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WILLIAM B. FISCH*

Plurality of Political Opinion and the Concentration of Media in the United States†

This paper reviews regulatory efforts of the U.S. federal government to promote viewpoint diversity in broadcast media (radio, television, cable, and satellite) in the face of increasing concentration of ownership of such media, and the impact on such efforts of the freedoms of speech and press embodied in the First Amendment to the federal constitution. With respect to this issue, the regulatory work has been done overwhelmingly by the Federal Communications Commission, operating under an act of Congress which has been amended from time to time to push the FCC in particular directions. The anti-trust laws are applicable to the media, but they have not been used explicitly to address the issue of viewpoint diversity. The regulations, under the statutory rubric of "the public interest," have broadly addressed two dimensions of the media: programming content and concentration of media ownership. The dominant political theme of the last thirty years has been deregulation, but remnants of the earlier era persist and may be regaining favor, while the constitutional parameters are unsettled in important respects. The FCC invoked the First Amendment along with market policies in abandoning most of its efforts to regulate content, but the courts have yet to fully endorse its view (adopted in 1987) that the constitution required it, and some statutory rules have remained on the books. Limiting the number of media outlets a particular person or enterprise can own has presented fewer First Amendment problems, and the FCC's deregulation has relied mostly on raising the permitted numbers; but it has been unable to persuade the courts that any particular formula of ownership limitation is rationally related to the overriding goal of viewpoint diversity, so that statutory rules which were meant to prod the agency into further deregulation have ironically remained as limitations.

Increasing concentration of ownership of mass media (newspapers, radio, and television) raises the question of access to such media for a variety of viewpoints on matters of public concern not shared or accommodated by the existing owners or managers. The question presupposes that other options for the holder of a particular viewpoint to

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reach the same or a comparable audience—or to respond to a viewpoint expressed or accommodated by the owners/managers—are impracticable or otherwise foreclosed. Does the legal system under such circumstances impose an enforceable duty on the media owners to accommodate other viewpoints, to refrain from mergers or acquisitions of competing media that would have the effect of limiting the range of viewpoints that can be effectively expressed, or to downsize so as to make room for others? To what extent is any such duty defined or limited by constitutional protections of freedom of speech and press, as distinguished from ordinary legislation?

In the United States, this issue has a long history generating an enormous literature which can only be hinted at in a report of this nature. Nonetheless, an historical overview is important, because it provides examples of efforts—mostly less than completely successful—to deal with a persistent problem of access to media which ebbs and flows with the introduction and maturity of new technologies. The report will concentrate primarily on the more or less traditional mass media, and specifically on the federally regulated broadcast media, which is where most of the legal action has been. The internet has entered the current debate frequently as an effective alternative forum, although the heavy involvement of private internet service providers itself presents its own question not yet fully resolved: may these providers limit subscribers' access to material otherwise available on the net?

I. REGULATORY FRAMEWORK

A. *Freedom of Speech and Press under the Federal Constitution*

The starting place for evaluating any media regulatory scheme concerned with content and editorial policies today is the First Amendment of the federal constitution, which forbids government to infringe the freedom of speech or of the press.¹ The two freedoms are closely related, and reflect two dimensions of their purpose: on the one hand the freedom of speakers/publishers to speak or otherwise express themselves, and on the other the interest of the public in access to the fullest possible range of ideas, information and opinions on matters of public concern.²

1. The precise text in relevant part is as follows: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." This provision has been interpreted (1) as literally applicable to any act of any agency of the federal government, and (2) as applicable, by virtue of the "due process" clause of the 14th Amendment, to all agencies of state and local governments as well. *Gitlow v. New York*, 268 U.S. 652 (1925).

2. See, e.g., *Turner Broadcasting System v. FCC*, 512 U.S. 622, 633-4 (1994): "... [A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values that are central to the First Amendment."

For the present issue of viewpoint diversity, it is important to note further that these constitutional freedoms are freedoms from *government* infringement only.³ A private media owner does not violate the *constitutional* right of another private speaker by refusing to accommodate that person's viewpoint. Since the great majority of traditional mass media are privately owned, therefore, the predominant legal question is the extent to which government may, by legislation and regulation, impose obligations and limitations on them in the interest of maximizing the range of information and viewpoints available to the public.

The federal Constitution itself does not define either "freedom of speech" or "freedom of the press," and neither freedom had a precise, fully developed legal meaning at the time of adoption of the First Amendment in 1791. For the most part, therefore, subsequent interpretation provides the detail, and virtually all of the U.S. Supreme Court's work in this regard has occurred within the last century. Three of the most basic principles currently applied by the Court to government restrictions on speech and the press are worthy of mention here. *First*, the protections of speech and press are not absolute, but restrictions on a given activity are subjected to a means-ends analysis which measures the legitimacy and importance of the government's interest in restricting the activity against the nature and degree of the restriction.⁴ *Second*, the Court distinguishes generally between regulations which are based on the content of the speech and those that are content-neutral, imposing a higher burden of justification on the former than on the latter. Content-based restrictions are usually said to require a compelling governmental purpose and a narrow tailoring of the restriction to achieve that purpose.⁵ Content-neutral restrictions are said to require an important or substantial governmental interest that is unrelated to the suppression of free speech, and an incidental restriction of speech that is no greater than necessary to protect that interest.⁶ *Third*, "prior restraints" on publication—such as licensing or censorship or a judicial injunction against publication—are the most difficult of all restrictions to justify.⁷ The distinction between content-based and content-neutral restrictions is of the most recent origin, not fully articulated until well after our regulatory story begins.

3. See JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed. 2004) (hereinafter "Nowak & Rotunda"), sec. 16.1.

4. *Id.* at sec. 16.7.

5. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988).

6. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

7. The leading modern case on "prior restraints" is *Near v. Minnesota*, 283 U.S. 697 (1931), involving a statutorily authorized injunction, with references to the earlier history. Licensing as a prerequisite to the right to print, as practiced by the English crown until its abandonment in the 17th century, is a classic infringement. See Nowak & Rotunda, n. 3 above, at p. 1144.

B. *Federal Communications Commission*

Broadcast media (radio and television, including satellite and cable television) in the United States are subject to the licensing authority of the Federal Communications Commission (FCC), created by an Act of Congress in 1934 which also created a framework of regulation for the Commission to administer, including the power to make implementing regulations.⁸ The FCC was preceded by a Federal Radio Commission (FRC) created in 1927⁹ with similar authority but a technologically narrower mandate; the FCC's initial domain included interstate telephone and telegraph transmission as well as radio/television,¹⁰ and has expanded to keep up with new technologies. The Radio Commission itself had been a response to the failure of the first system of federal licensing of broadcast media under the Radio Act of 1912, which had tried to control the overlapping and mutual interference of signals by requiring a license from the Department of Commerce, but did not provide the Secretary with power to control the frequencies used.¹¹

The Communications Act of 1934 expressly acknowledges the relevance of the First Amendment to its regulatory system:

Nothing in this Chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.¹²

The rationale for the licensing system as such, in relation to the First Amendment's traditional prohibition against prior restraints, was

8. Communications Act of 1934, June 19, 1934, c. 652, 48 Stat. 1088, now codified as amended at 47 U.S.C. ss. 151 ff. (2002) The most important amendments to the Act itself—primarily aimed at loosening regulatory burdens and increasing competition in the telephone industry—were adopted in the Telecommunications Act of 1996, Pub.L. 104-104, Title I s. 104, 110 Stat. 86.

9. Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927), sec. 3.

