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Double Crossed: Why the Newspaper/Broadcast Cross-Ownership Ban Remains Necessary in the Public Interest

Daniel C. Moore

Note

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*Daniel C. Moore**

In the weeks leading up to the 2000 presidential election, the editorial staff of the *Milwaukee Journal Sentinel* was in a quandary.[1] Who would they endorse for President? The majority of the staff favored Democratic candidate Al Gore, but others favored George W. Bush, the candidate favored by the newspaper's parent corporation.[2] Four years earlier, the *Journal Sentinel* had endorsed Republican Bob Dole, although a majority of the staff favored then-incumbent President Bill Clinton.[3] In 2000, after much debate, the staff reached a compromise, deciding to endorse neither candidate.[4] Why would a newspaper's editorial staff, twice in a period of four years, choose not to endorse the candidate favored by the majority of its members, or, more perplexing still, endorse the *opposing* candidate in a presidential campaign?

One explanation is that the parent corporation, either directly or through subtle pressure, was exerting influence on the

* J.D. Candidate 2005, University of Minnesota Law School; B.A. 1997, Princeton University. The author would like to thank the Law Review editorial board and staff, in particular Lauren Hancock and Adam van Alstyne.

1. *See* David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper / Broadcast Cross-Ownership*, 54 FED. COMM. L.J. 31, 47 (2001) (describing the difficulties that the newspaper's editorial staff had in coming to a decision about which candidate to endorse).

2. *See id.* (citing a personal communication from an editorial writer for the newspaper who requested anonymity). The *Milwaukee Journal Sentinel* is owned by Journal Communications, Inc., a company that also owns television stations in Wisconsin, Michigan, Nevada, and California, and thirty-four radio stations in markets nationwide. *See id.* at 46. For a detailed list of the company's Milwaukee holdings, see *infra* note 8.

3. Pritchard, *supra* note 1, at 47.

4. *Id.*

editorial process.[5] In fact, the Federal Communications Commission (FCC) concedes that media ownership often influences viewpoint, especially when the parent corporation's interests are involved.[6] Despite this correlation, the FCC considers such instances to be isolated aberrations that do not reflect the kind of "uniform bias" that would warrant serious concern.[7] But what happens when the same parent corporation also owns a local television station, two local radio stations, and more than twenty weekly newspapers in the surrounding suburbs?[8] When

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5. *But see id.* at 49 (concluding that the *Journal Sentinel*'s ownership did not have a significant influence on its viewpoint in that instance, because the choice not to endorse Gore did not prevent the newspaper from asserting a generally pro-Gore point of view in its news articles, staff columns, and other staff-selected materials). Despite the results of the study, Pritchard has acknowledged other instances where Journal Communications used its media holdings to forward its own political objectives. *See Street Sweep* (CNNfn television broadcast, June 1, 2003) (providing comments of David Pritchard regarding uniformly slanted news coverage by Journal Communication's newspaper, television, and radio properties regarding a proposal to spend tax dollars on a stadium plan that was favored by the parent corporation), *available at* http://www.cnn.com/TRANSCRIPTS/0306/01/sun.12.html (last visited Apr. 25, 2004). For a discussion of the many ways ownership can influence editorial viewpoint in the news media, see generally DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY (1998).

6. *See* Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286, 46,314 (Aug. 5, 2003) *stayed pending judicial review by* Prometheus Radio Project v. FCC, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003) (per curiam) (to be codified at 47 C.F.R. pt. 73.3555(c)) [hereinafter 2003 Ownership Rules] (acknowledging evidence that ownership influences viewpoint, without establishing the precise degree of such influence); *see also* Bill Moyers, Keynote Address to the National Conference on Media Reform (Nov. 8, 2003) (discussing the reluctance of news organizations to report on the efforts of their parent corporations to lobby the FCC for repeal of the cross-ownership ban), *at* http://www.commondreams.org/views03/1112-10.htm (last visited Apr. 25, 2004). For additional examples of news organizations refusing to cover stories implicating the interests of their parent corporations, see *infra* note 88.

7. *See* 2003 Ownership Rules, *supra* note 6, at 46,314 (finding that anecdotal evidence of ownership influencing viewpoint is insufficient to justify a "blanket prohibition" on newspaper/broadcast cross-ownership).

8. In addition to the *Journal Sentinel*, which is the only daily newspaper in the Milwaukee area, Journal Communications owns WTMJ-TV, a highly rated Milwaukee television station; WTMJ-AM, a local conservative talk radio station; WKTI-FM, a contemporary music station; and more than twenty weekly newspapers in the Milwaukee suburbs, helping to make Milwaukee one of the most concentrated media markets in America. *See* Pritchard, *supra* note 1, at 46; *see also Street Sweep*, *supra* note 5 ("There arguably is no other city where a single company has such a stranglehold on news and public af-

does ownership's influence cease to be an aberration and begin to pose a serious threat to democracy?

The *Milwaukee Journal Sentinel* is owned by Journal Communications, one of only a handful of media companies that own daily newspapers, broadcast television stations, and radio stations in the same markets. These companies obtained grandfather status prior to the 1975 newspaper/broadcast cross-ownership ban, and are currently the exception to the rule.[9] Soon that may no longer be the case. In June 2003, after a perfunctory public comment period,[10] the FCC voted to repeal or modify a series of media ownership restrictions that had been in place since the 1970s.[11] Among these restrictions was the newspaper/broadcast cross-ownership ban.[12] The new Cross Media Ownership Rule, by permitting newspaper and broadcast cross-ownership in most major markets, promises to continue a disturbing trend toward concentration of mass media ownership in America.[13]

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fairs content as Milwaukee.") (comments of David Pritchard). Journal Communications also owns Norlight Telecommunications, one of the largest telecom networks in the Midwest, with clients such as AT&T and the State of Wisconsin. Robert N. Wold, *Consolidation and Convergence Among Uplinkers*, VIA SATELLITE, Aug. 10, 2001, at 8. In 1997, the State of Wisconsin awarded Norlight a five-year contract worth an estimated $12 million per year. John Welsh, *Fiber Optic Line a Link to Future*, WIS. ST. J., Mar. 1997, at 1.

9. *See* Pritchard, *supra* note 1, at 33.

10. While the FCC received close to three-quarters of a million public comments on the proposed rules changes, comments "almost unanimous in opposition" to the changes, the FCC held only one official public hearing before a final vote. 149 CONG. REC. S11,503 (daily ed. Sept. 16, 2003) (statement of Sen. Feingold). Feingold went on to note, "This is more than carelessness or bureaucratic inertia. This was simple disdain for the public in whose interest the FCC by statute is required to act." *Id.* At a later point in the debate, Senator Tom Daschle, criticized FCC Chairman Powell noting that his "'field' hearing was held 90 miles from Washington, and much of his invited testimony came from industry representatives, many of whom, in fact live inside the Beltway." *Id.* at S11,506 (statement of Sen. Daschle).

11. *See* Frank Ahrens, *Panel Fires Shot Across FCC's Bow: Stevens Amendment Maintains Cap on TV Networks' Size*, WASH. POST, Sept. 5, 2003, at E5.

12. Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *amended upon reconsideration by* 53 F.C.C.2d 589 (1975) (codified at 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976)) (repealed 2003) [hereinafter 1975 Ownership Rules].

13. There are approximately 1800 daily newspapers, 11,000 magazines, 11,000 radio stations, 2000 televisions stations, and 3000 book publishers in North America. In 1984, 50 companies owned a controlling interest in the properties listed above. By 1987 that number was 26. As of 1996 the number had shrunk to 10, and as of 2002 only six companies owned a controlling inter-

The FCC claims new media technologies have created a competitive media environment where restrictions on ownership are no longer necessary to protect the public interest.[14] Where the deregulatory environment fails to provide adequate structural safeguards against competitive abuses by media owners, the FCC claims antitrust law will provide a meaningful restraint on excessive media concentration.[15] This Note argues that the newspaper/broadcast cross-ownership ban should be retained, as the only effective means to safeguard the public's First Amendment interest in a robust and uncensored marketplace of ideas, and to prevent antidemocratic abuses by mass media conglomerates.[16] By relaxing restrictions on cross-ownership, the FCC leaves noneconomic values such as viewpoint diversity and localism at the mercy of the open market and the antitrust laws, thereby abdicating its statutory responsibility to protect the public interest.[17]

I. FIRST AMENDMENT JUSTIFICATIONS FOR CROSS-OWNERSHIP REGULATION

The restrictions on media cross-ownership enacted in the 1970s have their roots in the Supreme Court's First Amendment doctrine of the marketplace of ideas and the goal of "the widest possible dissemination of information from diverse and antagonistic sources."[18] This section analyzes the constitutional justifications for the newspaper/broadcast cross-ownership ban by examining Supreme Court case law, beginning with *Associ-*

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est in the media listed above. *See Politics and Economy: Massive Media*, NOW: WITH BILL MOYERS, *at* http://www.pbs.org/now/politics/media.html (last visited Apr. 25, 2004).

14. *See* 2003 Ownership Rules, *supra* note 6, at 46,293 (discussing the impact of the Internet on the availability of news and information sources); *see also infra* Parts II.B–C (examining the FCC's justifications for the new cross-ownership rule).

15. *See infra* Part IV; *see also* 2003 Ownership Rules, *supra* note 6, at 46,313 (suggesting that the Department of Justice and Federal Trade Commission, as well as state attorneys general and private parties, may bring antitrust actions to protect competition in the advertising markets in the absence of restrictions on cross-ownership). For a discussion of the new relevance of antitrust law in the aftermath of deregulation of radio ownership by the Telecommunications Act of 1996, see C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 870 (2002) ("[T]he Antitrust Division of the Department of Justice has been the remaining, although weaker, source of restrictions on the recent consolidating trends in radio.").

