POINT

More Than "a Toaster with Pictures": Defending Media Ownership Limits

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The recent Federal Communications Commission (FCC) vote rolling back virtually all of the existing media ownership limits attracted widespread attention from the American public.[1] At last count, over two million communications were directed to the FCC, 99 percent of them opposed to any diminution of protection.

Nor has the furor abated with the conclusion of the FCC's rulemaking. A survey by the Pew Research Center for People and the Press in July 2003 showed that many people had not known of the FCC's proceeding until news of its release and that as they learned of the FCC's decision, opposition to it increased.[2] Democratic presidential candidates have spoken out against the FCC's decision with sitting senators vowing to take action.[3] Advocacy groups attacking the FCC's decision have reported a sharp surge in public support for their positions.[4]

At the time of this writing, the Senate Commerce Committee has reported out two bills rolling back the bulk of the FCC's rules changes.[5] Thirty-five senators signed a "resolution of disapproval," a rare procedure under the Contract with America Act that permits Congress to veto an agency action, and forced a vote over the objections of the Senate leadership.[6] The resolution of disapproval passed by a 55–40 vote over the objections of Senate Majority Leader Bill Frist and Commerce Committee Chair John McCain.[7]

In the House, when Commerce Committee Chair Billy Tauzin refused to consider legislation to reverse the FCC, the Appropriations Committee approved an appropriations rider to restore the television national ownership cap to 35 percent. More remarkably, the bipartisan 40–25 vote in favor of the amendment came in the face of stiff opposition from Billy Tauzin, Majority Whip Tom DeLay, and a veto threat from the White House. For many in Congress, this has become a matter of principle over party discipline. Virginia Republican Tom Wolfe angrily declared that "I did not get elected here to be a potted plant and I don't care how the White House feels about the Amendment."[8] The measure passed as part of a broader spending bill by a vote of 400 to 21;[9] an effort by the Republican leadership to recruit pledges not to override a veto failed to garner support from the rank and file.[10]

What has inspired such a response from the public? Issues of media consolidation go to the heart of our democracy. The U.S. Supreme Court has stated that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[11] The Court has applied this principle of diversity of views as a necessary stimulus of democracy and vigorous public debate to entertainment as well as news production.[12] Many fear a world in which a few media gatekeepers control access to the mass media. At best, these multimedia conglomerates will homogenize news and entertainment into a single "infotainment" package leveraged across multimedia platforms and targeted primarily at advertiser-coveted demographics. At worst, the few media gatekeepers may suppress news or perspectives that run counter to their economic or ideological interests, or to curry favor with the government. The perception by the viewing and listening public that this already had begun to happen under the prior rules accounts for the public's visceral reaction against further relaxation of the rules.[13]

The Media Market Is Not Competitive

Contrary to the assertions of those favoring deregulation, the media marketplace is not open and competitive. The government prohibition on broadcasting without a license, together with the economic structure of the cable industry, has created a highly concentrated market with effectively impenetrable barriers to entry. Moreover, even if the media marketplace were competitive, legal principles as old as this country hold that the precious lifeblood of news and information deserve treatment as something more than a mere commodity. Democracy depends upon a competitive marketplace of ideas; it is a compelling governmental purpose "of the highest order" to take prophylactic steps to ensure that that market does not fail.[14] Because the connections that allow large corporate interests to influence content are complex and subtle, structural rules that protect diversity by fragmenting ownership are essential. Indeed, if media ownership restrictions were removed, the only way to ensure diversity would be to impose explicit content mandates and access rules.[15] Ownership restrictions offer a far more effective means of achieving the needed diversity to ensure a robust democracy with less damage to the First Amendment.

