MEDIA OWNERSHIP REGULATION: A COMPARATIVE PERSPECTIVE

Enrique Armijo*

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* Associate, Covington & Burling LLP, Washington DC. I researched this Article while at the University of Oxford’s Centre for Socio-Legal Studies’ Programme for Comparative Media Law and Policy, which I thank for allowing me to visit. Thanks also to Kurt Wimmer for his support for this project and in many other areas. Any views expressed here, as well as any errors, are exclusively my own. I can be reached at armijol@gmail.com.
I. INTRODUCTION

Media matters. But does it matter who owns the media? If it does, should government decide among buyers in the private market for a television or radio station who would be the “best” owner of that station or how many stations a particular owner should hold? If so, is government action in furtherance of its normative notions of a “better media” in conflict with the First Amendment? If unregulated ownership of media outlets is harmful for democracy, are there market-based solutions that can address it so that the Constitution is not implicated? And finally, what can we learn about the justification, validity, and effectiveness of ownership regulation by comparing how Western countries regulate private ownership of the broadcast outlets within their borders?

For decades, the Federal Communications Commission (FCC) has enforced limits on the media holdings of a single owner in the United States at both the national and local level, and has generally prohibited one entity’s joint ownership of a television station and major newspaper in a single community. In 1996 Congress adopted the Telecommunications Act, in which Section 202(h) mandates that the FCC revisit its media ownership rules on a regular basis to ensure they continue to serve the public interest. The most

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1 See, e.g., Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in 11 THE PAPERS OF THOMAS JEFFERSON 48–49 (Julian P. Boyd et al., eds., 1950) (“Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”); James Madison, Report on the Kentucky-Virginia Resolutions to the General Assembly of Virginia (Jan. 7, 1800), quoted in Near v. Minnesota, 283 U.S. 697, 718 (1931) (“[T]o the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression.”).

2 47 C.F.R. § 73.3555 (2008). Roughly, the FCC regulates media ownership in three areas: (1) the number of individual television or radio stations one entity can own in a local market; (2) the number of properties across different media (newspaper/television, newspaper/radio, and radio/television) one entity can own in a local market; and (3) the number of television stations one entity can own nationally (once measured by overall number of stations, but now measured by audience reach, discussed infra Part IV.A). Id. The FCC also indirectly bars the joint ownership of the “Big Four” national networks (i.e., ABC, CBS, NBC, and Fox) by disallowing any television station from affiliating with an entity that owns any two of them. See id. § 73.658(g).

recent review of the rules began in the fall of 2006, and in December 2007 ex-Chairman Kevin Martin proposed to relax the rule barring common ownership of a major newspaper and television station in the same local market; the full Commission adopted the new rule by a 3–2 vote along party lines. The U.S. Court of Appeals for the Third Circuit retained jurisdiction over the ownership rules it remanded for error in the summer of 2004, and challenges to the Commission’s recently completed review of those rules are piling up before that same court. With the significant implications an eventual decision will have for administrative and constitutional law, the U.S. Supreme Court may well have the last word on any retention, modification, or abolition of the FCC’s media ownership policy.

The FCC’s rules all rest on the same presumption: the amount of media ownership’s concentration in private hands relates to the number of viewpoints expressed in the idea marketplace. As the agency has maintained for the last thirty years, “ownership carries with it the power to select, to edit, and to choose the methods, manner, and emphasis of presentation.” Therefore, the United States, like nearly every Western European country, has adopted some form of restriction on the ownership of television stations and other media outlets in addition to any generally applicable provisions from antitrust law.

public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. Id. Congress has since amended the statute to provide for quadrennial rather than biennial review. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, § 629 (2004) (amending Sections 202(c) and 202(h) of the 1996 Act).


6 See Memorandum Order, Judicial Panel on Multidistrict Litigation (Mar. 11, 2008) (consolidating more than a dozen petitions for review of the 2006 Media Ownership Order in the Ninth Circuit, which eventually transferred those petitions to the Third Circuit).

7 In re Amendment of Sections 73.34, 73.240, and 73.636 of the Comm’n’s Rules Relating to Multiple Ownership Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046, 1050 (1975).

8 Id.

9 See 47 C.F.R. §§ 73.3555, 73.658 (establishing guidelines for multiple media ownership);
The presumption leads to regulation of ownership as a proxy for regulation of content; if the presumption holds, then providing the widest possible range of station owners will offer a broad spectrum of content, ensuring a diverse public discourse among both the stations themselves and the media consumers who watch and listen to them. The converse of that goal relies on the same presumption—preventing excessive media ownership in the hands of a few powerful individuals or entities, which, if allowed, grants them the ability to shape opinion or exploit the market for personal gain by overrepresenting their own biases, interests, and viewpoints in public debate. If one looks across Western democracies, the policy goal is consistent, but the regulatory

see also Gillian Doyle, Media Ownership 148 (2002) ("[M]ost member states of the European Union impose some special restrictions on ownership of the media over and above safeguards provided by domestic or EU competition law.").

10 The FCC has articulated the ownership presumption thusly:

Outlet ownership can be presumed to affect the viewpoints expressed on an outlet. The Commission therefore continues to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners.


11 The Council of Europe, responsible for ensuring compliance with Article 10 of the European Convention's freedom of expression guarantees, "has defined pluralism in the following terms: 'media pluralism should be understood as diversity of media supply, reflected, for example, in the existence of a plurality of independent and autonomous media and a diversity of media contents available to the public.' " Doyle, supra note 9, at 12, quoting Council of Europe, Committee of Experts on Media Concentration and Pluralism, Secretariat Memorandum prepared by the Directorate of Human Rights, Report on Media Concentrations and Pluralism in Europe, MM-CM (97) 6. American and European courts have long endorsed the policy goal of ensuring a diverse range of voices in media. See, e.g., United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), 326 U.S. 1 (1945) (Frankfurter, J., concurring) (diversity of news sources is a vital interest because the "right conclusions are more likely to be gathered out of a multitude of tongues"); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 12, 1987, 57 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 295 F.R.G. (finding the German Constitution requires the legislature to ensure that private broadcasters provide a diversity of opinion, or Meinungsvielfalt).

12 See, e.g., Doyle, supra note 9, at 6–7, 12.
mechanisms used to achieve it are quite different. Political tradition defines and draws parameters around a particular regulatory approach.

For example, in historically interventionist states such as those of Western Europe, we expect to find relatively strict regulation, of both a structural and content-based nature, of relatively few outlets in the name of the public interest. In a historically laissez-faire free market state such as the United States, we expect to find minimal content regulation and a governmental role mostly limited to the provision and renewal of broadcast licenses and management of the broadcast spectrum. With its lower barriers to entry, the latter approach would predictably result in more private outlets than in a state-based system. As this analysis shows below, this prediction proves to be well-founded. In Western Europe, media's potential as a public good rendered it, at least for a while, too important to be entrusted to private owners. The public monopoly was therefore a method of regulating private ownership, in the sense that the former did not allow for the latter. Now, however, even the most interventionist governments are trending toward an increased role for the market and private ownership in the development of media space.

A comparative look at broadcast regulation provides a means to examine the ownership presumption's implementation across different countries, and to determine whether governments are right to assume that a greater number of media outlet owners are more likely to provide a broad range of content than a smaller number. The ownership presumption's most prominent detractors, namely free-market academics and regulators, challenge it via market segmentation principles. They argue that it is in the economic interest of a media monopolist to present a diverse range of content, and therefore a market in which ownership is concentrated results in more pluralism than a market in which regulation disperses ownership. The critique has gained

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14 Id. at 337–39.
15 This distinction has also been referred to as the trustee model versus the market model. Id. at 340–41.
16 Id. at 336–37.
17 Id. at 339–41.
18 Economic analyses arguing that horizontal concentration can increase program diversity rely on the Steiner Model, a model of radio markets developed by economist Peter Steiner. Drastically oversimplified, the Steiner Model, as applied to broadcast television, can be summarized thusly: assume a television audience with diverse viewing preferences (i.e., of 1000 possible viewers, 500 prefer sports, 200 prefer sitcoms, 150 prefer classical theatre adaptations and 150 prefer cartoons). If, on the one hand, I have a media monopoly (i.e., I own all four television stations in the television market), it is in my economic interest to attempt to capture
traction in the U.S. judiciary as well. But in most democracies the ownership presumption still holds firm, and nearly every country with media ownership limits relies on it to justify its policy. Taking a step back, however, the threshold issue is whether the ownership presumption is a viable or effective guiding principle upon which to base governmental restrictions upon the ownership of private property.

Relatedly, to study a country’s media regulation is to study the country itself. Media law is a tool that governments use to advance their societal goals: it reveals both the present and the aspirational national character. The regulatory process is a “narrative text about the society” from which we can learn a country’s conception, informed by its particular history, of its own ideal state of deliberative discourse. What is important to note is not merely how political tradition shapes the end regulatory product, such as the authority of an agency or the reach of a rule or statute, but how it also informs the debate that leads to the adoption of those products. Comparing media systems, then, like all comparative law projects, is a political science exercise as well as a legal one.

In Part II of this Article, I discuss the history of Western European media ownership concentration, with particular focus on the state media monopoly model established by the United Kingdom. Part III considers the worldwide trend toward privatization of media markets, examining it in two senses: as a

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the entire audience by showing as broad a variety of programming as possible (i.e., I will show a different type of programming on each channel). If, on the other hand, each of the four stations has a different owner, if I were to show sports on channel 1, the owner of channel 2 is more likely to also show sports to try to win half of my audience—250 viewers—than to show a sitcom, which will capture only 200 viewers, or either of the other two options, which will each only net 150 viewers. See Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. ECON. 194, 206–07 (1952). Less theoretically, take the example of Viacom’s joint ownership of the CBS and UPN networks during the late 1990s and early 2000s. Since CBS’s demographics tended to skew older, the parent company could program UPN to directly appeal to a younger audience without fear of competing with itself for audience members on the national level during prime time.

19 See Schurz Commc’ns, Inc. v. FCC, 982 F.2d 1043, 1054–55 (7th Cir. 1992) (favorably discussing the hypothesis that broadcasting monopolies might promote diversity).

20 See Monroe E. Price, Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples, 11 CARDOZO ARTS & ENT. L.J. 275, 284 (1993) (suggesting that statutes should be examined in the same way and for the same purpose archaeologists examine shards: to aid in deciphering, decoding, and explaining civilizations).

21 In this sense, comparing countries’ media regulation is also like comparing their media because “press always takes on the form and coloration of the social and political structures within which it operates.” FRED S. SIEBERT, THEODORE PETERSON & WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS 1–2 (1956).
tool of deconsolidation, in the sense of ending or circumscribing state broadcasting monopolies, and as a tool of convergence, in the sense of accumulating media influence in the absence of effective monopoly protection. Part IV attempts to draw some comparative conclusions from the relevant data, points out some constitutional problems with ownership regulation in the U.S. context, and proposes an alternative method—self-regulation, particularly private contractual agreements between owners and content decision makers to limit potential ownership abuse of control—to ensure a diversity of viewpoints in the media space. Part V concludes.

II. "PERFECTLY" CONSOLIDATED MARKETS: THE STATE AS MEDIA MONOPOLIST IN WESTERN EUROPE

During the pre-broadcast era, consolidated ownership of print media outlets was the norm. In Western Europe during the early part of the twentieth century, technological advances such as improved transportation and industrialization of the printing process combined with literacy's spread among the working classes to create a mass market for media. Freshly minted capitalists invested eagerly in the now-profitable news business. In Weimar Germany, for example, the right-wing Hugenberg press empire, backed by industrialists who made their fortunes by mining coal in the Ruhr Valley, controlled hundreds of newspapers and its own news agency. Similar market concentration occurred in France and England after World War I. For the most part, the European press baron operated in a total free market environment—one that was highly concentrated and usually partisan.

Later, broadcasting similarly developed from a tradition of consolidated ownership; indeed, in Western Europe, broadcasting's ownership history is one of outright monopoly. The monopolist owner, however, was not a private

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23 Id. at 15, 19, 25.

24 Id. at 25–26.

25 Id. at 26, 68.

26 Id. at 26–27.

27 The American press ownership tradition was similar; before 1920, owners, publishers, and journalists believed the pursuit of objectivity was at best anomalous and at worst a fool's errand. See MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 120–22 (1978).

