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THE FIRST AMENDMENT AND MEASURING MEDIA DIVERSITY: CONSTITUTIONAL PRINCIPLES AND REGULATORY CHALLENGES

Adam Candeub*

Since the New Deal, the Federal Communications Commission (FCC) has placed limits on the number of media outlets one entity can control in either national and local media markets. The FCC also has promulgated "cross-ownership" restrictions prohibiting, for instance, one entity from owning a television and newspaper station in a particular local market. The FCC has justified its regulations, in significant part, as efforts to promote diversity of viewpoint. While the Supreme Court for decades has upheld these restrictions against First Amendment challenge, the Court’s most recent cases, as well as those from lower courts, suggest growing disagreement over the degree to which these restrictions are exempt from First Amendment scrutiny.

This article will examine the courts’ growing unease with media ownership regulation and whether this judicial shift represents what our symposium calls “First Amendment Lochnerism.” As the other symposium participants have observed, “Lochnerism” has become an epithet with no precise reference, other than being something most judges seemingly wish to avoid at all costs. As symposium participants also point out, however, “Lochnerism,” in a general and imprecise way, refers to the judicial use of constitutional principles to strike down or limit reasonable economic regulation in order to impose some type of unpalatable, laissez-faire economic ideology. “First Amendment Lochnerism,” our symposium’s topic, would therefore refer to using the First Amendment, as opposed to substantive due process, to limit government’s power to impose economic regulation to further ideological goals.

The Article concludes that such an ideological shift might well exist or may be occurring in the future—at least as exemplified by in Turner Broadcasting v. FCC (Turner I). There, the Court applied First Amendment intermediate scrutiny to cable regulation, marking a departure from previous more deferential

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2. See id. at 94-95.
3. Id. at 89.
4. Id. at 175.
5. See id. at 184.
6. KRATENMAKER & POWE, JR., supra note 1, at 188.
In addition, the four justice-dissent went further, arguing for strict scrutiny. View this case as shift towards "Lochnerism" is nothing new. Numerous eminent commentators already have concluded explicitly that Lochner-type review is being applied to the media and information industry regulation.

This article, however, argues that the problems the FCC's regulations have faced are more complex than a media regulation-allergic Supreme Court. The problems stem from the FCC's inability or unwillingness to rely on meaningful metrics for media diversity—and reflect, therefore, a regulatory failing as much as a doctrinal shift in the judiciary. After all, courts, consisting both of majority Democratic- and Republican-appointed judges, have come down on the intellectual vacuity of the FCC's decision-making—particularly its inability to describe and measure the object of its regulation: a robust, diverse media market. For instance, the Third Circuit in a panel consisting of Thomas L. Ambro and Julio Fuentes, both Clinton appointees, in Prometheus Radio struck down the FCC's order deregulating media and did so on grounds that more conservative appellate judges have relied upon: the inconsistency of the FCC's treatment of diversity. In other words, courts on both sides of the ideological spectrum have struck down FCC regulation and deregulation relying on similar grounds—the FCC's weak definition and quantification of diversity.


10. Jim Chen, Conduit-Based Regulation of Speech, 54 DUKÉ L.J. 1359, 1456 (2005) ("The shield protecting ordinary economic regulation from First Amendment scrutiny has worn thin. The doctrinal distinction may not withstand the sheer amount of money in contemporary communications."); Michael Burstein, Towards A New Standard For First Amendment Review Of Structural Media Regulations N.Y.U. L. REV. 1030 (2004) (arguing that "such Lochner-like scrutiny is inappropriate in media regulation cases"); Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, 47 DUKE L.J. 899, 944-45 (1998) ("the First Amendment has become the first line of challenge for virtually all forms of regulatory initiatives."); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. REV. 1, 27-28 (2004) ("We are living through a Second Gilded Age, which ... comes complete with its own reconstruction of the meaning of liberty and property. Freedom of speech is becoming a generalized right against economic regulation of the information industries."); Benkler, supra note 9, at 201-03 ("As the information economy and society have moved to center stage, the First Amendment is increasingly used to impose judicial review on all regulation of this sphere of social and economic life."); Yochai Benkler, Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, 66 LAW & CONTEMP. PROBS. 173, 201-05 (2003).


Diversity is a central goal of FCC regulation. The Supreme Court repeatedly has stated that the FCC may limit ownership in order to further “viewpoint diversity,” the number of viewpoints and ideas expressed in media coverage and political debate. The FCC, however, does not attempt to quantify or identify the number of viewpoints and ideas in a given media market. Instead, it simply equates viewpoint diversity to diversity of ownership almost as a matter of religious faith—without empirical backing. The Biennial Media Ownership Order, the FCC’s recent and comprehensive statement of its regulatory principle states with shocking, and probably unintended, bluntness, “[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. We believe this proposition, even without the benefit of conclusive empirical evidence . . . .”

Accepting the connection between diversity of ownership and viewpoint as a self-evident truth is tendentious, particularly because a significant body of economic theory suggests the opposite: that concentrated ownership produces greater diversity in programming content. Judge Posner explained this insight in Schurz v. FCC, discussed infra:

It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity. If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group. For that would be the strategy that maximized the size of the station’s audience. Suppose, as a simple example, that there were only two television broadcast frequencies (and no cable television), and that 90 percent of the viewers in the market wanted to watch comedy from 7 to 8 p.m. and 10 percent wanted to watch ballet. The monopolist would broadcast comedy over one frequency and ballet over the other, and thus gain 100 percent of the potential audience. If the frequencies were licensed to two competing firms, each firm would broadcast comedy in the 7 to 8 p.m. time slot, because its expected audience share would be 45 percent (one half of 90 percent), which is greater than 10 percent. Each prime-time slot would be filled with “popular” programming targeted on the median viewer, and minority tastes would go unserved. Some critics of television believe that this is a fair description of prime-time network television. Each

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15. See id. at 780.
18. A recent analysis suggesting a connection between increased media concentration and increased viewpoint diversity can be found in Simon P. Anderson & Stephen Coate, Market Provision of Broadcasting: A Welfare Analysis, 72 Review of Economic Studies 947 (2005). This insight is quite old, being first applied to broadcast in Peter Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q. J. of Econ. 194 (1952).
network vies to put on the most popular programs and as a result minority tastes are ill served. 19

As with most economic insights, its application is questionable, depending on numerous assumptions that may or may not be appropriate in today’s media markets. 20 Yet, even if one were to dismiss this insight as so much theoretical musing and agree with the D.C. Circuit and the FCC that “ownership is perhaps an aspirational but surely not an irrational proxy” for diversity in programming, 21 this proxy has proven intractable. The FCC has difficulty determining when there are “enough” independently owned media outlets in a given market. Indeed, this inquiry is meaningless when not tethered to a measurement of whether or not more independently owned outlets produce more diversity of media content. Conceptually hobbled, the FCC produces Humpty-Dumpty from Alice in Wonderland-type regulation in which claims about diversity exist without any general standard of empirical justification, i.e., enough diversity is what the FCC says is enough. It also results in the stunning recent record of failure of the FCC’s media ownership rules when reviewed by the courts of appeal. 22

