supra* note 200, at 19111.

specifically defined as "noncommercial programming of an educational or informational nature."[225] The Act also directs DBS operators to comply with the political broadcasting rules,[226] granting candidates reasonable access and offering equal access for political advertising at the lowest unit rate.[227] Pursuant to the statute, the FCC requires DBS operators to set aside four percent of their channel capacity for public interest programming.[228]

61. The development of a legal regime to deal with the relationship of DBS operators and local service stations is only now reaching maturity. Under the 1988 Satellite Home Viewer Act ("SHVA"), DBS operators were allowed to transmit distant network signals only to areas that were "unserved" by over the air broadcasting through a statutory copyright license for DBS service that met certain criteria.[229] SHVA protected broadcasters' interests by preventing DBS operators from transmitting distant broadcast signals into markets that were already served by local broadcast stations. In 1999, Congress passed the Satellite Home Viewer Improvement Act ("SHVIA"),[230] allowing DBS operators a statutory copyright license for carriage of local broadcast stations when they are transmitted into a station's local market. As the technology improves for DBS operators, SHVIA further encourages "local into local" transmission of broadcast signals through DBS operators.

62. Under SHVIA, the provisions for carriage of local stations are evolving into a full must-carry regime. As of January 1, 2002, a DBS provider is no longer able to pick and choose the local stations it will carry on its system. If a DBS operator carries one local station, it will be obligated to carry any other local station at the station's request and must group these stations contiguously on its channel line-up.[231] In "unserved areas," DBS providers may continue to transmit distant signals to DBS customers.[232] The new DBS regime protects both the interests of broadcasters and DBS operators. Broadcasters can benefit from a system in which local carriage is preserved despite the potentially non-local character of broadcasting that is transmitted from outer space. Furthermore, less viable local broadcasters can piggyback on the more desirable networks to ensure carriage through the new must-carry provisions (perhaps a more dubious benefit). DBS providers gain the benefit of being able to transmit local broadcasting, thus providing them with the functional equivalent of the "basic tier" of programming found in cable. The ability to offer local broadcast signals is considered a substantial point of economic viability in the MVPD marketplace.[233]

63. In order for DBS to compete with other MVPD services, it is necessary for the DBS service to offer competitive programming. Communications law contains certain safeguards to ensure that the market for the purchase of video programming is an open one. At this writing, vertical

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[225] 1992 Cable Act, *supra* note 116, § 25 (codified as amended at 47 U.S.C. § 335(b)(1)(West 2001).
[226] 47 U.S.C.A. § 312(a)(7) (West 2001).
[227] *Id.* § 315(b)(2).
[228] Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, 13 F.C.C. Rcd. 23254, 23266 (1998).
[229] 17 U.S.C. § 119(a)(2)(B) (1994).
[230] SHVIA was passed as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521, tit. I (codified in scattered sections of Titles 17 and 47 of the U.S.C.).
[231] 47 U.S.C.A. § 325(b)(2)(E), § 338(a),(d) (West 2001).
[232] 17 U.S.C. § 119(d)(10)(B); 47 U.S.C. § 339(c)(2).
[233] *See* John M. Higgins, *It Could Have Been Worse: Cable Operators say better Ergen in charge of DirecTV than Murdoch*, BROADCASTING & CABLE, Nov. 5, 2001, at 18 (explaining the importance of the Echostar-DirecTV merger in terms of greater capacity to carry local signals).

integration in DBS services is virtually non-existent as compared to that found in the cable industry.[234] When DirecTV was up for sale, however, one perceived threat among cable operators was that Rupert Murdoch's News Corp., owner of Fox Television and extensive in-house programming, would merge with DirecTV.[235] The fear that the DBS industry would, in such quick fashion, become vertically integrated with a powerful programming company was of concern to cable operators.[236] Although vertical integration does apparently provide an edge to cable MSOs, the program access provisions of the 1992 Cable Act dull that edge substantially. The laws that were designed to apply primarily to the cable industry in this respect have had a substantial effect in facilitating the development of the DBS industry. In turn, now that DBS appears to be gaining a high degree of market power, it will not be surprising when the DBS operators purchase a production studio or two of their own. In the case of horizontal concentration, the growth of DBS dramatically alters the competitive landscape by providing a nationwide head-to-head competitor for cable systems.

II. OWNERSHIP CONTROLS AFTER *TIME WARNER* AND *FOX*: BACK TO THE DRAWING BOARD

64. In the short history of MVPD regulation in the United States, a complex regime has evolved to shape the marketplace for distribution and programming supply. The three primary interests of concern in this context are the broadcasters, competing MVPD services, and the suppliers of programming. Must-carry obligations protect the interests of broadcasters in an MVPD environment. Program access rules encourage competition in the market for MVPD services by guaranteeing that programming will be available to competing providers on non-discriminatory terms. Other controls, such as the ownership and channel occupancy limits, protect the interests of competition in the programming market. The program access rules complement the ownership controls in this respect. Ownership caps protect the market entry of program suppliers by regulating cable distributors, while the program access rules protect the market entry of competing MVPD distributors by regulating the supply of programming. The problem with this scenario, however, is that *Time Warner II* has vacated the channel occupancy and ownership limits, sending the FCC back to the drawing board either to develop better evidence for the rules, modify them, or scrap them altogether.[237] The FCC faces a similar challenge of either justifying, modifying, or scrapping the national ownership limits in the context of broadcasting after the ruling in *Fox Television v. FCC*.

65. Are ownership limits effective in encouraging competition in the video programming market? Does a restriction on channel occupancy make sense in an MVPD environment in which hundreds of channels are available? Do ownership controls impede the development of advanced, interactive services? A variety of proposals are on the table for replacing the ownership rules, including moving to a case by case analysis of cable mergers within the FCC.[238] This Section argues that a relaxed form of the fixed national ownership limit for cable,

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[234] One exception is Dominion Video Satellite, Inc., marketed as Sky Angel, a DBS service oriented towards Christian religious and family programming. *See* Seventh Annual Report, *supra* note 117, ¶ 66. *See also* http://www.skyangel.com (last visited April 14, 2002).

[235] *See* Higgins, *supra* note 233 (discussing the preferences of the President of Comcast to face a DBS competitor that was not also a profitable programming company).

[236] *Id.* *See also* Albiniak, *supra* note 220.

[237] *Time Warner*, 240 F.3d 1126.

[238] Further Notice of Proposed Rulemaking, Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996;

in the manner of the 60 percent limit discussed by the court in *Time Warner II*, is preferable to the case by case method discussed by the FCC. The channel occupancy limits, however, appear to miss their mark in any form. In an MVPD marketplace characterized by expanding channel capacity, placing a limit on how many channels a cable operator can fill with its own programming sacrifices a high degree of editorial discretion for a benefit that does not even appear to exist. If the horizontal ownership limit accomplishes its goal—as paraphrased by the D.C. Circuit—of preventing any one MVPD service from "singlehandedly [dealing] a programmer a death blow,"[239] then the channel occupancy rule accomplishes nothing.

66. In the context of broadcasting, it is important to remember that the First Amendment standard that applies to the ownership regulations is less than intermediate scrutiny under the *Red Lion* approach. One important point is that even if the scarcity/public trustee model of broadcasting endures in an era dominated by subscription-based, multichannel services, the scarcity model should, at the very least, be lifted to an equal First Amendment standard as its competing (e.g., cable) delivery modes, if not abolished altogether. Although the broadcasting rules are characterized by a different set of issues from those facing MVPD services, the medium is essentially the same—that of televised entertainment and pubic interest programming.

67. On the subject of the broadcast ownership rules, there are plenty of reasons to get rid of them. As discussed below, the broadcast ownership caps do not legitimately serve the interests of competition or diversity. While the rules do serve the interest of maintaining local control over stations in the broadcast industry, such local control may not be in the best interests of the local community, if capital-rich networks are unable to invest in stations at the local level in order to improve their services. In short, this article recommends that the broadcast ownership caps should be lifted. Instead, the chain broadcasting rules should be modified in order to ensure representation of local interests, regardless of ownership. The Commission also has authority to review license renewals on the basis of whether local interests are being served.

A. REASSESSING CABLE CONTROLS AFTER *TIME WARNER*

68. Since the subscriber limits and channel occupancy rules were vacated and remanded in *Time Warner II*, the FCC has instituted proceedings to reevaluate the rules based on a more comprehensive evidentiary record.[240] The fundamental choice facing the FCC on the subscriber limit is whether to resume with a percentage cap on cable systems or to allow mergers on a case by case basis.[241] Possibilities include utilizing antitrust market gauging methods, such as the HHI or "q-ratio."[242] In response to the *Time Warner II* court's

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The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules; Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, 2001 FCC LEXIS 5025 (Sept. 21, 2001).

[239] 240 F.3d at 1131.

[240] *See* Press Release, FCC, FCC Begins Reviewing Cable Ownership Limits: Agency Seeking Evidence That Will Withstand Further Judicial Scrutiny (Sept. 13, 2001).

[241] *See* Bill McConnell, *FCC's sizeable shift: Crossownership rules and percentage caps seem headed for big changes*, BROADCASTING & CABLE, Oct. 1, 2001, at 40. The Commission uses favorable language in describing the threshold approach. Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 72 ("The threshold approach appears to provide a means of tailoring regulation to fit the marketplace as it changes, and it would provide a degree of certainty to actors in the relevant markets.").

[242] Further Notice of Proposed Rulemaking, *supra* note 238, ¶¶ 62-63.

admonishment, the Commission appears to be making an effort to develop a more accurate measure of market power, as opposed to relying on a method that is based merely on market share. One proposed methodology involves the use a "threshold/safe harbor," which would allow the triggering of ownership limits when a certain threshold level of market power is present within the industry.[243] The threshold approach would require that the FCC continuously monitor the industry and analyze merger activity against the backdrop of the overall levels of concentration within the industry.[244]

i. The Subscriber Limit: What Comes Next?

69. The provisions of Section 613(f) of the 1992 Cable Act authorizing subscriber and channel occupancy limits are aimed primarily at promoting competition in the market for video programming. In mandating the proceedings to set such limits, Congress required that the Commission make such regulations taking into particular account the "market structure, ownership patterns, and other relationships of the cable television industry."[245] On one hand, the FCC is supposed to ensure that cable operators are restrained from unfairly impeding, by virtue of size or joint action, the flow of video programming. On the other hand, the Commission is directed to "account for any efficiencies and other benefits that might be gained through increased ownership or control."[246] While some rules on channel occupancy and subscriber limits appear necessary under the statute, trying to balance the benefits of economies of scale and scope with a desire for competition in video programming is a process that may ultimately be resistant to any regulatory balance. At this stage, the FCC faces the challenge of crafting a rule that allows cable operators the greatest amount of investment flexibility, while accomplishing the congressional objective of ensuring that cable operators are unable to unfairly impede the flow of video programming from the video programmer to the consumer.[247]

70. One of the problems the FCC faces in developing a measure of market power in the cable industry is that its concern for competitive activity is rooted in the effect of market power in a downstream market (the market for delivery) on an upstream market (the market for program supply). The FCC proposes that three separate markets exist in this context, including one for the production of programming, one for the packaging of programming, and another for the distribution of programming to consumers. In the market for distribution, the primary competitive modes of delivery include broadcast, cable, and satellite. When one speaks of the need to protect the market for program supply, it is necessary to isolate the particular entities within the upstream market that merit protective regulation. In assessing to whom those regulations should apply, it is necessary to isolate those conditions in the downstream market that either facilitate or inhibit such anticompetitive behavior.