28 HUMPHREYS, supra note 22, at 111–12.
press baron, but the state.\textsuperscript{29} The guiding principle, adhered to (although not strictly followed, as discussed \textit{infra}) in Western Europe to this day, is that a public broadcasting service, with the outlet owned by the state but statutorily insulated from both governmental influence and the pressures of the market, is the most effective use of the critically valuable broadcast resource and the best way to ensure a diversity of voices in the media marketplace.\textsuperscript{30}

The fountainhead for the public interest broadcasting model was the UK's British Broadcasting Corporation. Originally a consortium of private telecommunications companies licensed by the General Post Office pursuant to its exclusive authority over telegraphy, the British government established the BBC as a state-owned broadcasting service in 1927, and its Royal Charter expressly charges it to present a range of reportage and opinions in the service of the public interest.\textsuperscript{31} The BBC's founding was premised on the notion that broadcasting existed to educate and inform, as well as to entertain, and the market was not equipped to serve those goals;\textsuperscript{32} therefore a radio and television monopoly, whose ownership was vested in the state and divorced from the profit-seeking motive, could ensure greater quality and diversity in programming. A monopoly broadcaster simply was better for the viewer and for the country.\textsuperscript{33}

\begin{itemize}
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 112.
  \item \textsuperscript{31} \textit{Id.} at 112–13; see also The BBC Story, History of the BBC, Pre-BBC, http://www.bbc.co.uk/heritage/story/index.shtml (providing information about the BBC's origin) (last visited May 12, 2009); BBC Charter Review, Background, http://www.bbccharterreview.org.uk/home/background.html (providing the BBC's date of charter) (last visited May 12, 2009); DEPARTMENT OF NATIONAL HERITAGE, BROADCASTING, COPY OF THE AGREEMENT DATED THE 25TH DAY OF JANUARY BETWEEN HER MAJESTY'S SECRETARY OF STATE FOR NATIONAL HERITAGE AND THE BRITISH BROADCASTING CORPORATION § 3.2(c), available at http://www.ps b-review.org.hk/eng/documents/BBC%20Agreement%20with%20the%20Secy%20of%20State.pdf (the agreement, accompanying a recent renewal of the BBC's Royal Charter of Incorporation, states that the broadcasting services it provides must "contain comprehensive, authoritative and impartial coverage of news and current affairs in the United Kingdom and throughout the world to support fair and informed debate at local, regional and national levels").
  \item \textsuperscript{32} About the BBC: Purpose and Values, http://www.bbc.co.uk/info/purpose (last visited May 12, 2006). The BBC's tripartite "inform, educate, and entertain" mandate is widely attributed to John Reith (later Lord Reith, its founding Director General). DEPARTMENT FOR CULTURE, MEDIA, AND SPORT, BROADCASTING, COPY OF THE ROYAL CHARTER FOR THE CONTINUANCE OF THE BRITISH BROADCASTING CORPORATION ¶ 1, available at http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbc_royal_charter.pdf; see also R.H. Coase, \textit{BRITISH BROADCASTING: A STUDY IN MONOPOLY} 46–48 (1950) (discussing Reith's emphasis upon expanding the use of broadcasting beyond simple entertainment, so as to provide edification to the listening public).
  \item \textsuperscript{33} Most Western European countries adhere to a similar regulatory premise. \textit{See} Peter
Insulation from market pressures also meant foreclosing the use of the airwaves for advertising; accordingly, the broadcasting service was to be funded not by the sale of on-air time for commercials, but by a license fee charged to each home that had a television. Other Western European countries followed Britain’s lead in viewing broadcasting as a tool to promote pluralism, debate, and national identity and in establishing a national broadcast enterprise to meet those goals.


In Germany, it has always been axiomatic that broadcasting fulfills a special public-service role. Accordingly, ‘broadcasting freedom’ cannot be assured by a laissez-faire approach; it has to be both protected by negative restrictions (e.g., against political interference or dominance by strong social and economic actors) and positively promoted (e.g., through strong, publicly accountable and pluralistically representative, public-service broadcasters).

Id. Similar sentiments were expressed, at least initially, during the early days of radio in the United States. See PAUL STARR, THE CREATION OF THE MEDIA 338 (2004) (then-Secretary of Commerce Herbert Hoover stated it was “inconceivable that we should allow so great a possibility for service, for news, for entertainment, for education, and for vital commercial purposes, to be drowned in advertising chatter”).

34 See INDEPN, APPRAISING THE PROPOSED BBC LICENSE FEE INCREASE (May 2006), 6–7, available at http://www.indepen.co.uk/docs/bbc_license_fee.pdf. The British government imposes a yearly license fee, £131.50 in 2006, to each home with a television to fund the BBC. In 2004 the BBC’s revenue from licensing fees alone nearly doubled the advertising revenue of its largest private broadcast competitor, ITV. Id. The government also imposes the fee on homes that are not the owners’ primary residence; the Oxford short-let apartment in which I lived while researching this Article was advertised as “TV license-fee included,” and our landlord provided a copy of the license along with the user manuals for our stove, washer-dryer, and dishwasher.


The companies listed in Article 44 and 45 carry out public service assignments in the public interest. They shall offer the public, taken as a whole, a group of programmes and services which are characterised by their diversity and their pluralism, their requirement of quality and innovation, respect for the rights of the person and of constitutionally defined democratic principles.

They shall present a diversified offer of programmes in analogue and digital modes in the areas of information, culture, knowledge, entertainment and sport. They favour democratic debate, exchanges between different parts of the population as well as integration into society and citizenship. They shall promote the French language and highlight cultural and linguistic heritage in its regional and local diversity. They shall contribute to the development and broadcasting of intellectual and artistic creation and of
The BBC was the product of a policy decision that a public monopoly could do what privately owned media could not: fulfills broadcasting's unique political and cultural potential. Early on, Britons agreed; the monopoly's uninterrupted twenty-five-year reign was supported, for the most part, by public opinion. By 1950, however, competition advocates began making inroads by challenging the rationales offered for continuing the BBC monopoly. Despite entrenched opposition from pro-monopoly factions, in November 1953 the reigning Conservative Party government published a White Paper, Memorandum on Television Policy, that spoke out in favor of introducing competition to British broadcasting. After vigorous debate, Parliament passed the 1954 Television Act, permitting the establishment of the

civic, economic, social, scientific and technical knowledge as well as to audio-visual and media education.


The decision to set up broadcasting as a public service monopoly in the hands of the BBC was a clear rejection of the market as means for organizing this new medium. The central consideration was that the audience would be treated as citizens rather than consumers and educated to play a full part in the democratic and cultural life of the nation.

Id.

See ASA BRIGGS & PETER BURKE, A SOCIAL HISTORY OF THE MEDIA 223 (2002) ("The Times observed that it has been 'wisely decided to entrust broadcasting in this country to a single organization with an independent monopoly and with public service as its primary motive.' " (quoting British Broadcasting, TIMES (UK), Aug. 14, 1934, at 20)); COASE, supra note 32, at 133 ("It is one of the many advantages of the public ownership and control of the radio that certain standards have been maintained. We have kept out the advertiser of pills and corn-plasters and suchlike who holds the American radio in the hollow of his hand." (quoting A.G. Gardiner, John Bull, May 9, 1936)).

For an overview of the commercialization debate, see ASA BRIGGS, THE HISTORY OF BROADCASTING IN THE UNITED KINGDOM: VOLUME IV: SOUND AND VISION 908–34 (1979), and H.H. WILSON, PRESSURE GROUP: THE CAMPAIGN FOR COMMERCIAL TELEVISION 50–53 (1961). The pro-privatization faction included British and American advertisers' lobbies, the radio and television manufacturing industry, Conservative backbencher Members of Parliament, Prime Minister Churchill, artists and musical directors' associations interested in earning more pay for television performances, and financial institutions hoping for a new investment venture. BRIGGS, supra; WILSON, supra. The commercial television coalition in the UK shared many similarities with the one in Germany decades later. While a limited amount of advertising was permissible on publicly owned channels under German communications law, in the early 1980s, German advertisers lobbied for private channels in the hopes that competition would reduce the price of on-air advertising time, which the public broadcasters kept artificially high. See Humphreys, supra note 33, at 530.

See WILFRED ALTMAN, DENIS THOMAS & DAVID SAWERS, TV: FROM MONOPOLY TO COMPETITION 25–27 (1962).

Id. at 29.
first commercial television service in Great Britain, called Independent Television, or ITV. The also created the Independent Television Authority (ITA), an agency with regulatory power over the ITV network.41

Among its other duties, the ITA was charged with ensuring that British commercial broadcasting would not mimic its crass, rapidly-developing American counterpart.42 Critics opposed to commercial broadcasting pointed to the "vulgar" state of American television as a harbinger of what was to come in Britain if the government were to end the BBC's monopoly.43 Particularly criticized was American TV's treatment of Queen Elizabeth II's June 1953 Coronation, where NBC's *Today* show aired a BBC shortwave radio report on the Westminster Abbey ceremony, along with still pictures of the Queen, intermingled with a live in-studio appearance by the show's much-loved chimpanzee mascot J. Fred Muggs.44 The insertion of commercials during the aired repeats of the Coronation and car ad copy using terms such as "Queen of the Road" also drew the UK anti-commercial television lobby's ire.45 On British television and radio, commercials had to be clearly marked as distinct from programs,46 and a certain portion of content on the network had to be of British origin.47 All political coverage in which party views were expressed on the new private channel had to be balanced.48 Strict cross-ownership restrictions were also put in place, preventing national newspaper proprietors from owning shares in ITV.

Private broadcasting ownership in Great Britain expanded in fits in the decades following the 1954 legislation. The 1996 Broadcasting Act—promulgated to increase consumer choice and to assist British companies competing internationally—further eased restrictions on broadcast ownership. The 1996 Act set out an ownership cap for a private entity of no more than a fifteen percent share of the UK audience.49 The ITA, now called the

42 ALTMAN, THOMAS & SAWERS, supra note 39, at 27.
43 Id.
44 Id.
45 Id.
46 Television Act, § 4.
47 Id. § 3(1)(d).
49 Broadcasting Act, 1996, c. 55, § 2(1)(a)-(b) sched. 2, available at http://www.opsi.gov.uk/ acts/acts1996/ukpga_19960055_en_1. The BBC enjoyed almost fifty percent of audience share in the UK at the time of the 1996 Act. See DOYLE, supra note 9, at 110–11. "The effect of including BBC audiences within the total television market is to almost double the size of that
Independent Television Commission, was empowered to impose new conditions on a licensee where it determined that an ownership change could compromise regional programming or production quality. The 1996 Act also significantly relaxed the UK’s restrictive cross-ownership prohibitions. Previously, the owner of a newspaper, radio, or TV station group could only own a minority stake in another medium’s ownership group. Now, a single owner was allowed to own up to fifty percent of the radio sector, but no more than one national radio license; up to fifteen percent of the television sector, but no more than one national license; and up to twenty percent of national daily newspaper circulations. While smaller newspaper groups were allowed, under the new Act, to own interests in broadcasting outlets, the two largest newspaper groups in the UK—the Mirror Group, owner of the Daily Mirror and The Independent, among other papers, with a share of about twenty percent of total UK circulation, and Rupert Murdoch’s News Corporation, owner of The Sun and the Times papers, with about a forty percent circulation share—were unable to expand into broadcast television.

The 1996 Act also included a statutory provision allowing regulators discretionary power to block media mergers not in the “public interest.” Beginning in the early 1990s and culminating shortly after the passage of the 1996 Act, ITV, the network formerly composed of fourteen separate regional broadcast licenses established by the 1954 Act, experienced significant ownership consolidation. Three ownership groups acquired all but the two smallest license groups in the ITV network.

Subsequent proposals in the Communications Act of 2003 supported continued deregulation in the name of efficiency, investment, and international competition. The Act established a single agency, the Office of Communications, or OFCOM, to replace the ITA and several other communications regulators that had cropped up in the intervening years.