This article proposes two approaches, empirical and normative, to strengthen the regulatory justification for media ownership regulation in times of ever more demanding judicial scrutiny. On the empirical side, the FCC, following the lead of numerous economics and communications scholars, could make a serious effort to measure media diversity and tackle the difficult question of enumerating the number of ideas and concepts expressed within a given media market structure. 23 To date, it has not done so, but has used economic and empirical data in a haphazard, even chaotic manner. 24 Second, it could argue from

20. See id. (stating: “We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity . . . . We believe this proposition, even without the benefit of conclusive empirical evidence remains sound.”).
22. It is hard to remember a major FCC media ownership rule that has been upheld. See Prometheus Radio Project v. FCC, 373 F.3d 372, 403 (3d. Cir. 2004) (remanding the FCC’s “Cross-Media Limits” for justification or further modification); Fox Television v. FCC, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (remanding the FCC’s decision concerning the national television station ownership cap and cable cross-ownership rule); Sinclair Broad. Group v. FCC, 284 F.3d 148, 169 (D.C. Cir. 2002) (holding the FCC failed to justify adequately its local ownership rules even under a deferential standard of review); Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1136 (D.C. Cir. 2001) (holding the horizontal ownership cap for cable arbitrary and capricious).
24. See Miller, supra note 18, at 353 (stating that the FCC’s use of its own “Diversity Index” to gauge the degree of media diversity concentration “is the source of widespread opposition to the methods used by the FCC to determine the limits of market saturation.”).
normative grounds the importance of decentralized ownership and maximize it up to the point at which economic data clearly point to inefficiencies. In this way, firm normative principles would guide regulatory action, and those opposing such action would have to build their case on the shifting sands of economic data and analysis. Such a move, the Article argues, would result in a de facto shift of the burden of persuasion from the FCC to pro-deregulation parties.

This article will proceed as follows. First, it will examine the First Amendment challenges to media ownership regulation; most particularly, recent cases, such as *Turner Broadcasting* and *Time Warner*, that create a higher degree of judicial scrutiny of ownership regulation. Second, the Article turns to the FCC’s Biennial Media Ownership Order and its judicial review. This comprehensive order concisely exemplifies the FCC’s use of the First Amendment to limit its scrutiny of the relationship between viewpoint diversity and market structure and deflect attention from the shallowness of its economic and empirical analyses. Finally, this article describes its two approaches to more firmly justify media ownership regulation in the face of more hostile judicial review.

I. MEDIA OWNERSHIP AND CONSTITUTIONAL LIMITS

The Federal Communications Commission has been in the business of restricting media ownership almost since the agency’s inception. Since the
1930s, the FCC has considered furthering diversity in ownership as a goal in awarding radio licenses and later applied the principle to broadcast licenses.\textsuperscript{34} As discussed in Section III, many have interpreted these efforts as merely veils to conceal presidential pique at certain groups critical of administration policies. Be that as it may, a remarkably complex quilt of rules has developed over the decades that limit ownership in broadcast, radio, cable, and, to some degree, newspaper ownership.\textsuperscript{35} Due to the Third Circuit Court of Appeals' rebuff in \textit{Prometheus Radio Project} v. \textit{FCC}\textsuperscript{36} of the FCC's recent effort to ease these rules, they continue in large measure to be in force.\textsuperscript{37}

These rules have been challenged on First Amendment grounds since these rules' inception.\textsuperscript{38} The challenge to these rules is straightforward: they limit the number of outlets individuals or corporations may own so as to express and/or set forth their views—and, therefore, constitute federal restrictions on the press.\textsuperscript{39} The Supreme Court traditionally has reviewed the FCC restrictions, however, under the highly deferential rational basis standard—treating them essentially as economic regulation, not free speech regulation.\textsuperscript{40} On the other hand, recent decisions, such as \textit{Turner Broadcasting} v. \textit{FCC I}\textsuperscript{41} and \textit{II}\textsuperscript{42}; as well as certain lower court rulings, such as \textit{Schurz Communications, Inc.} v. \textit{FCC},\textsuperscript{43} \textit{Sinclair Broadcast Group, Inc.} v. \textit{FCC},\textsuperscript{44} and \textit{Time Warner Entertainment Co., L.P.} v. \textit{FCC}\textsuperscript{45} suggest a retreat from previous, almost axiomatic deference.\textsuperscript{46}

\begin{footnotesize}
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  \item 34. See \textsc{Lucas A. Powe Jr.}, \textsc{American Broadcasting and the First Amendment} 167 (1987).
  \item 35. See generally \textsc{Leonard M. Baynes}, \textit{Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color}, 39 U. Mich. J.L. Reform 199, 199-200 (2006) (discussing the FCC's attempt to limit the number of media outlets any one owner could own).
  \item 36. 373 F.3d 372, 423-25 (3d. Cir. 2004).
  \item 37. See Baynes, supra note 30, at 200-02 (discussing the effect of the \textit{Prometheus Radio Project} case).
  \item 38. See, e.g., \textit{FCC} v. \textit{National Citizens Comm. for Broad.}, 436 U.S. 775, 799-800 (1978) (stating a typical argument that "it is inconsistent with the First Amendment to promote diversification by barring a newspaper owner from owning certain broadcast stations.").
  \item 39. See id.
  \item 40. See, e.g., \textit{FCC} v. \textit{National Citizens Comm. for Broad.}, 436 U.S. 775, 796 (1978) (stating "[i]t is thus clear that the [FCC] regulations at issue are based on permissible public-interest goals and, so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the [FCC's] general rulemaking authority . . . .").
  \item 43. 982 F.2d 1043 (7th Cir. 1992).
  \item 44. 284 F.3d 148 (D.C. Cir. 2002).
  \item 45. 240 F.3d 1126 (D.C. Cir. 2001).
  \item 46. \textit{See Turner I}, 512 U.S. 622, 639 (1994) (holding that "application of the more relaxed standard of scrutiny adopted in \textit{Red Lion} and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation."); \textit{Turner II}, 520 U.S. 180, 189-90 (1997) (applying the \textit{O'Brien} intermediate test); \textit{Schurz Comm'n, Inc.}, 982 F.2d 1043, 1049-50 (7th Cir.
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The following briefly describes the Supreme Court's treatment of media ownership regulation. It discusses the changes in this treatment that have occurred—changes towards higher levels of scrutiny. This analysis will focus on how courts' changed views of diversity have led to more rigorous scrutiny.