10. The FRC considered "picture and television broadcasts" as within its purview virtually from the start, issued the first television broadcast license in 1928, and imposed restrictions on the permissible frequencies for "picture and television broadcasts" as early as 1929. See ALBERT ABRAMSON, *THE HISTORY OF TELEVISION, 1880 TO 1941* (1987), at 112 and 128.

11. *Hoover v. Intercity Radio Co.*, 286 F. 1003 (C.A.D.C. 1923) (FRC must select a frequency for any qualified applicant, with discretion only to choose the one that least interferes with others). *U.S. V. Zenith Radio Corp.*, 12 F.2d 614 (D.C. Ill. 1926) (license need only designate a "normal wavelength" that would not preclude the use of others by the licensee). For overviews and references on this development, see e.g., FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 15-17 (1976) (hereinafter "Friendly, Good Guys"); CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK* 41-47 (2000) (hereinafter "Tillinghast, Another Look").

12. 47 U.S.C. s. 326 (2008), a provision carried over from the Radio Act of 1927.

the nature of the medium. There are only so many places on the electromagnetic spectrum, and they cannot be occupied by more than one broadcaster at a time in any given area without mutually destructive interference. Only government regulation can control traffic on the spectrum, so as to ensure the maximum effective use.¹³

C. Competition Laws (Antitrust)

As economic enterprises, all media companies—whether otherwise regulated or not—are presumptively subject to the federal antitrust laws¹⁴ to the extent that their activities are in or affect commerce among the several states or with foreign states.¹⁵ Two federal agencies are primarily involved with enforcement of federal laws against anti-competitive practices: the Department of Justice headed by the Attorney General,¹⁶ and the Federal Trade Commission (an independent regulatory agency created in 1914).¹⁷

The Communications Act confirms the applicability of these laws to broadcast media, notwithstanding the FCC's regulatory jurisdiction,¹⁸ and the courts have held that the FCC itself does not have authority directly to apply the basic antitrust laws as such, even though its mandate requires it to take competitive factors into account.¹⁹ Moreover, its own regulatory powers are not comprehensive enough to warrant giving it primary competence (ahead of the anti-trust agencies) over competition issues within its mandate,²⁰ and it

13. See, e.g., *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 226-7 (1943).

14. These laws prohibit monopolies, combinations and other acts in restraint of interstate or international trade, including mergers and acquisitions having such effects, currently codified in 15 U.S.C. ss 1 ff. (2004). The original law was the Sherman Act of 1890, now codified in 15 U.S.C. ss 1-7. The Clayton Act of 1914, now codified at 15 U.S.C. ss. 12-27, introduced, in addition to substantive amendments, a comprehensive remedial structure including private rights of action by persons injured by violations of the law.

15. See, e.g., *Lorain Journal Co. V. U.S.*, 342 U.S. 143 (1951), holding that a local newspaper engaged in gathering news from around the country and the world and distributing it in a particular community is engaged in interstate commerce, and that its activity seeking to persuade advertisers to boycott a competing local radio station constituted an attempt to monopolize.

16. The responsible unit within the Department is the Antitrust Division, headed by an Assistant Attorney General. See <http://www.usdoj.gov/atr/>.

17. The responsible subunit in the FTC is the Bureau of Competition. See <http://www.ftc.gov/bc/about.shtm>.

18. Federal Communications Act (47 U.S.C.) sec. 313. The section also authorizes any court that has determined that a licensee has violated any of the antitrust laws to order the license revoked, and directs the FCC to deny a license or construction permit to anyone whose license has been so revoked by a court.

19. *U.S. v. Radio Corp. Of America*, 358 U.S. 334 (1959), holding that the FCC's findings with respect to competition issues are governed by the statutory standard of "the public interest," and that FCC approval of an exchange of television stations between licensees did not foreclose a Justice Department suit asserting antitrust violations.

20. *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F2d 708 (3d Cir. 1958). For further references see II AMERICAN BAR ASSOCIATION SECTION ON ANTI-

has generally deferred to the antitrust enforcement agencies on matters of competition policy as it relates to the business aspects of media enterprise.²¹

There is one narrowly defined statutory exemption for newspapers,²² allowing newspapers otherwise competing in the same market to enter into agreements sharing production facilities and business functions, subject to three important conditions: (1) the newspapers must maintain full editorial and reportorial independence from each other; (2) all but one of the participating papers must be a "failing newspaper," defined as "in probable danger of financial failure"; and (3) the agreement must be reviewed and approved by the Attorney General before it can take effect. The clear purpose of the exemption was to preserve diversity of viewpoints and editorial policies within communities in danger of becoming one-newspaper markets or worse; but the agreements have not been successful in long-term preservation of newspaper competition in local markets.²³ Otherwise it does not appear that the antitrust enforcement agencies have concerned themselves with viewpoint diversity as such. One treatise characterizes the present-day policy in this way: "Antitrust's overriding goal is to maintain public confidence in the market mechanism by deterring and punishing instances of economic oppression."²⁴

A well-known newspaper case illustrates the interaction between the First Amendment, private conduct, and the competition laws. In *Associated Press v. U.S.*,²⁵ the Court had before it antitrust complaints against a cooperative organization of which almost 1200 newspapers (nearly two-thirds of all daily English-language newspapers then published in the country) were members, engaged in the business of collecting, assembling and distributing news gathered by its employees as well as by those of member papers. Several anti-competitive practices were charged that were provided for under the Associated Press's by-laws and enforced by significant sanctions: member newspapers were (a) required to publish AP news items on a regular basis, and (b) forbidden to sell news to any non-member papers or organizations; and (c) new members could be admitted by the Board of Directors without a vote of the existing members, unless they are or would be competing with an existing member, in which case, if the existing member objected, admission of the new member

TRUST LAW, ANTITRUST LAW DEVELOPMENTS 1315 ff. (6th ed. 2007) (hereinafter "Antitrust Developments 6th").

21. Antitrust Developments 6th, preceding note, at 1316.

22. The Newspaper Preservation Act of 1970, 15 U.S.C. ss. 1801 *et seq.* (2008).

23. For a critical assessment of the law, see AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW ch. IX, pp. 241 ff. (2007).

24. LAWRENCE A. SULLIVAN AND WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK (2006) at p. 10.

25. 326 U.S. 1 (1945).

required a four-fifths vote of the membership accompanied by onerous financial conditions. The Court held that these practices were indeed violations of the antitrust laws and that they were not protected by the First Amendment freedom of the press. "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."²⁶

II. SPECIFIC REGULATORY APPROACHES TO ACCOMMODATION OF DIVERSE VIEWPOINTS

A. *Broadcast Media under the Licensing System: Affirmative Duties*

1. Statutory Duties of Existing Licensees toward other Viewpoints
 - a. "The public interest"

The Radio Act of 1927 established the general standard for issuing and renewing licenses to broadcast as whether "the public convenience, interest or necessity" would be served thereby, and this language is retained in the present statute.²⁷ As early as 1929, in an order denying a license modification for a fiercely ideological radio station, the FRC defined the purpose of the broadcast licensing system as follows: "Broadcasting stations are licensed to serve the public interest, and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals."²⁸ The U.S. Supreme Court repeatedly sustained a broad interpretation of the scope of the FCC's powers and discretion in determining what is "in the public interest" within the meaning of the Communications Act of 1934,²⁹ even as it occasionally sent a decision back to the agency for a fuller explanation of why a particular ruling fit that standard.³⁰ The Commission, responding to technological developments but also to social and political changes typically reflected in membership turnover, has

26. 326 U.S. at p.20. See also *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), enjoining a newspaper from promoting a boycott of a local radio station, as an unlawful attempt to monopolize a media market.

