ARCHITECTURAL CENSORSHIP AND THE FCC

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ABSTRACT

Most First Amendment analyses of U.S. media policy have focused predominantly on "behavioral" regulation, which either prohibits the transmission of disfavored content (such as indecent programming) or mandates the dissemination of preferred content (such as children's educational programming and political speech). In so doing, commentators have largely overlooked how program content is also affected by "structural" regulation, which focuses primarily on increasing the economic competitiveness of media industries. In this Article, Professor Christopher Yoo employs economic analysis to demonstrate how structural regulation can constitute a form of "architectural censorship" that has the unintended consequence of reducing the quantity, quality, and diversity of media content. The specific examples analyzed include (1) efforts to foster and preserve free television and radio, (2) rate regulation of cable television, (3) horizontal restrictions on the number of outlets one entity can own in a local market, and (4) regulations limiting vertical integration in television and radio. Unfortunately, current First Amendment doctrine effectively immunizes architectural censorship from meaningful constitutional scrutiny, and it appears unlikely that existing doctrine will change or that Congress or the Federal Communications Commission will step in to fill the void.

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INTRODUCTION

Recent events have suddenly turned the media ownership regulations promulgated by the Federal Communications Commission ("FCC") into a hot topic. In 2001 and 2002, a remarkable series of decisions by the U.S. Court of Appeals for the D.C. Circuit invalidated significant portions of the FCC's media ownership restrictions.[1] Moreover, the reasoning of the opinions, which at times chided the FCC for failing to honor its statutory obligation to "repeal or modify any regulation it determines to be no longer in the public interest,"[2] casts doubt on the validity of a number of the FCC's other media ownership provisions. With its regulatory scheme thrown into disarray, the FCC undertook its most comprehensive reexamination of media ownership regulations in decades, which resulted in a mammoth order that loosened many of the most prominent restrictions.[3]

The prospect of widespread media consolidation touched off a political firestorm.[4] Congress responded by enacting legislation partially scaling back the most salient of the FCC's regulatory changes.[5] Numerous

1. *See* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 162–64 (D.C. Cir. 2002) (invalidating the FCC's rule restricting ownership of more than one television station in any local market); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir.) (invalidating the FCC's rules limiting the number of television stations one entity can own nationally and prohibiting joint ownership of a television station and local cable operator in the same city), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001) (invalidating the FCC's rule limiting the number of cable subscribers one entity can reach nationwide).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12. The scope of this statutory mandate has generated substantial controversy. The D.C. Circuit initially interpreted section 202(h) as erecting "a presumption in favor of repealing or modifying the ownership rules." *Fox Television Stations*, 280 F.3d at 1048. *See also Sinclair Broad. Group*, 284 F.3d at 159 (citing with approval the quoted language from *Fox Television Stations*). Subsequent decisions have been somewhat more circumspect. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 394, 423 (3d Cir. 2004) (rejecting the idea that section 202(h) serves as a "one-way ratchet"); Cellco P'ship v. FCC, 357 F.3d 88, 97–98 (D.C. Cir. 2004) (concluding that *Fox Television Stations* and *Sinclair Broadcasting Group* left open whether section 202(h) created a presumption in favor of eliminating existing regulations).

3. 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, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003) [hereinafter 2003 Biennial Review Order].

4. *See, e.g.*, Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645 (2004) (reviewing the political controversies surrounding the FCC's media ownership decision).

5. Consolidated Appropriation Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (scaling back the FCC's decision to liberalize the number of television stations one entity could own nationwide). For further discussion, see *infra* note 170 and accompanying text.

parties challenged the FCC's actions in court, some contending that the amendments were too sweeping and others arguing that they did not go far enough. The U.S. Court of Appeals for the Third Circuit stayed, and ultimately invalidated, the FCC's order.[6] These decisions gave the FCC precious little guidance regarding the types of changes that will be necessary in order for the media ownership regulations to survive judicial review. The resulting uncertainty threatens to undermine forthcoming mergers whose legality depend on the less restrictive limits that the FCC sought to impose. What will happen next is anyone's guess.

Although the bulk of the commentary on these events has focused on the relative merits of the FCC's actions and the court's decision to strike them down, I would like to analyze these events from a somewhat broader perspective. What I find most interesting are the specific grounds invoked by the courts to invalidate the media ownership rules. In most instances, the courts based their actions on principles of administrative law while largely rejecting challenges based on the First Amendment.[7] The failure of these challenges is consistent with the conventional wisdom concerning the constitutionality of ownership restrictions. It has long been recognized that measures directly regulating the behavior of media speakers—either by prohibiting the transmission of disfavored content, such as indecent programming,[8] or by mandating the dissemination of preferred content, such as children's educational programming and political speech[9]—raise serious First Amendment problems. Ownership restrictions and other forms of structural regulation are generally thought to pose fewer constitutional concerns.[10] Consequently, although the constitutionality of behavioral

6. *See Prometheus Radio Project*, 373 F.3d at 372 (remanding portions of the order), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. Jan. 28, 2005) (Nos. 04-1020 & 04-1036), *and* 73 U.S.L.W. 3466 (U.S. Jan. 31, 2005) (Nos. 04-1033 & 04-1045); Prometheus Radio Project v. FCC, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003) (staying the FCC's media ownership order).

7. *See Prometheus Radio Project*, 373 F.3d at 401–02; *Sinclair Broad. Group*, 284 F.3d at 167–69; *Fox Television Stations*, 280 F.3d at 1045–47. For notable exceptions, see *infra* notes 78, 164, 282 and accompanying text.

8. *See* 18 U.S.C. § 1464 (2000).

9. *See* 47 U.S.C. §§ 303b(a)(2), 335(b)(1) (requiring broadcasters to offer children's educational programming); *id.* §§ 312(a)(7), 315 (requiring broadcasters to provide access to political candidates).

10. *See, e.g.*, Am. Family Ass'n v. FCC, 365 F.3d 1156, 1168–69 (D.C. Cir. 2004); Ruggiero v. FCC, 317 F.3d 239, 244 (D.C. Cir. 2003) (en banc); *Sinclair Broad. Group*, 284 F.3d at 167–68; *Fox Television Stations*, 280 F.3d at 1046; Leflore Broad. Co. v. FCC, 636 F.2d 454, 458 n.26 (D.C. Cir. 1980); David L. Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 FED. COMM. L.J. 201, 212 (1979); Timothy G. Gauger, Comment, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses*, 83 NW. U. L. REV. 665, 673 (1989).

regulation has been the subject of extensive academic commentary, the constitutionality of structural regulation has received considerably less attention.[11] A complete analysis of the impact of structural regulation on program content has yet to appear in the literature.

This Article seeks to move beyond those previous analyses by offering a more comprehensive discussion of the ways that structural regulation affects media content. Part I explores a series of examples in which structural regulation has had a dramatic influence on the content of speech. The specific examples include: (1) efforts to foster free television over pay television, (2) rate regulation of cable television, (3) restrictions on the number of media outlets one entity can own in any media market, and (4) regulations limiting vertical integration in television and radio. Each of these examples was enacted to further three interests that the Supreme Court has determined to be unrelated to the content of expression: the preservation of free, local broadcasting; the promotion of competition; and the need to foster a diversity of sources and viewpoints.[12]

Each case demonstrates how structural regulation can have unintended effects on media content. Not only do these structural regulations tend to reduce the overall quantity and quality of media programming, they also

11. One analysis focused on the relatively narrow issue of whether particular structural regulations were enacted out of conscious effort to promote a diversity of viewpoints. *See* Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989). Other scholars have offered general discussions of how media concentration supposedly threatens the democratic values that they see underlying the constitutional commitment to free speech. *See* C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839 (2002) [hereinafter Baker, *Media Concentration*]; Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000); Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813; Lawrence Lessig, The Censorships of Television (Mar. 8, 1999) (unpublished manuscript, *available at* http://cyber.law.harvard.edu/works/lessig/tv.pdf). For my criticism of efforts to reconceptualize free speech in civic republican terms, see Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 306–46 (2003). More importantly for our purposes, these analyses have not engaged in any extended analysis of the precise relationship between media concentration and media content. Other scholars have analyzed the First Amendment implications of a single type of structural regulation without offering a more general analysis of the relationship between structural regulation and content. *See* C. Edwin Baker, *Merging Phone and Cable*, 17 HASTINGS COMM & ENT. L.J. 97 (1994) (discussing the constitutionality of a provision barring crossownership of local telephone and cable operations); Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1 (2002) (discussing the free speech implications of federal spectrum policy). The most complete discussion of the issue is C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 20–62 (2002) (discussing the impact of advertising support and local concentration on content). Even Baker's analysis stops short of exploring the full range of complexities of how structure and content interact.

12. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) [hereinafter "*Turner I*"].

affect the diversity of media content. Put another way, structural regulation can represent a form of "architectural censorship"[13] that can have a tangential, but substantial, adverse impact on speech.[14] In so doing, my analysis reveals that previous First Amendment discussions of structural regulation have simultaneously been too broad and too narrow. They have been too broad in their tendency to simply posit that media concentration necessarily represents a threat to free speech without engaging in any searching analysis of the precise nature of the relationship between concentration and content. This analysis suggests that the relationship between media concentration and the quantity, quality, and diversity of media content is more complex than is generally realized. At the same time, prior analyses have been too narrow in restricting their focus to media concentration. My analysis identifies other structural features that pose even more serious dangers of architectural censorship than do the concerns about industry concentration patterns that have dominated the existing scholarship.

Part II examines how the identified instances of architectural censorship would fare when measured against current First Amendment doctrine. Given the potentially adverse impact that structural regulation can have on the content of speech, one would hope that the First Amendment would provide a basis for identifying and redressing architectural

13. Professor Baker correctly notes that the term "censorship" is most applicable to situations in which the government deliberately attempts to affect the content of speech. *See* C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 754–755 & n.71 (2005). I concede that I use the term in part to add a touch of rhetorical flourish to my argument. That said, the censorship label may be more apt than initially appears. Many early attempts to regulate media structure were intended to influence media content. *See, e.g.*, Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcasting Stations, Report and Order, 18 F.C.C. 288, 291–93 (1953) (noting that national ownership rules were designed in part to "maximize diversification of program and service viewpoints") [hereinafter 1953 Multiple Ownership Order]; FED. COMMUNICATIONS COMM'N, REPORT ON CHAIN BROADCASTING 65 (1941) (imposing the Chain Broadcasting Rules in part because network control hampers local stations' ability to "broadcast[] such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest"). *See also Turner I*, 512 U.S. at 676–77 (O'Connor, J., concurring in part and dissenting in part) (arguing that seemingly structural measures designed to protect free broadcasting were really motivated by a desire to promote more local, educational, and public affairs-related content); Christopher H. Sterling, *Television and Radio Broadcasting*, *in* WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 299, 310 (Benjamin M. Compaine ed., 2d ed. 1982) (noting that "the FCC has followed an unwritten but fairly clear policy of seeking to modify the ownership of broadcasting facilities as a means of effecting changes in content").

14. In some respects, my analysis bears some similarity to Lawrence Lessig's claim that Internet protocols represent architectural elements that can censor in much the same manner as the government. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999); Lessig, *supra* note 11. The analytical tools that I employ and the claims that I advance are quite different from Professor Lessig's.

censorship when it arises. Unfortunately, such hopes are misplaced. Recent judicial decisions indicate that the most stringent standard of review that might be applied to structural regulation is the intermediate scrutiny announced in *United States v. O'Brien*.[15] *O'Brien* doctrine has been widely criticized as being too deferential.[16] As a result, current Supreme Court precedent effectively insulates instances of architectural censorship from meaningful constitutional scrutiny.

Part III briefly explores possible solutions to the de facto constitutional immunity enjoyed by architectural censorship. Although courts could leave resolution of these constitutional issues to the political branches, doing so would represent an abdication of the proper role of courts and would charge Congress and the executive with responsibilities that they are loath to bear. The only other alternative is to revise *O'Brien* doctrine to take the individual's interest in speech and the availability of alternative means of communication seriously. The failure of the Supreme Court's recent efforts to put teeth in *O'Brien* scrutiny, however, makes it unlikely that architectural censorship will be subject to meaningful First Amendment review in the foreseeable future.

I. ARCHITECTURAL CENSORSHIP OF MEDIA CONTENT

This Part employs economic analysis[17] to examine four ways in which the current regime of structural regulation can give rise to architectural

15. United States v. O'Brien, 391 U.S. 367 (1968).

16. *See infra* Part II.D.

17. Professor Baker spends a significant portion of his commentary criticizing my work for taking an economic or "commodity-based" approach to media policy rather than framing the issues in terms of democracy. *See* Baker, *supra* note 13, at 742–747. I have offered two basic criticisms of attempts to base media regulation on democratic principles elsewhere and will only sketch my conclusions here. First, by valuing speech for its contributions to democracy, these theories adopt a consequentialist approach that is at odds with the autonomy-centered vision that has long dominated free speech theory. Second, the existing democracy-centered theories are too insufficiently theorized to yield a workable system of media regulation. These theories recognize that their Jeffersonian vision of small speakers might have to yield to other considerations (including economics), yet fail to provide a coherent framework for determining how to balance these countervailing considerations. In this respect, it is telling that such luminaries as Lillian Bevier, Vincent Blasi, Robert Bork, Cass Sunstein, Owen Fiss, and Harry Kalven have each advanced theories of media regulation that began from similar, democracy-based premises, and yet have implemented their theories by drawing radically different conclusions. Yoo, *supra* note 11, at 306–46. *See also* Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933, 1953–62 (2000). In this respect, the debate between economic and democratic visions of media policy parallels a similar debate in antitrust. In that case, the populist approach to antitrust failed in no small part because of its inability to offer a basis for resolving the trade-offs between competing considerations. *See* Christopher S. Yoo, Beyond Network Neutrality pt. II.E.2 (unpublished manuscript, on file with author). Professor Baker appears to recognize the

censorship. Although most of the features of the current regime were not always created out of a desire to affect media content, they nonetheless have precisely that effect.

A. THE PREFERENCE FOR FREE RADIO AND TELEVISION

The desire to promote free (advertising-supported[18]) radio and television over pay versions of the same media has long represented one of the central tenets of U.S. media policy.[19] Policymakers have exhibited hostility toward radio services that were provided on a fee basis since the earliest days of radio regulation. This hostility is reflected in the FCC's longstanding hostility toward subscription-based radio technologies,[20] discernible most recently in its resistance to satellite radio—known technically as Digital Audio Radio Services ("DARS")—such as XM and Sirius.[21]

problem, and indeed his work on "complex democracy" is among the most promising in the field. *See* Baker, *supra* note 11, at 143–47. Even his laudable efforts fall short of articulating a basis sufficient to make difficult trade-offs inherent in any system of media regulation.

18. As I have noted elsewhere, the term "free" is something of a misnomer. "Free" radio and television is only possible because the broadcast industry receives hundreds of billions of dollars worth of spectrum for free. Indeed, the industry members are the only significant commercial users of spectrum that do not have to pay for their frequencies. The commitment of these resources inevitably increases the cost of all other spectrum-based technologies. As a result, the public bears the costs of "free" radio and television by paying higher fees for cellular telephony and other spectrum-based technologies. *See* Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1712–14 (2003).

19. The discussion that follows draws on the more complete analysis appearing in Yoo, *supra* note 18, at 1668–82. For other related analyses that draw somewhat different policy conclusions, see BAKER, *supra* note 11, at 24–40; Jora R. Minasian, *Television Pricing and the Theory of Public Goods*, 7 J.L. & ECON. 71 (1964); Michael Spence & Bruce Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q.J. ECON. 103, 118–19 (1977).

20. *See* KMLA Broad. Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 41 (C.D. Cal. 1967). *See generally* Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage"*, 97 COLUM. L. REV. 1048, 1052–57 (1997) (detailing the hostility toward subscription radio services historically exhibited by the FCC and its predecessor agency, the Federal Radio Commission). One of the few early exceptions was the transmission of background music pioneered by the Muzak Corp., which the FCC allowed to be provided on a subscription basis. *See* Muzak Corp., 8 F.C.C. 581, 582 (1941). Even then, such subscription services are generally heavily restricted. *See KMLA Broad. Corp.*, 264 F. Supp. at 37–38 (describing how the FCC required radio stations to provide background music services solely via subcarrier frequencies and mandated that those services not interfere with the main-channel transmissions that are available for free to the entire listening public).

21. *See* Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233, 248–52 (2004) (detailing the manner in which FCC regulations have hampered DARS).

The hostility toward subscription media services is also manifest in U.S. television policy.[22] When the development of scrambling technology made subscription television feasible, the FCC acted fairly quickly to stifle the industry's growth.[23] The bias against pay television services was even more evident in the FCC's policies toward cable television, most particularly in the relentless campaign to require local cable operators to provide free carriage to all full-power broadcast stations operating in their service area (commonly known as "must-carry").[24] The desire to foster free

22. *See* Yoo, *supra* note 18, at 1669–75.

23. The FCC declined to authorize subscription television as a general service and instead, the FCC merely authorized it on an experimental basis. Amendment of Part 3 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, Third Report, 26 F.C.C. 265 (1959). When the FCC eventually authorized more widespread deployment in 1968, it saddled the technology with a host of restrictions. Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, Fourth Report and Order, 15 F.C.C.2d 466 (1968), *aff'd sub nom.* Nat'l Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969). It was only after the D.C. Circuit's adverse decision in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28–51 (D.C. Cir. 1977) (per curiam), that the FCC relented and lifted the restrictions on subscription television. *See* Repeal of Programming Restrictions on Subscription Television, Report and Order, 43 Fed. Reg. 15,322 (F.C.C. Apr. 7, 1978); Amendment of Part 73 of the Commission's Rules and Regulations in Regard to Section 73.642(a)(3) and Other Aspects of the Subscription Television Service, Third Report and Order, 90 F.C.C.2d 341 (1982).

24. The FCC foreshadowed the imposition of must-carry in the very first decision in which it asserted jurisdiction over cable systems. Carter Mountain Transmission Corp., 32 F.C.C. 459, 465 ¶ 17 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963). The FCC later imposed must-carry on cable systems receiving programming through microwave transmission, *see* Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, First Report and Order, 38 F.C.C. 683, 705 ¶ 57, 716–17 ¶¶ 85–90 (1965) [hereinafter CATV First Report and Order], and extended must-carry to systems that retransmitted over-the-air television broadcasts, Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, Second Report and Order, 2 F.C.C.2d 725, 746 ¶¶ 48–49, 752–53 ¶ 66 (1966) [hereinafter CATV Second Report and Order] (extending the same rules to all cable systems). *See also* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order, 36 F.C.C.2d 143, 170–71 ¶ 74, 173–76 ¶¶ 78–87 (1972) (reaffirming must-carry); Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637 (F.C.C. May 2, 1985) (final rule) (same).

