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MEDIA MYTHS *Making Sense of the Debate Over Media Ownership* Adam D. Thierer

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MAKING SENSE OF THE DEBATE OVER MEDIA OWNERSHIP

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Library of Congress Catalog Card Number: Pending
ISBN: Pending

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“There are no limits to the growth of ideas.”
-- Ithiel de Sola Pool, *Technologies without Boundaries*, 1984

INTRODUCTION
UNDERSTANDING MEDIA MADNESS

For most of human civilization people have lived in extreme information poverty. Only the elite were lucky enough to have access to news and information about the developments of their day. Today, by contrast, we are blessed to live in an Information Age, a world of unprecedented media availability and diversity in which citizens can access and consume whatever media they want, wherever, whenever, and however they want.

Despite this undeniable reality, life in the Information Age has its detractors. The funny thing about information and media is that the more you have, the more people find to complain about. This tendency was on full display when a debate about media power erupted in America in June 2003 following the release by the Federal Communications Commission (FCC) of revised regulations meant to govern media ownership structures and practices.

These complicated rules attempted to answer some difficult questions, namely:

- Are media companies in this country too big?
- How big is "too big"?
- How many media outlets should a single company be allowed to own nationally or locally?
- Is the media diverse enough and competitive enough today?
- And what relationship, if any, does media size have to the health of our democracy?

Concluding that "Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before," the FCC promulgated a wide-ranging, 258-page rulemaking reassessing the ownership rules that have governed television and radio broadcasters for many years.[1] Although the FCC's order only moderately relaxed the existing regulations—and even retained or strengthened some of the rules under consideration—many groups and lawmakers mounted a vociferous campaign to overturn the revisions alleging that media ownership liberalization would result in more industry consolidation, less "diversity," the "death of localism," and a "threat to democracy."

During ensuing debates in Congress, many lawmakers used remarkably apocalyptic rhetoric to describe the horrors that would ensue unless the FCC's

[1] Federal Communications Commission, *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 03-127, June 2, 2003, p. 4, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf, cited hereafter as FCC, *Media Ownership Proceeding*.

effort to revise media ownership rules was reversed. For example, during the debate on the House floor over an amendment that would have overturned one element of the new FCC rules, Rep. Lynn Woolsey (D-Calif.) said the FCC's tweaking of the rules was an attempt to impose a centralized "Saddam-style information system in the United States."[2] Other lawmakers expressed their opposition to the new rules by making references to the movie *Citizen Kane*,[3] or referred to the new rules as "mind control"[4] that would result in Soviet Union-esque control of the media.[5] And in response to questions from talk show host Chris Matthews regarding how he would handle media ownership matters, Democratic presidential candidate Howard Dean said, "[W]e're going to break up giant media enterprises" because "11 companies in this country control 90 percent of what ordinary people are able to read and watch on their television." When Matthews specifically asked: "Would you break up [News Corp.-owned] Fox?" Dean answered, "On ideological grounds, absolutely yes."[6]

This rhetorical backlash by lawmakers was equaled or even exceeded in some cases by the statements of other critics who supported tighter controls on media:

- *New York Times* columnist William Safire warned that the FCC's actions have "opened the floodgates to a wave of media mergers that will further crush local diversity and concentrate the power to mold public opinion in the hands of ever-fewer giant corporations."[7]

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[2] Quoted in "Lawmakers Predict Revolt over Media Dictatorships," *Broadcasting & Cable*, July 23, 2003, http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA313012.

[3] For example, Rep. Edward Markey (D-Mass.) told the *Washington Post* that the FCC's decision to revise the newspaper-television rules was, "the worst decision ever made in the history of the Federal Communications Commission." Quoted in Jonathan Krim and Christopher Stern, "House May Block Part of FCC's Media Plan," *The Washington Post*, July 23, 2003, p. E1. And during a committee hearing several months later, in what was apparently supposed to be a humorous gesture, Rep. Markey introduced an amendment that would have deemed the new FCC cross-ownership rules to be "indecent" and require Commissioners who supported the rule to watch the movie *Citizen Kane* over and over again "until they flinch at the word 'Rosebud.'" Quoted in Terry Lane, "House Commerce Committee Raise 'Indecency' Fines to $500,000," *Communications Daily*, March 4, 2004, p. 2.

[4] In proposing legislation to reregulate media and reimpose the so-called Fairness Doctrine, Rep. Maurice Hinchey (D-N.Y.) argued that media ownership deregulation amounted to "mind control" by Republicans who were trying to "dumb down" the public. "It's a well thought out and planned effort to control the political process," he argued and, "It will wipe out our democracy." Quoted in Terry Lane, "Hinchey Pushes Fairness Doctrine Bill to CWA," *Communications Daily*, March 31, 2004, p. 9.

[5] Noted in "Lawmakers Predict Revolt over Media Dictatorships." Similarly, the same story noted that Rep. David Price (D-N.C.) argued during the debate that "people with pitchforks and torches" would be protesting outside the Capitol if the amendment was defeated.

[6] "Dean Vows to 'Break Up Giant Media Enterprises,'" *The Drudge Report*, December 2, 2003, http://www.drudgereport.com/dean1.htm; Bill McConnell, "Dean Threatens to Break Up Media Giants," *Broadcasting & Cable*, December 3, 2003, http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA339546.

[7] William Safire, "Regulate the F.C.C.," *The New York Times*, June 16, 2003, p. A23.

- *CNN* founder Ted Turner warned that the relaxation of the rules, "will stifle debate, inhibit new ideas and shut out smaller businesses trying to compete."[8] (Turner would later compare the popularity of the Fox News Channel to the rise of Adolf Hitler prior to World War II).[9]

- Former FCC Chairman Reed Hundt accused then-Chairman Michael Powell of "promoting the most radical view of media consolidation that any democracy has ever supported. It's an experiment with the underpinnings of democracy."[10]

While it would be reasonable to expect such claims to be accompanied by extensive factual support for the proposition that the media sky was falling, such evidence was not forthcoming. Instead, critics used unfounded rhetoric and dire predictions to support the broader thesis that there was massive market failure at work within the media sector and that only immediate government action could halt or reverse this situation. Meanwhile, critics conveniently ignored the solid factual record of stunning technological change and market evolution outlined in this book, which dramatically illustrates how much better off citizens and consumers are today than in the past.

Radical Deregulation or Piecemeal Reform?

The hyperbolic rhetoric employed by critics of media deregulation was even more curious given just how limited the FCC's ownership revisions were in reality. Although the opponents of regulatory reform made it sound as if the agency had eviscerated all media ownership regulations—"radical deregulation," FCC Commissioner Michael Copps called it[11]—the reality was quite different. As Table 1 illustrates, of the six major media ownership rules that the FCC considered, *none* were repealed outright. Four were moderately relaxed, one (dual TV network ownership ban) was left unchanged, and another (local radio ownership rule) was actually tightened. This hardly constitutes "radical deregulation;" it was more like tinkering around the edges of a complex regulatory scheme.

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[8] Ted Turner, "Monopoly or Democracy?" *The Washington Post*, May 30, 2003, p. A23; Also see Ted Turner, "My Beef With Big Media," *Washington Monthly*, July/August 2004, http://www.washingtonmonthly.com/features/2004/0407.turner.html.

[9] Jim Finkle, "Turner Compares Fox's Popularity to Hitler," *Broadcasting & Cable*, January 25, 2005, http://www.broadcastingcable.com/CA499014.html.

[10] Quoted in David Lieberman, "Media's Big Fish Watch FCC Review Ownership Cap," *USA Today*, July 8, 2001, http://www.usatoday.com/money/covers/2001-07-09-bcovmon.htm. Likewise, Angela Campbell, a lawyer representing several groups that mounted a legal challenge to the FCC's new rules, said, "There is truly potential here for one company to have significant dominance of public discourse." Quoted in Dan Fost, "Fewer Moguls, Bigger Empires: Congress Wrestles with Media Ownership," *San Francisco Chronicle*, February 12, 2004, p. B1, http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/02/12/BUGMD4UQ051.DTL.

[11] Michael Copps, "Dissenting Statement of Commissioner Michael Copps," in FCC, *Media Ownership Proceeding*, p. 3, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A5.pdf.

Table 1: The Media Ownership Rules and the FCC's Proposed Revisions

National TV Ownership Rule (TV Audience Cap)

Old Rule: Adopted in 1941, the rule prohibits broadcast television networks from owning TV stations with a combined audience reach of more than 35 percent. In 2000, the cap was raised from 25 to 35 percent.

Proposal: Audience cap raised from 35 to 45 percent.

Dual Television Network Ownership Prohibition

Old Rule: Adopted in 1946, the rule prohibits any of the top four traditional TV networks (CBS, NBC, ABC, and Fox) from acquiring each other.

Proposal: Unchanged.

Local TV Multiple Ownership Rule

Old Rule: Adopted in 1964, the rule limits a firm from owning more than one TV station in a market, or two if there are at least eight other stations and no more than one of the commonly owned stations is one of the four biggest in the market.

Proposal: In markets with five or more TV stations, a company may own two stations, but only one of those stations can be among the top four in ratings. In markets with 18 or more TV stations, a company can own three TV stations, but only one of those stations can be among the top four in ratings. In deciding how many stations are in the market, both commercial and noncommercial TV stations are counted. The FCC adopted a waiver process for markets with 11 or fewer TV stations in which two top-four stations seek to merge. The FCC will evaluate on a case-by-case basis whether merged stations would better serve their local communities together rather than separately.

Broadcast-Newspaper Cross-Ownership Ban

Old Rule: Adopted in 1975, the rule prohibits a newspaper owner from also owning a television or radio station in the same local market.

Proposal: In markets with three or fewer TV stations, no cross-ownership is permitted among TV, radio, and newspapers. A company may obtain a waiver of that ban if it can show that the television station does not serve the area served by the cross-owned property (i.e., the radio station or the newspaper). In markets with between four and eight TV stations, combinations are limited to one of the following: (A) A daily newspaper; one TV station; and up to half of the radio station limit for that market (i.e., if the radio limit in the market is six, the company can only own three) OR (B) A daily newspaper; and up to the radio station limit for that market; (i.e., no TV stations) OR (C) two TV stations (if permissible under local TV ownership rule); up to the radio station limit for that market (i.e., no daily newspapers). In markets with nine or more TV stations, the FCC eliminated the ban.

TV-Radio Cross-Ownership Ban

Old Rule: Adopted in 1970, the rule limits the number of radio stations that can be owned by a TV station owner in the same market, using a sliding scale based on the number of broadcast stations in the market.

Proposal: Same as broadcast-newspaper cross-ownership rule.

Local Radio Ownership Limit

Old Rule: Adopted in 1941, the rule limits the number of radio stations a firm can own in a local market. The rules were modified under the Telecom Act of 1996 as follows: In markets with 45 or more radio stations, a company may own 8 stations, only 5 of which may be in one class, AM or FM.
In markets with 30 to 44 radio stations, a company may own 7 stations, only 4 of which may be in one class, AM or FM. In markets with 15 to 29 radio stations, a company may own 6 stations, only 4 of which may be in one class, AM or FM. In markets with 14 or fewer radio stations, a company may own 5 stations, only 3 of which may be in one class, AM or FM.

Proposal: The Telecom Act ownership caps were retained but the FCC proposed a new "geographic contour" methodology for defining radio markets that would replace its old "signal contour" method. The end result of the new methodology is that it will likely restrict further consolidation in the radio industry.

(*Note: The following cable ownership rules were not considered as part of the FCC's June 2, 2003 rulemaking).*

Cable-Broadcast Cross-Ownership Ban

Old Rule: Adopted in 1970, the rule prohibited the joint ownership of a cable television system and a television broadcast station in the same local market.

Status: The D.C. District Court unilaterally threw the rule out in the February 2002 decision *Fox Television Stations, Inc. v. FCC*

Cable National Ownership Caps

Old Rule: The Cable Act of 1992 directed the FCC to create both horizontal and vertical caps on cable ownership or vertical integration. The horizontal rule imposed a 30 percent cap on the number of subscribers that may be served by a cable operator. The vertical rule placed a cap of 40 percent on the amount of proprietary programming cable operators could put on their own systems.

Status: Not yet reviewed by the FCC since the D.C. District Court remanded the rules to the agency in the March 2001 decision *Time Warner Entertainment v. FCC* for further consideration. The rulemaking remains unfinished at the FCC.

Moreover, although critics accused the FCC of pushing through a radical deregulatory agenda, the limited steps the FCC took in this proceeding were not even entirely voluntary in nature. Through the Telecommunications Act of 1996, Congress demanded that the FCC undertake a biennial review of all its ownership rules and determine whether the rules were "in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."[12] Like most other provisions of the Telecom Act, this mandate was understood by most observers to be deregulatory in character.

The FCC was also under pressure from the courts to revise many of these rules since their validity had been challenged in various lawsuits. For example, in *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals held that the FCC's decision to retain the national television station ownership rule was "arbitrary and capricious and contrary to law." [13] The court required the commission to reconsider the rule and make changes consistent with the deregulatory thrust of the Telecom Act. In fact, in the *Fox* decision, the court specifically cited Section 202(h) of the Telecom Act and noted that it "carries with it the presumption in favor of repealing or modifying the ownership rules [since] the Telecommunications Act of 1996... set in motion a process to deregulate the structure of the broadcast and cable television industries."[14] In the same decision, the Court also vacated the cable/broadcast cross-ownership rule, "because we think it unlikely the Commission will be able on remand to justify retaining it." In *Sinclair Broadcast Group, Inc. v. FCC*,[15] another D.C. Circuit Court decision that was handed down just two months after the *Fox* decision, the court remanded the local television ownership rule to the agency with orders to go back and justify it.

These court decisions and others demanded that the FCC revisit its media ownership regulations and provide more substantial justification for their continued existence in light of ongoing marketplace and technological developments.[16] As FCC Commissioner Kathleen Abernathy noted when the rules were released last June: "The federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence—not on fear and speculation about hypothetical media monopolies intent on

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[12] Section 202(h), Telecommunications Act of 1996, Public Law No. 104-104, 1996.

[13] *Fox Television Stations, Inc. v. FCC*, 280 F. 3d 1027 (D.C. Circuit, 2002), http://laws.lp.findlaw.com/dc/001222a.html.

[14] Ibid.

[15] *Sinclair Broadcast Group, Inc. v. FCC*, 284 F. 3d 148 (D.C. Circuit, 2002), http://www.fcc.gov/ogc/documents/opinions/2002/01-1079.html.

[16] "A fair reading of the decisions leaves little doubt that the court is troubled that the commission continues to act as if three dominant television networks still force-feed us our news as they did during Walter Cronkite's heyday. The commission seems to think that cable and satellite TV networks, VCRs, DVDs—not to mention the Internet—were never invented, and that radio stations and newspapers have ceased to exist!" Randolph May, "Robed Revolutionaries," *Legal Times*, May 6, 2002, p. 46.

exercising some type of Vulcan mind control over the American people."[17]

The combined effect of these court rulings and the congressionally mandated (and generally deregulatory) review process was to pressure the FCC to review all its media ownership regulations with a skeptical eye, questioning the legitimacy of each rule.[18] As the FCC noted in the opening paragraphs of its media ownership order, "Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve."[19]

Consequently, the agency really had no choice but to reconsider each of these restrictions on media ownership and either abolish them outright or revise them in such a way that they would be enforceable in the future. If they failed to do so, the courts might have thrown the rules out altogether eventually. "In effect, the FCC [was] merely trying to catch up with the realities of a media landscape that has already largely been shaped," noted two *Financial Times* reporters.[20] In the end, however, the FCC's final package of reforms was very timid in scope and, again, failed to eliminate any rules in their entirety.

Despite this, when the agency announced its new media ownership regulations on June 2, 2003, it was greeted with a firestorm of criticism. Most surprisingly, critics claimed that the agency had radically overstepped its bounds of authority. And during the heated congressional debates that would follow, many lawmakers denounced the FCC's limited reforms in the same manner, ignoring the fact that the agency had little choice but to act in such a way that scaled back the rules somewhat. Multiple bills were introduced in Congress aimed at overturning some or all elements of the FCC's reform measure.[21] And as part of later congressional efforts to enact increased penalties for broadcast

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[17] Statement of Commissioner Kathleen Q. Abernathy, "2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act or 1996," June 2, 2003, pp. 1-2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A4.pdf, cited hereafter as Statement of Commissioner Kathleen Abernathy.

[18] As *The Economist* magazine has noted, "Mr. Powell's changes were meant to end a legal fight that began with the passage of the 1996 Telecommunications Act, in which Congress required the FCC to review its media rules every two years, with the goal of scrapping unnecessary ones. After its first two reviews, the FCC made no changes. But the courts then found that the FCC had not properly justified its decisions and scrapped some rules which they thought were impossible to justify. Opponents of media deregulation challenged these rulings, with some complaining about the follies of 'conservative judges.'" See "The Politics of Big Media," *The Economist*, September 11, 2003, http://www.economist.com/displayStory.cfm?Story_id=2054729.

[19] FCC, *Media Ownership Proceeding*, p. 4.

[20] Peter Thal Larsen and Demetri Sevastopulo, "Powell under Pressure," *Financial Times,* April 30, 2003, p. 13.

[21] These bills were: S. 1046 and H.R. 2052, "Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003;" S. 1264, "FCC Reauthorization Act of 2003;" H.R. 2462, "Protect Diversity in Media Act;" H.R. 4069, "Media Ownership Reform Act of 2004."

indecency in 2004, the Senate considered an amendment that would have frozen FCC implementation of the revised ownership rules until the Government Accountability Office (GAO) had studied the question of whether there was a link between industry consolidation and supposed increases in indecency on television and radio.[22] Legislation was also introduced proposing a resurrection of the so-called Fairness Doctrine and the Financial Interest and Syndication (or "Fin-Syn") rules, which limited television network ownership of program production studios.[23]

In the end, the most extreme measures did not pass Congress. But as part of the Consolidated Appropriations Act of 2004, Congress did overturn the FCC's decision to bump the national television ownership cap from 35 to 45 percent. The Appropriations Act compromise pegged the cap at 39 percent.[24] Meanwhile, opponents of reform also pursued legal action in the courts to overturn the rules and succeeded. In September of 2003, the Third Circuit Court of Appeals issued an order blocking the FCC's new rules from going into effect until the Court had time to review the legitimacy of the new rules.[25] On June 24, 2004, the Third Circuit threw out most of the FCC's new rules in the case of *Prometheus Radio Project v. FCC*.[26] By a 2 to 1 vote—with two Democratic appointees outvoting the lone Republican appointee—the Third Circuit continued its stay of the rules so they could not take effect and then remanded the ownership proceeding back to the FCC for reconsideration and revision. Neither the Justice Department nor the FCC asked the Supreme Court to consider the decision.[27]

The Third Circuit was particularly critical of the FCC's "Diversity Index," a tool the agency created in its new media ownership order to evaluate media competition and gauge the wisdom of liberalization in various markets. The Third Circuit felt that the measures and weights the FCC employed in creating the index overvalued some media outlets or voices relative to others, but the court didn't make it clear what the correct weights should be. Of course, while the Third Circuit may have been correct in arguing that the Diversity Index was a flawed,

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[22] Ron Orol, "FCC Blocked on Merger Rules," *The Deal*, March 9, 2004, http://www.thedeal.com/NASApp/cs/ContentServer?pagename=IWM&c=TDDArticle&cid=1078420952031; Terry Lane, "Broadcast Decency Amendment Proposed for DOD Authorization Bill," *Communications Daily*, June 9, 2004, pp. 1-2.