27. FCA Art. 307(a), (47 U.S.C. s. 307(a)).

28. Friendly, Good Guys, n. 11 above, at 19, quoting from *Great Lakes Broadcasting Co.*, 3 FRC An. Rep. 32 (1929).

29. *E.g.*, *NBC. v. U.S.*, 319 U.S. 190, 216 (1943).

30. *E.g.*, *F.C.C. v. RCA Communications*, 346 U.S. 86 (1953), holding that the Commission had erred in issuing a license for a particular service in competition with another license on the assumption that competition, if feasible, should always be fostered, without making clear why it believed that such competition was in the public interest.

taken a variety of regulatory approaches to defining the concept over its long history.³¹

b. "Equal Opportunities" rule during elections

The Radio Act of 1927 introduced a requirement for licensees that, if they permit a candidate for any public office to use a broadcasting station, they must afford "equal opportunities to all other such candidates for that office" for such use, without the licensee having any power of censorship over the material, but without any duty to allow such use in the first place.³² This conditional duty was carried forward in the Communications Act of 1934, with provisions regarding permissible charges for such use, and remains in the statute today.³³ Subsequent amendments have provided substantial elaboration, perhaps the most important of which is the 1959 clarification that the obligation is not triggered by an appearance of such a candidate on any bona fide newscast, news interview, news documentary in which the appearance is incidental to the subject(s) covered, or on-the-spot coverage of a bona fide news event.³⁴ In 1969, in conjunction with its review of the FCC's fairness doctrine, the Supreme Court said of this statutory provision that its constitutionality "was unquestioned."³⁵

c. Reasonable access for candidates in federal elections

Finally, a 1971 amendment to another provision of the Communications Act, adopted as part of a more comprehensive regulation of federal election campaigns, provides as one of the permissible grounds for revocation of a broadcast license or construction permit the licensee's "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time" for a qualified candidate for *federal* elective office.³⁶ This statutory reasonableness standard has been applied liberally on a case-by-case basis by the

31. For an overview of this history identifying four distinct approaches reflected in the FCC's rhetoric if not always its effective action, see Lili Levy, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813 (2008) (hereinafter "Levy, *Four Eras*").

32. Radio Act of 1927, 44 Stat. 1162 (1927), sec. 18. This requirement is frequently referred to as the "equal time rule," see Tillinghast, *Another Look*, n. 11 above, at p. 79.

33. Communications Act of 1934, s. 315, now codified as amended at 47 U.S.C. s. 315.

34. Pub.L. 86-274, § 1, 73 Stat. 557 (1959). This revision overruled a specific FCC decision which treated newscast appearances by the incumbent mayor during a campaign for re-election as entitling his opponent to an equal opportunity to appear. See Friendly, *Good Guys*, n. 11 above, at 25-6.

35. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 391 (1969).

36. FCA 1934 s. 312(a)(7), added by Federal Election Campaign Act of 1971, Title I, Pub. L. 92-225 (1972). Sustained against First Amendment attack in *CBS v. FCC*, 453 U.S. 367 (1981).

FCC, giving stations leeway to protect uniquely valuable time slots and special services from the duty to accept campaign advertisements, and the courts have sustained such an approach as consistent with the broadcasters' First Amendment rights.³⁷

2. "Fairness Doctrine" in Broadcast Media

a. Origins

As indicated above, the Federal Radio Commission began its exercise of the licensing function by assuming that the general statutory standard of "public interest, convenience or necessity" required it to deny licenses to broadcasters who were committed to a particular set of interests or ideological views and to prefer those which sought to reach the widest range of listeners. In effect, although the Commission's earliest report on policies opposed commercial advertising, this approach quickly turned to favoring commercial stations offering mainstream, nationally oriented programming with the widest variety of formats designed to reach the largest possible audience.³⁸ It and its successor FCC developed this interpretation into a more detailed set of obligations for licensees over a number of years in the course of adjudicating complaints and renewal applications, and articulated its position in a series of reports and policy statements, all under the rubric of reasonable interpretation of the statutory standard.³⁹ In one of the earliest comprehensive statements of the doctrine, a 1949 report on editorializing by broadcast licensees (which had been forbidden by earlier rules), the overriding principle was stated as follows:

Licensee editorializing is but one aspect of freedom of expression by means of radio. Only in so far as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest.⁴⁰

37. See *Columbia Broadcasting System v. FCC*, 453 U.S. 367 (1981); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 510-514 (D.C.Cir. 1986).

38. See Levi, *Four Eras*, n. 31 above, at pp. 826 ff., with extensive references, characterizing this as "the melting pot approach." On the influence and motivation of the major broadcasters in this development, see Tillinghast, *Another Look*, n. 11 above, at ch. 5.

39. See *Complaint of Syracuse Peace Council v. Station WTVH*, 2 F.C.C.R. 5043, 1987 WL 344763 (FCC 1987), para. 25.

40. *In the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), as quoted in FCC, 15th ANNUAL REPORT for the Fiscal Year Ending June 30, 1949, at p. 33. See Tillinghast, *Another Look*, n. 11 above, at p. 73.

b. Elements

The fairness doctrine had several facets. The 1949 report in its conclusion articulated two principal ones: (a) the duty of broadcasters to devote a "reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations," and (b) the duty to design such programs "so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community."⁴¹ Two others were recognized as rights of affected persons to be given air time to reply: (c) that of a person or group which has been personally attacked by a broadcast (mentioned in the 1949 report), and (d) that of an opponent of a political candidate endorsed or of a candidate editorially opposed by the station (clearly related to the statutory "equal opportunities rule").⁴²

c. Judicial evaluation of the doctrine and its scope

There was a great deal of debate over the fairness doctrine in the period of the 1960's and 1970's, a time generally characterized by great social and political upheaval over issues such as civil rights and the Vietnam war, giving rise (among other things) to wide-ranging skepticism toward federal regulation as such as well as increasing local political activism. In this period, three landmark Supreme Court decisions helped to define the scope of the doctrine and identify its most contestable aspects, without invalidating either it or the Commission's actual administration of it.

Confirmation of the doctrine's constitutionality. It was the "personal attack" rule, applied to broadcasts in the highly charged atmosphere of a cold-war-era presidential campaign, which gave rise to the Supreme Court's first full examination of the fairness doctrine against a challenge under the First Amendment's freedoms of speech and the press.⁴³ A small radio station in Pennsylvania owned by an evangelical preacher was among hundreds of stations nationwide which had carried a broadcast of a religious program in which another evangelical preacher attacked the author of a book highly critical of the 1964 Republican presidential candidate Barry Goldwater. The attack was directed not only to the book but also to the author personally, accusing the author of communist affiliations, making false charges against others, and so on. The author sought reply time from many of these stations, but refused to pay for it, and

41. See preceding note.

42. These rights of reply were eventually incorporated into formal rules specifying procedures for providing the reply time, *In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates*, 8 F.C.C.2d 721, 1967 WL 13878 (FCC).

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

the Pennsylvania station denied his request for free time. The author complained to the FCC, and it found that the station under the circumstances was obliged to provide free time for a reply. While most of the stations complied with the order, the Pennsylvania station did not, and went to court to challenge the constitutionality of the FCC's order as well as the fairness doctrine itself.⁴⁴ The Supreme Court's decision in the case⁴⁵ held without dissent⁴⁶ that the fairness doctrine and specifically the personal attack rule were consistent with the First Amendment freedoms and constituted reasonable applications of the statutory "public interest" standard. With respect to the freedom of speech, the court relied principally on the unique nature of the radio frequency spectrum, and characterized the consequences of that situation for First Amendment protections in the following way:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses, but there are only 10 frequencies to allocate, all of them may have the same "right" to a license, but, if there is to be any effective communication by radio, only a few can be licensed, and the rest must be barred from the airwaves

By the same token, as far as the First Amendment is concerned . . . the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves

. . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.⁴⁷

44. For an extended description of the political background of the case see Friendly, *Good Guys*, n. 11 above, chs. 3 and 4.