Media Concentration Will Exacerbate Existing Market Failures

Contrary to the arguments of those favoring deregulation, the current "market" in news and entertainment is not marked by competitive entry or abundance.[16] Further, the majority of media owners are vertically integrated, multinational conglomerates with diverse economic interests. Accordingly, even excluding incompetent actors or irrational ones who might make programming choices based on ideology rather than efficiency, the economic incentives of media content suppliers do not necessarily align with the interests of viewers and citizens. Even where broadcasters or other providers of programming rely solely on their interests in the broadcast markets, the results can still be detrimental to the broader concerns of democracy and civic discourse. Two recent cases—

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ABC/Disney's attempt to replace the popular news show *Nightline* with *Late Show with David Letterman* because of the desirability of the latter's perceived viewer demographic, and CBS/Viacom's attempt to interview former Iraqi prisoner of war Jessica Lynch—demonstrate the fallacy of relying on economic incentives to ensure a mass media market that produces accurate, unbiased, and detailed news programming, even when such news programming is both popular and profitable.

As an initial matter, broadcasting remains a government-controlled monopoly, and only those with a government license can broadcast.[17] No matter how much money someone wants to invest to develop better or more popular television or radio programming, it will not reach potential audiences unless someone with a federal license agrees to carry it. When these local broadcast licenses become concentrated in a few hands, those few hands decide what goes on the air.

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Consider an analogy to the restaurant business. If a group of entrepreneurs thinks that consumers would like more variety in their diet, such as Ethiopian food, they can open a restaurant and try their luck. Either they have accurately assessed the needs of customers and will succeed or they have not and will go bankrupt. But if someone owns the only restaurant in town and local ordinances prevent anyone else from opening one, consumers have no choice.

Nor does the 200-channel cable or direct broadcast satellite system change this equation. Cable television operators are monopolies in virtually every market, and they are vertically integrated. Thus, cable viewers who want a different type of programming have no competitive options if they do not like the selections available on their cable systems. They cannot pick and choose to pay for only one or two channels; they must pay for a whole package in order to receive most channels.[18]

Finally, the Internet does not change this calculus. Because of the economics of news production, only a handful of websites control the bulk of news generation and distribution over the Internet.[19] Although anyone remains free to set up a website and post information, or even send it unsolicited to the rest of the world, this does not equate with an ability to effectively compete with existing media companies. As discussed in more detail below, the question is not whether news is somehow discoverable, but whether it enters into the public's awareness. Finally, fights over access to content and technological limitations have prevented streaming media from emerging as serious competitors to either radio or television.

In addition, as even supporters of deregulation agree, neither cable networks nor the Internet provide local news.[20] Although consumers display a considerable interest in local news, and local news remains critical to maintaining an informed local electorate, increased concentration harms, rather than enhances, the production of local news. An independent study from the Pew Foundation Project on Excellence in Journalism (PEJ) found that stations owned by small companies (three stations or less) were more than twice as likely than the largest owners to receive the PEJ's highest news quality score.[21]

The structure of the industry bears this out. Local stations generate local news from local revenues. Because typical margins on a well-run television station in a top market are 60 percent (and even weak performers earn between 50 and 55 percent), owners of large groups of stations view them as cash cows and absorb the local revenue for other corporate purposes, such as servicing debt.[22] As a result, deregulation and increased concentration result in failures in local news markets.

Even on a national level, economic incentives lead to market failure in news production. Several studies by the PEJ support the conclusion that major networks prefer to produce soft news about the entertainment industry or "infotainment" stories dwelling on the misdeeds of celebrities than report hard news on significant public policy issues.[23]

The two examples mentioned above demonstrate how reliance on market forces can create failures in the availability of news to the public. First, in 2002, ABC attempted to replace Ted Koppel's news program *Nightline* with *Late Show with David Letterman.* Although more people watch Koppel than Letterman, Letterman draws a younger demographic more desirable to advertisers, which will pay a premium for shows that are less popular overall but that concentrate on a desirable demographic.[24] By the same token, a cable company has a greater incentive to air its own programming than to give access to another company's product.

Second, a more disturbing example, and a demonstration of how economic incentives of vertically integrated media conglomerates can warp news coverage, is the recent attempt by CBS, a subsidiary of Viacom, to secure an interview with U.S. Army Private First Class Jessica Lynch. PFC Lynch attracted public attention during the Iraq war when a squad of Marines apparently rescued her after her capture by the Iraqis. To land the first interview, CBS offered to leverage PFC Lynch across Viacom's media properties. In addition to a news interview promoting Lynch, Viacom offered to provide a two-hour CBS news documentary, a reunion with her rescuers, and a publicity campaign. The latter would feature segments on several CBS news programs, including *CBS Evening News*, an MTV appearance, a Country Music Television concert in her hometown, a two-hour, made-for-TV movie produced by CBS Entertainment, and book publication with the imprimatur of Viacom's Simon & Schuster.[25] Although this proposed deal made economic sense for Viacom, it represents a serious breakdown in the ability of the public to receive news with confidence that the news meets high standards of journalistic integrity (rather than simply being a cross-promotional advertisement).