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50 Broadcasting Act, § 73(3).
51 Broadcasting Act, sched. 2.
52 News Corporation does, however, own approximately one-third of satellite company BSkyB, the UK’s most popular subscription television service and the largest television company of any sort in Europe. OPEN SOCIETY INSTITUTE, TELEVISION ACROSS EUROPE: REGULATION, POLICY, AND INDEPENDENCE 136 (2005), available at http://www.eumap.org/topics/media/television_europe.
53 DOYLE, supra note 9, at 102.
54 Id. at 48–49.
56 Communications Act, § 264.
Ofcom was intended to provide consistency in the regulation of communications law across several different industry platforms such as radio, television, telecommunications, and wireless industries.\(^{57}\) As for regulating private broadcast stations, the 2003 Act preserved the public service obligations for commercial broadcasters. They were required to provide “a range of high-quality and diverse programming” that is “properly balanced” in nature and subject matter, but the Act was clearly competition-friendly; it subjected broadcasters to a public service assessment every five years, but revoked the fifteen percent national audience cap set out in the 1996 Act.\(^{58}\)

By far the most controversial provision of the bill introducing the Communications Act, however, was the further relaxation of cross-ownership restrictions, which would have allowed newspaper groups controlling more than twenty percent of the UK market to purchase interests in private broadcast station Channel 5.\(^{59}\) Consolidation opponents focused their attention, as they usually do, on Rupert Murdoch and News International, News Corporation’s UK subsidiary; the new legislation would have allowed News International to bid for Channel 5 shares.\(^{60}\) After significant debate, the House of Lords and the government agreed to a compromise: a provision subjecting all media mergers and acquisitions involving transactions of a certain size to a public interest plurality test. Ofcom would be statutorily required to take the “public voice” into account when considering mergers in the media market.\(^{61}\) Ofcom’s role in applying the plurality test to ownership mergers, however, would be merely advisory; the decision as to whether the merger passed the test would be left to the Secretary of State for Culture, Media, and Sport, a government cabinet minister (in this case, the Minister whose department offered the initial deregulatory bill).\(^{62}\)

\(^{57}\) Id.

\(^{58}\) Id. § 265(3), (4)(c); see also id. § 350 (stating that the restrictions on accumulations of interest in amended parts of 1990 Act “shall cease to have effect”).

\(^{59}\) Id. § 350.


\(^{61}\) Communications Act, § 3(2)(c)–(d); see also id. c. 2, § 378 (amending the Enterprise Act, legislation enabling the Secretary of State to review certain mergers to ensure they are in the public interest, and to include a public interest plurality test in review of cross-media mergers).

\(^{62}\) Id. § 384. The potential for conflict was not lost on some members of the House of Lords during parliamentary debate. See 651 Parl. Deb., H.L. (5th ses.) (2003) 138, 145–60, available at http://www.parliament.the-stationery-office.co.uk/pa/id200203/dhansrd/vo030708/text/30708-07.htm (expressing concern that Lord McNally, the sponsor of the amendment, may be
The replacement of a national broadcast ownership cap with the public plurality test casts light upon what seems like a contradiction in OFCOM's public service remit. Its guiding principle is pro-competition and "light-touch" regulation; on the other hand, it is charged with protecting the public's interest in a commercial broadcasting service by ensuring a plurality of ownership. Whether abandoning bright-line consolidation controls, such as the national audience share cap, for a case-by-case analysis, such as the public interest plurality test, results in more consolidation in the UK remains to be seen; the regulator has yet to apply the standard. But OFCOM's cross-industry jurisdiction, along with a requirement that the Secretary of State consider whether there is a "sufficient plurality of persons with control of the media enterprises serving [the relevant] audience" in determining whether a merger or transaction is in the public interest, seems to compel at least one conclusion: because the goal of the 2003 Act was to establish a comprehensive and unified communications policy, the agency will likely consider the presence of the other media outlets within its bailiwick, such as cable, television, satellite, or the Internet, in determining whether a broadcast media transaction harms media plurality.

Cable and satellite stations' audience share in the UK has increased more than sevenfold since 1991, from just four percent to nearly thirty percent in 2005, so time will likely show that OFCOM's cross-platform approach is the correct one. It is already clear, however, that the agency was designed to subject to a conflict of interest).

63 See OFCOM's Annual Plan, § 1 (2005), available at http://www.ofcom.co.uk/ ("[W]e are determined that OFCOM's overall approach will be that of a light touch regulator . . . .").


65 Communications Act, § 375(1)(2A)-(2C) (stating public interest factors the Secretary will consider in applying plurality test to media mergers). The second part of the three-part test requires the Secretary to consider "the need for the availability throughout the United Kingdom of a wide range of broadcasting, which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests"; this section seems to preclude the consideration of non-broadcast outlets, but the prong quoted above referring to the "media landscape" would clearly allow the Secretary to consider nonbroadcast outlets in reviewing broadcast or cross-media mergers. Indeed, the broadcasting prong of the test seems to invite consideration of the BBC and the strict public interest obligations placed on commercial broadcasters as a factor in favor of allowing broadcast and cross-media mergers.

operate and in many senses is the product of, an interconnected and privatized media space. A one-broadcast channel state monopoly that served as the predominant information source for the vast majority of Britons is a relic of a soon-to-be-unrecognizable past.

III. PRIVATIZATION AND RECONSOLIDATION

A. Media Pluralism Through Privatization

Following the BBC’s lead, the public service broadcasting tradition held fast in Europe for decades. Until the mid-1980s, Italy, Luxembourg, and the UK were the only states in Europe with private television broadcasters. But across Europe in the late 1980s and early 1990s, starting in the West and pushing across the continent to the new democracies in the East, the regulatory environment at the national level was in a period of liberalization. As Monroe Price points out:

A hallmark, both rhetorical and real, of the global restructuring process in broadcast has been the effort to shift

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67 Indeed, Luxembourg has taken a hands-off approach to media regulation and essentially has no rules limiting private ownership. Its market is therefore an attractive one to investors, and media has become a significant sector in its economy. See Alison Harcourt, The European Commission and the Regulation of the Media Industry, http://www.medialaw.ru/ass/other_laws/european/e-eh.htm (last visited May 14, 2009).

68 Despite regulatory convergence in Europe under the banner of the EU, media ownership regulation continues to be a task reserved for national governments. In 1992 and 1994, the European Commission (EC) issued two Green Papers (a document published by the EC to invite Europe-wide discussion on a particular issue) on pluralism and media concentration; the EC stated that “concentration of media access in the hands of a few is by definition a threat to diversity of information,” and sought input on a continental regulatory framework to address ownership consolidation. See Pluralism and Media Concentration in the Internal Market, COM (1992) 480 (Dec. 12, 1992), available at http://www.ceh.ef.uni-lj.si/magister/comic161.pdf; Follow Up to the Consultation Process Relating to the Green Paper on “Pluralism and Media Concentration in the Internal Market — An Assessment of the Need for Community Action,” COM (1994) 353 final (Oct. 5, 1994), available at http://aei.pitt.edu/1158/01/pluralism_gp_follow_up_COM_94_353.pdf. The effort to harmonize national media ownership rules throughout the EU resulted in a 1996 draft directive proposing a thirty percent audience media ownership cap in the broadcasting market in each member country, and member states were allowed to exclude public service broadcasters from the caps’ limitations. European media companies lobbied European Commissioners hard against the proposal, however, and attempts to coordinate media ownership regulation of member countries on the basis of protecting or promoting pluralism rationale have failed. See Alison Harcourt, The European Union and Regulation of Media Markets 80–112, 115 (2005).
control over information spaces away from governments. . . .
[T]he tendency, fairly constant over regions of the world and even across forms of government, has been toward widely expanding the role of the private sector.69

In the Netherlands, where the architecture of media regulation was expressly designed to promote diversity, it was resistance to that architecture, as manifested by consumer choice and increased privatization, which led to more content in the media market.70 Pillarization, the organization of a multicultural society along political and religious lines, affected all aspects of Dutch life.71 Broadcasting was no exception, and by the mid-1920s, Protestant, Catholic, and socialist broadcasting associations were sharing time on state-owned radio networks; members of each group would receive a programming guide listing their associations' programs.72 The state-owned and operated television broadcaster, established by statute in 1969, aired general interest programming for approximately twenty percent of on-air time; the remainder was divided among pillars according to the size of their respective memberships.73

In the 1960s, however, while the media system was still segmented, younger Dutch viewers moved from pillar to pillar. As consumer use fell outside of the regulatory pillarization framework, it "led to a corresponding depillarisation of the media system, if not in structure at least in . . . programme content."74 Later, organizations independent of political or religious pillars that broadcast their signals from beyond Dutch territory fought for and won access to broadcasting time on Dutch channels,75 and the 1987 Media Act eventually allowed cable operators to provide their subscribers with foreign programs subject to strict restrictions on the length and content of advertising.76 In the Netherlands, private channels led to more choice.

71 Pillarization has also been termed "sociological federalism." AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 185 (1984).
72 Korthals Altes, supra note 70, at 317. Belgian society was segmented along linguistic lines in a similar fashion. HUMPHREYS, supra note 22, at 140–41.
73 HUMPHREYS, supra note 22, at 140–41.
74 Id. at 141–42.
75 Korthals Altes, supra note 70, at 318.
76 Media Act, art. 66, 1987 Stb. 249.
The transitional states in Eastern Europe have followed the modern Western dual-service model: a public service broadcasting sector, independent from its state owner, and a private sector, subject to strict public service regulatory obligations as to content, journalistic ethics, and transparency of ownership. However, opening the communications market to private owners in the continent’s formerly totalitarian states—where state-owned ownership was synonymous with state control—was about more than just promoting competition. In post-Soviet Eastern Europe, the privatization of state-owned channels was a critical plank in the democratization project. During the midst of perestroika in 1990, the Supreme Soviet, the USSR’s lawmaking body, and President Mikhail Gorbachev enacted legislation outlawing media monopoly and restructuring the governmental agency responsible for program production, breaking the link in the vertical integration chain between state control and content development. Article 7 of The Law of the Union of Soviet Socialist Republics on the Press and Other Means of Mass Information, or Press Law, declared that the right to establish media outlets belonged to “political parties, public organizations, mass movements,” and any citizen of the USSR over the age of eighteen, as well as governmental legislative bodies and agencies.

Later, after the dissolution of the USSR, the media law of formerly communist countries such as the Czech Republic, Hungary, Poland, and Slovakia allowed some commercial television and advertising on state-owned channels, but legislation enabling private broadcasting held commercial stations to strict public service obligations. In the Czech Republic, for example, private stations were required to dedicate at least forty percent of their

77 See generally TELEVISION ACROSS EUROPE, supra note 52, summary 38.
79 Zakon oiuza Sovetskikh Sotsialisticheskikh Respublik o pechati i drugkh sredstvakh massovoi informatsii, Izvestiia, [Russian Abbrev.] [Press Law], 1990 No. 172, art. 7. The Russian Press Law is available in English at 42 CURRENT DIG. SOV. PRESS No. 25, July 25, 1990, at 16–20. See also Krug, supra note 78, at 389. This point should not be read to imply, however, that Russia’s post-socialist transition in the media sphere was any less fraught than in other areas. President Yeltsin and the Russian Parliament engaged in a fierce battle over who would control the dissemination of information to Russian citizens, and Russian media reform in the early 1990s almost certainly hurt democratic development more than helped it. Monroe E. Price, Law, Force, and the Russian Media, 13 CARDozo ARTS & ENT. L.J. 795, 806–20 (1995). I point to the Press Law as only an indicative example of a policy trend that accepted private ownership of broadcast outlets as a transitional tool in the move from authoritarianism to democracy.
airtime to domestic productions from the start of their second year.\textsuperscript{81} Hungary's 1997 broadcasting law required an even higher percentage of native-bred content—a symbolic fifty-one percent.\textsuperscript{82} The mandates for homegrown productions sought to repair the damage that communist rule had wrought on the countries' respective national identities.\textsuperscript{83} Content regulation was therefore a regulatory tool used to promote and protect the formerly suppressed Czech and Hungarian cultures.\textsuperscript{84}

Media regulation in post-conflict states also created a space for private broadcasters. Slobodan Milošević, then president of Serbia, had seized control of television transmitters in Bosnia-Herzegovina in 1992 and broadcast fictitious reports of Croatian militiamen ruthlessly massacring Serbs.\textsuperscript{85} These broadcasts fostered rage among the Serbian people against Croats and Muslims to support his ethnic cleansing project.\textsuperscript{86} After the Dayton Accords brought peace to the region, the United Nations' Office of High Representative, in charge of administering Bosnia-Herzegovina's 2006 democratic elections, instituted a comprehensive regulatory regime that included codes of conduct for program content, ensured equal access for opposition parties, and established licensing standards.\textsuperscript{87}

The OHR also granted an international media standards commission, the Communications Regulatory Authority (CRA), the power to set out public service obligations in commercial broadcasters' licenses, and to sanction noncompliant stations.\textsuperscript{88} The CRA, mindful of media abuses in the region's recent past, has also passed rules prohibiting commercial stations from broadcasting any material that carries a clear and immediate risk of inciting ethnic or religious hatred among Bosnia-Herzegovina's diverse communities of Bosnians, Croats, and Serbs.\textsuperscript{89} The recently promulgated Rule on Media

\textsuperscript{81} Id. at 149.
\textsuperscript{82} Id. at 151.
\textsuperscript{83} Id. at 151–52.
\textsuperscript{84} For a survey of the media's role in newly democratic and pre-democratic countries' transition to the rule of law, see MEDIA REFORM: DEMOCRATIZING THE MEDIA, DEMOCRATIZING THE STATE (Monroe E. Price et al., eds. 2002).
\textsuperscript{85} Monroe E. Price, Bosnia-Hercegovina: Post-Conflict Restructuring, in id. at 93.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 94.
\textsuperscript{89} Advertising and Sponsorship Code of Practice for Radio and Television, ¶ 5, 8(c), 10, 14, C.R.A. (Mar. 9, 2000) (BiH).
Concentration and Cross Ownership has imposed some order on what was formerly an unregulated free-for-all by preventing multiple broadcast outlet ownership in a single media market, disallowing any cross-ownership other than that of a single newspaper and a single broadcast station, and imposing reporting requirements for ownership transactions of a certain size. While still largely dependent on foreign aid, the dual private/public broadcasting system in Bosnia-Herzegovina looks to continue beyond the country’s status as a UN protectorate.