[23] See Adam Thierer, "Return of the (Un)Fairness Doctrine: The Media Ownership Reform Act," Cato Institute *TechKnowledge* no. 80, April 20, 2004, http://www.cato.org/tech/tk/040420-tk-2.html.

[24] In June 2004, the Senate also adopted an amendment to the Department of Defense Authorization bill that overturned the FCC's new rules entirely. But it was not included in the final version of the bill.

[25] http://www.ca3.uscourts.gov/staymotion/e59o090303.pdf.

[26] *Prometheus Radio Project v. FCC*, (Third Circuit Court of Appeals, June 24, 2004), http://www.ca3.uscourts.gov/opinarch/033388p.pdf.

[27] See Stephen Labaton, "U.S. Backs Off Relaxing Rules for Big Media," *The New York Times*, January 28, 2005, p. C1; Michael Feazel, "Feds Leave Broadcasters Alone in FCC Media Ownership Appeal," *Communications Daily*, January 28, 2005, p. 3.

subjective exercise, it failed to realize that *any* attempt to draw up such an index—or even the numerical ownership limits themselves—will be an arbitrary guessing game open to multiple interpretations. And the court's claim that the FCC had "not sufficiently justified its particular chosen numerical limits" was bizarre considering the voluminous record the FCC compiled to justify its new rules. This record included not only the final 250-page rulemaking, but a dozen "Media Ownership Working Group" studies that provided extensive empirical support for the rule changes.[28] Hundreds of groups and individuals also filed comments with the agency; many were mentioned in the final rulemaking.

Finally, the Third Circuit ruling is somewhat at odds with the earlier decisions by the D.C. Circuit Court in the *Fox* and *Sinclair* cases, which questioned the validity of the rules and encouraged the FCC to revise the rules in the first place. With the *Prometheus* decision cutting the opposite direction, media ownership rules are left in a state of limbo pending further action by the FCC , the courts, or Congress. Essentially, the old regulatory status quo prevails once again. Following the release of the decision, former FCC Chairman Michael Powell argued that the *Prometheus* decision "has created a clouded and confused state of media law"[29] because, in the words of *The Wall Street Journal*, it has "foil[ed] years of work by regulators to devise a plan that would withstand legal challenges."[30] While further legal action might occur, Powell has suggested that it could be the case that the FCC will simply abandon any attempt to draw strict numerical limits on ownership and review each proposed change in media ownership structures on a case-by-case basis. Barring Supreme Court review of the rules, it appears this will be the case.

Other Factors Contributing to the Anti-Media Backlash

It is also important to mention how the confluence of several other factors contributed to the remarkable anti-media maelstrom that developed in the wake of the FCC's rulemaking:

(1) <u>Resurgence of general anti-corporate, anti-capitalist attitude</u>: Recent years have witnessed a reinvigorated anti-corporate, anti-capitalist attitude spurred on by the anti-globalization movement as well as highly publicized business scandals at Enron and WorldCom.[31] As a general exception to this

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[28] See Federal Communications Commission, Media Ownership Working Group Studies, http://www.fcc.gov/ownership/studies.html.

[29] Michael Powell, *FCC Chairman Michael Powell Reacts to Third Circuit Media Ownership Decision*, June 24, 2004, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248793A1.pdf.

[30] Anne Marie Squeo and Joe Flint, "Court Bars Media-Ownership Rules," *The Wall Street Journal*, June 25, 2004, p. A3.

[31] "With hostility towards big business in America still raging, the politicians have mostly used their muscle to impose more restrictive policies [in recent years]," noted a July 2003 *Economist* magazine article. See "Tied Up in Red Tape," *The Economist*, July 24, 2003,

prevailing attitude, the FCC's media ownership liberalization proposal could not have come at a worse time.

(2) Concerns about journalistic standards: The FCC's reform proposal was also released at a time when concerns about journalistic ethics were very much in the news. High-profile scandals involving fabricated stories by Jayson Blair of *The New York Times*,[32] Stephen Glass of *The New Republic*, and Jack Kelley of *USA Today*[33] were raising questions about journalistic ethics and integrity. There has also been a great deal of hostility directed toward the Fox Network and Rupert Murdoch in particular, as the 2004 documentary *Outfoxed: Rupert Murdoch's War on Journalism* reveals.[34]

(3) Concerns about "indecency" and violence in media: Finally, the FCC's media ownership reforms were bound to get tied up with the ongoing debate over indecency and violence in media. Media censorship proposals have become something of a sport for members of Congress and FCC commissioners, giving them a chance to complain about the nature or quality of what they see or hear on television, the radio, the Internet, or even in video games.[35] Consequently, when the FCC proposed to somewhat loosen the chains on industry ownership, some in Congress took it as a threat to their ongoing ability to censor or even mandate certain types of programming on broadcast radio and television in particular. Some conservative or religious groups, such as the Parents Television Council, also tried to draw a connection between media consolidation and what they regarded as declining standards on television and radio.

When these factors came together, it created an explosive political mix, especially with so many special interest groups and media critics of all ideological stripes waiting in the wings to exploit such a situation and once again push their various agendas to regulate media in one manner or another. Lawmakers were all too eager to oblige since, as a recent *Broadcasting & Cable* editorial charged, "what Congress wants is a media obedient to its will."[36]

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http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=1944024. Also see Del Jones, "America Loves to Hate Dastardly CEOs," *USA Today*, September 15, 2004, p. 1B.

32 See Seth Mnookin, *Hard News: The Scandals at* The New York Times *and Their Meaning for American Media* (New York: Random House, 2004).

33 Blake Morrison, "Ex-USA Today Reporter Faked Major Stories," *USA Today*, March 18, 2004, p. 1A.

34 Louise Witt, "Outfoxed: A Unique Sleeper Hit," *Wired News*, July 23, 2004, http://www.wired.com/news/digiwood/0,1412,64312,00.html?tw=wn_story_top5.

35 See generally Adam Thierer, "Return of the 'Seven Dirty Words' Indecency Standard," Cato Institute *TechKnowledge* no. 68, December 18, 2003, http://www.cato.org/tech/tk/031218-tk.html; Adam Thierer, "Should Government Censor Speech on Cable and Satellite TV?" Cato Institute *TechKnowledge* no. 77, March 29, 2004, http://www.cato.org/tech/tk/040329-tk.html.

36 "Brownback's Hysteria," *Broadcasting & Cable*, April 5, 2004, p. 44, http://www.broadcastingcable.com/article/CA408026?verticalid=311&industry=Editorials&industryid=1034.

Debunking the Media Myths

This book will address the many "media monopoly" myths given widespread circulation by some of the leading critics of media liberalization, including: FCC Commissioner Michael Copps,[37] *Media Monopoly* author Ben Bagdikian,[38] Mark Cooper of the Consumer Federation of America,[39] University of Chicago law professor Cass Sunstein,[40] Jeffrey Chester and Gary O. Larson of the Center for Digital Democracy,[41] Cheryl Leanza and Harold Feld of the Media Access Project,[42] authors David Croteau and William Hoynes,[43] C. Edwin Baker of the University of Pennsylvania Law School,[44] Stanford University law professor Lawrence Lessig,[45] leftist political activist and linguist Noam Chomsky,[46] John Nichols of *The Nation*,[47] and especially Robert W. McChesney of the University of Illinois, the most prolific and probably the most radical of the critics of media liberalization.[48]

These critics rest their case for widespread and ongoing government intervention in the media marketplace on seven basic myths:

- Myth #1: **Diversity** will suffer in an unregulated marketplace and many niche or minority audiences will not have access to the news, information or entertainment they desire or need.

- Myth #2: "**Localism**" will be ignored in an unregulated marketplace since media providers will only deliver local fare if they are small "mom-and-pop"

[37] Copps.
[38] Ben Bagdikian, *The New Media Monopoly* (Boston, MA: Beacon Press, 2004).
[39] Mark Cooper, *Media Ownership and Democracy in the Digital Information Age* (Stanford, CA: Center for Internet and Society, Stanford University Law School, 2003), http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf.
[40] Cass Sunstein, *Republic.com* (Princeton, NJ: Princeton University Press, 2001).
[41] Jeffrey Chester and Gary O. Larson, "A 12-Step Program for Media Democracy," *The Nation*, July 23, 2002, http://www.thenation.com/doc.mhtml?i=20020805&s=larson20020723.
[42] Cheryl Leanza and Harold Feld, "More Than 'a Toaster with Pictures': Defending Media Ownership Limits," *Communications Lawyer*, Fall 2003, pp. 12-22, http://www.mediaaccess.org/ToasterFINAL.pdf.
[43] David Croteau and William Hoynes, *The Business of Media: Corporate Media and the Public Interest* (Thousand Oaks, CA: Pine Forge Press, 2001).
[44] C. Edwin Baker, "Media Concentration: Giving Up on Democracy," *Florida Law Review*, vol. 54, no. 5, December 2002, pp. 839-919.
[45] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).
[46] Noam Chomsky, *Media Control: The Spectacular Achievements of Propaganda* (New York: Seven Stories Press, 2nd ed., 2002).
[47] John Nichols and Robert W. McChesney, *Our Media, Not Theirs: The Democratic Struggle against Corporate Media* (New York: Seven Stories Press, 2002).
[48] Of the many books and papers McChesney has produced, the most important would probably be: Robert W. McChesney, *Rich Media, Poor Democracy: Communications Politics in Dubious Times* (New York: New Press, 2000). Robert W. McChesney, *The Problem of the Media: U.S. Communication Politics in the 21st Century* (New York: Monthly Press Review, 2004). A complete list of his publications is available at: http://www.robertmcchesney.com/.

organizations. Larger media providers or chain owners cannot be expected to fulfill the needs of local communities.

- Myth #3: **Concentration** of media ownership has become a crisis as only a few companies control the entire media universe. Absent government controls on the growth of media firms, only a few giant conglomerates would be left to control all media.

- Myth #4: The future of our **democracy** is at stake since modern media fails to provide the necessary elements and conditions for public discussion of important issues.

- Myth #5: Ownership rules are needed to preserve the **quality** of journalism and ensure informative, high-quality content and entertainment.

- Myth #6: **Free speech** will be betrayed since the First Amendment was meant as a guarantee of press diversity and "freedom of access" to media outlets.

- Myth #7: **New technologies**, including the Internet, make little difference to the outcome of this debate or cannot be used as justification for relaxing existing media ownership rules.

As the evidence will illustrate, these claims are wildly off-base and bear no relationship to empirical reality whatsoever. As *Washington Post* columnist Robert J. Samuelson argues: "The idea that 'big media' has dangerously increased its control over our choices is absurd. Yet large parts of the public, including journalists and politicians, believe religiously in this myth. They confuse size with power."[49] And media scholar Jonathan A. Knee of Evercore Partners notes: "Many of the arguments against [reform] seem based on idealized notions of the media's historical and actual structure."[50] Notions, Knee notes, that are patently false. "The contemporary belief that such rules are necessary to preserve a 'diversity of voices' ignores the overwhelming evidence that the marketplace of ideas has never been more robust."[51]

Building on these themes, this book will challenge the many outlandish claims made by the media critics:

✓ **Diversity**: Chapter 1 will show that today's media environment is more diverse than ever before and is characterized by information abundance, not information scarcity. Citizens enjoy more news and entertainment options than at any other point in American history or human civilization. If

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[49] Robert J. Samuelson, "The 'Big Media' Myth," *The Washington Post*, August 6, 2003, p. A17.
[50] Jonathan A. Knee, "Should We Fear Media Cross-Ownership?" *Regulation*, Summer 2003, p. 17, http://www.cato.org/pubs/regulation/regv26n2/v26n2-3.pdf
[51] Ibid., p. 20.

there is a media diversity problem today it is that citizens suffer from "information overload" because of all the choices at their disposal. The number of information and entertainment options has become so overwhelming that many citizens struggle to filter and manage all the information they can choose from on any given day.

- ✓ **Localism**: While we do not really know exactly how much local fare citizens demand, citizens still receive a wealth of information about developments in their communities. Chapter 2 will argue that although citizens are increasingly opting for more sources of national news and entertainment, local information and programming are still popular and will not disappear in a deregulated media marketplace. Indeed, "localism" is the one thing that distinguishes traditional radio and television broadcasting from newer forms of media and keeps it competitive. And new technologies are making it easier than ever before to access local information on demand.

- ✓ **Concentration**: Chapter 3 will show that the media marketplace is vigorously competitive and not significantly more concentrated than in past decades. But, it will also show that competition and concentration are not mutually exclusive. Citizens can have more choices even as the ownership of media outlets grows slightly more concentrated as it has in some sectors in recent years. Importantly, much of the consolidation we have seen in recent years has been a response to rising competition from new outlets and technologies. As this competition has segmented the market and given consumers more options, many traditional media outlets have used consolidation as one method of offsetting increased audience fragmentation.[52]

- ✓ **Democracy**: Civil discourse and a healthy democracy are the products of a free and open society unconstrained by government restrictions on media structures or content. "Democracy" does not equal untrammeled majoritarianism, and it does not mean that government can simply can ordain any ownership structures or business arrangements it wishes. But, as Chapter 4 will show, by all objective historical standards, deliberative democracy has never been more vigorous than it is today.

- ✓ **Media quality**: Media quality is, at root, a subjective matter. Government should have no say over—or even attempt to influence the quality of—news or entertainment in America. But with so many media outlets and

[52] Christopher Dixon, managing director of Gabelli Group Capital Partners, has argued that consolidation was tantamount to a "circle the wagons" strategy by major media operators in response to audience declines and fragmentation. "The [ownership] consolidation offset the [audience] fragmentation," he says. Cited in Jon Ziomek, "Journalism Transparency and the Public Trust," Aspen Institute *Report of the Eighth Annual Aspen Institute Conference on Journalism and Society*, 2005, p. 17.

options available today, citizens have a wide range of options from which to choose—meaning they can decide for themselves what level of "quality" they are looking for in news and entertainment. Importantly, increasing media diversity and competition has allowed for a flowering of more "biased" or opinioned news and commentary. Far from being a negative development, this is exactly the sort of vigorous exchange of ideas that should be hoped for in a democracy. Chapter 5 will discuss media quality, and claims of media "bias," in detail.

- ✓ **First Amendment**: The First Amendment was not written as a constraint on private speech or actions, but rather as a direct restraint on government actions as they relate to speech.[53] Chapter 6 will argue that if the First Amendment is to retain its force and true purpose, structural ownership rules and "media access" mandates must not be allowed to stand.

- ✓ **New technologies**: New technologies and media trends *do* have an important bearing on this debate and call into question the wisdom of existing media ownership restrictions. In particular, the rise of the Internet and online media is radically changing the nature of this sector. Today's media marketplace looks very different than that of just 20 years ago and even more profound changes are likely on the way. Moreover, rapid technological convergence has made it increasingly difficult to distinguish one type of media outlet from another. Bits are bits, and they should not be artificially separated by archaic cross-ownership regulations.[54] The impact of new media technologies and trends will be discussed in great detail in Chapter 7.

What's Really Going on Here?

If a thorough review of the factual record clearly establishes that there is no empirical foundation for the claims made by the critics of media decontrol, what, then, explains the unusual passion they have exhibited during this debate?

It is the field of psychology, not law or economics, where the best explanation for such "media madness" can be found. It goes without saying that a lot of people have an axe to grind with the media for one reason or another, and that has probably been the case throughout our nation's history, likely going back to the day the first newspaper was published. "Public discourse about the media tends toward the apocalyptic, and the media are convenient scapegoats for the

[53] "The First Amendment precludes government's dictating the content of speech; it does not dictate structural regulations." Thomas G. Krattenmaker and Lucas A. Powe, Jr., *Regulating Broadcast Programming* (Cambridge, Massachusetts: The MIT Press, 1994), p. 226.

[54] For an early and enlightening discussion on this "bits are bits" notion, see Nicholas Negroponte, *Being Digital* (New York: Knopf, 1995), pp. 56-58.

myriad ills that are thought to assail us," argues political scientist Mary Stuckey.[55] Such media criticism is often based in large part upon the sociopolitical objectives of a wide variety of media pundits and critics who want to reshape the marketplace in their preferred image. Structural ownership regulations provide one of many ways for such critics to control media, explaining the support that these rules have gained in different quarters.

More specifically, as Chapter 5 will argue, perhaps the most powerful explanation for the media ownership backlash is a phenomenon psychologists label the "third-person effect hypothesis." Simply stated, critics sometimes seem to only see and hear in media what they want to see and hear—or what they *don't* want to see or hear. If they encounter viewpoints at odds with their own, they will likely be more concerned about the impact of those programs on others throughout society and come to believe that government must "do something " to correct this supposed bias. *Many people desire regulation, therefore, because they think it will be good for others, not necessarily for themselves*. And the regulation they desire has a very specific purpose in mind: the "re-tilting" of news coverage or entertainment in their preferred direction.[56]

That is very clearly the case when the media critics make their arguments against media reform and liberalization by attacking specific media personalities or news outlets they do not care for. For example, in July of 2004 left-leaning advocacy groups MoveOn.org and Common Cause cosponsored the release of the anti-Fox News documentary *Outfoxed: Rupert Murdoch's War on Journalism* and then also filed a complaint with the Federal Trade Commission (FTC) accusing Fox News of violating FTC deceptive advertising regulations for using the phrase "fair and balanced" to describe their news programs. Common Cause President Chellie Pingree told *The Wall Street Journal* that the campaign against Fox News was meant to highlight the supposed evils of media consolidation and the threats to diversity.[57] But Fox News is a prime example of the explosion of diversity we have witnessed in recent years. It may be the case that media critics do not like the type of reporting they see on Fox News or any other of the dozens of new news programs or channels that now exist, but this cannot also serve as proof of a "loss of diversity" in news or entertainment. To the contrary, it proves that we have more diversity than ever before. This example illustrates the third-person effect at work, and with a vengeance.