16. *See infra* Part III.

17. *See infra* Part IV.

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

ated Press in 1945 and culminating with the Court's upholding of the cross-ownership ban in 1978's *National Citizens Committee for Broadcasting.*

A. *ASSOCIATED PRESS*

In 1945 the Supreme Court upheld the application of the Sherman Act to anticompetitive behavior by a news wire service in *Associated Press v. United States.*[19] At issue in the case were private restraints in the Associated Press's (AP) bylaws that restricted access to AP news to member newspapers.[20] Justice Black's majority opinion established a goal to guide future applications of the First Amendment to the press and the media in general: "That Amendment rests on the assumption that the *widest possible dissemination* of information from *diverse and antagonistic sources* is essential to the welfare of the public, that a free press is a condition of a free society."[21]

The opinion began by discussing competition within the newspaper industry, finding the AP's bylaws to be a "contractual restraint of interstate trade,"[22] without engaging in the kind of detailed market analysis typical of an antitrust case.[23] Justice Black rejected the AP's argument that it deserved First Amendment immunity from antitrust enforcement by virtue of its role as a news provider.[24] Black unequivocally announced the government's right to intervene structurally when private interests threaten the free flow of information necessary for a democratic system of government: "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary."[25]

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19. 326 U.S. 1, 23 (1945).

20. *See id.* at 4; *see also* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 262 (2001) (describing the fact situation and the government's case in *Associated Press*).

21. *See Associated Press*, 326 U.S. at 20 (emphasis added).

22. *See id.* at 18–19 (comparing the restraint of trade in information created by the AP bylaws to restraints of trade in other industries that were held unlawful by the Court).

23. *See* Stucke & Grunes, *supra* note 20, at 262–63 (discussing the Court's atypical antitrust analysis in relation to the First Amendment and the marketplace of ideas); *see also* Baker, *supra* note 15, at 871 ("Historically, media-specific policy concerns related primarily to the democratic or pluralist structure of participation in the communications order—the interest that Justice Black so famously endorsed in *Associated Press.*" (citation omitted)).

24. *See Associated Press*, 326 U.S. at 19–20.

25. *Id.* at 20. Justice Black argued that the First Amendment was in fact a powerful justification for such antitrust enforcement by the government. *See*

In his concurring opinion, Justice Frankfurter emphasized the unique relationship of the press to the public interest, and the corresponding insufficiency of a purely economic analysis in determining the scope of permissible government intervention:

> A free press is indispensable to the workings of our democratic society. The business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.[26]

According to Frankfurter, the unique factors that differentiate the press from "ordinary commodities" implicate public policy concerns that go beyond formulaic analyses of economic competition to touch on the very foundations of democratic government.[27]

The commitment to "diverse and antagonistic" sources of information announced in *Associated Press* has been repeatedly affirmed by the Supreme Court in the context of print media,[28] and has been applied to justify administrative regulation of more modern means of communication, such as broadcast and cable television.[29] In the 1970s, when the FCC first enacted regulations banning cross-ownership of newspapers and broadcast television stations, it relied on Justice Black's language from *Associated Press* to ground the regulations solidly in First Amendment concerns.[30] According to the FCC, the goal of fos-

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id. ("It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.").

26. *Id.* at 28 (Frankfurter, J., concurring).

27. Justice Frankfurter echoed Justice Black's language from the majority opinion, describing the goal of the First Amendment as fostering the "dissemination of news from as many different sources, and with as many different facets and colors as is possible." *Id.*

28. *See* Buckley v. Valeo, 424 U.S. 1, 49 (1976); Citizen Publ'g Co. v. United States, 394 U.S. 131, 139–40 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

29. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 796 (1978); Red Lion Co. v. FCC, 395 U.S. 367, 390 (1969); *see also* Comments from Consumers Union et al., In re Cross-Ownership of Broadcast Stations and Newspapers Before the FCC (Dec. 3, 2001) (discussing the Supreme Court's applications of the First Amendment principles announced in *Associated Press* to other means of communication, such as broadcast and cable television), http://www.mediaaccess.org/filings/consumers_union_et_al_nbco_comments.pdf.

30. 1975 Ownership Rules, *supra* note 12, at 1048; *see also Nat'l Citizens*

tering the "widest possible dissemination of information from diverse and antagonistic sources" was an essential principle in defining the public interest in diversification of media ownership.[31]

B. *NATIONAL CITIZENS COMMITTEE FOR BROADCASTING*

In 1975 the FCC passed administrative regulations banning joint ownership of newspapers and broadcast television stations in the same geographic markets, and ordering divestiture of certain "egregious" combinations already in existence.[32] The cross-ownership bans were enacted with the purpose of "promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints."[33] While the FCC acknowledged studies concerning the effects of cross-ownership on competition were inconclusive, and there was no direct evidence of competitive abuses by existing cross-media owners, the FCC found the diversification rationale sufficient to justify the newspaper/broadcast cross-ownership ban in the absence of persuasive countervailing interests.[34]

In 1978 the Supreme Court upheld the cross-ownership ban in *FCC v. National Citizens Committee for Broadcasting*.[35] Despite the "inconclusiveness" of the evidence in the record, the Court held that the regulations were a reasonable means of achieving the public interest goal of diversification of media ownership, and therefore within the FCC's regulatory author-

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Comm. for Broad., 436 U.S. at 785 (discussing the FCC's prospective ban on cross-ownership as "grounded primarily in First Amendment concerns").

31. *See* 1975 Ownership Rules, *supra* note 12, at 1048 (quoting *Associated Press*, 326 U.S. at 20); *see also* CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK 80 (2000) ("Virtually all Commission policies intended to serve the public interest were also originally intended to increase diversification of programming.").

32. *See* Baker, *supra* note 15, at 862 (citing 1975 Ownership Rules, *supra* note 12).

33. *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 784. The Supreme Court also acknowledged the objective of "preventing undue concentration of economic power" as an additional benefit of diversification of mass media ownership. *See id.* at 780.

34. *See id.* at 786 ("The prospective rules were justified . . . by reference to the Commission's policy of promoting diversification of ownership: Increases in diversity of ownership would possibly result in enhanced diversity of viewpoints, and, given the absence of persuasive countervailing considerations, 'even a small gain in diversity' was 'worth pursuing'" (quoting 1975 Ownership Rules, *supra* note 12, at 1076, 1080 n.30)).

35. 436 U.S. 775, 792 (1978) (upholding a prospective cross-ownership ban).

ity.[36] The Court explicitly accepted the FCC's argument that a rational connection existed between diversity of ownership and diversity of viewpoints: "[I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run."[37]

The rationale put forth by the FCC, and accepted by the Supreme Court in *National Citizens Committee for Broadcasting*, was that an increase in independent media voices through enforced diversification of ownership was both a reasonable regulatory objective and the primary impetus for the cross-ownership ban.[38] Three decades after *Associated Press*, the First Amendment goal of maximizing viewpoint diversity continued to justify and inspire structural regulation of the media.[39] It was not until the early 1980s that the FCC began to reconsider its presumption against concentration in favor of a "new unbounded . . . faith in the market,"[40] and dispersal of ownership for its own sake ceased to be considered a legitimate policy objective.[41]

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36. *See id.* at 796 (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), to establish the Commission's authority to promote diversification of ownership through reasonable regulations).

37. *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 797 (quoting 1975 Ownership Rules, *supra* note 12, at 1079–80); *see also id.* at 785 ("[O]wnership carries with it the power to select, to edit, to choose the methods, manners and emphasis of presentation." (quoting 1975 Ownership Rules, *supra* note 12, at 1050)). *But see* Jerome A. Barron, Commentary, *Globalism and National Media Policies in the United States and Canada: A Critique of Edwin Baker's* Media, Markets and Democracy, 27 BROOK. J. INT'L L. 971, 987 (2002) ("The cross-ownership rule reflects a certain leap of First Amendment faith, based on underlying notions that a larger number of smaller and independently owned media in a community are more likely to yield diverse and original voices.").

38. *See* 1975 Ownership Rules, *supra* note 12, at 1079.

> It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible.

Id.

39. *See* Baker, *supra* note 15, at 867 ("[D]ispersal itself, not competition or similar concerns of an efficiency oriented antitrust policy or even audience choice, was clearly central to FCC policy.").

40. *Id.* at 870.

41. *See id.* at 869–70 (describing the FCC's changing policy in the 1980s toward eliminating restraints on concentration, and asserting that the changes were brought about by a new faith in the market, evolving theories of

II. MODIFICATIONS TO THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE

By the late 1970s and early 1980s, the FCC began to disfavor traditional structural regulation of the media, but resistance from Congress and the courts prevented massive overhaul of the regulatory framework.[42] The 1980s and 1990s saw increased concentration of media ownership, attributable to FCC rule changes and trends in antitrust policy.[43] Only in 1996, when the Telecommunications Act[44] passed, did the FCC receive a statutory mandate to consider repealing all remaining media ownership restrictions, including the newspaper/ broadcast cross-ownership ban.[45]

A. THE TELECOMMUNICATIONS ACT OF 1996

In addition to completely deregulating national ownership of radio stations and increasing the proportion of the national television audience a single owner could reach,[46] the Telecom-

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competition and substitutability, and an increasing willingness to cave in to corporate interests). Despite this trend, the FCC continues to occasionally assert that diversity of media ownership promotes "competition within the marketplace of ideas." *See id.* at 870 n.163. ("[T]oday this diversity concern is almost an afterthought, much less likely than previously to be the determinative consideration in any decision.").