B. Public and Private Ownership Convergence: Italy

As noted, privatization has played a significant role in breaking down state-owned broadcast monopolies. In most cases, the result was a diversified media market and increased consumer choice; in Italy, however, the result was consolidated media power in a manner never before seen in a post-war, Western, democratic state.

By the mid-fifties, Italy, like nearly every other Western democracy except the United States, had an entrenched state-owned television monopoly dedicated to providing public interest broadcasting. RAI, or Radiotelevisione Italiana, was a formerly private radio service transferred to government control that began broadcasting in 1954, and was funded partly through license fees and partly through carefully circumscribed advertising. The familiar rationale for purely public control was that only such an outlet could guarantee “independence, objectivity and openness to different political, social and cultural tendencies and respect for the right of freedom of expression guaranteed by the [Italian] Constitution.” While RAI enjoyed its decades-long broadcast monopoly, Silvio Berlusconi, a businessman who began his career in real estate in the 1960s, founded Telemilano, a local cable TV station established to provide television service to an apartment complex he developed.

90 CRA Rule No. 21/2003 (2004); TELEVISION ACROSS EUROPE, supra note 52, vol. 1, 318–19.
91 Consistent with the broadcasting structures of the international donors themselves, the EU seems to be providing most of the foreign aid supporting public service broadcasting, such as the state-owned Radio-Television Republika Srpska, while the United States, mostly through USAID media programs, supports commercial broadcasting services such as the Mreza Plus Network. See TELEVISION ACROSS EUROPE, supra note 52, at vol. 1, 265–303.
92 Id. at vol. 2, 880, 922–24.
on the outskirts of Milan. Through Telemilano, which later became Canale 5, Berlusconi began mounting a challenge to RAI’s dominance.

The public broadcaster’s nationwide monopoly was undisputed on pluralism grounds; however, a series of Italian Constitutional Court decisions in the late 1970s and early 1980s found that private television stations broadcasting locally did not interfere with RAI’s monopoly and their operations were therefore legal. Berlusconi, armed with the decisions, bought programs, especially U.S. movies and soap operas, and aired them simultaneously over the local stations he was purchasing throughout the country or offered them at cut-rate prices to small regional television stations. He also inserted pre-recorded advertising into the programs and reinvested the revenue from its sale into purchasing more local stations. Local Canale 5 stations throughout Italy agreed to broadcast the same programs at the same time, granting Berlusconi a national audience and, by extension, a de facto national network.

In the mid-1980s, Berlusconi, flush with advertising profits, bought his two rivals in the private broadcasting industry, Italia 1 and Rete 4, holding them through his media company Fininvest. After several local magistrates in Turin, Rome, and Pescara shut down his stations for broadcasting nationally in violation of RAI’s monopoly, he tapped political clout with his close friend and then-Prime Minister Bettino Craxi to win a decree allowing his stations to remain on the air. Six months later the decree became law, and in August 1990 a new media bill was passed, allowing private ownership of national networks but placing an ownership cap of three networks by any one owner. While technically twelve broadcast stations were available at the time on Italian televisions, the three most-watched channels other than Italia 1, Rete 4, and Canale 5 were all run by RAI, and the rest had a combined

95 Id.
98 An Italian Story, supra note 97.
99 Id.
100 Id.
101 See Law Converting Into Law “Law Decree 807” of 6 December 1984 on Urgent Dispositions in the Area of Television Broadcasting, no. 10 (Feb. 4, 1985), Gazz. Uff. no. 30 (Feb. 5, 1985); GINSBORG, supra note 94, at 38. Those Berlusconi stations still on the air also rallied to the privatization cause; in response to the blackout they called for a recognition of the television viewer’s right to “use the television’s automatic controls,” or to libertà di telecomando. GINSBORG, supra note 94, at 38.
audience share of less than nine percent. Berlusconi's holdings were legitimized post hoc by the Italian media law, and the three commercial television stations he owned grew to represent up to forty-five percent of the Italian viewing audience—an amount equal to that of RAI's three channels.

Commentators have argued that Berlusconi used control over his media holdings to help him secure the premiership of Italy in 1994 and 2001. Analysis of the 1994 election results shows that there was more of a swing to the right among Berlusconi-channel viewers than among the Italian electorate at large. Berlusconi's coalition government fell apart in 1996, forcing him to resign from office, only to run again five years later. The use of his TV networks for political advantage leading up to the latter election was even more pronounced; during the 2001 campaign for Prime Minister, Berlusconi's stations gave him almost two times the coverage of his center-left rival Francesco Rutelii (RAI, by contrast, gave roughly equal time to the two candidates on its three stations). In the two years preceding the official campaign, the difference was even more striking, with Berlusconi appearing on television more than four times as often as his opponent. During the pre-election period in 2001, Italy's Communications Authority censured Rete 4 for violating its rules on political impartiality.

Once in office, Berlusconi wasted little time in seeking to exercise his influence over RAI. He characterized critics of his policies appearing on RAI programs as putting public television to "criminal use." After his accusations, RAI management took the two highly-rated programs that hosted those critics, II Fatto and Sciuscià, off the air. The latter show was replaced by a program hosted by a journalist widely perceived as sympathetic to the

103 TELEVISION ACROSS EUROPE, supra note 52, at vol. 2, 925.
104 HUMPHREYS, supra note 22, at 179–80.
105 DOYLE, supra note 9, at 20; HUMPHREYS, supra note 22, at 209.
106 DOYLE, supra note 9, at 20 (citing A. GRAHAM AND G. DAVIES, BROADCASTING, SOCIETY AND POLICY IN THE MULTIMEDIA AGE 32 (1997)).
111 Id. at 12.
right-wing coalition government; it proved to be a ratings failure.112 During the controversy over the cancelled programs, Luigi Zanda and Carmine Donzelli, opposing members of RAI's board, resigned in protest.113 Berlusconi also sought to broaden his media holdings once in office; his supporters on the Italian right proposed a media law passed by the Italian Parliament in 2003 that would have significantly relaxed restrictions on cross-ownership, allowing Fininvest's broadcasting arm Mediaset to acquire radio and newspaper outlets.114 President Carlo Azeglio has implicitly rejected the legislation.

Berlusconi's interests extended through the print media as well, but his newspaper holdings were a far less effective tool in attempting to corral public opinion in his favor. He was a forty-eight percent shareholder in the Mondadori publishing group, which itself owned thirty-one percent of the publishing industry, including Panorama, one of the country's biggest news weekly magazines.115 His wife and brother also ran two large daily Italian newspapers, Il Foglio and Il Giornale, respectively;116 cross-ownership restrictions passed in 1990 compelled his divestiture of the latter paper.117 Despite the reach and influence of the Berlusconi empire in the print medium, the Italian paper press offers a range of diverse viewpoints due to a tradition of editorial autonomy, a multitude of titles, and entrenched partisan political identities of individual papers.118 Berlusconi endured significant criticism in print during his tenure. For example, even Il Corriere della Sera, Italy's largest daily newspaper, owned by a group and run by well-known conservative industrialist Cesare Romiti has opposed the government on several occasions on issues such as Berlusconi's control over RAI and Italy's support of U.S. policy in the Middle East.119

The environment that allowed Berlusconi's convergence of broadcasting power was unique in many ways. One might argue that the Italian Parliament was simply not up to the task of amending media law, post hoc, in any meaningful way once Berlusconi had already amassed his broadcast holdings...
MEDIA OWNERSHIP REGULATION

and had turned their use to his political advantage. Parliament made no effort to put regulations in place governing media acquisitions; it proposed no rules requiring government approval for consolidating transactions or mergers.\textsuperscript{120} Parliament effectively remained inactive in the media policy area despite continued admonitions from the constitutional court, which provided both constitutional underpinnings and specific recommendations to promote and protect pluralism in the broadcast market.\textsuperscript{121} Attempts to amend the media law after Berlusconi entered office also gave superficial shrift to the issue. A law passed by the Parliament in February 2002, ostensibly to resolve Berlusconi’s conflicts of interest, barred elected officials from managing a private company or holding an honorary position such as a chairmanship. The law, however, did not bar controlling ownership in private companies. Berlusconi therefore had to relinquish his honorary chairmanship in his AC Milan soccer club but was not required to divest himself of his controlling ownership interests in Fininvest.\textsuperscript{122}

Berlusconi narrowly lost his bid for re-election in April 2006 and was then re-elected two years later; given the print press’s active criticism of him as both Prime Minister and candidate, one could conclude that the people’s will eventually works its way through the obstructing influence of media consolidation the way running water eventually finds the cracks in a dam. But for a time, the Italian Parliament was at least complicit, if not a direct accomplice, in his accumulation of power over Italian television. Perhaps the Berlusconi example cuts both ways; since government is inherently susceptible to such influence, can it ever be fully entrusted to guard the electorate against the perceived distortions caused by an overconsolidated media space?\textsuperscript{123}

\textsuperscript{120} See TELEVISION ACROSS EUROPE, supra note 52, at vol. 2, 913–14 (explaining that media regulations in 1990s Italy proved largely ineffective).

\textsuperscript{121} See id. at vol. 2, 915 (stating lawmakers have “the obligation to prevent the formation of dominant positions and to promote access to the broadcasting sector of the highest possible number of different opinions, so the public could be in a position to make its decisions having in mind different standpoints and alternative cultural forms of expression” (quoting Racc. uff. corte cost., 26 Mar. 1993, n.112, 14 Gazz. Uff. 1993)).

\textsuperscript{122} See In Italy’s Interests, FIN. TIMES, Mar. 4, 2002, at 20 (asserting that the new law is a “fig leaf” and changes nothing).

\textsuperscript{123} Nor is our political class here at home immune to the self-preservation instinct when exercising its regulatory muscle over the media. As President Nixon noted in the heat of Watergate coverage, “[t]he main, main thing is The [Washington] Post is going to have damnable, damnable problems out of this one. They have a television station. . . . and they’re going to have to get it renewed.” S. REP. No. 93-981, at 149 (1974). Senator Ted Kennedy successfully slipped legislation into a large, unrelated budget bill that eliminated the FCC’s temporary waiver of the cross-ownership rule allowing Rupert Murdoch to own both the Boston
addition, does the prospective electorate feel the need to be so protected? Imagine if, instead of twelve nationally licensed private broadcast stations, of which Berlusconi owned three during his rise to power, there were thirty or forty. Or consider whether his holdings could have influenced public opinion in the run-up to his first election to the same degree as in the present-day United States, where the cable, satellite, and Internet options for seeking out and finding alternative viewpoints are nearly immeasurable. Increasing media choices, rather than trying to disincentivize the acquisition of existing media properties, might be a more efficient fix for diffusing media consolidation’s perceived potential to distort public opinion.

IV. Analysis

If ownership consolidation is truly a problem, the prescription is simple: do not let media owners exert editorial control over their outlets. A regime mandating distinct separation between ownership and management would dislodge the ownership presumption and obviate the need for consolidation controls. Where ownership and control over content are unlinked, the dangers of a consolidated media market disappear and firms can enjoy the efficiencies of mergers. Private investment and the development of economies of scale could continue unabated. Large media firms would invest in new outlets, and consumer choice would effectuate pluralism of content.