71. With regard to the market for the production of programming, i.e., the studios that create and sell programming, one might argue that barriers to entry are relatively low. Strictly independent producers have a variety of "program packaging" services to which they can market their programming, including broadcast networks, cable networks, and public television stations. Independent programming produced by small to medium size studios, if it is of high

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[243] McConnell describes this as a "leading proposal." *See* McConnell, *supra* note 241.
[244] Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 71.
[245] 47 U.S.C.A. § 533(f)(2)(A) (West 2001).
[246] *Id.* § 533(f)(2)(D).
[247] *Id.* § 533(f)(2)(A).

aesthetic and/or substantive quality, presents a potential source of high value to networks in need of programming. Program packagers, if they believe a particular studio or program is of sufficient value, may even invest or purchase the studio in order to ensure an adequate capital flow. Even low budget projects can be favorably received in this context. For example, an independent documentary film producer can market a program costing under $15,000.00 at a programming conference, and negotiate a favorable distribution contract with a multinational distribution and production firm, such as Alliance Atlantis, who will market that program to television stations and programming networks.[248] Small-scale independent producers, such as the author of this article, face little in the way of impediments for finding a market for their programming. The key factor in this equation rests with the creators, whether or not they have the requisite skill to create quality programming. The final arbiter of that question is the consuming public, who exercise a high degree of control in the marketplace of mass media ideas.

72. The possible investing arrangements for the production of more sophisticated, expensive programming are myriad. In many cases, cable networks will invest in partnerships with unaffiliated production studios in order to develop original programming for their network. One such example is *Farscape*, a prime-time science fiction series produced in partnership with the Sci-Fi Channel (a subsidiary of USA Networks), the Jim Henson Company (a subsidiary of the German-based EM.TV & Merchandising AG), and Hallmark Entertainment.[249] The market for program production involves a lot of potentially independent inputs, such as special effects, actors, editors, and set designers for which producers and program packagers must compete.[250] As cable networks are "racing to distinguish themselves with original programming,"[251] it is hard to imagine that quality program suppliers will have much trouble finding outlets for their product. One study even showed that "majorities of the prime-time programs exhibited by [Fox and Disney] are produced by other studios, and the production branches of both firms do business with competing networks."[252] If anything, vertical integration provides a potential boon to independent program producers. The primary concern of the subscriber limits thus cannot be the fate of individual production studios, but that of the programming networks (what the FCC terms "aggregators of the product of program producers"[253]). As the FCC notes, the 40 percent "open field" at the heart of the vacated and remanded subscriber limits "was intended to support the typical high-cost programming network that requires large audiences."[254]

73. Vertical integration does allow some dangers of program foreclosure that could be compounded at high levels of horizontal concentration. These dangers do not directly effect the market for program supply except insofar as one might use competition in the market for programming

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[248] *See, e.g., Documentary film: Mirror to History: Confronting War Crimes in Bosnia* (Cristian DeFrancia); AAC FACT Production Catalogue, Alliance Atlantis, at http://www.aactv.com (catalogue listing for *Mirror to History*).

[249] *See* Press Release, The Jim Henson Company, Sci Fi's Ultimate Weapon, Farscape, Returns for Unprecedented 4th and 5th Seasons (Sept. 27, 2001), *at* http://www.henson.com/company/press/092701.html.

[250] *See* Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 9, n.39 (cataloguing various inputs in program production market).

[251] Susanne Ault, *It's Not Just for Broadcast Anymore: Syndicators Turn to Cable as they Look to Diversify Outlets*, BROADCASTING & CABLE, Sept. 24, 2001, at 16.

[252] Daniel Waterman, *Viacom-CBS Merger: CBS-Viacom and the Effects of Media Mergers: An Economic Perspective*, 52 FED. COMM. L.J. 531, 537 (2000).

[253] Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 10.

[254] *Id.* at ¶ 54.

networks as a proxy for competition in program supply. In other words, it is fair enough to assume that the availability of a wider range of programming outlets would enhance competition in the market for sources of programming supply. The dangers of vertical integration in this respect deal largely with the actions of MSOs to impede the development or carriage of programming networks that compete with their pre-existing, affiliated programming line-up. A dominant MSO might have an incentive to exercise its monopsony power to deny carriage to a programming network that competes with one of its own. As Waterman and Weiss point out, restricted access from cable networks raises average costs per subscriber, decreasing the viability of the programming network. The ease of raising a rival's costs in this context has led some to conclude that monopoly MSOs will generally offer "fewer choices among similar types of programming."[255] The direct trade-off of an incentive to offer fewer choices among similar types is to offer more different types of programming.[256] In a competitive MVPD environment these incentives would likely shift. For example, if a DBS provider offers three 24-hour news networks, this package would be more preferable to the average consumer than a Time Warner cable system[257] that merely offers its own affiliate, CNN. As competition increases with channel capacity, the incentives operate towards the provision of more choices to consumers: more different types of programming and more competition between similar types of programming will make a particular MVPD service more attractive overall. In this environment, the benchmark that ensures viability would again properly be measured in terms of quality. Where there is no hindrance in the market for the sale of quality programming, regulatory measures are increasingly difficult to justify.

74. As to the concerns of both innovative program production and the development of networks to package such programming, the synergies of integration and concentration become significant. One benefit is that an integrated program producer realizes internally efficient contracting in the vertical context; transactions that occur internally in the production process do so, in theory, at true marginal cost.[258] Profits on the production of the program are realized in their final output, as opposed to being first realized by the producer and later realized by the distributor. MSOs then reap the rewards on two fronts; as program suppliers themselves and in the enhanced value of their multichannel service.[259] At the front end of program production, MSOs may provide a high degree of financial security in the production of programming or development of a network. A larger MSO, with substantial capital, can provide the needed funds to sustain incipient program supply sources that are characterized by high fixed costs and low marginal cost for additional distribution.[260] At the back end of program distribution, vertical integration guarantees the program supply an audience, thus generating further revenue to sustain such programming. These types of corporate relationships, as Waterman and Weiss

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[255] *Id.* ¶ 35 (citing OWEN & WILDMAN, *supra* note 26, at 116); Michael Spence & Bruce Owen, *Television Programming, Monopolistic Competition, and Welfare*, Q. J. of ECON., Page 112 (1977).
[256] *See* WATERMAN & WEISS, *supra* note 170, at 63. *See also* Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 35, n.85.
[257] Time Warner Cable ended the second quarter of 2001 with 12.7 million basic cable subscribers. *See* http://www.aoltimewarner.com/about/companies/twcable.html. (n.d.).
[258] *See* WATERMAN & WEISS, *supra* note 170, at 48 (discussing problem of double marginalization). Waterman & Weiss also note that vertical contracting among affiliated entities does not always avoid the problem of double marginalization in practice. *Id.* at 49. *See generally* Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950).
[259] WATERMAN & WEISS, *supra* note 170, at 49.
[260] *See, e.g.,* Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 15 (discussing characteristics of programming networks).

note, "are likely to stimulate innovation and thus entry and diversity in programming."[261] Add to this the program access rules, which require vertically integrated cable operators to offer non-discriminatory access to their program supply, and the benefits of this innovation are extended to competing modes of delivery. This formula becomes increasingly important where capital-intensive requirements of developing interactive television programming content are concerned.

75. In its *Time Warner II* initiated rulemaking inquiry, the FCC raises five potential problems of MSO concentration. One is the concern about an MSO having enough power to determine the success or failure of a programming network.[262] Another is the ability of monopoly MSOs to command large discounts from networks that seek carriage, driving down the profits of unaffiliated networks and thus endangering their program production budgets.[263] A third concern is the problem of a long-term absence of competitive pressure, which would result in X-inefficiencies (less than optimal use of inputs).[264] A fourth concern is the potential absence of competition for local franchises.[265] The final concern involves the above noted problem of fewer choices among similar types of programming.[266]

76. On the side of the benefits of cable concentration, the Commission cites the Schumpeterian theory that monopoly can be more conducive to innovation.[267] The Commission also notes two significant trends in the MVPD marketplace—"increased competition from DBS and expanded channel capacity through system upgrades and the use of advanced digital technologies."[268] The Commission indicates that these changes could alleviate some concerns, yet notes that these developments do not necessarily eliminate the potential drawbacks of concentration.[269]

77. The 30 percent subscriber limit vacated by *Time Warner II* was based on the previously discussed 40 percent "open field" requirement and the hypothesis that the two largest MSOs could collude to shut out new programming networks. A 30 percent subscriber limit thus guarantees that, even if the two largest MSOs act to foreclose distribution opportunities to a programming network, 40 percent of the market will be open to that network in order to market their programming. The court rejected the collusion hypothesis as unsubstantiated by the evidence and did not rule on the validity of the open field theory. Considering the levels of competition and fluidity in the market for video programming production, it is not likely that two dominant MSOs would have a mutual interest in shutting out a new programming source. This point is accentuated by the advent of increasing channel capacity and the need for MVPDs to fill those channels. Under the court's formula, Congress did not grant the FCC authority to promulgate, "solely on the basis of the 'diversity' precept, a limit that does more than guarantee a programmer two possible outlets (each of them a market adequate for viability)."[270] The Commission is welcome to return with a rule that guarantees there will be at least four MSOs in the market on the basis of achieving the statutory objective of ensuring "effective

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[261] WATERMAN & WEISS, *supra* note 170, at 51.
[262] Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 28.
[263] *Id.* ¶ 29.
[264] *Id.* ¶ 31 (citing literature on X-inefficiency).
[265] *Id.* ¶ 32.
[266] *Id.* ¶ 35.
[267] *Id.* ¶ 36 (citing JOSEPH SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (1961)).
[268] *Id.* ¶ 41.
[269] *Id.* ¶ 43.
[270] *Time Warner*, 240 F.3d at 1135.

competition"[271] in the market, yet would have to provide tangible evidence to support such a move. To proceed with a subscriber limit based merely on market shares of nationwide MVPD subscribership, the Commission in effect is limited to pursuing a 60 percent rule, which would guarantee at least two possible distribution outlets while preserving the 40 percent open field requirement.

78. There are substantial benefits to proceeding with a more liberal nationwide percentage limit. Perhaps the most obvious reason is administrative ease. Using such a method allows the Commission to employ ex ante market analysis, which it could rely upon on a forward looking basis. This avoids the FCC having to review mergers on a case by case basis. A percentage cap also avoids the necessity of having to analyze market conditions in both the upstream and downstream markets. If the theory that a programming network needs 40 percent of the market is considered both theoretically sound and based on the evidence, that analysis saves the Commission the necessity of having to review the market conditions every time there is merger activity. The 40 percent open field theory would likely remain constant despite changes in the structure of the industry. A 60 percent subscriber limit would also serve as a convenient outer boundary for the size of a cable firm, a predictable figure that allows substantial concentration and the concomitant economies of scale while guaranteeing that market conditions will sustain unaffiliated programming networks, if they are of sufficient quality to receive carriage by competing MVPDs. In short, a fixed percentage cap of 60 percent would provide a practicable solution to the dispute.