The same incentives problem exists in production of entertainment. Because media conglomerates have multiple platforms, the industry has increasingly come to rely on repurposing, i.e., reusing entertainment developed on one property for another.[26] Although this practice saves costs, it severely undercuts the argument that greater concentration leads to an increase in original programming, or that more outlets without ownership limitations guarantee more programming variety. In one case study of the

Los Angeles market, where television stations increasingly have come under common ownership, the quantity of children's programming in the market decreased (as stations stopped competing with each other and segmented the market), and the quantity of original children's programming declined precipitously (as commonly owned stations repurposed children's programming from their sister stations and affiliated cable networks).[27] Indeed, a company may prefer to air a poorer quality show that the company produces itself than to air a higher-quality, independent show. The same company may continue to air its own show despite low ratings, solely because it can reuse the programming. Programming in such situations does not have to be the best to succeed as would be necessary in a competitive market. It merely has to be good enough to prevent viewers from abandoning television altogether.

Finally, as illustrated by the Letterman/*Nightline* example, relying on market forces will leave underserved those markets that advertisers see as less desirable from a demographic standpoint. Society should not have to tolerate a media market where programming is aimed almost exclusively at eighteen- to thirty-five-year-old white males. Increasing the diversity of owners by limiting horizontal and vertical integration creates a greater likelihood that minority demographics will be served. Studies show that minority owners are more likely to program for minorities and that local owners are more likely to program for the local community rather than the national demographic.[28]

The U.S. Supreme Court has consistently recognized that the broadcast and cable markets are not functioning free markets; rather, they are a system of government broadcast monopolies and "natural" cable monopolies. A privileged few are free to make programming decisions based not on free market principles and genuine audience interest but on the ability to control captive customers.[29]

We Must Distinguish Between Toasters and Information

Mark Fowler, FCC chair under the Reagan administration, once stated that television was "simply another appliance . . . a toaster with pictures."[30] Why do the American people have an interest in maintaining a competitive and diverse mass media? Antitrust law applies to the media, so why does the public need more protection?

Since the founding of the nation, believers in our democratic form of government have argued that the public must remain informed of the news and stimulated with debate. No less a figure than James Madison, who regarded deliberative debate as a necessary element of democracy, articulated the principle that the government has an obligation to protect the marketplace of ideas when private interests threaten it.[31] As the U.S. Supreme Court has said, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal."[32]

As a result, Congress and the U.S. Supreme Court have identified maintaining a competitive media marketplace as a "government purpose of the highest order."[33] Because the broadcast media remain the primary means by which the public receives information and entertainment, the government has a vital interest in maintaining competition and diverse ownership in this sector.[34]

Proponents of deregulation respond that competition has replaced the need for regulation. When these ownership rules were made, they argue, three networks were broadcast and most Americans had access to only a handful of local channels. Now anyone can subscribe to systems that provide access to hundreds of channels.

This argument misses the mark for several reasons. As discussed above, Americans depend on their local broadcasters and local newspapers for local news. To allow local news to become dominated by a single provider would undermine democracy as much as would a monopoly on national news. Even without an owner consciously slanting the news, the deterioration of local news coverage from concentration discussed above justifies ownership limits that preserve multiple local outlets.

More important, the First Amendment command that the government ensure a robust marketplace of ideas is, like the world of communication itself, an expanding ideal, not a minimum threshold. The continued availability of newspapers did not negate the need to ensure diversity in broadcasting. The continuation of broadcasting did not negate the need to preserve diversity in cable. Rather, as the U.S. Supreme Court has stressed, the government has a duty to preserve more than a "rump" information market, and should instead promote "the widest possible dissemination of information from diverse and antagonistic sources."[35]

The Threat Is Real, If Subtle

Proponents of deregulation make their argument in a reductio ad absurdum. Because information cannot be completely suppressed, it follows that fears of media concentration are unfounded. At the FCC hearing adopting the deregulation order, Commissioner Abernathy mocked "speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people."[36] Proponents demand absolute proof that news outlets will be influenced in all cases by the economic interests of the news outlets' parent companies.