The FCC justified must-carry in large part by a desire to prevent those who are unable or unwilling to pay for television service from being deprived of it. *See* Cable Television Syndicated Program Exclusivity Rules, Report and Order, 79 F.C.C.2d 663, 744 ¶ 185 (1980), *aff'd sub nom*. Malrite T.V. of N.Y. v. FCC, 652 F.2d 1140 (2d Cir. 1981); CATV Second Report and Order, *supra*, at 788–89 ¶ 155; CATV First Report and Order, *supra*, at 699 ¶ 44, 700 ¶ 48(1).

Eventually, congressional intervention was necessary before must-carry could withstand judicial review. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4–5, 106 Stat. 1460, 1471–81 (codified as amended at 47 U.S.C. §§ 534, 535 (2000)). The must-carry statute would eventually be sustained by the Supreme Court as a valid means to further the government's interest in "preserving the benefits of free, over-the-air local broadcast television." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) [hereinafter "*Turner II*"].

television is apparent in the steps taken to regulate direct broadcast satellite ("DBS") systems, such as DirecTV and the Dish Network,[25] and underlies the FCC's decision to deploy digital television through broadcasters rather than through cable and satellite providers.[26]

Historically, efforts by Congress and the FCC to promote free radio and television have not been driven by content-based motivations. Instead, they are the result of a desire to preserve access for households that cannot afford subscription services.[27] Although these goals are quite laudable, application of economic analysis reveals that fostering advertising-supported radio and television has had a hidden, deleterious effect on the quantity, quality, and diversity of programming provided.

25. *See* H.R. CONF. REP. NO. 106-464, at 101 (1999) (noting that the Satellite Home Viewer Improvement Act was "intended to preserve free television for those not served by satellite or cable systems"); S. REP. NO. 106–51, at 1 (1999) (recognizing that the purpose of the legislation was "protecting the availability of free, local over-the-air television"); *id.* at 13 (finding that "maintaining free over-the-air-television is a preeminent public interest" and identifying "protecting the viability of free, local, over-the-air television" as one of the statute's purposes); H.R. REP. NO. 100-887(II), at 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5638, 5655 (expressing the concern that, if unregulated, satellite television would "undermine the base of free local television service upon which the American people continue to rely").

26. The FCC has repeatedly justified the importance of deploying digital television through broadcasting rather than other television services on the grounds that broadcasting, unlike subscription services, represents a "free" service that is available to almost all U.S. households. *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 12 F.C.C.R. 12,809, 12,811–12 ¶ 5, 12,820 ¶¶ 27–29 (1997); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Further Notice of Proposed Rule Making, 11 F.C.C.R. 6235, 6249 ¶ 36 (1996); Advanced Television Systems and Their Impact upon Existing Television Broadcast Service, Second Report and Order and Further Notice of Proposed Rulemaking, 7 F.C.C.R. 3340, 3342 ¶ 4 (1992); Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Tentative Decision and Further Notice of Inquiry, 3 F.C.C.R. 6520, 6525 ¶¶ 38–39 (1988). *See also* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fourth Report and Order, 11 F.C.C.R. 17,771, 17,787–88 ¶ 33 (1996) (noting that the goals of digital television deployment include preserving a free, universal broadcasting service); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, 10 F.C.C.R. 10,540, 10,541 ¶ 6, 10,543 ¶ 22 (1995) (same). Concerns about preserving free television have also animated the FCC's proceedings regarding the extension of the must-carry rules to digital programming. *See* Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 2598, 2600 ¶ 3, 2648 ¶ 113 (2001); Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, 13 F.C.C.R. 15,092, 15,114–15 ¶ 43 (1998).

27. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12), 106 Stat. 1460, 1461 (finding a "substantial government interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming"); *Turner II*, 520 U.S. at 190 (relying on the need to preserve free television to uphold must-carry).

1. Impact on the Quantity of Television Produced

Reliance on advertising support is likely to lead to a systematic underfinancing of media programming. When broadcasters derive revenue solely from advertising, one would expect the total revenue to be determined by viewers' and listeners' responsiveness to the advertising contained within programs. In other words, advertisers will increase their spending so long as the revenue generated by exposing audiences to an additional commercial exceeds the cost of purchasing an additional commercial.

Although it is possible that audiences' responsiveness to advertising might yield the same net revenue as direct payments for the underlying programs, there is no theoretical reason to expect that these levels would be the same.[28] In fact, the available empirical evidence indicates that advertisers place a significantly lower value on programming than viewers and listeners. One oft-cited study conducted in the 1970s estimated that viewers were willing to pay seven times more for television programming than were advertisers.[29] A pair of recent event studies confirmed those results by showing that television programs financed by pay-per-view generate significantly greater revenue than programs financed by advertising support.[30]

28. *See* Minasian, *supra* note 19, at 74–75. *See also* Spence & Owen, *supra* note 19, at 104–05.

29. *See* ROGER G. NOLL, MERTON J. PECK & JOHN J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 23 (1973). *See also* Harvey J. Levin, *Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings*, 61 AM. ECON. REV. 81, 82, 88 (1971) (concluding that entry by pay television supported more informational programming and other special interest programming than would advertising-supported television); Spence & Owen, *supra* note 19, at 118–19 (drawing on the Noll-Peck-McGowan data to show that reliance on advertising support was suppressing the emergence of a fourth television network). Although other economists have quibbled with the precise size of this disparity, they do not dispute the fundamental conclusion that consumers are willing to pay far more for television than advertisers. *See* Stanley M. Besen & Bridger M. Mitchell, *Noll, Peck, and McGowan's* Economic Aspects of Television Regulation, 5 BELL J. ECON. & MGMT. SCI. 301, 308–11 (1974) (book review); Bryan Ellickson, *Hedonic Theory and the Demand for Cable Television*, 69 AM. ECON. REV. 183, 188–89 (1979).

30. *See* Claus Thustrup Hansen & Søren Kyhl, *Pay-Per-View Broadcasting of Outstanding Events: Consequences of a Ban*, 19 INT'L J. INDUS. ORG. 589, 590, 601, 604 (2001); Steinar Holden, *Network or Pay-Per-View?: A Welfare Analysis*, 43 ECON. LETTERS 59, 62–64 (1993). It is interesting to note that these two studies drew different normative implications from the same empirical findings. The difference results from the fact that the Hansen and Kyhl study employed the generally accepted welfare metric of total surplus, while the Holden study focused solely on consumer surplus. This disagreement over the proper welfare metric should not obscure the conclusion drawn by both studies that a shift to pay television would cause the total revenue captured by the programmer to increase and would make possible programming that would not exist if advertising support were the sole source of revenue.

These studies indicate that advertising support drastically understates the intensity of consumers' preferences for television and radio programming and that reliance on advertising support causes revenue to drop far below efficient levels. Put another way, favoring advertising support over direct payments systematically starves programming of resources. Programmers would be able to generate substantially greater revenues (and thus devote greater resources to production) if they were allowed to charge directly for programs.[31] Preventing them from doing so has the effect of reducing the total amount of television and radio programming produced.

The policy commitment to foster advertising-supported television has also had the indirect effect of hindering the development of multichannel television technologies.[32] This preference was implicit in the regulations requiring cable and satellite television providers to carry all full-power local broadcast stations.[33] The bias against multichannel technologies was made explicit during proceedings to determine how to deploy digital television.[34] The unfortunate result of this bias against new, multichannel technologies is a restriction on the amount of channel capacity available in any local market.[35] As we shall see, limitations on channel capacity play a

31. I do not mean to suggest that advertising support should be banned, but rather that television and radio providers should be allowed to rely on subscription fees or advertising as they see fit. I would not expect the market to rely exclusively on either form of financing. On the contrary, the most likely result would be a mix of networks, some relying solely on advertising, some relying solely on direct viewer payments, and some relying on a combination of the two, resembling the current market for newspapers in many cities. *See* Yoo, *supra* note 18, at 1682.

32. *See id.* at 1703.

33. *See supra* notes 23–26 and accompanying text.

34. The initial regulations encouraged digital broadcasters to transmit a single stream of high definition television rather than multiple streams of standard definition television. Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, First Report and Order, 5 F.C.C.R. 5627, 5627 ¶ 1, 5629 ¶ 12 (1990).

35. This effect is the most dramatic with respect to the local carriage obligation imposed on satellite television services, such as DBS. By its nature, DBS provides service on a national scale. As a result, DBS providers who wish to offer programming from the major broadcast networks (namely, ABC, CBS, NBC, and Fox) in Nashville must necessarily transmit that programming to the entire country even though no one outside of Nashville would be legally allowed to receive those signals. Although the DBS providers are in the process of deploying "spot beam" technology that should allow them to restrict the geographic coverage of particular channels, such technologies are not likely to be operational for several years. Requiring DBS providers to carry all local stations in any market in which they would like to provide local service forces them to dedicate large amounts of their limited channel capacity to transmitting redundant signals that only a small portion of the country can legally receive. This has the inevitable effect of reducing the number of channels that viewers in any particular city can receive.

critical role in causing media markets to underproduce programming that appeals to relatively small audience segments.[36]

2. Impact on the Quality and the Diversity of Programming

Reliance on advertising also reduces program quality and diversity. Limiting programs' ability to generate revenue necessarily increases the minimum audience size needed for a program to break even. This in turn has the inevitable effect of skewing the market against programming that appeals only to a relatively small segment of the audience.[37]

Conventional markets provide a straightforward mechanism for encouraging the production of low-volume products that enrich the product mix, as evidenced by the survival of high-priced boutiques in a world increasingly dominated by mass-market discounters. So long as consumers who prefer those low-volume products are willing and able to pay more for them, the total revenue generated will be sufficient to cover costs, even if those costs are substantially higher. Stated more formally, low-volume products can exist so long as consumers can use prices to signal the intensity of their preferences.

Advertising support effectively forecloses viewers and listeners from using prices to signal the intensity of their preferences. Simply put, advertising support provides viewers and listeners with only a single degree of freedom with which to signal the intensity of their preferences. They can either choose to view the programming offered by the network, in which case the network derives revenue equivalent to that type of viewer's responsiveness to advertising, or they can choose not to watch, in which case the network receives nothing. This limits viewers to an all-or-nothing signal of their preferences.[38] It makes revenue largely a function of audience size,[39] thereby preventing small audiences from obtaining the programming they want no matter how much they are willing to pay for it.

The recent financial and critical success of HBO provides an eloquent demonstration of these dynamics. Viewers' ability to signal intensity of

36. *See infra* notes 101, 108, 124–126 and accompanying text.

37. *See* Spence & Owen, *supra* note 19, at 112.

38. This distortion is analogous to the problem endemic in many election schemes, in which voters simply vote "yes" or "no" for a particular candidate without being able to signal the intensity of their preferences. *See* Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1332 (2000); Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111 (2000).

39. *See, e.g.*, *Turner II*, 520 U.S. 180, 208–09 (1997) (collecting empirical research confirming the "direct correlation [between] size in audience and station [advertising] revenues" (alterations in original and internal quotation marks omitted)).

preference through direct payments allows HBO to generate more than half the revenue of CBS even though its prime time audience is almost fifteen times smaller.[40] In other words, HBO is able to generate roughly eight times more revenue per viewer than CBS. This makes it far easier for HBO to produce programs that appeal to relatively small audiences. In addition, to the extent that program quality is correlated with the amount spent producing each program, a shift to subscription services also causes program quality to improve. Indeed, HBO's dominance of recent Emmy Awards provides a powerful demonstration of this effect.[41]

Reliance on advertising support has the inevitable effect of excluding programming that appeals only to small audiences, regardless of both the strength of viewers' and listeners' preferences and their willingness to pay. Reliance on advertising support thus tends to reduce the diversity of the programming mix by preventing the survival of economically viable programs that appeal only to small audiences.[42] Indeed, recent empirical studies focusing on black and Hispanic audiences, who represent precisely the type of small audiences with nonmainstream preferences that advertising support tends to disfavor, indicate they are in fact underserved in precisely the manner that this theory predicts.[43]

Conversely, allowing direct payments for preferred programming would make it far easier for programming strongly desired by a small portion of the audience to appear. To use a somewhat fanciful example, suppose that there is a small group of ten thousand opera lovers who each would be willing to pay up to $1000 to view the entire season of the New York Metropolitan Opera on television.[44] If these opera lovers were able to make direct payments to the television network, they would be able to offer

40. *See* John M. Higgins, *Still Strutting after All These Years: Although NBC Remains No. 1, CBS Is Close Behind*, BROADCASTING & CABLE, Dec. 13, 2004, at 20, 21, 24 (reporting that CBS had 2004 revenue of $4.45 billion with an average audience of 13.3 million, while HBO had 2004 revenue of $2.4 billion with an average audience of 893,000).

41. *See* Mike Duffy, *Sunday Belongs to HBO: Cable Network Is the Emmy Powerhouse to Beat*, DET. FREE PRESS, Sept. 21, 2003, at 1E; Bernard Weinraub, *HBO Is Big Winner at Emmy Awards,* N.Y. TIMES, Sept. 20, 2004, at A22;

42. *See* Spence & Owen, *supra* note 19, at 113; SIMON P. ANDERSON & STEPHEN COATE, MARKET PROVISION OF PUBLIC GOODS: THE CASE OF BROADCASTING 23–28 (Nat'l Bureau of Econ. Research, Working Paper No. 7513, 2000), *available at* http://www.nber.org/papers/w7513.

43. Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, 10 ADVERTISING & DIFFERENTIATED PRODUCTS 73, 80–83 (Michael R. Baye & Jon P. Nelson eds., 2001); Joel Waldfogel, *Preference Externalities: An Empirical Study of Who Benefits Whom in Differentiated-Product Markets*, 34 RAND J. ECON. 557 (2003).

44. For those with different tastes, the example applies equally well to a small group of loyal fans of a team located in a different city.

a total of $10 million to a station willing to provide such programming, in which case the programming might well appear. If the network offering this programming were forced to rely solely on advertising support, the amount of revenue that such a program would capture would be limited by the amount of advertised products that this relatively small group of opera lovers would be willing to buy. In this case, the revenue generated by advertising support would likely be only a fraction of that generated by direct payments.[45]

3. Distortions Resulting from Allowing Advertisers to Serve as Intermediaries

Reliance on advertising support introduces additional market distortions by allowing advertisers to serves as intermediaries in the relationship between audiences and program producers. Although reliance on advertising support tends to make the impact of any particular audience member more uniform than would be possible under a system of direct payments, the fact that individuals with certain demographic characteristics are likely to be more responsive to advertising inevitably makes some audience members more valuable to advertisers than others.[46]

This, in turn, can skew the markets away from an audience's true preferences. For example, reliance on advertising support encourages television and radio programmers to be consumerist in focus and tends to make them excessively sensitive to the preferences of those demographic groups that are the most responsive to advertising.[47] Consequently, it tends

45. Professor Baker chides me for ignoring externalities. *See* Baker, *supra* note 13, at 749. This criticism is in tension with one of the central economic lessons of the past half-century, which is that, so long as transaction costs are low, markets are far more effective at dealing with externalities than previously thought. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). For my analysis of the implications of externalities and transaction costs on media ownership policy, see Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 193–200, 213–17, 232–37 (2002). To the extent that the relevant externalities are positive externalities enjoyed by audiences, however, the collective action problems created by the large number of people involved may cause markets to fail. *See* Christopher S. Yoo, Rethinking the Coasean Critique of Broadcast Regulation (2005) (unpublished manuscript, on file with author). Even if transaction costs prevent markets from fully internalizing the extant externalities, the classic solution would be subsidies (or perhaps liability rules) rather than ownership restrictions. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 192–94 (4th ed. 1932) (subsidies); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (liability rules).

46. *See* Franklin M. Fisher, John J. McGowan & David S. Evans, *The Audience-Revenue Relationship for Local Television Stations*, 11 BELL J. ECON. 694 (1980).

47. *See* BAKER, *supra* note 11, at 26; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 71 (1993).

to bias the market against programming preferred by those who are the least responsive to advertising. For example, one would expect that reliance on advertising support would tend to lead to a systematic underproduction of children's educational television, since purchasing decisions are typically made by supervising parents whose responsiveness to the commercials contained in children's programming is constrained by the fact that they frequently do not see the commercials at all.[48] Allowing parents to make direct payments for programming would provide a much more straightforward means for signaling their preferences. It is almost certainly no accident that most of the best children's educational programming on commercial television appears on cable.[49]

Reliance on advertising support also allows the biases of particular advertisers to influence the program mix. Anecdotal evidence suggests that some advertisers have discouraged networks from offering programming that addresses controversial issues or that casts their products in a poor light.[50] This reliance also leaves programmers vulnerable to the political biases of advertisers and special interest groups. Consider, for example, the recent controversy surrounding the miniseries *The Reagans*, originally scheduled to air on CBS. When dissatisfaction with the portrayal of the former President and First Lady threatened to erupt into a consumer boycott of any products advertised during the miniseries, Viacom shifted the program from CBS to Showtime, a premium movie channel that does not depend on advertising support.[51]

This episode bears a striking resemblance to the reaction to a pair of programs on abortion aired during the 1970s. When NBC tried to broadcast its movie version of *Roe v. Wade*, it faced such a backlash from advertisers that it eventually opted to show the movie without commercials, which in turn caused it to incur significant economic losses on the project.[52] This is in sharp contrast to the relative ease with which HBO was able to air a documentary on the same subject. The fundamental difference is that HBO's survival does not depend on its ability to assuage sponsors. As one

48. *See* Policies and Rules Concerning Children's Television Programming, Report and Order, 11 F.C.C.R. 10,660, 10,675 ¶¶ 32–33 (1996).

49. *See* Yoo, *supra* note 11, at 327–28.

50. *See* BAKER, *supra* note 11, at 24–30; SUNSTEIN, *supra* note 47, at 63–65; Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 696–713 (1994).

51. *See* Meg James, Greg Braxton & Bob Baker, *The Vetoing of "Reagans": How Protests and Bad Timing Led CBS to Cancel a Movie About the Former First Couple*, L.A. TIMES, Nov. 10, 2003, at E1; Emily Nelson & Joe Flint, *CBS Pulls "Reagans" amid Opposition from Conservatives*, WALL ST. J., Nov. 5, 2003, at A3.

52. *See* SUNSTEIN, *supra* note 47, at 65; Shiffrin, *supra* note 50, at 698.

HBO executive explained, "We're not any braver than the networks. It's just that our economic basis is different."[53]

It is thus clear that the FCC's historical commitment to promoting a radio and television industry supported by advertising represents a form of architectural censorship that has had the unintended consequence of reducing the overall quantity, quality, and diversity of radio and television programming. Although a number of other scholars recognizing the problems associated with advertising support have proposed second-order corrective measures,[54] I would prefer the more straightforward solution of eliminating the hostility toward fee-based services. Advertising-supported media would appear to be a singularly inefficient mechanism for ensuring that all U.S. households have access to media regardless of their socioeconomic status. The evidence suggests that a targeted subsidy system, in which households falling below the poverty line are given discounted service, would be far more effective than the current system of untargeted subsidies.[55]

Recent pronouncements by Congress, the Supreme Court, and the FCC, however, make it quite likely that the commitment to preserving free television will remain one of the central aims of U.S. media policy for the foreseeable future.[56] As long as that is the case, this policy will continue to have unintended and adverse impacts on the content of speech.