79. To address the question of market power, the FCC is also considering developing an approach that would provide an extra layer to traditional antitrust merger analysis, such as a "safe harbor/threshold" approach.[272] This approach would allow the FCC to refrain from enforcing horizontal limits "provided there were, in addition to cable, alternative means for video programmers to reach consumers" sufficient to alleviate the harms Congress sought to prevent.[273] This would require the FCC to ascertain whether there is sufficient competitive pressure in both the upstream and downstream markets to prevent the ability of the MSO to determine the success or failure of a video programming network.[274] In determining the threshold, the FCC is also considering using an approach based on a "contestable markets" theory, i.e., the notion that monopolists will behave competitively if they "face [a] threat of swift entry."[275] In this respect, a threshold might take into account the percentage of subscribers to which competing MVPD service is offered, in addition to the number of actual subscribers. For example, a safe harbor for horizontal aggregation might be that "competing MVPDs offer service to 50 percent of U.S. households and provide service, at a minimum, to 15 percent of MVPD subscribers."[276] Thresholds might also be measured by traditional antitrust indicia of market power, such as the q ratio, the Implicit Lerner Index, or the HHI.[277] There has been some discussion within the FCC of using "experimental economics," by

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[271] 47 U.S.C.A. § 533(f)(1) (West 2001).
[272] Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 60.
[273] *Id.* ¶ 64.
[274] *Id.*
[275] *Id.* ¶ 69.
[276] *Id.* ¶ 69, n.161.
[277] *Id.* ¶¶ 62-63.

incorporating game theory into case by case analysis and using control groups to test program-related decision-making scenarios.[278]

80. One issue the Commission or Congress will eventually have to contend with is the disparity of treatment between cable MSOs and owners of other MVPD services (e.g., DBS) when those other services begin to acquire substantial levels of market power. At this writing, the law only requires that ownership controls be utilized vis-à-vis cable systems. Mergers in the DBS and other industries are subject to review before the FTC, DOJ, and the FCC, and presumably these agencies would take prophylactic measures with other MVPD systems to equalize the treatment with cable. The gap in the law remains, however. As an extension of this issue, the FCC has instituted an inquiry into whether to prohibit cable/DBS cross-ownership, which is currently not prohibited.[279] Regardless of the outcome of the cable/DBS cross-ownership proceedings, the ownership control regime that applies to cable should apply equally to other MVPDs.

ii. Channel Occupancy Limits: An Outmoded Idea

81. The most substantial obstacle the FCC faces in eliminating the channel occupancy rules is whether or not such a move would be an abdication of their statutory duty under Section 613 of the 1992 Cable Act.[280] The Act requires the FCC to "prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[281] The *Time Warner II* court, however, found that the FCC did not adequately link the 40 percent/up to 75 channel capacity limit to the alleged harms resulting from vertical integration. If no such link can be found on remand, however, then the Commission would be at a loss to produce a channel occupancy limit that could withstand administrative or constitutional scrutiny. To the extent that the statute directs the Commission to "not impose limitations which would impair the development of diverse and high quality video programming,"[282] then it would appear that the Commission has the statutory authority to impose no limit at all. In its proceeding to reexamine the limits, the FCC has tipped its hand at elimination by virtue of the fact that it proposed no replacements for the channel occupancy limits. The channel occupancy rules serve no valid purpose in today's marketplace.

82. The subscriber and channel occupancy limits were aimed at promoting competition in the market for video programming. If a subscriber limit accomplishes its goal of ensuring that a market will be available to programming networks, then the channel occupancy rule should be unnecessary. The effect of the channel occupancy is to directly limit the ability of MSOs to invest in programming networks. As noted above, the channel occupancy rules also miss their mark in that they leave MSOs free to reject unaffiliated channels that compete with their

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[278] *See* Bill McConnell, *Merger Modeling: FCC May Take Experimental Approach to Cable Competition*, BROADCASTING & CABLE, Nov. 26, 2001, at 38.

[279], Notice of Proposed Rulemaking, Policies and Rules for the Direct Broadcast Satellite Service, 13 F.C.C. Rcd. 6907 (1998); Mem. Op. and Order, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 16 F.C.C. Rcd. 6547, 6647-49, ¶¶ 241-251 (Jan. 22, 2001).

[280] *See, e.g.,* Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 83 (Commission seeking commentary on whether the elimination of the rule would be consistent with the statutory mandate of Section 613).

[281] 47 U.S.C.A. § 533(f)(1)(B) (West 2001).

[282] *Id.* § 533(f)(2)(G).

affiliated channels.[283] Worse yet, the channel occupancy rules potentially forbid MSO investment into networks that may require capital infusions, resulting in decreased programming diversity. Under prevailing market conditions, as the FCC notes, vertical integration among cable MSOs and programming networks has actually decreased substantially between 1994 and 2000.[284] Additionally, as channel capacity increases and new MVPD delivery modes gain footing, MSOs have incentives to diversify their channel offerings regardless of whether those networks are affiliated. Preventing the MSOs from investing in such networks serves no purpose whatsoever.

B. OWNERSHIP CONTROLS IN BROADCASTING: THE *FOX* DECISION

83. There are two fundamental stories at work in the disputes over ownership controls in broadcasting. One is a legal story, revolving around the question of whether the ownership controls adequately serve the regulatory goals of competition, diversity, and localism. The other is a story of business policy, about the allocation of power between the networks and the affiliates. Affiliates fear that elimination of the ownership rules would strip local programming of its independent character, providing further ammunition to networks that are already exercising too much control in the local environments.[285]

84. The proceedings in *Fox Television v. FCC* largely centered upon whether the Commission has complied with its procedural obligations to review the ownership rules biannually pursuant to the 1996 Act.[286] The underlying substantive questions at issue, whether the 35 percent national ownership is justified, and whether the review process was endowed with a deregulatory purpose,[287] have lead to the unraveling of the 35 percent limit and to the immediate elimination of the cable-broadcast cross ownership rule.

85. Although the attacks on the broadcast ownership rules are contemporaneous with the attacks on the cable rules in *Time Warner II*, there are substantial differences that distinguish the two cases. First, broadcast is subject to a lower standard of First Amendment scrutiny because of the spectrum scarcity theory still extant from *Red Lion*.[288] Second, the interest of diversity is a more clearly established regulatory purpose underlying enactment of the broadcast ownership caps.[289] The *Time Warner II* court cabined the proper regulatory purpose of the cable caps to the explicit statutory language that they should be devised to promote "effective competition,"

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[283] *See* WATERMAN & WEISS, *supra* note 170, at 145.
[284] The Commission explains that 35 percent of all national programming networks were vertically integrated in 2000 compared to 53 percent in 1994. Further Notice of Proposed Rulemaking, *supra* note 238, ¶ 77, n.178.
[285] *See* Bill McConnell, *Caps on the Ropes: In Oral Arguments, Judges Indicate Broadcast Limits Could Go*, BROADCASTING & CABLE, Sept. 10, 2001, at 18 (discussing the arguments of affiliates in opposition to repeal of ownership caps). *See also* Biennial Review Report, 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 F.C.C. Rcd. 11058, 11071 (2000) (citing affiliated networks' argument that an increase in the audience reach cap will "diminish localism by making it more difficult for affiliates to program their stations in the interests of the communities they are licensed to serve.").
[286] The discussion in the oral arguments of this case primarily concerned the method by which the Court could best ensure that the FCC fulfill its statutory mandate on remand, i.e., whether the rules should be vacated or merely remanded. *See generally* Transcript of Proceedings, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000).
[287] *See id.* at 13-15 (discussing whether the statutory review process implied a "deregulatory force" in favor of repeal of the rules).
[288] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978).
[289] *See* Multiple Ownership of Standard, FM and Television Broadcast Stations, *supra* note 70, at 1467-77.

a limitation not present with regard to the rules on broadcast ownership.[290] Although the statute requires the Commission to review the importance of the rules "as the result of competition,"[291] it does not obviate the regulatory objective of diversity. The *Fox* court explicitly legitimated the regulatory goal of diversity, stating that the regulatory concept of the public interest "has historically embraced diversity (as well as localism)."[292] Third, the broadcast caps are largely designed to promote localism, a goal not present in the cable caps.[293]

86. Despite the differences between broadcasting and cable caps, this Section argues that the ownership caps do not effectively guarantee any substantial measure of localism, competition, or diversity. Lifting the ownership caps on broadcast networks may in fact enhance these objectives. In terms of the procedural aspects of this case, the question of ownership controls should ultimately be decided by the Supreme Court. The *Fox* case could represent an opportunity for the Court to equalize First Amendment standards in televised media and to more clearly define the First Amendment rights of various business interests within this industry. If the Court doesn't take the opportunity now, it will need to address these issues at some point.

87. The networks which challenge the 35 percent audience reach limit in *Fox Television v. FCC* pursued a two-pronged strategy. First they claimed that the rule hurts them, violating their First Amendment rights and curtailing investment opportunities. The First Amendment right asserted is that the rule prohibits them from "exercising their editorial discretion to select and provide the video programming of their choice in the localities of their choice to the audience of their choice."[294] In short, the rule "effectively bans them as speakers in a significant number of television markets."[295] Second, the networks challenge the internal consistency of the rules, as well as the flaws in the review process. The ownership rule is "irrational," according to the petitioners, because it promotes neither competition nor diversity. In conducting its biennial review pursuant to the requirement of Section 202(h) of the 1996 Act, according to the networks, the Commission failed to take into account the deregulatory purpose of the Act. Section 202(h) requires the Commission to review its ownership rules to determine whether they are "necessary in the public interest as the result of competition."[296] The D.C. Circuit agreed with these arguments.[297] Inadequate consideration of the competitive considerations of the market in the FCC's subsequent review of the rules demonstrates the fundamentally flawed nature of the Commission's approach.