42. Prior to the late 1970s, the FCC aimed to restrict concentration of ownership and maximize the number of independent voices in the media, emphasizing the public interest in a diverse marketplace of ideas. *See supra* Part I.A–B. Since the 1980s, FCC policy has shifted to favor elimination of legal restrictions on concentration, and reliance on market forces or the antitrust laws to address competitive problems. *See* Baker, *supra* note 15, at 869.

43. In the 1980s the FCC began to enact rule changes independently of Congress under the chairmanship of Mark Fowler, a Reagan appointee. *See* TILLINGHAST, *supra* note 31, at 86–87. Fowler undertook a systematic assault on the existing regulatory framework, beginning in the broadcast television arena, where the FCC expanded national limits on station ownership. *See* Baker, *supra* note 15, at 868. In a final interview after leaving the FCC in 1987, Fowler stated that if it were possible he "would have closed the doors for good" upon leaving the building. *See* TILLINGHAST, *supra* note 31, at 87. For a detailed description of Fowler's regulatory philosophy, see Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 230–57 (1982) (proposing a market alternative to trusteeship regulation of the broadcast industry).

44. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

45. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1033–34 (D.C. Cir. 2002) (describing § 202(h) of the Telecommunications Act as a "mandate" to continue review of ownership rules in favor of deregulation).

46. The 1996 Act increased the proportion of the national television audience that could be reached by a single owner from 25% to 35%. *See* Telecom-

munications Act of 1996 directed the FCC to reconsider remaining ownership limitations on a biennial basis to determine whether they remain "necessary in the public interest."[47] The FCC and the D.C. Circuit have interpreted this provision to carry a "presumption in favor of repealing or modifying the ownership rules," rather than requiring an affirmative justification, as required under traditional administrative law.[48] The D.C. Circuit's interpretation emboldened the FCC to actively pursue deregulatory policy initiatives without fear of intervention by Congress or the courts.[49] Since 1996 the FCC has con-

munications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111. The modifications to the ownership rule approved by the FCC in June 2003 further increased the audience reach limit to 45%. *See* 2003 Ownership Rules, *supra* note 6, at 46,286. In July 2003, the House of Representatives overwhelmingly approved a spending bill that would have prevented any changes in the television ownership limits, but would not have impacted other aspects of the proposed rules changes. *See* Christopher Stern & Jonathan Krim, *House Votes to Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A1. On January 22, 2004, after a "closed door bargaining session" between congressional GOP leadership and White House representatives, the Senate approved a spending package already passed by the House that provides funds to the FCC so long as they do not prohibit common ownership by a parent company of stations that reach up to 39% of American viewers. *See* Frank Ahrens, *Senate Adopts TV Station Limit*, WASH. POST, Jan. 23, 2004, at A5. The 39% figure accommodated media giants Viacom Inc., owner of CBS, and News Corp., owner of Fox. *Id.* Both companies were in violation of a 35% ownership limit and faced the prospect of divestiture of stations in the absence of the compromise. *Id.*

47. Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(h), 110 Stat. 56, 111–12.

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Id.

48. *See* 2003 Ownership Rules, *supra* note 6, at 46,307 ("The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it."); *Fox Television Stations*, 280 F.3d at 1044 (remanding the national television ownership rule to the Commission); Sinclair Broad. Group v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002) (remanding the local television ownership rule to the Commission).

49. In fact, both Congress and the courts have resisted the rule changes. In September 2003, the Third Circuit placed the rules under an emergency stay pending judicial review. Prometheus Radio Project v. FCC, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (per curiam). Two weeks later, the Republican-controlled U.S. Senate passed a "resolution of disapproval" to roll back the new rules, a rarely invoked legislative device that allows Congress to overturn a federal administrative regulation. S.J. Res. 17, 108th Cong. (2003); *see* Frank Ahrens, *Senate Votes to Block FCC Media Rules*,

ducted three biennial reviews, easing restrictions on joint ownership of television stations in 1999,[50] and initiating proceedings that resulted in the rule changes announced in June 2003.[51]

B. THE NEW CROSS MEDIA OWNERSHIP RULE

In June 2003 the FCC modified a series of media ownership rules, including the ban on cross-ownership of newspapers and broadcast television stations.[52] The new Cross Media Ownership Rule increases the circumstances in which a company can own television stations, radio stations, and daily newspapers in a single market.[53] The FCC justified the new rule on the premise that technological innovations have resulted in a modern media landscape where evolving forms of communications, such as the Internet, can effectively compete with traditional media forms, such as newspapers and broadcast television.[54] The FCC concluded that in the highly competitive modern

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WASH. POST, Sept. 17, 2003, at A1. The resolution of disapproval languished in the House, see Frank Ahrens, *Hill Faulted on Scrutiny of FCC Rules*, WASH. POST, Dec. 9, 2003, at E1. In January 2004, Congress passed a spending bill that compromised on the scope of the television ownership regulations, see *supra* note 46. For more on opposition by Congress and the public to the new media ownership rules, see Robert W. McChesney & John Nichols, *Up in Flames: The Public Revolts Against Monopoly Media*, THE NATION, Nov. 17, 2003, at 3 (describing public opposition to media ownership restrictions). *See also* Frank Ahrens, *'Soldier's Ethic' Guides Powell at the FCC; Chairman Gets Advice from Father, the General*, WASH. POST, Oct. 15, 2003, at B1 (discussing Powell's controversial chairmanship).

50. *See* Baker, *supra* note 15, at 869. It was this rule change that allowed the merger of CBS and Viacom, announced shortly thereafter. *See id.* at 869 n.160.

51. It was during the 1998 Biennial Review that the FCC first considered eliminating the newspaper/broadcast cross-ownership rule. *See id.* at 869.

52. *See* Frank Ahrens, *Panel Fires Shot Across FCC's Bow: Stevens Amendment Maintains Cap on TV Networks' Size*, WASH. POST, Sept. 5, 2003, at E5.

53. The previous cross-ownership rule prohibited common ownership of daily newspapers and broadcast outlets in the same market. *See* Washington Monitor, *FCC Adopts New Rules That Generally Permit Companies to Own More Media Businesses Than They Could Before*, ENT. L. REP., June 2003, at 4.

54. *See* 2003 Ownership Rules, *supra* note 6, at 46,314 ("The Commission's analysis turns . . . on the availability of other news and information outlets. . . . The average American has a far richer and more varied range of media voices from which to choose today than at any time in history."). *But see* ALGER, *supra* note 5, at 162 (pointing out that many Web sites offer links to information, but few involve any original reporting, which "raises questions about how meaningful a source of news coverage the 'new media' really are").

media market, the outright ban on cross-ownership was no longer an essential, or justifiable, means of promoting viewpoint diversity.[55]

The revised cross-ownership rule opens the door for newspaper companies to acquire television station in markets where they already have print dailies, as long as those markets have more than three operating television stations.[56] In markets with four to eight television stations, companies are permitted to own any of the following combinations: one daily newspaper, one television station, and half the number of radio stations allowable under the Local Radio Ownership Rule;[57] a daily newspaper, no television stations, and as many radio stations as are permitted for that market; or two television stations and as many radio stations as are permitted for the market, but no newspapers.[58] In markets with nine or more television stations, the FCC has eliminated all restrictions on cross-ownership.[59]

C. THE FCC'S PUBLIC INTEREST ANALYSIS

In its 2003 Final Report and Order, the FCC justified its reversal of the cross-ownership ban based on an analysis of studies of cross-ownership's potential effects in three areas: competition in media markets (based on the market for advertising dollars), localism in news content, and viewpoint diver-

55. 2003 Ownership Rules, *supra* note 6, at 46,314. The Commission claimed it had therefore failed to meet its evidentiary burden to refute the statutory presumption of modification or repeal in section 202(h) of the Telecommunications Act of 1996. *See id.* at 46,315; Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111. Based on a study of various markets using the diversity index, the Commission concluded that "the vast majority of local media markets are healthy, well-functioning, and diverse." 2003 Ownership Rules, *supra* note 6, at 46,321.

56. *See* Washington Monitor, *supra* note 53, at 4 (summarizing provisions of the new Cross Media Ownership rule). *But see* Jonathan A. Knee, *Should We Fear Media Cross-Ownership?*, REGULATION, Summer 2003, at 16 (arguing that concerns about broadcast media conglomerates purchasing newspapers are misplaced: "Not one of the major broadcasters has recently evinced any interest in owning significant U.S. newspaper assets.").

57. The FCC also altered the Local Radio Ownership rule to allow ownership of as many as eight radio stations in markets with forty-five or more radio stations, and five stations in markets with fourteen or fewer stations. *See* Washington Monitor, *supra* note 53, at 4. The new rule also alters the method for determining a "market" to consider geographic boundaries rather than signal reach. *See id.*

58. *Id.*

59. *Id.*

sity.[60] After balancing the potential detrimental effects of cross-ownership against the potential gains in each of these three areas, the FCC concluded that a complete ban on cross-ownership was no longer "necessary in the public interest."[61]

The Report and Order first considered potential effects on competition between newspapers and broadcast television stations. The FCC looked to competition in the advertising market, and concluded that "most advertisers do not view newspapers, television stations, and radio stations as close substitutes."[62] Thus, a merger between newspapers and broadcast television stations would not result in any meaningful reduction in competition sufficient to offset the efficiencies of integration.[63] The FCC conceded that a "small group" of advertisers may employ all three media, and could suffer competitive harm in the event of a cross-media merger, but concluded that the antitrust laws and other limits on station ownership would offer sufficient protection from monopolistic behavior by cross-media owners.[64]

The Report and Order recognized the promotion of localism as a general policy goal, and suggested that localism can be achieved by fostering market structures that create incentives for media companies to serve local communities.[65] While the FCC noted that newspapers and television stations continue to be the dominant source of local news content, the Report and

60. *See* 2003 Ownership Rules, *supra* note 6, at 46,312–14.