B. RATE REGULATION OF CABLE TELEVISION

Another common feature of U.S. media policy has been the imposition of rate regulation on the cable television industry.[57] These efforts were clearly designed to protect consumers against excessive prices charged by

53. Jan Hoffman, *TV Shouts "Baby" (and Barely Whispers "Abortion")*, N.Y. TIMES, May 31, 1992, at H1, *quoted in* Shiffrin, *supra* note 50, at 698.

54. *See* BAKER, *supra* note 11, at 98–99, 114–21; SUNSTEIN, *supra* note 47, at 84–88.

55. *See* Yoo, *supra* note 18, at 1675–76; Yoo, *supra* note 11, at 354–55.

56. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(12), 106 Stat. 1460, 1461 (codified as amended at 47 U.S.C. §§ 534–535 (2000)); *Turner I*, 512 U.S. 622, 663 (1994) (recognizing that "nearly 40% of American households still rely on broadcast stations as their exclusive source of television programming" and holding that "protecting noncable households from loss of regular television broadcasting service" is an important federal interest (internal quotation marks omitted)); 2003 Biennial Review Order, *supra* note 3, at 13,674–75 ¶ 148 (identifying "the preservation of free, universally available local broadcast television in a digital world" as an important goal).

57. For a useful overview of the early history of cable rate regulation, see *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 178–80 (D.C. Cir. 1995) (opinion of Randolph, J.).

local cable monopolists.[58] Because of its economic focus and its unrelatedness to program content, rate regulation represents a classic example of structural regulation. As a result, conventional wisdom presumes that rate regulation has little to no impact on the content of speech.[59]

The on-again/off-again history of cable rate regulation[60] provides an ideal opportunity for using event studies to assess its effectiveness empirically. Somewhat surprisingly, these studies indicate that rate regulation has largely been a failure. Despite the fact that rate regulation was designed to protect consumers against excessive prices charged by cable operators who did not face effective competition, the evidence suggests that rate regulation failed to yield any real welfare benefits for consumers.[61]

The key to understanding why rate regulation proved to be such a disappointment is to acknowledge the regime's inherent limitations. Rate regulation has always worked best when applied to commodity services, in which the quality and type of service provided does not vary. The would-be monopolist has only one dimension—price—with which it can extract surplus from consumers. When that is the case, limiting the prices that monopolists charge may well prove effective in limiting the exercise of market power.

A different situation obtains when the regulated service is not a commodity.[62] Where products vary in terms of quality, price represents

58. *See* 47 U.S.C. § 543(b)(1) (2000); *Time Warner*, 56 F.3d at 184–85.

59. *See Time Warner*, 56 F.3d at 183.

60. Rate regulation was widely imposed by cities until 1984, at which point it was effectively abolished by Congress. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, sec. 623(b), 98 Stat. 2779, 2788 (codified as amended in scattered sections of 47 U.S.C.) (allowing rate regulation unless cable operators faced "effective competition"); Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, 18,648–50 ¶¶ 91–100 (F.C.C. May 2, 1985) (final rule) (defining "effective competition" in a way that exempted 96% of all cable systems). Congress reinstated cities' authority to regulate cable rates in 1992. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 3(a), 106 Stat. 1460, 1464. It abruptly changed course once again four years later by passing another statute largely deregulating cable rates. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b), 110 Stat. 56, 114–15.

61. *See generally* THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION (1997); Gregory S. Crawford, *The Impact of the 1992 Cable Act on Household Demand and Welfare*, 31 RAND J. ECON. 422 (2000).

62. *See generally* David Besanko, Shabtai Donnenfeld & Lawrence J. White, *Monopoly and Quality Distortion: Effects and Remedies*, 102 Q.J. ECON. 743 (1987); David Besanko, Shabtai Donnenfeld & Lawrence J. White, *The Multiproduct Firm, Quality Choice, and Regulation*, 36 J. INDUS. ECON. 411 (1988); Kenneth S. Corts, *Regulation of a Multi-Product Monopolist: Effects on Pricing and Bundling*, 43 J. INDUS. ECON. 377 (1995).

only one of several dimensions along which producers can appeal to customers. Unless the regulator imposes comprehensive controls over quality as well as price, the regulated entity may evade any price restrictions simply by degrading the quality of its product offerings.

Indeed, the empirical evidence strongly suggests that this is precisely what has occurred in the cable industry. Although rate regulation caused nominal cable prices to drop, once other characteristics—such as the total number and quality of channels offered—are taken into account, the empirical evidence indicates that rate regulation caused quality-adjusted rates to increase and that deregulation caused quality-adjusted rates to fall.[63] This implies that consumers would have preferred larger, higher quality bundles of channels than they received under rate regulation, even if acquiring them meant paying higher prices. Placing a cap on cable rates simply limited cable operators' ability to move their product packages closer to consumers' ideal preferences.[64]

It thus appears that rate regulation did little to prevent local cable operators from exercising whatever monopoly power they possessed. Instead, rate regulation had the unintended consequence of degrading the quality of existing cable offerings and foreclosing the emergence of higher quality channel packages despite viewers' willingness to pay for them.[65]

63. *See* HAZLETT & SPITZER, *supra* note 61, at 2, 69–177, 208; Crawford, *supra* note 61, at 444–45.

64. Cable operators wishing to add high-end programming did have another option. They could have purchased it on an à la carte/premium channel basis. Forcing cable operators, however, to offer such channels on a stand-alone basis can have a dramatic impact. It prevents the operator from obtaining the benefits of bundling, which in turn makes it possible for the cable operator to offer a wider range of programming. *See* Yoo, *supra* note 18, at 1706–12.

65. Baker argues that distributive concerns, particularly the need to preserve access to the media by the poor, might justify cable rate regulation. *See* Baker, *supra* note 13, at 748. As is typical of economic analyses, my argument is not focused on distribution. That said, Baker's position is somewhat inconsistent with the basic structure of media policy. As noted earlier, preserving access to television by all citizens represents one of the central commitments of U.S. policy with respect to *broadcasting*. *See supra* notes 17–22, 25 and accompanying text. Broadcast stations remain the only commercial users who are not required to pay for their spectrum. The justification for what some Senators have condemned as an unsupportable act of corporate welfare is the need to preserve access to television. Yoo, *supra* note 18, at 1673–74, 1700. Conservative estimates place the value of this spectrum giveaway at $450 billion. *See* Hazlett, *supra* note 21, at 252 & n.44. The need to preserve access to broadcast television also represented one of the central justifications for must-carry. *See supra* notes 23, 26 and accompanying text. Having already set aside *broadcasting* as the medium for ensuring universal access to television and after having committed so many resources to ensure that it is available to everyone, regulating *cable* to accomplish the same end would seem excessive. Even if that were the goal, it is quite likely that direct subsidies would represent a far more effective means for promoting indigent access to cable television. *See* Yoo, *supra* note 18, at 1675–76; Yoo, *supra* note 11, at 354–55.

C. RESTRICTIONS ON HORIZONTAL CONCENTRATION

The FCC has long restricted the number of media outlets that one entity can own in any local media market. Some rules focus on *intra*media crossownership. They originated as a preference in licensing hearings against holding licenses to two AM radio stations operating in the same city.[66] The FCC formalized this licensing preference in a "duopoly rule" promulgated in 1940, which explicitly prohibited anyone from holding licenses for two television stations or two FM radio stations that served substantially the same area.[67] The duopoly rule was extended to AM radio in 1943.[68]

Other restrictions focus on *inter*media crossownership. Like the intramedia crossownership restrictions, intermedia crossownership restrictions began in licensing hearings as a preference in favor of diversification of media ownership.[69] In the 1970s, the FCC formalized these preferences into a series of explicit intermedia crossownership restrictions. The principal intermedia crossownership restrictions included (1) the "one-to-a-market" rule, which prohibited combined ownership of a radio and television station in the same local market;[70] (2) the

66. *See* Genesee Radio Corp., 5 F.C.C. 183, 186–87 (1938).

67. *See* 6 FCC ANN. REP. 68 (1940).

68. *See* Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16,065 (F.C.C. Nov. 27, 1943). The FCC tightened the duopoly rule in 1969, abolishing the more permissive standard that only prohibited joint ownership if the stations served "substantially the same area" in favor of a more stringent restriction forbidding joint ownership of radio stations that had any overlap in their primary service contours, no matter how small. The rule was even more restrictive for television, which prohibited joint ownership of stations whenever there was any overlap in their secondary service contours. *See* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order, 45 F.C.C. 1728 (1964).

69. *See, e.g.*, Port Huron Broad. Co., 5 F.C.C. 177, 182 (1938); Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (F.C.C. Jan. 18, 1944) (notice of dismissal of proceeding). *See generally* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394–95 (1965) (identifying "[d]iversification of control of the media of mass communications" as a "factor of primary significance" in comparative licensing proceedings) (italics omitted). The FCC's early application of this criterion was far from consistent. *See* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 64–69 (1962); Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 673–78, 685–94 (1959).

70. *See* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, 308 ¶ 8 (1970) [hereinafter 1970 Multiple Ownership Order]. Shortly thereafter, the FCC liberalized the one-to-a-market rule to permit AM-FM combinations in the same market and to allow existing radio licensees to acquire UHF stations in the same market. *See* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order, 28 F.C.C.2d 662 (1971).

newspaper/broadcast crossownership rule, which banned common ownership of a newspaper and broadcast station when the broadcast station's service contour completely encompassed the newspaper's city of publication;[71] (3) the cable/broadcast crossownership rule, which effectively prohibited the owner of a local cable system from also owning a local broadcast station;[72] and (4) the cable/local telephone company crossownership rule, which prohibited local telephone companies from providing video programming to subscribers in their respective local service area.[73]

The FCC has long justified its restrictions on horizontal concentration with two rationales: the need to protect competition[74] and the need to promote a diversity of programming and viewpoints.[75] The first is completely economic in focus and unrelated to the content of speech. The second implicates First Amendment concerns more directly because "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation."[76]

71. *See* Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975) [hereinafter 1975 Multiple Ownership Order].

72. As a formal matter, this rule only prohibits a cable television system from carrying the signal of any broadcast television station if it owns a broadcast station in the same local market. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Second Report and Order, 23 F.C.C.2d 816, 820–21 689 ¶ 12–14 (1970) [hereinafter Community Antenna Order]. When combined with the cable operators' must-carry obligations, this rule effectively prohibits cable/broadcast crossownership. *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1035 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

73. Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307, 323–25 ¶¶ 43–49 (1970), *aff'd sub nom.* Gen. Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). This requirement was codified by the 1984 Cable Act. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, sec. 613(b)(1), 98 Stat. 2779, 2785 (originally codified at 47 U.S.C. § 533(b)).

74. *See, e.g.*, Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, First Report and Order, 4 F.C.C.R. 1723, 1724 ¶ 8, 1727 ¶¶ 32–33 (1989) [hereinafter 1989 Multiple Ownership Order]; 1975 Multiple Ownership Order, *supra* note 71, at 1074 ¶ 99; 1970 Multiple Ownership Order, *supra* note 70, at 307 ¶ 3 ; Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 45 F.C.C. 1476, 1476–77 ¶¶ 2–3 (1964) [hereinafter 1964 Multiple Ownership Order]; Genesee Radio Corp., 5 F.C.C. 183, 186–87 (1938).

75. *See, e.g.*, *Genesee*, 5 F.C.C. at 186–87; 1989 Multiple Ownership Order, *supra* note 74, at 1723–24 ¶ 7, 1727 ¶ 31; 1975 Multiple Ownership Order, *supra* note 71, at 1074 ¶ 99; 1970 Multiple Ownership Order, *supra* note 70, at 307 ¶ 3; 1964 Multiple Ownership Order, *supra* note 74, at 1476–77 ¶¶ 2–3.

76. 1975 Multiple Ownership Order, *supra* note 71, at 1050 ¶ 14.

Several forces led the FCC to relax a number of these rules in the ensuing years. The first was a series of deregulatory initiatives launched during the administrations of Ronald Reagan and George H.W. Bush.[77] Furthermore, a series of lower federal court decisions handed down during the mid-1990s voided the cable/local telephone company crossownership rule on First Amendment grounds.[78] The issue had already been briefed and argued before the Supreme Court when it was rendered moot by a provision of the Telecommunications Act of 1996 that eliminated the rule.[79]

The 1996 Act also contained a number of provisions raising the thresholds needed to trigger various horizontal ownership restrictions.[80] In

77. In 1989, the FCC relaxed the duopoly rule. Under the old rule, common ownership of two broadcast stations in the same service was prohibited if there was any overlap in the two stations' primary service contours. Under the new rule, same-service common ownership would be prohibited only if the two stations' principal city contours overlapped. 1989 Multiple Ownership Order, *supra* note 74, at 1723. The next day, the FCC relaxed the one-to-a-market rule to allow for a presumptive waiver for failed stations and for crossownership in the top twenty-five markets so long as thirty independent voices remain in the market. Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Second Report and Order, 4 F.C.C.R. 1741 (1989) [hereinafter 1989 Second Multiple Ownership Order]. In 1992, the FCC repealed the network/cable crossownership rule. Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, Report and Order, 7 F.C.C.R. 6156, 6162–63 ¶ 10 (1992) [hereinafter Order to Eliminate the Prohibition on Common Ownership]. The FCC also relaxed the duopoly rule with respect to radio, allowing a single entity to own two AM and two FM stations in the same market so long as the market contained fifteen or more commercial stations and so long as the radio combinations did not exceed a designated audience share. In smaller markets, the 1992 amendments permitted a single entity to own three radio stations, no more than two of which could be in the same service. Revision of Radio Rules and Policies, Report and Order, 7 F.C.C.R. 2755, 2757–61 ¶¶ 4–12 (1992) [hereinafter Radio Rules and Policies]. The FCC also initiated proceedings to revisit the rules with respect to television. *See* Broadcast Services, 60 Fed. Reg. 6,490 (F.C.C. Feb. 2, 1995) (further notice of proposed rulemaking). Television Broadcast Services; Video Marketplace, 57 Fed. Reg. 28,163 (F.C.C. June 24, 1992) (notice of proposed rulemaking); Broadcast and Cable Services, Effect of Changes in the Video Marketplace, 56 Fed. Reg. 40,847 (F.C.C. Aug. 16, 1991) (notice of inquiry).

78. *See* US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1995), *vacated and remanded*, 516 U.S. 1155 (1996); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996); S. New England Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civ. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994). *See generally* Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1018–24 (1997) (reviewing these cases).

79. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (repealing 47 U.S.C. § 533(b) (1994)).

80. Specifically, the Act substantially relaxed the one-to-a-market rule with respect to radio. *Id*. § 202(b), 110 Stat. at 110. It also directed the FCC to conduct a proceeding to determine whether to retain, modify, or eliminate the duopoly rule with respect to television. *Id*. § 202(c)(2), 110 Stat. at 111. It expanded a presumptive waiver to the radio/television crossownership rule for the top twenty-five markets discussed above, *supra* note 70, to cover the top fifty markets. § 202(d), 110 Stat. at 111. The

addition, Congress directed the FCC to create a biennial review process in which it would revisit all of its ownership rules every two years to "determine whether any of such rules are necessary in the public interest as a result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest."[81] The FCC amended a number of its rules during its initial biennial review, but left many others in place.[82] This was followed by a pair of decisions issued by the D.C. Circuit in 2002 striking down the FCC's refusal to revisit the cable/broadcast crossownership[83] and the revised duopoly rules.[84]

Judicial invalidation of these ownership restrictions prompted the FCC to undertake a massive reassessment of the regulations as part of its 2002 biennial review proceeding. Rejecting calls for repeal of most of its ownership rules, the FCC instead replaced the hodgepodge of local ownership rules with a new, integrated approach based on a "diversity index" designed to take into account all media when assessing the overall competitiveness of the local market.[85] The FCC supplemented the traditional concerns of competition and diversity of viewpoints[86] with one additional policy consideration that was often asserted in connection with television and radio policy, but had not previously been invoked with

Act also repealed the statutory provision prohibiting cable/telephone company crossownership. *Id*. § 302(b)(1), 110 Stat. at 124. It also repealed the provision codifying the cable/broadcast crossownership rule. *Id*. § 202(i), 110 Stat. at 112. Repealing the statutory ban on cable/broadcast crossownership left in place the parallel regulatory requirement imposed by the FCC. *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1035 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

81. Telecommunications Act of 1996, § 202(h), 110 Stat. at 111–12.

82. Review of the Commission's Regulations Governing Television Broadcasting, 64 Fed. Reg. 50,651 (F.C.C. Sept. 17, 1999) (final rule). Of particular note is the manner in which the FCC relaxed the one-to-a-market rule and the duopoly rule for television. In each case, the FCC incorporated an "independent voices" test into the rule that allowed a greater degree of crossownership if a sufficient number of independent ownership groups remained after the merger. There was one key difference between the two independent voices tests devised by the FCC. With respect to the duopoly rules, the FCC took an expansive view of what constituted an independent voice, including other media such as radio stations, daily newspapers, and local cable systems. *Id*. at 50,659–60. The Commission took a much narrower approach when determining what constituted an independent voice for purposes of the one-to-a-market rule, limiting its scope only to other television stations. *Id.* at 50,655 ¶ 30.

83. *See Fox Television Stations*, 280 F.3d at 1049–52. On remand, the FCC declined the opportunity to attempt to generate an alternative justification for the rule and instead simply repealed it. 2003 Biennial Review Order, *supra* note 3, at 13,620. The D.C. Circuit also invalidated the FCC's national television station ownership rule. *Fox Television Stations*, 280 F.3d at 1040–47. As that rule is primarily vertical, rather than horizontal, in focus, it is discussed *infra* notes 171–172 and accompanying text.

84. *See* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 162–65 (D.C. Cir. 2002).

85. 2003 Biennial Review Order, *supra* note 3, at 13,775–807 ¶¶ 391–481.