88. The *Fox* court explicitly left open the possibility that the FCC could justify the ownership caps on remand, and thus denied the petitioners' request for vacatur of the rule.[298] On the issue of diversity, the court found no evidentiary basis to demonstrate a nexus between the strength of the bargaining position of the local affiliates and program diversity.[299] It did note, however,

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[290] *Time Warner*, 240 F.3d at 1136.
[291] 1996 Act, *supra* note 32, § 202(h).
[292] *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *30.
[293] *See* Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 74, 83 (1985).
[294] Petitioners Opening Brief, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000)).
[295] *Id*.
[296] 1996 Act, *supra* note 32, § 202(h).
[297] *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *32.
[298] *Id.* at *51-52.
[299] *Id.* at *35.

that the FCC's cryptic reference to "possible competitive problems in the national markets for advertising and program production" could be better proven on remand and thus in the end justify the rule.[300] The court granted the petitioner's request for vacatur of the cable-broadcast cross ownership rule based on the absence of any likelihood that the rule could be justified on remand.[301] The FCC had argued that the cross ownership rules created greater incentives for discriminatory treatment of unaffiliated local station carriage. The court rejected this argument, noting the protective role of the must carry rules and the absence of any showing of substantial probability of discrimination.[302] The court also chastised the FCC for failing to reconcile its decision to retain the cross-ownership ban with a recent decision in which the Commission found that common ownership of two broadcast stations in one market would not compromise diversity.[303]

89. The networks' arguments on the merits are fundamentally correct. It is clear that the ownership rules do not serve the interests of competition or diversity. Whether the rules serve the interests of localism seems somewhat an open question. The problem with localism, however, is that it is not clearly defined as a regulatory matter. Unfortunately, the term is all to easily used as a proxy for a power struggle between decision-makers at the networks and those at the controls of the local station, irrespective of the needs of the local communities. To the extent that the FCC will be required to revisit these questions on remand from *Fox Television v. FCC*, the real question is, what should happen next? Should the ownership caps be abolished altogether? Should the FCC merely provide a stronger evidentiary basis for retaining the rules? Is there a strong enough theoretical justification for the rules? Do the capital requirements of deploying DTV systems merit loosened ownership controls? Should the rules be relaxed or modified? Can the Supreme Court provide additional guidance in these matters? In order to answer these questions, it is useful to more fully explore the issues in the case and the possible outcomes.

i. A Larger Issue Looms: A First Amendment Right Against Structural Controls?

90. The *Fox* case illustrates a complex problem in First Amendment analysis of mass media that can only be resolved by the Supreme Court. The cable-broadcast cross-ownership rule, for example, applies to two different industries that involve two different standards of First Amendment analysis. Pursuant to the scarcity doctrine, broadcast regulations are entitled to the deference of rationality review. Pursuant to the cable regulation cases, content neutral regulation of speech industries requires intermediate scrutiny. Rather then enter the quagmire on which standard should apply to mixed broadcast-cable regulations, the *Fox* court declined to reach the First Amendment issue, instead opting to invalidate the retention of the cross ownership rule as "arbitrary and capricious."[304] The *Fox* court did, however, take care to distinguish bans on editorializing, which would require strict scrutiny, from bans on structural regulation, which require a lesser standard of scrutiny.[305] This distinction in the *Fox* case, however, masks a very unstable state of affairs in First Amendment analysis as applied to the televised media.

[300] *Id.* at *51.
[301] *Id.* at *64.
[302] *Id.* at *56-57.
[303] *Id.* at *62.
[304] *Id.* at *53.
[305] *Id.* at *44.

91. The First Amendment editorial speech right asserted by the networks is not a clearly defined right in the context of structural business relationships in the media. At their journalistic core, editorial rights are sacred to the First Amendment. Under stock First Amendment theory, more protections for higher value politically-oriented speech are justified, being those First Amendment rights "which the Framers of the Bill of Rights were most anxious to protect--speech that is 'indispensable to the discovery and spread of political truth'…"[306] As we step further away from the journalistic core of editorial speech to a system operator's editorial rights to make programming decisions, the First Amendment value of the editorial right ostensibly remains at least partially intact. In this context, content neutral restrictions on editorial control, such as the must-carry rules, will receive intermediate scrutiny under the First Amendment. When we step out to the region where ownership controls restrict investment opportunities in the business of speech, the character of the First Amendment right is less clear.

92. In *CBS v. DNC*, the Court reaffirmed the First Amendment value of the private rights of the station editors to deny access for paid editorial advertisements on Vietnam War-related issues.[307] The Court flat-out rejected that the holding of a broadcast license and involvement of government industry regulation was sufficient government action to invoke a public forum right of access.[308] The Court was more concerned about the "erosion of the journalistic discretion of broadcasters in the coverage of public issues," noting that mandated access simply transfers discretion to unaccountable private individuals who then become "self-appointed editorial commentators."[309] Extending this reasoning by analogy, there is something to be said for allowing programming editors to exercise their professional skill in determining the selection of programming, even when, as in the context of cable, this programming occurs in entire channel blocks.

93. To accord full First Amendment editorial discretion to video programming editors in broadcast and cable would be to adopt the print model of First Amendment theory for the televised media.[310] Under the print model, for example, any government compulsion to determine what will be carried would be unconstitutional. In the context of broadcasting, however, the special characteristic of the medium for which the broadcaster is a public trustee, namely scarcity, justifies a lower standard of scrutiny. Thus, as *Red Lion* holds, the broadcaster can be subject to mandated access in the public interest of hearing a diversity of views.[311] *Red Lion* goes so far as to suggest that the public has a First Amendment right to receive a diversity of views that is superior to the First Amendment right of the broadcaster to speak.[312] And in the *Turner* cases, the special characteristic of the medium is that it is a bottleneck. A greater tolerance for

[306] FCC v. League of Women Voters, 468 U.S. 364, 383 (1984).
[307] CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
[308] *Id.* at 115.
[309] *Id.* at 124-25.
[310] The print model reasoning is captured in the *Tornillo* case: "[A]ny such [ ]compulsion to publish that which ''reason' tells them should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945)).
[311] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969).
[312] *Id.* at 390.

regulation of speech related activity is justified, as noted in *Turner I*, because a "cable operator exercises far greater control over access to the relevant medium."[313]

94. The seminal Supreme Court cases dealing with regulation of the televised media and the First Amendment are concerned with rights of access or the right to editorialize. *CBS v. DNC* was about access to broadcasting for the purpose of editorializing.[314] *Red Lion* was about the fairness doctrine, a government mandated right of access for opposing views.[315] *FCC v. League of Women Voters* guaranteed government funded television stations a right to editorialize.[316] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* protected the editorial discretion of cable operators in the context of screening indecent programming.[317] The *Turner* cases dealt with the must-carry rules, that is, forcing the cable operators to accept carriage of broadcasters. Of all of these cases, the *Turner* cases represent the furthest extension of the First Amendment into regulation aimed at the economic affairs of media operatives. Under *Turner I*, the editorial right to exercise control over channel capacity is squarely within the ambit of the First Amendment.[318] These cases do not, however, directly confront the limits of the First Amendment rights when invoked against structural and economic regulation.

95. The expanded use of the First Amendment to challenge all forms regulation of the media presents what Glen Robinson calls a *Lochner* problem.[319] The *Lochner* decision[320] represented an era in which the doctrine of substantive due process was repeatedly invoked by Supreme Court majorities to invalidate economic regulation of business industries.[321] Under the *Lochner* approach, the Court could strike down labor regulations because they unnecessarily interfered with the liberty to contract between an employer and an employee.[322] The Court might additionally strike down business-specific taxes on equal protection grounds.[323] Or the Court would invalidate federal regulation of prohibiting the use of child labor in manufacturing on the grounds that such regulation was an impermissible exercise of authority under the Commerce Clause.[324] Under this approach to judicial review, any economic regulation of business entities could be nullified on constitutional grounds. The problem is where to draw the line.

96. Where video programming is concerned, one might argue that any regulation prohibiting any entity from providing such services in any market is a denial of a First Amendment right to speak in that market. When the phone companies mounted such a challenge against the ban

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[313] *Turner*, 512 U.S. at 656 ("A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities.").
[314] CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94.
[315] *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367.
[316] FCC v. League of Women Voters, 468 U.S. 364.
[317] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
[318] *Turner*, 512 U.S. at 636.
[319] Robinson, *supra* note 1, at 943-46. Robinson raises the *Lochner* issue not as an ideological critique of the Court's past or present position, but rather to signify "a fairly rigorous constitutional review of economic and social legislation." *Id.* at 945 n.172.
[320] Lochner v. New York, 198 U.S. 45 (1905).
[321] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3 (West Publishing Co. 5th ed. 1995). *See generally* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265 (1987).
[322] *Lochner*, 198 U.S. at 53.
[323] *See, e.g.,* Quaker City Cab Co. v. Pennsylvania. 277 U.S. 389 (1928).
[324] *See, e.g.,* Hammer v. Dagenhart, 247 U.S. 251, 271-73 (1918).

prohibiting them from providing video programming services, lower courts agreed with them.[325] The issue was ultimately rendered moot by the lifting of the prohibition in 1996.[326] The phone companies tried to make a similar argument with respect to the ban on their provision of electronic publishing, in which case the lower courts have rejected such challenges.[327] Although the proper standard for First Amendment analysis remains unclear, one might take the position of the networks in *Fox Television v. FCC*, that "heightened scrutiny is required . . . where editorial discretion is at stake."[328] The networks' argument that the ownership rules "effectively [ban] them as speakers in a significant number of markets"[329] is designed to evoke First Amendment sympathies so that they would be distinguished from other industries subject to government regulation. As Robinson explains, what is involved here is the potential for the First Amendment to become "a vehicle for selectively reviving Lochnerian review within the domain of electronic media regulation."[330]

97. The right of access and right to editorialize cases can be misleading when applied to economic regulation. For example, the logic of First Amendment analysis from *FCC v. League of Women Voters*, granting public television stations a right to editorialize, does not translate easily to the realm of economic regulation. To grant absolute protection to the editorial right in the economic context would be to nullify all regulations affecting channel make-up, program access, and ownership relations.

98. A significant line of Supreme Court cases counters such a categorically anti-regulatory interpretation of the First Amendment vis-à-vis economic regulations. This line of cases begins with *NBC v. United States*, in which a variety of structural or behavioral regulations were upheld over the broadcast industry.[331] It continues with *United States v. Storer*, which upheld an early manifestation of ownership controls known as the Seven Station Rule.[332] In *Storer*, the Court upheld the ownership regulation as a valid exercise of the FCC's authority to regulate in the "public interest."[333] In *FCC v. National Citizens Committee for Broadcasting*, the Court denied that any special First Amendment standard should apply to the newspaper-broadcast cross ownership prohibition.[334] Insofar as the rule was designed to "promote free speech," the rule could not be invalidated on First Amendment grounds.[335] Whether or not these cases are correct in upholding ownership and behavioral regulations over broadcasters, they must either be distinguished from or reconciled with the idea that any economic regulation of media is a

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[325] Chesapeake & Potomac Tel. Co. v. Nat'l Cable Television Ass'n, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded*, 516 U.S. 415 (1996). *See generally* Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1022-23 (1997) (discussing the history and implications of the successful challenges to the ban on phone company provision of video services).
[326] *Id.*
[327] *See, e.g.,* BellSouth Corp. v. FCC, 144 F.3d 58, 67-71 (D.C. Cir. 1998) (rejecting First Amendment challenge to ban on phone company provision of electronic publishing services); SBC Comm. v. FCC, 154 F.3d 226, 246-47 (5th Cir. 1998) (agreeing with *BellSouth* First Amendment analysis).
[328] Transcript of Proceedings at 69, Sept. 7, 2001, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000)). Petitioners make this argument despite their recognition that they can still "speak" to 100 percent of the market through affiliation contracts. *Id.* at 70.
[329] Petitioners Opening Brief, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000)).
[330] Robinson, *supra* note 1, at 945.
[331] NBC, Inc. v. United States, 319 U.S. 190. *See supra* Part I.B.i.
[332] United States v. Storer Broad. Co., 351 U.S. 192 (1956).
[333] *Id.* at 203.
[334] *Nat'l Citizens Comm. For Broad.*, 436 U.S. at 802-803. *See supra* Part I.B.iii.
[335] *Id.*

violation of the First Amendment. In this respect, *National Citizens Committee* is more on point than *Red Lion*.[336]