45. For purposes of its decision, the Court joined *Red Lion's* appeal from a judgment sustaining the FCC's position on the specific broadcast, 381 F.2d 908 (D.C. Cir. 1967), with the FCC's appeal from a judgment in another case, *Radio-Television News Directors Association v. FCC*, 400 F.2d 1002 (7th Cir. 1968) which held the right-of-reply rules in their formal regulation form to be in violation of the First Amendment rights of broadcasters.

46. Justice Douglas, who would have dissented, did not participate in the decision, having been unable to attend the oral argument due to illness.

47. 395 U.S. at pp. 388-390.

Approval of the Commission's limits on the doctrine. In the year immediately following the *Red Lion* decision, the Commission decided a pair of cases testing the scope of a licensee's duty to "share his frequency" under the fairness doctrine and the First Amendment in light of that decision. Both—a complaint by an anti-Vietnam war advocacy group against a specific radio station and a request by the Democratic National Committee for a declaratory ruling—attacked a widespread policy of major networks of refusing to sell time for so-called "editorial ads" expressing the advertiser's views on matters of public concern; both argued that *Red Lion* confirmed the existence of a right of access to broadcast media for "responsible groups." The FCC rejected both petitions with respect to a right to buy time for editorial ads, citing earlier rulings and policies emphasizing that licensees had broad editorial discretion in determining how to meet their obligation of reasonable and fair coverage of issues of public concern, and that that part of the fairness doctrine does not provide anyone else a right of access to the licensee's broadcast time. The Supreme Court sustained the FCC's decisions both on the statute and on the First Amendment.⁴⁸ This time there were concurring and dissenting opinions disagreeing with important elements of the majority's opinion. Justice Douglas concurred in the result, but would have struck down the fairness doctrine altogether.⁴⁹ Justice Brennan dissented, arguing that the licensees themselves act for the government in exercising a monopoly, and are thus themselves be subject to First Amendment obligations.⁵⁰

Rejection of similar rights of access to unregulated print media. Five years after *Red Lion*, the Supreme Court had occasion to deal with similar arguments concerning newspapers. In *Miami Herald Publishing Co. v. Tornillo*⁵¹ it reviewed a Florida state law of long standing but infrequent application, which granted a right of reply analogous to the federal personal attack rule sustained in *Red Lion*, though limited to candidates for public office attacked by any newspaper regarding their personal character or official record. A candidate with respect to whom a newspaper had published a negative editorial demanded that the paper publish his replies, the newspaper refused, and the candidate brought suit in the state courts seeking punitive damages as well as injunctive and declaratory relief. The newspaper challenged the law as a violation of First Amendment freedoms, and the state Supreme Court sustained the law against that challenge, finding that it did not infringe on the freedom of speech but rather enhanced it by furthering the public interest in the

48. *Columbia Broadcasting System, Inc. v. FCC*, 412 U.S. 94 (1973).

49. 412 U.S. at p. 154.

50. 412 U.S. at p. 196.

51. 418 U.S. 241 (1974).

free flow of information. The U.S. Supreme Court, again without dissent, reversed the state court's judgment and held that the law was unconstitutional. It acknowledged the argument that newspapers (in competition with new electronic media!) had become highly concentrated and held virtual monopolies in most markets. Nonetheless, it rejected the inference, made by a number of "access advocates" based in part on *Red Lion*,⁵² that government could properly remedy the effects of such a concentration by imposing "fiduciary" obligations on the owners, specifically by forcing a newspaper to "print that which it would not otherwise print," which the Court characterized as "a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."⁵³

In striking down the state right of reply law, none of the justices referred to the *Red Lion* decision or to the broadcast medium which that decision had treated so differently, leaving it to commentators and perhaps its own future decisions to explain the difference.⁵⁴ *Tornillo* could be understood, however, as applicable in the regulated media against an argument for restrictions on the freedom of speech such as rights of access and regulation of program content, when it is based on entry barriers attributable not to the inherent limitations of the medium but to normal competition in the marketplace.

d. Evolution of the FCC's regulatory approach: to deregulation—and back?

The political climate of the 60's and 70's appears to have induced the FCC itself to shift its enforcement emphasis away from direct monitoring of program content against a more or less national model of diversity, toward establishing and monitoring a detailed "ascertainment" process whereby broadcasters themselves determined what local needs and interests exist in the communities served by their stations and how to shape programming to meet them.⁵⁵ Its own record of enforcement of the fairness doctrine had become rather loose, already relying primarily on overall reviews of periodic reports and renewal applications from broadcasters to show balanced activity rather than careful attention to their handling of specific issues, aside from a few highly publicized cases arising out of complaints.⁵⁶

52. See, e.g., Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARVARD L. REV. 1641, esp. 1665-1666 (1967).

53. 418 U.S. at p. 256.

54. Friendly, *Good Guys*, n. 11 above, at p. 195, reports that this was a deliberate omission, agreed to by the majority in order to achieve unanimity, when Justices Douglas and Stewart would have refused to support an opinion that affirmed *Red Lion*.

55. Levi, *Four Eras*, n. 31 above, at pp. 834 ff., characterizing this as "the community representation approach."

56. *Id.* at pp. 836-7, esp. n. 87. See also Marvin Ammori, *The Fairness Doctrine: A Flawed Means to Attain a Noble Goal*, 60 ADMIN. L. REV. 881, 887 ff. (2008) (hereinaf-

By the end of the 1970's the Commission's trend toward looser regulation and enforcement blended into a full-blown deregulation movement, led in national politics by Ronald Reagan's successful presidential campaign of 1980 and supported by free-market economic theory. The FCC came under new leadership appointed by President Reagan, imbued with this market-oriented philosophy, and proceeded to dismantle most of the non-statutory program content regulations adopted in the previous fifty years, including the ones embodying the "community representation approach" mentioned above.⁵⁷

Most instructively for our topic, the Commission in 1987 abandoned the original core of the fairness doctrine, not only on economic principle but also on First Amendment grounds.⁵⁸ The foundation for this ruling was an extensive report published by the Commission in 1985⁵⁹ which concluded on the basis of a review of enforcement history and comments from interested parties that the doctrine had the effect of chilling and inhibiting free expression of views, causing broadcasters to refrain from addressing controversial issues in order to avoid having to give valuable time to competing viewpoints, and creating opportunities for abuse for partisan political purposes. Moreover, it found that technological improvements since *Red Lion* had made many more broadcast channels available, so that its scarcity rationale no longer fit the facts. After some prodding by an appellate court in a specific case,⁶⁰ the Commission rescinded the first two elements of the doctrine as inconsistent with the First Amendment not merely as applied to that case but "on its face"; but that same court sustained the ruling not on constitutionality but as a reasonable exercise of the Commission's delegated authority.⁶¹

As to the third and fourth elements of the doctrine, the individual rights of reply in case of personal attack or political editorial, which had been transposed into formal rules prescribing procedures for asserting the rights, the Commission was unable to make up its mind. In 2000, after twenty years of Commission inaction on petitions to reconsider these rules, capped by a failure to repeal them by reason of a tie vote and a dithering response to a judicial order to provide further justification for their retention in light of the abandonment of the first two elements, the federal appellate court ordered

ter "Ammori, Flawed Means"), citing statistics on complaint success rates in this period.