These straw-man arguments fail to confront the realities of public debate served by the First Amendment. The question is not whether information is somehow discoverable, but whether the public at large has sufficient information to stimulate debate on public affairs and to ensure an informed and active electorate.[37] As a practical matter, because the public generally relies on daily newspapers and broadcast media for their news and entertainment, these outlets generally set the public agenda.

As for irrefutable evidence, rarely do corporate heads send notices directing their staff to cover only one side of a story or to 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. Further, the impact on our news and culture from large media owners is many layered. Nevertheless, the U.S. Supreme Court has found that the FCC can—indeed must—consider the effects of concentration on public discourse.[38]

Furthermore, evidence exists that ownership influences media coverage in both gross and subtle ways. A survey by the Pew Research Center and the *Columbia Journalism Review* (CJR) demonstrated that 25 percent of local and national journalists have intentionally avoided newsworthy stories, the same number have softened the tone of stories to benefit the interests of their news organizations, and 41 percent have done both.[39] Of those surveyed, "one-third (35%) say news that would hurt the financial interests of a news organization often or sometimes goes unreported, while slightly fewer (29%) say the same about stories that could adversely affect advertisers."[40] Indicative of the subterranean nature of the problem, 26 percent of local reporters in the Pew/CJR study believed that a directive to avoid a story for other reasons was really a pretext to protect the financial interests of the corporate owner.[41]

The chilling effect of [threats to free speech] is no less powerful when the private sector is doing the threatening.

Anecdotal examples abound supporting the link between the size and identity of a station's owner with its content or quality. For example, newspaper and cable news outlet coverage of a decision by Congress in 1996 to award over $70 billion in free spectrum to broadcasters directly correlated with whether its corporate parent derived significant income from broadcasting properties. Those that derived significant income from broadcasting properties supported the measure; those that did not opposed it.[42] Similarly, local radio station managers sponsored pro-war rallies when they suspected that their efforts would be greeted with welcoming telephone calls from corporate headquarters because headquarters invested mightily in shoring up its links with the current presidential administration.[43]

Furthermore, although they may be rare, centralized decisions do occur, and the instances that become public should raise concerns about what happens behind closed doors. For example, at one talk-radio station, a corporate policy prohibits airing any callers who sound "old" in order to better target the more profitable twenty-five to fifty-four-year-old age group.[44] As another example, General Electric told its subsidiary, NBC, not to cover its pollution of the Hudson River.[45]

Owners also may make central decisions to support government policy as a means of currying favor, further compromising the critical role of the media in democracy. For example, Clear Channel management sent a list of 160 songs to its stations that were deemed inappropriate for air time after 9/11, among them antiviolence songs such as John Lennon's "Imagine" and Peter, Paul, and Mary's "Blowin' in the Wind."[46] After a member of the Dixie Chicks criticized the Bush administration's Iraq policy at a concert, radio stations owned by Cumulus and Clear Channel banned the group from airplay.[47] Although the Dixie Chicks have survived (after lead singer Natalie Maines apologized for her remarks), the chilling message to less popular musicians was quite clear—"toe the corporate party line or else."[48]

Examples of other Western democracies that do not have ownership limitations provide object lessons of the danger of concentrated ownership to democratic discourse. In Canada, for example, CanWest, which owns more than fourteen metropolitan daily newspapers, 120 community newspapers, sixteen television stations, seven networks, and an Internet news portal, ordered all of its daily newspapers to carry the same national editorials as of December 2001 and prohibited editorials or letters to the editors that contradicted an approved editorial on Palestinian-Israeli relations.[49]

In Italy, Prime Minister Silvio Berlusconi's ownership of the three commercial Italian broadcast networks (as well as his influence over the content of the three government-owned networks) gives him effective control over news programs, which inevitably supports the position of the government.[50]