However, as the Italian example shows, there is more than one kind of control. An owner’s influence extends well beyond content-based decisions to include personnel and investment choices, among other indirect controls—decisions that can affect content to almost the same degree as an owner telling his station group what to air.


124 In a recent global survey, Italians reported the highest levels of dissatisfaction with their government of any Western country. Richard Wike, Italy’s Malaise: La Vita Non È Così Dolce, PEW RESEARCH CENTER, Jan. 17, 2008, available at http://pewresearch.org/pubs/695/italys-malaise-la-vita-non-e-cosi-dolce. So in one sense, perhaps Italians have already made up their minds about their politicians.


126 See DOYLE, supra note 9, at 19 (stating that “[a]n owner’s influence may manifest itself in the choice of key personnel, or in strategic decisions about which resources to reduce or invest
On the other hand, lest we forget, owners have rights too.127 It would be absurd to call for a regulatory scheme that would bar the owner of a newspaper from expressing his views in that paper; the notion does violence to our collective memory of the Founding Era's archetypical sole pamphleteer. Some control is inherent in ownership, whether of a television station or of a corner store.

So what are we to do? The rest of this Part assesses the regulatory approaches countries most often use and considers the strengths and weaknesses of each method. The approaches can roughly be broken down into two types: (1) structural limitations on private ownership that bar a certain owner from owning combinations of a certain kind or amount, and (2) development of alternatives to alleviate some of the perceived problems caused by private ownership. However, neither of these approaches adequately addresses what its proponents view as the harms associated with ownership consolidation because such proponents can demonstrate neither those harms nor the approaches' salutary effects upon them. In addition to an effectiveness problem, media ownership regulation in the United States raises a constitutional question. Because the government justifies its ownership preferences by citing a concern over what some (disfavored) potential owners might say, such a preference could well be interpreted by the Supreme Court as a content-based regulation and declared suspect, if not invalid. Given these concerns, I propose an alternative method of curbing the potential of excessive media ownership influence: self-regulation through private contract.

A. The Problem with Ownership Limitations

In terms of direct rules affecting television station transactions, if there is an internationally predominant regulatory trend, it is the use of a national audience cap as a limit on the holdings of any private owner. The amount of the cap is somewhat consistent, except for a few outliers: the figure in the United States is thirty-nine percent; Germany's cap is set at thirty percent; the

more in, or in arrangements for sourcing or distributing content”).

127 The United States Supreme Court and FCC have recognized as much. See Miami Herald v. Tornillo, 418 U.S. 241 (1974); 2002 Media Ownership Order, ¶ 352 (“[I]t is hardly surprising, nor do we find it troubling, that newspaper owners use their media properties to express or advocate a viewpoint. To the contrary, since the beginning of the Republic, media outlets have been used by their owners to give voice to, among others, opinions unpopular or revolutionary, to advocate particular positions, or to defend, sometimes stridently, social or governmental institutions. Our broadcast ownership rules may not and should not discourage such activity... The media are not common carriers of speech.” (footnotes omitted)).
cap used in the United Kingdom until recently was set at thirty percent of the commercial television audience. A national audience cap as compared to some other method of limitation can work in the interest of the broadcast owner seeking to expand into other, newer segments of the media market. Germany had an ownership cap that was similar to Italy’s, based on the total number of channels any single entity could own, but during comprehensive reform of its ownership regulation in 1996 and in response to complaints from broadcasters who wanted to expand into cable, Germany switched to a cap based on national audience share. Even countries with significantly concentrated ownership, such as Australia, adhere to a national audience size limitation.

One criticism leveled against an ownership limitation based on the size of the audience one particular broadcaster reaches is that it is arbitrary regulatory line-drawing at its worst. An audience limit of thirty percent is no easier to justify than a limit of thirty-five percent or forty percent; informed by the ownership presumption, we “know” only that more consolidation is bad. But the U.S. example shows that, at least in the public’s collective psyche, there may be a tipping point. When the FCC sought in 2003 to raise the national ownership cap to forty-five percent, some members of the electorate revolted, and groups and constituents across the political spectrum filed more than two million comments to the agency expressing their dissatisfaction. Congress eventually intervened, statutorily setting the cap at thirty-nine percent.

One might reasonably ask why forty-five percent, or even forty percent, is too high while thirty-nine percent is acceptable. One answer seems to be that some members of the U.S. public and their representatives had a psychosomatic reaction to a cap number that was within spitting distance of allowing a single owner to reach half the national television audience. The difference between

128 47 C.F.R. § 73.3555(e)(1) (2008); Josef Trappel & Werner A. Meier, Media Concentration: Options for Policy, in MEDIA POLICY: CONVERGENCE, CONCENTRATION, AND COMMERCE 191, 193 (Denis McQuail & Karen Siune, eds. 1998). Failed efforts to harmonize ownership concentration regulation across the EU also utilized a thirty percent national audience ownership cap for member countries. See supra note 67.

129 TELEVISION ACROSS EUROPE, supra note 52, at vol. 2, 762. Germany’s national audience cap has a cross-ownership component as well; any company with a dominant presence in another media sector such as print or radio is subject to a reduced national audience cap of twenty-five percent. Id. at 763.

130 See Broadcasting Services Act, 1992, § 53(1) (Austl.) (“A person must not be in a position to exercise control of commercial television broadcasting licenses whose combined license area populations exceed [seventy-five percent] of the population of Australia.”).

131 2002 Media Ownership Order, ¶ 539.

132 To be fair, there was a practical reason Congress arrived at the thirty-nine percent figure;
an administrative line and a legislative line, however, is not where the line is drawn, but the hand behind the pencil: as to the U.S. national cap, the line was drawn not by appointed regulators but by elected representatives. That distinction alone may make the result less arbitrary. But it does not satisfy anyone who seeks an adequate justification for government to regulate media ownership more, less, or at all. 

One might also ask what it means that some countries' caps are higher than others', or that a country might adopt or decrease an ownership cap. Australia, one of the outliers referred to earlier, has a seventy-five percent cap;\(^\text{133}\) does this mean that the results in U.S. elections are more reliably based on informed voter decisions rather than on distorted media influence? Does the answer to that question change if Australians watch less television than Americans do, or if Americans visit more political blogs or watch more debates? Canada's media regulator, the Canadian Radio-Television and Telecommunications Commission, has recently announced a forty-five percent national audience cap, as well as cross-media limits in local markets.\(^\text{134}\) Does this mean that Canadians can be better assured that their election results will more accurately reflect the considered collective will? To ask these questions is to answer them; dispersal of ownership to promote viewpoint diversity may be a worthwhile policy goal, but the conclusion is more intuitive than empirical.

Another approach is to vest discretionary power in an independent agency to consider media mergers on a case-by-case basis. In Ireland, for example, there are no formal rules regarding cross-ownership or consolidation of ownership of either press or broadcast outlets, but the broadcast licensing authority of Ireland is statutorily required to consider diversity concerns in the issuance of licenses.\(^\text{135}\) But a case-by-case approach presents problems as well.

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\(^{133}\) Broadcasting Services Act, § 53(1).

\(^{134}\) See Daina Lawrence, Canada's New Media Rules Attacked, FIN. TIMES (Can.), Jan. 16, 2008.


In the consideration of applications received by it and in determining the most suitable applicant to be awarded a sound broadcasting contract, the Commission shall have regard to—
The lack of regulatory stability, as well as the prospect of administrative rigmarole, may drive prospective station buyers out of the market. Case-by-case analyses also make the regulator-appointment process critical, as the approval of a merger and interpretation of statutory concerns rests entirely within the discretion of the sitting regulators; a change in the Commission's majority could result in either a flood or a trickle of prospective station purchases, depending on the direction of the agency's political tip.

The more serious flaws with both the national cap and a case-by-case approach lie in the practice of regulating ownership through licensing. Consider the following hypothetical: the owner of the largest audience market share in Country X decides to run an editorial, simultaneously on all of his stations during their evening news broadcasts, demanding the abolition of the national ownership cap, arguing it violates core freedom of expression principles, and encouraging viewers to contact their representative and the relevant regulator to urge them to advocate this abolition. Next, crank up the owner's consolidation power to maximum effect, and assume that every single television in his stations' viewing areas was tuned to those evening news programs. (If you prefer your media barons nefarious, make it a news story about the ineffectiveness of the cap, instead of an editorial.) Even so, we simply do not know how many viewers were watching intently enough to be

(g) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Act;
(h) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media.


[T]he Commission shall endeavour to ensure that the number and categories of broadcasting services made available in the State by virtue of this Act or the Act of 1988 best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity.

influenced, how many listened but had already decided that ownership caps were a good thing and were therefore not persuaded, or how many were fixing dinner, feeding the baby, or reading the evening paper and not paying attention. There is no way, in other words, to measure the intensity of consumption of the media product, let alone its direct effects. Unlike lead in toothpaste or mercury in drinking water, the symptoms associated with consuming consolidated media are difficult to measure and nearly impossible to define.

So in a real sense, media anticonsolidation measures regulate against potential influence, rather than exercised influence. But as the Berlusconi example shows (admittedly in the extreme), where the existence of concentration power is a predicate to its abuse, it may be a worthwhile societal goal to prevent the predicate. As Edwin Baker argues, "although this power [of unchecked concentration] may seldom or never be exercised, no democracy should risk the danger." However, even assuming such a potential danger exists does not necessarily mean the government should aggressively regulate to preclude such potentiality, especially when its power to do so may be constitutionally suspect.

B. A Constitutional Concern

Even some deregulation advocates have presumed (sometimes for the sake of argument; sometimes because they had another regulation more clearly identifiable as content-based, such as affirmative programming requirements, in their sights) that ownership regulation would undergo rational basis review if subjected to First Amendment challenge. But by its own admission, the reason government regulates ownership is to ensure that broadcast content is sufficiently diverse—the presumption is that two different owners will result in different, more desirable programming content across both stations than

136 Commentators have noted other problems with the ownership presumption: that whether it works is empirically unproven, see Benjamin M. Compaine, The Impact of Ownership on Content: Does it Matter?, 13 CARDOZO ARTS & ENT. L.J. 755, 763 (1994) ("There is no evidence that any of [the FCC’s] policies on ownership has in fact resulted in greater (or less) diversity of content.")., or worse, that the FCC has recognized this infirmity but continues to rely on it, see Adam Candeub, The First Amendment and Measuring Media Diversity: Constitutional Principles and Regulatory Challenges, 33 N. KY. L. REV. 373, 375 (2005) (stating that the FCC "simply equates viewpoint diversity to diversity of ownership almost as a matter of religious faith—without empirical backing").


would occur if those stations were jointly owned. The government has expressed a preference for diverse speech over the speech that an unregulated media market would cause, and for one owner over another. As Jonathan Emord notes:

[T]he entire system of ownership regulations proceeds from the Commission's unsubstantiated presumption of a close nexus between the identity of the broadcaster and the viewpoints expressed by that broadcaster through his choice of programming. . . . [By using ownership regulation to create viewpoint diversity, the FCC is] presuming that each new broadcast media owner will add a different voice to the marketplace of ideas.139

The critical inquiry is whether a government preference for diverse content is a content-based justification requiring the regulations enacted in pursuit of the preference to be subjected to a higher level of scrutiny. Moreover, if it turns out the FCC is right and there is a “close nexus” between owner and viewpoint of the kind Emord describes, the argument that ownership regulation is content-based is arguably even stronger. Therefore, the more empirical support the Commission provides for the presumption, the more constitutionally suspect it becomes.

Proponents of regulation who take the constitutionality of ownership restrictions as a given make two intertwined claims: that structural regulations do not express a viewpoint preference, and are therefore not content-based, and that the broadcast spectrum is a scarce public good, which entitles government to impose greater conditions upon the entities that use it. Unpacking the two justifications reveals the problems inherent in each.

1. Structural Regulations as Inherently Content-Neutral?

The Supreme Court's most recent foray into analyzing the level of First Amendment scrutiny that should be applied to structural media regulation was in the 1994 case Turner Broadcasting System, Inc. v. FCC (Turner I), where the Court held in a 5-4 opinion that the so-called "must-carry" provisions of

the 1992 Cable Act, which required cable operators to carry the local broadcast stations in their markets, were content-neutral regulation and therefore subject to only intermediate scrutiny. The government does not engage in content-based regulation, the majority found in an opinion written by Justice Kennedy, so long as its measures "are not a subtle means of exercising a content preference" or "enacted to promote speech of a favored content." The government's intent was not content-motivated, in other words, and the must-carry rules "on their face, impose burdens and confer benefits without reference to the content of speech"; they were therefore content-neutral. Congress's "overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television."