When asked during an interview to explain the unusually heated backlash to the media ownership decision, Michael Powell correctly noted that content concerns typically underlie much of what's going on. "Here's the truth: the

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[55] Mary Stuckey, "Presidential Elections and the Media," in Mark J. Rozell, ed., *Media Power, Media Politics* (Lanham, MD: Rowman & Littlefield, 2003), p. 159.

[56] "This is a debate about content masquerading as a debate about over-concentration," argues Jason Riley of *The Wall Street Journal.* Jason L. Riley, "A Cheap-Talkin' Bureaucrat," *The Wall Street Journal*, July 21, 2004, p. A11.

[57] Noted in Julia Angwin, "Liberals Step Up Political Assault against Fox News," *The Wall Street Journal*, July 20, 2004, p. B1.

ownership debate is about nothing but content… [The ownership rules] became a stalking horse for a debate about the role of media in our society…. It was really an invitation for people with particular viewpoints to push for a thumb on the scale, for content in a direction that people preferred."[58] Thus, the third person effect hypothesis helps explain why critics on both the Left and Right decry "bias" in media, when in reality, that complaint often masks critics' underlying concern that a particular program is not to their liking, or a fear that the public will be misled or corrupted by it. Structural ownership rules simply become another way for such groups to take a stab at controlling content, albeit more indirectly.

As Chapter 4 argues, another explanation of what motivates many of the media critics comes down to simple politics: Many left-leaning activists view media reform as part of a broader effort to advance social change or "social justice."[59] "Media reform cannot win without widespread support and such support needs to be organized as part of a broad anti-corporate, pro-democracy movement," says McChesney.[60] And as Nichols and McChesney argue, that effort begins with "the need to promote an understanding of the urgency to assert *public control over the media*."[61] In reviewing the work of the media critics, these motivations are repeatedly used to justify their anti-media regulatory crusade. As McChesney and Nichols' comments suggest, at the end of the day, it all comes down to one thing: More government control of the media and, by extension, speech.

Will Regulation Really Benefit Consumers?

Given the overwhelming evidence of how much better off Americans are today than in the past, one might reasonably ask: Why do we need any media ownership rules at all? Why not just get rid of all the FCC media ownership controls and, to the extent any rules are needed to address "market power" problems that might arise, let the antitrust laws govern? More specifically, why must we have ownership rules on the books that generally address only one segment of our multifaceted media marketplace—broadcasting? Why single out just one set of providers or source of content for unique regulatory treatment? Does all this—do all these rules—really make any sense?

Media critics might respond by asking a different question: What harm can come of having *some* caps or controls on how the broadcast sector organizes its business affairs? In a sense, however, the question answers itself since if it can be shown that there are more media choices and diversity today than in the more heavily regulated past, it should be clear that the further relaxation of media ownership regulations is not something to be feared.

[58] Ken McGee, *Gartner Interview with FCC Chairman Michael Powell*, June 15, 2004, http://www4.gartner.com/research/fellows/asset_91308_1176.jsp.
[59] Bagdikian, pp. ix, 257.
[60] McChesney, *Rich Media*, p. xxxiv.
[61] Nichols and McChesney, p. 34 (emphasis added).

But perhaps the most important reason to reject ownership controls is that government regulation of media markets produces unintended, anti-consumer consequences as the following case studies discussed throughout this book make clear:

* *Fin-Syn*: The financial interest and syndication (“Fin-Syn”) rules, which were put into effect in 1970, prohibited a television network from acquiring a financial interest in independently produced programs. Department of Justice (DOJ) consent decrees also limited the in-house program production activities of TV networks. In essence, the Fin-Syn rules and DOJ consent decree restrictions prohibited the vertical integration of broadcast television program creation and distribution. The logic behind these restrictions was that vertical integration of broadcast television program creation and distribution would allow broadcasters to gain excessive control over prime-time programming on their airwaves.

But by 1993, the FCC came to realize that the Fin-Syn rules were counter-productive and began dismantling them. The result was a great deregulatory success story. In the wake of decontrol, media operators were free to structure new business arrangements and alliances to finance increasingly expensive new programs, as well as entirely new networks and cable stations. (The UPN and WB television networks largely owe their existence to the repeal of Fin-Syn). Also, by eliminating Fin-Syn and allowing greater integration of programming and distribution, content providers were also able to ensure that their shows were more widely distributed not only on network television but on cable channels as well.

* *The “Fairness Doctrine”*: The hideously misnamed Fairness Doctrine was put in place by the FCC in 1949 to require broadcasters to “afford reasonable opportunity for the discussion of conflicting views of public importance.” After the doctrine came under attack by the courts in subsequent decades, the FCC finally discarded the rule in 1987 because, contrary to its purpose, the doctrine failed to encourage the discussion of more controversial issues. In fact, the courts and numerous academics found that that instead of expanding the range of viewpoints on the airwaves, the Fairness Doctrine had a chilling effect on free speech. With the threat of potential FCC retaliation hanging over their heads, many broadcasters were reluctant to air controversial opinions because it might require them to broadcast alternative perspectives that their audience did not want to hear. Alternatively, they feared they would not be able to air enough, or the right type of, responses to make regulators happy. Consequently, the Fairness Doctrine actually stifled the growth of disseminating views and, in effect, made free speech less free. As the FCC noted in repealing the doctrine in 1987, it “had the net effect of reducing, rather than enhancing, the discussion of controversial issues of public importance.”[62] Indeed, after repeal of the Doctrine, there was an explosion of diverse political speech on the airwaves.

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[62] “FCC Ends Enforcement of Fairness Doctrine,” Federal Communications Commission, Report No. MM-263, August 4, 1987, p. 1.

* *Content controls / censorship*: Structural ownership controls are often accompanied by content controls. While proponents of media ownership regulation typically claim that government can regulate underlying media ownership structures without influencing content, the reality is that the two go hand-and-hand. Once regulators gain the ability to control media business decisions, it should not be surprising that media content regulations will follow. For example, during recent fights over broadcast indecency fines, lawmakers attempted to link media ownership policy with the need for censorship proposals, arguing that increased consolidation had spawned more "indecent" television and radio programming. Ironically, it may be the case that increased competition with cable and other media sources is leading traditional broadcasters to "push the envelope" in terms of content. Thus, regulation becomes a lose-lose scenario for broadcasters who have their hands tied by both ownership regulations and content controls when attempting to respond to rising competition.

* *Industry protectionism*: Increased FCC activism in the media sector has also created a regulatory process subject to "capture" by certain interests who can then use regulation to thwart new competitors or technologies.[63] Several case studies in this book will illustrate how government regulation is typically used to diminish, not enhance, media diversity. For example, this was the case for many years in the television industry as broadcasters successfully used government regulation to fend off competition from cable television. And even today, some terrestrial radio broadcasters are trying to use regulation to prevent the spread of competition from nationwide satellite radio providers, such as XM and Sirius.[64] Again, it is the existence of government regulations that creates such barriers to entry and discourages expanded media diversity.

Toward Media Freedom

In a free society, government should not be in a position to dictate private media structures and outcomes. It is obvious that many media critics seemingly care very little about property rights or capitalist freedoms, but those rights and freedoms are genuine and should not be infringed through coercive regulatory mandates that essentially seek to control the size of the soapbox an individual or corporation uses to speak to the American people. Just as citizens would never tolerate government policies limiting the number of printing presses *The New York Times* can own to print newspapers, they should think twice before inviting

[63] As Robert Corn-Revere and Rod Carveth note: "The Commission's protection of existing services from prospective competitors has not been limited to those proposing to use the same transmission technology. Regulation also has been extended to new technologies in order to maintain a certain balance of power between competing media." Robert Corn-Revere and Rod Carveth, "Economics and Media Regulation," in Alison Alexander, James Owers, Rod Carveth, C. Ann Hollifield, and Albert N. Greco, eds., *Media Economics: Theory and Practice* (Mahwah, NJ: Lawrence Erlbaum Associates, 2004), p. 57.

[64] See Radley Balko, "All Politics Is Local: How Broadcasters Want to Silence Satellite Radio," Cato Institute *TechKnowledge* no. 71, January 20, 2004, http://www.cato.org/tech/tk/040120-tk.html.

lawmakers to limit speech in other ways by controlling business ownership decisions for other media providers.

To the extent that "market power" is the issue here, if any specific media provider grew so large as to monopolize the dissemination of information for the entire nation or even a major geographic region, it is likely that the antitrust laws would be employed to deal with the situation.[65] But it is difficult to imagine even this scenario coming about. As the late political scientist and communications theorist Ithiel de Sola Pool argued over 20 years ago, "There are no limits to the growth of ideas."[66] Information and entertainment cannot be monopolized in a free society, especially in today's world of media abundance.[67]

Even in the most remote rural communities of America there are typically several media choices or outlets, especially if the Internet is considered in the mix. The only way information and entertainment could be monopolized is by coercive state control of media like that in Russia today.[68] In July 2004, a state-controlled entity took over Russia's NTV television network and began canceling programs that were critical of the government, including, ironically, one talk show called "Freedom of Speech." Now *that* is a verifiable "media monopoly."[69] But we have nothing of the sort here in America; and so long as the marketplace remains open and free of government controls on entry and action, a "media monopoly" is impossible in this country.

In sum, American citizens have more media options today than ever before. Far from living in a world of "media monopoly" we now live in a world of media multiplicity. Media ownership regulations should be abolished because they do little to actually encourage increased media diversity and competition. Indeed, more often than not, they thwart important new developments that could enhance media diversity and competition. Citizens will be better off without such regulations because their private actions and preferences will have a greater bearing in shaping media markets than arbitrary federal regulations. No matter how large any given media outlet is today, it is ultimately just one of hundreds of sources of news, information, and entertainment that we have at our collective

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65 See Jonathan W. Emord, "The First Amendment Invalidity of FCC Ownership Regulations," *Catholic University Law Review*, vol. 38, 1989, pp. 466-469.

66 Ithiel de Sola Pool, *Technologies without Boundaries* (Cambridge, MA: Harvard University Press, 1990), p. 236.

67 Similarly, FCC Commissioner Abernathy argues: "[G]iven… the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world." Statement of Commissioner Kathleen Abernathy, p. 4.

68 Susan B. Glasser, "Russian Talk Show Host Faces Shutdown," *The Washington Post*, July 8, 2004.

69 Similar government crackdowns on media have occurred in China. See Edward Cody, "Party Censors Leave a Chinese City to Speculate on Corruption Scandal," *The Washington Post*, November 1, 2004, p. A14.

disposal. It is just one voice in our contemporary media cacophony, shouting to be heard above the others.

To the extent there was ever a "Golden Age" of media in America, we are living in it today. The media sky has never been brighter and it is getting brighter with each passing year. And this is most definitely not a case of looking for silver linings around clouds; *there are no clouds*. The facts presented throughout this book—some of the most significant of which are summarized in Table 2—speak for themselves in this regard.

In the end, policymakers must decide if this debate will be governed by facts or fanaticism; evidence or emotionalism. Because the hyperbolic rhetoric, shameless fear-mongering, and unsubstantiated claims that have thus far driven the overheated backlash to media liberalization have no foundation in reality, they must be rejected as the debate over media policy continues.

Table 2: An Assortment of Media Fun Facts

General Media Facts or Trends

- "A weekday edition of the *New York Times* contains more information than the average person was likely to come across in a lifetime in seventeenth-century England."[70] A 1987 report estimated that more new information has been produced within the last 30 years than in the last 5,000.[71]
- According to Ben Bagdikian, there are 37,000 different media outlets in America. That number jumps to 54,000 if all weeklies, semiweeklies, advertising weeklies, and all periodicals are included, and to 178,000 if all "information industries" are included. And yet Bagdikian is a leading critic of media deregulation and the title of his most recent book is *The New Media Monopoly*.[72]
- By 2007, the average American will spend 3,874 hours per year using major consumer media, an increase of 792 hours per year from the 3,082 hours per year that the average person spent using consumer media in 1977.[73]
- As of 2003, household penetration rates for various new media and communications technologies were very high and growing fast: VCR (88%); DVD (50%); DBS (24%); cell phones (70%); personal computers (66%); Internet access (75%). With the exception of VCRs, none of these technologies were in American homes in 1980.[74]
- In 2002, the average consumer spent $212 for basic cable, $100 for books, $110 for home videos, $71 for music recordings, $58 for daily newspapers, $45 for magazines, $45 for online Internet services, and $36 on movies.[75]
- A three minute coast-to-coast long-distance phone call, which cost roughly $1.35 in 1970, only cost 15 cents in 2003.[76]

Television / Video Competition

- 85 percent of Americans now subscribe to cable and satellite "pay TV" sources even though "free, over-the-air" television remains at their disposal.[77]
- The FCC notes that, "In 1979, the vast majority of households had six or fewer local television stations to choose from, three of which were typically affiliated with a broadcast network. Today the average U.S. household receives seven broadcast television networks and an average of 102 channels per home."[78]
- There are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS and other systems today. The FCC concludes, "We are moving to a system served by literally hundreds of networks serving all conceivable interests."[79]
- In 1980, 75 percent of televisions in use during the dinner hour were tuned in to an evening news broadcast from one of "Big 3" networks. By 2003, however, the number was down to 40 percent thanks to competition from 24-hour news networks on cable and other news sources.[80]

Newspapers and Magazines

- In 1900, the average newspaper had only 8 pages.[81] In the year 2000, by contrast, according to the *Encarta* encyclopedia, "Daily general-circulation newspapers average[d] about 65 pages during the week and more than 200 pages in the weekend edition."[82]

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70 Richard Saul Wurman, *Information Anxiety* (New York: Doubleday, 1989), p. 32.

71 Susan Hubbard, in Carol Collier Kuhlthau, ed., *Information Skills for an Information Society: A Review of Research* (Syracuse, NY: ERIC Clearinghouse on Information Resources, December 1987).

72 Bagdikian, p. 29.

73 Joe Mandese, "Study: Media Overload on the Rise," *Television Week*, May 17, 2004.

74 Data from various organizational publications and Web sites, including U.S. Department of Commerce, Census Bureau; Electronic Industries Association; National Cable and Telecommunications Association; and Nielsen/NetRatings.

75 *Plunkett's Entertainment & Media Industry Almanac 2002-2003* (Houston: Plunkett Research Ltd., 2002), p. 7.

76 Noted in Christina Wise, "The Good Ol' Days Are Now: Cox," *Investor's Business Daily*, April 19, 2004, p. A22.

77 Federal Communications Commission, *Eleventh Annual Video Competition Report*, February 4, 2005, p. 115, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf, cited hereafter as FCC, *Eleventh Annual Video Competition Report*.

78 FCC, *Media Ownership Proceeding*, p. 15.

79 *Ibid.*, pp. 48-49.

80 "Network TV," *The State of the News Media 2004*, Journalism.org, http://www.stateofthenewsmedia.org/narrative_networktv_audience.asp?cat=3&media=4.

Table 2: An Assortment of Media Fun Facts (Continued)

- There were 17,254 magazines produced in 2003, up from 14,302 in 1993. "For virtually every human interest, there is a magazine."[83]
- There were 440 new magazine launches in 2003, up from 289 in 2002.[84] Another source puts the number much higher at 949 new launches in 2003.[85]

Radio

- The number of radio stations in America has roughly doubled since 1970. As of March 2004, there were 13,476 radio stations in America, up from 6,751 in January 1970.
- Satellite radio (XM & Sirius), an industry that did not even exist prior to December 2001, boasted over 4 million subscribers nationwide by the end of 2004.[86]

Internet / Online Services

- 72 percent of Americans are now online and spend an average of nine hours weekly on the Internet.[87]
- The World Wide Web contains about 170 terabytes of information on its surface; in volume this is 17 times the size of the Library of Congress print collections.[88]
- As of January 2005, Technorati.com, a website that monitors developments in the world of Internet "blogging," was tracking over 5 million weblogs, up from 100,000 two years prior. The site reports that "A new weblog is created every 7.4 seconds, which means there are about 12,000 new blogs a day. Bloggers… update their weblogs regularly; there are about 275,000 posts daily, or about 10,800 blog updates an hour."[89]
- Although less than 10 years old, online auction giant E-Bay has grown so massive that it now handles more daily trading traffic than the Nasdaq Stock Market according to E-Bay CEO Meg Whitman.[90]
- In early 2004, online search giant Google reported that its collection of 6 billion items includes "4.28 billion Web pages, 880 million images, 845 million Usenet messages, and a growing collection of book-related information pages."[91]
- The Internet Archive "Wayback Machine" (www.archive.org) offers 30 billion Web pages archived from 1996 to the present. It contains approximately 1 petabyte of data and is currently growing at a rate of 20 terabytes per month. The site notes, "This eclipses the amount of text contained in the world's largest libraries, including the Library of Congress. If you tried to place the entire contents of the archive onto floppy disks… and laid them end to end, it would stretch from New York, past Los Angeles, and halfway to Hawaii."[92]

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81 Benjamin M. Compaine, "The Newspaper Industry," in Benjamin M. Compaine and Douglas Gomery, eds., *Who Owns the Media? Competition and Concentration in the Mass Media Industry* (Mahwah, N.J.: Lawrence Erlbaum Associates, 3rd Edition, 2000), p. 7.

82 "Newspaper," Microsoft Encarta Online Encyclopedia, 2004, http://encarta.msn.com/encyclopedia_761564853/Newspaper.html.

83 *The Magazine Handbook 2004-5* (New York: Magazine Publishers of America, 2004), p. 5, http://www.magazine.org/content/Files/MPA%5Fhandbook%5F04.pdf.

84 Ibid., p. 7.

85 Samir Husni, *Samir Husni's Guide to New Magazines 2004*, 19th Ed., http://www.shgncm.com/shgncm/.

86 "XM Satellite Radio Tops 3.1 Million Subscribers Ahead of Year-End Goal," December 27, 2004, available at http://www.xmradio.com/newsroom/screen/pr_2004_12_27.html; "SIRIUS Satellite Radio Ends Year with More than 1.1 Million Subscribers," January 3, 2005, available at http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=PresReleAsset&cid=1102975192985.

87 FCC, *Media Ownership Proceeding*, p. 148.

88 Peter Lyman and Hal R. Varian, *How Much Information? 2003*, School of Information Management and Systems, University of California at Berkeley, 2003, http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf.

89 See "About Technorati" available at http://www.technorati.com/about/.

90 Leslie Walker, "EBay Gathering Puts Highs, Lows on Full Display," *The Washington Post*, July 1, 2004, p. E1, http://www.washingtonpost.com/wp-dyn/articles/A17604-2004Jun30.html.

91 "Google Achieves Search Milestone With Immediate Access To More Than 6 Billion Items," *Google Press Release*, February 17, 2004, http://www.google.com/press/pressrel/6billion.html.

92 "Frequently Asked Questions," Internet Archive Wayback Machine, http://www.archive.org/about/faqs.php.