61. *See id.* at 46,310.

62. *Id.* at 46,312. The Report and Order states: "Historically the Commission has relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets." *Id.* at 46,289.

63. For a discussion of the efficiencies that may result from cross-ownership, such as the benefits of a common newsroom, see *id.* at 46,313.

64. *See id.* (stating that the Department of Justice and the Federal Trade Commission review mergers for detrimental effects in the advertising market). In fact, evidence shows that media conglomerates such as Gannett often already have extensive market power in local advertising markets. *See* ALGER, *supra* note 5, at 12 (describing Gannett's business practices as described in Richard McCord's book, *The Chain Gang*). Alger cited a study by journalism professor John Busterna that found that Gannett papers charged about ten percent more than independent newspapers for equivalent advertising. *Id.* at 130–31. Antitrust challenges to abusive behavior by newspaper groups, such as predatory pricing of subscriptions, have been largely unsuccessful, in part due to special immunities such as the Newspaper Preservation Act of 1970. *See* Robbie Steel, Comment, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PA. L. REV. 275, 276 (1989).

65. *See* 2003 Ownership Rules, *supra* note 6, at 46,290.

Order claimed that the "breadth and depth" of local news coverage is actually enhanced by the efficiencies that result from common ownership, such as the sharing of newsroom resources and staff.[66]

Finally, the FCC considered potential effects on viewpoint diversity. The Report and Order acknowledged that the purpose of the original cross-ownership rule was to promote viewpoint diversity, but claimed the new rule will be adequate to preserve diversity while permitting important efficiencies that enhance overall news quality.[67] The FCC suggested that such efficiencies may even lead to an increase in the number of newspapers in some markets and "foster the development of important new sources of local news and information."[68] As evidence of such efficiencies, the FCC pointed to empirical studies of grandfathered newspaper-television combinations that illustrate local television news coverage superior to other network affiliates, without displaying patterns of bias that would endanger viewpoint diversity.[69] The FCC concluded that its "his-

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66. *Id.* at 46,313 (citing studies that show that newspaper-owned network affiliates provide more local news and public affairs programs than independents, and that stations owned by newspapers in the same community provide more public affairs programming than stations owned by newspapers outside the community).

67. *Id.* ("[T]he local rules . . . herein will sufficiently protect diversity of viewpoint while permitting efficiencies that can ultimately improve the quality and quantity of news and informational programming."). For more on the purposes of the original cross-ownership rule, see *supra* Part I.B.

68. *See* 2003 Ownership Rules, *supra* note 6, at 46,314. Such an increase in new competitors in the newspaper and broadcast industry seems unlikely given the recent consolidation of the radio industry following the repeal of ownership restrictions by the Telecommunications Act of 1996. *See* Adam J. van Alstyne, Note, *Clear Control: An Antitrust Analysis of Clear Channel's Radio and Concert Empire*, 88 MINN. L. REV. 627, 639–42 (2004). The possibility that repeal of the rule might lead to an increase in the number of newspapers in some markets also conflicts with declining trends in daily newspaper circulation and the number of daily newspapers in general. *See* ALGER, *supra* note 5, at 130–34.

69. *See* 2003 Ownership Rules, *supra* note 6, at 46,314 (citing Pritchard, *supra* note 1). The results of such studies, however, have been largely inconclusive. For example, in Chicago, where the Tribune Company owns a local television station and radio station, the Pritchard study found that the editorial page of the *Chicago Tribune* was solidly pro-Bush, reflecting the viewpoint of management, but news stories had a slight pro-Gore slant. *See* Pritchard, *supra* note 1, at 42–44. Therefore, the study found that the Tribune Company's viewpoints had little influence "other than on the editorial page." *Id.* at 43–44. In Dallas, where the *Morning News* is owned by the Belo Corporation, (which also owns a local television station and three nonlocal television stations), the study also found a decidedly pro-Bush slant on the editorial

torical assumption that media ownership inevitably shapes the news to suit its own interests may no longer be true (if it ever was)."[70]

While the FCC acknowledged that ownership has some influence on viewpoint, it found the evidence of such an effect insufficient to mandate a "blanket prohibition" on cross-ownership.[71] According to the Report and Order, the record did not establish the "high degree" of confidence that media outlets of cross-media parent companies demonstrated the kind of "uniform bias" that would be necessary to justify the rule.[72] While acknowledging that particular outlets may be prone to show some bias, particularly where the interests of their parent corporation are involved, the Report and Order claimed such "anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated."[73]

The single most important justification for the FCC's repeal of the cross-ownership ban was the increased availability of other news and information outlets to make up for any losses in viewpoint diversity that increased cross-ownership may bring.[74] The Report and Order pointed to "ample evidence that competing media outlets abound in markets of all sizes—each providing a platform for civic discourse."[75] Traditional media

page, but noted that published letters to the editor were pro-Gore. *Id.* at 45–46. In Milwaukee, where Journal Communications owns the only daily newspaper, as well as a local television station, two radio stations, and twenty weekly newspapers serving the suburbs, the study found that the majority of the editorial board of the *Journal Sentinel* favored Gore, but others favored Bush, leading to a stalemate and a decision to endorse neither candidate for President. *Id.* at 46–47. The study noted that the material selected on the editorial page of the *Journal Sentinel* tended to be pro-Gore, as did the daily news coverage. *Id.* at 48. Coverage on the television and radio stations owned by Journal Communications were found to be pro-Bush, *see id.* at 48, while radio coverage "amounted to little more than unpaid propaganda for the Bush campaign," *id.* at 49.

70. *See* Pritchard, *supra* note 1, at 51.

71. *See* 2003 Ownership Rules, *supra* note 6, at 46,314.

72. *See id. But see* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 786 (1978) (noting that the lack of empirical evidence was not fatal to the cross-ownership rule, and that "even a small gain in diversity" was a sufficient justification).

73. *See* 2003 Ownership Rules, *supra* note 6, at 46,314.

74. *See id.* (stating that the FCC's determination does not hinge on theoretical market pressures on corporate owners to provide diverse viewpoints, but "on the availability of other news and information outlets" to provide such viewpoints).

75. *See id.* The FCC based its analysis of diversity on an index that ac-

forms such as television, radio, and daily newspapers have been supplemented by cable and satellite television, and the Internet, which the FCC claims has become a "commonly-used source for news."[76] According to the Report and Order, the influx of new media outlets ensures that "the influence of any single viewpoint source is sharply attenuated."[77] Therefore, the FCC concluded that a complete ban on cross-ownership was no longer in the public interest and could not be justified in the modern media climate.[78]

III. A NEW CASE FOR RETAINING THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN

The FCC concluded in its 2003 Report and Order that the newspaper/broadcast cross-ownership ban was no longer in the public interest based on several related factors: (1) the evidence connecting diversity of ownership to viewpoint diversity was unpersuasive; (2) the development of new media technologies has resulted in greater viewpoint diversity, which makes cross-ownership regulation unnecessary; and (3) cross-ownership does not harm localism in the media, and may in fact enhance local coverage.[79] This section addresses each of these factors in turn, and considers the potential effects of cross-ownership on the democratic process, in asserting that the newspaper/broadcast cross-ownership ban remains necessary in the public interest.

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corded equal weight to all outlets within a given medium, without considering individual market shares. *See* Dr. Mark Cooper, Abracadabra! Hocus-Pocus! Making Media Market Power Disappear with the FCC's Diversity Index (Consumer Fed'n of Am.), July 2003, at 5, http://www.consumersunion.org/abrafinal721.pdf. An FCC study of various markets using this diversity index led the Commission to conclude "the vast majority of local media markets are healthy, well-functioning and diverse." *See id.* at 5 n.4 (quoting 2003 Ownership Rules, *supra* note 6, at 46,321).

76. 2003 Ownership Rules, *supra* note 6, at 46,314.

77. *Id.*

78. *Id.* The FCC stated that the issue was not whether a firm could dominate the distribution of news in any one market, but "whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." *Id.* The Commission claimed the perceived growth in local media sources will ensure a "plethora of voices in most or all markets absent the rule." *Id.*

79. *See supra* Part II.B (analyzing the FCC's rationale in the 2003 Final Report and Order).

A. OWNERSHIP REMAINS A RELEVANT, AND NECESSARY, PROXY FOR VIEWPOINT

The FCC originally justified the newspaper/broadcast cross-ownership ban on the premise that ownership is an effective, if imperfect, proxy for viewpoint. Therefore, enforced diversification of ownership would result in greater viewpoint diversity.[80] The Supreme Court upheld the ban as a reasonable means of achieving viewpoint diversity, without requiring explicit proof of anticompetitive effects from cross-ownership.[81] The Court stated that while there was no necessary connection between ownership and viewpoint, it was unrealistic to expect commonly owned newspapers and television stations to reflect the same diversity of viewpoints "as if they were antagonistically run."[82] In the absence of persuasive countervailing considerations, "even a small gain in diversity" was "worth pursuing."[83]

By removing the presumption of validity normally attributed to administrative regulations, the Telecommunications Act of 1996 forced the FCC to reexamine media ownership regulations on a biennial basis to determine if they remained "necessary in the public interest."[84] In its 2003 Report and Order, the FCC interpreted this language to require evidence in the record establishing a "high degree" of confidence that cross-owned properties exhibited "uniform bias" in their reporting.[85] Such an extreme evidentiary burden is a far cry from the rational relationship relied upon by the FCC in 1975, and subsequently affirmed by the Supreme Court in *National Citizens Committee for Broadcasting*.[86]

It is difficult to imagine a case where the record would illustrate that ownership leads to a pattern of "uniform bias," because bias itself is often exerted in subtle ways, and reserved for situations where the direct interests of ownership are at

80. *See supra* note 37 and accompanying text.