57. *Id.* at pp. 841 ff. ("the market approach").

58. *Complaint of Syracuse Peace Council v. Station WTVH*, 2 F.C.C.R. 5043, 1987 WL 344763 (FCC 1987).

59. *Inquiry into . . . the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine*, 102 F.C.C.2d 145 (1985).

60. *Meredith Corp. v. FCC*, 809 F. 2d 863 (D.C. Cir. 1987).

61. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. den. 493 U.S. 1019 (1990).

the Commission to repeal the rules.⁶² Nonetheless the court explicitly refrained from deciding whether similar rules might be reinstated with a sufficient justification in terms of the public interest within the constraints of the constitution.⁶³

In the last decade or so the FCC has taken some new public interest regulatory initiatives which indicate some moderation of the deregulation movement. The most interesting in terms of viewpoint diversity came in 2008 with two simultaneous actions concerning “localism,” television broadcasters’ obligations to the communities served by their stations. One was an order significantly expanding reporting requirements concerning interactions with the communities served, along with a requirement that the TV broadcasters put their public inspection files on line.⁶⁴ The other was a notice of proposed rule-making seeking public comment, which would, among other things, return to at least portions of the pre-1987 localism ascertainment regime, including license renewal processes that require the applicant to demonstrate satisfactory community programming including public affairs, a requirement that each broadcaster have its main studio in the community served, and that they set up community advisory boards to help them keep abreast of community needs.⁶⁵ So far no action has been taken on these latter proposals, but if adopted they would likely attract judicial challenge.

e. Current status of *Red Lion*’s broadcast exceptionalism

Although it had indicated in a decision handed down just before the Commission’s deregulation ruling that it might reconsider *Red Lion* if Congress or the Commission showed that technology had overtaken it,⁶⁶ the Supreme Court—like the lower appellate courts—has not taken occasion since then to treat that ruling as a basis for such reconsideration. The *Red Lion* opinion itself specifically acknowledged that, if experience with the fairness doctrine were to show that it has “the net effect of reducing rather than enhancing the volume and quality of coverage,” reconsideration of its constitutionality

62. *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

63. *Id.* at p. 272.

64. See *In the Matter of Standardized and Enhanced Disclosure Requirements For Television Broadcast Licensee Public Interest Obligations*, 23 F.C.C.R. 1274 (2008). The questions on the disclosure form “can easily be read as an implicit return to content suggestions by the FCC,” Levi, Four Eras at p. 845. A petition for review of this order is pending in the federal appeals court.

65. FCC, Report on Broadcast Localism and Notice of Proposed Rulemaking, doc. FCC 07-218, adopted Jan 24, 2008, accessed 11/05/09 at FCC’s Localism Proceedings page <http://www.fcc.gov/localism/>.

66. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), holding by a narrow majority that Congress could not properly attach, as a condition of the receipt by a non-profit broadcaster of federal funds to support programming, a prohibition against all editorializing by the broadcaster itself.

would be in order,⁶⁷ so that it can be said that the Commission's abolition of the doctrine was consistent with *Red Lion*, in so far as its finding of negative effect is empirically sound with respect to the particular regulations invalidated. Thus the statement about scarcity no longer being an issue could be treated as unnecessary to the Commission's decision.

In any event, defenders of broadcast exceptionalism have argued that "scarcity" in the ordinary sense of a commodity or resource otherwise capable of private ownership is not what *Red Lion* is about, but rather a "tragedy of the commons," a common good the use of which must be regulated to avoid destruction of its value to all, and that it is the need for public regulation which entails priority for the interests of viewers and listeners over those of broadcasters.⁶⁸ If the technical capacity to accommodate an increased number of broadcasters does not eliminate the need for regulation altogether, then the public interest standard is still the appropriate determinant of how much restriction on broadcaster freedom is justified. Thus the statutory provisions embodying that standard, as well as giving rights of reply to candidates or to purchase time for federal elections candidates remain on the books and have been sustained, even though repeated efforts to reinstate the fairness doctrine by legislation have failed politically.⁶⁹

B. Statutory Rights of Access to Cable Systems ("Must-Carry") and the First Amendment

In 1994 the Court had another occasion to consider the scope of *Red Lion*, in relation to a statutory regulation of cable television, a technology first introduced in the 1940's, over which the FCC had only belatedly asserted regulatory authority in the 1960's and which had since come to reach a significant majority of U.S. TV households. In *Turner Broadcasting Systems, Inc. v. FCC*,⁷⁰ the Court reviewed a so-called "must-carry" rule, enacted by Congress in 1992 after the FCC's attempts at instituting the rule by regulation had twice been struck down by a federal appellate court.⁷¹ The rule requires cable systems to make at least one-third of their channel capacity available to local broadcast stations that demand it, to be carried in full. If

67. 397 U.S. at p. 393.

68. See, e.g., C. Edwin Baker, *Three Cheers for Red Lion*, 60 ADMIN. L. REV. 861, 866ff. (2008); Levi, *Four Eras*, note 31 above, at pp. 819ff.

69. For an argument that reinstatement of the doctrine is unlikely to gain favor from either major party, see Ammori, *Flawed Means*, n. 56 above, at 882f. (2008).

70. 512 U.S. 622 (1994).

71. Communications Act of 1934, sec. 614, as added by Cable Television Consumer Protection and Competition Act, U.S. Pub. L. 102-385 sec. 4 (1992), codified as 47 U.S.C. sec. 534(b) (2008). On the history of FCC regulation of cable, see Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment after Turner Broadcasting System, Inc. V. FCC*, 60 MISSOURI L. REV. 799 (1995).

more local stations request carriage than the system has channels available, the cable operator has discretion to choose among them. The stated purposes of the statute were (1) to preserve the benefits of free local over-the-air broadcast television, (2) to promote the widespread dissemination of information from a multiplicity of sources, and (3) to promote fair competition in the market for television programming. The Court, by a sharply divided vote, reversed a lower court's judgment in favor of the government, and remanded the case to the lower court for an evidentiary hearing on whether or not local broadcasters were in fact in danger of being driven out of their markets, and whether less intrusive means existed for preserving the viability of over-the-air broadcasters. This time, however, it did not simply ignore the government's argument that *Red Lion* supported such a right of access,⁷² but rather declared the rationale of that case to be inapplicable to the cable medium. The plurality opinion distinguished the two media:

The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations of the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.⁷³

Instead the justices evaluated the must-carry rule for cable under general First Amendment doctrine, and split over (a)—whether the rule should be considered content-based or content-neutral for purposes of defining which burden of justification is applicable, and (b) whether this measure would even satisfy the requirements for content-neutral restrictions. The narrow majority concluded that the rule was content-neutral, and that the stated gov-

72. Specifically, the government argued that *Red Lion* was based not merely on the physical characteristics of the medium, but also on the existence of a "market dysfunction," noting the decision's reliance on the antitrust case *Associated Press v. U.S.*, described above (text at ns. 25 and 26) for the proposition that the First Amendment does not protect a private actor's suppression of others' private speech. See Brief of the Federal Appellees, 1993 WL 796837, at p. 17. The plurality rejected this argument, both as a misdescription of the basis of the broadcast cases and as inapplicable in any event to non-broadcast cases, which clearly do not support market dysfunction in itself as a basis for relaxing the First Amendment standard. 512 U.S. at p. 640.