A. Judicial Deference to the FCC's Notions of Diversity

Without providing an exhaustive examination of the judicial precedent concerning the FCC's media ownership rules, a job that others have already done extremely well, the following briefly surveys the major historic features of judicial deference towards the FCC's media ownership regulation, concentrating on the concept of diversity—how the FCC uses it and courts understand it.

The first challenge of the Federal Communication Commission's ownership regulation was in 1943, in Nat'l Broadcasting Co. v. United States, which involved the broadcast industry's First Amendment challenge to the FCC's "Chain Broadcasting Regulations." These rules prohibited the granting of "licenses . . . to stations or applicants having specified relationships with networks."47

Some of the Chain Broadcasting Regulations were behavioral, setting forth mandates on networks and broadcasters; others were structural, regulating ownership interests and industry organizations. On the behavioral side, the Regulations prohibited contracts between broadcasters and networks that restricted the broadcaster's ability to use non-affiliated network programming, agreements that forbade networks to sell programs to any other station in the same area, affiliation agreements that extended more than three years, network affiliation contracts that gave networks the power to specify what programs would be aired during certain time slots, and networks' failure to describe their programming sufficiently in advance so that the broadcaster could decide whether to air it.48 Finally, the Regulations prohibited a broadcast station from "having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."49

On the structural side, the Regulations forbade the licensing of two stations in the same area to a single network as "basically unsound and contrary to the public interest."50 In addition, the rules prohibited any license to be granted to a

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48. See id. at 199-201.
49. Id. at 209.
50. Id. at 207.
network organization, or any entity controlled by a network, if such license involved more than one standard broadcast station where one of the stations covered substantially the service area of the other station.51

Against First Amendment challenged, the Court upheld these regulations, relying on what became the “scarcity” doctrine — which holds that given the limited amount of broadcast spectrum, the federal government has the power to regulate broadcast in spite of the First Amendment.

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. . . . Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.52

The next review of an FCC ownership restriction, United States v. Storer Broad. Co.,53 involved the FCC’s Multiple Ownership Rules, which restricted the number of licenses for FM radio stations that could be granted if the applicant, directly or indirectly, had an interest in AM radio stations. Individuals, such as the respondents, who already owned a number of AM or “standard stations,” could own fewer than they wished to. In a statutory challenge the Court upheld these regulations with little constitutional analysis.54

The Supreme Court’s next major re-examination of the FCC’s media ownership policy occurred several decades later in Federal Communications Commission v. National Citizens Committee for Broadcasting. 55 The Court reviewed FCC rules that prohibited cross-ownership between broadcast and newspapers, i.e., forbade entities that owned either radio or television stations from owning a newspaper in the same community.56 Here, the FCC justified its rules explicitly on be diversity” concept.57 As the Supreme Court stated, “[diversification] of control of the media of mass communications’ has been viewed by the Commission as ‘a factor of primary significance’ in determining

51. Id. at 208.
52. Id. at 226-27.
54. Id. at 203. “The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.” Id.
56. Id. at 779.
57. Id. at 794.
who, among competing applicants in a comparative proceeding, should receive the initial license for a particular broadcast facility."

The Court accepted wholeheartedly the FCC's diversity justification—arguing (somewhat paradoxically) that by limiting the rights of entities to own media outlets one was, in fact, furthering First Amendment goals. Relying on language from Associated Press v. United States, an antitrust case dealing with the exclusive practices of the Associated Press in selling stories to non-affiliated newspapers, the Court stated that "Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. [T]he 'public interest' standard necessarily invites reference to . . . the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources.""

In explicitly stating the rather paradoxical notion that restricting ownership of news outlets furthers the First Amendment goals of diversity, the Court showed a remarkable deference to the FCC in defining and measuring diversity. The Court stated that the First Amendment seeks diversity of "viewpoint." The Court sometimes appears to equate diversity of viewpoint with diversity of ownership. At other times, it simply accepts the Commission's judgment that diversity of ownership is an acceptable proxy for diversity of viewpoint. The Court stated "notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints . . . .[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds. . . . ."

* NCCB represents the high tide mark in judicial deference to the FCC's power to regulate media market structures and its determinations concerning

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58. *Id.* at 781 (citing Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-395 (1965)).
60. *Id.* (citing Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973) and Associated Press v. United States, 326 U.S. 1, 20 (1945)).
61. *Id.* at 796.
62. *Id.* at 796-97.
63. *Id.*
64. Compare *id.* at 797 ("It had thus become both feasible and more urgent for the Commission to take steps to increase diversification of ownership, and a change in the Commission's policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service.") with *id.* at 800-801 ("In the instant case, far from seeking to limit the flow of information, the Commission has acted, in the Court of Appeals' words, "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech.")
65. *Id.* at 796-97 (citing National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938, 961 (D.C. Cir 1977)).
diversity. It firmly stated that limiting media ownership is, in itself, a First Amendment principle. Further, it established a standard of considerable deference to the FCC, naming media diversity an "elusive" goal for which judicial second guessing is inappropriate. Not surprisingly, the FCC liked the descriptor "elusive" as applied to media diversity, for the adjective dubbed it a sort of Delphic expert agency—whose often cryptic pronouncements should be accepted even by robed mortals. Citation to the "elusive" language in NCCB is found in virtually all subsequent FCC decisions concerning ownership and media diversity.

B. Diversity, Scarcity, and Changing Standards: The Supreme Court and the Courts of Appeal

In Turner Broadcasting System, Inc. v. FCC (Turner I) and Turner Broadcasting System, Inc. v. FCC (Turner II), the Court ruled on the constitutionality of a statute that required cable systems to carry local broadcasters' signals (the "must-carry" statutes). These cases certainly represent a shift from the view that all media regulation is governed by the rational basis standard of NCCB. In these opinions, the Court established the principle that only regulation of broadcast, due to its unique history and the scarcity doctrine, should receive such lax review. Instead, cable regulation, and presumably other, non-broadcast media regulation, should receive intermediate scrutiny as a content-neutral restriction on speech. Given these decisions' fractured pluralities, the future of media regulation is in doubt. In addition, lower courts, in cases like Time Warner, Sinclair, and Schurz point to the difficulties the FCC may face in the future in getting its regulations upheld. In short, these courts, under the rubric of intermediate scrutiny, demand more precise measurements and a clearer definition of diversity.