The Court's conclusion in *Turner I* begs the question why the government thought access to free programming should be preserved. The obvious answer? Its content. As Justice O'Connor pointed out in dissent, the must-carry rules were analogous to a government mandate "order[ing] all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers." The rules at issue expressed a preference for local broadcast programming over that which a cable programmer would have otherwise provided, like the dissent's hypothetical regulations expressed a preference for American films over French cinéma or charitable books over get-rich-quick guides, and that preference was justified

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140 512 U.S. 622 (1994). The right to provide the programming of one's choice has long been treated by the Court as First Amendment-protected speech. See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("Through original programming or by exercising editorial discretion over which stations or programs to include," cable programmers "seek[] to communicate messages on a wide variety of topics and in a wide variety of formats"); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

141 *Turner I*, 512 U.S. at 643.

142 Id. at 645.

143 Id. at 647. Lower courts have followed *Turner I* majority's holding in finding the Commission efforts to regulate broadcasting on diversity and localism grounds to be content-neutral. See, e.g., *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1169–70 (D.C. Cir.), cert. denied, 125 S. Ct. 634 (2004); *Fox Television Stations v. FCC*, 280 F.3d 1027, 1041–42 (D.C. Cir. 2002); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401–02 (3d Cir. 2004).

144 *Turner I*, 512 U.S. at 676 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor concurred only in those parts of the majority opinion holding that cable operators' programming decisions enjoyed full First Amendment protection. Joining her in dissent were Justices Scalia, Thomas, and Ginsburg; joining Justice Kennedy's majority opinion were Chief Justice Rehnquist and Justices Blackmun, Stevens, and Souter.
“with reference to content.”\textsuperscript{145} As Congress’ Cable Act findings stated, “[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media,” “[p]ublic television provides educational and informational programming to the Nation’s citizens, thereby advancing the Government’s compelling interest in educating its citizens,” and “[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.”\textsuperscript{146} Congress was therefore clearly expressing a preference, the dissent concluded, and expressly referred to a favored kind of content in making its preference known.\textsuperscript{147}

The must-carry rules may have been structural in nature, but they clearly evince a content-based intent: to ensure a space for local content on the televisions of cable subscribers. They also certainly communicate a content-based preference for the kind of programming a local broadcasting licensee would be likely to provide over that which a cable programmer or operator would offer on those same channels. Their overriding objective was to promote and preserve local content by ensuring the survival of local broadcasting. In operation, they precluded a cable operator’s right to air the content of its choice, a First Amendment interest that all nine members of the Court recognized. Therefore, the conclusion that they were content-based, and therefore subject to strict scrutiny, should have followed.\textsuperscript{148}

\textsuperscript{145} Id. Indeed, the Commission has justified ownership regulations with similarly explicit references. See 2002 Media Ownership Order, 68 Fed. Reg. 46,286, ¶ 30 (Aug. 5, 2003) (“[E]vidence from a variety of researchers and organizations appears to disclose a meaningful connection between the identity of the outlet owner and the content delivered via its outlet(s). This evidence provides an additional basis to reaffirm our longstanding conclusion that regulating ownership is an appropriate means to promote viewpoint diversity.”).

\textsuperscript{146} Turner I, 512 U.S. at 676–77 (O’Connor, J., concurring in part and dissenting in part) (quoting the Cable Act § 2).

\textsuperscript{147} Id. at 677–78.

\textsuperscript{148} The majority conceded that Congress’s findings recognized the value of local programming, but found this value judgment did not express a content preference: [I]n the course of describing the purposes behind the Act, Congress referred to the value of broadcast programming. . . . We do not think, however, that such references cast any material doubt on the content-neutral character of must-carry. That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as more valuable than cable programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value[,] and[ ] thus, are worth preserving against the threats posed by cable.
Turner I illustrates that distinguishing regulations on the basis of whether they are structural or facially content-neutral is a formalistic fiction. The Court's content-based and content-neutral jurisprudence has focused on whether the challenged law or regulation at issue evinced a governmental intent to favor or disfavor a given message or speaker for which it had a preference, regardless of whether the law or regulation was facially content-neutral or structural in nature. Likewise, a hypothetical regulation requiring that twenty-five percent of all broadcast licensees be located in their community of license could be characterized as a structural regulation, but it clearly expresses a content-based intent on the part of the government—to place more local programming on the air—as well as a content-based preference for the kind of programming a local, as opposed to an absentee, licensee would provide. Similarly, any regulation of broadcast ownership relying on the principle of viewpoint diversity, whether structural in nature or not, could fairly be characterized as content-based. As Justice O'Connor's Turner I dissent noted, "[t]he interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say." That analytical principle applies with equal force to ownership regulation because the rationale for limiting ownership is an explicit governmental preference for diverse content over whatever content a consolidated market would produce, as well as for the kind of owner that the government presumes will provide that preferred content.

The examples offered by Justice O'Connor in Turner I, discussed above, illustrate the fallacy of the distinction between structural- and content-based regulations. Similarly, one could imagine a law requiring internet service providers to provide access to a minimum number of different websites on their portal pages; or a planning department that refused a construction permit to a DVD store owner unless he agreed to carry educational films; or a local

Id. at 648 (majority opinion). The majority cited no authority for the proposition that in order to be content-based, the government must express a preference for the speech benefitting from the regulation over the speech being burdened. Nor did it explain why Congress's recognition that local broadcast content has "intrinsic value" would be different than a recognition that it was "more valuable" than cable programming. The content-based/content-neutral determination cannot turn on the distinction between "valuable" and "more valuable."

See United States v. O'Brien, 391 U.S. 367, 377-79 (1968) (upholding a statute criminalizing the burning of Selective Service cards because of a non-speech-related government interest in efficient functioning of draft system); see also, e.g., United States v. Eichman, 496 U.S. 310, 315 (1990) (Flag Protection Act expressed no content-based limitation but was intended to curtail freedom of expression and was therefore unconstitutional).

Turner I, 512 U.S. at 678 (O'Connor, J., dissenting).
ordinance that precluded the same proprietor from owning more than one bookstore in a particular town. One could even imagine, as Ronald Coase postulated, a "commission appointed by the federal government [which] had the task of selecting those who were to be allowed to publish newspapers and periodicals in each city, town, and village in the United States." All of these limitations can be fairly characterized as structural regulation. Arguably, none express a particular viewpoint preference with specificity. All, however, would be at least suspect under, if not flatly inconsistent with, the First Amendment, and subjected to strict scrutiny. Determining whether a regulation is structural in nature does not answer the question of whether it is content-based; rather, it raises it.  

The foreign regulatory systems discussed above support the same conclusion. Take the BBC. Its establishment, and the coextensive bar on private broadcast ownership, was purely structural, yet rooted in the notion that broadcasting's capacity to deliver content was too important a power to leave to the market. Therefore, the British government, guided not by profit but by an interest in providing quality, state-building, self-improving content to the viewing public, decided to retain the authority to own and air content by itself. The speaker was favored because of the content it was likely to provide. Similarly, a Dutch pillar was designed to ensure that a given segment of Dutch society would receive programming that was responsive to their needs, experiences, and concerns. Even the Italian example is illustrative, in that it shows what can happen when no limitations are placed on ownership by government, competition, or private actors themselves: a consolidation of

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151 Coase, supra note 139, at 7.
152 A red herring lurks in the Turner I analogy; one should not pursue it. In Turner I, the government action (the must-carry rules) forced the speaker (the cable operator) to speak against his will (carry a local station on the cable system over one of his choice). By contrast, there is no constitutional right to own a television station. Following the herring's scent, one might conclude that unlike in Turner I, no speech right is implicated by the denial of a license to an otherwise qualified entity on the grounds that the ownership rules forbid it. But the relevant constitutional event for constitutional purposes is not the denial itself, but the justification given for it. No one would argue that a buyer who was denied a broadcast license "upon the basis of their political, economic or social views," NBC v. United States, 319 U.S. 190, 226 (1943), would have a viable First Amendment claim. On the other hand, a buyer who was denied a license because he had been convicted of a crime of moral turpitude would not.
153 When Lord Reith was asked whether the BBC was going to give the viewing public what they wanted, he famously replied, "No. Something better than that." See Vanessa Thorpe, BBC Under Fire for Teen Bias After DJ is Axed, GUARDIAN (UK), May 28, 2000, at 3, available at http://www.guardian.co.uk/media/2000/may/28/bbc.uknews (reporting on public outcry after dismissal of popular host).
154 HUMPHREYS, supra note 22, at 140–41.
content control in the hands of a single owner. Clearly the reason to regulate ownership is not simply, or even primarily, to exercise control over who can speak, but to influence the kind of programming aired. As the D.C. Circuit once noted, any content-based definition of diversity "may well give rise to enormous tensions with the First Amendment"; a reviewing Supreme Court might find that in regulating in pursuit of viewpoint diversity, the FCC is, by definition, engaging in a content-based exercise.

Arguments that ownership regulations are consistent with the First Amendment by courts and commentators alike rely on *FCC v. National Citizens Committee for Broadcasting (NCCB)*, where the Supreme Court found that the newspaper-broadcast cross-ownership rule was a "reasonable means of promoting the public interest in diversified mass communications." But the case is unreliable authority. First, the 1978 decision, authored by Justice Marshall, found that the rule was reasonably related to the Commission's goal of serving the public interest by "promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." It grounded the FCC's regulatory authority over media ownership, however, in the physical scarcity of the broadcast spectrum—a rationale that courts have found increasingly more difficult to justify, as will be shown below. Second, *NCCB*, following *Red Lion Broadcasting Co. v. FCC*, found the First Amendment interests of the television audience, rather than the First Amendment rights of the speaker, paramount—a mode of analysis that the Court has turned away from in recent speech cases, with good reason (after all, the Amendment expressly protects the right to speak, not to receive speech).

155 Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998).
156 436 U.S. 775, 802 (1978).
157 Id. at 780.
158 Id. at 795, 799. The Court upheld the rule on procedural review "notwithstanding the inconclusiveness of the rulemaking record" on the harms of cross-ownership, and even though "evidence of specific abuses by common owners is difficult to compile." Id. at 796–97.

"Compare Red Lion, 395 U.S. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); and NCCB, 436 U.S. at 800 ("Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the 'public interest' does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the 'people as a whole . . . in free speech.' " (quoting Red Lion, 395 U.S. at 390)), with *Turner I*, 512 U.S. at 642 (discussing must-carry regulations for First Amendment purposes in terms of the regulations' burden on the speaker, rather than the benefit of the viewing audience's receipt of local programming), *Reno v. ACLU*, 521 U.S. 844, 870–71 (1997) (discussing First Amendment burdens placed on speakers by the Communications Decency Act), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("[T]he
In short, NCCB relies on presumptions that have been undermined by technological advances and subsequent cases. Its application to the present media space is an attempt to cloak a policy preference with the infallibility of constitutional law.

2. Physical Scarcity: A Failed Justification

The courts and the FCC have long relied on Red Lion v. FCC to support the proposition that the First Amendment rights of broadcasters are inherently limited because of the scarce nature of the broadcast spectrum that the government allows them to use to cast their signals. With Red Lion prevailing as law and delineating a reduced level of First Amendment protection for broadcasters, perhaps the Court would permit even a content-based regulation to survive constitutional scrutiny as applied to those broadcasters. But as judges have recognized, the scarcity doctrine has been under attack almost from the moment it was adopted. In academia, liberal and conservative

fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."), cited in Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2671 n.9 (2007). Indeed, any valuation of the speech the "people" as listeners may need to fulfill their democratic responsibilities is misplaced, since for the marketplace of ideas metaphor to have any salience, the First Amendment must be agnostic as to the kind or quality of the ideas or information that the speaker speaks and the listener receives.

161 The other case that advocates use to defend ownership regulation's reliance on diversity, Associated Press v. United States, 326 U.S. 1 (1945), is similarly a thin reed, but for a different, more fundamental reason. Associated Press was an antitrust case, not a First Amendment case. The Court found that applying antitrust principles to the newspaper industry served, rather than frustrated, certain First Amendment-derived principles. Id. at 20. It is an altogether different proposition to claim that the First Amendment compels the government to ensure diversity in broadcast ownership to protect the viewing public's constitutional interest in viewpoint diversity.