CHAPTER ONE
DEATH OF DIVERSITY OR AGE OF ABUNDANCE

Probably the most commonly repeated myth about media liberalization is that it will lead to the death of media diversity. Media critics argue that regulation is needed to promote diverse sources of news, opinion, culture, and entertainment because markets ultimately fail to satisfy these needs. “The age of diversity is gone,” proclaims Tom Rosenstiel, director of the Project for Excellence in Journalism.[93] And Leanza and Feld of the Media Access Project claim that “the current ‘market’ in news and entertainment is not marked by competitive entry or abundance.”[94]

Numerical caps on media ownership, therefore, are intended to serve as a crude regulatory proxy to supposedly help ensure a diversity of viewpoints. “Structural limits remain the best means for promoting diversity in civic discourse,” argues Mark Cooper of the Consumer Federation of America.[95] Essentially, although they never state it in such terms, it is as if the critics believe perfect media diversity can only be achieved by mandating one media outlet per owner. Implicitly, the critics are also trying to make the case that we were better off in the past than we are today. As the facts demonstrate, nothing could be further from the truth.

The Layered Media Model

Today’s media environment is more diverse than ever before. Citizens enjoy more news and entertainment options than at any other point in American history. To get a feel for just how much the media marketplace has changed in the past few decades, it helps to take a look at what the world looked like in a sample year, say 1970, compared to today. And to properly compare and contrast the past and the present, the media universe needs to be broken into four components or layers:

Layer 1: **Product or content options**: Who creates media? What is it that citizens are consuming?
Layer 2: **Distribution mechanisms**: Who delivers media? How is it distributed to the viewing and listening public?
Layer 3: **Receiving or display devices**: How is media received (seen and heard) by consumers?
Layer 4: **Personal storage options**: How do citizens retain media and information?

Table 3 illustrates just how radically the media marketplace has changed in the past 30 years in each of these four layers.

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[93] Quoted in Catherine Yang, “Keeping Little Choices in Big Media,” *Business Week*, March 1, 2004, p. 40.
[94] Leanza and Feld, p. 12.
[95] Cooper, p. 14.

Table 3: The Media Universe of Yesterday and Today

Layer 1	Layer 2	Layer 3	Layer 4
The Media Environment Circa 1970			
Product or Content	**Distribution Mechanism**	**Receiving or Display Device**	**Personal Storage Tools**
Television Programming	Broadcast TV Stations	TV Sets	none
Radio Programming	Broadcast Radio Stations	Radios, Stereos	none
Print News & Literature	Newspaper & Magazine Delivery	Bound newsprint, Books	Books, Personal Library
Advertising	TV, Radio, Mail, Magazines	Everything	none
Movies	Cinemas, Broadcast TV	Movie Theater	none
Music	Radio, Records	Radio, Stereo	Records
Telecommunications	Phone Networks	Telephones	none
Photography	Cameras	Print film	Film / Prints
The Media Environment Circa 2004			
Product or Content	**Distribution Mechanism**	**Receiving or Display Device**	**Personal Storage Tools**
Television Programming	Broadcast TV, Cable, Satellite, Internet, VHS tapes, DVD discs	TV Sets, Computer Monitor, Personal Digital Devices	PVRs (i.e., TiVo), VCRs, DVDs, Computer discs and hard drives
Cable & Satellite Programming (+ Video on Demand)	Cable, Satellite, Internet, VHS tapes, DVD discs	TV Sets, Computer Monitor, Personal Digital Devices	PVRs (i.e., TiVo), VCRs, DVDs, Computer discs and hard drives
Radio Programming	Broadcast Radio, Satellite Radio (XM & Sirius), Internet	Home & Car Radios, Stereos, Personal Digital Devices (Walkman), Internet	CDs, tapes, Personal Digital Devices, computer discs and hard drives
Print News & Literature	Newspaper & Magazine Delivery, Internet, Software	Bound newsprint, Books, PCs, Internet websites, Personal Digital Devices (BlackBerrys)	Books, Personal Library, Personal Digital Devices, Computer discs and hard drives, Printers
Advertising	TV, Radio, Mail, Magazines, Cable, Satellite, Cell Phones, E-mail	almost anything	rarely stored
Movies	Cinemas, Broadcast TV, Cable, Satellite, Internet, Tapes, DVDs, Camcorders	Movie Theater, TV Set, Computer Monitor, Personal Digital Devices	VCRs, DVDs, Computer discs and hard drives
Music	Radio, CDs, Websites, Peer-to-Peer Networks	Radio, Stereo, Personal Digital Devices (MP3 players)	MP3s, CDs, Tapes, Personal Digital Devices, Computer discs and hard drives
Telecommunications	Phone Networks, Cellular Networks, Cable Networks, Internet Telephony, IM	Telephones, Cell Phones, Internet Phones, Personal Digital Devices (Palm Pilot)	Voice Mail, Personal Digital Devices
Internet Content & Services (+ E-Mail)	Phone Networks, Cable Networks, Wireless Networks, Power Lines, IM	Computer Monitor, Personal Digital Devices, Cell Phones, TV Set	Computer discs and hard drives, Personal Digital Devices
Video Games	Video Game Platforms, Computer Software, Websites	TV Set, Computer Monitor, Personal Digital Devices, Cell Phones	CDs / DVDs, Computer discs and hard drives
Photography	Digital Cameras, Cell Phones, Camcorders, Websites	Print film, Computer Monitor, TV set, Personal Digital Devices, Cell Phones	Prints, CDs / DVDs, Memory cards, Computer discs and hard drives, Printers

NOTE: "*Personal Digital Devices*" *refers to a broad category of handheld devices such as pagers, Palm Pilots, BlackBerrys, MP3 players, cassette and CD players, DVD players, and hybrid cell phone devices*

Consider two average families, one living in 1970 and the other in 2005, and their available media and entertainment product options (Layer 1). While impossible to quantify precisely, the sheer volume of content options offered has increased dramatically. Within the home, a typical 1970 family would have had television (probably one, or maybe two sets), radio (a few in the home and probably one in their car), newsprint (papers, magazines, books), music (via vinyl records or radio broadcasts), and basic telecom service (almost certainly through Ma Bell). A typical night could have been spent watching one of the three major network television stations, a Public Broadcasting Service (PBS) station or a UHF channel or two in their community. Or perhaps they would have listened to a few local radio stations or records on their phonograph. They could have gone out to the movies too, or gathered around the phone to make a long-distance phone call to grandma, which would have cost roughly $1.35 for a three-minute coast-to-coast call).[96]

This pales in comparison to the media products and content the average family of 2005 has at their disposal. Today, we still have access to all the same content the 1970 family did, but now we also have a 500-plus channel universe of cable and satellite-delivered programming options, video games, computer software, and the cornucopia of services that the Internet and online networks offer. And while we could all still drive down to the local cinema to catch a movie, there's less reason to do so since we can rent movies at local video stores, purchase personal copies on VHS or DVD, or order them instantaneously via cable, satellite, or the Net using video on demand (VOD) services. Finally, that cross-country call to grandma can now be made any time of the day at a low, flat rate and can be made by any member of the family using an old landline phone, one of their cell phones, or even via the Internet through voice over Internet protocol (VoIP) systems. Or we could e-mail her photos and movies of the grandkids.

But the most radical part of this media metamorphosis lies in what has unfolded in Layer 2 (Distribution Mechanisms) and Layer 3 (Receiving or Display Devices) of this chart. The number of distribution paths or delivery mechanisms to the home has expanded greatly. Likewise, the number and nature of receiving and display devices used by consumers have changed dramatically. In 1970, citizens received media in their homes via broadcast TV and radio signals delivered to their TV and radio sets; phone calls were connected over the analog phone lines controlled by AT&T; and newspapers and magazines were delivered by hand. That was about all that was delivered directly to them. They had to go to a store or library if they wanted books or records, or drive to the cinema to watch a new movie.

[96] Noted in Wise citing Michael Cox.

By contrast, today's media delivery and receiving methods would have been unimaginable to the 1970s family. Imagine being transported back in time and attempting to explain to the average family of 1970 that within 30 years the following developments would take place:

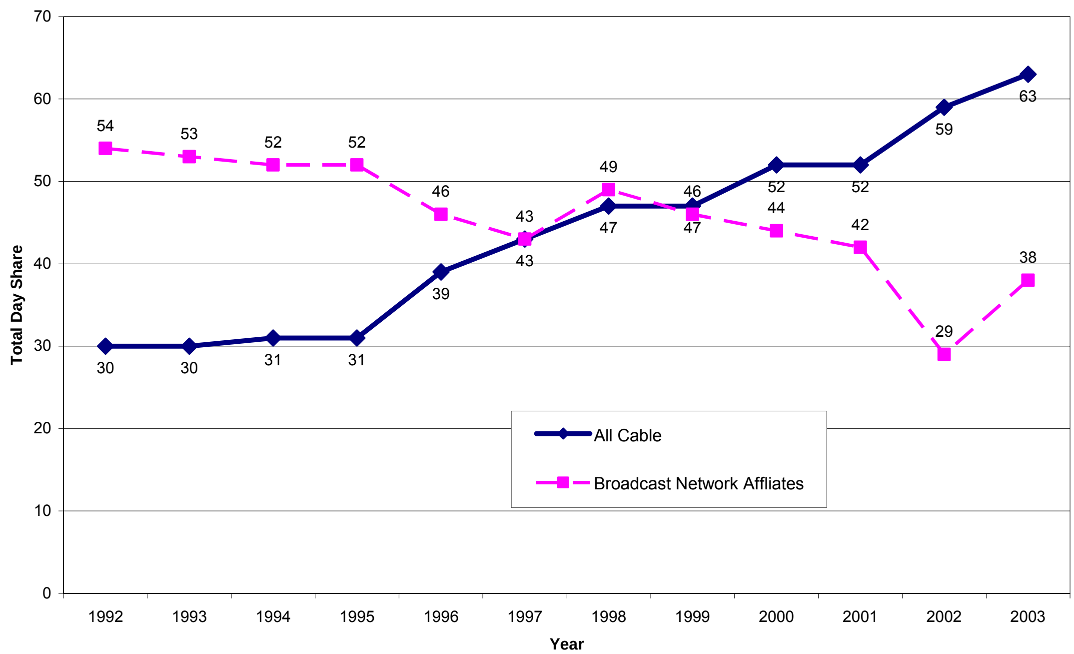
- The "Big Three" TV networks would have less prime-time market share than cable[97] (see Figure 1) and cable and satellite providers would serve almost 90 percent of all homes with hundreds of television channels of news, sports, music, movies, and other types of highly specialized information and entertainment.[98] By contrast, most households had six or fewer local television stations to choose from 25 years ago, three of which were affiliated with a major broadcast network. But thanks to the rise of cable and satellite competition the average home now receives seven broadcast television networks and an average of 102 channels.[99]

[97] National Cable and Telecommunications Association, www.ncta,com. Also see Gary Levin, "Cable Wins Summer's Ratings War," *USA Today*, September 2, 2003, p. 1D; Gary Levin, "'Housewives' Slows TV Migration to Cable," *USA Today*, December 27, 2004, p. 1D; Anne Becker, "Cable Wins Big in 2004," *Broadcasting & Cable*, January 3, 2005, p. 14.

[98] A recent FCC report on program diversity on broadcast television noted the new pressure put on traditional broadcasters by its new competitors. "The networks may feel less of a need to diverge from one another, but rather, want to diverge from cable. For example, one reason variety/music programming disappeared from the schedule in the 1990s is because these programs were available on a 24-hour basis on individual cable networks like Comedy Central and MTV." Mara Einstein, "Program Diversity and the Program Selection Process on Broadcast Network Television," Federal Communications Commission, *Media Ownership Working Group Study* no. 5, September 2002, p. 22, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.

[99] FCC, *Media Ownership Proceeding*, p. 15. "Non-broadcast television programming continue to proliferate. Today, there are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS and other multichannel video program distribution ("MVPD") systems. In 2002, the Commission also identified at least 86 regional non-broadcast networks, including 31 sports channels, and 32 regional and local news networks. We are moving to a system served by literally hundreds of networks serving all conceivable interests. Programming in particular abundance are sports, entertainment, and informational in nature. The four largest broadcast networks own both broadcast and cable channels. Their share of viewership is far greater than their share of the channels received by the typical American household. Of the 102 channels received by the average viewing home, the four largest broadcast networks have an ownership interest in approximately 25% of those channels." Ibid., pp. 48-49.

Figure 1: Cable Ratings Now Top Broadcasters



Source: National Cable and Telecommunications Association; Cablevision Advertising Bureau analysis of Nielsen data.

- Movies (including some first-run movies) would be delivered directly to the home or could at least be rented from a local store for a few dollars and played on the video cassette recorders that would be in almost 90 percent of households by 2002.[100] And entire collections of movies could be owned by consumers for as little as $15 to $20 per title.[101]

- Children's games would soon be electronically rendered into something known as a "video game." Although a nonexistent media sector in 1970, the video gaming phenomenon would grow to be a $10 billion industry and become so popular that it would be growing three times faster than the motion picture industry by the late 1990s.[102]

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[100] *U.S. Entertainment Industry: 2002 MPA Market Statistics*, Motion Picture Association, 2002, p. 29, http://www.mpaa.org/useconomicreview/2002/2002_Economic_Review.pdf.

[101] *Ibid.*, p. 35.

[102] "A striking measure of the impact of the computer and video game software publishing industry on the U.S. economy was its 15 percent annual growth in sales between 1997 and 2000. In contrast, over the same period the U.S. economy grew only 6 percent per year and sales in the motion picture production, distribution, and allied services industry grew 4.6 percent per year." Robert Damuth, *Economic Impacts of the Demand for Playing Interactive Entertainment Software*, Entertainment Software Association, 2001, p. 5, http://www.theesa.com/pressroom.html. And it wouldn't just be about kid's games. Of the 50 percent of Americans who play video games today, 39 percent are women and the average age of a computer or video game player is 29 years old. Meanwhile, interactive, online video game networks are beginning to develop that allow these games to be played simultaneously by multiple participants across the nation. See: *Essential Facts About the Computer and Video*

It would be difficult for the family of 1970 to fathom these new media delivery and display concepts. Likewise, they would likely not believe it when you next told them that almost all these new types of media that were delivered to the family of the future would be capable of being stored by consumers and reused at their leisure. As illustrated in Layer 4 of Table 3, few personal media storage tools existed for citizens in 1970. By comparison, today's media universe offers a diverse array of storage devices that allow media to be consumed at the time and place of a citizen's choosing. There's no longer any need to be home at exactly 8:00 p.m. to catch your favorite television show; to lug around your entire album collection with you if you want to listen to your favorite music wherever you go; to go to the cinema five times to watch your favorite movie; to be sitting next to the hard-wire phone in your home to catch a call from Grandma. All of these things, and much more, can be accomplished today in many different ways at many different times thanks to the explosion of the personal media storage market.

What's most important about all the technologies and developments outlined above is not just the sheer volume of new media available to average citizens but what it has enabled them to do. Many media critics are fond of repeating the famous quip of A.J. Liebling that "Freedom of the press is guaranteed only to those who own one,"[103] which of course was never really true since journalists and even average citizens were protected by the First Amendment without owning a media outlet.

But even if one assumed there was some truth to this contention, the beauty of modern media technologies such as the Internet and Web blogs is that they give every man, woman, and child the ability to be a one-person publishing house or broadcasterer and to communicate with the entire planet, or even break news of their own. In this new "individualized, on-demand media world," *Wonkette* blogger Ana Marie Cox argues that, "There will be more voices and more places to hear them. Our options will grow—and have grown—beyond changing the channel: Now we can start one."[104] As Michael Lewis, author of *Next* and *The New New Thing*, quips: "Technology [has] put afterburners on the egalitarian notion that anyone-can-do-anything."[105] Consider, for example, the impact of online journalist Matt Drudge's "Drudge Report" and its role in leaking the Clinton-Lewinsky scandal, eventually leading an impeachment proceeding of President Bill Clinton. (The blogging phenomenon is discussed at much greater length in subsequent chapters). "Podcasting" is the latest rage in this regard. Using little more than an iPod and a computer, anyone can record and broadcast their own radio show to the rest of the world.[106]

Game Industry, 2004, Entertainment Software Association, Media Center, http://www.theesa.com/pressroom.html.

[103] A.J. Liebling, "Do You Belong in Journalism?" *The New Yorker*, May 14, 1960, p. 109.

[104] Ana Marie Cox, "Howard Stern and the Satellite Wars," *Wired*, March 2005, p. 135.

[105] Michael Lewis, *Next: The Future Just Happened* (New York: W.W. Norton, 2001), p. 103.

[106] See Marco R. della Cava, "Podcasting: It's All Over the Dial," *USA Today*, February 8, 2005, p.1D; Annalee Newitz, "Adam Curry Wants to Make You an iPod Radio Star," *Wired*, March

Moreover, new media technologies have literally put encyclopedias worth of information at our fingertips. While a 1970 family could have spent many hundreds of dollars purchasing a multivolume encyclopedia set or gone to a library to view them or other collections, there is simply no need to do this today. Instead, the library comes to us today as the Net, websites, computer software, and other electronic media place a world of information and data at our immediate disposal. And while the family of 1970 could read the local newspaper together, today's families can view thousands of newspapers from communities across the planet.

The beauty of modern media technologies such as the Internet is that it gives every man, woman, and child the ability to be a one-person publishing house or broadcasting station and to communicate with the entire planet or break news of their own.

Even taking the Internet out of the equation, the volume of media choices has expanded in every other way for citizens. Instead of just the local newspaper, they now can get several national newspapers too and micro-papers or community weeklies. And there are more radio stations than ever before (over 13,000 today versus under 7,000 in 1970**)**, and more musical formats too.[107] There are also more over-the-air broadcast television networks than in 1970 (Fox, WB, UPN, etc.), and cable or satellite is available too. The following charts tell the story of just how much the media marketplace has evolved over the past few decades.

2005, pp. 111-113; John Markoff, "For a Start-Up, Visions of Profit in Podcasting," *The New York Times*, February 25, 2005, p. C1.

[107] See Victor B. Miller, Christopher H. Ensley, and Tracy B. Young, "Format Diversity: More from Less?" Bear Stearns, *Equity Research*, November 4, 2002; "Has Format Diversity Continued to Increase?" BIA Financial Network, June 5, 2002.