72. Turner I, 512 U.S. at 662.
73. Time Warner Entm't Co. v. United States, 211 F.3d 1313 (D.C. Cir. 1999).
75. Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992).
Many observers (and justices) claimed that the must-carry statutes at issue in *Turner I* and *Turner II* resulted from broadcasters' fear that over-the-air broadcast television would become obsolete in an age when virtually every household receives its signals through a cable. And, given that the local broadcasters are among the few media outlets that cover the doings of the local representative or senator, Congress is without doubt solicitous towards broadcasters' needs and responsive to their fears—and thus designed the must-carry law to help broadcasters. 76 Regardless of the political motivations that gave rise to the must-carry provisions, requiring cable systems to carry particular programming implicates the First Amendment because it mandates certain speech and restricts the opportunity to air other types of programming. It is on that basis that they were primarily challenged. 77

In *Turner I*, the Supreme Court reviewed the constitutionality of the must-carry regulation, specifically sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act or Act). Section 4 requires carriage of "local commercial television stations," which is defined to include all full power television broadcasters that operate within the same television market as the cable system. 78 According to their size, cable systems must reserve a portion of their available capacity to carry local broadcasts. 79 Section 5 of the Act imposes similar carriage requirements regarding local public broadcast television stations. 80

Specifically, in *Turner I*, the Supreme Court reviewed sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act or Act). Section 4 requires carriage of "local commercial television stations," defined to include all full power television broadcasters that operate within the same television market as the cable system. 81 According to their size, cable systems must reserve a portion of their available capacity to carry local broadcast. 82 Section 5 of the Act imposes similar carriage requirements regarding local public broadcast television stations. 83

76. *Id.* at 676 (O'Connor, J., concurring in part and dissenting in part) ("I cannot avoid the conclusion that [the statutory] preference for broadcasters over cable programmers is justified with reference to content."); *see also id.* at 685 (Ginsburg, J., concurring in part and dissenting in part) ("Congress' 'must-carry' regime . . . reflects an unwarranted content-based preference. . . ."); *see also Ashutosh Bhagwat, Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture, 74 N.C. L. Rev. 141, 186 (1995) ("A preference for local broadcasting and community-based speakers [as expressed in the must-carry rules] incorporates, at least to some degree, a vision of the appropriate structure of society that is political at heart, and therefore suspect.").


The Court in *Turner I* did not apply the rational basis review that the *NCCB* court applied to the broadcast-newspaper cross-ownership distinction and that is applicable to economic regulation in general. That standard was not appropriate, the Court reasoned because, “cable television does not suffer from the inherent limitations that characterize the broadcast medium. . . . Nor is there any danger of physical interference between two cable speakers attempting to share the same channel.”84 Rather it limited its deferential First Amendment review of media ownership solely to the broadcast context, and ruled that intermediate scrutiny, appropriate for content-neutral regulations of speech, should be applied to cable regulation.85

In reaching this conclusion, the Court reasoned that the rules “on their face” were content-neutral because they “impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past.”86 Further, the Court determined the Congress did not intend to favor one type of speech over another, for “our review of the Act and its various findings persuades us that Congress’ 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 programming for the 40 percent of Americans without cable.”87

In reaching this conclusion, the Court reasoned that the rules “on their face,” were content-neutral because they “impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past.”88 Further, the Court determined that Congress did not intend to favor one type of speech over another through a facially neutral statute, stating that “our review of the Act and its various findings persuades us that Congress’ 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 programming for the 40 percent of Americans without cable.”89

The Court concluded that the must-carry rules receive intermediate scrutiny, applicable to content-neutral restrictions that impose an incidental burden on speech.90 Under this test, the Court sustains a content-neutral regulation if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.91

85. *Id.* at 662.
86. *Id.* at 644.
87. *Id.* at 646.
88. *Id.* at 644; *see also* Ward v. Rock Against Racism, 491 U.S. 781 (1989).
89. *Id.* at 646.
90. *Id.* at 663.
91. *Id.* at 664.
The Court reasoned that the governmental interest in the must-carry statute was sufficient "in the abstract" to withstand intermediate scrutiny.\textsuperscript{92} A four-Justice plurality found that genuine issues of material fact remained concerning whether "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry,"\textsuperscript{93} and whether must-carry "‘burden[s] substantially more speech than is necessary to further the government's legitimate interests.'"\textsuperscript{94} To secure a majority of the Court, Justice Stevens, who would have ruled the statute constitutional on the record then before the Court, agreed with the plurality to remand the case to the district court for further proceedings.\textsuperscript{95}

When the remand returned to the Supreme Court in \textit{Turner II}, the Court affirmed the must carry statute, again by a fractured majority. The four-member plurality opinion ruled that Congress reasonably concluded that cable television posed an economic threat to the viability of broadcast stations and that Congress could legitimately encourage "diversity in broadcast television service" as a policy goal.\textsuperscript{96} Justice Breyer, in concurrence, relied more on the diversity rationale, than on economics or antitrust, concluding, and echoing \textit{NCCB}, that it "has long been a basic tenet of national communications policy . . . that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."\textsuperscript{97}

The dissenting justices argued the majority failed to identify true anticompetitive harms that the must carry statute remedied—faulting the plurality and concurrence for citing examples of carriage decision adverse to broadcast, but not examining whether these decisions had appreciable impacts on any particular markets or on viewership rates.\textsuperscript{98} Further, "when separated from anticompetitive conduct," the interest in simply preserving a "multiplicity of broadcast programming sources" for its own sake becomes an untenable policy goal.\textsuperscript{99} The dissent stated "[n]either the principal opinion nor the partial concurrence offers any guidance on what might constitute a ‘significant reduction’ in the availability of broadcast programming."\textsuperscript{100}

The "Lochnerism" of \textit{Turner I} and \textit{Turner II} reflects the Court's demand (or, at least, a significant portion of the Court) for clearer definitions and better evidence from the FCC. While \textit{NCCB} was more than happy to declare diversity "elusive" and accept pretty much any FCC action that created more "voices," the

\begin{itemize}
\item \textsuperscript{92} Id. at 663.
\item \textsuperscript{93} Id. at 665.
\item \textsuperscript{94} Id. (quoting \textit{Ward}, 491 U.S. at 799).
\item \textsuperscript{95} Id. at 673-674 (Stevens, J., concurring).
\item \textsuperscript{96} \textit{Turner II}, 520 U.S. at 204.
\item \textsuperscript{97} Id. at 226-27 (Breyer, J., concurring) (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972)); see also \textit{FCC} v. \textit{WNCN Listeners Guild}, 450 U.S. 582 (1981).
\item \textsuperscript{98} Id. at 229-30 (O'Connor, J., dissenting).
\item \textsuperscript{99} Id. at 232 (O'Connor, J., dissenting).
\item \textsuperscript{100} Id.
\end{itemize}
dissent in *Turner II* demanded a clear definition of media diversity and metrics to measure it. While the *Turner* cases established as law a higher standard of First Amendment review, they—particularly the dissent in *Turner II*—also point to a more rigorous approach to establishing factual claims about diversity. Several lower courts presaging and following *Turner* also have required rigorous factual showings—pointing to the same weakness in the FCC’s rulemaking.

In *Schurz Communications, Inc. v. FCC*, the Seventh Circuit, in an opinion authored by Richard Posner, reviewed the FCC’s financial interest and syndication or “FINCEN” rules that prohibited a television network from licensing its own programs for rebroadcast by independent stations or from purchasing syndication rights from independent producers. The regulations required the networks to sell syndication rights to an independent syndicator. These regulations were revised and re-promulgated in 1991.