81. *See supra* notes 35–36 and accompanying text.

82. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 797 (1978) (quoting 1975 Ownership Rules, *supra* note 12, at 1079–80).

83. *Id.* at 786 (quoting 1975 Ownership Rules, *supra* note 12, at 1076, 1080 n.30).

84. Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(h), 110 Stat. 56, 111–12; *see also supra* Part II.A.

85. 2003 Ownership Rules, *supra* note 6, at 46,314.

86. *See supra* Part I.B.

stake.[87] For example, would a media outlet that chooses to forego all coverage of a corporate scandal involving its parent corporation illustrate a pattern of uniform bias?[88] Or would such censorship represent an isolated anecdote? What if a newspaper decides to cover a controversial issue, but moves it from the front page to the back of the business section? Such editorial judgments can have an immense impact on how the public perceives an issue, yet they are almost impossible to measure empirically.[89] By erecting a standard for itself that is so high as to be essentially illusory, the FCC set the stage to repeal not only the cross-ownership ban, but also all remaining restrictions on media ownership.[90]

87. *See* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 15–17 (6th ed. 2000) (stating that media owners are more likely to influence how an issue is presented than to mandate or ban coverage of that issue); Cheryl Leanza & Harold Feld, *More Than "a Toaster with Pictures": Defending Media Ownership Limits*, COMM. LAW, Fall 2003, at 12, 19 ("[R]arely do corporate heads send notices directing their staff to cover only one side of a story or omit coverage of an issue. As with all social policy issues, the question of cause and effect is subtle and not always easy to measure empirically."); *Street Sweep*, *supra* note 5 (stating the comments of media critic David Berkman on the direct and indirect methods ownership uses to get its message across to journalists).

88. For examples of specific instances of media outlets exhibiting bias where the interests of their parent corporations are involved, see Baker, *supra* note 15, at 908–09 (describing CBS's decision to pull an episode of *60 Minutes* relating to the interests of its parent corporation); Leanza & Feld, *supra* note 87, at 12, 18–19 (describing examples of media owners influencing content to target desirable age groups, protect their financial interests, or curry favor with the government); Richard Pollack, *Is GE Mightier Than the Hudson?*, THE NATION, May 28, 2001, at 11, 14 (discussing NBC's coverage, or lack thereof, of pollution in the Hudson river by GE, its parent corporation).

89. Recent criticism of the *New York Times*, *Washington Post*, and other newspapers for their reluctance to criticize the Bush administration's intelligence prior to the invasion of Iraq shows how subtle editorial decisions can influence public discourse. *See* Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS, Feb. 26, 2004, at 43–49. While articles on the front pages of the major newspapers are "very important in shaping what other people think . . . [akin to] writing . . . a memo to the White House," most of the articles criticizing the Bush administration's intelligence prior to the war were buried in the back pages of the major newspapers. *See id.* at 48 (quoting *Washington Post* reporter Walter Pincus: "[The *Post*'s editors] went through a whole phase in which they didn't put things on the front page that would make a difference.").

90. Exactly what kind of evidence would be necessary to show the kind of "uniform bias" the FCC refers to? Given the difficulties in measuring viewpoint, could the record in even the most concentrated markets ever establish the "high degree" of confidence the FCC finds lacking? These questions obviously cannot be answered, but serve to emphasize the differing standards relied upon by the Commission in approving the cross-ownership regulation in 1975, and modifying it in 2003.

In fact, evidence shows that ownership influences viewpoint in many cases. A recent study by the Pew Research Center found that about twenty-five percent of journalists on the local and national level had intentionally avoided stories to benefit the interests of their news organizations, nearly the same percentage had softened the tone of stories to achieve the same result, and forty-one percent had done both.[91] More than a third of those surveyed said that news topics contrary to the ownership's financial interests often or sometimes go unreported.[92] A quarter of local reporters surveyed believed that they had been told to avoid a certain story for fabricated reasons, as a pretext to protect the financial interests of ownership.[93]

As the number of independently owned broadcast television stations and newspapers dwindles, and existing media owners continue to diversify and expand their holdings, the potential for conflicts of interest between ownership and editorial staffs increases. It is almost a truism that large corporations will tend to hold political views that favor their own self-interest, and the interests of their shareholders.[94] Even if ownership has only a minimal impact on viewpoint, and this impact only presents itself in rare cases, the implications of such a uniformity of viewpoint among media owners are troubling. Enforced diversification of ownership is the only reliable means to ensure that when conflicts do arise, other media outlets are available to expose them.[95]

The FCC has a statutory mandate to protect the public interest in viewpoint diversity, based on the acknowledged goal of preserving the "widest possible dissemination of information from diverse and antagonistic sources."[96] The FCC has historically relied upon the rational connection between ownership and viewpoint to justify media ownership regulation, as the best available means of protecting competition in the market-

91. Pew Research Center for the People & the Press, *Self-Censorship: How Often and Why* (Apr. 30, 2000), http://people-press.org/reports/display.php3?ReportID=39.

92. *Id.*

93. *Id.*

94. *See generally* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1996) (tracing the political origins of American corporate governance structures).

95. *See* Leanza & Feld, *supra* note 87, at 20–21. For more on the anti-democratic dangers of concentrated media ownership, see *infra* Part III.D.

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

place of ideas.[97] By refusing to recognize ownership as a legitimate if imperfect proxy for viewpoint, the FCC has effectively eliminated the only viable regulatory method of preserving viewpoint diversity, leaving the public interest at the mercy of the open market and the antitrust laws.[98]

B. NEW MEDIA FORMS HAVE A LIMITED IMPACT ON VIEWPOINT DIVERSITY

The FCC's 2003 Report and Order claims that the cross-ownership ban is no longer necessary, primarily because the development of new media technologies has greatly increased competition in the marketplace of ideas.[99] The question is no longer whether a firm may dominate a particular market, according to the FCC, but whether a firm "will be able to be heard at all among the cacophony of voices vying for the attention of Americans."[100]

By relying on new media sources such as the Internet to preserve competition in the marketplace of ideas absent traditional ownership regulation, the FCC fails to make the crucial distinction between source and viewpoint.[101] While the Internet offers a plethora of information from an essentially limitless number of sources, most of the news sources on the Web provide little or no original reporting.[102] A chorus of information sources singing the same note does not provide diversity in the marketplace of ideas, but only serves to clutter the debate.[103] By

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97. *See supra* note 34 and accompanying text.

98. *See* Leanza & Feld, *supra* note 87, at 12 (arguing that ownership rules are essential given the lack of effective alternatives short of explicit content mandates or access rules). For a discussion of the trend in FCC policy toward making the media more responsive to commodities markets, see generally Baker, *supra* note 15.

99. *See supra* notes 74–78 and accompanying text.

100. 2003 Ownership Rules, *supra* note 6, at 46,314.

101. *See supra* notes 74–75 (quoting FCC references that equated an increase in "informational outlets" and "voices" to an increase in viewpoints). Ironically, while the FCC refuses to equate ownership with viewpoint in the absence of hard evidence, it does not hesitate to assume that new media sources represent new viewpoints, a questionable assertion.

102. *See* ALGER, *supra* note 5, at 162 (describing the lack of original reporting on the Internet); *see also* Thane Peterson, *Moveable Feast: Stop the FCC's Covert Operation*, BUS. WK. ONLINE, May 30, 2003 ("[M]ost actual news gathering is still done by print organizations such as newspapers, news agencies like the Associated Press and Bloomberg, and news magazines like *BusinessWeek*."), *at* http://www.businessweek.com:/print/bwdaily/dnflash/may2003/nf20030530_8491_db028.htm (last visited Apr. 25, 2004).

103. *See* 149 CONG. REC. S11,507 (daily ed. Sept. 16, 2003) (statement of

analogy, imagine if the Senate was suddenly doubled or tripled in number, but each of the new members voted in accordance with a specified incumbent—would our democracy be any richer?[104]

In the television arena, the development of cable and satellite technologies has significantly increased viewing options over the last few decades, but the FCC overstates the impact of such technologies on viewpoint diversity. The consolidating trends in the newspaper, radio, and broadcast television markets have also reached cable and satellite television, where the majority of channels are owned by the same handful of massive media corporations.[105] It is important again to distinguish between programming sources and viewpoint. Given that ownership has the power to influence viewpoint, and exercises that power in at least some cases, it is unrealistic to assume increases in media sources and programming variety provided by the same handful of owners will provide meaningful new competition within the marketplace of ideas.[106]

The FCC studies of diversity in local media markets overemphasize the influence of new media technologies in concluding "that the vast majority of local media markets are healthy, well-functioning, and diverse."[107] In formulating its diversity index, the FCC fails to take into account actual market shares, thereby giving equal weight to media outlets that have vastly different impacts on local discourse.[108] An Internet Web site or cable television channel cannot compete on an equal footing with a local broadcast television station or a dominant daily newspaper, especially when that Web site or channel offers lit-

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Sen. Snowe) ("While more mouths speaking is good, having more mouthpieces guarantees neither diversity of opinion nor information. The point is the amalgamation of control in media outlets.").