162 See, e.g., Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501, 508-09 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987). Even the Supreme Court has expressed its unease with relying on the scarcity doctrine as justification for reduced First Amendment rights for broadcasters. See FCC v. League of Women Voters of Cal., 468 U.S. 364, 376 n.11 (1984) (stating that even the advent of alternative video programming providers such as cable and satellite, "[the Court is] not prepared . . . to reconsider its longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required"). Justice Kennedy discussed the scarcity doctrine in comparing First Amendment standards for cable and broadcast in Turner I, 512 U.S. at 638-40, but because the case dealt with the rights of cable carriers, the Court was not faced with the issue directly; thus, its scarcity discussion was dicta. Some thought the Court's recent grant of certiorari to review the FCC's regulation of broadcast indecency during the October 2008 term—its first such case in more than thirty years—would signal its intent to reconsider the scarcity regime, but only Justice Thomas indicated a willingness to reconsider its continuing vitality. See FCC v. Fox Television Stations, Inc., No. 07-582 (U.S.
commentators alike have demonstrated its speciousness on technological, economic, and theoretical grounds.\(^{163}\) Even the Commission itself has questioned the doctrine's continuing salience.\(^{164}\) Indeed, television broadcasters are in the midst of completing their transition from analog to digital broadcasting—a technology that is, by any measure, a far more effective and efficient way to allocate frequencies and broadcast sound and images. The scarcity justification is therefore more vulnerable now than it has ever been.

There is no reason to add another snare to the drum beat here; it is sufficient to state that if the Supreme Court were to revisit the issue of spectrum scarcity today, it may well find that the broadcast spectrum is neither scarce nor any more "owned" by the public than is a federally maintained park or lane on a highway. Some reasonable limitations may be placed on its use, in other words, but the mere fact of public "ownership" provides no justification for reducing the constitutional standards to be applied to government action affecting the users.\(^{165}\) The government may own the delivery system for the mail, but it does not rely on its ownership for placing limitations on who is allowed to mail a letter.\(^{166}\)

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163 See, e.g., Posting of Jack M. Balkin to Balkinization, http://www.balkin.blogspot.com (search “Fairness Doctrine Part II”) (Aug. 8, 2007, 08:00 EST) (noting that “[t]he scarcity theory is spurious” because “[a]ll resources are scarce,” but that other analytical rationales exist for upholding broadcast regulation). For a compilation of these criticisms, including critiques by other proponents of broadcast regulation, see Christopher S. Yoo, Architectural Censorship and the FCC, 78 S. CAL. L. REV. 688, 719 n.232 (2005).

164 General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 145, 152–53 (1985); Syracuse Pace Council, 2 F.C.C. Rcd. 5043, ¶ 74 (1987) (“[W]e no longer believe that there is scarcity in the number of broadcast outlets available to the public.”).

165 An entirely distinct First Amendment issue from regulating ownership of broadcast outlets is the government’s application of a licensing regime to broadcasters that would be wholly inconsistent with settled freedom of the press principles in the print context. See generally Lucas A. Powe, Jr., American Broadcasting and the First Amendment 49–101 (1987) (detailing the development of broadcast licensing and related First Amendment jurisprudence). Indeed, as Powe reminds us, the first-ever prevailing First Amendment plaintiff was Jay Near, a Minnesota publisher who successfully challenged a state statute that the Supreme Court analogized to prior licensing schemes. Id. at 19–21 (discussing Near v. Minnesota, 283 U.S. 697 (1931)). The fact that Americans turn to television as their primary source for news adds a particularly ironic gloss to the constitutional problems associated with licensing broadcast outlets. See id. at 44–45 (discussing some problems, constitutional and otherwise, arising from requiring licenses for broadcasters).

166 Distinguishing mail from a television station’s news program, as an advocate of media regulation might, is only partly responsive to this example. Newspapers, after all, are often
C. Providing Alternatives

In addition to structural ownership limitations, governments have taken other steps to help stem the perceived potential effects of a consolidated media space. These measures, two of which are discussed here, are not direct regulatory mechanisms, but the development of alternatives to private ownership and its possible abuse. The first is the development and support of a public broadcasting system alongside a private one. Where the public broadcaster was a monopolist, public broadcasting was not strictly a supplement to correct market failure, but a whole-cloth substitute for the market itself. Where, as now, the public broadcaster operates in the same market as the private broadcaster, the question shifts to whether a strong multichannel public broadcast service with public service obligations serves to mitigate consolidation's possible deleterious effects. The idea is the same: the state, rather than the market, can best fulfill the public-interest obligations of broadcasters and the information-disseminating potential of the medium. But once the public broadcast system is used as an alternative to private stations for public affairs information rather than the only choice, a question arises as to the adequacy of the substitute.

Numerous researchers have demonstrated that public broadcasting viewers are politically better informed than those who watch commercial broadcasting. See, e.g., Holtz-Bacha & Norris, *supra* note 135, at 3 (finding that in Europe "watching public television is associated with higher levels of political information than watching commercial TV"). Holtz-Bacha and Norris, through multiple-regression analysis, controlled for such variables as education, income, interest in politics, and frequency of consumption of newspapers and radio. *Id.* at 20. However, a correlation between a preference for public television and a higher knowledge of politics and international affairs does not necessarily mean that the former causes the latter. As the study's authors acknowledge, their findings and analysis cannot disprove the hypothesis that "the direction of causality runs from cognitive skills to media use" rather than the other way around, and that "the more politically knowledgeable choose to watch the more informative public TV news." *Id.* at 16.
correlation runs. Study after study has also shown that public broadcasting viewers have received more formal education, and their increased level of knowledge could be attributable to other information products, such as newspapers and newsmagazines, that the higher-educated are more likely to consume in addition to their daily diet of PBS. None of this is to say that public broadcasting does not serve the public interest; it only shows that, if public broadcasting is intended to provide a substitute to the narrowing of viewpoints on public affairs issues that consolidated ownership purportedly causes, then the results on that score are inconclusive.

A related point—and one reason some have claimed that public television serves as an inadequate substitute for market-based service—is private broadcasting's deleterious effect on public service broadcasting. Arguments that the presence of competition with privately owned stations results in a dumbing down of public service broadcaster programming across Western Europe, however, prove too much. I doubt the majority of British viewers would complain, for example, if BBC Four, looking to fill a timeslot in which ITV has been particularly competitive, decided to rerun an episode of BBC Two’s “The Office” rather than yet another of Sir Henry Wood's Proms. But in the real world, such a programming choice would presumably never occur because Ricky Gervais fans have their BBC Two, and Sir Henry Wood fans have their BBC Four. It is oversimplistic to state that all four BBC channels have diluted their programming quality in order to compete with more popular programming on the private broadcaster and cable networks because a public broadcaster can program its stations to reach distinct (though not exclusively distinct) audiences—just as a private broadcaster would program those same

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168 See, e.g., DANIEL C. HALLIN & PAOLO MANCINI, COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS 274–75, 277 (2004) (leveling a typical charge: “In most countries[,] . . . commercial broadcasting had a majority of the audience and competition for audience had significantly transformed public broadcasting as well, forcing it to adopt much of the logic of the commercial system. . . . Increasingly even public broadcasting systems must follow the logic of global cultural industries.”).

169 A true Reithian regulator might respond that these Brits would choose Sir Wood over Ricky Gervais if they knew which was better for them. But the point here is that in a multichannel media space, there is sufficient capacity and opportunity for each to find its audience.

170 As their respective websites state, BBC Two “is a mixed-genre channel combining serious factual and specialist subjects with inventive comedy and distinctive drama,” BBC Statements of Programme Policy, 2006/2007: BBC Two, http://www.bbc.co.uk/info/statement2006/tv/bbc two.shtml (last visited May 14, 2009), while BBC Four is for audiences in search of even greater depth and range in their viewing. With an ambition to be British television’s most intellectually and culturally
channels. There is room on the dial to accommodate almost anyone's taste. Also, the BBC may "compete" with ITV for viewers, but not for revenue or for advertisers.  

Clearly, however, not all broadcasting systems have the luxury of differentiating their offerings. The "problem," if there is one, is in smaller transition states where the public service broadcaster only has one channel and the competition for eyeballs with newly established private stations is more acute. But even in Eastern European countries such as the Czech Republic, Serbia, and Romania, the government has found room on the dial for up to three terrestrial channels, one of which airs local reality shows and comedies; it stocks the other channels with cultural and public interest programming.  

Another approach, gaining currency as new communications technologies develop, involves nonregulation, or light-touch regulation, of non-broadcast media markets. The emergence of multichannel operations and the digital media space, the argument goes, will obviate the need for media ownership regulation beyond generally applicable competition law. The more channels the better, and consumer choice can create a pluralistic marketplace of ideas far better than any regulatory regime. Cable and satellite stations throughout Europe and the United States will provide pluralism in the media marketplace in a way that ownership regulation never could. Online media such as blogs and independent websites also maximize consumer choice and correct any possible market failure in the broadcast space due to consolidated ownership.  

Some are doubtful of the Internet's capacity to correct for private ownership by providing pluralism in the media marketplace, arguing that the Web serves

enriching channel, BBC Four balances a distinctive mix of documentary, performance, music, film and topical features to offer a satisfying alternative to more mainstream programming.


171 INDEPEN, APPRAISING THE PROPOSED BBC LICENSE FEE INCREASE, supra note 34, at 6–7.

172 TELEVISION ACROSS EUROPE, supra note 52, at summary 73.

173 See generally Mark Armstrong, Public Service Broadcasting, Mar. 10, 2005, http://www.econ.ucl.ac.uk/downloads/armstrong/psb.pdf (arguing that subscription television solves prior market failures, thus removing a justification for broadcast regulation). Such arguments tend to rely on a different conception of public service broadcasting than the current understanding, at least in the United Kingdom. Indeed, as the number of channels increases and the television market becomes more fragmented, the license fee regime becomes more susceptible to criticism from consumers who claim they do not use license fee-funded channels such as the BBC and should therefore not be forced by the government to subsidize them.

as a complementary or duplicative media outlet rather than a substitutive one. More critically, Cass Sunstein argues that the Internet, by affording the user seamless power to self-select and filter out content, can do harm to deliberative democracy.¹⁷５ Before accepting such a claim, though, one might ask how many of those using the Internet for news and information were previously filtering the content they viewed or read via “old” media. Since we cannot know the answer to that question, it is difficult, if not impossible, to show other than in a theoretical sense that new media’s echo chambers might cause us to deliberate less or be exposed to fewer alternative points of view.

D. The Self-Regulation Alternative

The reason many of the mechanisms described above are generally unsatisfying, or cannot be shown to work, either theoretically or on their own terms, is that they share misdirected aim. To repeat, the real problem with consolidation, assuming there is one, is not “excessive” ownership in and of itself, but the danger of an owner who owns an “excessive” number of outlets imposing his or her views on his or her media outlets. The most focused target for a remedy is therefore not at the point where the owner purchases the outlet, but at the point where the owner can exercise the control over the outlet.

Self-regulatory mechanisms have traditionally been used in the United States to govern private broadcasters’ conduct regarding journalistic ethics and in programming areas such as the advertising of alcoholic beverages and time-zoning of content deemed inappropriate for children.¹⁷⁶ Other countries also rely on private agreements to effect voluntary separation of ownership and control in order to counteract the possibly deleterious effects of media influence. In Norway the Redaktørplakaten oversatt tilegelsk, or the Rights and Duties of the Editor, a declaration adopted in 1953 by the Association of Norwegian Editors and the Norwegian Media Business Association, states that editors “shall promote an impartial and free exchange of information and opinion” and are entitled to “a free and independent leadership of the editorial [department] and editorial work and full freedom to shape the opinions of the paper even if they in single matters are not always shared by the publisher or

Owners make similar pledges not to interfere excessively with the newsgathering and editorial functions. Support among Norwegian journalists for the Redaktørplakaten has not been unqualified, as some have complained about the lack of symmetry in the obligations it imposes upon journalists and outlet owners. For example, while an editor who finds herself with views irreconcilable with the paper's owner or publisher is called upon to resign, nothing prevents an owner from firing an editor who disagrees with her position. But private agreements such as the Redaktørplakaten can establish norms within the industry and cultures of editorial independence that it is in owners' economic interest to follow. The most popular media outlets are generally those with the most talented staff, and top-rank journalists would tend to gravitate toward media outlets where their editorial independence is expressly protected from excessive ownership interference. And where owners violate the agreement, noisy withdrawals by editors and journalists could preclude further breaches. Of course, nonsignatories to the agreement would not be bound, but the public censure that would accompany a board ruling adverse to an owner might serve as a significant deterrent to any future exercises of inappropriate control. Both the owner and his outlets would lose credibility in the eyes of media consumers. More importantly, they could lose journalists and viewers who placed a premium on independence.