99. Although *Red Lion* is not an economic regulation case, it has come to symbolize this line of cases granting relaxed First Amendment treatment on the basis of the interests of the public. Meanwhile, there is a contrary strain of jurisprudence that provides fairly stringent protection to the editorial rights of the broadcasters and cable operators. The right of telephone companies to be in a market, if worthy of First Amendment protection, would equally apply to the rights of broadcasters to be in whatever market they choose. The "public interest" in applying special rules to ensure that diversity interests are served in the licensing scheme for broadcasters may become an ancient concept. Such a First Amendment attack could potentially topple the entirety of public interest regulation by its logical implications. To project the *League of Women Voters* analysis into the realm of ownership controls would effectively overrule *NBC* and *National Citizens Committee*. The *Fox* court recognized this point when it declined the networks' invitation to apply *League of Women Voters*, which would have resulted in heightened First Amendment scrutiny regarding the ownership caps.[337]

100. A Lochnerian approach to economic regulation in the media also runs counter to the jurisprudence of Supreme Court under *Associated Press v. United States*.[338] In *Associated Press*, Justice Hugo Black wrote for a Court majority rejecting the argument that the First Amendment renders the newspaper industry immune from the antitrust laws. At issue in the case were provisions in the bylaws of the Associated Press that allowed members to block competing non-members from joining the group. The bylaws violated the antitrust laws as an unlawful conspiracy in restraint of trade. In a strongly worded opinion, Justice Black chastised the media for so much as suggesting that the First Amendment provides immunity from the antitrust laws: "Freedom of the press from governmental interference…does not sanction repression of that freedom by private interests."[339]

101. In the end, the public interest of preserving "a lane on the information superhighway"[340] for local broadcasters could be a constitutional non-starter. Granted, *Red Lion* needs to be revisited. In the process, however, it will be necessary for the Court to distinguish between economic regulations and those that directly effect editorial discretion. Editorial *control* might be distinguished from editorial *discretion* in this respect. The absence of editorial control does not necessarily implicate a denial of First Amendment rights. For example, a network can speak in all markets within the United States through either ownership of stations or affiliate agreements. The fact that they are not able to own the station does not prevent carriage of their programming. It merely prevents them from having final control over the program line-up in the station output. The First Amendment should not be used as a catch-all to invalidate any regulations that have some indirect bearing on editorial control. There are plenty of other reasons to invalidate the broadcast ownership controls.

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[336] Interestingly, there is no mention of *Red Lion* in the FCC's brief. *See* Brief for Respondents, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000)). The FCC argues their constitutional point using *National Citizens Committee for Broadcasting* as opposed to *Red Lion* in the *Fox Television* proceedings. *Id.* at 29.

[337] *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *43.

[338] Associated Press v. United States, 326 U.S. 1 (1945).

[339] *Id.* at 20.

[340] *See* Gigi B. Sohn and Andrew Jay Schwartzman, *Broadcast Licensees and Localism: At Home in the "Communications Revolution"*, 47 FED. COMM. L.J. 383 (1994) (quoting Reed E. Hundt, former FCC Chairman).

102. One approach to developing a consistent standard of First Amendment scrutiny might be to distinguish types of regulation on the basis of a three-tiered system of scrutiny, distinguishing between economic regulation, content-neutral regulation directly affecting editorial discretion, and content-based regulation. In this respect, the Court would reconcile its First Amendment calculus with the category of economic laws and regulations encountered in *Associated Press*. This category would involve laws and regulations designed to ensure that the competitive economic interests underlying the marketplace of ideas are preserved. Regulations such as requirements of fair dealing in program distribution, ownership controls, and intellectual property related rules would fall into this category. Where editorial discretion is directly affected on a content-neutral basis, then the Court might move up to intermediate scrutiny. Editorial discretion in this respect would entail the decisions a media outlet owner makes about what content it will carry, channel line-up, and so forth. Editorial discretion would have to be distinct from editorial control, which could be implicated vis-à-vis ownership restrictions and program distribution matters. Although the must-carry rules are arguably a form of structural regulation, their direct effect on editorial discretion would bump them into the range of intermediate scrutiny. The third level of scrutiny would be content-based, requiring a standard of strict scrutiny. Whether or not these suggestions are viable, the Supreme Court may need to revisit these issues in the near term.

ii. Competition and Diversity: The Limits of Ownership Caps

103. The networks in *Fox Television v. FCC* claimed that the 35 percent station ownership cap is fundamentally irrational. Although the court agreed that the decision to retain the caps was irrational, a legal determination as to whether the cap itself is irrational has yet to be made. To the extent that there is no rational relationship between the rule and its objectives, the basis for the broadcast ownership caps is irrational. Cable can easily be distinguished from broadcast in terms of the number of competitors in a local market. There are generally between three and seven commercial networks in a local market.[341] The markets are in this respect naturally competitive. In the typical market, ABC, CBS, NBC, and Fox network-owned or affiliated stations are competing for viewership.[342] The dual network rule prevents the networks from merging with each other, effectively guaranteeing they will compete with one another.[343] Cable franchises, on the other hand, do not generally face competition from other cable systems.[344] Thus, concentration of network power in any given market can never exceed the percentage of the market that the station is able to garner in competition with the other networks. In the local market, viewership is diluted by the presence of other networks. On the national level, a 35 percent national audience reach limit thus results in a national audience share that is substantially lower than 35 percent, perhaps even as low as 5 percent.[345] Such conditions, according to the networks, cannot reflect undue market power.[346] The court

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[341] *See generally* WALKER & FERGUSON, *supra* note 25, at 59-60.
[342] *Id.* *See also* NIELSEN MEDIA RESEARCH, 1998 REPORT ON TELEVISION 21 (1998) (discussing addition of new networks, such as UPN and WB, to local markets).
[343] 47 C.F.R. § 73.658(g) (2002).
[344] *See generally* ZUCKMAN ET AL., *supra* note 66, § 13.3 (explaining that “effective competition” among cabel companies includes network stations but not other cable companies).
[345] Petitioners Opening Brief at 24, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000))(citing Report and Order, Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17 (1984).
[346] *Id*.

acknowledges these points, taking notice of the competitive conditions of the local markets and stating that "an owner of television stations cannot in practice achieve an audience share that approaches 35% of the national audience."[347]

104. Competition analysis might be justified as applied to the bargaining positions of local affiliates if the local stations were competing with the networks in some fashion. The interests of the networks and their affiliates, however, are aligned with respect to competition factors. For example, it is in a network's best interest for a local affiliate to compete vigorously with the other local stations. Local affiliates use network fare to compete in those markets. When the stations, whether owned or affiliated, lose market share vis-à-vis other local broadcasting outlets, the loss is still a loss, whether calculated on a local or national level. The networks in this respect offer fuel for competition in local markets by increasing the programming available to local stations in competition with one another. Another possible justification would be a desire to encourage healthy competition between the networks for affiliate agreements.[348] By limiting ownership, one might argue, the local affiliates might have more bargaining power to encourage competition among the networks in tailoring to the needs of the local station. Such a justification would require evidence that this type of competition is possible and beneficial. The issue of bargaining power becomes more important in the context of localism arguments for sustaining the ownership caps.

105. The networks also challenged whether or not a national ownership rule is effective in promoting diversity. The basis for this challenge is the increase in programming made available through the new programming outlets.[349] The fundamental flaw in the Commission's approach on this front was that it failed even to conduct a diversity analysis in its review of the ownership rules pursuant to Section 202(h) of the 1996 Act. In its *1998 Biennial Review*, the FCC explains that a diversity analysis "focuses on the ability of broadcast and non-broadcast media … [to] advance, … three types of diversity (viewpoint, outlet, and source)."[350] To the extent that the FCC makes this analysis, it relies on the false assumption that somehow these types of diversity are necessarily symbiotic. "Promoting diversity in the number of separately owned outlets," according to the Commission, "has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers."[351] Separate ownership, however, is not a guarantee of diversity. If a local station cannot afford to produce its own programming, and makes more money off of network fare anyhow, then there is no reason to believe that the ownership control is encouraging diversity in any way. With respect to diversity in the program markets, it is telling that an unaffiliated television station would rely primarily on syndicated programming, network re-runs, to fill its schedule in a local market.[352] The *Fox* court reached a similar conclusion, finding that the FCC offered no evidence that the station ownership cap promoted diversity in the broadcasting marketplace.[353]

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[347] *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *27.
[348] *See, e.g.,* Notice of Proposed Rulemaking, *supra* note 56, at 11957-58 (reviewing the chain broadcasting/network rules).
[349] Petitioners Opening Brief at 25, Fox Television v. FCC, No. 00-1222 (D.C. Cir. filed 5/31/2000).
[350] Biennial Review Report, *supra* note 285, 15 F.C.C. Rcd. 11058, 11062.
[351] *Id.*
[352] *See, e.g.,* Dan Trigoboff, *Preparing to Say Nay to Eye: CBS's Jacksonville Affil, WJXT, Considers Turning Independent*, BROADCASTING & CABLE, Nov. 5, 2001, at 5 (discussing the role of syndicated programming in filling the programming needs of an independent local station).
[353] Fox Television Stations, 280 F.3d 1027, 2002 U.S. App. LEXIS 2575, *34.

iii. The Distinction of Broadcasting: Contending with Localism

106. While the national ownership caps on broadcasters don't appear to serve any strong competition or diversity objectives, the question of whether there are important interests of localism underlying the caps is a bit more challenging. One of the reasons the FCC chose not to rescind the ownership caps is that it felt that such a move might "influence the bargaining positions between broadcast television networks and their affiliates."[354] This manner of reasoning touches on the heart of the conflict surrounding the ownership caps, namely localism. An alliance of network affiliates argues that the caps are "the essential mechanism for maintaining the balance between networks and their affiliates to ensure that affiliates can program their stations in the interests of the communities they are licensed to serve."[355] The independently owned affiliates, according to this view, play an important "counterbalancing" role in determining whether to clear network programming or programming from other sources. These affiliates argue that networks are looking to use affiliates simply as a "dumb pipe" to clear all of their programming, rather than to truly pay attention to the needs of the local community.[356]

107. Increasing the bargaining power of network affiliates ostensibly accomplishes two objectives. First, it lowers barriers to entry for non-network sources. If affiliates are free to clear programming from non-network sources, program providers will likely compete for such carriage in the local markets.[357] Second, it potentially allows more tailoring to the needs of the local community. In this respect, the interests of networks and affiliates may not always be aligned. In some markets, for example, a local station might want to air a popular program at 10:00 p.m. instead of 9:00 p.m., in order to use it as a lead-in to the local 11:00 p.m. news.[358] It may be in the interests of the national network to retain a more profitable time slot for a particular program without having to adjust its advertising contracts to reflect varying airtime in different markets.[359] Meanwhile, a local station may have an interest in boosting ratings for its local programming in order to reap advertising profits for its local programming. The chain broadcasting rules, by allowing local stations to preempt network programming, represent a powerful point of leverage for the affiliates in this respect. Network affiliates complain that these rules are widely violated and undermined by the networks, however.[360] Removal of the ownership caps would give the networks incentives to circumvent these rules entirely through outright purchase of the local affiliates.