104. To further the analogy, would such an increase in individual senators make it unnecessary to retain limits on the number of senators representing each state?

105. *See supra* note 13 (citing statistics reflecting ownership trends over the last twenty years).

106. *See supra* note 88 (citing examples of media outlets exhibiting bias where the interests of their parent corporations are involved); *see also* 149 CONG. REC. S11,512 (daily ed. Sept. 16, 2003) (statement of Sen. Cantwell) ("While I firmly believe that we are only at the cusp of an information age that will drastically change how we receive information, it makes no difference if the access points are controlled by fewer people.").

107. *See* 2003 Ownership Rules, *supra* note 6, at 46,321.

108. *See* Cooper, *supra* note 75, at 7–9 (analyzing flaws in the FCC's diversity index).

tle original reporting. In fact, many critics have questioned whether the Internet has any impact at all on local civic discourse,[109] yet the emergence of new media forms is the single most important justification for the FCC's decision to modify the cross-ownership rule.[110]

In 1975 the FCC stated that "even a small gain in diversity" was worth pursuing in accordance with its First Amendment goal of "'the *widest possible* dissemination of information from *diverse and antagonistic* sources.'"[111] Unless ownership and viewpoint are entirely unrelated, ownership restrictions necessarily result in at least small gains in viewpoint diversity, and should therefore be retained. While important new sources of information have developed over the last three decades, the ultimate control of such sources is in fewer and less diverse hands—those of a handful of corporate CEOs.[112] The FCC must retain restrictions on media cross-ownership to ensure that these new technologies become a vehicle for new and diverse voices, rather than a mere conduit for existing ones.

C. CROSS-OWNERSHIP AND LOCALISM

The FCC, in its 2003 Report and Order, claims that cross-ownership increases the amount of local news content provided by media outlets, citing studies comparing network affiliates owned by newspapers within the same community to affiliates owned by newspapers outside the community.[113] Because the affiliates owned by newspapers in the same community tended to provide more public affairs programming, the FCC concluded that cross-ownership results in efficiencies that increase the "breadth and depth" of local news coverage; therefore, the cross-ownership ban was unnecessary to protect localism.[114]

While broadcast affiliates and newspapers in the same community may benefit substantially from pooling their re-

109. *See* ALGER, *supra* note 5, at 222 (discussing the limited effectiveness of the Internet as a substitute for the mainstream mass media in fostering civic discourse within communities); Leanza & Feld, *supra* note 87, at 18 (pointing out that "even supporters of deregulation agree" that cable networks and the Internet are ineffective in providing local news).

110. *See supra* note 74 and accompanying text.

111. 1975 Ownership Rules, *supra* note 12, at 1048, 1080 n.30 (emphasis added) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

112. *See supra* note 13.

113. *See supra* note 66 and accompanying text.

114. 2003 Ownership Rules, *supra* note 6, at 46,313.

sources, the benefits are unlikely to accrue in both directions. For example, if a cross-owned newspaper and television station decide to adopt a common newsroom and streamline their reporting staff, the television station may benefit from more in-depth reporting, while the newspaper suffers from increased demands on its reporting staff. The other drawback of cross-media mergers is the loss of an independent news provider in the local market, which has a negative impact on viewpoint diversity.[115]

Ironically, by extolling the benefits of newspaper and television station synergy, the FCC acknowledges that homogeneity of content and viewpoint are likely to result, reinforcing the argument that common ownership results in an overall decrease in viewpoint diversity.[116] Localism is an important virtue when it serves to better inform citizens about events and issues in their communities, but to be truly informed, citizens must be exposed to diverse viewpoints about local issues from a variety of independent sources.[117] Localism without viewpoint diversity is an empty value, and is not a persuasive justification for modifying restrictions on cross-ownership.

D. ANTIDEMOCRATIC DANGERS OF MEDIA CROSS-OWNERSHIP

The FCC's 2003 modifications to the media ownership rules did not come out of the blue. For years, the companies that own the media have vigorously lobbied the FCC to repeal regulations such as the cross-ownership ban to allow them to acquire additional media outlets and become even larger.[118]

115. *See* Peterson, *supra* note 102 ("The 'efficiencies' that come with mergers will likely mean fewer reporters, less local news, and a diminishing of the debate democracy needs to function.").

116. *See supra* note 37 and accompanying text.

117. See 149 CONG. REC. S11,512 (daily ed. Sept. 16, 2003) (statement of Sen. Cantwell) (Arguing that removing the cross-ownership ban "reduces the number of voices in individual markets and threatens to place too much control over local news and information in the hands of too few companies. Repacking and repeating stories produced in other venues is not the same as real reporting of local news.").

118. *See* THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES 134–36 (1996) (describing the historical role of lawyers and lobbyists in formulating FCC policies); Bob Williams, *Behind Closed Doors: Top Broadcasters Met 71 Times with FCC Officials*, THE PUBLIC I, May 29, 2003 (describing private, closed-door sessions between broadcasters and the FCC's five commissioners and their top advisors prior to the June 2003 vote on the relaxation of media ownership rules), *at* http://www.publicintegrity.org/dtaweb/report.asp?ReportID=526 (last

Over the last two decades, the number of entities controlling the majority of American media outlets has declined from more than fifty to only six.[119] In the world of antitrust law, such an oligopoly is considered dangerous because it may facilitate collusion between its members, and thereby threaten competition.[120] While collusion may lead to price-fixing in the market for peanuts or potatoes, its implications for the mass media market, and the marketplace of ideas, are far more profound.[121]

Policy issues that news organizations choose to ignore tend to escape public discussion, and are often decided by politicians, and the powerful special interests that influence them.[122] The massive corporations that own the media are among these special interests, and together possess the power to dictate, or limit, public discourse.[123] It is perhaps these instances of self-censorship that pose the biggest threat to an informed democracy by removing important issues from the public eye.[124] For example, a corporation involved in a lawsuit would often prefer no coverage at all to even favorable coverage by the news media.[125] The ability to silence the media is as powerful as the ability to influence its content, and must be taken into account in measuring viewpoint diversity.

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visited Apr. 25, 2004). The media's lobbying efforts have not only been directed at the FCC, but have also extended to political candidates. *See* Leanza & Feld, *supra* note 87, at 20 (describing an ultimatum by several Iowa television stations encouraging candidate Bob Dole to change his stance on a critical media issue on the eve of the Iowa caucus).

119. *See supra* note 13.

120. *See infra* note 140 and accompanying text.

121. *See supra* note 26 and accompanying text (quoting Associated Press v. United States, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring)).

122. *See* ALGER, *supra* note 5, at 21. Dean Alger notes that

> if a policy issue is not broadly covered by the main newspapers and news shows and widely discussed in the public arena, it is likely that the scope of societal conflict about the issue will be rather narrow and only governmental insiders and . . . special interests will be effectively involved in the debate over what policy option to choose—or not to choose.

Id.

123. *See supra* note 118 (describing the historical lobbying power of news organizations).

124. *See* Leanza & Feld, *supra* note 87, at 20 (noting owners' prerogative to promote or remain silent on political issues). For a notable example of media silence, one need only look at the major media's failure to cover the FCC's hearings leading up to the 2003 media ownership rules changes. *See* Dante Chinni, Editorial, *Media Drop the Ball on FCC Rules Changes*, CHRISTIAN SCI. MONITOR, June 10, 2003, at 11.

125. *See supra* note 88 and accompanying text.

For example, an editorial staff that favors one candidate but chooses to forego an endorsement to avoid displeasing management is reflecting the biases of the newspaper's owners.[126] A choice not to endorse a candidate is equivalent to a decision not to publish a story—both remove a viewpoint that would otherwise have become part of the civic discourse. An endorsement of the presidential candidate is perhaps the most direct and important statement of viewpoint a newspaper can make. Yet the failure to make such an endorsement might not be considered relevant to a study analyzing the effect of ownership concentration on viewpoint diversity.[127]

The First Amendment accords constitutional protection to the press as an important check on government power. But the press is only an effective check to the extent that it remains independent and diverse.[128] As soon as the press ceases to reflect the diversity of viewpoints of the populace, the populace loses its ability to make informed decisions in exercising its democratic rights. By relaxing the ban on cross-ownership, the FCC will allow existing media conglomerates to acquire even more media outlets, and increase the danger that such corporations will use their media holdings to further their own political objectives, without being held accountable by their peers.

IV. ANTITRUST LAW AND NEWSPAPER/BROADCAST MERGERS

If restrictions on cross-ownership are abandoned, natural market forces and the antitrust laws will be the only remaining restraints on newspaper/broadcast mergers. Because newspapers and television stations exist in different submarkets, and can achieve significant efficiencies through merger, antitrust law provides little or no resistance to newspaper/broadcast mergers. Current antitrust law, which focuses almost exclusively on the economic effects of a merger or restraint, does not adequately take into account noneconomic policy concerns such as viewpoint diversity, and is therefore a poor surrogate for cross-ownership regulation by the FCC.

126. *See supra* notes 1–5 and accompanying text.
127. *See supra* notes 1–5 and accompanying text.
128. *See supra* note 21 and accompanying text.