There are historical precedents for a similar system in the United States. Following a self-regulation model similar to what the National Association of

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177 Norsk Journalistlag, Rights and Duties of the Editor, http://www.nj.no/English/?module=Articles;action=Article.publicShow;ID=4675 (last visited May 14, 2009). In the United Kingdom, a self-regulation entity, the Press Complaints Commission, establishes a code of conduct for journalists and hears and resolves complaints from the public. It was established after British MPs essentially told journalists to either establish a self-regulatory regime for protecting privacy and establishing a right of reply or be subjected to one by the government. See Torin Douglas, Battle to Raise Standards, BBCNEWS, Feb. 7, 2001, http://news.bbc.co.uk/1/hi/uk/1157911.stm; Press Complaints Commission, http://www.pcc.org.uk/index2.html (click "Code of Practice" or "Making a Complaint") (last visited May 14, 2009).


179 As one commentator stated during the debate on whether to incorporate the agreement into law, under the declaration, "the owners have power without responsibility, and the editors have responsibility without power." Asle Rolland, The Norwegian Declaration on the Rights and Duties of the Editor—from Private Arrangement to Public Law, 7 (Mar. 2005) (manuscript, available at http://web.bi.no/forskning%5Cpapers.nsf/WDiscussionPapers/ (click "2005," follow link to article)).
Broadcasters (NAB) has used in the past, the industry could set up, in collaboration with media-focused public interest groups, a commission designed to establish guidelines on editorial independence that all stations and station owners could be encouraged to follow. A complaints system could be used to report incidents of excessive owner influence if, for example, an owner discouraged an editor or reporter from covering a story that could directly affect the owner's economic interest, or if an owner sought to influence an editorial writer to express an opinion consistent with his own. A review board, made up of an equal number of news directors, editors, management, and owners, could hear complaints of improper influence filed by editors and reporters. Retaliatory firings or other discipline could be discouraged.

A recent major media transaction utilized a private agreement to preclude excessive owner influence over editorial decisions: Rupert Murdoch's summer 2007 purchase of the *Wall Street Journal*. Reports indicated that Murdoch's agreement with the Bancroft family for a controlling interest in the *Journal*’s parent company, Dow Jones & Company, provided that the pre-purchase managing editors and editing page editor of the *Journal* would remain in place after consummation of the transaction and would have exclusive authority over staffing and content. News Corporation could not remove any of those editors without preapproval from a special committee established by News Corporation and the Bancrofts. In the case of the *Journal*, it is the very independence and quality of the paper that the agreement protects and for which Murdoch paid a premium. Murdoch, as aware of this fact as any astronomically successful media magnate might be, was vocal regarding his intent to retain the *Journal*’s editorial leadership during his courtship of the Bancrofts.

Whether the agreement will preserve the paper's independence has been an open question. As one commentator noted, the agreement "was flawed, in that it anticipated, if not actually required, that the *Journal*’s managing editor would

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180 In the mid-1930s, the NAB set up a voluntary Radio Code, which called for, among other regulations, close supervision of children's content, balanced coverage of controversial issues, and limitations on advertising. A Compliance Committee was established for enforcement purposes. Later, a Television Code was adopted, setting out advertising guidelines and issuing rulings on the compliance of programs and commercials. Both Codes were repealed, however, when the Department of Justice filed suit against the NAB claiming the Codes as applied to advertisers violated antitrust laws. Campbell, supra note 176, at 721-23.


182 Id.


184 Id.
want to protect his or her autonomy, at least enough to file a complaint with the committee in the event the M.E.'s autonomy was infringed upon." The managing editor in place at the time the agreement was entered into resigned before any interference meriting a complaint arose. The point for present purposes is that the agreement was negotiated between the buyer and seller, rather than mandated by government regulation. In the end it will be the Journal's readership, and its owner's stock price, that will determine whether the newspaper is sufficiently insulated from interference or whether it is merely a tool for the influence-peddling of its visible owner and his business interests.

Another currently used private model for separating ownership from control in a media entity is the media trust, the most notable of which is the Scott Trust, owner of the British-based, left-leaning Guardian newspaper. John Scott, owner of the then-Manchester Guardian in the mid-nineteen thirties, established a trust to ensure the Guardian's independence from excessive ownership influence (like any trustor, he also did so to avoid estate taxes). The Scott Trustees perform the paper's executive functions but are barred from interfering with "the financial and editorial independence of The Guardian in perpetuity: as a quality national newspaper without party affiliation." Trustees appoint editors, monitor the corporate parent Guardian Media Group's management of finances, and occasionally sit as a "court of appeal" in disputes between editorial and management branches of the paper. As a recent article in the Columbia Journalism Review noted, a number of local American papers, such as Manchester, New Hampshire's Union Leader and Alabama's Anniston Star, are also owned by nonprofits or in trust. While the trust model is not as widely used in the broadcast context, a trust or nonprofit-like structure that interposes a decision making layer between ownership and the news department might preclude station owners from exercising excessive influence over news content while shedding light on possible ownership conflicts of interest.

There are many owner exercises of control that even a self-regulation regime should not reach. Owners may well choose to utilize their outlets to express their opinions on issues of public concern, or even to influence public opinion; such are the prerogatives of property ownership. But any concern

186 Id.
188 Id.
associated with those prerogatives has a relatively straightforward solution, one that many stations already engage in as a matter of industry practice: disclosure. As Justice Scalia has noted in the analogous context of campaign finance reform, "[t]he premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source." Here, as in politics, "[e]vil corporate (and private affluent) influences are well enough checked" by internal regulations requiring, for example, that a station disclose where an investigative story might implicate an owner's investments, or that a commentator's opinions reflect those of the station owner or general manager. And a particular station's lack of such controls could be disclosed and discussed by its competitors. Consider the following illustration:

**STATION 1 NEWS STORY:** "A study has recently shown that tea is better for you than coffee."

**NEWSPAPER 1 STORY** (Newspaper 1 and Station 1 share the same owner): "A study has recently shown that tea is better for you than coffee."

**STATION 2 NEWS EDITORIAL:** "Last night, Station 1 ran a story about tea. Newspaper 1 ran the same story this morning. Station 1 and Newspaper 1 share the same owner, and he also owns Company 1, which manufactures teakettles. Neither Station 1 nor Newspaper 1 has any policies preventing reporting in areas where there is a possible conflict of interest. Station 2, on the other hand, has a policy ensuring its editors and reporters would never have such a conflict. We believe these policies are critical to

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The implication that the people of this country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.


191 McConnell, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part).
keeping you informed. Therefore, if you want your news unfiltered, you should watch Station 2."

Even with such self-regulatory controls in place, in a country with few private broadcast outlets, an owner like Silvio Berlusconi could pursue his interests by other means, namely by appointing editors and other high-level decision makers who are sympathetic to his concerns. In this arrangement, there is no dispute between the owner and editor, since they share the same goal. But even with effective control over the six most popular television stations in Italy, Berlusconi could maintain a continuous hold on power; indeed, he returned to power even after losing ultimate control over RAI. And, as noted, part of the problem was the limited number of private Italian broadcast outlets, such that it was fairly simple for one owner to consolidate control over nearly fifty percent of the viewing audience. A licensing system with lower barriers to entry might have led to more private outlets, and a concurrent diffusion of Berlusconi’s sway over Italian television. In addition, had the government been willing to divest itself of one of the RAI stations to a private licensee back in the 1970s or 1980s, perhaps Berlusconi would have been less able to consolidate influence. A meaningful enforcement of competition law may have also curtailed the problem. Because of the longstanding RAI monopoly, there was no tradition of independence in the broadcasting context as there was in the print sector. It was therefore particularly susceptible to influence once a media baron eager to exercise power over television ascended to the prime ministership.

Apart from inter-industry efforts, non-governmental third-party actors can also have a role in developing self-regulation policies. In a report entitled Broadcast Freedom and the State, the Commission on Radio and Television Policy at the Carter Center, an advisory group established to assist new democracies in Eastern Europe develop media policies, recommended self-regulation practices such as allowing advertising rates for both public and private channels to be set by market rates. The Commission also

192 Former Russian President Vladimir Putin’s high poll ratings have similarly coincided with increasing Kremlin control over Russia’s public broadcasters. See Steven Lee Myers, On Russian TV, Whatever Putin Wants, He Gets, N.Y. TIMES, Feb. 17, 2004, at A1.

193 In the context of history, the owner/publisher pamphleteer example, supra Part IV, is also relevant here. See also supra notes 125–27 and accompanying text.

194 REPORT OF THE COMMISSION ON RADIO AND TELEVISION POLICY, BROADCAST FREEDOM AND THE STATE 4 (1994), available at http://www.pubpol.duke.edu/centers/dewitt/pdfs/rtvc_1994_rec.pdf. The advertising rate controls were designed so as not to allow public broadcasters, whose costs are partly defrayed by governmental subsidy, a competitive advantage.
recommended measures to ensure independence from state or private ownership, and called for the creation of buffer organizations to mediate between government and the media so as to insulate broadcasters from state influence. While many of these initiatives presume a preordained regulatory framework that contemplates a role for government intervention, they do recognize that independent actors in the media space are more responsive to and responsible for exertion-of-influence concerns than regulators. They incubate a new media space guided by principles of competition rather than public monopoly.

V. CONCLUSION

Consider one final hypothetical. WSEL, a television station in Springville, is for sale. WSEL’s transition to digital broadcasting and other economic challenges associated with operating a television station in a modestly sized city such as Springville has left it in financial straits. Two years ago, it pared its once award-winning news operation back to a single half-hour weeknight newscast at eleven p.m., and it is considering shutting its newsroom down to save costs.

There are three prospective buyers of WSEL. One is the owner of WAAA, a strong CBS network affiliate and the top-rated station in the mid-sized Springville market. WAAA has longstanding ties to the Springville community, and its owner has an established history of investing in news and supporting local nonprofits with employee contributions. Its local public affairs program, “Eye on Springville,” has aired weekly for the past twenty years, and it sponsors a dozen House and Senate debates for local races each election cycle. Its weekend anchor formerly hosted the evening news on WSEL and is much beloved by local viewers. On fall Friday nights, no one covers Springville high school football better.

Another prospective buyer is the ninety-year-old Springville Herald, a family-owned newspaper in Springville whose connections to the town run similarly deep. The Herald’s editorial staff is the largest newsgathering organization in the state and its reporters have won regional and national awards for their investigative work. Both WAAA and the Herald are committed to restarting WSEL’s once-proud local newscast, both out of a commitment to community service and out of economic sense, since investing in local news is a proven route to profitability. Unlike most media companies in smaller markets, they have the cash on hand and are ready to spend it. In

195 Id. at 2.
addition, both have pledged to keep their newsrooms completely distinct from that of WSEL, and have agreements in place ensuring the editorial independence of their news operations from ownership.

A third prospective buyer owns WBBB, an unaffiliated television station 600 miles from Springville, in a town called Lewisburg. WBBB has no news programming, and it does not participate in or support local events. Its website is bare-bones; it lists no community events or contact information for its newsroom staff. Its owner holds no media properties in Springville’s state and has no plans to bring WSEL back to anything above marginal profitability. It plans to do so by selling the station’s weekend airtime to a subsidiary of the Home Shopping Network. Under the FCC’s ownership rules, WBBB’s owner will win the station. Both WAAA and the *Herald* will be barred from doing so.196

This Article has focused on the legal and theoretical implications associated with governmentally imposed broadcast ownership controls. But the example illustrates an efficiency issue: even though the Communications Act obligates the FCC to award television licenses consistent with the public interest, its rules often preclude the very kind of transactions that would most be in that interest. Media theory, as manifested by the ownership presumption, defeats reality.

Like other Western countries, the United States government regulates the ownership of private media outlets to influence what those outlets might say. It may not write the music for the singers, but it does choose who gets to sing. The interest in either case, however, is to try and ensure the audience hears a certain kind of music. In part, this Article has sought to illustrate that to square the government’s method for selecting singers with the First Amendment, we must first define, with clarity and precision, its interest in the song.

196 47 C.F.R. § 73.3555(b), (d) (2008).