Finally, politicians who set national and local policy believe that broadcasters are in a unique position to control their access to constituents. They therefore will rarely oppose policies favored by the broadcast industry.[51] Consider the case of the 1996 Telecommunications Act, which gave broadcasters $70 billion in spectrum for free. Bob Dole, then a candidate for the Republican nomination for president, opposed the giveaway. On the eve of the Iowa caucus, Dole received a letter from the owner of several Iowa television stations threatening to support other candidates if he did not change his stand. A few days later, Dole withdrew his opposition.[52]

As broadcast outlets concentrate in the hands of fewer interests, these few owners wield a proportionately greater influence. When these owners are not merely broadcasters, but multinational, vertically integrated corporations with a multiplicity of interests, the ability of these few media giants to shape national policy through their direct influence on legislators (at both the national and the local level) becomes frightening indeed.

Decentralizing ownership defuses the threat to democracy. Maximizing the number of media owners does not eliminate the influence of economic interests, but at least multiple owners will have different interests. In a world of many owners, if one owner refuses to cover a newsworthy story, rivals will cover it, and the public will be informed. If a news manager is fired for certain practices, he or she may be able to find a job elsewhere. But if a few owners with similar economic interests dominate the media, stories will go uncovered and essentially be suppressed.

Structural Rules Facilitate the First Amendment

Those who oppose ownership restrictions accuse opponents of attempting to control content. If a station owner supports the Iraq war and therefore chooses to ban the Dixie Chicks from play, the First Amendment protects this choice.

But no one has said otherwise. Rather, what the U.S. Supreme Court and supporters of ownership regulation have said is that the First Amendment also requires that no one person or oligarchy can act as censor for the rest of the country. Ownership restrictions thus protect the rights, assured under the First Amendment, of broadcasters to make independent editorial choices and of the public to a diversity of views.[53]

Media ownership rules are like a breakwater or anchor to keep some boundaries on the decision-making process. They preserve a minimum level of competition sufficient to encourage the production of quality news and entertainment serving diverse segments of our society without imposing content mandates. More important, they protect our society from corporate censorship as inimical to our democratic society as government censorship. At a minimum, if one corporation has a conflict of interest with respect to a story, at least another outlet is available to investigate it.

As a result, media ownership rules free those who depend upon the media—not merely performers like the Dixie Chicks or others in the entertainment industry, but politicians as well—to speak their minds. First Amendment analysis recognizes that even small threats to speech can have a chilling effect on speech.[54] The chilling effect is no less powerful when the private sector is doing the threatening.

Endnotes

1. The FCC's decision addressed six previously existing media ownership rules. The first three are relatively easy to understand—two local media rules governing radio and television only and a national television rule. The national television rule comprised an underlying policy that discounts certain stations, thus allowing certain owners to possess many more stations than the rule would otherwise allow. In addition, the FCC addressed two "cross-ownership" rules, i.e., rules that prohibit the ownership of multiple media in a local area. Prior to the FCC's decision, no local radio or television station could own a newspaper located in the same geographic area, and multiple radio and television station combinations also were restricted. In its recent order, the FCC adopted a single, novel "diversity index" that essentially removes any competitive scrutiny from all but the smallest markets in the country.

2. *See* PEW RESEARCH CENTER, STRONG OPPOSITION TO MEDIA CROSS OWNERSHIP EMERGES (July 13, 2003), *available at* http://peoplepress.org/reports/display.php3?ReportID = 188.

3. *See, e.g., FCC Eases Media Ownership Rules*, WASH. POST, June 3, 2003, *available at* www.washingtonpost.com/ac2/wpdyn/A5555–2003Jun2?language = printer&content = article.

4. For example, Common Cause reported that 30,000 people joined during the first month after it announced its campaign against media ownership deregulation. *See* www.commoncause.org. MoveOn, another advocacy group, reported a similar surge in interest. *See* www.moveon.org.