86. *Id.* at 13,627–43 ¶¶ 18–72.

respect to horizontal ownership restrictions: localism.[87] Interestingly, in each instance, the FCC concluded that relaxation of the horizontal ownership restrictions would have no adverse impact on the responsiveness of media outlets to the needs and interests of their local communities.[88] Unlike vertical integration, which can give national networks the power to dictate local programming decisions, horizontal integration has no effect on localism, since the locus of programming decisions remains within the community.[89] In many cases, the record suggested that permitting greater horizontal concentration would actually promote localism by allowing media outlets to realize the efficiencies associated with crossownership.[90]

Shortly after the issuance of the biennial review order, the Third Circuit issued a stay preventing it from going into effect pending judicial review.[91] The court, somewhat remarkably, held that it could ignore the traditional requirement that the party seeking the stay demonstrate a likelihood of success on the merits—generally regarded as one of the standard requirements for the grant of a stay—if the issues were sufficiently complex and the hardships sufficiently severe.[92] The Third Circuit subsequently remanded the changes to the horizontal ownership restrictions that would have been effected by the biennial review order.[93]

1. The Complex Relationship Between Market Concentration and Program Diversity

There is general agreement that horizontal concentration affects program diversity, although theorists differ as to the precise nature of the relationship. On the one hand are commentators who are largely critical of increases in media concentration and warn that the likely result will be a reduction in the quantity and diversity of media content.[94] On the other

87. *Id.* at 13,643–45 ¶¶ 73–79. *See also id.* at 13,738 ¶ 304 (noting that the FCC had not previously emphasized localism as a justification for restricting the number of radio stations one entity could own in any one locality).

88. *See id.* at 13,737–38 ¶¶ 302–304, 13,753–54 ¶ 342, 13,772–73 ¶ 383.

89. *Id.* at 13,738 ¶ 304.

90. *See id.* at 13,678–85 ¶¶ 155–169, 13,753–60 ¶¶ 342–354, 13,772–73 ¶¶ 382–385; *infra* Part I.C.2.

91. Prometheus Radio Project v. FCC, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003).

92. *Id.* at *1 (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

93. Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (affirming the FCC's power to regulate ownership restrictions, but remanding several portions of the order as not sufficiently supported by the record).

94. *See, e.g.*, BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (6th ed. 2000); EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 3–

hand are scholars who adopt the less intuitive position that increases in market concentration can promote program quality and diversity.[95] This section outlines a more complex approach that captures the nuances of both positions. As with most economic issues, the truth lies somewhere in between.

a. Steiner Models

Reconciliation of these two divergent inferences requires an understanding of how it is possible for media monopolies to produce greater program diversity than competitive markets. The argument has its roots in the model of local radio markets proposed by Peter Steiner,[96] which has subsequently been adapted to the television industry[97] and which has gained substantial attention from courts,[98] commentators,[99] and the FCC.[100]

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14 (1988); Baker, *Media Concentration*, *supra* note 11; Krotoszynski & Blaiklock, *supra* note 11, at 832–34, 859–80.

95. For my initial review of this literature, see Yoo, *supra* note 17, at 1935–48. For other surveys, see BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 64–100, 141–44 (1992); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 304–17 (1991).

96. Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952).

97. *See* Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15 (1977); Jerome Rothenberg, *Consumer Sovereignty and the Economics of TV Programming*, 4 STUD. PUB. COMM. 45, 47–48 (1962); P. Wiles, *Pilkington and the Theory of Value*, 73 ECON. J. 183 (1963).

98. *See* Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1054–55 (7th Cir. 1992).

99. *See, e.g.*, Benjamin, *supra* note 11, at 97 n.278; Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 94–95 (2001); Daniel L. Brenner, *Government Regulation of Radio Program Format Changes*, 127 U. PA. L. REV. 56, 63–69 (1978); Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1448, 1491 (1996); Krotoszynski & Blaiklock, *supra* note 11, at 868 & n.366; Spitzer, *supra* note 95, at 305–12.

100. *See* 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, Notice of Proposed Rule Making, 17 F.C.C.R. 18,503, 18,530 ¶ 82 & n.159 (2002); Revision of Radio Rules and Policies, Second Memorandum Opinion and Order, 9 F.C.C.R. 7183, 7186 ¶ 21 (1994). *See also* 2003 Biennial Review Order, *supra* note 3, at 13,740–42 ¶¶ 310–15 (discussing Steiner); Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, 10 F.C.C.R. 3524, 3550–51 ¶¶ 62–63 (1995) (same); Revision of Radio Rules and Policies, Notice of Proposed Rule Making, 6 F.C.C.R. 3275 (1991) (same); Reexamination of the Commission's Cross-Interest Policy, Policy Statement, 4 F.C.C.R. 2208, 2212 ¶ 30 (1989) (same); Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, Second Report and Order, 50 F.C.C.2d 829, 894 (1975) (Robinson, Comm'r, dissenting) (same). *But see* 2003 Biennial Review Order, *supra* note 3, at 13,742 ¶ 314 (declining to embrace Steiner's model).

The counterintuitive nature of Steiner's argument can best be understood through a simple numerical example. Steiner assumed that the preferences of an audience in a particular local market could be divided into four discrete program formats of the following sizes:

FIGURE 1. Steiner's model of program diversity

	Program format			
	Type 1	Type 2	Type 3	Type 4
Audience size	210	75	50	31

The first station to enter the market would naturally offer programming targeted at the largest segment, Type 1. The second entrant would face a choice of either offering programming targeted toward the second largest segment, Type 2, in which case it would capture an audience of 75, or duplicating the same type of programming offered by the first entrant, in which case it would split the Type 1 audience with the first entrant and capture an audience of 105. So long as half of the largest segment exceeds the size of the second largest segment, the second entrant will duplicate existing programming format.

The problem, from a welfare standpoint, is that the entire volume captured by the second entrant consists of audience members who were already being served by the first (an effect sometimes called "demand diversion"). Because the first entrant was already serving these listeners, entry by the second station creates no welfare benefits. If the second entrant had instead offered Type 2 programming, its audience would have consisted entirely of incremental listeners who were not previously being served by the incumbent (an effect sometimes called "demand creation"). Thus, to the extent that the audience captured by a new entrant results from demand creation, entry is welfare enhancing. To the extent that the new entrant's audience results solely from demand diversion, it creates no consumer benefits and instead simply wastes resources.

Steiner recognized that competitive entrants would target their programming without taking into account whether the audience it captured was the product of demand creation or demand diversion. As a result, they may offer redundant programming notwithstanding the fact that doing so creates no welfare benefits. In addition, to the extent that channel capacity is limited, duplication of existing formats tends to crowd out other program types.[101] This logic suggests that a third entrant would offer programming targeted toward Type 2,[102] while a fourth entrant would again duplicate Type 1 programming.[103] Type 3 programming would not appear until the arrival of the sixth station, and Type 4 until the arrival of the tenth.[104]

The tendency toward duplication of program types disappears, however, if the entrants are jointly owned.[105] Unlike a competitive entrant, a monopolist would consider whether the revenue captured by an additional station resulted from demand creation or from demand diversion. In fact, a monopolist controlling all stations would focus solely on generating new audiences and would eschew any strategy that simply cannibalized listeners from its other stations.

Stated in the terms of the numerical hypothetical described above, if the initial two entrants were jointly owned, the owner would not use both stations to target Type 1, since the audience captured by the second station would come entirely at the expense of the first. Instead, the owner would direct each successive station at a different market segment. Thus, Steiner was able to show that, under his assumptions, monopoly control of a local radio market can satisfy more viewers and yield greater program diversity than can competition.[106]

Steiner's analysis also has implications for program quality. In the case of competitive entry, multiple entrants divide the revenue generated by any particular program type. In the case of monopolistic control of a local radio market, each audience segment is served by precisely one station. Therefore, each station under the monopoly solution will capture more revenue than under competition. To the extent that quality correlates with program cost, monopoly provision should cause program quality to increase.[107]

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101. *See* Beebe, *supra* note 97, at 23, 30–31; Rothenberg, *supra* note 97, at 48.

102. The third entrant would find that the size of the second largest segment (75) exceeds the audience it would capture if it divided the largest segment with the two other entrants (70).

103. The fourth entrant would find that one-third of the Type 1 audience (70) would still be larger than half of the Type 2 audience (37.5) or the entirety of the Type 3 audience (50).

104. *See* Steiner, *supra* note 96, at 200.

105. *See id.* at 206–07; Wiles, *supra* note 97, at 188.

106. Steiner, *supra* note 96, at 206–07.

107. *See* OWEN & WILDMAN, *supra* note 95, at 144–48. The extent to which increased revenue will result in increased expenditures on programming depends on the elasticity of demand. Bruce Owen and Steven Wildman note the theoretical possibility that competitive entry might stimulate the production of higher-quality programming. *See id.* at 85. In either scenario, governmental restrictions on horizontal concentration would have a direct impact on program quality.

b. Limitations of Steiner Models

Steiner models suffer from a number of limitations, some well recognized, other less so. Theorists building on Steiner's work have pointed out that the correlation between monopoly and program diversity that he found depends on a host of assumptions: the particular skewness found in the distribution of demand, the willingness of audiences to view second-choice programming, the magnitude and variability of program cost, and the availability of excess channel capacity.[108] These limitations have been analyzed elsewhere[109] and those arguments will not be repeated here.

Other fundamental limitations to Steiner's analysis have largely gone unnoticed. For example, his approach necessarily presupposes that programming can be segregated into one of several discrete formats.[110] Experience has shown that radio and television programming defies easy categorization. Consider the popular "oldies" radio format that, in a fairly short period, multiplied from one format to several, as different stations targeted listeners of different ages. The FCC has recognized that radio and television formats are far too dynamic and varied to be classified in such a simple, categorical manner, and the Supreme Court has given its blessing to this conclusion.[111]

Equally problematic is Steiner's assumption that entry by an additional station into an occupied format simply duplicates existing programming.[112] In effect, he assumes that, within any particular format, programming is completely fungible. The most casual perusal of the radio market falsifies this assumption—the popularity of radio stations offering the same format category varies widely.[113] Stations that appear to be offering the same type of programming typically provide very different levels of utility to listeners. This suggests that program types might be better understood not as falling into discrete categories, but rather as occupying a position along a spectrum of program characteristics. Revising the model of program selection in this manner would call into question the

108. *See* Beebe, *supra* note 97, at 23–31; Rothenberg, *supra* note 97, at 49–50.

109. *See* Yoo, *supra* note 17, at 1938–42.

110. For similar efforts, see Edward Greenberg & Harold J. Barnett, *TV Program Diversity—New Evidence and Old Theories*, 61 AM. ECON. REV. 89, 90 (1971); Levin, *supra* note 29, at 84–87.

111. *See* Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order, 60 F.C.C.2d 858, 861–63 ¶¶ 11–15 (1976) [hereinafter Format Policy Statement], *aff'd sub nom.* FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

112. *See* Steiner, *supra* note 96, at 199. *See also id.* at 206 (relaxing this assumption).

113. *See* Format Policy Statement, *supra* note 111, at 863–64 ¶ 18.

assumption that duplication of an existing program type by a new entrant necessarily yields no welfare benefit, since it remains possible that a new entrant might attract new listeners or provide greater satisfaction to members of the audience who were already listening.[114]

Finally, Steiner's approach measured welfare through a voting model that simply counted the number of viewers in any audience.[115] The inability of such voting-oriented models to take intensity of preferences into account limits their ability to assess economic welfare properly.[116] In addition, omitting any aspect of price competition eliminates the possibility that welfare gains created by increased program diversity might be offset by welfare losses incurred through the exercise of oligopoly power in a concentrated market. Although Steiner's voting model might have made sense at a time when radio broadcasters could not typically charge for their programs,[117] it makes less sense in a world in which fee-based radio and television services are a reality.

These weaknesses of the Steiner model indicate that local media markets might be better analyzed under the more general model of spatial competition pioneered by Harold Hotelling. This model assumes that producers compete by occupying a position along a continuous product spectrum, rather than by placing themselves into one of a discrete number of product categories.[118] The legal literature[119] and the FCC have largely overlooked these models.[120]

I hope to offer a more complete application of spatial competition models to the FCC's media ownership regulations in my future work. For

114. *See* Steiner, *supra* note 96, at 204.

115. *See id.* at 196–97.

116. *See id.* at 197.

117. *See id.* at 198.

118. *See* Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929). For a general introduction to spatial competition models, see Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 241–46 (2004). For applications to television programming, see Eli M. Noam, *A Public and Private-Choice Model of Broadcasting*, 55 PUB. CHOICE 163 (1987); Alessandro Vaglio, *A Model of the Audience for TV Broadcasting: Implications for Advertising Competition and Regulation*, 42 RIVISTA INTERNAZIONALE DI SCIENZE ECONOMICHE E COMMERCIALI 33 (1995); David Waterman, *Diversity and Quality of Information Products in a Monopolistically Competitive Industry*, 4 INFO. ECON. & POL'Y 291 (1991).

119. The only discussion of any significance appearing in the law review literature is Spitzer, *supra* note 95, at 314–16.

120. The only FCC reference to this literature of which I am aware is the bare citation of a paper by Richard Schmalensee that employed a spatial competition model. *See* Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, 10 F.C.C.R. 3524, 3551 n.81 (1995).

now, it suffices to note that spatial models suggest that the relationship between horizontal concentration and welfare may be more complex than Steiner's model suggests. First, Hotelling-style spatial competition acknowledges that entry by a similar product can yield welfare benefits, both by capturing incremental demand and by allowing some audience members who were already viewing to consume programming that offers a better fit with their ideal preferences. These models also reflect how joint ownership can cause welfare to increase by inducing firms to pay attention to whether their revenue is the product of demand creation or demand diversion.[121] Finally, the more sophisticated spatial models take into account the fact that any economic benefits resulting from a monopolist's refusal to duplicate existing programming must be offset by the welfare losses associated with the reduction in price competition.[122]

Spatial models thus provide reason to be somewhat skeptical of Steiner's simplistic conclusion that market concentration necessarily promotes greater program variety as well as the supposition advanced by many commentators that media concentration invariably reduces the diversity of media content.[123] Although monopolists' unwillingness to cannibalize audiences from their own stations may tend to promote product diversity, their willingness to withdraw stations from the market and their tendency to charge supercompetitive prices works in the opposite direction.

Which of these two countervailing effects dominates is an empirical question that cannot be determined a priori. Formal models have shown that either too much or too little program diversity may exist in equilibrium and that monopoly may or may not produce greater program diversity or generate greater economic benefits.[124] Attempts to resolve this question empirically have yielded mixed results. While one leading study concluded that increases in horizontal concentration in local radio markets tended to

121. *See* JOHN BEATH & YANNIS KATSOULACOS, THE ECONOMIC THEORY OF PRODUCT DIFFERENTIATION 57 (1991); Severin Borenstein, *Price Discrimination in Free-Entry Markets*, 16 RAND J. ECON. 380, 388–89 (1985); Roger W. Koenker & Martin K. Perry, *Product Differentiation, Monopolistic Competition, and Public Policy*, 12 BELL J. ECON. 217, 226–27 (1981); N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. ECON. 48, 49, 52, 54–55 (1986).

122. *See* JEFFREY CHURCH & ROGER WARE, INDUSTRIAL ORGANIZATION 395–404 (2000); B. Curtis Eaton & Myrna Holtz Wooders, *Sophisticated Entry in a Model of Spatial Competition*, 16 RAND J. ECON. 282 (1985); Steven C. Salop, *Monopolistic Competition with Outside Goods*, 10 BELL J. ECON. 141, 143–45 (1979).

123. *See supra* note 94 and accompanying text.

124. *See* ANDERSON & COATE, *supra* note 42, at 19–23.

increase program diversity,[125] other studies have confirmed the tendency toward duplication and underscored the critical role played by channel capacity.[126] Yet another study of the television industry focusing on product differentiation concluded that program variety approached optimal levels,[127] while another study of the radio industry found excess entry.[128] Still other studies have drawn somewhat different conclusions.[129]

Fortunately, for the purposes of this Article, the precise relationship between market concentration and program diversity need not be resolved. It is sufficient to show that a relationship does exist, even if the direction and magnitude of the effect remain somewhat uncertain.[130] This relationship reveals that the degree of horizontal concentration permitted under current media ownership regulations will have a direct impact on media content.

2. The Role of Efficiencies from Horizontal Integration

Horizontal integration also affects program diversity by allowing media groups to realize cost efficiencies. Horizontal integration enables entities that own multiple stations to economize on costs, which in turn can support increases in the quantity, quality, and diversity of programming

125. *See* Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q.J. ECON. 1009 (2001).

126. *See* August E. Grant, *The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television*, 7 J. MEDIA ECON. 51, 62 (1994); Robert P. Rogers & John R. Woodbury, *Market Structure, Program Diversity, and Radio Audience Size*, 14 CONTEMP. ECON. POL'Y 81 (1996).

127. *See* Ronald L. Goettler & Ron Shachar, *Spatial Competition in the Network Television Industry*, 32 RAND J. ECON. 624 (2001).

128. *See* Steven T. Berry & Joel Waldfogel, *Free Entry and Social Inefficiency in Radio Broadcasting*, 30 RAND J. ECON. 397 (1999). This study acknowledged, however, that the radio industry is somewhat unusual in that it serves two different groups of customers—advertisers and listeners—only one of which (advertisers) is able to make direct payments for programming. What appears to be excess entry when measured solely in terms of benefits to advertisers may in fact be efficient when measured in terms of both advertisers and listeners. *Id.* at 412–14.

129. *See* 2003 Biennial Review Order, *supra* note 3, at 13,740–42 ¶¶ 310–315 (reviewing the literature).

130. As Professor Baker points out, my conclusion that horizontal concentration has an ambiguous impact on media content is not completely consistent with my overarching claim that the forms of architectural censorship I have identified reduce the quantity, quality, and diversity of media programming. *See* Baker, *supra* note 13, at 739–740. I concede that my attempt to reduce the central thesis of this Article into a pithy catchphrase represents something of an overstatement in this limited respect. That said, I do believe that my summation does accurately reflect the negative impact that the other forms of architectural censorship I have identified have on media content. Furthermore, the fact remains that horizontal restrictions are having a direct effect on the content of media speech regardless of the direction of the effect. The fact that governmental actions are altering program content should raise First Amendment concerns regardless of the precise nature of the effect.

offered by allowing the media industry to invest a larger proportion of its revenue in program production. The FCC has repeatedly recognized that local crossownership provides precisely these benefits by allowing the station owner to combine administrative, programming, sales, marketing, promotion, and production costs.[131] Indeed, some data suggest that crossownership can reduce the cost of these functions by 30% to 35%.[132]

In addition, crossownership can help newspapers realize more efficient use of their efforts to collect local news. Like all forms of television and radio programming, local news bears many of the classic indicia of a pure public good. In particular, consumption of local news is nonrivalrous, in that consumption of it by one person does not reduce the supply available for others. In economic terms, this is usually modeled by assuming that once a media entity has incurred the fixed costs associated with gathering the news, the marginal cost of sharing with others is zero. Thus, once the costs of collecting the local news have been incurred, economic success depends on disseminating that information to as many paying customers as possible.[133] Thus, as a theoretical matter, the greater return on investment made possible by crossownership may enable media outlets to provide more diverse programming.[134] Empirical studies have largely borne this out.[135]

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131. *See* Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, 14 F.C.C.R. 12,903, 12,920–22 ¶¶ 34–36 (1999); Radio Rules and Policies, *supra* note 77, at 2760–61 ¶ 11, 2774 ¶ 37; 1989 Second Multiple Ownership Order, *supra* note 77, at 1746–47 ¶¶ 39–51; 1989 Multiple Ownership Order, *supra* note 74, at 1727 ¶ 36.

132. Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Notice of Proposed Rulemaking, 2 F.C.C.R. 1138, 1140–41 ¶ 20 (1987).

133. *See* Yoo, *supra* note 18, at 1657–59.

134. *See* 2003 Biennial Review Order, *supra* note 3, at 13,678 ¶¶ 155–156, 13,753–61 ¶¶ 342–358, 13,772–73 ¶¶ 382–385; 1989 Second Multiple Ownership Order, *supra* note 77, at 1747 ¶ 44.

135. *See* John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. MEDIA ECON. 63 (1988); Robert B. Ekelund, Jr., George S. Ford & Thomas Koutsky, *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J.L. & ECON. 157, 180 (2000); 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 (2001). These studies largely corroborated earlier research finding that media ownership had little to no impact on the diversity of program content. *See* 1975 Multiple Ownership Order, *supra* note 71, at 1073 ¶ 97 (noting that empirical studies of the impact of ownership on content were "inconclusive"); WALTER S. BAER, HENRY GELLER, JOSEPH A. GRUNDFEST & KAREN B. POSSNER, CONCENTRATION OF MASS MEDIA OWNERSHIP: ASSESSING THE STATE OF CURRENT KNOWLEDGE 121–40 (1974) (surveying the empirical literature and concluding that crossownership plays a "minor role, if any" in influencing media content); STANLEY M. BESEN & LELAND L. JOHNSON, REGULATION OF MEDIA OWNERSHIP BY THE FEDERAL COMMUNICATIONS COMMISSION: AN ASSESSMENT 28–31, 52, 57–59 (1984) (reviewing the empirical literature and concluding that crossownership has no clear impact on program diversity); Benjamin M. Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755, 770 (1995) ("Multiple studies have concurred that

It is thus clear that the degree of horizontal integration permitted can have a fairly dramatic impact on the quantity, quality, and diversity of speech. Horizontal ownership restrictions represent a little-recognized, but important, form of architectural censorship.

D. Restrictions on Vertical Integration

The FCC has long been concerned that vertical integration in the radio and television industry would harm competition.[136] The focus has been on whether vertical integration or vertical contractual agreements can allow a firm to use a dominant position in one market (called the primary market) to harm competition in another market (called the secondary market). These concerns animated the FCC's first major regulatory initiative, commonly known as the Chain Broadcasting Rules. The Rules were driven by the belief that the then-existing triopoly of radio networks was hindering the emergence of competition from new networks[137] and was inhibiting local control of the programming carried by any particular station.[138] As a result, the Chain Broadcasting Rules strictly limited radio networks' ability to own broadcast stations[139] and restricted the networks' ability to use affiliation agreements to limit the autonomy of local stations.[140] The Supreme Court sustained the Rules in the seminal decision on broadcast regulation, *NBC v. United States*.[141] The FCC subsequently extended the Chain Broadcasting Rules to television in 1946.[142] In time, the FCC would

programming differences related to group ownership are mixed and, even at that, are quite small." (footnote omitted)).

136. For a more detailed review of the history and theory of the FCC's regulation of vertical integration in the television industry, see Yoo, *supra* note 45, at 181–248. The primary focus of this discussion is downstream vertical integration by television and radio networks. It bears mentioning that at times the FCC has also regulated upstream vertical integration by networks into program supply. For critiques of the now-notorious and defunct "prime time access rule" ("PTAR") and the financial interest and syndication rules ("finsyn"), see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 72–74, 99–100 (1994); Chen, *supra* note 99, at 1454–58.

137. *See* FED. COMMUNICATIONS COMM'N, *supra* note 13, at 51, 59, 66.

138. *Id.* at 64–65.

139. Specifically, the FCC prohibited networks from owning more than one station in any market and from owning any stations in markets in which competition was substantially restrained. *See id.* at 92, *repealed in part by* Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, 10 F.C.C.R. 4538, 4540 ¶ 10 (1995) [hereinafter 1995 Chain Broadcasting Order]. This rule was overshadowed by the national television station ownership limits discussed below.

140. FED. COMMUNICATIONS COMM'N, *supra* note 13, at 51–66.

141. NBC v. United States, 319 U.S. 190 (1943).

142. Amendment to Part 3 of the Commission's Rules, 11 Fed. Reg. 33 (F.C.C. Jan. 1, 1946).

repeal them with respect to radio[143] and roll back some of the restrictions with respect to television as well.[144] Certain television-related provisions still remain in effect.[145]

Congress has also taken steps to limit vertical integration in the cable industry.[146] The "channel occupancy" provision authorized the FCC to limit the channel capacity that cable operators could devote to their vertically affiliated networks.[147] Congress also enacted a series of access requirements designed to protect against the dangers of vertical integration. For example, the leased access provision requires all cable systems with more than thirty-five channels to set aside part of their channel capacity for use by unaffiliated programmers.[148] The program access provisions prevent vertically integrated programmers from discriminating against unaffiliated operators[149] or from entering into exclusive dealing contracts.[150] Most importantly, Congress enacted the must-carry provisions, requiring cable operators to provide free carriage to all full-power television stations broadcasting in their service area.[151] Although enacted in part to preserve

143. Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, Report, Statement of Policy, and Order, 63 F.C.C.2d 674 (1977).

144. *See* 1995 Chain Broadcasting Order, *supra* note 139; Review of Rules and Policies Concerning Network Broadcasting by Television Stations: Elimination or Modification of Section 73.658(c) of the Commission's Rules, Report and Order, 4 F.C.C.R. 2755 (1989).

145. *See* 47 C.F.R. § 73.658 (2004). A proposal to repeal these remaining restrictions has been pending without action since 1995. *See* Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, Notice of Proposed Rule Making, 10 F.C.C.R. 11,951 (1995).

146. Even before Congress acted, the FCC placed some limits on vertical integration in the cable industry when it promulgated regulations prohibiting national television networks from holding ownership stakes in cable operators. *See* Community Antenna Order, *supra* note 72, at 821 ¶ 15. The FCC relaxed this restriction in 1992. *See* Order to Eliminate the Prohibition on Common Ownership, *supra* note 77. Congress abolished it altogether in 1996. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(f)(1), 106 Stat. 56, 111.

147. 47 U.S.C. § 533(f)(1)(B) (2000). The FCC set this limit at 40% of the operators' channel capacity. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 F.C.C.R. 8565, 8592–96 ¶¶ 64–70 (1993). The channel occupancy limit applied only to the first seventy-five channels of any cable operator's capacity. Channel capacity in excess of seventy-five channels was not subject to the limit. *Id*. at 8601–02 ¶ 84. The D.C. Circuit overturned the 40% limit. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1137–39 (D.C. Cir. 2001).

148. The amount of channel capacity that must be set aside varies from 10% to 15%, depending on the size of the cable operator. 47 U.S.C. § 532(b)(1). Enactment of this statute overturned a previous Supreme Court decision holding that the FCC lacked the authority to mandate leased access. *See* FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

149. 47 U.S.C. § 548(c)(2)(B).

150. *Id.* § 548 (c)(2).

151. *Id.* §§ 534, 535.

horizontal competition in local advertising markets,[152] must-carry was also intended to guard against vertical integration.[153]

In addition, the FCC has historically limited the number of television and radio stations that any one entity can own nationwide.[154] It justified these restrictions with the need to foster competition,[155] the need to promote a diversity of sources,[156] and the desire to encourage local initiative.[157] Congress eventually eliminated the national station ownership limits for radio and amended the national television station ownership limit to permit ownership of any number of television stations reaching less than 35% of the national audience.[158] Congress also passed legislation authorizing the FCC to establish a limit on the number of cable subscribers

152. *See Turner II*, 520 U.S. 180, 200–01 (1997).

153. *See id*. at 198–99 (justifying must-carry in part on testimony indicating that vertical integration gives "cable operators . . . an incentive to drop local broadcasters and to favor affiliated programmers"). *See also* Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1460–61 (codified as amended at 47 U.S.C. §§ 534–535) (finding that vertical integration in the cable industry has given "cable operators . . . the incentive and ability to favor their affiliated programmers" and "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems"); S. REP. NO. 102-92, at 25 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 (noting that "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services" and might lead a cable operator to refuse to carry unaffiliated programmers).

154. The FCC initially set the national cap for television at three stations. *See* Rules and Regulations Governing Experimental Television Broadcast Stations, § 4.226, 6 Fed. Reg. 2283, 2284–85 (F.C.C. May 6, 1941). The national cap for radio was set at five stations. *See* Multiple Ownership, 9 Fed. Reg. 5442 (F.C.C. May 23, 1944). By 1954, a series of subsequent amendments eventually turned both the national radio and television station ownership limits into what became known as a "Rule of Seven." *See* 1953 Multiple Ownership Order, *supra* note 13, at 291 (limiting any one owner to five television stations and seven radio stations nationwide); Amendment of Multiple Ownership Rules, Report and Order, 43 F.C.C. 2797 (1954) (increasing the national limit for television from five to seven stations so long as two stations were UHF). The Rule of Seven was sustained against a judicial challenge by the Supreme Court. *See* United States v. Storer Broad. Co., 351 U.S. 192 (1956). The limit was later liberalized into a "Rule of Twelve." *See* Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 & 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM & Television Broadcast Stations, Report and Order, 100 F.C.C.2d 17 (1984) [hereinafter 1984 Multiple Ownership Order] (authorizing group ownership of up to twelve stations), *on reconsideration*, 100 F.C.C.2d 74 (1985) (adding the additional requirement that the twelve-station group reach no more than 25% of the national audience).

155. *See Storer Broad*., 351 U.S. at 203 (concluding that the FCC's public interest mandate requires it to "assure fair opportunity for open competition in the use of broadcasting facilities"); 1984 Multiple Ownership Order, *supra* note 154, at 38–46 ¶¶ 64–86, 50–51 ¶¶ 97–99

156. *See Storer Broad*., 351 U.S. at 203; 6 FCC ANN. REP. 68 (1941); 1984 Multiple Ownership Order, *supra* note 154, at 24–38 ¶¶ 24–63.

157. *See* 6 FCC ANN. REP. 68 (1941).

158. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c), 110 Stat. 56, 110 (codified as amended at 47 C.F.R. § 73.3555(b) (2004)).

that any one company can reach nationwide.[159] The FCC eventually set that limit at 30%.[160]

The first round of judicial challenges to these provisions proved unsuccessful.[161] More recent decisions have exhibited the courts' greater willingness to invalidate vertical ownership restrictions. In *Time Warner Entertainment Co. v. FCC*,[162] the D.C. Circuit invalidated the 30% cable subscriber limit set by the FCC based on a failure to implement the provision in the manner prescribed by Congress.[163] The court also struck down the FCC's channel occupancy limit on First Amendment grounds.[164] Furthermore, in *Fox Television Stations, Inc. v. FCC*,[165] the D.C. Circuit overturned the FCC's decision not to eliminate the national television station ownership cap during its first biennial review.[166] The court held that refusal to repeal the rule violated both the Administrative Procedure Act and the FCC's obligation under the Telecommunications Act of 1996 to "repeal or modify any regulation it determines to be no longer in the public

159. *See* 47 U.S.C. § 533(f)(1)(A) (2000).

160. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 F.C.C.R. 8565, 8576–79 ¶¶ 24–29 (1993) (setting this limit at 30% of all nationwide subscribers). Cable systems were allowed to reach up to 35% of nationwide cable homes provided that such additional cable systems were minority-controlled. *Id.* at 8578–79 ¶ 28. After seeking additional comment, the FCC subsequently reaffirmed these limits. *See* Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 F.C.C.R. 14,462, 14,467–83 ¶¶ 9–51 (1998); Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Third Report and Order, 14 F.C.C.R. 19,098, 19,113–27 ¶¶ 36–70 (1999).

161. *See Turner II*, 520 U.S. 180 (1997) (sustaining must-carry against a facial challenge); Time Warner Entm't Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) (sustaining the subscriber limit and the channel occupancy provision against a facial challenge); Time Warner Entm't Co. v. FCC, 93 F.3d 957, 967–71, 977–79 (D.C. Cir. 1996) (sustaining the leased access and vertically integrated programmer provisions against a facial challenge). Interestingly, the district court did initially sustain a facial challenge to the subscriber limit provision, only to see its decision overturned on appeal. *See* Daniels Cablevision, Inc. v. United States, 835 F. Supp 1, 10 (D.D.C. 1993), *rev'd sub nom.* Time Warner Entm't Co. v. FCC, 211 F.3d at 1316–20.

162. Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001).

163. *Id.* at 1133–36.

164. *Id.* at 1137–39. Interestingly, the distinction seems to turn on the fact that *Sinclair Broadcasting Group* and *Fox Television Stations* involved broadcasting and thus were only held to rational basis scrutiny, whereas *Time Warner* involved regulation of the cable industry and thus was held to intermediate scrutiny. On the problematic nature of this distinction, see *infra* Part II.C.

165. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

166. *See* 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Biennial Review Report, 15 F.C.C.R. 11,058, 11,072–75 ¶¶ 25–30 (2000).

interest."[167] The FCC responded by revising the national television station ownership rule to permit companies to own any number of stations so long as the station group could reach no more than 45% of the nation's television households.[168] Again, the FCC analyzed the issues in terms of the policy goals of competition, diversity, and localism, placing primary reliance on localism considerations.[169] The ensuing controversy over the decision led Congress to enact legislation setting the national television station ownership cap at 39% and exempting the restriction from mandatory periodic review by the FCC.[170]

The national television station ownership and cable subscriber limits are often misconstrued as being horizontal in focus.[171] Properly evaluated, horizontal restrictions bar mergers among direct competitors who would otherwise be serving the same customers. In the case of U.S. media regulation, excess horizontal concentration is prevented by the rules prohibiting crossownership of media outlets in the same city described in the preceding subsection. The national television station ownership and cable subscriber limits are more properly regarded as prohibiting joint ownership of television stations or cable systems in different cities. Even though these jointly owned properties occupy the same product market, their geographic markets are distinct, and thus they do not compete with one another. In other words, allowing a television station operating in New York City to merge with one operating in Los Angeles does not involve a merger between direct competitors and does not have any impact on options available to any viewer.

Although group ownership of broadcast stations does not enhance horizontal market power with respect to viewers, it may enhance vertical market power by increasing the group's bargaining leverage with respect to networks and other program suppliers. As a result, the national television

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167. *Fox Television Stations*, 280 F.3d at 1040–49.

168. 2003 Biennial Review Order, *supra* note 3, at 13,842–45 ¶¶ 578–84.

169. *Id.* at 13,818–42 ¶¶ 508–578.

170. Consolidated Appropriation Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100. Setting the national television ownership cap at 39% had the practical advantage of making it unnecessary for Fox and Viacom to divest the television stations they had acquired in excess of the previous 35% cap pursuant to temporary waivers granted by the FCC. Making it possible for Fox and Viacom to retain these stations removed much of the political impetus for further liberalization of the national ownership cap.

171. *See* S. REP. NO. 102-92, at 32–33 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1165–66 (referring to the growth of multiple system operators as "horizontal integration" and "horizontal concentration"); *Turner II*, 520 U.S. 180, 197 (1997) (referring to the growth of multiple system operators as "[h]orizontal concentration"); Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1128 (D.C. Cir. 2001) (referring to the subscriber limit provision as a "horizontal" restriction).

and radio ownership restrictions are more properly regarded as protecting against vertical market power rather than horizontal market power.[172]

Concerns about vertical integration are also evident in the furor that has surrounded many recent mega-mergers in the television industry, including Disney's acquisition of ABC, Viacom's merger with CBS, Time Warner's acquisition of Turner Broadcasting, and America Online's subsequent acquisition of Time Warner. Each merger was accompanied by a spate of commentary warning of dire consequences should the mergers be permitted.[173]

1. Structural Preconditions Implicit in Vertical Integration Theory

The nature of the economic threat posed by vertical integration has long been one of the most hotly contested issues in competition policy.[174] Although proponents of the leading schools of antitrust law and economics have often disagreed sharply over the extent to which vertical integration can harm competition, they do share common ground on some basic points.[175] Both sides in the debate agree that certain structural preconditions must be satisfied before vertical integration can pose a threat to competition. All of the vertical integration models explicitly or implicitly acknowledge that the primary market must be concentrated before vertical integration can harm competition. If this precondition is not met, the allegedly anticompetitive firm has no dominant position to use as leverage. Furthermore, the secondary market must be protected by barriers to entry if attempts to reduce competition in the secondary market are to have any hope of success. In addition, even if these structural preconditions are met, both approaches acknowledge the possibility that efficiencies may exist that nonetheless make vertical integration economically desirable.

In fact, these structural preconditions have become so much a part of the conventional wisdom that they are incorporated into guidelines

172. Yoo, *supra* note 45, at 219, 222.

173. *See, e.g.*, John H. Barton, *The International Video Industry: Principles for Vertical Agreements and Integration*, 22 CARDOZO ARTS & ENT. L.J. 67 (2004); Symposium, *Viacom-CBS Merger*, 52 FED. COMM. L.J. 499 (2000); Patrick M. Cox, Note, *What Goes Up Must Come Down: Grounding the Dizzying Height of Vertical Mergers in the Entertainment Industry*, 25 HOFSTRA L. REV. 261 (1996).

174. *See, e.g.*, Andy C.M. Chen & Keith N. Hylton, *Procompetitive Theories of Vertical Control*, 50 HASTINGS L.J. 573, 575 (1999) ("Few subjects in American antitrust law have undergone as many changes and generated as much debate among economists and lawyers as the regulation of vertical arrangements.").

175. The discussion that follows draws on the more complete analysis appearing in Yoo, *supra* note 45, at 187–205.

employed by the Justice Department and the Federal Trade Commission to evaluate the impact of vertical mergers on competition.[176] These guidelines explicitly acknowledge that vertical mergers are unlikely to harm competition unless the primary market is concentrated.[177] The measure of market concentration employed by the guidelines is the Hirschman-Herfindahl Index ("HHI"), which is calculated by squaring the market share of each competitor and then summing the resulting numbers. For example, a market of four firms with market shares of 30%, 30%, 20%, and 20% would have an HHI of 2600.[178] The result is a continuum that situates the concentration of a market on a scale from 0 (in the case of complete market deconcentration) to 10,000 (in the case of monopoly). When the post-merger HHI of the primary market is below 1800, vertical integration is considered unproblematic.[179] This standard is somewhat more lenient than that applied to horizontal mergers, which are more likely to create competitive problems.[180] The D.C. Circuit recognized the importance of these structural preconditions in striking down the FCC's attempt to implement the channel occupancy provision enacted by Congress.[181]

2. Applying the Structural Preconditions to the Television Industry

Determining whether a particular market is concentrated depends on proper market definition, which in turn requires the identification of the relevant product and geographic markets. The relevant market is best understood if the television industry is viewed as the multilevel chain of

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176. U.S. DEP'T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES §§ 4.212, 4.213, 4.221, 4.24 (promulgated in 1984 and reaffirmed in 1992 and 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/2614.pdf.