108. The real concern over bargaining power in the network-affiliate relationship is the areas that are not protected by the network rules. Absent the requisite leverage, the affiliates can fall prey to a variety of network tactics used to keep the affiliates from straying too far from the network's

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[354] Biennial Review Report, *supra* note 285, 15 F.C.C. Rcd. 11058, 11074.
[355] *Id.* (citing comments of the Network Affiliated Stations Alliance).
[356] Harry A. Jessell, *It's Come to This: Frank and Fisher say only Washington can Save the Affiliates from the Networks*, BROADCASTING & CABLE, Apr. 9, 2001, at 18 (Interview with Alan Frank & Andy Fisher).
[357] *See* Notice of Proposed Rulemaking, *supra* note 56, at 11955.
[358] *See, e.g.,* Bill McConnell, *Grievance List*, BROADCASTING & CABLE, Mar. 12, 2001, at 7 (discussing such a scenario for the program *Who Wants to be a Millionaire?*).
[359] *See generally* OWEN & WILDMAN, *supra* note 26, at 11-14 (for analysis of how local and national advertising markets work).
[360] *See* Steve McClellan, *It's War!: Affiliates go to FCC with Attack on Networks*, BROADCASTING & CABLE, Mar. 12, 2001, at 6 (providing details of network affiliate's complaint of network abuses filed with the FCC).

agenda.[361] Although affiliates have the right to reject programming, networks can arguably withhold programming unless they receive their preferred terms. Many of the rights of the respective parties, including the local stations' right to receive "network compensation," will still be negotiated in the affiliation contracts.[362]

109. The benefits of the ownership caps arguably involve more bargaining power for the affiliates and a resultant benefit to non-network programming and the interests of the local communities. The benefits of nixing the ownership controls, however, outweigh the harms. The FCC acknowledges that the absence of ownership controls is equally likely to result in two contradictory outcomes.[363] On one hand, the networks could buy up their affiliates. On the other hand, "group ownership" among the affiliates could become more widespread. Group ownership would allow the affiliates to band together as a group when they negotiate their affiliate contracts, securing more favorable bargaining power for transactions in which the networks have more at stake. On both ends of the scale, allowing larger entities greater holding capacity should facilitate economies of scale in which stations in ailing markets could be saved. At a time when many broadcast markets can barely earn a profit,[364] allowing network buyouts might not be such a bad thing. Such buyouts may help to facilitate expensive DTV conversions and studio/transmission capacity upgrades in the local communities.

110. The interest of local communities can be preserved and even enhanced without ownership caps. No matter how national a station owner may be, they are still subject to public interest requirements as a local license holder. The licensee is still required to maintain a studio capable of originating programming. As a business matter, local station owners still have to answer to their customers. Local programming is important in a community, yet in many areas it is underfunded and of poor quality. As a result, consumer interest in such programming may be low. Ownership controls do nothing to change this. If anything, some degree of consolidation in ownership will allow for more infusion of capital into programming for local markets, for upgrades in local studio facilities, and a stronger capability for viable local stations to stay alive in a multichannel marketplace.

III. REGULATORY FLUX AND THE ERA OF CONVERGENCE: THE NEW ENTERTAINMENT ECONOMY

111. Three factors combine to exemplify the remarkable changes occurring in the market for televised media. One is the multiplication of outlets for delivery. These outlets include primarily broadcast, cable, and DBS, but could possibly expand to include other modes of delivery, such as open video systems ("OVS"), fixed wireless, and streaming video over the Internet. The second factor is the convergence of services offered through these modes of delivery. For example, information services like the Internet may soon be bundled with television and telephony services. A new technology, known as "Interactive Television" ("ITV") is currently in the development and deployment phase. ITV will serve as a primary

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[361] *See id.*

[362] Most broadcast networks are phasing out network compensation arrangements, resulting in financial woes for many local stations. *See* Steve McClellan, *Small Towns, Big Problems: Get out of the Major Markets and there's a Squeeze on Profits at TV Stations*, BROADCASTING & CABLE, Aug. 6, 2001, at 20.

[363] Biennial Review Report, *supra* note 285, 15 F.C.C. Rcd. 11058, 11074. *See also* Notice of Proposed Rulemaking, *supra* note 56, at 11960.

[364] *See, e.g.,* McClellan, *supra* note 362, at 21.

vehicle for this convergence, allowing the simultaneous operation of two-way information services and program services over the TV set. The third factor accompanying these technological changes is the consolidation of content providers and distribution outlets, i.e., vertical integration. These changes in the industry pose numerous challenges for Congress and regulators. As regulatory classifications begin to blur, the need to ensure that outdated regulatory policies do not disparately affect the deployment of new technologies is critical.[365] As consolidation proceeds, it will be necessary to keep a watchful eye for anticompetitive behavior and the entrenchment of monopolies. On the other hand, a substantial degree of freedom from ownership controls will allow the emergence of the proper synergies for better development of these technological advances.

A. THE CHANGING STRUCTURE OF THE ENTERTAINMENT INDUSTRIES

112. The middle to late 1990's witnessed a slate of mergers in the entertainment industry reflecting an increasing trend toward vertical integration of content providers and distributors. Despite the claim that "you can't consolidate creativity,"[366] the entertainment industries have dramatically consolidated their holdings. The acquisition of ABC by Disney and the acquisition of CBS by Viacom indicate an interest on the part of program producers to control the outlets for distribution. The Time Warner buyout of Turner Broadcasting and subsequent merger with AOL represented not only an interest in increasing program holdings, but an interest in controlling the modes of delivery.

113. Shortly after the Fin-Syn rules were lifted, Disney acquired ABC.[367] Disney was able to wed its television programming and movie production to a broadcast network that owned stations reaching 25 percent of American homes.[368] Due to competition from cable networks, the DOJ concluded that the merger "was not likely to produce vertical anticompetitive effects."[369] While self-dealing is assumed to occur, ABC continues to buy programming from other sources while Disney continues to sell its programming to other outlets.[370] In the same year ABC was acquired, Time Warner acquired Turner Broadcasting. Although this merger did not raise eyebrows within the FCC, the FTC required that Time Warner cable operators carry another news channel besides CNN, revealing the FTC's shared concern with the FCC in respect to competition in the market for programming.[371] Allowing the integration of complementary and overlapping media empires was a tacit recognition of the importance of large concentrations of capital to fund quality entertainment.

114. In arguing for the CBS-Viacom merger, Sumner Redstone explained that because of its financial wherewithal, Viacom was able to engage in the "risky enterprise" of developing a

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[365] One commentator expresses a concern that market distortions may result from inconsistencies in regulation: "If national regulators are unsuccessful in regulating Internet-delivered video-on-demand, the resulting inconsistencies will create a distortion of the overall market." Arlan Gates, *Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector*, 58 U. TORONTO FAC. L. REV. 83, 110 (2000).
[366] *See* Lawrie Mifflin, "*CBS-Viacom Deal Raises Competition Questions,*" N.Y. TIMES, Sept. 9, 1999, at C1.
[367] "*Disney/Capital Cities Agree to Merge*," BUSINESSWISE, July 31, 1995, Press Release, USDOJ, No. 96-002 (Jan. 16, 1996). *available at* www.usdoj.gov/atr/public/press_releases/1996/002.html. [fn. 377].
[368] *See* Gotts, *supra* note 10.
[369] Press Release, USDOJ, No. 96-002 (Jan. 16, 1996). *available at* www.usdoj.gov/atr/public/press_releases/1996/002.html.
[370] *See* Waterman, *supra* note 252, at 537.
[371] Gotts, *supra* note 10.

staple of children's programming.[372] Viacom also sustains interest in the fledgling UPN network, which would likely go out of business if dropped.[373] The merging of media conglomerates such as CBS and Viacom, it was argued, actually enhances competition by promoting increased program choices. Furthermore, in a market of specialized media interests, complementarity of programming becomes increasingly important. As the executives argued, "the vast majority of their business operations simply do not compete with one another."[374] The argument for efficiencies eventually won the day and the merger was approved.[375] One can only wonder what role the pre-existing FCC ownership controls played in the reasoning process of the FTC in approving these mergers.[376]

115. The government did not turn a blind eye to the problem of program foreclosure in the recent wave of media mergers. In the merger of Time Warner and Turner Broadcasting, for example, the government required the new entity to provide its programming on non-discriminatory terms to competing multichannel providers.[377] When TCI acquired Liberty Media, the FTC conditioned the merger approval on a similar requirement.[378] The government can exercise its tools to prevent program foreclosure in the context of its antitrust enforcement authority. The question of whether it can be relied upon to do so in the absence of stated regulatory objectives on the part of the FCC is another question.

i. Information Services and the Entertainment Industries

116. Over the past decade, content-related programming services have been developing in a market adjacent to that of the televised media, namely the Internet. The Internet falls under the regulatory classification of "information services," characterized by two-way transmission of informational data.[379] The Internet is generally not regulated under the jurisdiction of the FCC, pursuant to an age-old tradition of regulatory forbearance towards data services in the telecommunications environment.[380] The Internet started with non-graphic interfaces, allowing people to send e-mail and to join special listserves for special topics of interest. The Internet

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[372] *Viacom-Merger: Joint Statement of Sumner M. Redstone Chairman and CEO of Viacom Inc. and Mel Karmazin President and CEO of CBS Corp.*, *Hearings Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 106th Cong. (1999), *reprinted in* 52 FED. COMM. L.J. 499 (2000).
[373] Viacom & CBS, *VIACOM-CBS MERGER: Joint Statement of Sumner M. Redstone Chairman and Chief Executive Officer Viacom Inc. and Mel Karmazin President and Chief Executive Officer of CBS Corp.*, 52 FED. COMM. L.J. 499, 510 (2000).
[374] *Id.* at 504.
[375] See U.S. OKs CBS-Viacom Deal, ABCNEWS.COM, May 3, 2000, *at* http://abcnews.go.com/sections/business/DailyNews/cbs_viacom000503.html (last visited April 14, 2002).
[376] For a comparison of the two institutions' review process, *see* Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29 (2000).
[377] In re Time Warner, Inc., 123 F.T.C. 171 (1997).
[378] United States v. Tele-Communications, No. 94-0948, 1994 U.S. Dist. LEXIS 20983 (D.D.C. Aug. 19, 1994). *See generally* Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631 (2001) (discussing vertical antitrust concerns implicated by media mergers).
[379] Information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C.A. § 153(20) (West 2001).
[380] *See generally* JASON OXMAN, THE FCC AND THE UNREGULATION OF THE INTERNET (Office of Plans and Policy, Working Paper No. 31, 1999), *available at* http://www.fcc.gov/opp/workingp.html.

has evolved, however, into an extensive network for communication, commerce, news, and entertainment. The advent of high-speed broadband delivery capacity is opening the way for advanced content delivery programming. The apex of this development will be when these services converge with traditional graphic media.