5. S. 1046 and S. 1264, *available at* www.Thomas.loc.gov.

6. Frank Aherns, *Senators Move to Block New Media Ownership Rules,* WASH. POST, July 16, 2003, at E1.

7. Heather Phillips, *Senate Rejects New Media Ownership Rules*, SAN JOSE MERCURY NEWS, Sept. 17, 2003. The resolution, S.J. Res. 17, must be passed by the House and signed by the president.

8. Brooks Bolliek, *House Panel Bucks FCC, Seeks Return of 35 Percent Lid*, HOLLYWOOD REP., July 17, 2003, *available at* www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id = 1934325.

9. Doug Halonen, *Station Cap Rolling Back?*, TELEVISION WK., July 28, 2003, at 1.

10. *House Republicans Fail to Rally Media Bill Opposition*, BLOOMBERG.COM, *at* http://quote.bloomberg.com/apps/news?pid = 10000103&sid = aPf64rmGkaUY&refer = us.

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

12. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391 (1969).

13. *See, e.g.,* Commissioner Michael J. Copps Bench Statement, *In re* 2002 Biennial Regulatory Review, June 2, 2003, at 6.

14. Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 190 (1997).

15. *Red Lion*, 395 U.S. at 390.

16. *Cf. Broadcast Ownership Biennial Review, Oral Statement Before the U.S. Senate Commerce, Science, and Transportation Comm.*, 107th Cong. 3 (June 4, 2003) (statement of Michael K. Powell, Chairman, Federal Communications Comm'n) ("Today's media marketplace is marked by abundance.").

17. 47 U.S.C. § 301.

18. The exception to this rule is broadcasters, who are entitled to "must carry" by cable. 47 U.S.C. § 534(a) (2003). Virtually all cable networks are affiliated with either a broadcast network or a cable operator. No one else can get on the system.

19. *Nightly Business Report: The Business of Online News* (PBS television broadcast, Aug. 4, 2003) (transcript available at www.nightlybusiness.org).

20. *Id.*

21. PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS: A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY 4 (Feb. 2003). A second Pew study found that news coverage generally declined in proportion to increased concentration of ownership in broadcasting.

22. Emily Nelson, *CBS Now Eyes Local Stations*, WALL ST. J., Aug. 26, 2002.

23. PROJECT FOR EXCELLENCE IN JOURNALISM, THE CHANGING DEFINITION OF NEWS (1998) (shifting definition of news to increasingly focus on entertainment rather than "hard" news); THE WAR ON TERRORISM, THE NOT SO NEW TELEVISION LANDSCAPE (2002) (after spike in foreign affairs coverage following 9/11 terrorist attacks, trend toward soft news and infotainment continuing), *available at* www.journalism.org/resources/research/reports/definitions/default.asp.

24. Frank Ahrens, *In TV's Numbers Game, Youth Trumps Ratings*, WASH. POST, Mar. 13, 2002, at A1. This may also be an example of an inefficient decision by advertisers since no empirical evidence supports the belief by advertisers that the youth demographic is in fact more susceptible to advertising. *Id.*

25. Jim Rutenberg, *To Interview Former P.O.W., CBS Offers Stardom*, N.Y. TIMES, June 16, 2003, at A1.

26. *A Season of Seeing Double*, BROAD. & CABLE MAG., Sept. 30, 2002.

27. *Big Media, Little Kids: Media Consolidation & Children's Television Programming*, CHILDREN NOW, May 21, 2003, *available at* www.childrennow.org.

28. JOEL WALDFOGEL, WHO BENEFITS WHOM IN LOCAL TELEVISION MARKETS? (2001).

29. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655–57 (1994) (*Turner I*) (discussing effective monopoly of cable and concluding that "the potential for abuse of this private power over a central avenue of communication cannot be overlooked"); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389–91 (1969).

30. C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 3 (2002).

31. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvii (1993); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14–16 (1965).

32. *Turner I*, 512 U.S. at 641.

33. *Id*. at 663.

34. *Id*.; Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189–94 (1997) (*Turner II*).

35. *Turner II*, 520 U.S. at 193.

36. *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 02–277 (released July 2, 2003) (separate statement of Commissioner Abernathy).