177. *Id.* § 4.213.

178. $30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2600$.

179. U.S. DEP'T OF JUSTICE, *supra* note 176, § 4.213. *See also id.* § 4.131 (using the 1800 HHI threshold for determining when vertical integration can harm potential competition); *id.* § 4.221 (using the 1800 HHI threshold for determining when vertical integration can facilitate collusion).

180. *Id.* § 4.0. Unlike vertical mergers, which are thought to raise competitive problems only if the post-merger HHI exceeds 1800, horizontal mergers are open to challenge even when post-merger HHI is as low as 1000. Specifically, the Horizontal Merger Guidelines classify markets in which the post-merger HHI is between 1000 and 1800 as "moderately concentrated." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.51(b), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/ 15.html (Apr. 8, 1997). Horizontal mergers in markets that fall within this range "potentially raise significant competitive concerns" and may be subject to challenge if they increase HHI by more than 100 points. *Id.* The Horizontal Merger Guidelines treat markets in which the post-merger HHI exceeds 1800 as "highly concentrated." *Id.* § 1.51(c). In these markets, mergers that raise post-merger HHI by more than 50 points "potentially raise significant competitive concerns" and may be challenged. Mergers that raise post-merger HHI 100 points are "presumed . . . to create or enhance market power or facilitate its exercise" and are likely to be challenged. *Id.*

181. Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1138–39 (D.C. Cir. 2001).

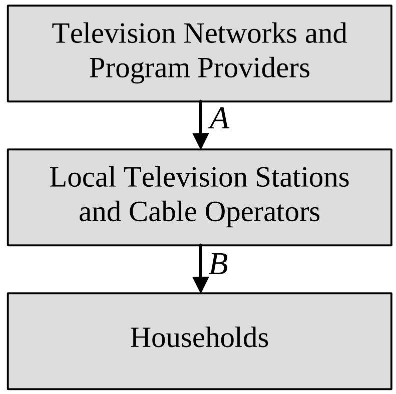
distribution depicted in Figure 2.[182] The uppermost level is occupied by the networks and movie studios that create television programs. The intermediate level is occupied by local television stations and local cable operators, who acquire programming from program suppliers and deliver them locally. The bottommost level is occupied by end users, who obtain television service from local television stations and cable operators.

Many mistakenly assume that the relevant market is the one in which households obtain television programming from broadcast stations and cable operators (denoted in the figure by the letter *B*). *B* is a local market because, until recently, households could only obtain television from an outlet located within their local community. In addition, because the number of entities from which households could obtain television programming has historically been rather limited, if this were the relevant market, it would appear to be sufficiently concentrated to make vertical integration a real anticompetitive threat.[183]

182. This is a somewhat simplified version of the description of the industry advanced in Yoo, *supra* note 45, at 182–83, 220–21. The more complex analysis presented in that paper disaggregated the first stage depicted in Figure 2 into two different stages rather than lumping program producers and television networks into the same category. Because that distinction is not as central to the argument presented here, the basic framework can be simplified in this manner without any loss of analytic power.

183. It is unclear whether this is still true. The arrival of DBS as a significant multichannel video programming distributor ("MVPD") has made the market for local delivery of television signals much more competitive. The FCC's most recent data indicate that as of June 2004, DBS had captured over 25% of the MVPD market. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, FCC 05-13, slip op. at 38–39 ¶ 54, 115 tbl.B-1 (F.C.C. Feb. 4, 2005) [hereinafter Eleventh Annual Report on Video Competition], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf. This exceeds the 15% threshold established by Congress for determining when a cable operator faces effective competition from other MVPDs. *See* 47 U.S.C. § 543(*l*)(1)(B)(ii) (2000).

FIGURE 2. Vertical chain of production in the television industry



The problem with this analysis is that limits on the number of viewers that one station or cable operator group can reach nationwide have no impact whatsoever on the degree of market concentration in any local market. This fundamental insight can be seen most clearly by conducting the following thought experiment. Suppose the FCC banned vertical integration in the television industry altogether and required every television station owner and cable operator to divest any ownership interests in any network or program supplier. Would doing so decrease the ability of television stations and cable operators to exercise market power in market *B*? Clearly, the answer is no. Market power in *B* exists by virtue of the relatively small number of options any particular household has for obtaining television service. Preventing television stations and cable operators from holding ownership interests in networks would not increase or decrease the number of those options one iota. Forcing owners of television stations and cable operators to sell their proprietary interests in television programming would have no impact on market power in market *B*.

Vertical disintegration could potentially have an impact on market *A*, the upstream market in which local television stations and cable operators meet networks and program suppliers. The economics of producing television programming (particularly the fact that it requires the incurrence of substantial up-front costs) leaves program producers vulnerable to strategic behavior by local television stations and cable operators. Restrictions on the number of television stations and cable operators one entity can own nationwide has the inevitable effect of reducing program producers' ability to use vertical integration or vertical contractual arrangements to internalize these risks.[184] In addition, the national television station ownership and cable subscriber limits also affect the relative bargaining power of the players in market *A* by ensuring that the networks and other program suppliers negotiate with station and cable operator groups that represent smaller proportions of the national audience.

The proper focus, then, is on market *A*, in which television stations and cable operators bargain with networks and program suppliers. On reflection, it becomes clear that the geographic scope of this market is national, not local. Even in the extreme case, where the local cable operator possesses monopoly power over viewers in a particular city, that operator is unlikely to be able to exert any significant market power against a television network that can reach a sufficient number of other viewers located elsewhere in the nation. A program producer cares less about whether it is able to reach viewers in any particular city and more about how much of the national market it is able to access. In other words, it is the network's national reach, not its local reach, that matters. The network would, of course, prefer to reach all viewers nationwide. That it may be unable to reach certain customers is of no greater concern than it would be to manufacturers of particular brands of cars, shoes, or other conventional goods who are unable to gain access to the entire country. Their inability to reach customers in any particular geographic area does not threaten competition so long as they are able to obtain access to a sufficient number of customers located elsewhere. The proper question is not whether local television stations and cable operators wield market power in the local market for television viewers in any particular city, but rather whether groups of television stations and local cable systems possess sufficient market power to harm competition in the nationwide market for obtaining television content.

When viewed in this manner, it becomes relatively clear that the relevant primary market (as in the national market for household delivery of television programming) is unconcentrated. Consider, for example, the current national television station ownership rule, which prohibits television station groups that can reach more than 39% of the U.S. television audience.[185] It would be a mistake to assume that this limit would permit a television station group to control 39% of the market. This is because no broadcast network is able to capture more than 15% of the

184. *See* Yoo, *supra* note 45, at 192–200, 213–17, 232–37.
185. *See supra* note 170 and accompanying text.

potential audience that it reaches.[186] Thus, even if a group were able to reach 39% of the U.S. market, it would only be able to capture less than one sixth of those viewers. Setting the national audience cap at 39% effectively guarantees that no group of television stations will control more than 6% of the national audience. In that case, there are at least sixteen independent players bidding in the national market for television programming, more than enough to ensure that the market remains competitive.[187] Indeed, these numbers suggest that there would have been little danger setting the national audience cap at the 45% level that was overturned by Congress.

Similar reasoning applies to the national cable subscriber limits. As of June 2002, no multichannel video program distributor ("MVPD") controlled more than 15% of the national market, and the HHI of the total market was 884.[188] By June 2004, Comcast's acquisition of AT&T's cable properties caused HHI to rise to 1097.[189] Even this higher number falls well below the enforcement threshold under the vertical merger guidelines.[190] The level of concentration in the market for MVPDs is thus too diffuse to give any MVPD market power sufficient to give rise to anticompetitive concerns.[191]

186. For example, the highest ranked network during the November 2004 sweeps period (CBS), was only able to capture 12% of adult viewers. *See* Jim Finkle, *How Fall Played Out; CBS Triumphs, ABC Improves, NBC Falters*, BROADCASTING & CABLE, Dec. 6, 2004, at 14.

187. Even if the entire industry were composed of station groups of the largest size, the HHI would be less than 700, well below the levels thought to raise competitive concerns.

188. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report, 17 F.C.C.R. 26,901, 26,913 tbl.B-3 (2002).

189. *See* Eleventh Annual Report on Video Competition, *supra* note 183, at 77 ¶ 144, 118 tbl.B-3, 119 tbl.B-4

190. In fact, the level of concentration in the market for MVPDs approaches the level of nonenforcement under the more stringent guidelines governing horizontal mergers. Indeed, as the FCC has noted, economic theory and empirical studies suggest that a market need not have more than five participants of roughly equal size. *See* 2003 Biennial Review Order, *supra* note 3, at 13,731 ¶ 289 & n.609 (citing economic commentary). This suggests that HHIs as high as 2000 might well be unproblematic. That said, the Third Circuit rejected the FCC's finding that five equal-sized competitors would be sufficient to protect competition as arbitrary and capricious. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 432–34 (3d Cir. 2004).

191. Professor Baker invokes Edward Chamberlin's classic analysis of monopolistic competition as support for his belief that media entities typically earn high operating profits. *See* Baker, *supra* note 13, at 737 & n.15. *See also id.* at 750–751. I offer a more complete analysis of the implications of Chamberlinian monopolistic competition for media policy in Yoo, *supra* note 18, at 1602–28, 1633–36. For the time being, it is sufficient to point out that Chamberlin himself did not believe that firms engaged in monopolistic competition would earn sustainable economic profit. Although firms might earn some profit in the short-run, entry by other firms selling similar products would eventually dissipate any supercompetitive returns. *See* EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE 83–85 (8th ed. 1969).

Furthermore, an empirical analysis of the relevant secondary market—comprised of television networks and program providers—reveals that it is sufficiently unprotected by barriers to entry to obviate any anticompetitive concerns. The FCC reports that the total number of television networks has steadily increased, swelling from seventy networks in 1990[192] to a total of 388 networks in 2004, with another seventy-eight networks in the planning stages.[193] In addition, the percentage of vertically integrated networks has declined more or less steadily over the past decade.[194]

It is also likely that vertical integration in the radio and television industry will yield sufficient efficiencies to justify condoning it. The FCC has acknowledged that permitting broader network station ownership could yield substantial managerial, technical, and operational efficiencies.[195] Furthermore, because the creation of television programming typically requires the incurrence of substantial sunk costs, program producers are often vulnerable to hold-up, free riding, and other forms of strategic behavior.[196] The classic solution to such problems is through vertical integration or through some form of vertical contractual restraint.[197] Empirical studies confirm that, on balance, vertical integration in the cable industry tends to be welfare enhancing.[198]

Chamberlin's zero-profit result is in turn subject to several caveats. *See* Yoo, *supra* note 18, at 1607–09. Subsequent research has shown that the general validity of Chamberlin's zero-profit result depends on the magnitude of the fixed costs relative to the overall market. *See* Yoo, *supra* note 118, at 240. Baker's observation would have had greater applicability during earlier eras, when television and radio markets were protected by entry barriers. The emergence of alternative transmission technologies and new networks has largely dissipated the danger of supercompetitive returns. *See* Yoo, *supra* note 18, at 1633–36. This suggests that media policy would be better served by focusing on lowering barriers to entry, which in turn would require an abandonment of the commitment to fostering free radio and television as well as lowering the barriers to vertical integration.

192. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report, 19 F.C.C.R. 1606, 1691 tbl.8 (2004) [hereinafter Tenth Annual Report on Video Competition].

193. Eleventh Annual Report on Video Competition, *supra* note 183, at 78 ¶ 145, 81 ¶ 152.

194. Tenth Annual Report on Video Competition, *supra* note 192, at 1690–91 ¶ 142 & tbl.8 (noting that the percentage of vertically integrated networks declined steadily from 50% in 1994 to 30% in 2002 before rising slightly to 33% in 2003); Eleventh Annual Report on Video Competition, *supra* note 183, at 78 ¶ 145 (noting that in 2004, the percentage of vertically integrated networks once again declined to 23%).

195. *See* 1995 Chain Broadcasting Order, *supra* note 139, at 4540 ¶ 11.

196. *See* Yoo, *supra* note 45, at 213–17, 232–37.

197. *See, e.g.*, Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

198. *See* Tasneem Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*, 91 AM. ECON. REV. 428, 430, 448–50 (2001).

It thus appears that the structure of the television industry makes it unlikely that vertical integration will harm competition, as demonstrated eloquently by the failure of the Disney-ABC, Viacom-CBS, Time Warner-Turner Broadcasting, and AOL-Time Warner mergers to generate significant anticompetitive harms. Instead, the existing regulations limiting vertical integration only serve to prevent industry participants from realizing the available efficiencies, which in turn reduces total quantity, quality, and diversity of speech. As a result, the regulatory restraints on vertical integration appear to represent still another form of architectural censorship.

II. ARCHITECTURAL CENSORSHIP'S IMMUNITY FROM MEANINGFUL FIRST AMENDMENT SCRUTINY

Many of the extant structural regulations thus constitute forms of architectural censorship that can have a dramatic impact on the quantity, quality, and diversity of radio and television programming. As a result, one would expect that the incidental impact structural regulation can have on speech would be subject to scrutiny under the First Amendment. This Part analyzes the level of scrutiny to which structural regulation should be subject under current First Amendment doctrine. Unfortunately, my analysis suggests that the identified types of architectural censorship will be effectively insulated from meaningful judicial review.

A. THE NATURE OF ARCHITECTURAL CENSORSHIP

The impact that structural regulation can have on media content should raise First Amendment concerns. Consider first the reductions in the total quantity of television and radio programming. Regulations that impede all forms of speech without regard to content still impair the free flow of expression. That a regulation may have affected all viewpoints equally does not change the fact that the reduction in opportunities for expression effects a First Amendment harm, whether viewed from the perspective of individual liberty or the proper functioning of the democratic process.[199] Scholars have also cautioned that media-specific regulations allow special interest groups to redirect the regulatory process toward rent

199. *See* Benjamin, *supra* note 11, at 32–35; Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128–31 (1981); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 782–83 (1985).

seeking at the expense of the general public.[200] Moreover, the government may not merely be an innocent bystander in the process of rent seeking by politically powerful groups; it may actually be following a policy of "rent extraction," in which it deliberately restricts or threatens to restrict speech to create a pool of rents that can then be redistributed through the regulatory process.[201]

In addition, liberty-oriented theorists would find interference with individual speakers' editorial discretion to be a First Amendment harm, even in the absence of evidence that particular content was favored or disfavored. Access requirements are particularly problematic in this regard.[202] Tellingly, the Supreme Court has found preserving editorial discretion to be an important First Amendment value even with respect to broadcasting, the medium of communications that receives the lowest level of constitutional protection.[203] The Court has also repeatedly recognized that cable operators' selection of the content they transmit represents an exercise of their free speech rights.[204] Acknowledging that the interest in editorial discretion may be offset by other considerations[205] does not change the fact that interference with a speaker's liberty interest implicates important First Amendment values.

200. *See* Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 61–67 (2001).

201. *See* Benjamin, *supra* note 11, at 35–36 (suggesting that regulators reduce the total amount of spectrum-based speech in order to generate monopoly rents). For a general discussion on the process of rent extraction, see FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997).

202. *See* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 11 (1986) (plurality opinion); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). *Cf.* Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114–17 (1999) (describing the cognitive and dignitary harms associated with imposing affirmative content obligations on the media).

203. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673–75 (1998); FCC v. League of Women Voters, 468 U.S. 364, 379–80 (1984); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105–11, 118–21, 124–25 (1973).

204. As the Court noted in the *Turner I* decision, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner I*, 512 U.S. 622, 641 (1994). *See also* Leathers v. Medlock, 499 U.S. 439, 444 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

205. The Court has acknowledged that the interest in preserving broadcasters' editorial discretion must be balanced against the benefits to the public of being exposed to views that would otherwise be barred from the airwaves. *See Ark. Educ. Television*, 523 U.S. at 673–74; *League of Women Voters*, 468 U.S. at 377–78; *CBS*, 412 U.S. at 101–02. With respect to cable, the Court has held that bottleneck control of cable operators justifies permitting some restriction of their editorial discretion. *Turner I*, 512 U.S. at 656–57.

Lastly, as I have detailed above, many of the FCC's structural restrictions have the unintended consequence of skewing media content toward certain demographic groups and stifling the emergence of more diverse programming. There can be little doubt that such content-specific effects raise serious constitutional concerns.[206]

B. *MINNEAPOLIS STAR* AND THE SHORT-LIVED PROSPECT OF STRICT SCRUTINY

Even though the structural regulations described above affect the quantity and mix of media content in ways that implicate the First Amendment, it is not completely clear what standard the courts would apply when evaluating the constitutionality of these regulations. It is now well established that regulations restricting speech on the basis of its content are subject to strict scrutiny.[207] At the same time, the Supreme Court has squarely established that it does not regard the rationales that underlie structural regulation as content-based.[208]

206. Professor Baker suggests that because the market can have as much of an adverse impact on media content as structural regulations, market distortions should raise similar concerns under my approach to the First Amendment. *See* Baker, *supra* note 13, at 755–759. This ignores the state action doctrine, which represents one of the central underpinnings of classic liberal theory. *See* Yoo, *supra* note 11, at 331–34 (describing the difficulties in reconciling democratic theories of media policy with the state action doctrine). The role that state action plays in defining the relationship between the individual and the state explains why adverse speech effects resulting from governmental actions might be problematic, whereas similar effects resulting from private ordering would not.

207. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000); *Turner I*, 512 U.S. at 641–43; Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230–31 (1987).

208. *Turner I* squarely concluded that each of the three policy goals underlying structural regulation—(1) the preservation of free, local television; (2) the promotion of a diversity of information sources, and (3) the promotion of competition—were unrelated to the content of message conveyed. *Turner I*, 512 U.S. at 662. *See also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 798–801 (1978) (holding that the promotion of diverse views is content-neutral).