The justification for these rules was the fear that the networks would leverage their control of programming distribution into a control of programming production, refusing to purchase non-affiliated programming unless the producers surrendered syndication rights and charging too much for syndication to independent, non-affiliated stations. As Judge Posner explained, “the rules would strengthen the independent stations (and so derivatively the outside producers, for whom the independent stations were an important market along with the networks themselves) by securing them against having to purchase reruns from their competitors the networks.”

This case was decided well before the *Turner* cases and, therefore, rational basis scrutiny applied—a conclusion Posner accepted but reluctantly so. Perhaps not surprisingly, Judge Posner therefore took a highly skeptical look at the rule’s purported goals and stated means. Anticipating later post-*Turner*

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102. *Id.* at 1045.
103. *Id.* The court distinguished between licensing of programming, which would entail ongoing revenues for the network, and were thus prohibited under the regulations, and outright sale of programming, which would not give the network an interest in later revenues, which was permitted. *Id.*
105. *Schurz*, 982 F.2d at 1045. Judge Posner indicated in the opinion that: The concern behind the rules was that the networks, controlling as they did through their owned and operated stations and their affiliates a large part of the system for distributing television programs to American households, would unless restrained use this control to seize a dominating position in the production of television programs. That is, they would lever their distribution “monopoly” into a production “monopoly.”
106. *Schurz*, 982 F.2d at 1046.
107. *Id.* at 1049 (“And although as an original matter one might doubt that the First Amendment authorized the government to regulate so important a part of the marketplace in ideas and opinions as television broadcasting, the Supreme Court has consistently taken a different view”).
cases, he questioned the justification for the rules, arguing that, in fact, the rules might weaken independent producers by limiting their bargaining power. He also questioned the justification that diversity in programming was increased by strengthening independent programming. He pointed out, trotting out the famous Hotelling/Steiner economic argument quoted in the Introduction, that more concentrated markets produce greater diversity.

In light of this theoretical possibility—i.e., that monopolistic market structure produces more diversity—and the development of multi-channel cable television, Posner challenged the FCC's claim that restrictions on network participation in programming promote diversity. Posner points out that the term diversity "is never defined" in the FCC's order and, therefore, one cannot see how the agency can claim that its restrictions further diversity, particularly in light of the economic theory that would predict that fewer ownership limits would enhance diversity.

In Time Warner Entertainment Co. v. FCC, the D.C. Circuit reviewed the FCC's national caps of cable ownership. Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, requires the Federal Communications Commission to set (i) "limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest" (the "horizontal limit") and (ii) "limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." (the "vertical limit"). Pursuant to the statute, the FCC imposes a 30% "horizontal" limit on the number of subscribers that may be served by a multiple cable system operator and required cable

108. Id. at 1051 (noting that "[t]he new rules . . . appear to harm rather than help . . . by reducing their bargaining options. It is difficult to see how taking away a part of a seller's market could help the seller.").
109. Id. at 1054.
110. The Hotelling and Steiner models both address, from varying vantage points, the effect that market concentration has on variety of available choices. For a more detailed discussion of both models, consider Harold Hotelling, Stability in Competition, 39 ECON. J. 41 (1929), and Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. ECON. 194 (1952).
111. Id. at 1055 ("Almost everyone in this country now has or soon will have cable television with 50 or 100 or even 200 different channels to choose among.").
112. Id.
113. Id. at 1054.
114. Id.; see also supra note 99 and accompanying text.
systems to reserve 60% of their channel capacity for programming by non-affiliated firms.\footnote{120}

The cable companies, Time Warner and AT&T, challenged the horizontal as exceeding statutory authority, unconstitutional infringements of their freedom of speech, and products of arbitrary and capricious decision-making in violation the Administrative Procedure Act.\footnote{121} Time Warner similarly challenged the vertical limit.\footnote{122} The Commission supported its horizontal limit on the grounds that it "maximizes" the number of cable systems so that "[w]ith more MSOs [multivideo system operators, i.e., cable companies] making purchasing decisions, this increases the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public."\footnote{123}

The court rejected this justification, finding, \textit{inter alia}, the FCC's understanding of diversity as too flimsy.\footnote{124} Finding the FCC's understanding of diversity as too flimsy, the court explained:

\begin{quote}
[w]e have some concern how far such a theory [of diversity] may be pressed against First Amendment norms. Everything else being equal, each additional "voice" may be said to enhance diversity. And in this special context, every additional splintering of the cable industry increases the number of \textit{combinations} of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in "diversity" would not qualify as an "important" governmental interest. Is moving from 100 possible combinations to 101 "important"? It is not clear to us how a court could determine the point where gaining such an increment is no longer important.\footnote{125}
\end{quote}

While the court sidestepped this issue of how much value the marginal voice has when weighed against "First Amendment norms," it did rule that under the Cable Act amendments, diversity means only that a programmer is guaranteed two possible outlets.\footnote{126} The court remanded to the FCC on the grounds that ownership caps could be justified, \textit{inter alia}, on the excess bargaining power they gave cable operators.\footnote{127}

The 1996 Telecommunications Act instructed the Commission to conduct a rulemaking proceeding, "to determine whether to retain, modify, or eliminate its

\begin{enumerate}
\item \footnote{120}{\textit{Time Warner}, 240 F.3d at 1129.}
\item \footnote{121}{\textit{Id.} at 1128.}
\item \footnote{122}{\textit{Id.}}
\item \footnote{123}{\textit{Id.} at 1134 (citing \textit{In the Matter of Implementation of Section 11(C) of the Cable Television Consumer Protection and Competition Act of 1992}, 14 F.C.C.R. 19098, 19119 ¶ 54 (Oct. 20, 1999)) (parenthetical text added).}
\item \footnote{124}{\textit{See} \textit{Time Warner Entertainment Co. v. FCC}, 240 F.3d 1126, 1135 (2001).}
\item \footnote{125}{\textit{Id.} (emphasis in original).}
\item \footnote{126}{\textit{Id.}}
\item \footnote{127}{\textit{Id.} at 1144-45.}
\end{enumerate}
limitation on the number of television stations that a person may own in . . . the same television market."\footnote{Telecommunications Act of 1996, Pub L. No. 104-104, §202(c)(2) (codified at 47 U.S.C. §303(c)(2)).} Pursuant to the Act, the Commission promulgated the \textit{Local Ownership Order}, which relaxed its prohibition on one entity controlling more than one station in a particular Nielsen designated market area (DMA) under certain conditions, one being the existence of eight independently owned full-power television stations.\footnote{Broad. Group v. FCC, 284 F.3d 148, 155 (D.C. Cir. 2002).} In counting this eight voice exception, the Commission determined that only broadcast television should count because, "there remain unresolved questions about the extent to which [non-broadcast television] alternatives are widely accessible and provide meaningful substitutes to broadcast stations."\footnote{\textit{Id.}} The Commission adopted a different counting approach in its exception to the radio-television cross-ownership rule in which it \textit{does count} local newspapers and cable television stations.\footnote{\textit{Id.}} \textit{Sinclair Broadcasting} challenged the rule on the grounds that eight was an arbitrary number of voices and that there was no reason to exclude non-broadcast voices.\footnote{\textit{Id.}}