A. SIMPLE ECONOMICS: ANTITRUST LAW SINCE THE 1970S

The shift in the late 1970s and early 1980s toward a market-based regulatory policy at the FCC was mirrored in the antitrust arena, where the courts began to rely almost entirely on economic factors in analyzing competitive effects.[129] The Chicago School of antitrust, led by Robert Bork, began to push for a more coherent antitrust policy based on maximizing consumer welfare through economic efficiency.[130] According to the Chicago School, traditional noneconomic concerns, such as protecting small businesses, had muddled the antitrust analysis and were no longer necessary.[131] As long as competition existed, wide dispersal of ownership was unimportant.[132] The essential question, and really the only question, was whether the merger or restraint had a positive or negative impact on economic efficiency.[133]

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129. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (refusing to weigh the interests of small businesses in applying the rule of reason under the Clayton Act); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (applying the rule of reason and upholding the use of a joint sales agent to negotiate blanket licensing of copyrighted music, based on the benefits of integration and reduced transaction costs that outweigh competitive harms); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (holding that a ban on competitive bidding among engineers could not be justified by public interest justifications such as quality or safety, and confining application of the rule of reason to an assessment of economic effects to determine net competitive consequences); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (applying the rule of reason to measure the economic effects of intrabrand vertical restraints). *But see* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) (finding that a maximum price-fixing scheme among doctors was per se unlawful despite asserted procompetitive benefits); United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) (considering noneconomic factors such as the importance of higher education in applying the rule of reason to an alleged price-fixing scheme between Ivy League universities).

130. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR ITSELF 6–11 (1978).

131. *See id.* at 7.

132. *See id.* at 7–8 ("Business efficiency necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or service offered; this is true whether the business unit is a competitor or a monopolist.").

133. Economic efficiency under the Chicago School model consists of two related but separate factors: productive efficiency and allocative efficiency. *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 226 (1985). Productive efficiency involves the company's ability to produce a product at the lowest possible cost, for example, by taking advantage of economies of scale. *See id.* Allocative efficiency relates to the distribution of resources between the company and the consumer. BORK, *supra* note 130, at

In 1977 the Supreme Court announced its decision in *Continental T.V. v. GTE Sylvania*, adopting a purely economic analysis to uphold territorial restraints imposed by a television manufacturer on its retail franchisees.[134] A year later, in *National Society of Professional Engineers v. United States*,[135] the Court struck down a ban on competitive bidding between engineers, confining its analysis to whether the challenged restriction promoted or restrained competition.[136] The implication was clear—there was no longer room for social or political concerns in the rule of reason, which had become a test of economic efficiency based on market factors alone.[137]

While developments in Supreme Court case law have made it harder to challenge conduct by existing firms, revisions to the Department of Justice's *Merger Guidelines* have made it easier for firms to merge or acquire one another, even in concentrated markets.[138] Under the current *Merger Guidelines*, the first step

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91–104. For example, a company that expands capacity to improve productive efficiency may simultaneously harm allocative efficiency if it charges monopoly prices. *Id.* at 98–101. The goal of the Chicago School model is to maximize the overall net efficiency gains, without regard for how such gains are distributed. Hovenkamp, *supra*, at 226; *see also* Baker, *supra* note 15, at 870 (discussing the maintenance of competition as the "only important policy concern" of current antitrust policy, and the lack of emphasis on dispersal of ownership in the absence of a monopoly situation). For a more thorough discussion of the evolution of antitrust theory from the Sherman Act to the Chicago School, see E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS (5th ed. 2003).

134. 433 U.S. 36, 58–59 (1977). For a discussion of the *Sylvania* case in the context of the rise of the Chicago School, see Hovenkamp, *supra* note 133, at 259–60.

135. 435 U.S. 679 (1978).

136. *See id.* at 688 (stating that the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions").

137. *See* E. THOMAS SULLIVAN & JEFFREY HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 4.08 (4th ed. 2003) (discussing the impact of *Professional Engineers* on the rule of reason analysis). Since the late 1970s, traditional noneconomic policy concerns—such as distribution of wealth, protection of small businesses, and the antidemocratic dangers of market concentration—have been largely absent from the Supreme Court's antitrust analysis. *See* Baker, *supra* note 15, at 870 n.163 (noting that such principles are still referred to, but usually only as an afterthought). Subsequent cases have solidified the economic approach to the rule of reason analysis, balancing restraints on competition against offsetting economic efficiencies. *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85 (1984); Reiter v. Sonotone Corp., 442 U.S. 330 (1979), Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

138. Section 7 of the Clayton Act bars mergers and acquisitions if the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. §18 (2000). The Department of Justice has jurisdiction to

in analyzing a merger or acquisition is to define the relevant market or submarket.[139] The relevant market determines whether the merging firms are horizontal competitors. Horizontal mergers are acceptable as long as the resulting firm will not have the capacity to exercise market power, either on its own or as part of an oligopoly.[140] If the firms inhabit different markets, the merger is considered a vertical or conglomerate merger, and is assessed under a more lenient standard.[141]

Even if anticompetitive conditions are present, a merger may be approved if the net impact is procompetitive.[142] While the original *Merger Guidelines* did not recognize business efficiencies as a valid defense,[143] the 1992 *Guidelines* emphasize that the "primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers."[144]

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decide which mergers to challenge on a case-by-case basis by applying principles defined in its *Merger Guidelines*. *See* Reid B. Horwitz, *Media Ownership Rules*, NAT'L L.J., Nov. 4, 2002, at B10. The FCC also has authority under the Communications Act of 1934 to disapprove mergers that it deems contrary to the public interest, but has seldom used its authority to alter transactions once they have been approved by the Department of Justice. *Id.* While the *Merger Guidelines* were not enacted by statute or formal rule making procedures, they continue to influence the courts in their application of the antitrust laws. *See* SULLIVAN & HARRISON, *supra* note 137, § 7.09.

139. *See* Horwitz, *supra* note 138, at B10.

140. *Id.* Market power is defined as the ability to raise price or reduce output below competitive levels. *Id.* For a more thorough discussion of market power as defined by the *Merger Guidelines*, see SULLIVAN & HARRISON, *supra* note 137, § 7.09.

141. *See* SULLIVAN & HARRISON, *supra* note 137, § 7.03(A). A vertical merger occurs when one firm merges with either its customer or supplier. *Id.* Such mergers theoretically leave competition in each market unchanged, but may have the effect of creating barriers to entry or facilitating collusion between firms. *Id.* Conglomerate mergers occur between firms that have no prior relationship and exist in different markets. *Id.* § 7.03(B). Such mergers are only challenged if they occur in concentrated markets, where they may result in entrenchment of a powerful firm that further discourages entry, or facilitate reciprocity between the merging entities that forecloses other buyers and sellers from a substantial share of the market. *Id.*

142. *See id.* § 7.03. Courts determine the net impact by weighing the benefits or efficiencies that might result from the merger against any potential for anticompetitive harm. *See* Horwitz, *supra* note 138, at B10.

143. *See* SULLIVAN & HARRISON, *supra* note 137, § 7.09(C)(1)(b) (describing the increasing relevance of efficiencies as a defense in merger cases, as reflected by specific changes in the 1982, 1984, and 1992 versions of the *Merger Guidelines*).

144. *Id.* (quoting § 4.4 of the 1992 *Merger Guidelines*). In 1997, the Department of Justice and the FTC revised section 4 again, specifying that only "merger specific efficiencies"—those that could not be achieved without

Thus, mergers that may have been disqualified in the past due to the high market shares or other factors may be permissible today, as long as economic efficiencies are likely to result.[145]

B. NEWSPAPER/BROADCAST MERGERS

Given the trend toward concentration and vertical integration in the media industry, it is likely that relaxation of the cross-ownership ban will encourage further mergers between newspapers and broadcast television stations in the same communities, and the expansion of existing newspaper groups into new media venues.[146] Because newspapers and television stations exist in different advertising submarkets for antitrust purposes, and can achieve significant efficiencies in news gathering and distribution through merger, courts are unlikely to prevent newspaper and television station mergers under current law.[147]

1. Newspapers as Natural Monopolies

As early as 1953, the Supreme Court conceded that competition among daily newspapers in most markets was no longer a realistic possibility.[148] By 1980, almost ninety-eight percent of American communities were served by a single daily newspaper.[149] The unique structural characteristics of the newspaper industry explain the tendency for dailies to monopolize. These characteristics include economies of scale,[150] the unavailability

merger—should be considered by the government in its preliminary review. *Id.*

145. Under the original 1968 *Guidelines*, market share of the merging firms was a critical element in determining whether to challenge a merger under Section 7 of the Clayton Act. *Id.* § 7.09. Unless no barriers to entry were present, the Department would challenge mergers in which the acquiring firm had a ten percent market share, and the acquired firm's market share exceeded six percent. *Id.* § 7.09(C)(2)(b). The 1968 *Guidelines* reflected the traditional concerns with industrial concentration and barriers to entry that characterized the Warren Court. *Id.* § 7.09. Today, the focus has shifted from market concentration to efficiency-enhancing potential. *See supra* notes 143–44 and accompanying text.

146. *See supra* note 13 and accompanying text.

147. *See* S. CHESTERFIELD OPPENHEIM & CARRINGTON SHIELDS, NEWSPAPERS AND THE ANTITRUST LAWS 11 (1981).

148. *See id.* at 2 (quoting Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 603 (1953)).

149. *Id.* at 3.