117. Some of the legal issues dealing with the content-distribution relationship in the Internet, such as the concern over foreclosure of content providers, run parallel to those found in the televised media. The "open access" debate,[381] for example, centers upon the question of whether providers of cable modem high-speed access should allow consumers to subscribe to other content-related portals to the Internet. For example, AT&T could deploy a broadband network, and design the contracts such that Excite@Home would be the Internet Service Provider ("ISP"). In short, the Internet service becomes bundled with the delivery mode. Incidentally, one disincentive for the cable modem operators is the possibility that the preferred ISP goes out of business.[382] Allowing ISPs to compete directly for the customers' favor may be economically more feasible for the cable modem provider anyhow.

118. The larger question of whether the government can require the cable modem provider to provide access to competing service providers is one of regulatory classification. If the cable modem service is a telecommunications service, then the provider must allow access to competing providers as a common carrier. If the cable modem service is regulated as a cable service, then the swath of regulations that apply to cable providers would then apply to one type of ISP, an unworkable outcome. As an information service, however, regulatory forbearance should dictate that that this relationship will not be regulated. Nonetheless, there remains a concern that a monopoly broadband access provider will foreclose competing Internet Service Providers. This concern over foreclosing service providers may be amplified in the context of a merged Internet-TV environment.

119. The simultaneous provision of information and media services does not at this stage present any substantial regulatory problems. If one can receive Internet service and cable service from the same provider or even through the same device, for example, there is nothing to the prevent regulatory treatment from remaining separate. This logic applies so long as the services are separate. In a converged environment, however, this could become a more challenging issue. For example, if television programming becomes a component of an Internet service, one might pose the question of whether the regulatory treatment of the cable service is subsumed in the deregulated environment for information services. Considering the intellectual property rights at stake, however, high cost programming will likely remain a component of a distinct video programming service, walled off from the Internet for subscribers only.

ii. The AOL Time Warner Merger: A Signal of What is to Come?

120. The AOL Time Warner merger put a new spin on old questions of where to draw the line on vertical integration. In many respects, AOL Time Warner is a company that represents the model for domination in a convergent media environment, vertically integrated in program,

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[381] *See* Cristian DeFrancia, *Local Competition and Telecommunications Convergence: Will New Legislation Help or Hurt?*, 17 J. L. & Pol. __ , at Section V.B. (publication forthcoming).

[382] For example, Excite@Home, the subject of the famous case *AT&T v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000), is now bankrupt. *See* Jonathan Krim, *No FCC Help for Stranded Cable Users*, THE WASHINGTON POST, Dec. 4, 2001, at E1.

information, and distribution services. By the apparent standards reflected in the recent regulatory shifts and merger approvals, aggregation of content may not be such a large concern. Take, for example, the Time Warner/Turner, ABC/Disney, and CBS/Viacom mergers. The dispute over the AOL Time Warner merger centered on questions of access to cable pipelines, content foreclosure in closed information systems, and the advent of a new product market, ITV. The bottlenecks involved are the cable systems owned by Time Warner and the Internet portals owned by AOL. Internet Service Providers were concerned that they would be denied access to the cable modem service due to exclusive arrangements to provide AOL Time Warner Internet service over those lines. Because of these concerns, the FTC conditioned the merger approval on AOL Time Warner's provision of open access to competing ISPs where cable broadband access was concerned.[383] Content providers are concerned that AOL's "walled garden," a relatively closed portion of the Internet in which AOL users browse, will foreclose Internet users' access to non-Time Warner content. This vertical integration, in short, gives AOL incentives to discriminate against third-party programming.[384]

121. Disney opposed the merger of AOL and Time Warner in part because it feared AOL would act to keep its users within a closed system, resulting in the foreclosure of unaffiliated program providers from that system.[385] This "walled garden" of AOL is allegedly composed of "content cul-de-sacs" in which AOL subscribers have access to AOL proprietary content.[386] Disney alleges that the walled garden is the "product of a calculated and extensive course of restrictive dealings," including demands that companies purchasing space on the AOL website desist from including links to websites outside the walled garden.[387] Disney contends that Time Warner also favors its own content in its cable system, citing the dispute over Time Warner's dropping of Disney as a basic service, a dispute that led Time Warner to temporarily drop ABC from its cable networks.[388] In a market witnessing a "three way convergence of traditional television, Internet services, and broadband delivery," Disney suggests that this type of vertically integrated gatekeeper will be in a strong position to exclude competitors and restrict consumer choice.[389]

122. In favor of AOL Time Warner are the incentives their merger provides for accelerated "development and deployment of a whole generation of interactive services and content."[390] Cable networks are currently the favored platforms for delivery of Interactive Television, a form of consumer-based multimedia that combines Internet and television services. Interactive Television depends upon a return-path in the cable line that allows the user to interact with the

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[383] In re America Online, Inc. & Time Warner Inc., No. C-3989, 2000 WL 1843019 (FTC Dec. 14, 2000).

[384] *See* Written Ex Parte Filing of the Walt Disney Company, at 19, In re America Online, Inc. and Time Warner, Inc., CS Docket No. 00-30 (FCC July 25, 2000) [hereinafter Disney Complaint].

[385] There is currently a developing literature on engineering practices that assist to protect cable information services providers from interference by competing content providers. *See, e.g.,* CISCO SYSTEMS, 1999 CISCO WHITE PAPER: CONTROLLING YOUR NETWORK - A MUST FOR CABLE OPERATORS (1999); Disney Complaint, at 39.

[386] Disney Complaint, *supra* note 384, at 19. *See also*, SearchSecurity Definitions, Walled Garden, *at* http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci554703,00.html (last visited April 14, 2002).

[387] *Id.*

[388] *See* Jessica Reaves, *Disney-Time Warner tiff heralds broadband age*, CNN NEWS, May 1, 2000, http://www.cnn.com/2000/US/05/01/cable5_1.a.tm/index.html (visited April 14, 2002).

[389] Disney Complaint, *supra* note 384, at 2-3.

[390] Press Release, AOL, America Online and Time Warner Will Merge to Create World's First Internet-Age Media and Communications Company, Jan. 10, 2000, *at* http://media.aoltimewarner.com/media/cb_press_view.cfm?release_num=50251353 (visited March 20, 2002).

programming, to participate in programming or simply to customize their content preferences. A vertically integrated provider such as AOL/Time Warner would be best positioned to deploy "a combination of broadcast video, on-demand video content, personalized, and Internet content" in one package.[391] The economies-of-scale argument turns on the ability to bundle all of these services together in a manner that optimizes output for the integrated firm, and allows them to swiftly assume dominance. According to Disney, the result is a monopoly in the making, a closed system whose network effects "would be a substantial selling card" for a monopoly on the ITV market.[392]

123. One key aspect of Disney's argument on program foreclosure is an accusation of return path discrimination on the part of the Time Warner cable systems. Disney argued that control over the cable pipelines enables the service provider to utilize its technology in a way that excludes or renders inoperable competitive interactive content.[393] Return path discrimination would effectively allow the creation of a closed ITV system. If the first-mover ITV system is a closed system that favors its own content, then incentives to develop interactive content would arguably be lower, resulting in a long-term net loss to the consumer in the deployment of interactive content. While there is considerable dispute over whether the technology does in fact allow such discrimination, it may be very difficult to create an open system when a series of closed systems is already in place. The question of developing closed systems with the use of technology intersects with a current debate in copyright law, i.e., the related question of how far protections of proprietary content extend into cyberspace.

124. On a practical level, the arguments for separating ownership of distribution and content are even weaker in the context of the Internet than in television. Although AOL can design a system that tends to keep its subscribers within a walled garden, the subscribers can get out of the garden if they so please. In this respect, content providers outside of the walled garden suffer no harm as a result of exclusion. Further, because of the ease of putting up a website, barriers to entry are extremely low. An open Internet might indeed be a more attractive option for the consumer, yet some degree of access restraint might be necessary to protect the value of proprietary content. If consumers are not satisfied with AOL service, they can simply terminate their service and subscribe to an ISP that merely defaults to its home page as a portal to a more flexible Internet browsing environment. With an open access requirement, barriers to entry in the ISP market would also be low. Allowing entrant ISPs to develop their own content would in this respect be procompetitive. Although structural separation might help sustain a market for independent content brokers, there is still no guarantee that such brokers would deal with new entrants.

B. INTERACTIVE TELEVISION: A ROLE FOR OWNERSHIP CONTROLS?

125. Interactive Television poses a variety of challenges for regulators. As a converged information and video programming service, the FCC must decide under what classification system it

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[391] Disney Complaint, *supra* note 384, *citing* CISCO SYSTEMS, INC, NEW REVENUE OPPORTUNITIES FOR CABLE OPERATORS FROM STREAMING MEDIA TECHNOLOGY, Inc., New Revenue Opportunities for Cable Operaters from Streaming Media Technology 1-2 (1999).

[392] *Id.*, at 45.

[393] Ex Parte Submission of the Walt Disney Company, Oct. 25, 2000, Deployment of Interactive Television Technology and Return Path Discrimination, In re American Online, Inc. and Time Warner, Inc., CS Docket No. 00-30 (FCC Oct 25, 2000)

should fall, or if it should be regulated as a hybrid system. If the Commission can effectively apply cable regulations, the question also arises as to whether the existing regulations will be sufficient for the new system. Are the current regulations applied to broadcast and cable going to help or hurt the deployment of ITV service? Should a consideration of ITV services play a role in the current review of the ownership controls for broadcasting and cable? Do capabilities for program foreclosure, such as walled gardens, merit special regulatory measures? Should must-carry regulations apply to interactive services? The FCC has begun to address some of these questions by putting forth an *ITV Notice of Inquiry*.[394]

126. ITV represents an opportunity for interactive program development that will take many years to catch up with the technology. Although some regulatory treatment of the service will be critical to safeguarding against program foreclosure and monopoly entrenchment, loosened ownership controls in both cable and broadcasting will likely encourage deployment of ITV technology. Preservation of an open field for cable distributors, however, will ensure that one cable system is not able to dominate the market for deployment. In the broadcasting context, larger station ownership blocks may give broadcasters greater program development capacity and leverage to compete in the multichannel marketplace. With a diminished role for ownership controls, the non-discrimination and program access requirements of Section 628 of the 1992 Cable Act will take on a greater role in guarding against program foreclosure.

i. "Walled Gardens:" Technology, Regulation, and Emerging Market Structure

127. The FCC tentatively defines ITV as a "service that supports subscriber-initiated choices that are related to one or more video programming streams."[395] ITV is delivered to the consumer through a set-top box that connects the television to a video programming source, with dual video and information streams.[396] The two-way system operates in conjunction with broadcast file servers that use multiple software applications to enable interactive programming.[397] An ITV set-top box may interface simultaneously with three separate servers during its use, a video server, an advertising server, and a web server.[398] At its optimum, the two-way system should allow for simultaneous video programming, e-mail, Internet access, video on demand, program-specific "wrap-arounds" (supplemental interactive content), games, chat rooms, and television commerce ("T-commerce").[399]