This conclusion is far from unassailable. As noted earlier, the goal of promoting diversity is intimately intertwined with who has the power to select, edit, and present speech. *See supra* note 76 and accompanying text. Similarly, the preference for localism clearly signifies the government's conclusion that a particular type of speech is especially valuable. Indeed, Justice O'Connor's dissent in *Turner I* vigorously disputed the conclusion that promoting diversity and localism was content-neutral. *See Turner I*, 512 U.S. at 677–78 (O'Connor, J., dissenting). Courts that have recognized the problematic nature of the conclusion that regulations designed to promote viewpoint diversity and localism are content-neutral have felt constrained to follow *Turner I*'s resolution of the issue. *See* Horton v. City of Houston, 179 F.3d 188, 192–94 (5th Cir. 1999). *See also* Am. Family Ass'n, Inc. v. FCC, 365 F.3d 1156, 1169–70 (D.C. Cir.) (holding that promotion of a diversity of views and localism to be content-neutral), *cert. denied*, 125 S. Ct. 634 (2004); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1041–42, 1046 (D.C. Cir.) (identifying the promotion of competition, diversity, and localism as the interests underlying the national television station ownership limits and holding them to be content-

One line of decisions, associated with *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[209] appeared to entertain the possibility of subjecting structural restrictions to strict scrutiny even in the absence of facial content discrimination or content-based motive. In *Minneapolis Star*, the Court expanded on a precedent invalidating a state tax that applied only to newspapers[210] and applied strict scrutiny to strike down a generally applicable tax whose burden fell disproportionately on a small group of newspapers. In so doing, the Court framed the issues in a manner almost ideally suited for redressing the problems of architectural censorship. Strict scrutiny was not limited to instances in which the government acted out of an illicit motive.[211] Instead, the Court recognized that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[212] As a result, any restriction "that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."[213] This language suggests that the doctrine is not designed solely to ferret out regulations that are mere facades for suppressing speech of a particular content or by particular speakers. Rather, *Minneapolis Star* could arguably be construed as applying to economic regulation that, though innocently enacted, has the unintended byproduct of adversely affecting the content of speech.

The Supreme Court reinforced this line of jurisprudence in *Arkansas Writers' Project, Inc. v. Ragland*,[214] in which it struck down a sales tax that exempted newspapers and religious, professional, trade, and sports journals. The Court held that the reasoning of *Minneapolis Star* applied a fortiori to a tax that differentiated on its face among different types of magazines on the basis of their content.[215] Because the differential taxation of magazines represented sufficient grounds for striking down the sales tax, the Court declined to address whether the distinction drawn between newspapers and magazines also violated the First Amendment.[216]

neutral), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); CBS Broad., Inc. v. Echostar Communications Corp., 265 F.3d 1193, 1210 (11th Cir. 2001) (holding the promotion of localism to be content-neutral).

209. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

210. *See* Grosjean v. Am. Press Co., 297 U.S. 233 (1936).

211. *Minneapolis Star*, 460 U.S. at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

212. *Id.*

213. *Id.* at 592–93.

214. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

215. *Id.* at 229–30.

216. *Id.* at 232–33.

The Court would soon foreclose any prospect that *Minneapolis Star* and its progeny would serve as a check on architectural censorship. In *Leathers v. Medlock*,[217] the Court upheld a sales tax that applied to cable television but exempted satellite television providers as well as certain newspapers and magazines. The Court regarded the tax as a law of general applicability that did not single out the press for differential treatment.[218] The tax was not structured in a way that raised suspicions that it was intended to fall solely on a small group of media speakers.[219] Even though the exemption for satellite television providers effectively created differential treatment for media that were functionally similar, the fact that the tax affected approximately one hundred cable suppliers obviated any suggestion that it penalized any particular speaker or the expression of any particular idea.[220]

The Court reaffirmed the idea that the *Minneapolis Star* line of precedents only applies when a statute of general application affects a small number of speakers in its first *Turner Broadcasting* decision ("*Turner I*").[221] Rejecting the argument that must-carry should be subject to strict scrutiny, the Court distinguished the *Minneapolis Star* line of cases by pointing out that the restriction in question applied to large numbers of cable systems. As a result, it "d[id] not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star*" and its progeny.[222]

The limitations imposed by *Leathers* and *Turner I* drastically limit the *Minneapolis Star* line of cases' potential for redressing the problem of architectural censorship.[223] So long as the restriction in question applies to a sufficiently large number of entities, it does not matter that it favors one form of communication over another. The type of structural regulations that represent the focus of this Article will almost invariably apply to a sufficiently large number of entities to take them outside of this scope.

217. Leathers v. Medlock, 499 U.S. 439 (1991).

218. *Id.* at 447.

219. *Id.* at 448.

220. *Id.* at 449.

221. *Turner I*, 512 U.S. 622 (1994).

222. *Id.* at 661. The Court alternatively noted that differential treatment may also be "'justified by some special characteristic of' the particular medium being regulated." *Id.* at 660–61 (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983)). The Court concluded that the bottleneck monopoly power exercised by cable operators represented just such a special characteristic. *Id.* at 661.

223. Indeed, the D.C. Circuit has suggested that *Minneapolis Star* and *Arkansas Writers' Project* only apply to tax cases. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 68 n.11 (D.C. Cir. 1998); Walsh v. Brady, 927 F.2d 1229, 1236 (D.C. Cir. 1991). *See also* Benjamin, *supra* note 11, at 29–30.

Indeed, *Leathers* and *Turner I* fundamentally altered the spirit of the *Minneapolis Star* line of cases, in effect suggesting that differential impacts caused by laws of general applicability only raise constitutional concerns when they betray some indicia of a clandestine desire to suppress expression. As such, *Minneapolis Star* no longer offers much promise of addressing architectural censorship that arises from the unintended consequences of economically motivated regulation.

C. RATIONAL BASIS VS. INTERMEDIATE SCRUTINY

Since the Supreme Court's foreclosure of any real possibility of subjecting structural regulation to strict scrutiny, courts have struggled to determine whether the proper standard should be one of rational basis or intermediate scrutiny. The problem was presented quite nicely by the D.C. Circuit in *News America Publishing, Inc. v. FCC*.[224] *News America* is the result of a rider buried in a massive, 471-page continuing resolution appropriating funds for the entire federal government for fiscal year 1988.[225] The rider forbade the FCC from using any funds to extend any temporary waivers to the current newspaper/television crossownership rule. As the court noted, the statute was "general in form but not in reality."[226] At the time, only one such temporary waiver had been issued: the one held by Rupert Murdoch that allowed him to own both WXNE-TV and the *Boston Herald*.

Because this generally applicable statute had the effect of burdening a single speaker, it appeared to represent precisely the type of provision that would be subject to strict scrutiny under *Minneapolis Star*. The court instead evaluated the constitutionality of the rider under the lower level of First Amendment scrutiny applied by the Supreme Court to the newspaper/broadcast crossownership rule in *FCC v. National Citizens Committee for Broadcasting* ("*NCCB*").[227] There, the Court upheld the newspaper/broadcast crossownership rule as a "reasonable means of promoting the public interest in diversified mass communications."[228]

224. News Am. Publ'g, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

225. This is in contrast to the usual practice, in which the federal budget is enacted through a series of thirteen appropriations acts. The continuing resolution was also unusual in that the text of the legislation was printed only in a 1194-page conference report. *See id.* at 801–02.

226. *Id.* at 802.

227. *Id.* at 810–11 (citing FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978)). *See also* NBC v. United States, 319 U.S. 190 (1943) (applying a lower level of First Amendment scrutiny to broadcasting to sustain the Chain Broadcasting Rules).

228. *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 802.

Other courts addressing constitutional challenges to structural regulation of the broadcast industry have felt obligated to follow *NCCB*.[229]

Several aspects of this decision are quite problematic. *NCCB* was based on the longstanding rationale that the physical scarcity of the electromagnetic spectrum justifies conferring a lesser degree of First Amendment protection on broadcasting than on other media.[230] Over the years, however, a stream of commentary has undermined the vitality of the scarcity doctrine by demonstrating its analytical incoherence.[231] In addition, technological developments allowing for more intensive use of the spectrum and the advent of cable television have lessened the extent to which the spectrum serves as a bottleneck for transmitting media speech. The Supreme Court seems to have backed away from the doctrine as well. Not only has the Court declined invitations to extend it to other forms of communication,[232] its recent decisions raise serious questions as to its continuing vitality even with respect to broadcasting.[233]

229. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 401–02 (3d Cir. 2004); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 167–68 (D.C. Cir. 2002); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1045–46 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). *See also Sinclair Broad. Group*, 284 F.3d at 172 (Sentelle, J., dissenting); 2003 Biennial Review Order, *supra* note 3, at 13,625–27 ¶¶ 13–16. As the D.C. Circuit noted in another case involving the newspaper/broadcast crossownership rule, "We are stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lion* no longer rules the broadcast jungle." Tribune Co. v. FCC, 133 F.3d 61, 69 (D.C. Cir. 1998).

230. *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 799. The scarcity doctrine has its roots in the seminal decision on broadcast regulation, *NBC v. United States*, 319 U.S. 190, 226–27 (1943), and has been reaffirmed many times since then. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 566–67 (1990), *overruled on other grounds by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); FCC v. League of Women Voters, 468 U.S. 364, 374–77 (1984); CBS, Inc. v. FCC, 453 U.S. 367, 394–96 (1981); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101–02 (1973); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–89 (1969).

231. The academic criticism of the constitutionality of the scarcity doctrine is voluminous. *See generally* Yoo, *supra* note 11, at 266–92 (reviewing and extending the leading critiques of scarcity). Tellingly, even proponents of broadcast regulation no longer attempt to defend the scarcity doctrine. *See, e.g.*, LEE C. BOLLINGER, IMAGES OF A FREE PRESS 87–90 (1991); SUNSTEIN, *supra* note 47, at 110; Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1247 (1996); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation,* 85 CAL. L. REV. 1687, 1701–05 (1997); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1106 (1993).

232. The Supreme Court has rejected attempts to extend the broadcast regime to the mail, telephony, and the Internet. *See* Reno v. ACLU, 521 U.S. 844, 868 (1997) (Internet); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 124 (1989) (telephony); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 10 n.6 (1986) (plurality opinion) (mail); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (mail); Consol. Edison Co. v. Pub. Service Comm'n, 447 U.S. 530, 542–43 (1980) (mail). *But see* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 974–77 (D.C. Cir. 1996) (extending the broadcast rationale to DBS). For a time, the Court appeared to entertain the possibility of extending the broadcast justification to cable television. *Compare Turner I*, 512 U.S. 622, 637–39

In addition, this broad reading of *NCCB* is hard to square with *Turner I*, which rejected extending the Court's broadcast precedents to cable television. Notwithstanding the Court's acknowledgement of other courts' and commentators' criticisms of the scarcity doctrine's analytical coherence,[234] the Court declined to revisit the applicability of the scarcity doctrine to broadcasting in a case that did not properly present the issue.[235] Because cable does not depend on the broadcast spectrum, it does not suffer from the "inherent limitations" and "danger of physical interference" that supposedly confront broadcasting.[236] At the same time, the Court held that "laws that single out the press, or certain elements thereof, for special treatment" must be subject to some measure of heightened scrutiny.[237] As a result, the Court followed a line of D.C. Circuit cases[238] and concluded that the proper standard was the level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech as announced in *United States v. O'Brien*.[239] Unlike the *NCCB* standard, which is stated in

(1994) (rejecting the application of the broadcast regime to uphold must-carry), *with* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 737–48, 755 (1996) (plurality opinion) (suggesting that *Turner I* did not foreclose applying the broadcast regime to uphold behavioral regulation of cable television). This possibility was subsequently foreclosed by the Court's decision in *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 811–14 (2000) (5-4 decision).

233. The Supreme Court's recent decisions have avoided reliance on the traditional justifications and have instead turned to other doctrines to justify holding the regulation under review to a lower level of First Amendment scrutiny. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (commercial speech); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (public forum doctrine); United States v. Edge Broad. Co., 509 U.S. 418 (1993) (commercial speech).

234. *Turner I*, 512 U.S. at 638 & n.5.

235. *Id.* at 638 (citing FCC v. League of Women Voters, 468 U.S. 364, 376, n.11 (1984)).

236. *Id.* at 638–39.

237. *Id.* at 640–41.

238. *See* Century Communications Corp. v. FCC, 835 F.2d 292, 298–304 (D.C. Cir. 1987) (invalidating revised must-carry regulations), *clarified by* 837 F.2d 517 (D.C. Cir. 1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454–62 (D.C. Cir. 1985) (invalidating initial must-carry regulations); Home Box Office, Inc. v. FCC, 567 F.2d 9, 14, 48–50 (D.C. Cir. 1977) (invalidating regulations restricting pay television). The must-carry decisions did not formally decide that *O'Brien* provided the appropriate basis for evaluating the constitutionality of must-carry. Because the courts concluded that the restrictions under review failed the more lenient level of scrutiny announced in *O'Brien*, they found it unnecessary to resolve whether the regulations should be subjected to a more stringent standard of review, such as strict scrutiny. *See Century Communications*, 835 F.2d at 298; *Quincy Cable*, 768 F.2d at 1448, 1450–54.

239. *Turner I*, 512 U.S. at 661–62 (citing United States v. O'Brien, 391 U.S. 367 (1968)). *Turner I* thus represented the culmination of a fairly remarkable transformation of *O'Brien* doctrine. Originally applicable only to general regulations that had a tangential impact on speech, following *Turner I*, *O'Brien* doctrine is now applicable to direct regulations of speech so long as they are content-neutral. For an insightful discussion of pre-*Turner I* cases applying *O'Brien* to direct restrictions of speech, see Keith Werhan, *The* O'Brien*ing of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 649–58 (1988).

terms reminiscent of rational basis,[240] the *O'Brien* standard employs language that suggests an intermediate level of scrutiny.[241]

The language in *Turner I* holding that all regulations targeting a certain element of the press were necessarily subject to some form of heightened scrutiny seems to apply with equal force to structural regulation imposed on broadcasting. Courts have struggled to reconcile these two precedents. Some courts have attempted to rely on a technology-based distinction, applying the *NCCB* standard to the structural regulation of broadcasting,[242] while applying the *Turner I* standard to structural regulation of the cable industry.[243] They point out that, although *Turner I* acknowledged the analytical deficiencies with the scarcity doctrine, it explicitly declined to question its continuing validity with respect to broadcasting.[244]

Attempts to draw technology-based distinctions suffer from severe analytical problems. Most obviously, they do not provide a basis for determining the appropriate standard of review to be applied to crossownership of broadcast and nonbroadcast media. Indeed, the FCC's 2003 Biennial Review Order recognizes the conundrum posed by crossownership restrictions. Although the FCC maintains that

240. *See supra* note 228 and accompanying text.

241. Specifically, *O'Brien* requires that the restriction in question "further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The first prong focuses on the constitutional authority to impose the regulation rather than the First Amendment. The third prong is the equivalent of a threshold inquiry into whether the restriction is content-based. The remaining two prongs, which require a "substantial government interest" that is "no greater than is essential to the furtherance of that interest," are analogous to classic intermediate scrutiny. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1202 (1996); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401, 404 (1995).

242. *See* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 167–69 (D.C. Cir. 2002); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046–47 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

243. *See, e.g.*, Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1129–30 (D.C. Cir. 2001); Time Warner Entm't Co. v. United States, 211 F.3d 1313, 1316–19 (D.C. Cir. 2000); Time Warner Entm't Co. v. FCC, 93 F.3d 957, 966–67, 967–73, 978–79 (D.C. Cir. 1996); Time Warner Entm't Co. v. FCC, 56 F.3d 151, 181–86 (D.C. Cir. 1995); US West, Inc. v. United States, 48 F.3d 1092, 1100–06 (9th Cir. 1995) (striking down cable/telephone company crossownership), *vacated and remanded*, 516 U.S. 1155 (1996).

244. *See Sinclair Broad. Group*, 284 F.3d at 161–62; *Fox Television Stations*, 280 F.3d at 1046. *Cf.* Prometheus Radio Project v. FCC, 373 F.3d 372, 402 (3d Cir. 2004).

crossownership restrictions will be subject only to rational basis scrutiny, it acknowledges that because they

> [w]ill limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection—newspapers), we should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression.[245]

At the same time, the FCC acknowledged the possible relevance of the cable precedents by ensuring that the crossownership rules are "narrowly tailored."[246]

The distinction between broadcast and nonbroadcast media is likely to be clouded still further by the growing functional similarity between different television technologies.[247] For example, television broadcasters are now in a position to use the enhanced efficiency made possible by digital transmission to begin to provide multichannel service.[248] In addition, the emergence of DBS systems, such as DirecTV and the Dish Network, has rendered spectrum-based and wireline television technologies largely interchangeable. As a result, it would seem quite strange to subject functionally identical technologies to drastically different First Amendment standards. Indeed, courts have reacted with some confusion as to the proper standard of review to be applied to DBS regulations. While some courts have applied the more lenient broadcast standard to DBS, other courts have

245. 2003 Biennial Review Order, *supra* note 3, at 13,793 ¶ 441.

246. *Id.* at 13,798 ¶ 455 & n.988 (citing *Time Warner*, 240 F.3d at 1135). Courts have largely been able to avoid addressing the merits of this issue. On a few occasions, it arose in the context of the newspaper/broadcast crossownership restrictions and thus was squarely controlled by *NCCB*. *See* Tribune Co. v. FCC, 133 F.3d 61, 69 (D.C. Cir. 1998). When the issue arose in the context of the cable/broadcast crossownership rule, the D.C. Circuit was able to avoid the issue by disposing of it on statutory grounds. *See Fox Television Stations*, 280 F.3d at 1049. The only court that attempted to reconcile the ambiguity created by these competing standards of review held that the heightened scrutiny mandated by *Turner I* applied only when a regulation singles out a subclass of broadcasters and did not apply to regulations imposing obligations on broadcasters as a whole. *See Sinclair Broad. Group*, 284 F.3d at 168. This resolution is inconsistent with *Turner I*, which concluded that heightened scrutiny is applicable to any laws that "single out the press, or certain elements thereof, for special treatment." *Turner I*, 512 U.S. 622, 640 (1994). Indeed, *Turner I*'s limitation of *Minneapolis Star* to cases in which regulations single out small numbers of media speakers suggests that the distinction identified in *Sinclair Broadcasting* is better suited to identifying situations subject to strict scrutiny than to determining whether to apply rational basis or intermediate scrutiny. *Id.* at 659–61.

247. *See* Yoo, *supra* note 45, at 227–29.

248. *See id.* at 213, 227.

subjected structural regulation of DBS to the higher level of scrutiny mandated by *Turner I*.[249]

Even courts that agree that *NCCB* provides the appropriate First Amendment standard have expressed confusion over the proper way to apply that standard of review. Some courts have construed *NCCB* as holding that structural regulation of the broadcast industry is subject only to rational basis scrutiny.[250] Other courts have construed *NCCB* as requiring them to apply intermediate scrutiny.[251] Still others have applied a standard of review that falls somewhere in between.[252] Thus, even if one were to settle on the particular constitutional standard to be applied, considerable confusion would remain as to precisely what that standard requires.