The D.C. Circuit, while reciting the language of deference in \textit{NCCB}, remanded on the ground that the Commission irrationally excluded cable from its eight-voice count.\footnote{\textit{Id.}} While the Commission stated that broadcast was more important than cable, it never presented a theory or any data as to why broadcast, but not cable, should constitute a "voice."\footnote{\textit{Id.}} Of course, this should not surprise. If an agency cannot define "diversity," then it can have no idea about what might constitute one "unit" of diversity.\footnote{\textit{Id.}}

Judge Sentelle, who dissented in part on the grounds that the diversity rules should be vacated, not simply remanded, attacked the Commission for claiming that eight voices ensures an appropriate level of diversity but then failing to provide evidence that its rules will result in diversity.\footnote{\textit{Id.}} While agreeing that an agency has broad discretion to draw lines, Sentelle points out that "there are no meaningful limits to the diversity rationale offered [and] . . . [t]here is no suggestion as to how much diversity is enough, how much it too little, or how much is too much."\footnote{\textit{Id.}}

\textit{Schurz, Time Warner}, and \textit{Sinclair} as well as the dissent in \textit{Turner II}, expressed the same frustration: how can a court determine whether the FCC's rules reasonably further diversity, when the FCC, itself, cannot precisely define
the term? On one hand, this does not represent "Lochnerism"—an ideological use of constitutional principles to overturn statutes or regulations. It perhaps instead, or also, represents a growing sophistication among the judiciary in economic matters and judicial confidence to rely on economic principles in questioning administrative agencies. This demand for a higher level of justification could reflect frustration at the FCC’s often transparently political accommodations—appellate courts have simply no trust that behind the “elusive” concept of diversity there is nothing but Beltway interest-adjustments.

On the other hand, these cases do represent a sort of Lochnerism in that courts are demanding a much higher level of proof and justification than did the NCCB court and appear to be expressing an ideological aversion to the FCC’s ownership regulation. Arguably, the 4-justice dissent in Turner I, calling for the highest level of First Amendment scrutiny on must-carry, reflects an ideological aversion to media regulation, as much as it does a reasoned application of the notoriously vague content-based/content-neutral distinction. Indeed, as some have pointed out, this higher level of scrutiny may simply represent an indifference to the normative questions media ownership presents.

In any case, against this legal background, the FCC, under the leadership of Chairman Michael Powell, undertook a massive, comprehensive re-examination of virtually all of the media ownership rules concerning broadcast in 2003: the Biennial Media Ownership Order. As discussed below, the FCC’s continued failure to forward a meaningful definition of diversity doomed the Order’s fate on appeal to the Third Circuit in Prometheus Radio. It is to this Order and its appellate review that the next section turns.

II. THE FCC’S BIENNIAL MEDIA OWNERSHIP ORDER AND ITS APPELLATE REVIEW

On July 2, 2003, the FCC released its Biennial Media Order which re-examined the entire spectrum (so to speak) of broadcast ownership regulation. The Order examined the most important media ownership rules including: the

cross ownership rules that prohibited television station ownership from owning newspapers or radio stations within the same market; the local television cap that limited the number of stations one firm could own in a particular market, and the local radio cap that limits ownership concentration in local radio markets.\textsuperscript{144} In general, the FCC justified the Biennial Media Ownership Order on the basis that the FCC had long established that its restrictions further the policy goals of "competition, localism, and diversity," particularly in news coverage.\textsuperscript{145} ("Localism" is defined as the goal of local news outlets to be responsive to the needs of the local community and is a type of diversity that the FCC particularly encourages—though arguably this diversity occurs at the expense of other types of media diversity.)\textsuperscript{146}

In the Biennial Media Ownership Order, the FCC attempted to put forth a more subtle and complex notion of diversity, combining diversity of ownership with market share.\textsuperscript{147} Yet, the FCC continued to rely squarely on the assumption that diversity of outlet ownership implies diversity of viewpoint.\textsuperscript{148} It never effectively utilized research that attempted to identify and quantify actual diversity of ideas. The court in Prometheus Radio had little trouble rejecting the FCC's reasoning.\textsuperscript{149}

A. The Two Cross-Ownership Rules.

In the Biennial Media Ownership Order, the FCC abolished both the radio-television and television-newspaper cross ownership rules.\textsuperscript{150} In their stead, the FCC created a complicated scheme in which different standards apply to different markets.\textsuperscript{151} In effect, the FCC eliminated all cross-ownership restrictions in large media markets.\textsuperscript{152} In the smallest media markets, it retained limits.\textsuperscript{153} For those markets in between, it created the "Diversity Index" (DI) to determine whether markets were "at risk" for a lack of media diversity.\textsuperscript{154} If a market has too low of a DI, such market would potentially be subject to further regulation.\textsuperscript{155}

The DI was modeled after the Herfindahl-Hirschman Index (HHI) in antitrust law, which measures the degree of concentration in markets for antitrust

\begin{enumerate}
\item[144.] \textit{Id.} at 386-89.
\item[145.] \textit{Id.} at 446.
\item[146.] \textit{Id.} at 447.
\item[147.] \textit{Id.}
\item[148.] \textit{Id.}
\item[149.] \textit{Id.} at 382.
\item[150.] 373 F.3d at 387-88.
\item[151.] \textit{Id.} at 388.
\item[152.] \textit{Id.}
\item[153.] \textit{Id.}
\item[154.] \textit{Id.}
\item[155.] 373 F.3d at 403-04.
\end{enumerate}
purposes. The higher the HHI, the more concentrated the market, and the more potential there is for market participants to exercise market power. The HHI is a simple calculation that squares each market participant's share.

Analogously (in a rough way), the DI measures "viewpoint diversity" concentration. It weights various media (newspapers, radio, etc.) by their market share in the total media market. But then, the DI does not weigh the market share of each firm. Rather, within a given media category (newspaper, television, etc.), each outlet counts equally, regardless of its market share.

The DI, however, only really counts the number of participants in a market, not the diversity and dissemination of views. Thus, while HHI is tied to market performance in some general way, it is not clear what the DI measures. It does not measure diversity; it measures market share and the number of market participants. Thus, a market with 50 independent radio stations all saying the same thing would rank higher in the DI than an NPR and FoxNews duopoly. Obviously, this is a limited metric.