37. A delightful fictional illustration of this problem can be found in J.K. Rowling's *Harry Potter and the Order of the Phoenix* (2003). Because the primary newspaper of the wizarding world, the *Daily Prophet,* refuses to publish Harry Potter's story that the villain Voldemort has returned and instead engages in a smear campaign against Potter, the wizarding public refuses to believe it.

38. FCC v. Nat'l Citizens Comm. for Better Broad., 436 U.S. 775, 796–97 (1978) (observing that diversity is "an elusive concept," that evidence of abuses by common owners is "difficult to compile," and that the "possible benefits . . . do not lend themselves to detailed forecasts").

39. PEW CENTER FOR THE PEOPLE AND THE PRESS, SELF-CENSORSHIP: HOW OFTEN AND WHY (Apr. 30, 2000), *available at* http://people-press.org/reports/display.php3?ReportID = 39

40. *Id*.

41. *Id*.

42. J.H. SNIDER & BENJAMIN I. PAGE, DOES MEDIA OWNERSHIP AFFECT MEDIA STANDS? THE CASE OF THE TELECOMMUNICATIONS ACT OF 1996, Position Paper #1: Overt Bias 14-16 (1997, republished by the New Am. Found. in 2003) (noting that of all cable news networks,

only CNN, whose parent did not derive significant income from broadcast properties, covered the broadcast spectrum issue). Similarly, although newspapers such as the *Wall Street Journal* gave consistent coverage of the issue and published editorials opposed to the "spectrum giveaway," newspapers owned by A.H. Belo (which derived 64 percent of its profits from broadcast properties in the relevant time period) gave little coverage and supported awarding spectrum to broadcasters).

43. John Schwartz & Geraldine Fabrikant, *War Puts Radio Giant on the Defensive*, N.Y. TIMES, Mar. 31, 2003 (describing Clear Channel station series of pro-war rallies called "Rally for America!").

44. Robert Feder, *WLS Radio Hanging Up On Callers*, CHI. SUN-TIMES, Nov. 21, 2002.

45. Richard Pollack, *Is GE Mightier Than the Hudson?*, THE NATION, May 28, 2001. A cartoon on *Saturday Night Live*, mocking NBC for failing to cover the pollution story and drawing the link between media ownership and news coverage, was pulled in reruns. *SNL Kills Controversial Cartoon Spoof*, N.Y. DAILY NEWS, June 18, 1998.

46. Rick Karr, *The Day the Music Died*, NAT'L PUB. RADIO (Morning Edition), Sept. 19, 2001, *available at* www.npr.org/news/specials/americatransformed/people/clearchannel.html.

47. Paul Krugman, *Behind Pro-War Protests, A Company with Ties to Bush*, INT'L HERALD TRIB., Mar. 26, 2003; *Dixie Chicks Axed by Clear Channel*, BUS. J. JACKSONVILLE, Mar. 18, 2003..

48. Chris Willman, *Dixie Chicks Answer Their Critics*, ENTM'T WKLY., May 2, 2003 (citing major star Vince Gill backtracking and vocally protesting his support for the war after a backlash when he suggested that the Dixie Chicks "had been 'bashed enough' ").

49. Aaron J. Moore, *Ownership: A Chill in Canada*, COLUM. J. REV., Mar./Apr. 2002, at 11.

50. *Italy's Colorful Leader Rides Out Controversies*, L.A. TIMES, June 22, 2003, at A5.

51. J.H. Snider, *The Paradox of News Bias*, *in* THE POLITICS OF DISCOURSE AND AMERICAN SOCIETY: NEW AGENDAS (Roderick P. Hart & Bartholomew H. Sparrow eds., 2001). *See also* J.H. SNIDER & BENJAMIN I. PAGE, DOES MEDIA OWNERSHIP AFFECT MEDIA STANDS?, THE CASE OF THE TELECOMMUNICATIONS ACT OF 1996, Position Paper #2: Covert Bias (1997), *available at* www.newamerica.net.

52. SNIDER & PAGE, *supra* note 50, at 54–58 (1997).

53. FCC v. Nat'l Citizens Comm. for Better Broad., 436 U.S. 775, 799–800 (1978).

54. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) ("Even minor punishments can chill protected speech.") (citing Wooley v. Maynard, 430 U.S. 705 (1977)).