D. Applying the Standard of Review

Ultimately, it may not matter precisely how this dispute is resolved. This is because even the most stringent of these tests—intermediate scrutiny under *O'Brien*—has long been criticized as too deferential. As noted earlier, the heart of the *O'Brien* standard requires that the restriction

249. *Compare* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 975–77 (D.C. Cir. 1996) (applying the more lenient broadcast standard to sustain a statute requiring a DBS provider to set aside channel capacity for "noncommercial programming of an educational or informational nature" (citation omitted)), *with* Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 352–66 (4th Cir. 2001) (applying the intermediate scrutiny of *Turner I* to sustain a statute requiring satellite broadcasters to carry local stations). These precedents cannot be squared with either the Supreme Court's broadcast or cable precedents. Under the broadcast precedents, one would have expected structural regulation of DBS to be subject to rational basis scrutiny under *NCCB* and behavioral regulation to be subject to intermediate scrutiny under *League of Women Voters*. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978); FCC v. League of Women Voters, 468 U.S. 364, 380 (1984). Because *Satellite Broadcasting & Communications Ass'n* applied intermediate scrutiny to structural regulation, these cases do not place DBS within the broadcast paradigm. Under the Supreme Court's cable precedents, one would have expected structural regulation of DBS to be subject to intermediate scrutiny under *Turner I* and behavioral regulation to be subject to strict scrutiny under *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813–15 (2000). Because *Time Warner* applied something less than strict scrutiny to behavioral regulation, *see Time Warner*, 93 F.3d at 975, these cases fall outside the cable paradigm as well.

250. *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372, 401–02 (3d Cir. 2004); *Sinclair Broad. Group*, 284 F.3d at 167–68. *Cf.* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046–47 (D.C. Cir.) (limiting heightened scrutiny to content-based restrictions on broadcast speech while holding that structural regulations were subject only to "deferential review"), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

251. *See, e.g.*, News Am. Publ'g, Inc. v. FCC, 844 F.2d 800, 812 (D.C. Cir. 1988). *See also* Benjamin, *supra* note 11, at 54–64 (arguing that broadcast regulation is subject to intermediate scrutiny).

252. *See* Ruggiero v. FCC, 317 F.3d 239, 243–45 (D.C. Cir. 2003) (en banc) (holding that more than minimal rationality is required when a structural regulation has the effect of completely prohibiting an individual from using a particular communications medium).

"further[] an important or substantial governmental interest" and that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest."[253] The requirement that the regulation further a "substantial" governmental interest has been construed to require only that the interest be nontrivial without requiring it to be particularly significant.[254] Any lack of substantiality can also be obviated by raising the level of generality until the requirement is met.[255]

O'Brien's tailoring requirement has proven to be equally permissive. Although initially stated in somewhat restrictive terms, the Court has subsequently reinterpreted it to be satisfied whenever the underlying government interest "would be achieved less effectively absent the regulation."[256] This reconstruction of the tailoring requirement represents a comparison of the various means available to the government, rather than an inquiry into whether the strength of the government interest justifies the intrusion on individual liberty. As a result, *O'Brien* doctrine devolves into a regulatory inquiry focusing solely on the extent to which the means chosen promote the government's goals.[257]

The result is a level of scrutiny that has been repeatedly criticized as tantamount to the presumption of nonprotection associated with rational basis review,[258] reaching only "laws that engage in the gratuitous inhibition of expression."[259] Unless *O'Brien* scrutiny is given more bite,[260] it is of little practical consequence whether any particular instance of structural regulation is formally subject to rational basis scrutiny, intermediate scrutiny, or something in between.[261]

253. *See* United States v. O'Brien, 391 U.S. 367, 397 (1968).

254. *See* Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 23.

255. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1486 n.17 (1975); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 51 (1987).

256. *Turner I*, 512 U.S. 622, 662 (1994) (internal quotation marks omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985))).

257. Werhan, *supra* note 239, at 672. Werhan further notes, "There is no speech side to the Court's balance. The Justices assess only the operational efficiency of the government's regulatory agenda, avoiding any consideration of whether that program is 'commensurably more important' than the [F]irst [A]mendment values advanced by the expression at issue." *Id.* at 641–42 (footnote omitted).

258. *See, e.g.*, Schauer, *supra* note 199, at 787–88; Stone, *supra* note 255, at 50–52.

259. Ely, *supra* note 255, at 1485–86.

260. *See infra* Part III.B (exploring this possibility).

261. Professor Baker argues that evaluating the constitutionality of structural regulation on the basis of the rationales proffered by the FCC risks overlooking the true rationales underlying structural regulations and their most important effects. *See* Baker, *supra* note 13, at 759–760. The Supreme

III. POSSIBLE SOLUTIONS TO THE PROBLEM OF ARCHITECTURAL CENSORSHIP

Thus, First Amendment doctrine does not appear to provide for meaningful judicial review of architectural censorship. This Part explores two possible solutions to this problem. First, it entertains the possibility of leaving matters unchanged and relying on Congress and the FCC to protect against architectural censorship. Second, it explores the possibility of revising *O'Brien* doctrine to allow for more meaningful judicial review.

A. RELIANCE ON THE POLITICAL BRANCHES

One alternative is to leave the responsibility for protecting against the dangers of architectural censorship squarely in the hands of the political branches. A long and distinguished heritage offers support for such a proposal. Indeed, the authority of each coordinate branch to interpret the Constitution has been endorsed by such historical luminaries as James Madison, Thomas Jefferson, Andrew Jackson, Daniel Webster, Stephen Douglas, Abraham Lincoln, and Felix Frankfurter,[262] as well as by a veritable "all-star list of constitutional law scholars."[263] Such a claim might seem somewhat jarring to those steeped in the ringing declaration of *Marbury v. Madison*[264] that "[i]t is empathically the province and duty of the judicial department to say what the law is."[265] To say, however, that the courts have authority to construe the Constitution is not to say that they have the *exclusive* authority to do so. Indeed, *Marbury* is based on the

Court's adoption of the "substantial evidence" test in *Turner I*, 512 U.S. 622, 666 (1994), would seem to justify focusing solely on the rationales and factual inferences that were before Congress and the FCC, and would limit reviewing courts to assessing the goals and the means asserted by the government.

262. *See* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 1–26 (1992); GERALD GUNTHER, CONSTITUTIONAL LAW 21–28 (11th ed. 1985); WALTER F. MURPHY, JAMES E. FLEMING & WILLIAM F. HARRIS, II, AMERICAN CONSTITUTIONAL INTERPRETATION 195–247 (1986); Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771, 777–82 (1994); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 84–97 (1993).

263. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 49 n.26 (1993) (noting that Alexander Bickel, Edward Corwin, Philip Kurland, Gerald Gunther, Henry Monaghan, and Herbert Wechsler had each endorsed the authority of all three coordinate branches to interpret the Constitution). *See generally* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1463–72 (1997) (providing an overview of the debate on coordinate construction).

264. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

265. *Id.* at 177.

premise that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."[266] Legislators and executive branch officials routinely apply the Constitution to particular factual contexts. Thus, in firmly establishing the judiciary's right to interpret the Constitution, *Marbury* implicitly recognized the other branches' authority to do so as well.[267]

The fact that Congress and the executive branch are competent to interpret and enforce the Constitution does not necessarily justify leaving important issues of constitutional interpretation exclusively in their hands. The judiciary bears an obligation to exercise its independent constitutional judgment even when other branches are in a position to offer their own assessment of the constitutionality of a particular governmental action.[268] From this perspective, allowing instances of architectural censorship to evade meaningful judicial scrutiny would represent a disturbing abdication of responsibility.

Whether the political branches will prove particularly effective in protecting against the dangers of architectural censorship is also questionable. Members of Congress are typically loath to consider constitutional issues. As Abner Mikva, who as a judge and former member of the House of Representatives was uniquely well situated to comment on the relationship between the judiciary and the legislature on matters of constitutional interpretation, once observed, "The fastest way to empty out the chamber [of Congress] is to get up and say, 'I'd like to talk about the constitutionality of this bill.' Members of Congress believe that's what courts are for."[269] Agencies are often equally reluctant to address constitutional issues,[270] as has been the case for the FCC.[271]

266. *Id.*

267. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-2, at 25 (2d ed. 1988); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 63 (1986); Merrill, *supra* note 263, at 51; William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 37 (1969).

268. *See Turner I*, 512 U.S. 622, 666 (1994); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843–44 (1978).

269. Linda Greenhouse, *What's a Lawmaker to Do About the Constitution?*, N.Y. TIMES, June 3, 1988, at B6. *See also* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983) (arguing that Congress should do more to discover constitutional shortcomings in legislation).

270. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 368 (1974) (noting that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies" (internal quotation marks and alterations omitted)); Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 523 (1970) (describing how agencies can suffer from "institutional 'tunnel vision'" that makes them more likely to frame questions of speech in terms of the regulatory issues with which they have been charged than in terms of the First Amendment).

B. INTENSIFYING *O'BRIEN* SCRUTINY

The other alternative is to refine First Amendment doctrine to give the courts a larger role in reviewing instances of architectural censorship. A plurality of the Supreme Court in *Turner I* experimented with this option when it incorporated into *O'Brien* scrutiny the requirement that the "recited harms [be] real, not merely nonconjectural, and that the regulation . . . alleviate these harms in a direct and material way."[272] To determine whether legislative findings satisfied this requirement, the Court balanced two opposing considerations. On the one hand was the fact that the legislative branch is better suited institutionally to make predictive judgments and is not required to produce the kind of record generally required of administrative agencies.[273] On the other hand was the recognition that blanket deference to legislative findings would constitute abdication of the judiciary's role in protecting the Constitution. To balance these two considerations, the Court borrowed the administrative law principle requiring the government to have "drawn reasonable inferences based on substantial evidence."[274]

The overall thrust of this development led many commentators to speculate whether the addition of this requirement would turn *O'Brien* scrutiny into a more meaningful form of judicial review.[275] Historically, courts have been quite reluctant to second guess the evidentiary findings made by Congress and the FCC. As the Court has noted, its "opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference."[276] On other occasions, the Court has been slightly more circumspect, declining to "defer" to the other branches, but nonetheless "afford[ing]

271. For example, the FCC initially declined to repeal the Fairness Doctrine notwithstanding serious doubts as to its constitutionality. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 147 ¶ 6, 148–57 ¶¶ 8–21, 246–47- ¶¶ 175–176 (1985), *vacated sub nom.* Radio-Television News Dirs. Ass'n v. FCC, 831 F.2d 1148 (D.C. Cir. 1987). The FCC's refusal to address the issue drew a sharp rebuke from the D.C. Circuit, which chided, "we are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987).

272. *Turner I*, 512 U.S. at 664 (citing Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

273. *Id.* at 665–66.

274. *Id.* at 666.

275. *See* Dorf, *supra* note 241, at 1201 n.101; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1263 n.67 (1995).

276. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (citing FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978)). *See also* FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946).

great weight to the decisions of Congress and the experience of the Commission" and "pay[ing] careful attention to how the other branches of Government have addressed the same problem" when confronted with "a complex problem with many hard questions and few easy answers."[277]

There are some indications that the Court may now be willing to engage in more searching scrutiny of the factual predicate underlying statutory enactments. For example, the Court has shown its willingness to scrutinize the sufficiency of the evidentiary record in other contexts, including the Commerce Clause,[278] warrantless searches under the Fourth Amendment,[279] and most notably Congress's exercise of its authority under Section 5 of the Fourteenth Amendment.[280] The Court's willingness to rely on the absence of a real, nonconjectural harm to strike down restrictions of commercial speech also makes this argument quite plausible.[281] Indeed, shortly thereafter, various courts invoked this consideration to invalidate a number of restrictions on the cable industry.[282] Some courts have seen in *Turner I* the emergence of a stricter standard, one that will govern all content-neutral regulations that discriminate amongst the media.[283]

Subsequent developments have substantially reduced the likelihood that the factual review announced by the *Turner I* plurality will

277. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102–03 (1973). *Accord* Metro Broad., Inc. v. FCC, 497 U.S. 547, 569 (1990) (quoting and following the above-quoted language from *CBS*), *overruled on other grounds*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

278. *See* United States v. Morrison, 529 U.S. 598, 614–18 (2000); United States v. Lopez, 514 U.S. 549, 557 n.2 (1995).

279. *See* Chandler v. Miller, 520 U.S. 305, 318–22 (1997).

280. *See* Bd. of Trustees v. Garrett, 531 U.S. 356, 368–72 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88–90 (2000); City of Boerne v. Flores, 521 U.S. 507, 530–32 (1997). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729–40 (2003) (sustaining the sufficiency of the legislative record underlying the Family and Medical Leave Act).

281. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 489–91 (1995); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 144–49 (1994); Edenfield v. Fane, 507 U.S. 761, 771–73 (1993); Zauderer v. Office of Disciplinary Counsel of the Sup. Ct., 471 U.S. 626, 648–49 (1985). *See also* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 476–77 (1995).

282. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001) (invalidating cable broadcast crossownership rule); Horton v. City of Houston, 179 F.3d 188 (5th Cir. 1999) (holding that summary judgment was granted in error in evaluating the fee charged on non-locally produced cable programs); US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994) (invalidating the cable/telephone company crossownership ban), *vacated and remanded*, 516 U.S. 1155 (1996); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994) (same), *vacated*, 516 U.S. 415 (1996); Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir. 1994) (invalidating the issuance of an exclusive cable franchise). *See also* Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (stating in dicta that ordinance requiring open access to cable modem systems would have failed intermediate scrutiny).

283. *See* Netanel, *supra* note 200, at 55–58.

significantly check architectural censorship. When the Court restated these principles in its second *Turner* decision ("*Turner II*"), it employed a far different tone. Noticeably missing from the opinion was any reference to judicial exercise of "independent judgment" or inquiry into whether the harm was "nonconjectural." Instead, the language and the structure of the opinion emphasized deference.[284] Later decisions have raised further doubts as to whether *Turner I*'s imposition of a substantial evidence requirement will actually lead to more searching judicial review. In *Nixon v. Shrink Missouri Government PAC*,[285] the Court noted that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[286] In particular, the Court acknowledged the possibility, first noted by the plurality opinion in *City of Renton v. Playtime Theatres, Inc.*,[287] that the government could rely on a factual record developed in another context or jurisdiction so long as the evidence on which the record is based is reasonably believed to be relevant.[288] A plurality of the Court reaffirmed this position in *City of Erie v. Pap's A.M.*,[289] concluding that the City of Erie could rely on the evidentiary foundations laid out in *Renton*[290] and *Young v. American Mini Theatres, Inc*.[291]

284. *Turner II*, 520 U.S. 180, 199 (1997). *See also* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 935, 937–38 (1998) (noting that "[w]ithout a doubt, the Court's decision in *Turner II* undercut what many thought to be the effect of *Turner I*" and lamenting the opportunity to engage in meaningful scrutiny of the relationship between ends and means). For an excellent analysis of the differences between *Turner I* and *Turner II*, see Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 301–03 (2000).

285. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000).

286. *Id.* It bears noting that this language is clearly dicta. After noting this possibility, the Court explicitly acknowledged the existence of a sufficient factual basis. *Id.* at 393–94.

287. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986).

288. *Shrink Mo. Gov't.*, 528 U.S. at 393 n.6.

289. City of Erie v. Pap's A.M., 529 U.S. 277, 296–97 (2000) (plurality opinion).

290. *City of Renton*, 475 U.S. at 50–51 (relying on the factual record recited in a decision of the Supreme Court of Washington upholding a restriction on nude dancing in Seattle).

291. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 & n.34 (1976) (plurality opinion). Even more disturbing is the suggestion that the City of Erie's invocation of the Supreme Court's decision in *Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991), would have been sufficient alone to sustain the restriction under review. *See Pap's A.M.*, 529 U.S. at 297. As Justice Souter noted in dissent, the plurality opinion in *Barnes* did not purport to rely on any factual evidence indicating the existence of a problem. *Id.* at 315 (Souter, J., concurring in part and dissenting in part). Permitting a mere citation of *Barnes* to satisfy *Turner I*'s substantial evidence requirement would effectively gut the substantial evidence standard and would condone a form of constitutional bootstrapping that would be quite unprincipled.

In any event, even if the substantial evidence requirement advanced by the *Turner I* plurality survives as a basis for more searching scrutiny under the *O'Brien* standard, it is unlikely to redress the type of architectural censorship discussed in this Article. Commentators have long regarded *O'Brien* doctrine as uncovering restrictions driven by an improper government motive.[292] Indeed, the search for illicit purpose best supports putting the government to its proof in the manner dictated by *Turner I*.[293]

As such, adding this element is unlikely to bear on architectural censorship, which is generally the unintended byproduct of truly innocent governmental actions.[294] Even under this invigorated form, *O'Brien* scrutiny would do little to balance the importance of the governmental interest asserted vis-à-vis the individual's interest to engage in speech. Nor would it lead courts to inquire whether alternative avenues of communication exist or whether the same goals could be accomplished in a less intrusive manner. Architectural censorship would be better addressed through a test focusing on a regulation's effects on speech. Such tests, however, are generally disfavored, largely due to concerns that employing an effects test would open an unacceptably large swath of governmental action to constitutional scrutiny.[295]

292. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 590 (1975) (suggesting that the real teaching of *O'Brien*, despite the Court's contrary language, was that "some motives are unconstitutional"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 438–42, 491–505 (1996) (arguing that *O'Brien* is primarily designed to expose regulations animated by improper governmental motives); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775–76 (2001) (concluding that "the *O'Brien* test itself is centrally concerned with legislative purpose, despite the Court's protests to the contrary"); Srinivasan, *supra* note 241, at 420 (synthesizing the Court's jurisprudence on incidental restrictions on speech as focusing on "a concern with speech-suppressive administrative motivation"). Interestingly, this reading of *O'Brien* is inconsistent with *O'Brien* itself, which disavowed that it was designed to identify illicit legislative motive. *See* United States v. O'Brien, 391 U.S. 367, 382–83 (1968).

293. *See* Netanel, *supra* note 200, at 61–62 (arguing that the invigorated intermediate scrutiny of *Turner I* is designed to root out improper governmental motive).

294. *See* Redish, *supra* note 199, at 130–31 (concluding that content-neutral regulations enacted without illicit motives can nonetheless skew speech markets in impermissible ways); Stone, *supra* note 255, at 106–07 (observing that properly motivated regulations may still have an adverse incidental impact on speech); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 658 (1991) (noting that "even regulations serving a noncommunicative purpose can have a discriminatory effect on the speech market available to would-be listeners").

295. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 84–86 (1997); Dorf, *supra* note 241, at 1178; Schauer, *supra* note 199, at 784, 790. *Cf.* Kagan, *supra* note 292, at 413–14 (criticizing the effects tests).

CONCLUSION

The analysis advanced in this Article demonstrates that the current debate has taken a far too simplistic approach to the impact that media ownership rules can have on television and radio program content. The analysis set forth reveals that the relationship between structural regulation and media content is much more complex than is generally recognized. Even worse, the current regulatory regime has all too often unintentionally degraded the quantity, quality, and diversity of programming available. In other words, structural regulation can represent a form of architectural censorship that can reduce the quantity, quality, and diversity of media programming. Unfortunately, current First Amendment doctrine effectively immunizes architectural censorship from meaningful constitutional scrutiny. As a result, either Congress or the FCC must bear the primary responsibility for safeguarding free speech values against these dangers, or the courts must revise *O'Brien* doctrine to permit more searching review capable of protecting the important speech interests at stake. Neither outcome appears likely at this point.