The Prometheus Radio court rejected the DI—and the FCC's elimination of the cross-ownership rules—largely because it failed to coherently count heads in order to provide meaningful estimate of media diversity. Thus, as the court observed, "the Dutchess Community College television and the stations owned by ABC" receive equal weighting. The Court also rejected the Commission's inclusion of internet news, but exclusion of cable news in its diversity calculation. Again, the FCC was on shaky grounds because it attempted to pick and chose which outlets to "count" rather than observe consumer behavior and the nature of news coverage, i.e., measure real media diversity.

B. Local Television Cap.

The FCC's order relaxed the local television cap, permitting a single firm to own two or three television stations in certain markets. Specifically, the order permitted triopoliess in markets of 18 stations or more and duopolies in markets

156. Id.
157. Id.
158. Id.
159. Id. at 403.
160. 373 F.3d at 404.
161. Id.
162. Id.
163. Id.
164. See id.
165. 373 F.3d at 409.
166. Id. at 408.
167. Id. at 408-09.
of 17 or fewer. The FCC continued to prohibit common ownership among the
top four stations in any given market.

This cap, therefore, treated ownership of the fifth, sixth, and seventh most­
watched station equivalent to that of the 16th, 17th, and 18th. This was designed
to ensure that most markets would have six firms because six equal-sized firms
would create an HHI index below 1800—and, therefore, was assumed to present
no competitive problems.

The FCC simply presumed that the firms would be equal-sized—and the
court had no problem finding this assumption irrational saying, “No evidence
supports the Commission’s equal market share assumption, and no reasonable
explanation underlies its decision to disregard actual market share.”

C. Local Radio Cap.

Existing regulation had a complicated tiered system of local radio ownership
limits. In radio markets with 45 or more radio stations, a company could own up
to eight stations, only five of which could be in one class, AM or FM. In
markets with 30-44 radio stations, a company can own seven stations, only four
of which could be in one class. In markets with 15-29 radio stations, a company
can own six stations, only four of which may be in one class. In
markets with 14 or fewer radio stations, a company can own five stations, only
three of which could be in one class, and an owner cannot control more than 50
percent of the stations within these markets.

This rule was designed to guarantee five firms in all markets. The
Commission primarily relied on two articles in game theory, 15 and 30 years old
respectively, for its claim that five equal-sized competitors would create a
competitive market. This was an odd justification, given that these articles
were not specifically about local radio, and their application not immediately
apparent.

The court found the Commission’s reliance on those articles irrational
because the DOJ’s merger guidelines and current policy contradict these articles’
claims. Further, the FCC inconsistently relied on the same DOJ Merger
Guidelines in other parts of the order. Finally, in a complaint that by now

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169. Id. See Prometheus Radio Project, 373 F.3d at 412.
170. Prometheus Radio Project, 373 F.3d at 412.
171. Biennial Media Ownership Order, ¶ 134.
173. Id.
175. Id. at ¶ 236.
176. Id.
177. Id.
179. Id.
180. Id.
should sound tedious, the court also found illogical that the five voices, regardless of market share, contribute meaningfully to diversity.181

III. COHERENT MEDIA OWNERSHIP IN TIMES OF GROWING JUDICIAL SKEPTICISM

It is not clear whether the courts’ growing demand for more convincing evidence and more precise notions of diversity stem from an ideology—or simply a growing awareness of the intellectual vapidity of the FCC’s ownership rulemakings. On one hand, the four-justice dissent in Turner, calling for strict scrutiny of media ownership regulation, does seem to constitute an ideological opposition to the regulation—suggesting the existence of a “First Amendment Lochnerism.”182 On the other hand, the majority in Prometheus Radio consisting of judges appointed by Democratic presidents—suggests that courts vacating the FCC’s rulings are just sick of their inconsistencies and analytical shortcomings.183 To the degree that First Amendment Lochnerism thwarts media ownership regulation, it has aimed its sights—as the preceding analysis suggests—at the FCC’s inability to come up with a coherent approach to defining diversity.

This section suggests that media ownership regulation can be strengthened in the face of a more disapproving judiciary in two ways. First, it can adopt a rigorous understanding of media diversity—one consistent with the more advanced economic and social scientific examinations of media markets. Of course, no approach to diversity-based media caps is a sure-fire—especially given the expertise that the large media companies can bring to oppose regulation in court.184 Further, as a practical matter, the FCC—given the inevitable political compromises that characterize its decisions—probably could not bring itself to be bound by objective, scientific data.

As an alternative approach, therefore, it can change the terms of the analysis—and use the vagaries of economic and social science to its advantage. As discussed above, the reviewing courts that have been so critical of the FCC’s use of diversity have consistently asked how much diversity is enough or required by statute.185 The FCC has not been able to answer that question because it can hardly even count diversity. What if the set of presumptions were changed?

The FCC could establish as normative matter that widespread ownership is preferable—a position that this Article does not necessarily endorse, but many

181. Id.
182. See Turner, 512 U.S. at 673-74 (dissenting opinion).
183. See Prometheus Radio Project, 373 F.3d at 372-480.
184. See Time Warner Entm’t Co., 240 F.3d 1126, 1136; Fox Television, 280 F.3d 1027, 144; Sinclair Broad. Group, 284 F.3d 148, 159; Prometheus Radio Project, 373 F.3d at 372-480.
185. See Time Warner Entm’t Co., 240 F.3d 1126, 1136; Fox Television, 280 F.3d 1027, 144; Sinclair Broad. Group, 284 F.3d 148, 159; Prometheus Radio Project, 373 F.3d at 372-480.
have defended convincingly as discussed below. The question then becomes the familiar issue of how much is required. One could argue that the FCC should require as much diversity of ownership as possible until convincing evidence suggests that significant inefficiencies would be introduced into media markets. Of course, there can be argument about what constitutes "significant inefficiency" and how to measure it. On the other hand, this test is eminently superior to the "counting diversity" approach in that people can disagree about levels of inefficiency, but there is agreement on how to define efficiency—unlike diversity. Further, it provides a point at which policy can aim—rather than the current goal of "maximizing diversity" which is a goal without end. The following examines in greater detail these proposals.

A. All That Elusive? Counting Diversity

Many critics have called for "objective, quantifiable standards" rather than "hopelessly subjective criteria for enforcement" in the FCC's media ownership orders. Despite the language in NCCB that media diversity is "elusive," it can be measured. Numerous economists and social scientists have done just that—looking to various media to see how many "ideas" or "viewpoints" are there contained. For instance, Berry & Waldfogel measure diversity in radio formats and relate formats to market structure. In order to determine what constitutes a separate format, they relied on Duncan, a service for radio advertisers. It has 18 formats that it uses to categorize all radio stations nationwide. While not guaranteeing ontological certitude that there are 18 radio formats in Platonic heaven, Duncan does have an economic incentive to correctly identify different types of radio stations that attract different types of viewers. It is hardly a perfect measure, but it is defensible approach to counting.