Table 4: Media Trends of Yesterday and Today

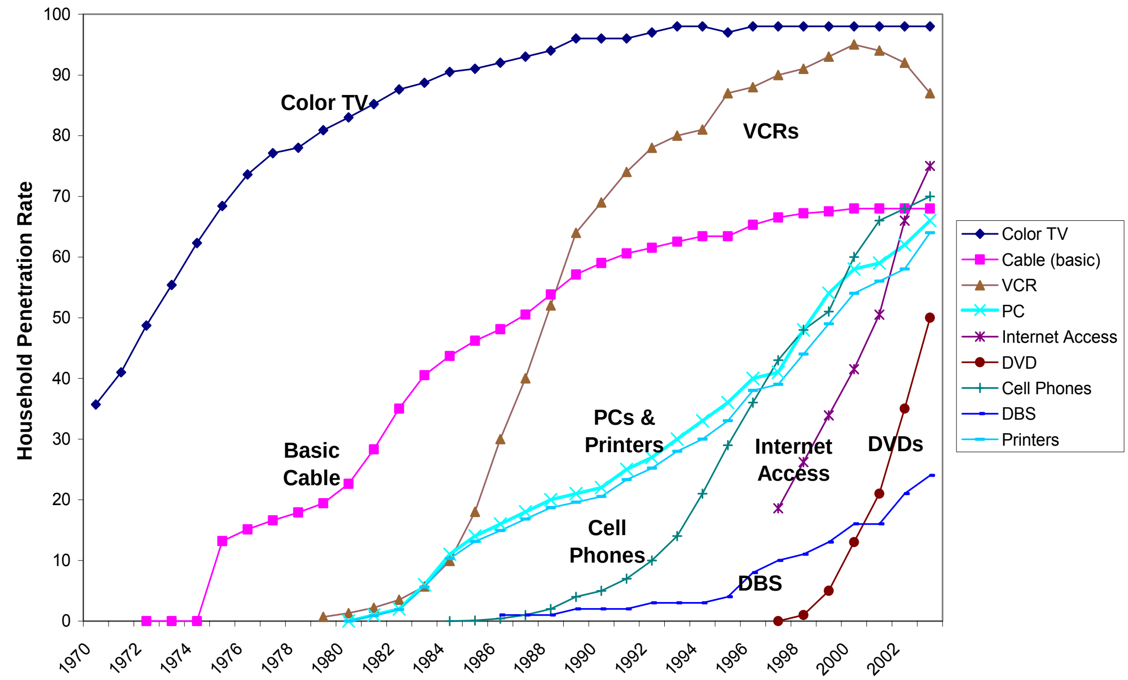
Circa 1970	**Today**
Extremely high barriers to entry	Much lower entry barriers thanks to explosion of new technologies and media outlets
High distribution costs	Lower costs of distribution
Primary business strategy = one-to-many; *broad*casting; focus on appeasing mass audiences; less media specialization	Primary business strategy = one-to-one; *narrow*casting; focus on appeasing niche or splintered audiences; hyper-specialization of media
Distinct media sectors with own sphere of influence	Greater competition / substitution among media sources and outlets
Limited media outlets; limited overall choices	Explosion of both sheer number of media outlets and overall range of choices
People complained about “information scarcity”	People complain of “information overload”
“Big 3” TV networks dominated television and controlled 90 percent of the audience	Seven broadcast TV networks and a 500-channel universe of cable and satellite choices now exist
Three nightly national newscasts shown once per evening	Dozens of national newscasts shown on a 24-7 basis, including foreign languages
We had to go to the library to retrieve hard-to-find information	The library comes to us via the Internet and online services
Limited number of electronic communications or information devices in the home (phone, TV, radio)	In addition to many phones, TVs, and radios, each home today usually has at least a few of the following: CDs, DVDs, VCRs, computers, Internet access, interactive software, cell phones and other mobile communications devices, etc.

Table 5: The Relentless March of Technology

	1970	**1980**	**1990**	**2002-4**
Percentage of households with **TVs**	95.3%	97.9%	98.2%	98.2%
Total number of broadcast **Television Stations**	875	NA	1,470	1,747
Average number of **TV sets** per household	1.4	1.7	2.1	2.4
Average daily time spent viewing TV (hours: minutes)	5:56	6:36	6:53	7:44
Percentage of households with **Radios**	98.6%	99%	99%	99%
Total number of broadcast **Radio Stations**	6,751	NA	10,819	13,476
Percentage of households with **VCRs**	0	1.1%	63%	87%
Percentage of households with **DVD players**	0	0	0	50%
Percentage of households with **Cell Phones**	0	0	5%	70%
Total number of cell phones subscribers	0	NA	5.2 mil.	175 mil.
Cell phone average monthly bill	NA	NA	$80.90	$49.91
Percentage of homes subscribing to **Cable Television**	6.7%	19.9%	56.4%	68%
Percentage of total households to which cable television is available	NA	42%	93%	95%
Estimated TV **market share of "Big 3"** (ABC, CBS, NBC)	55%	49%	31%	21%
Estimated TV **market share of Basic Cable**	1%	3%	20%	35%
Percentage of homes subscribing to **Direct Broadcast Satellite (DBS)** TV	0	0	1%	24%
Percentage of homes with a **Personal Computer**	0	0	22%	66%
Percentage of homes with **Internet Access**	0	0	0	74.9%

Sources: Consumer Electronics Association, *eBrain Market Research;* Cellular Telecommunications and Internet Association; *Statistical Abstract of the United States,* 2003; Federal Communications Commission; Nielsen Media Research.

Figure 2: "S Curves" for Various Technologies



Sources: U.S. Department of Commerce, Census Bureau, Electronic Industries Association, National Cable and Telecommunications Association, Nielsen/NetRatings.

What About Minority / Independent Viewpoints?

When faced with the undeniable evidence of increased choice in modern media, critics often shift gears and argue that while there may be more media choices, there are fewer outlets or opportunities for niche or minority audiences to find the information or entertainment they desire or need. "The failure of commercial mass media to meet the needs of citizens is nowhere more evident than in minority communities," argues Mark Cooper of the Consumer Federation of America.[108] "[Minorities] don't believe the white-bread media gives them a fair chance."[109] And Leanza and Feld of the Media Access Project believe that "relying on market forces will leave underserved those markets that advertisers see as less desirable from a demographic standpoint. Society should not have to tolerate a media market where programming is aimed almost exclusively at 18- to 35- year old white males."[110] And Chester and Larson of the Center for Digital Democracy make the following statement without apparently recognizing its self-contradiction: "There may be more media outlets than ever before, given the enormous range of niche publications, special-interest websites and self-produced recordings, but the mass media—more massive today than ever—

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108 Cooper, p. 52.

109 Quoted in Terry Lane and Michael Feazel, "Media Ownership Issue Could Have Long Legacy," *Communications Daily,* August 8, 2003, p. 3.

110 Leanza and Feld, p. 19.

scarcely admit independent or alternative voices."[111] And *Our Media, Not Theirs* authors Nichols and McChesney assert that "again and again, the market trumps the democratic potential of… technology," so much so that it even "tends to marginalize dissident Web sites."[112] But go tell that to Matt Drudge and the president whose impeachment he set in motion![113]

Even a casual review of the facts demonstrates just how off the mark these arguments about minorities or niche groups being underserved are. Compared to the past, there is clearly more niche programming than ever before and more outlets for "minorities"—however defined—to be heard. As Table 6 illustrates, cable and satellite television is home to an increasingly splintered smorgasbord of demographically diverse fare. There now exist multiple channels dedicated to the interests of women, children, African-Americans, religious groups, children, and so on.

Table 6: The Expanding Video Programming Marketplace on Cable and Satellite TV

News: *CNN, Fox News, MSNBC, C-Span, C-Span 2, C-Span 3, BBC America*
Sports: *ESPN, ESPN News, ESPN Classics, Fox Sports, TNT, NBA TV, NFL Network, Golf Channel, Tennis Channel, Speed Channel, Outdoor Life Network, Fuel*
Weather: *The Weather Channel, Weatherscan*
Home Renovation: *Home & Garden Television, The Learning Channel, DIY*
Educational: *The History Channel, The Biography Channel (A&E), The Learning Channel, Discovery Channel, National Geographic Channel, Animal Planet*
Travel: *The Travel Channel, National Geographic Channel*
Financial: *CNNfn, CNBC, Bloomberg Television*
Shopping: *The Shopping Channel, Home Shopping Network, QVC*
Female-oriented: *WE, Oxygen, Lifetime Television, Lifetime Real Women, Showtime Women*
Male-oriented: *Spike TV*
Family / Children-oriented: *Nickelodeon, Disney Channel, Cartoon Network, WAM (movie channel for 8-16-year-olds), Noggin (2-5 years)/The N Channel (9-14 years), PBS Kids, Hallmark Channel, Hallmark Movie Channel, Discovery Kids, Animal Planet, ABC Family, Boomerang, Familyland Television Network, HBO Family, Showtime Family Zone, Starz! Family, Toon Disney*
African-American: *BET, Black Starz! Black Family Channel*
Foreign / Foreign Language: *Telemundo (Spanish), Univision (Spanish), Deutsche Welle (German), BBC America (British), AIT: African Independent Television, TV Asia, ZEE-TV Asia (South Asia) ART: Arab Radio and Television, CCTV-4: China Central Television, The Filipino Channel (Philippines), Saigon Broadcasting Network (Vietnam), Channel One Russian Worldwide Network, The International Channel, HBO Latino, History Channel en Espanol*
Religious: *Trinity Broadcasting Network, The Church Channel (TBN), World Harvest Television, Eternal Word Television Network (EWTN), National Jewish Television, Worship Network*
Music: *MTV, MTV 2, MTV Jams, MTV Hits, VH1, VH1 Classic, VH1 Megahits, VH1 Soul, VH1 Country, Fuse, Country Music Television, Great American Country, Gospel Music Television Network*
Movies: *HBO, Showtime, Cinemax, Starz, Encore, The Movie Channel, Turner Classic Movies, AMC, IFC, Flix, Sundance, Bravo (Action, Westerns, Mystery, Love Stories, etc.)*
Other or General Interest Programming: *TBS, USA Network, TNT, FX, SciFi Channel*

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[111] Chester and Larson.
[112] Nichols and McChesney, p. 34.
[113] As Catholic University political scientist Mark J. Rozell notes, "Various websites, perhaps most notably the Drudge Report, have frequently 'scooped' the leading mainstream media outlets on big stories and thus precipitated a trend whereby more and more of these outlets seek to outpace the Internet site competition to break stories." Mark J. Rozell, "Congress and the Media," Rozell, ed., *Media Power, Media Politics*, p. 38.

Table 7: New Magazine Launches by Interest Category, 2003

Crafts / Games / Hobbies / Models (45)	Computers (10)	Teen (6)
Metro / Regional / State (45)	Women's (10)	TV / Radio / Communications / Electronics (6)
Sports (33)	Men's (10)	Art / Antiques (5)
Automotive (29)	Children's (8)	Business / Finance (5)
Special Interest (23)	Comics / Comic Technique (8)	Motorcycles (5)
Health (19)	Entertainment / Performing Arts (7)	Bridal (3)
Home Service / Home (17)	Literary Reviews / Writing (7)	Aviation (2)
Music (15)	Photography (7)	Gaming (2)
Sex (13)	Pop Culture (7)	Gardening (2)
Ethnic (11)	Religious / Denominational (7)	Military / Naval (2)
Epicurean (11)	Dogs / Pets (6)	Science / Technology (2)
Fashion / Beauty / Grooming (11)	Dressmaking / Needlework (6)	Media Personalities (1)
Fitness (11)	Fishing / Hunting (6)	Mystery / Science Fiction (1)
Travel (11)	Political / Social Topics (6)	
		TOTAL: 440

Meanwhile, as a trip to most modern bookstores reveals, almost every hobby or interest under the sun has its own magazine, journal or newsletter these days. According to the Magazine Publishers of America (MPA), there were 17,254 magazines produced in 2003, up from 14,302 in 1993.[114] And new titles are launched every week. As Table 7 illustrates, there were 440 new magazine launches in 2003, up from 289 new launches in 2002, according to the MPA.[115] From 1985 to 2000, an average of 690 new titles were released annually according to Albert Greco of Fordham University.[116] Similarly, as Chapter 3 reveals, there has been a proliferation in radio formats in recent decades with a genre to fulfill almost any taste or interest.

And then there's the Internet, with a website or newsgroup for almost any topic or interest imaginable. Again, consider the meteoric rise of personal blogs, which are online journals devoted to providing commentary on a wide variety of political and cultural issues. The "blogosphere" is opening up amazing opportunities to countless speakers and is revolutionizing journalism and public activism in important ways.[117]

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[114] As the MPA's annual *Magazine Handbook* notes, "For virtually every human interest, there is a magazine." *The Magazine Handbook 2004-5*, p. 5.

[115] Ibid., p. 7. Magazine industry expert Samir Husni actually puts the number much higher at 949 new launches last year. See Samir Husni, *Samir Husni's Guide to New Magazines 2004*.

[116] Albert N. Greco, "The Economics of Books and Magazines," in Alexander, et. al., p. 137.

[117] Jena McGregor, "It's a Blog World After All," *Fast Company*, April 2004, pp. 84-86. Commenting on the impact of political blogs, *Wall Street Journal* technology columnist Lee Gomes has argued that "These blogs are becoming an alternative-news universe, giving everyone with a PC and a Web connection access to the sorts of gossips that was once available only to reporters on the press bus." Lee Gomes, "Blogs Have Become Part of Media Machine That Shapes Politics," *The Wall Street Journal*, February 23, 2004, p. B1.

This development is confirmed by Joe Trippi, the campaign manager for Democratic presidential candidate Howard Dean, who effectively tapped the power of the Internet and blogs and gave an outsider a respectable chance of capturing the nomination. He credits much of Dean's success to the campaign's e-mail and blogging efforts but also notes that Dean and his campaign were the subject of countless other blogs.[118] Trippi argues that blogging is now transforming the way traditional media outlets and reporters do their job each day. "The little-known secret in newsrooms across the United States is that *right now* reporters are beginning every day by reading the blogs. They're looking for the pulse of the people, for political fallout, for stories they might have missed."[119] Democratic presidential candidate John Kerry must have learned this lesson from Dean's campaign, since he linked to over 50 independent blogs on his official website during the campaign.[120]

Thus, to say that the modern media environment is tailored exclusively to young white males as Leanza and Feld suggest, or that independent or alternative voices aren't able to be heard as Chester and Larson argue, simply doesn't mesh with reality. Their assertion might have had some validity in the media marketplace of the past, but not today. There is more diversity in media than ever before, and niche and minority audiences have more of a voice in media today than at any other time in the past.

The only possible counterargument is that all these new choices really aren't choices at all but rather just the same stuff recycled over and over again, or that all these new media outlets are being controlled by the same corporate masters, and therefore they do not offer citizens truly legitimate alternative choices. *New Yorker* media columnist Ken Auletta has echoed this sentiment when he argued that "You can literally say you actually have more voices, but they are the same voices increasingly."[121]

There is more diversity in media than ever before, and niche and minority audiences have more of a voice in media today than at any other time in the past.

The idea that all these new choices are just the same recycled information is silly, of course. Each new media outlet or format must provide at least something slightly different from its rivals or it wouldn't be able to stay in business

[118] Joe Trippi, *The Revolution Will Not Be Televised: Democracy, The Internet and the Overthrow of Everything* (New York: Regan Books, 2004), p. 147.
[119] Ibid., p. 229 (emphasis in original).
[120] This led New York University journalism professor Adam L. Penenberg to conclude, "[B]logs have indeed arrived as a force to be reckoned with." Adam L. Penenberg, "John Kerry and the Lost Kos," *Wired News*, July 7, 2004, http://www.wired.com/news/culture/0,1284,64113,00.html?tw=wn_tophead_3.
[121] Quoted on *News Hour with Jim Lehrer*, April 2001, http://www.pbs.org/newshour/media/conglomeration/auletta.html. And leftist author Noam Chomsky claims, "The media are a corporate monopoly. They have the same point of view." Chomsky, p. 29.

for very long. If every book, magazine, TV channel, radio program, and Internet site really said largely the same thing, citizens wouldn't bother consuming any more than one or two of them and we would not have nearly as many options or outlets as we do today. When critics make arguments about all media outputs being identical, it is based more on their own views regarding the way the media world should look or operate, not on what consumers actually believe or desire.

Moreover, this sort of conspiratorial "it's all being programmed from above" sort of thinking is what FCC Commissioner Abernathy was referring to when she criticized "fear and speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people."[122] Nonetheless, variations of this "puppet-master" theory of media manipulation come up repeatedly in the work of media critics. Chapter 5 will address these issues in much greater detail and show that this notion is cannot be taken seriously.

In summary, the preceding review of media diversity has illustrated that the FCC was not stretching the truth when it argued when releasing the new media rules that "Today's media marketplace is characterized by abundance. The public is better informed, better connected, and better entertained than they were just a decade ago.... In short, the number of outlets for national and local news, information, and entertainment is large and growing.[123]

Is the Problem Information Scarcity or Overload?

There is no denying that compared to the media universe of just 20 to 30 years ago, today's world is characterized by information abundance, not information scarcity. Indeed, not only do we now live in a world of information abundance, but some psychologists and social scientists fear that citizens now suffer from "information overload" because of all the choices at their disposal. The number of information and entertainment options has become so overwhelming that many citizens struggle to filter and manage all of the information they can choose from on an average day.[124] "A weekday edition of the *New York Times* contains more information than the average person was likely to come across in a lifetime in seventeenth-century England," estimates Richard Saul Wurman, author of *Information Anxiety*.[125] In fact, the investment

[122] Statement of Commissioner Kathleen Abernathy, pp. 1-2.
[123] FCC, *Media Ownership Proceeding*, p. 29.
[124] Bryan Keefer, a 24-year old author of *All the President's Spin: George W. Bush, the Media, and the Truth*, notes that his generation has been "raised in [a] media-saturated environment, where 24-hour cable news and Internet access bring us more information than we can possibly digest." Bryan Keefer, "You Call That News? I Don't," *The Washington Post*, September 12, 2004, p. B2.
[125] Richard Saul Wurman, *Information Anxiety* (New York: Doubleday, 1989), p. 32. Francis Heylighen of the Free University of Brussels puts this media abundance / overload into a historical context: "During most of history, information was a scarce resource that was of the greatest value to the small elite that had access to it. Enormous effort would be spent in

bank Veronis Suhler Stevenson predicts that by 2007 the average American will spend 3,874 hours per year using major consumer media. This represents an increase of 792 hours per year, or 21 percent, from the 3,082 hours per year that the average person spent using consumer media in 1977, according to that firm.[126]

The number of information and entertainment options has become so overwhelming that many citizens struggle to filter and manage all of the information they can choose from on an average day.