150. *See* Baker, *supra* note 15, at 878–82 (discussing the potential for monopoly profits by daily newspapers and its relation to structural characteris-

of exact substitutes for daily newspapers,[151] and the mutual dependency between circulation levels and advertising rates that creates a "downward spiral" for failing competitors.[152]

Like a telephone company or an electrical utility, newspapers face high initial costs followed by decreasing average costs over the supply curve.[153] Once an editorial staff has been hired, the first issue has been written, and the press is set in motion, the marginal cost of printing an additional copy is minimal.[154] Economies of scale do not always lead to monopoly, but may create barriers to entry once a monopolist has asserted control.[155] This is especially true in the newspaper industry, where market share (circulation) is directly related to advertising revenue, and a decline in one tends to affect the other, creating a downward spiral.[156]

Because daily newspapers tend toward natural monopoly, maximizing efficiencies as market share increases, the antitrust laws do not prevent mergers within newspaper submarkets.[157] Entry of daily newspapers into markets dominated by a monopolist is therefore rare, and usually results in merger or failure.[158] Group acquisitions of existing monopolists are more common, and are assessed for antitrust purposes in relation to the relevant submarket, without reference to national ownership share.[159] Therefore, newspaper groups such as

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tics of the industry, such as "high first copy costs").

151. *See* Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969) (ruling that daily newspapers represented their own submarket distinct from that of broadcast media, because of a range of unique uses for which the two were imperfect substitutes).

152. OPPENHEIM & SHIELDS, *supra* note 147, at 193 (discussing the "downward spiral" as a partial justification for the Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801–1804 (2000)).

153. *See* Baker, *supra* note 15, at 878. For a more complete discussion of the attributes of a natural monopoly, including economies of scale, see SULLIVAN & HARRISON, *supra* note 137, § 2.04.

154. *See* Baker, *supra* note 15, at 878 (stating that additional copies have "a low to zero cost").

155. *See* SULLIVAN & HARRISON, *supra* note 137, § 2.04.

156. The "downward spiral" results from the snowball effect of "declining circulation and diminishing advertising revenue" that emphasizes competitive disadvantages in contested newspaper markets. Steel, *supra* note 64, at 278.

157. In situations where natural monopolies are present, the courts have traditionally conceded the market to a single firm or entity, while policing that firm's conduct to prevent abuses of market power. *See* SULLIVAN & HARRISON, *supra* note 137, § 2.04.

158. *See* OPPENHEIM & SHIELDS, *supra* note 147, at 193.

159. *See id.* at 232 (noting "there is no national, or even regional, market in

Gannett are free to purchase daily newspaper monopolies in various submarkets without offending the *Merger Guidelines* or the Clayton Act.[160]

2. Newspaper and Television Station Submarkets

The unique package of services a daily newspaper represents, both for its audience and its advertisers, has traditionally led the Supreme Court to consider daily newspapers as their own submarket for the purposes of an antitrust analysis.[161] The nonsubstitutability between daily newspapers and other media forms makes demand for advertising relatively inelastic, allowing dominant newspapers to raise rates to supercompetitive levels.[162] Audience demand is also inelastic, allowing the monopolist to raise prices, or, perhaps more importantly, indulge content or viewpoint choices that the market would not otherwise support.[163]

Newspapers and television stations, despite some overlap among advertisers, also exist in different submarkets for antitrust purposes.[164] Since the two media forms are not considered competitors for advertising purposes, newspaper-television mergers will fall outside the *Merger Guidelines* for horizontal mergers.[165] Even if a plaintiff can show that a merger will produce secondary anticompetitive effects, such as increased barriers to entry or foreclosure of competition, the potential efficiencies from cross-ownership are likely to prevail in most

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which the multiple acquitisions of a newspaper group may be challenged").

160. *See* Steel, *supra* note 64, at 290–91 (discussing the role of the Newspaper Preservation Act of 1970 in increasing the dominance of newspaper chains, and the corresponding adverse effects on editorial diversity).

161. *See* Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969); Times Mirror Co. v. United States, 390 U.S. 712 (1968) (per curiam). For discussion of daily newspapers as a relevant submarket for antitrust purposes, see OPPENHEIM & SHIELDS, *supra* note 147, at 6–12.

162. *See* ALGER, *supra* note 5, at 130–31 (citing a study showing that Gannett had power to raise prices in the advertising market above those charged by independent publishers).

163. It is precisely this potential for a media monopolist to use supercompetitive profits to subsidize their own ideologies that justifies correlating ownership with viewpoint. *See* Baker, *supra* note 15, at 881–83.

164. *See Citizen Publ'g Co.*, 394 U.S. at 131; *see also* Dan Levine, *Bad to Worse: FCC Approves Even More Media Consolidation*, IN THESE TIMES, July 7, 2003, at 5 ("[I]f the defined market is newspapers, other properties like TV stations would be irrelevant in proving illegal market fixing.").

165. *See supra* Part IV.A.

antitrust challenges to cross-media mergers.[166] Therefore, repeal of the cross-ownership ban will allow many of the larger newspaper groups to purchase television stations in cities where they already enjoy newspaper monopolies, furthering the trend toward concentration of media ownership.

C. VIEWPOINT DIVERSITY AND THE ANTITRUST LAWS

Since newspaper and television station mergers are unlikely to create directly cognizable economic harms, antitrust law will only limit such mergers to the extent that noneconomic factors, such as viewpoint diversity, are taken into account by the Department of Justice and the courts.[167] Given current trends in antitrust law, it is unlikely that impacts on viewpoint diversity, no matter how drastic, will be sufficient to prevent newspaper and television station mergers in the absence of a cross-ownership ban.[168]

The proponents of the Chicago School of antitrust were concerned that the courts were applying the antitrust laws inconsistently and arbitrarily, using public policy concerns to justify favoring their personal political objectives.[169] The Supreme Court addressed this concern in *Sylvania* and *Broadcast Music, Inc. v. Columbia Broadcasting, Inc.*,[170] by excluding traditional noneconomic concerns from the rule of reason analysis, focusing exclusively on economic factors.[171] Current case law suggests that the antitrust laws should be restricted in their application to situations where economic harm, or the likelihood of such harm, can be affirmatively demonstrated.[172] Antitrust law therefore only prevents reductions in viewpoint diversity when such reductions coincide with the market power necessary for

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166. *See supra* Part IV.A.

167. *See supra* Part IV.A.

168. *See supra* Part IV.A (describing trends in antitrust law since the 1970s).

169. *See supra* Part IV.A.1.

170. 441 U.S. 1 (1979).

171. *See supra* Part IV.A.

172. *See supra* Part IV.A. *But see* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) (considering noneconomic factors in applying the rule of reason to an alleged price-fixing scheme). While some theorists have suggested that antitrust law should incorporate concerns about the marketplace of ideas in analyzing the effect of media mergers, the predominant approach is limited to considering economic factors to determine net competitive effect. *See, e.g.*, Stucke & Grunes, *supra* note 20, *passim* (proposing marketplace of ideas approach).

monopolistic pricing, or are likely to result in anticompetitive or oligopolistic conduct within a relevant market.[173]

Antitrust scrutiny of media mergers or media firms' conduct focuses on potential impacts in advertising markets.[174] The correlation between competition in advertising markets and diversity of media content is at best a loose one. For example, newspapers, television stations, and radio stations in the same geographic market can theoretically provide identical content without offending the antitrust laws, as long as they remain competitors in the local advertising market.[175] Therefore, dangers to viewpoint diversity are essentially immune from antitrust challenge unless they happen to coincide with anticompetitive harm in the advertising market, or the potential for such harm.

By suggesting that antitrust enforcement can provide a meaningful alternative to structural regulation of media ownership, the FCC implies that the goals and potential impacts of each form of government intervention coincide. In fact, the goals behind media ownership regulation are fundamentally different from the purposes of the antitrust laws as currently interpreted by the courts.[176] While viewpoint diversity was the primary impetus for the original cross-ownership rule, it is at best a minor consideration under the antitrust laws, which focus primarily on protecting economic competition.[177] Therefore, it is unrealistic for the FCC to expect the antitrust laws to preserve viewpoint diversity in the absence of media ownership regulations such as the newspaper/broadcast cross-ownership ban. Until antitrust law evolves to take into account competition in the marketplace of ideas, structural regulation of media ownership will remain necessary to protect viewpoint diversity and democratic discourse.

CONCLUSION

The FCC is charged with protecting the public interest in "the widest possible dissemination of information from diverse and antagonistic sources," a principle derived from the First

173. *See supra* Part IV.A.
174. *See supra* note 161 and accompanying text.
175. *See supra* note 161 and accompanying text.
176. *See supra* Part I.B.
177. *See supra* Part III.A.

Amendment concept of the marketplace of ideas.[178] Since the 1970s the FCC has considered this goal sufficient to justify regulation of media ownership, without requiring explicit evidence of competitive harms. Only in 1996, with the passage of the Telecommunications Act, did the FCC begin to reconsider ownership regulations under a heightened evidentiary standard, to determine if they remained necessary in the public interest.

In June 2003, the FCC concluded that the newspaper/broadcast cross-ownership ban could no longer be justified in the modern media climate. While circumstances have changed since adoption of the cross-ownership ban in 1975, the FCC vastly overstates these changes. New media forms provide meaningful sources of information, but do not necessarily increase diversity of viewpoints, and have not been proven effective in fostering local discourse. Repeal of the cross-ownership ban will likely result in further concentration of newspaper and broadcast ownership, and increase the potential for antidemocratic abuses by mass media corporations.

Antitrust law, as currently interpreted, focuses almost exclusively on economic factors. In the context of the media, the Department of Justice looks to the advertising market to assess competitive effects. Since television stations and newspapers exist in separate advertising markets, repeal of the cross-ownership ban will allow newspaper groups to purchase television stations in markets where they already enjoy natural newspaper monopolies without offending the antitrust laws. Antitrust law is therefore a poor substitute for proactive regulation by the FCC. The newspaper/broadcast cross-ownership ban remains necessary in the public interest, to ensure that the marketplace of ideas is accessible to more than a powerful few.

178. 1975 Ownership Rules, *supra* note 12, at 1048 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).