188. Id.
191. Id.
192. Id. at 1009.
193. While not guaranteeing ontological certitude that there are only a limited number of radio formats in Platonic heaven, Duncan does have an economic incentive to correctly identify different types of radio stations that attract different types of viewers.
diversity in media. Peter Alexander has examined the harmonic complexity and diversity of music played on broadcast radio and related that complexity and diversity to certain market structures.

More indirect measures of diversity in media, particularly as it affects the robustness of political participation, include examining the relationship between rates of participation by eligible voters in local elections and media market structure. For instance, George and Waldfogel, Oberholzer-Gee and Waldfogel, and Scheufele show the structure of local media markets affects the nature of political participation.

Even if "counting" diversity in this fashion has intellectual rigor, it may be appropriate in an academic setting, not the politicized FCC. Indeed, the FCC's unwillingness to rely upon such approaches may stem from the limits they place on FCC discretion. Further, social science can rarely provide the irrefutability that mathematics and physics do. Studies which attempt to classify media by their content would inevitably involve methodological challenges. A court with a penchant towards "First Amendment Lochnerism" could probably find sufficient incompleteness or uncertainty in any set of studies to overturn any FCC order that relied upon them.


197. Id.

198. See generally, Kristen Morse, Relaxing the Rules of Media Ownership: Localism and Competition and Diversity, Oh My! The Frightening Road of Deregulation, 24 J. Nat'l A. Admin. L. Judges 351, 370-75, (Fall 2004) (discussing the political reaction to the Biennial Media Ownership Order including the 3 to 2 vote along party lines and the minority commissioners' and Congressional reactions.).


201. See e.g., Prometheus Radio, 373 F.3d at 418-20.

202. Id.
B. Changing Presumptions: Stop Counting Diversity

Following the W.H. Auden injunction “Thou shalt not sit/With statisticians
nor commit/A social science,” one could re-conceptualize the FCC diversity
inquiry in a way that limits significantly the reliance on economic data and
changes the showings that challengers to FCC regulation must make. The FCC’s
current approach puts it in a position of declaring when there is “enough”
diversity and defining what diversity is. It may be impossible for an agency to
do this, particularly in times of a more skeptical judiciary. A different approach
might abandon the pretense of counting diverse viewpoints and state simply that
the FCC aims to further diversity of ownership—a position probably not
incongruent with Supreme Court precedent.

C. Six Values that Decentralized Ownership

Edwin Baker identifies six values that decentralized ownership furthers. First, Baker argues:

[O]wners living in the community where the media product is
distributed and owners closer to journalistic/editorial process are
generally likely to exercise more desirable decisionmaking control and
to be relatively more concerned with quality and less single-mindedly
focused on profit. Their identity is likely more at stake in relation to the
quality of the product, an effect reinforced by being personally close to
the consumers and professionally close to the journalism critics who
evaluate them primarily on the basis of content quality and not merely
the firm’s economic success.

Second, Baker identifies the “Berlusconi impropriety” of one media interest,
allied with a political interest, exercising an excessive control over a
democracy’s civil discourse. Third, decentralized ownership, Baker argues,
performs a watchdog or checking function—correcting the errors and mistake of
any one source of information. Fourth, decentralized ownership prevents
control of the media by corporate interests outside of media—interests that may

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203. W.H. Auden, Under Which Lyre (1946) reprinted in COLLECTED POEMS, 335, 339 (Edward

204. See supra notes 116, 128 and accompanying text.

205. Regulations limiting media ownership without regard to viewpoint would be content­
neutral and thus subject to intermediate scrutiny. See Turner I, 512 U.S. at 643-44, 652. A strong
argument can be made that such regulations would further the important government interest of
promoting diversity of ownership. The reasons that diversity of ownership could qualify as an
important government interest are explored in the text that follows. See infra notes 200-208 and
accompanying text.

206. C. Edwin Baker, Media Concentration: Giving Up on Democracy, 54 FLA. L. REV. 839,
902-13 (2002).

207. Id. at 904.

208. Id. at 905-06.

209. Id. at 906-07.
skew reporting.\textsuperscript{210} For instance, Baker points to Dupont's threat of withdrawal of advertising that apparently prompted Time, Inc., to pressure its associated Fortune book club to drop the distribution of a book critical of Dupont.\textsuperscript{211} Baker also contends that concentrated ownership can lend itself to co-option by one particular approach to the news, such as Rupert Murdoch's, and that concentrated media structures can create unwelcome synergies with other corporate interests.\textsuperscript{212}

Starting from the normative position that decentralization of ownership is desirable for its own sake, the FCC could then examine particular media markets with an eye to maximize decentralization of ownership up to the point at which significant economic inefficiencies can be expected. This approach would be immune from the problems that have plagued FCC media ownership regulation as of late—how much diversity is needed.\textsuperscript{213} Explicitly accepting diversity of ownership as a goal provides an answer.

While determining when inefficiencies would emerge in markets may be difficult, it is an inquiry with an agreed-upon criterion: economic efficiency—as opposed to the diversity determination that courts have found without criterion. Agencies, in general, receive considerable deference when engaged in line-drawing.\textsuperscript{214}

This approach alters the de facto burden of proof. Under its current approach to diversity regulation, the FCC must (i) create a metric for diversity and then (ii) determine whether its limits provide for "enough" diversity.\textsuperscript{215} Both steps are conceptually and theoretically tenuous. Under the approach proposed here, the FCC could propose a limit reasonably based upon the evidence in the record—and those who would appeal the order would have to show that efficiency mandated a different limit.\textsuperscript{216} The FCC would only have to show that it would be reasonable to expect that its limits would not create grave efficiency losses given the evidence; its opponents would have to show that efficiency losses/gains would be greater or lesser at some other level of concentration.\textsuperscript{217} This argument would be based upon a concept, economic efficiency, about
which there can be reasoned analysis. Given the defense to agency line drawing, the FCC's opponents would have to make the positive, affirmative case that a particular limit was arbitrary and capricious given the economic data, a difficult job given vagaries of economic theory and data. Rather than relying on conclusions about diversity, the FCC's limit would rely on a normative presumption that decentralized ownership is the preferable default rule. It could then look to economic efficiency as a principle to limit the application of that rule.

IV. CONCLUSION

The future of media ownership regulation in the United States is in flux. The FCC has yet to revise the limits the United States Court of Appeals for the Third Circuit remanded. In the face of increasingly skeptical courts, media regulation will depend in no small measure on the intellectual rigor of the FCC's analyses. To the degree "First Amendment Lochnerism" controls courts' behavior, the FCC must do a better job at justifying its regulations. Given the readiness with which courts have struck down its determinations about media diversity, the FCC must re-examine its entire approach to media diversity. This article has suggested several new approaches for a fresh regulatory start.