As long ago as 1971, the Nobel Prize winning economist and psychologist Herbert A. Simon foresaw the rise of this phenomenon when he noted: "What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention, and a need to allocate that attention efficiently among the overabundance of information sources that might consume it."[127] There exists a growing body of literature and academic studies dealing with this "poverty of attention" problem, although it goes by many different names today: "information overload;"[128] "cognitive overload;"[129] "information anxiety;"[130] "information fatigue syndrome;"[131] "information paralysis;"[132] "techno-stress;"[133] "information

copying and transferring the little data available, with armies of monks toiling years in the copying by hand of the few available books, and armies of couriers relaying messages from one part of the kingdom to another. Nowadays, it rather seems that we get much more information than we desire, as we are inundated by an ever growing amount of email messages, internal reports, faxes, phone calls, newspapers, magazine articles, webpages, TV broadcasts, and radio programs." Francis Heylighen, "Complexity and Information Overload in Society: Why Increasing Efficiency Leads to Decreasing Control," *draft paper*, April 12, 2002, pp. 12-13, http://pespmc1.vub.ac.be/Papers/Info-Overload.pdf. Similarly, Richard Saul Wurman argues that, "Access to information was once highly controlled. You had to have enough money to afford a book and an education, as well as time enough to read. Now anyone can acquire information." Wurman, p. 13.

126 Joe Mandese, "Study: Media Overload on the Rise," *Television Week*, May 17, 2004, http://www.tvweek.com/planning/051704study.html.

127 Herbert Simon "Designing Organizations for an Information-Rich World," in Martin Greenberger, ed., *Computers, Communications and the Public Interest* (Baltimore: Johns Hopkins Press, 1971) pp. 40-41.

128 Marsha White and Steve M. Dorman, "Confronting Information Overload," *Journal of School Health,* April 2000, p. 160; Hal Berghel, "Cyberspace 2000: Dealing with Information Overload," *Communications of the ACM*, vol. 40, no. 2, February 1997, pp. 19-24; Francis Heylighen, "Complexity and Information Overload in Society: Why Increasing Efficiency Leads to Decreasing Control," *draft paper*, April 12, 2002, http://pespmc1.vub.ac.be/Papers/Info-Overload.pdf; Paul Krill, "Overcoming Information Overload," *InfoWorld*, January 7, 2000, http://archive.infoworld.com/articles/ca/xml/00/01/10/000110caoverload.xml.

129 David Kirsh "A Few Thoughts on Cognitive Overload," *Intellectica*, 2000, http://icl-server.ucsd.edu/~kirsh/Articles/Overload/published.html.

130 Richard Saul Wurman, *Information Anxiety 2* (Indianapolis, IN: Que, 2001), p. 1.

131 This term is commonly attributed to psychologist David Lewis. See Kathy Nellis, "Experts: Information Onslaught Bad for Your Health," *CNN Interactive*, April 15, 1997, http://www.cnn.com/TECH/9704/15/info.overload/; Nick Hudson, "Managers Suffering from Info Overload," *Press Association Newsfile*, October 14, 1996.

pollution;"[134] "data smog;"[135] or even "data asphyxiation."[136] The title of one important early study on this issue asked the question if humans were now "dying for information." The report concluded that, "People can no longer develop effective personal strategies for managing information. Faced with an onslaught of information and information channels, they have become unable to develop simple routines for managing information."[137]

That is no doubt an overstatement, but people do struggle to sort through all of the media choices available to them today.[138] Some critics go further and argue that the fracturing of media will also have a profound sociological impact on our society by destroying the opportunity to have the same number of "shared experiences" we might have had in the past.[139] For example, as discussed in Chapter 4, University of Chicago law professor Cass Sunstein in his book *Republic.com* fears that the rise of the Internet may be destroying opportunities for the public to personally mingle as much as they did in the past, or have shared social experiences through other forms of media.[140] Sunstein's concerns were echoed recently by Bill Carrick, a media adviser for former Democratic presidential candidate Richard Gephardt (D-Mo.) Commenting on how the rise of the Internet, cable, and other newer forms of media have impacted the political campaign process, Carrick complained that, "The danger for democracy is that we're losing the universal campfire," in which all voters see and hear common

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[132] Dr. Neville Meyers quoted in Sherrill Nixon, "Too Much Information, Too Little Time to Digest It," *The Sunday Morning Herald,* June 30, 2003, http://www.smh.com.au/articles/2003/06/29/1056825278039.html.

[133] Larry Rosen and Michelle Weil, *TechnoStress: Coping With Technology @Work @Home @ Play* (New York: John Wiley & Sons, 1997), http://www.technostress.com/

[134] A recent *Washington Post* article reported that computer scientist David M. Levy of the University of Washington's Information School has grown so concerned about "information-polluted people" that he helped organize a conference entitled "Information, Silence and Sanctuary," to help diagnose and prescribe treatment for those suffering from this supposed problem. Noted in "Unplugging the Addiction To Information Overload," *The Washington Post*, May 10, 2004, http://www.washingtonpost.com/wp-dyn/articles/A13029-2004May9.html.

[135] David Shenk, *Data Smog: Surviving the Information Glut* (San Francisco: Harper, 1997).

[136] William Van Winkle, "Information Overload: Fighting Data Asphyxiation is Difficult But Possible," *Computer Bits*, Vol. 8, No. 2, February 1998, http://www.computerbits.com/archive/1998/0200/infoload.html.

[137] Paul Waddington, *Dying for Information? An Investigation into the Effects of Information Overload in the UK and Worldwide* (London: Reuters Business Information Report, 1996), http://www.cni.org/regconfs/1997/ukoln-content/repor~13.html.

[138] For example, commenting on the impact of TiVos and personal video recorders have had on our lives, Barry Schwartz, author of *The Paradox of Choice*, has argued that "the TV experience is now the very essence of choice without boundaries. In a decade or so, when these boxes are in everybody's home, it's a good bet that when folks gather around the watercooler to discuss the last night's big TV events, no two of them will have watched the same shows." Barry Schwartz, *The Paradox of Choice: Why More is Less* (New York: Ecco, 2004), p. 18.

[139] See, for example, Todd Gitlin, *Media Unlimited: How the Torment of Images and Sounds Overwhelms Our Lives* (New York: Henry Holt and Company, 2002). Others lament the impact all this will have on high-quality news coverage. See Jack Rosenthal, "What to Do When News Grows Old before Its Time," *The New York Times*, August 8, 2004, Sec. 4, p. 2.

[140] Sunstein, *Republic.com*.

ads and messages from candidates over common media sources.[141] Carrick was quoted in a front page *Washington Post* story in June of 2004 in which numerous political campaign advisers and experts bemoaned, in the words of the headline, "Voters Are Harder to Reach As Media Outlets Multiply: Campaigns Struggle against Media Overload."[142]

Thus, media critics appear to be making two contradictory arguments. On one hand, some fear media are too concentrated and too few choices are available for citizens to see and hear. On the other hand, other critics claim media are too diverse and too many choices are available to us, so much so that we no longer have the ability to share common thoughts or feelings about what we see and hear in the media marketplace, or how we interact in our democracy. Well, which is it? More on this in intellectual schizophrenia in Chapter 4.

The reality is that citizens do face an overwhelming number of media choices today, and that probably does make it somewhat more difficult for them to have "shared experiences" involving any individual news or entertainment program. But that isn't really such a lamentable development. Government need not take steps to make sure everyone watches or listens to the same programs each night so they can all talk about them around the watercooler at work the next day. It's just as good that everyone can discuss something different that they saw or heard the night before. And the very fact there are so many distinct media options available to citizens is better for a healthy democracy than a limited range of media options. Again, regardless of who owns what, the fact remains that we have more sources of news, communications, and entertainment than ever before in this country.

Still, some media critics wax nostalgic about a mythical time—a supposed "Golden Age" of newspapers, radio, or television—when the populace was more closely linked or unified in some grand sociological sense by common reporting or programming options. But that is a stretch. The days when William Randolph Hearst dominated media, or when only three TV networks brought us our news at a set time each night, could hardly be labeled the "Golden Age" of those respective mediums. If that's the world media critics want us to return to, then this represents, as Jonathan Knee argues, "an argument for homogeneity hiding under the pretext of diversity."[143]

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[141] As *Post* reporter Paul Farhi summarized, "The three-network universe has evolved into a far noisier electronic bazaar in the past two decades. Since the advent of the VCR in the early 1980s, people have had no end of electronic distractions at home: multichannel cable TV and satellite service, DVD players, MP3 players, video-game consoles, digital recorders such as TiVo, high-speed Internet connections, and cell phones, among others." Paul Farhi, "Voters Are Harder to Reach as Media Outlets Multiply," *The Washington Post*, June 16, 2004, p. A15, http://www.washingtonpost.com/wp-dyn/articles/A44697-2004Jun15.html.

[142] Ibid.

[143] As Knee aptly notes, "One cannot help wonder what 'golden age' of news and information those who would block further industry consolidation are attempting to return us to. If it is the era when almost all Americans got their news from a combination of Walter Cronkite, David

Media Substitution and the Battle for "Attention Share"

Finally, media critics will still insist that the marketplace is not truly diverse because not every citizen necessarily has access to each of the technologies or media outlets listed above. But this argument fails because, as the preceding review of the factual record illustrates, *all* citizens have access to more media options today than they did in past decades. Media critics are unable to muster substantive evidence to show that any niche of society is worse off in terms of access today than in the past.

When faced with overwhelming evidence of media abundance, critics quickly shift gears and instead claim that consumers do not use media interchangeably, that is, as substitutes for each other. Thus, in the minds of the critics, some media are far more important than others and new forms of media competition should not count for much, or be used as an excuse for deregulation.[144] This assertion is contradicted by the facts. The proliferation of new media outlets and sources has allowed individuals to develop more specialized viewing and listening habits, perhaps even coming to rely on only one type of media outlet while rejecting most others. That is because consumers view many forms of media as close substitutes for one another. And this substitution does not need to be perfect in order to be highly effective in checking the relative power of some media outlets relative to others.

In an important study on *Consumer Substitution among Media*, conducted for the FCC, Joel Waldfogel of the Wharton School notes that "we can reject the view that various media are entirely distinct…. [C]ertain media appear to compete with each other for consumers' attention," and there is "evidence of substitution by consumers between and among certain media outlets."[145] In particular, Waldfogel's research found that there is clear substitution going on between the Internet and both broadcast TV and daily newspapers, between daily and weekly newspapers, between daily newspapers and broadcast TV news, between cable and daily newspapers, and between radio and broadcast TV. But he finds less evidence to support substitution between weekly newspapers and broadcast TV, or between radio and either Internet or cable.[146]

Brinkley, Howard K. Smith, and their local monopoly paper, then theirs is an argument for homogeneity hiding under the pretext of diversity." Knee, p. 20.

144 See, for example, Mark Cooper, *Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project*, "In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996," MB Docket No. 02-277, January 2, 2003, pp. 96-116.

145 Joel Waldfogel, *Consumer Substitution among Media*, Federal Communications Commission, *Media Ownership Working Group Study* no. 3, September 2002, p. 3, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A8.pdf.

146 Ibid.

Nonetheless, substitution among media is increasing overall and the growing substitution among media outlets means that the market will grow increasingly competitive as providers vie for consumer "attention share."[147] Consumers can choose from among several hundred TV channels and they can also access several billion pages of Web content. And many consumers do so interchangeably.[148] A recent UCLA World Internet Project survey found that, in 2003, Internet access consumed over five hours per week of time previously spent watching TV.[149] "[I]t seems unlikely that today's media giants will capture anything like the same share of attention online as they currently command in the offline world," conclude Gary Hamel and Lloyd Switzer.[150] A prime example cited by Hamel and Switzer is the phenomenally successful online auction website E-Bay. "With its 95 million registered users, all of who seem to be captivated by the interactive allure of online auctions, eBay is as much an entertainment company as it is a retailer."[151]

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This splintering or segmentation of the consumer audience or "attention share" is driving intense competition in each layer of the media universe. "The increased competition for audiences [has] led to declines in market share for media producers in most sectors."[152] Consider the impact of segmentation and substitution on television. Geoffrey Colvin of *Fortune* has noted that "25 years ago the three major networks controlled 90% of the audience. So we've gone from each dominant player having 30% of the audience on average to each

[147] "There is more competition than ever for the attention and money of the consumer audience," notes Benjamin Compaine. Benjamin M. Compaine, "The Newspaper Industry," in Benjamin M. Compaine and Douglas Gomery, eds., *Who Owns the Media? Competition and Concentration in the Mass Media Industry* (Mahwah, N.J.: Lawrence Erlbaum Associates, 3rd Edition, 2000), p. 54.

[148] Gary Hamel and Lloyd Switzer, "The Old Guard vs. the Vanguard," *The Wall Street Journal*, February 23, 2004, p. A17.

[149] "While both users and non-users in almost equal numbers acknowledge that they watch television, the biggest gap in media use between users and non-users in both 2002 and 2001 was the amount of television viewing time – and the gap is growing. Overall, Internet users watched less television in 2002 than in 2001; 11.2 hours per week in 2002, compared to 12.3 hours in 2001. In 2002, Internet users watched about 4.8 hours of television less per week than non-users – this compared to 4.5 hours in 2001. Differences in television viewing become even more pronounced as Internet experience increases. Comparing time spent with various types of media by Internet non-users, new Internet users, and very experienced users, most usage varies by only about an hour or less per week. Yet when comparing nonusers to very experienced users, television viewing drops 5.8 hours per week." *The UCLA Internet Report: Surveying the Digital Future, Year Three*, UCLA Center for Communication Policy, February 2003, p. 33, http://ccp.ucla.edu/pdf/UCLA-Internet-Report-Year-Three.pdf.

[150] Hamel and Switzer.

[151] Ibid.

[152] C. Ann Hollifield, "The Economics of International Media," in Alexander, et. al., p. 91.

having 14%. That is not a trend toward increasing concentration."[153] Mr. Colvin also noted that, "In the old days, if a prime-time show didn't get a rating of 20, it was in danger of cancellation. Now TV's top-rated shows typically get a 12; the finale of American Idol got a 20 and made national headlines. And of course that was on Fox, a network that didn't exist 25 years ago. The overwhelming trend is not fewer choices but increasingly splintered audiences paying attention to more media voices."[154] Similarly, David Mindich of Saint Michael's College points out that while the most popular comedy of the 1950s ("I Love Lucy") captured two-thirds of all viewers, the most popular show of the 1970s ("All in the Family") only captured half the audience and by the 1990s the most popular comedy ("Seinfeld") was only netting one-third of the total audience.[155]

The bottom line is that, no matter how one chooses to measure media "diversity," all signs are that the marketplace today is intensely competitive and offers citizens an unprecedented array of media options to meet even the most demanding tastes and particular interests.

[153] Geoffrey Colvin, "Mental Flab Is Worse Than Media Muscle," *Fortune*, June 23, 2003, p. 38.

[154] Ibid. Similarly, Daniel Henninger of *The Wall Street Journal* notes just how sophisticated audience tracking techniques have become to try to satisfy these new consumer demands and meet the competition: "Every program that appears on the broadcast networks and on 46 cable channels—from *Animal Planet* to all-news cable—is measured for audience size by A.C. Nielsen. And Nielsen purports to tell its network clients whether a program's audience rises or falls every 15 minutes. Because advertiser revenue tracks the mercury in Nielsen's audience barometer, TV executives can quote these ratings from memory—for their own and each competitor's programs. It is a competitive, brutal, even crazy market." Daniel Henninger, "Lou Dobbs Takes on the World," *The Wall Street Journal*, March 5, 2004.

[155] David T.Z. Mindich, *Tuned Out: Why Americans under 40 Don't Follow the News* (New York: Oxford University Press, 2005), p. 15.

<u>In Focus</u>: *How Ownership Rules Can Threaten Diversity—The Fox Story*

Skeptics might argue that even if ownership regulations don't help boost diversity, at least they won't discourage it. But the story of how Rupert Murdoch created Fox Television and brought a fourth television network to America illustrates how ownership rules can actually discourage greater media diversity.

While many younger Americans can't remember a time without multiple networks and cable channels at their disposal, for most of television's history citizens had only three primary commercial options from which to choose. After inept regulatory policies caused the demise of the DuMont Television Network in the 1950s (discussed in a case study in the following chapter), no one thought a fourth network was feasible in America. Perhaps that explains why it took a non-American to think outside the box and roll the dice on the launch of a new network in the United States.

In the mid-1980s, Australian media entrepreneur Rupert Murdoch launched the Fox Television Network, mostly to howls of laughter. But Fox and Murdoch would have the last laugh as the network became a force to be reckoned with in less than a decade. If the FCC had strictly enforced its media ownership rules against Fox and Murdoch, however, it might never have been so.

At the time, Fox and Murdoch faced even more restrictive ownership rules than they do today, including tighter caps on the number of TV stations a network could own, regulations governing their financial interest in independent or syndicated programming (the "Fin-Syn" rules), and also foreign ownership regulations limiting a foreigner's ownership stake in an American media company.

Luckily, Fox and Murdoch were able to get waivers or favorable rule changes that enabled them to get the new network up and running. For example, Ben Compaine points out that the Fox network made its debut in 1986, "not coincidentally the same year that the FCC increased the number of stations a single entity could own from seven to 12. This change gave News Corp. the leverage to use a core of stations it owned to launch a network. The FCC also granted a waiver from rules that prohibited the older networks from owning their programming. News Corp. had previously bought 20th Century Fox and its television production unit, providing the company a base from which to make the costly start-up of a national network more feasible. Fox showed the way for similar ventures by station-owning and content-controlling media companies to start the WB and UPN. New, competitive networks had long been the holy grail of those who criticized television programming as dull and uninventive; they were created by deregulation and market forces, which many critics (then and now) view as the enemy."[156]

As Daniel M. Kimmel summarizes in his new history of the rise of Fox, *The Fourth Network: How Fox Broke the Rules and Reinvented Television*, these changes were essential in getting Fox off the ground. Getting around the ownership restraints helped Fox acquire a core number of seed stations to help increase the new network's visibility in markets across America and ensure a steady stream of advertising support.[157] Kimmel points out that Murdoch was also able to evade newspaper-broadcast cross-ownership rules and got around foreign ownership concerns by eventually becoming an American citizen.

Today, the Fox Television network carries major sporting events—including the World Series and the Super Bowl—and produces some of television's top-rated dramas, comedies, and reality shows. Most of its affiliates also offer nightly local newscasts an hour earlier than the "Big 3," an innovation Fox brought to television. These innovations and added diversity would not have been possible if the FCC had strictly enforced its media ownership regulations. Only by loosening the controls was this new competition to the Big 3 possible. Deregulation, in other words, increased diversity.

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[156] Ben Compaine, Domination Fantasies, *Reason*, January 2004, p. 29.

[157] See Daniel M. Kimmel, *The Fourth Network: How Fox Broke the Rules and Reinvented Television* (Chicago, IL: Ivan R. Dee, 2004), pp. 9-13.