73. 512 U.S. at 638-9.

ernmental interest was sufficiently important under that standard, but that the record established by the court below was insufficient to show that the viability of the local broadcast stations was sufficiently under threat to justify such an intrusion into the First Amendment rights of the cable companies. The dissenters argued that the statute, being intended to promote specific programming interests (diversity of viewpoints, localism, educational programs, and news and public affairs) through the locality requirement, was content-based and therefore subject to strict scrutiny. They found localism and diversity of viewpoints to be less than compelling governmental interests, and the restriction on cable owners' rights not narrowly tailored to the potentially compelling interests of preferring educational or public affairs programming, since it would presumably displace cable programming having similar purposes.⁷⁴ They would, therefore, simply have reversed the judgment below and entered final judgment for the operators. On remand to the lower court the parties developed a much-expanded record showing the factual basis for the statute, and the court again rendered judgment for the government. The Supreme Court affirmed, by the same five-four vote on essentially the same issues as on the first decision.⁷⁵

III. REGULATING CONCENTRATION: FCC CONTROLS ON OWNERSHIP OF MEDIA OUTLETS

A. *Origins and Early Judicial Evaluation*

Beginning in the late 1930's, the FCC began regulating the number of broadcast media outlets any one person or entity could own, justifying these limits primarily in terms of the public interest in viewpoint diversity on matters of public concern.⁷⁶ The limits were keyed to local market, national market, and particular medium (AM and FM radio, television, eventually cable and newspapers—numbers of outlets in any one format, and cross-ownership of outlets in different formats). The earliest rules precluded multiple licenses to the same entity for AM or for FM in the same area, and imposed a national limit on the ownership of TV stations to three. The progression of amendments to such rules, like that of the program content regulations, followed the development of technologies which in general tended to increase the number of outlets available. Three Supreme Court decisions are useful in tracing early developments

74. 512 U.S. at 680-681 (O'Connor, J., concurring in part and dissenting in part).

75. *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997).

76. On the history of these regulations, with extensive references, see Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U. CAL. DAVIS L. REV. 1547, 1556 ff. (2008) (hereinafter "Candeub, Media Ownership").

and setting the statutory and constitutional framework for ownership rules.

In 1943 the Court had before it challenges to the FCC's Chain Broadcasting Regulations governing the relationships between individual station licensees and radio networks, which restricted a variety of anti-competitive practices of the networks having the effect of unduly limiting the station's control over programming decisions.⁷⁷ One provision dealt directly with network ownership of licensed stations, and established the principles that licenses should not be issued to a network for more than one station in the same service area and that a network should not be licensed for a standard station in an area in which the existing standard stations are so few or so undesirable that granting the network license would substantially restrain competition. While this provision was not discussed separately in relation to the Commission's powers, it was sustained along with the others, under both the statute (including the authority to regulate competition) and the First Amendment.⁷⁸

*U.S. v. Storer Broadcasting Co.*⁷⁹ reviewed the FCC's 1953-4 revisions of its national limits on owning multiple licenses. This revision⁸⁰ adopted the "rule of seven": issuance of license to a broadcaster who already has stations would be denied "if the grant of the license would result in a concentration of control" of broadcasting in the particular service "in a manner inconsistent with public interest, convenience, or necessity," taking into account a variety of factors; but it would in any event be considered that such a concentration would occur if the applicant already held seven stations in the same service (AM, FM, or TV). Moreover, the regulations used a prophylactic definition of "ownership": if the applicant or "any stockholder, office or director of [the applicant] directly or indirectly, owns, operates, controls, or has any interest in, or is an officer or director of" another station in the same service, the rule applies.⁸¹ The Court held that the rules were within the regulatory power of the FCC, and that the procedure was adequate to satisfy the requirements of due process.

In 1975 the Commission, in an overall review of multiple ownership rules which had already resulted in regulations strengthening the prohibition against owning or controlling more than one broad-

77. *National Broadcasting Co. v. FCC*, 319 U.S. 190 (1943).

78. The Court's decision was its first to articulate the scarcity rationale for broadcast exceptionalism in relation to the freedoms of speech and press. *Id.* at p. 226-227.

79. 351 U.S. 192 (1956).

80. The first version had 7 AM, 5 FM, or 5 TV stations as its limits, and it was this version that was attacked in the Court; but the fact that the FCC amended its rule to raise the FM and TV limits also to 7 before the judgment was rendered did not affect the outcome.

81. 351 U.S. at 194n.1.

cast license in the same area,⁸² completed the process by extending this prohibition to the common ownership or control of a licensed broadcast station and a newspaper in the same community.⁸³ The rule forbade new combinations however formed (new licenses or transfer of existing licenses to newspapers, or renewals to licensees that have acquired newspapers), as well as the transfer of existing newspaper-broadcast combinations to the same person or entity, but it required *divestiture* of one or the other outlet by existing combinations only in a small number of "egregious" cases. The Commission explained this shift from what had been a case-by-case treatment of such combinations, which often accepted newspaper applications for broadcast licenses, in terms of the "maturity" of the broadcast media: the licenses are "worth applying for" in their own right, so that other "qualified and experienced applicants can be expected to step forward."⁸⁴ Now, the likelihood that a newspaper-owned license "is not going to enhance diversity" in local broadcast media became dispositive.⁸⁵ With respect to divestiture of existing combinations, the Commission took a nuanced view, which emphasized the difference between its mission and that of antitrust authorities, the latter concerned with competition in advertising and market share, the former concerned with "diversity of viewpoints from antagonistic sources."⁸⁶ From the diversity perspective, it concluded that "because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use only in the most egregious cases."⁸⁷ Reviewing a lower court judgment which rejected the divestiture rule as arbitrary, the Supreme Court sustained the regulation in its entirety against challenge based both on the underlying statute and on the First Amendment.⁸⁸ Specifically, it found the Commission's priority for the diversity goal and its assumption that diversity of ownership would enhance the possibility of diversity of viewpoints to be "rational" in light of the earlier cases and the language of the statute.⁸⁹

82. *Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order*, 22 F.C.C.2d 306 (1970). This order extended what had been a prohibition against "duopoly" in the same broadcast service to cross-service ownership and control.

83. *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046 (1975). The rules applied only to commercial media, not to non-profits or educational institutions.

84. *Id.* at para. 100.

85. *Id.* at para. 101.

86. *Id.* at para. 111. It appears, indeed, that a number of Justice Department petitions to the FCC to deny specific license renewals involving broadcast-newspaper combinations, thought by many to be motivated by the Nixon administration's hostility to newspapers, was a prime stimulus to the FCC's rule-making decision. See Candeub, *Media Ownership*, note 76 above, at 1567ff.

87. *Id.* at para. 112.

88. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

89. 436 U.S. at 796f.

With respect to the claim that the regulation violated the First Amendment rights of newspapers, the Court cited *Red Lion* for the proposition that no one has a First Amendment right to a broadcast license in light of the nature of the medium, and that denial of a license in the public interest is not a denial of free speech.⁹⁰

B. Recent Efforts at Deregulation

The multiple ownership rules as a means of promoting diversity of viewpoint proved more resistant to deregulation than did content control measures like the fairness doctrine. The first move on the part of the FCC came in 1984, when it changed the "Rule of 7" to a "Rule of 12" to define the maximum number of licenses a single entity could control nationally in each of the service categories (AM, FM, and TV).⁹¹ In doing so, the Commission relied both on a dramatic increase in the overall number of stations in the country⁹² and on a greatly expanded range of non-broadcast media sources it considered relevant to the public interest in diversity,⁹³ in addition to evidence that larger organizations were regarded as more reliable and more likely to provide public interest programming than single-station owners.⁹⁴ The majority of the Commission clearly viewed these findings as a basis for ending all restrictions on national ownership, concluding that they do not help the individual viewer whose relevant market is local,⁹⁵ but decided to postpone action on that goal for six years to allow for reconsideration after experience with relaxed limits.⁹⁶ On reconsideration of this amendment after Congress blocked its implementation, the Commission dropped the six-year "sunset" provision and added as a second limiting factor the maximum share of the total national broadcast audience that any one entity can reach, which was set at 25%.⁹⁷

A much broader statutory deregulation of the ownership rules came with the Telecommunications Act of 1996,⁹⁸ which had the

90. *Id.* at 799f.