128. It is difficult to predict just how the programming market will evolve in the context of ITV capabilities. The emergence of walled gardens will likely be one important feature, however. Walled gardens might operate at a personal level, so that an individual user would have an area for personalized content management.[400] The walled garden will also likely be an extension of

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[394] Notice of Inquiry, In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable, 16 F.C.C. Rcd. 1321 (2001).
[395] *Id.* at 1323.
[396] Scientific-Atlanta Advertising Supplement, *Charting the Future: Interactive TV Ultimately Means Bringing Viewers What They Want, When They Want It*, BROADCASTING & CABLE, Oct. 29, 2001, at 4A.
[397] *Id.* at 8A.
[398] Andrew Hinchley, *Convergence of the internet and Television: Diffuse Conference for Andrew Hinchley Future TV*, *at* http://www.diffuse.org/conference1.html#Hinchley (last modified March 7, 2001)
[399] Notice of Inquiry, *supra* note 394, at 1321. *See also* Interactive Television Dictionary Online, *What is Interactive Television?*, http://www.itvdictionary.com/itv.html (last visited April 14, 2002).
[400] *See, e.g.,* TRACY SWEDLOW, 2000: INTERACTIVE ENHANCED TELEVISION: A HISTORICAL AND CRITICAL PERSPECTIVE 13 (2000), *available at* http://www.itvt.com/etvwp.pdf.

what is found in the Internet context, a closed system for content distribution. The closed component of the system may consist of the traditional video signal and its supplementary interactive content. An open system would operate in connection with the closed system, so that the viewer/user could freely access Internet content and services as well.

129. Internet Television service can be provided over a two-way, high-speed broadband platform, regardless of whether it is wireless, satellite, or wireline.[401] Because two-way transmission technology is more advanced over cable systems, the preferred platform at this juncture is cable.[402] As the technology develops, MVPDs could offer competing ITV services in the same markets. Two dangers are evident with respect to vertically integrated cable providers of ITV service. One is that they might refuse to provide their interactive programming to competing MVPD service providers. Another is that they might refuse to carry the interactive programming content of competing video programmers or broadcasters. The first problem is generally addressed by the non-discrimination provision of the 1992 Cable Act, requiring vertically integrated cable operators to offer their programming to competing MVPDs on a non-discriminatory basis.[403] Whether these program access provisions apply to interactive content is an open question.

130. While refusal to carry programming has not been a regulatory concern outside of the broadcasting context, the implications of refusing to carry interactive content can be greater in the ITV environment. Imagine a system where walled gardens generally consist of a package of video programming channels, each with a range of interactive content. A vertically integrated provider may have more incentives to exclude unaffiliated programming from the walled garden, because including that program channel also invites the viewer into another provider's realm of interactive services. Hence, the walled gardens develop as exclusive affiliation zones. Whether or not this situation eventuates, the possibilities for program access discrimination rise to a new level in the ITV environment.

131. If cable remains the preferred platform for ITV development, then some measure of horizontal ownership controls might be justified. The value of having competitors in the national cable market is that no one cable operator can completely subsume the ITV market. ITV program deployment and development, on the other hand, is an expensive business. The maximum level of flexibility in ownership should be permitted within an outer boundary established to sustain competition. A 40 percent open field, for horizontal competition could work well in this respect. If the FCC moves to a case by case analysis, the market for ITV deployment should become a factor in that analysis.

132. The best solution to prevent the effects of program foreclosure is the application of the program access rules and non-discrimination. Assuming that the channel occupancy rules go the way of the Oldsmobile, these rules will take on added significance. First of all the program access rules should be adopted to apply to ITV in the same fashion that they applied to cable programming. Supplemental interactive programming should fall within the ambit of "programming," as it is construed under the 1992 Cable Act. The FCC may also prevent problems of program foreclosure by enforcing its program access provisions to avoid

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[401] Notice of Inquiry, *supra* note 394, at 1327.
[402] Notice of Inquiry, *supra* note 394, at 1322 (seeking comment on whether cable is the superior platform).
[403] *See supra* Part I.C.iii.

"unreasonable refusals to sell" on the part of vertically integrated program providers.[404] Furthermore, the use of these rules leaves the content providers and MVPDs free to restructure (within reasonable limits) in whatever ways necessary to develop the proper economies of scale to fund expensive ITV programming.[405]

ii. The Challenge of Maintaining Regulatory Classifications in an Interactive Environment

133. The substantial distinguishing feature of ITV is that it is a two-way service. Traditionally, television was a one-way service, from the provider to the home. Telephone communication represents a standard two-way service. Separate regulatory regimes evolved for each service. Then along came the Internet, a two-way information service. Because of the technological intricacies of information transmission, the government decided to back off from regulation in order to promote deployment. The boundaries between these technologies were fairly distinct; no one would mistake a telephone for a computer or a television for a telephone. We are poised to enter an era in which these classifications begin to blur. In the *ITV Inquiry*, the FCC must determine whether to regulate ITV service as a cable service, a telecommunications service, an information service, or as a hybrid service.[406] The converging services of the Internet and television are diametrically opposed in terms of regulatory treatment. Developing a hybrid system of regulation will necessarily involve resolving the gray areas in which video programming and information services are indistinguishable. This is the challenge of convergence.

134. Some services, such as web-surfing and e-mail, are distinct enough from video programming so as to easily remain unregulated in a hybrid regulatory system. Transmission of the traditional television signal can easily remain within the scope of the respective regulatory models applied to broadcast, cable, and DBS. The simple combination of video programming and information services should not magically result in the total deregulation of video programming. Developing a model for the regulatory treatment of the in-between services, the program-specific interactive content that is part programming and part two-way communications, reveals the need for some new approaches to regulation. To the extent that a hybrid service is the subject of regulation, that regulation should be of a hybrid nature. Developing these regulations represents an opportunity to address the real character of the converged information, telecommunications and mass media environment.

135. In the scope of this article, it is sufficient to suggest that the program access rules and non-discrimination provisions of the 1992 Cable Act can be very useful in preventing the dangers of program foreclosure and walled gardens in the ITV environment. A limited ownership rule will ensure that ITV deployment is availed of the appropriate economies of scale without being completely monopolized by one provider. Although convergence poses an opportunity to rethink old regulatory models and classifications, the historical concerns of content and distribution abuses of the entertainment industry will likely continue as factors to consider in the development of new technologies. Thus, some of the old models of regulation should not be totally discarded, but perhaps should be revised.

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[404] FCC Broadcast Radio Sevices, 47 C.F.R. § 76.1002(b)(2001).
[405] *See* SWEDLOW, *supra* note 400, at 22 (discussing lack of funding for ITV projects).
[406] Notice of Inquiry, *supra* note 394, at 1334-35.

CONCLUSION

136. The changes taking place in the broadcast and cable industries require serious attention to the revision of regulatory policies. The FCC faces the challenge of updating policies designed for a different era to accommodate the needs of converging markets for entertainment, information, and communications services. Ownership controls should not be categorically eliminated in this context, but they should be relaxed. Broadcast television has historically been in the catbird seat for the airing of programs that attract the largest national audiences. In order to preserve the broadcasters' viability in a multichannel marketplace, the FCC should permit flexible ownership relations among networks and affiliates. Considering the intense competition between the four national networks, preventing aggregate station ownership does little but impede the ability of the networks to compete with one another and their cable competitors. Total integration of a network and its affiliates cannot result in antitrust level monopoly harm on the local or the national level, because the network can never capture the market while there are three other widely popular and competitive players in it. In broadcasting, the question of program diversity is one of program line-up, not channel line-up. With respect to competition in video programming, there are enough outlets to ensure a market for independent productions if they are of high quality. In fact, there is a shortage of such high quality programming. Lifting the ownership control in broadcasting will result in more benefit than harm in this respect.

137. In the context of cable services, the advent of competing modes of delivery merits a substantial relaxation of the subscriber limits and total elimination of the channel occupancy rules. In order to preserve a viable market for independent program providers, maintenance of a limited "open field" is warranted. This open field may be more important in the context of the deployment of ITV services, a market in which a content developer with control over the means of distribution will have substantial advantages. Proceeding with a case by case analysis in this respect could get murky, and may inevitably result in charges of disparate treatment. A solidly supported percentage limit admits of the most uniform and administrable application. In any case, the Commission must confront the challenge of developing a reasonably fixed standard of ownership analysis rooted in law, economics, and intimate study of market conditions.

138. The behavioral regulations underlying the cable industry may take on added importance in a converging media marketplace. Requiring that the video programming elements of ITV walled gardens be offered on a non-discriminatory basis to competing providers may prevent the fears that were expressed in regard to the AOL Time Warner merger proceedings. Developing a regime for the proper regulatory treatment for the provision of interactive content accompanying the video programming of the future will require intensive study and remains beyond the scope of this article. Suffice to say, however, that any regulatory model in this respect should minimize ownership controls and emphasize behavioral non-discrimination requirements.

139. The Supreme Court also has a role to play in the converging media marketplace. Conflicting standards of First Amendment analysis and the seemingly outdated character of differential treatment reveal a great deal of uncertainty in the realm of judicial review of communications regulation. The Court might address the scarcity doctrine, for example, by distinguishing between economic and editorial regulation, or distinguishing between editorial discretion and

editorial control. In the context of editorial regulation, the idea of scarcity is null and void. Because of the multiplicity of program outlets, the idea that opposing viewpoints would have limited access to the public is simply untenable. In the context of economic regulation, on the other hand, there may be some residual merit to the scarcity argument. The broadcasting medium arguably remains scarce in terms of the allocation of local interests. The structural preservation of a scarce medium for local programming may provide a plausible basis for an important government interest, however, irrespective of the expansive scarcity doctrine. In this respect, the Court might dispose of *Red Lion* while preserving *National Citizens Committee* in bringing its First Amendment doctrine up to date. The Court might also reject differential treatment of video programming media and promote a uniform standard of intermediate scrutiny that would apply equally to the regulation of all televised media. These are simply possibilities for the Court to consider. Almost anything would be better than the current state of First Amendment confusion.

140. The convergence of mass media, telecommunications, and information services presents a major opportunity for businesses and consumers. Congress, the FCC, and the courts face the challenge of adjusting their regulatory policies in order to facilitate a smooth transition for the new technologies. The traditional concerns of competition, diversity, and localism need to be reexamined in this context. For example, how important is it to preserve a "lane" on the information superhighway for local broadcasting? In promoting these goals, it is important to undertake careful analysis of the means to end relationship of regulatory policies to avoid market distortion. For example, while localism is a noble goal, does prohibiting aggregate network ownership of local stations truly protect the local communities? At what point do we trust the marketplace to properly adjust to the needs and demands of consumers? Responsible attention to these issues in the early stages will facilitate an era of convergence in which the goals of localism, diversity, and competition are achieved with minimal government intervention.