CHAPTER TWO
"LOCALISM" AND MODERN MEDIA

A second popular myth circulated by critics of media liberalization is that regulation is needed to preserve "localism" and community-based media. Democratic FCC Commissioner Michael Copps argues, "Localism is one of the fundamental goals of our ownership rules and of the public interest. I believe that it is impossible to divorce localism from ownership."[158] Critics argue that market forces alone cannot guarantee the optimal supply of local fare. Leanza and Feld of the Media Access project believe that "deregulation and increased concentration result in failures in local news markets."[159] And Cooper argues that consolidation "reduces the diversity of local reporting," gives large firms "an immense amount of power to influence critical decisions," and "squeezes out the local point of view."[160]

In July 2004, the FCC opened a new proceeding on localism and broadcasting that will once again tee up these issues and give the critics another chance to make sucharguments about the supposed "death of localism" in modern media.[161] But is there any truth to such a claim?

What Does the Public Really Demand?

In responding to these assertions, it is important to begin by acknowledging that while we do not really know exactly how much local fare citizens demand, they still receive a wealth of information about developments in their communities. Left to their own devices, however, it is evident that many citizens have voluntarily flocked to national sources of news and entertainment. Consider the success of *USA Today* in recent years, a newspaper that didn't even exist prior to 1982. And daily editions of *The Wall Street Journal* and *The New York Times* are now delivered to homes and offices across the nation each day. Forty-nine percent of *The New York Times*' daily circulation is now outside the New York area (up from 38 percent five years ago) and the paper offers home delivery in 275 markets (up from 171 markets five years ago).[162]

Left to their own devices, it is evident that many citizens have voluntarily flocked to national sources of news and entertainment.

[158] Commissioner Michael Copps, "Statement on Broadcast Localism Notice of Inquiry," July 1, 2004, p. 1, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-129A4.doc.
[159] Leanza and Feld, p. 18.
[160] Cooper, *Media Ownership and Democracy,* p. 6.
[161] Federal Communications Commission, *In the Matter of Broadcast Localism*, MB Docket no. 04-233, July 1, 2004, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-129A1.pdf.
[162] Robert J. Samuelson, "Bull Market for Media Bias," *The Washington Post*, June 23, 2004, p. A21.

Similarly, with the rise of cable television and cable “superstations” (nationwide networks) throughout the 1980s and 1990s, Americans have increasingly turned to national news and entertainment options in the video marketplace. CNN, Fox News, ESPN, TNT, WGN, The Weather Channel, HBO, and Showtime are just a few examples of popular national networks that have captured the public’s attention and viewing allegiance. While the idea of 24-hour national news, sports, and weather channels was once laughed at, it quickly become obvious that the public hungered for such services. Similarly, direct broadcast satellite (DBS) exploded onto the scene in the mid-1990s and nationwide service has gone from just 70,000 subscribers in 1993 to over 23 million in 2004.[163] Nationwide satellite radio is taking off in a similar fashion.[164] The rise of the Internet has also driven many citizens to shift their attention to national (even global) sources of news and entertainment.

In sum, for whatever reason, Americans seem to be increasingly choosing national sources of media content and communications over local sources. In analyzing the impact of these developments almost 10 years ago, *Federal Broadband Law* authors John Thorne, Peter Huber, and Michael Kellogg predicted that national media content and communications links “will soon finish the job of delocalizing television, and with it public policy…. Not everyone accepts the fact yet, but the war between localism and telecommunications is over. Telecom has won.”[165]

But even though there may be a natural media evolution taking place in America, with citizens opting for more national media inputs over local sources, it is obvious that many citizens continue to place a high value on being able to access some local information. In particular, local news, weather, and traffic reports are essential to the daily lives of many Americans. Others just want to see their child’s name in the local paper when they score a point in a local sporting event, or retrieve coupons for a local grocery store.

It is very difficult to imagine such local information and programming disappearing in a deregulated media marketplace. Indeed, such fare is currently available in almost all local communities from daily and weekly papers, radio stations, cable channels, and even websites—even those owned by national media conglomerates. As long as citizens continue to demand local information, someone will provide it, especially in a completely deregulated media marketplace.

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[163] FCC, *Eleventh Annual Video Competition Report*, p. 115.

[164] See generally Sabrina Tavernise, “The Broad Reach of Satellite Radio,” *The New York Times*, October 4, 2004, p. C8; Peter Johnson, “Sacked, and Now They’re Back,” *USA Today*, October 4, 2004, p. 5D; Howard Kurtz and Frank Aherns, “Sirius Lands a Big Dog: Howard Stern,” *The Washington Post*, October 7, 2004, p. A1.

[165] John Thorne, Peter Huber, and Michael Kellogg, *Federal Broadband Law* (Boston: Little, Brown and Company, 1995), p. 154.

> ***As long as citizens continue to demand local information, someone will provide it, especially in a completely deregulated media marketplace.***

Critics will persist with claims that the relaxation of the national television ownership cap or the various cross ownership rules will lead to underreporting of certain local affairs, or lead to the imposition of national viewpoints for local ones. There may very well be some truth to the latter argument since, as was shown above, we know the public has increasingly opted for sources of national programming over local fare. This appears to be a natural societal shift in viewing and listening preferences that potentially would have developed much sooner if America had had more national media outlets in the past.

On this point, it is worth noting that America's sheer geographic scope may have played a large role in making "localism" in U.S. media such an important public policy value. In less geographically expansive nations such as Great Britain and France, media have long been dominated by national sources of news and entertainment. At least part of the reason for this was that newspapers, television, and radio stations in those countries were able to more easily achieve nationwide coverage. In America, by contrast, national distribution for many media providers only became possible and economically sensible in recent decades. Attempting to disseminate a daily national newspaper to the entire country in past decades would have been extremely difficult without the aid of modern means of electronic communications—such as satellite and fiber optic distribution—as well as regional production facilities.

Likewise, although national television networks did produce much programming for distribution to local affiliates in the past, prior to the 1980s it would have been very difficult and prohibitively costly for them to produce enough programming to operate 24-hour national networks. Importantly, federal spectrum allocation policies were crafted in such a way that nationwide television and radio transmission by a single broadcaster was essentially impossible. Instead, regulators decided to carve markets along local or regional boundaries and hand out licenses to serve specific communities. For example, as the adjoining case study illustrates, the FCC rejected an innovative spectrum allocation plan by the DuMont Television Network in the 1940s to expand channel capacity. The result of the FCC's mistake was the death of DuMont as the potential fourth television network in America.

<u>In Focus</u>: *DuMont—The Fourth Network That Never Was*

Over 30 years before Rupert Murdoch and the Fox Television Network brought America a fourth option to compete against the "Big 3," the DuMont Television Network was already providing Americans with that competitive choice. Created in the mid-1940s, DuMont was, for a brief time, a leader in broadcast television alongside NBC. Unfortunately, "DuMont was not favored by the FCC," notes David Weinstein, author *of The Forgotten Network: DuMont and the Birth of American Television*.[166] "In fact, the commission's allocation system severely hindered the DuMont Network and prevented any other firm from starting a fourth network until the mid-1980s."

Weinstein is referring to the convoluted and remarkably inefficient way in which the FCC has traditionally allocated broadcast television spectrum licenses. In the late 1940s, when the FCC was debating how to structure the broadcast industry for the future, it made a series of fateful policy decisions that forever changed the nature of the medium. In particular, the agency decided to allocate broadcast VHF (very high frequency) licenses on a local basis, limiting the overall number per market. Thus, most cities had fewer than four VHF stations. While UHF (ultra high frequency) channels offered the opportunity for channel expansion, few households had televisions capable of receiving both VHF and UHF signals at the time. Consequently, local broadcasting choices were limited and would remain so unless a solution was found.

DuMont had an answer. It proposed making some regional markets VHF-only and others UHF-only. The rise of competitive UHF markets would have encouraged consumers to purchase more UHF-ready sets and encouraged network expansion and more efficient spectrum utilization. "Ultimately, DuMont's plan would have created more stations in each city and a more viable multi-network system: eighty-eight of the top one hundred markets would have had four or more stations," notes Weinstein.[167]

But the FCC rejected the DuMont plan with the adoption of the TV Allocation Table of 1952, a move that Manhattan Institute telecom expert Tom Hazlett argues "killed the fourth network, DuMont, by dishing out insufficient licenses to allow survival against the Big Three. DuMont protested strenuously but regulators acted on the public interest in 'localism,' denying additional stations in big city markets to scatter licenses widely. The emergence of just three national viewing choices was [the] appalling result."[168] Bruce M. Owen, Jack J. Beebe, and Willard G. Manning, Jr., authors of *Television Economics*, have summarized what a disastrous decision this was for not only DuMont but the entire broadcast sector and its consumers: "If it were not for the FCC's TV allocation plan, which created low-power, local stations, we could all have access to a great many more channels.… [T]he DuMont Plan does point up the choice that was before the FCC in the early years of television—a greater range of diversity or programming and competition versus localism in decision-making."[169]

Thus, an arcane decision the FCC made 50 years ago greatly limited diversity and competition. It meant there would only be two or three stations in many communities instead of six or seven. And it took almost four decades for technology and new entrants to overcome this mistake. Moreover, this industrial policy decision is largely what gave rise to the notion of broadcast "localism." It could just as well have been the case that networks and affiliates developed on a more regional or even national basis.

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166 David Weinstein, *The Forgotten Network: DuMont and the Birth of American Television* (Philadelphia: Temple University Press, 2004), p. 18.
167 Ibid., p. 20.
168 Thomas W. Hazlett, "Wrestling over Media," *FT.com*, June 25, 2003.
169 Bruce M. Owen, Jack J. Beebe, and Willard G. Manning, Jr., *Television Economics* (Lexington, MA: Lexington Books, 1974), p. 124.

In sum, the combined impact of geography and misguided early regulatory policy decisions dealing with spectrum allocation largely led to the notion of "localism" that many pay homage to today. It could just as well have been the case that America took the opposite route (like many European countries) and pushed for end-to-end, nationwide broadcasting systems from the start. Or perhaps even a regional system such as the DuMont plan envisioned could have worked. Had that been the case, it is less likely such a fracas would have developed over "localism" in broadcasting as part of the current media ownership debate. In fact, many of the ownership rules on the books today would not exist if policymakers had made different choices decades ago, or technology would have made those options feasible earlier.

It could also be the case that the increased "nationalism" in media we are witnessing today will help offset the fears raised by some social scientists (discussed in Chapter 1) about the decline of unifying cultural themes or "common experiences" in modern society. As former FCC Chairman Powell has argued, "Network programming is a huge part of what people want to watch when they go home at night. Don't we all want to watch the Super Bowl? Don't we want to talk about *West Wing* tomorrow at work?"[170] In an age of media abundance and the hyper-specialization of news and entertainment, national programming or reporting offers at least some common news or entertainment for citizens to share or discuss.

The combined impact of geography and misguided early regulatory policy decisions dealing with spectrum allocation largely led to the notion of "localism" that many pay homage to today.

Regardless, if the current movement toward national programming is a natural cultural and technological development, should government really have any role in curbing the resulting mix of national versus local media outputs? Even if the viewing and listening choices made by citizens result in a decline in local media relative to national programming, would critics want the government to limit consumer choices to stop this natural progression? Such a proposal would be elitist and anti-consumer.

[170] "Powell's Agenda for '04," *Broadcasting & Cable*, January 26, 2004, p. 30.

<u>In Focus</u>: *The National Ownership Cap and "Localism"*

One of the most controversial elements of the FCC's proposed media ownership reform proposal was the decision to relax the 35 percent cap on the overall audience reach of network television station owners to a new 45 percent threshold. As Chapter 3 points out, the national ownership cap is perhaps the most misrepresented media ownership regulation, since many paint it as a cap on overall market share when, in reality, it is a cap on the audience reach a single network can have.

Nonetheless, critics argue that the relaxation of the rule would damage localism in broadcasting by allowing national television networks to own more local affiliates. The assumption underlying this fear is that national networks are unable or unwilling to provide news, information, and entertainment that meet the needs of the local communities they serve.

The reality is much different. The seventh of the FCC's 12 Media Ownership Working Group studies took a close look at this claim and after reviewing the evidence found:

"Our analysis suggests that the performance of network owned-and-operated (O&O) stations and affiliates is virtually identical with respect to ratings of early evening newscasts. With respect to the receipt of awards for local news operations, network O&Os outperform affiliates. In addition, network O&Os appear to produce, on average, a greater quantity of local news and public affairs programming than affiliates in markets where the two station types compete directly. Within the class of affiliates, there is clear variation in performance between affiliates that are owned in common with a newspaper publisher and all other network affiliates. Affiliates co-owned with newspapers experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates."[171]

Similarly, an independent study of the same issues conducted by the consulting firm Economists Incorporated concluded that "O&O stations carry more minutes of local news and public affairs programming than affiliates," and that the number of news awards won by O&O stations is roughly the same as affiliates.[172]

In sum, the relationship between national television networks and their local broadcast affiliates is a complicated matter molded by ongoing negotiations and contracts with which government should not interfere. Networks and their affiliates negotiate detailed agreements regarding how much network programming must be aired, when such programming can be preempted, and so on. These are contractual issues over which the government should have no influence. Both the networks and their affiliates are big boys who can work out these deals on their own. And local content will remain available regardless of who owns the stations.

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[171] Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, "The Measurement of Local Television News and Public Affairs Programs," Federal Communications Commission, *Media Ownership Working Group Study* no. 7, 2002, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf.

[172] Bruce M. Owen, Kent W. Mikkelsen, Rika O. Mortimer, and Michael G. Bauman, "News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations," Economists Incorporated, *Economic Study* no. H, February 3, 2003, p. 11.

If People Want It, Someone Will Provide It

"Localism" will continue to play a major role in the media marketplace of the future, but it will not be as dominant as it once was. Moreover, the ways in which local programming is made available to the public will continue to evolve in coming years. Large daily city newspapers will likely continue their decline in relative importance, especially as small community papers and magazines become less expensive to produce.[173] The rise of the Internet and electronic communications technologies will also become an increasingly important source of local information. Cell phones and personal digital assistants (like pagers, Palm Pilots, and Blackberrys) already offer consumers on-the-go updates that are likely to become far more specialized in upcoming years.[174] One can easily imagine a day when such wireless media devices are coupled with geo-location technologies allowing media providers to instantaneously "spot-beam" local news and developments to your handheld devices.

National media outlets will also continue to use new targeting technologies to offer local fare as part of a national package of services. For example, in September 2004, DirecTV announced plans to spend $1 billion to launch four new satellites that will provide "local-into-local" television services, including local high-definition (HD) signals.[175] The firm plans to deliver more than 1,500 local HD channels (in addition to more than 150 national HD channels) to consumers by 2007. DirecTV already delivers local channels in standard definition in 130 of the nation's local 210 television markets.[176]

The Weather Channel also foreshadows what the future holds in terms of national outlets delivering more localized programming. Although it is a national cable channel, it has continuous local weather updates scrolling along the top or bottom of the screen at all times and comprehensive local weather updates at set intervals ("on the 8's"). On satellite systems, The Weather Channel also offers viewers the ability to punch their local zip code into their remote controls and retrieve the current weather and forecast for their area.

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[173] The newspaper industry is the only major media sector that is in a steady state of decline. "Over the last decade, newspaper circulation has generally declined in the face of competition from the Internet and other sources," reports Jacques Steinberg of *The New York Times*. He notes that average daily circulation for the nation's 841 daily newspapers fell again last year according to the Audit Bureau of Circulations. See Jacques Steinberg, "Newspaper Circulation Continues to Decline," *The New York Times*, November 2, 2004, p. C7.

[174] For example, "Thanks to Microsoft, now you can buy a watch that receives news, weather, e-mail, sports scores, stock prices, and more—all for under $300, plus the low subscription price of $9.95 a month." Grainger David, "Subscription Burnout," *Fortune*, February 23, 2004, p. 86.

[175] "DIRECTV Announces Plan to Launch Next Generation Satellites to Provide Dramatic Expansion of High-Definition and Advanced Programming Services," DirecTV, Inc., *Press Release*, September 8, 2004, available at http://www.directv.com/DTVAPP/aboutus/mediacenter/NewsDetails.dsp?id=09_08_2004A.

[176] "DIRECTV Announces First 12 Markets to Receive Local Channels in High-Definition This Year," DirecTV, Inc., *Press Release*, January 6, 2005, available at http://www.directv.com/DTVAPP/aboutus/mediacenter/NewsDetails.dsp?id=01-06-2005A.

Similarly, nationwide satellite radio providers XM and Sirius announced plans in 2004 to roll out local traffic and weather report services for subscribers.[177] These national carriers understand that providing such local content is essential to their long-term viability.[178] Ironically, because of this decision local broadcasters cried foul and claimed unfair competition from these rival companies.[179] Edward Fritts, president of the National Association of Broadcasters (NAB), the trade association that represents local, terrestrial radio stations, issued a press release in early January 2004 arguing that this new competition represented "an appalling back-door attempt to bypass the FCC's intent to limit satellite radio to a national service only."[180] Similarly, Greater Media, a broadcaster serving several East coast cities, told the FCC in a June 2004 filing that, "while XM and Sirius may be able to pass themselves off as local broadcasters, the fact is that they have made utterly no local investment in local communities."[181] Greater Media reasoned that because XM and Sirius supposedly do not participate in "local food drives, benefit concerts, holiday toy drives and other charitable events that improve the lives of the people they serve and provide essential resources to the communities in need," they should not be allowed to provide any local news, weather, or traffic reports to those communities.[182]

But that's like arguing that online bookseller Amazon.com should not be allowed to sell consumers books since it doesn't own local bookstores. This shameless effort by the NAB and Greater Media to block new competition is an example of industrial protectionism at its worst.[183] There is little doubt consumers will benefit from the added local programming options provided by satellite radio providers. Other national programmers will likely build on this model to offer continuous or on-demand local news updates.[184]

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177 Anitha Reddy, "XM to Air Traffic, Weather for Region," *The Washington Post*, February 28, 2004; Page E1.

178 See Lisa Schmeiser, "Will Lack of Local Content Hurt Satellite Radio Growth Prospects?" *Investors' Business Daily*, October 11, 2004, p. A4.

179 Radley Balko, "All Politics Is Local: How Broadcasters Want to Silence Satellite Radio," Cato Institute *TechKnowledge* no. 71, January 20, 2004, http://www.cato.org/tech/tk/040120-tk.html.

180 Statement From NAB President and CEO Edward O. Fritts on XM Radio's Plan to Provide Local Weather and Traffic Alerts, National Association of Broadcasters, January 7, 2004, http://www.nab.org/Newsroom/PressRel/statements/S0104.htm.

181 Greater Media, Inc., "In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service," MB Docket no. 04-160, June 2004, p. 3, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516215281.

182 Ibid.

183 See generally Scott Woolley, "Broadcast Bullies," *Forbes*, September 6, 2004, pp. 134-142. Woolley argues that the NAB's business strategy throughout the years can be summarized as: "If you can't compete, get a bill to outlaw the competition." Ibid., p. 142.