91. *Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984).

92. *Id.* at paras. 4 and 24, the latter noting that a 12-station owner in 1984 had a smaller percentage of the total than did a 7-station owner in 1953 when the rule of 7 was adopted.

93. *Id.* at para. 30, identifying cable, videocassette recorders, newspapers, magazines, books, and other electronic video sources as media to be considered in evaluating diversity concerns.

94. *Id.* at paras. 44ff. and 82ff.

95. *Id.* at paras. 60ff.

96. *Id.* at para. 112.

97. *Rules Related to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 F.C.C.2d 74 (1984). The revision also dropped a "sunset" provision which would have caused the entire package of limitations to expire altogether in 6 years unless subsequent developments warranted some continuation.

98. Pub.L. no. 104-104, 110 Stat. 56 (1996).

stated purpose of “promoting competition and reducing regulation” in the field. The Act specifically directed the Commission to amend its regulations to eliminate national limits on the number of stations owned by one entity, both with respect to radio⁹⁹ and television,¹⁰⁰ and to raise the maximum national audience share for any one television owner from 25% to 35%.¹⁰¹ A new formula was required for determining the number of commercial radio stations that can be commonly owned at the local level, keyed to the total number of such stations in the market and with maximums ranging from eight in the larger markets (forty-five+ stations) to five or half the total—which ever is smaller—in smaller markets (fourteen or fewer stations).¹⁰² With respect to local television ownership, the Act ordered the Commission to expand its program of waivers of the existing anti-duopoly rule to the fifty largest markets, and to conduct an investigation and rule-making proceeding to determine whether it should retain, modify or eliminate any of its rules governing the number of permissible co-ownerships.¹⁰³ Finally, and in the outcome most tellingly, it ordered the Commission to conduct biennial (since 2004, quadrennial) reviews of all of its ownership rules, including the ones commanded by the Act, to determine “whether any of such rules are necessary in the public interest as the result of competition” and to “repeal or modify any regulation it determines to be no longer in the public interest.”¹⁰⁴

Since the Telecommunications Act of 1996 took effect, the FCC has conducted several comprehensive reviews of the ownership rules pursuant to the statutory mandate, and each time it has attempted revisions it has been largely overruled by appellate courts, typically on the ground that it did not provide an adequate justification for its action under the public interest standard and the specific requirements of the statute. The decisions so challenged included both retentions and relaxations of existing restrictive rules, and the result has been that almost all of the statutory rules have remained in force.

In its first review beginning in 1998, the FCC decided to retain the national TV ownership audience cap at 35% and the prohibition against common ownership of a cable system and a TV broadcast station in the same market,¹⁰⁵ and both decisions were challenged in federal appeals court by network and cable system owners. The court

99. *Id.* sec. 202(a).

100. *Id.* sec. 202(c)(1)(A).

101. *Id.* sec. 202(c)(1)(B).

102. *Id.* sec. 202(b).

103. *Id.* sec. 202(d) and 202(c)(2) respectively.

104. *Id.* sec. 202(h).

105. *1998 Review of Broadcast Ownership Rules*, 15 F.C.C.R. 11058 (2000), at 11073ff. (TV ownership) and 11114ff. (Cable/TV cross-ownership).

found that both retention decisions were inadequately supported by the reasons given in light of the record.¹⁰⁶ Regarding the national audience cap the court noted that the FCC asserted that national diversity was important but failed to explain why it no longer adhered to the contrary view expressed in the 1984 review, and it asserted a need to observe the effects of the statutory changes of 1996 despite the statute's presumption that any restrictive rule should be eliminated or modified.¹⁰⁷ With respect to the cable/television cross-ownership rule, the court found the FCC's reasoning—that the rule is necessary to prevent discrimination by the cable owner against other broadcasters—to be unresponsive to cable owners' objections, and inconsistent with its relaxation, in a separate proceeding, of the prohibition against ownership of more than one TV station in the same market.¹⁰⁸ That local TV ownership rule change,¹⁰⁹ in turn, was reviewed later by the same court and found to be inadequately supported in one respect.¹¹⁰ The FCC had decided to modify the flat prohibition against duopolies, by redefining the relevant local market (not measured by signal coverage, but by commercial rating areas) and by allowing dual ownership provided that (1) the stations' signals don't overlap, (2) one of the two is not in the top four rated stations in the market, and (3) at least eight independently owned, full-power TV stations remain whose signals overlap with at least one of the two co-owned ones. The court found that the Commission had not adequately explained why non-broadcast media (specifically, general-circulation daily newspapers and cable systems) were not included in the list of "remaining voices" to be counted, whereas they were in another rule relaxation using the same criterion, that of cross-ownership of local radio and TV stations.¹¹¹ None of these court rulings questioned the basic concept of broadcast exceptionalism with regard to freedom of speech.¹¹²

106. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (C.A.D.C. 2002), modified on rehearing 293 F.3d 537 (2002).

107. 280 F.3d at 1042ff. The same court had rejected a similar national market share limit on cable systems, which the FCC had set at 30% on the premise that that would protect against a program producer seeking access to a cable system from being blocked by two rejections, on the ground that the underlying assumptions about competition and what it would take to open the field for independent programmers were purely conjectural. *Time Warner Entertainment Co. v. FCC*, 249 F.3d 1126 (C.A.D.C. 2001). The Commission reconsidered and readopted the 30% rule with equally non-empirical justification, and the court rejected it, in *Comcast v. FCC*, 579 F.3d 1 (2009).

108. 280 F.3d at 1049ff.

109. *Regulation Governing Television Broadcasting*, 14 F.C.C.R. 12903 (1999).

110. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (C.A.D.C. 2002).

111. 284 F.3d at 162ff., noting in particular that the FCC claimed regarding the TV duopoly rule that broadcast television was the dominant source of news in most markets, while citing studies which in fact did not distinguish between broadcast and cable.

112. See Candeub, *Media Ownership*, note 76 above, at 1555f.

All of these remands were consolidated into the Commission's next biennial review with a new chair in full deregulatory mode, resulting in a 2003 order which reviewed all six ownership rules, liberalizing five of them and retaining one unchanged.¹¹³ The local TV ownership rule was modified to allow as many as three stations to be co-owned in markets with eighteen or more stations, without changing either the definition or the number of independent voices that must remain. The local radio ownership rule was modified to use a geographic rather than signal-based definition of market and by including non-commercial stations in the count, without changing the numerical limitation. The local newspaper/broadcast cross-ownership rule and the local TV/radio cross-ownership rule were merged into a single cross-media rule. The national TV ownership rule based on audience share was raised to 45%.¹¹⁴ The "dual network rule," which allows common ownership of more than one broadcast network but forbids merger of any of the top four in market share, was retained without change. The underlying factual assumption of the majority opinion was that the advent of cable, satellite and internet had produced a situation of abundance in most markets,¹¹⁵ and that effective competition by broadcasters with the new non-broadcast media requires new efficiencies.¹¹⁶ A challenge by public interest and consumer advocacy groups was heard not in the FCC's home base of the District of Columbia but in a different circuit, and it was successful.¹¹⁷

Of particular interest in the Third Circuit's analysis is its questioning of a central concept in the Commission's local ownership and cross-ownership rules, namely that within any given media type, all outlets are to be counted equal, regardless of their actual market shares. The new local TV ownership rule did prohibit combinations of the top four stations in the market, but in determining whether ownership of as many as three stations is permissible it was the total number of outlets rather than their individual market shares that counted, and the merger of *any* top-four with *any* two of the others counted the same as a merger of the smallest three. The court found the Commission's explanation, that market share is too fluid to be a

113. *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13620 (2003).

114. While the court challenge was pending, this particular change was overruled by Congress, which amended the Telecommunications Act of 1996 sec. 202(c) to set the audience share cap at 39%, and amended sec. 202(h) to exclude that provision from periodic review by the FCC. Consolidated Appropriations Act of 2004, Pub. L. 108-199, sec. 629, 118 Stat. 3, 99-100 (2004).

115. *Id.* at paras. 86ff.

116. *Id.*, e.g., at para.138.

117. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (C.A. 3d Cir. 2003).

reliable measure in itself, to be irrational and self-contradictory.¹¹⁸ The common cross-media ownership rule was a complicated one which divided local markets into three categories: those with three or fewer television stations (smallest), those with nine or more television stations (largest), and those in between; it then forbade all cross-media ownership in the smallest, allowed a wide variety of cross-ownership scenarios in the largest, and excluded one such (one newspaper and two TV stations) in the middle category. In making these calculations, the rule used a “diversity index” which took into account six media types (daily or weekly newspapers, radio, broadcast television and cable or dial-up internet), assigned a relative value to each type based on *national* usage patterns, treated each outlet within each media type as if it had the same market share, then used the sum of the squares of each outlet’s market share as an indicator of concentration (the higher the number the greater the risk of harmful concentration). The court found that the assumptions underlying this index were faulty in three respects: its omission of cable as a relevant local medium was not supported by the record, it irrationally treated each outlet within a category as having equal market shares (thus arriving at the lowest possible aggregate number for concentration purposes), and it reached conclusions that were not consistent with its stated formulas.¹¹⁹ Finally, the Commission’s decision to retain the existing numerical limits on local radio station ownership, after redefining the relevant market and including non-commercial stations in the count (both of which changes were approved by the court), was based on a game-theory analogy which presupposed a minimum number of roughly equal competitors to assure the benefits of competition; it determined that the minimum number was five, and that the existing multi-tiered limits guaranteed at least that number of roughly equal competitors in all but the smallest markets.¹²⁰ The court found that the Commission had not adequately explained why the standard should be five roughly equal competing firms, and that it was quite irrational and factually incorrect to assume that the limiting numbers (which had been in place since they were introduced by the 1996 statute) would produce that competitive structure.¹²¹ Thus all of the proposed changes were remanded for further consideration, leaving the pre-2002 rules intact except for the national TV audience share cap which was changed by Congress, and were carried over to the next review.

118. 373 F.3d at 418f.

119. 373 F.3d at 404ff.

120. 18 F.C.C.R. 13620, at paras. 289ff.

121. 373 F.3d at 433ff.

The most recent review produced a report and order in 2007,¹²² which revived only one of the Commission's 2003 proposals for change, and that only partially: a relatively modest modification of the absolute ban on newspaper/broadcast cross-ownership based on the court's agreement that the ban was no longer necessary in the public interest.¹²³ Specifically, the attempt at a common rule for all cross-media ownership was abandoned, as was the hopelessly confusing "diversity index," and a presumption against allowing newspaper/broadcast cross-ownership was retained for the great majority of markets. That presumption was reversed only for the largest twenty markets, for one-paper/one broadcast station combinations only, and with conditions attached to newspaper/television combinations: (1) that the television station is not ranked in the top four in the market area, and (2) that there are at least eight independent "major media voices" remaining in the area.¹²⁴ As to what voices to count as "major" the Commission concluded that daily newspapers, radio and broadcast television are still the primary sources that people rely on for news, especially local news, whereas on the available data it was impossible to evaluate the contribution of other electronic media such as cable and the internet to this specific concern.¹²⁵ The Commission insists on a case-by-case analysis, however, and requires consideration of a wide variety of factors in deciding whether or not either presumption should be overcome in a given case;¹²⁶ in this context the conceded contribution of cable and internet to viewpoint diversity becomes important in justifying the presumption that allowing newspaper/broadcast combinations in the largest markets will not harm that interest.¹²⁷ The concern here was the weak economic situation in the newspaper industry, endangering the most significant media investment in local news if they are unable to diversify their revenue base; but only in the largest markets is there sufficient diversity of media present to absorb the concentration effects of the paper/TV combination.¹²⁸ On the other hand many such combinations did exist which the ban of 1975 had not required to be divested, and some had enhanced local news production.¹²⁹ Court challenges are pending at the present writing which apparently involve both the change and some of the retentions, but at least one commentator believes that

122. 2006 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1994*, 23 F.C.C.R. 2010 (2007).

123. *Id.* at paras. 18ff.

124. *Id.* at para.53.

125. *Id.* at paras. 53ff.

126. *Id.* at paras. 68ff., listing four factors to be considered in deciding on a request for waiver in smaller markets.

127. *Id.* at para. 59.

128. *Id.* at paras. 27ff.

129. *Id.* at paras. 42ff.

the new rule will hold up in court, although efforts in Congress to overturn it by statute could render the judicial review moot.¹³⁰

IV. CONCLUSION

Viewpoint diversity, at least at the local level, is clearly a legitimate goal of broadcast and cable regulation, furthering the public interest in access to a wide variety of information and opinions on matters of public concern. The question of what kind of regulation of broadcasters' freedom of speech is appropriate to achieve that goal, however, is one to which there is not a permanent answer. Certainly the recent trend—responding to technological improvements which make room for more broadcasters, as well as to general First Amendment doctrine—is to disfavor measures to control content, such as the fairness doctrine, and to prefer those which are more structural, such as ownership controls designed to promote greater numbers of independent voices. To the extent that the latter are successful, the fairness doctrine in its various manifestations is likely to remain on the sidelines. On the other hand the Commission has had great difficulty persuading the courts that there is an empirical correlation between any particular number of independently owned “voices” and a properly representative diversity of viewpoint.

In the commentary there remains widespread concern about the quality of coverage of public affairs, in particular the strong tendency toward polarization and partisanship in reporting which has certainly increased since the FCC's abandonment of most content regulation,¹³¹ but even here proposals favor less coercion and content-control and more attention to structure.¹³² It remains to be seen whether and how the FCC itself will follow through on its localism initiatives,¹³³ but its most important improvement could be the generation of a wide range of reliable information about media operations and market situation, the lack of which has so troubled courts and critics.¹³⁴

130. Alicia Flarity, *David Slays Goliath: The Fight Against the FCC's Recent Relaxation of the Newspaper-Broadcast cross-Ownership Rule*, 61 BAYLOR L. REV. 261 (2009), at 280ff (judicial scrutiny) 284ff (Congressional efforts).

131. Levi, *Four Eras*, n. 31 above, at 853 ff.

132. See Ammori, *Flawed Means*, n. 56 above, at 892 ff. Another suggestion is to restructure the concept of the local market so as to make it coincide to a greater degree with political boundaries, thereby enhancing the media's function as agent for the citizen in monitoring the performance of governmental officials. Candeub, *Media Ownership*, n. 76 above, at 1585ff.

133. Above, text at notes 64-65.

134. See, e.g., Philip M. Napoli, *Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation*, 60 ADMIN. L. REV. 801, 804f. (2008).