184 Paul Gallant. "Satellite Radio's Local Content Draws D.C. Attention," Charles Schwab Washington Research Group, *Schwab Soundview Capital Markets*, May 21, 2004.

Cutting the opposite direction, others may mimic the practice of "voice tracking" that Clear Channel has made popular in the radio industry. Voice tracking allows radio stations to use and reuse content across several radio markets by taping a single audio track or program and then making it available to affiliate stations in other cities. The parent station or its affiliate stations can splice in some added material to add more local flair to the program, but the bulk of the program will be created by the parent station. In essence, voice tracking is telecommuting for DJs and newscasters. They can stay in one place but deliver news or entertainment to many other places at the same time.[185] The practice generates significant savings for radio stations since they can reduce overhead and personnel costs. It also allows a company to develop a more uniform voice or brand image across markets. But voice tracking has come under intense criticism from critics who argue that it eliminates a local presence or personality from the airwaves.[186]

Traditional terrestrial broadcasters will need to strengthen their connections to local communities to retain audiences and advertisers.

Voice tracking will certainly continue, but will likely be limited in scope. The experiment will be short-lived, however, if radio takes it too far and completely abandons its local roots. As radio industry expert Alan Albarran argues, "In order to attract and maintain audiences, radio must continue to embrace localism and provide the information and entertainment local audiences need and want—otherwise there is nothing to separate a local radio station from any other type of audio service that simply delivers music."[187] This will certainly be the case as satellite radio providers and Internet radio stations expand their service offerings, which cater more to national and even international audiences. Traditional terrestrial broadcasters will need to strengthen their connections to local communities to retain audiences and advertisers.

Finally, while proponents of tighter controls on media cross-ownership or chain ownership of local media outlets are fond of arguing that such restrictions will help ensure a more responsive and independent media, that argument can actually cut both ways. While a local media owner may indeed have strong ties to its local community, those ties may be so strong as to discourage them from providing as much scrutiny of local affairs as an outsider might. For example, a family-owned local newspaper might have strong ties to a local politician or businessman and be less likely to report about a scandal than a media owner from outside that community. Scholars have found that with greater distance from

[185] Corey Deitz, "The Pros and Cons of Radio Voice Tracking," *About.com*, http://radio.about.com/library/weekly/aa081103a.htm.
[186] Susan Whitall, "Local Deejays Detest 'Tracking'," *The Detroit News*, November 10, 2002, http://www.detnews.com/2002/specialreport/0211/11/a09-6504.htm.
[187] Alan B. Albarran, "The Economics of the Contemporary Radio Industry," in Alexander, et. al., p. 217.

political pressure and parochial ties, chain ownership can be a neutral to positive factor in terms of independent reporting.[188] Moreover, as Chapter 3 argues, chain ownership can help ensure profitability and stability for local media outlets during turbulent economic times and provide those outlets with greater resources to expand their traditional news gathering or entertainment objectives.

Plenty of Outlets for Local Fare

Despite claims to the contrary, localism is alive and well in the modern media marketplace. While it is impossible to measure the exact amount of local fare citizens truly demand, we know numerous outlets exist for them to access the local news and information they desire. Media providers will continue to provide local fare as long as citizens demand it. “Localism” also helps traditional broadcasters differentiate themselves from newer forms of media and keeps them competitive.[189] In sum, while national news and entertainment sources have obviously become more important to most citizens in recent years, in a relative sense citizens have access to more sources of local programming as well thanks to the advent of new technologies and distribution channels.

Is it possible, however, that some communities will suffer a loss of “localism” or “ownership diversity” in a deregulated environment? If diversity is strictly defined as “one owner = one viewpoint,” then, yes, some small (especially rural) communities might suffer a loss of localism when, say, Gannett purchases both newspapers in town or Clear Channel owns six of the eight local radio stations.

There are two responses to this concern, however. First, almost all communities have experienced a net increase in the overall number of media outlets and owners serving local consumers. As Table 8 illustrates, an FCC survey of 10 randomly sized media markets—from the largest (New York City) to the smallest (Altoona, Pa.)—reveals that in every case there were more media outlets and more media owners in 2000 then there were in 1960. Importantly, the FCC was being extremely conservative when compiling this data. The agency counted all the cable channels available in a media market as part of a single cable or DBS system. Apparently the FCC didn’t want to claim that each channel equaled a different media outlet even though most viewers would count them as distinct media outlets. Moreover, national newspapers are not included in the count, nor are Internet sites taken into account as alternative media sources. Thus, the diversity picture is even brighter than this table suggests.

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[188] See Benjamin M. Compaine, “The Newspaper Industry,” in Compaine and Gomery, pp. 20-21.
[189] Tania Panczyk-Collins, “Broadcasters Say Key to Survival Relies on Localism,” *Communications Daily*, January 27, 2005, p. 3.

Table 8: Comparison of Media Outlets and Owners for 10 Selected Media Markets (1960-2000)

Market Rank	City	1960 Outlets	1960 Owners	1980 Outlets	1980 Owners	2000 Outlets	2000 Owners	% Change '60-'00 Outlets	% Change '60-'00 Owners
# 1	**New York, NY**	89	60	154	116	184	114	107%	90%
# 29	**Kansas City, MO**	22	16	44	33	53	33	141%	106%
# 57	**Birmingham, AL**	28	20	44	34	59	38	111%	90%
# 85	**Little Rock, AR**	17	14	35	30	60	33	253%	136%
# 113	**Lancaster, PA**	14	10	21	16	25	20	79%	100%
# 141	**Burlington, VT / Plattsburgh, NY**	15	13	37	28	53	34	253%	162%
# 169	**Myrtle Beach, SC**	6	6	22	16	38	23	533%	283%
# 197	**Terre Haute, IN**	12	8	26	19	33	22	175%	175%
#225	**Charlottesville, VA**	8	5	13	10	23	14	188%	180%
# 253	**Altoona, PA**	11	9	19	12	23	15	109%	67%
								195%	**139%**

Source: Federal Communications Commission, Media Ownership Working Group, September 2002.

Of course, there may be some communities (especially very small rural media markets) that have not experienced similar gains over the past 40 years. But this leads to a second counter-argument: how are we defining "media markets"? Again, with the rise of more regional and nationwide media outlets, it is increasingly difficult to nail down exactly where one media market begins and another ends. Even if Gannett owns both local newspapers or Clear Channel has six of the eight local radio stations, that does not mean other sources of news and entertainment don't exist. Other media outlets, even many located outside the community, might still be able to provide important local information to the community, as is the case with XM and Sirius providing local news, weather, and traffic reports. And new media services and technologies, especially the Internet, make it increasingly possible for local reporting to take on a different dimension than it did in the past. The increasing popularity of weekly or semi-weekly newspapers, for example, may provide most of the local fare citizens desire while they get the rest of their news and entertainment from national media outlets.

Again, before the critics of media decontrol attempt to rally the opposition to media liberalization around the flag of "localism," they should ask themselves if the *relative* decline in local media is simply a natural development resulting from the voluntary choices made by millions of American citizens.

In Focus: ***A Look at Localism in TV News through the Years***

As part of its June 2003 media ownership rulemaking, the FCC took an in-depth look at claims made by some critics that there is less local news and public interest programming available to the public today than in the past. Here is a summary of the FCC's major findings by decade:

1960s: "An informal analysis of the news and public interest programming available to the public over television in 1960, revealed that in selected sample markets, local news programming in 1960 was limited to approximately one or two hours per-station, per-day (or a total of three to five hours of local news programming produced daily by all television stations combined in a given market). National news programming in 1960 was in most cases limited to anywhere from five minutes per-station, per-day, to one hour per-station, per-day. As a result, in most markets, there was less than one-hour of national news programming broadcast daily by all the stations combined in a given market. Programming characterized as "public interest programming" on average was aired for about two to three hours per station, per-day (or approximately six to nine hours of public interest programming produced per-day by all stations combined in the markets we reviewed)." (pp. 34-35)

1980s: "Our informal analysis of the news and public interest programming available to the public via television revealed that, on average, most television stations in the markets we reviewed were airing more local news programming in 1980 than they did in 1960, though some small market stations were airing less local news programming." (p. 39)

Today: "The number of hours of news and public interest programming has also grown significantly since 1980. Whereas in 1960 and 1980, there was on average only about one or two hours of local news programming per-station, per-day in the markets we reviewed, local news programming expanded to about two to four hours per station per day by 2003. In addition, several regional and local news networks were launched between 1980 and 2003, providing local news on a 24-hour basis in numerous markets throughout the country. Although in most markets, only a few stations increased the amount of national news programming available from 1980, when national news was aired for about thirty to forty five minutes per station per day, there were more broadcast stations airing national news in 2003, and several non-broadcast news networks airing national news programming on a 24-hour a day basis. Public interest programming also has proliferated." (p. 47)

CHAPTER THREE
CONCENTRATION, COMMERICALISM, AND CITIZEN CHOICE

A common theme of much of the literature penned by media critics is that what we are seeing in today's modern media industry is a case of catastrophic market failure that must be reversed by comprehensive government regulation. In particular, critics claim that media is concentrated in the hands of only a few mega-conglomerates.

Surprisingly, for all the fuss over this supposed "media monopoly," the critics never seem to able to arrive at any sort of a consensus about how many companies they're talking about. In a recent book, Lessig says "just *three* companies control more than 85 percent of media," but two sentences later cites other sources saying the number is *five*.[190] Controversial documentary maker Michael Moore claims that, "By the end of the millennium *five men* controlled the world's media."[191] And at one point in their manifesto *Our Media, Not Theirs*, Nichols and McChesney say "the U.S. media system is dominated by about *ten* transnational conglomerates" and then less than 30 pages later say that "*two dozen* profit-seeking transnational corporations… rule U.S. media."[192] (In an earlier book, McChesney claimed the number was *seven*.)[193]

Three, five, seven, ten, two dozen. Well, which is it? It seemingly makes little difference to the media critics who go on to make sweeping and quite radical claims about how commercial media can never truly serve citizens or democracy. In large part the critics' case against modern media is a case against commercialism or capitalism in general. Critics argue that modern media is hopelessly over-commercialized and that for-profit media will always fail to account for the needs of a diverse citizenry.[194]

Contrary to these claims, the media marketplace is vigorously competitive today and, as made clear above, different media sectors do compete with one another. But while it is an unassailable fact that consumers have more choice than ever before, what about ownership diversity? Has the number of owners shrunk relative to the number of outlets? As discussed in the previous chapter, a wide-ranging FCC survey of large and small media markets across America from 1960 to 2000 revealed that "Collectively, the number of media outlets and owners increased tremendously over the 40-year period from 1960 to 2000. The percent increase in the number of outlets averaged almost 200 percent across all ten

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[190] Lessig, p. 162.
[191] Quoted in Nichols and McChesney, p. 114.
[192] Ibid. pp. 48, 73.
[193] McChesney, *Rich Media*, p. xxvi.
[194] "[T]he corporate commercialism so rampant in today's media has dramatically undermined the potential contribution of the media to our public life," argue David Croteau and William Hoynes, authors of *The Business of Media: Corporate Media and the Public Interest* (Thousand Oaks, CA: Pine Forge Press, 2001), p. 243.

markets. The percent increase in owner count, somewhat less dramatic due to consolidation, averaged 140 percent."[195] And McKinsey & Company director Michael J. Wolf also notes that "There are more than 100 media companies worldwide with more than $1 billion in revenues; and entertainment and media are still fragmented compared with other industries such as pharmaceuticals and aerospace."[196]

Making Sense of Concentration Ratios and Results

But even if the number of outlets and owners is increasing in the aggregate, isn't ownership within America's media marketplace significantly more concentrated than it was in past decades? Contrary to the views expressed by media critics, the media industry is not substantially more concentrated today than it was 10 or 20 years ago. As Benjamin Compaine, author of *Who Owns the Media?*, has found: "Even after a period of mild deregulation and high-profile mergers, the top 10 U.S. media companies own only a slightly bigger piece of the overall media pie than the top 10 of two decades ago."[197]

Two important caveats are in order before a closer examination of media concentration surveys and measurements.

First, it is vitally important to realize that comparisons to the past using strict concentration indices are greatly complicated by the fact that the media marketplace has expanded so rapidly, with new technologies and players constantly entering (and exiting) the picture. It is an extremely dynamic industry. Compaine's research has shown, for example, that half the companies found on the top 50 list of media companies in 1997 were not on the 1986 list.[198] Thus, regardless of what concentration surveys or measures reveal at any given moment, such a "snapshot" of media ownership does not necessarily tell the whole story. It fails to explain how markets might be evolving, or what new developments might be shaking things up.

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[195] Scott Roberts, Jane Frenette, and Dione Stearns, "A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000," Federal Communications Commission, *Media Ownership Working Group Study* no. 1, September 2002, p. 2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A2.pdf.

[196] Michael J. Wolf, "Here Comes Another Wave of Media Mergers," *The Wall Street Journal*, February 21, 2002.

[197] Compaine, "Domination Fantasies," p. 31.

[198] Compaine and Gomery, p. 541.

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Second, on a related note, how markets are defined has an important bearing on the results of these concentration surveys. If the "relevant market" is too narrowly defined and does not include the potential substitutes or true competitors, then concentration ratios are likely to be artificially inflated and meaningless.[199] And Jeffrey L. Harrison of the University of Florida notes that "markets can rarely be defined with precision. Thus, market definition and the determination of market power remain activities that are 'art' as much as 'science.'"[200] Thus, the really important question in these debates is who defines the market and how narrowly they do so.[201]

For example, if an economist or a regulator set out to evaluate market concentration in the market for online book sellers and only included the current primary online vendors such as Amazon.com and Barnes and Noble.com, then at first blush this would appear to be a very highly concentrated industry. But that would not be indicative of the true nature of the marketplace or competition in this sector since online firms obviously compete against traditional "bricks and mortar" bookstores as well. Moreover, online booksellers don't just sell books. They sell such a wide array of products that they are considered "online retailers" by many. Thus, they compete against offline retailing powerhouses such as WalMart, Target, and so on (and those firms' websites as well). Therefore, despite a high concentration ratio for online book sellers, it is obvious that Amazon.com and Barnes and Noble.com face cutthroat competition from a relevant market that includes myriad players and potential substitutes. As a result, most analysts and consumers alike would agree that prices remain very competitive, and that quality and quantity are increasing regardless of what any concentration surveys reveal.

To summarize, the important point to keep in mind when evaluating concentration surveys is that, "Market definition – both product market definition and geographic market definition – is important in any measure of concentration."[202] Not only must the entire geographic extent of the market be properly understood, but all the potential substitutes must be considered. In the media world, this is a vital point since "traditional media are finding a blurring of

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[199] "Two economists attempting to define a relevant market can, and often do, reach divergent conclusions regarding market definition," argue economists David L. Kaserman and John W. Mayo in *Government and Business: The Economics of Antitrust and Regulation* (Fort Worth, TX: The Dryden Press, 1995), p. 111.

[200] Jeffrey L. Harrison, *Law and Economics* (St. Paul, MN: Thomson West, 2000), p. 265.

[201] "Who Defines a Market?" *The Wall Street Journal*, February 23, 2004, p. A16.

[202] Michael R. Baye and John Morgan, "Competition in Internet Industries: Evidence from E-retailing," *OII Internet Issue Brief* no. 1.2, November 2003, http://www.oii.ox.ac.uk/resources/publications/OIIIB1-2_1103.pdf.

the boundaries among themselves"[203] as new technological and marketplace developments upend older business models, delivery mechanisms, pricing schemes, and market definitions. Bottom line: "There cannot be a single 'correct' way to measure concentration if people differ about the nature of the problem, its effects, and its proper remedies."[204]

With those caveats in mind, we can explore the results of media industry concentration surveys. The most popular concentration measure used by economists and government officials is known as the Herfindahl-Hirschman Index (HHI). The HHI is the sum of the squared market shares of every firm in a certain market. A perfectly concentrated marketplace, therefore, would consist of a single firm with 100 percent market share, or a 10,000 HHI (100 squared). If a given market had five perfectly equal competitors with 20 percent market share, the HHI would be 2000. Antitrust officials at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have adopted the HHI as a tool to help them determine when an antitrust case should be brought or a proposed merger denied. As a general rule of thumb, a market exhibiting an HHI below 1,000 is viewed as unconcentrated, a market with an HHI between 1,000 and 1,800 is considered moderately concentrated, and a market with an HHI over 1,800 is viewed as highly concentrated under current DOJ and FTC guidelines.[205]

The most recent and comprehensive HHI surveys for the media sector have been conducted by Eli Noam, director of the Columbia University Institute for Tele-Information. Noam has examined 95 different media subsectors and calculated HHI ratios for each and then aggregated the data into four major industry sectors: mass media, telecommunications, information technology, and the Internet. He then again aggregated the results for those four sectors into a single "information sector" to survey concentration trends on the broadest possible basis.[206] His preliminary data show that concentration of the entire information sector declined from 1984 to 1996, but then rose slightly after that point. The overall concentration level today, while up slightly since 1996, is much lower than it was before 1983. From 1988 to 2001, the HHI for the entire information sector generally hovered around 1,500. Again, under current DOJ-FTC antitrust guidelines, this would only be considered moderate concentration. Of the four major information industry subsectors Noam surveys, the mass media

[203] Compaine and Gomery, p. 541.

[204] Bruce Owen, "Confusing Success with Access: 'Correctly' Measuring Concentration of Ownership and Control in Mass Media and Online Services," Stanford Law School, Olin Program in Law and Economics, *Working Paper* no. 283, May 2004, p. 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=545302

[205] U.S. Department of Justice and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, April 2, 1992 (revised April 8, 1997), http://www.usdoj.gov/atr/public/guidelines/hmg.htm.

[206] For preliminary data, see Eli M. Noam, "Internet Concentration – and What it Tells Us About the Problems of the Information Economy," February 2004, http://www.law.msu.edu/quello/noam_file.pdf; Eli M. Noam, "The Internet: Still Wide Open and Competitive?" November 8, 2002, http://www.marconifoundation.org/documents/noam.PDF.

sector (which includes broadcasting and cable TV) actually exhibits the lowest levels of concentration. Only recently did overall mass media concentration approach the 1,000 "unconcentrated" threshold on the HHI index.

By contrast, an earlier HHI survey by Compaine came up with much lower overall concentration numbers. His 1997 survey of the top 50 media companies showed an aggregate HHI of only 268, up slightly from 205 in 1986. "[T]he media industry remains one of the most competitive major industries in U.S. commerce," concluded Compaine.[207] The differences between Noam and Compaine's HHI results come down to differences in survey methodologies and determinations about how broadly to define the marketplace. Again, this illustrates why concentration numbers must be carefully scrutinized and put in the proper context.

As Noam notes, "[W]hile the fish in the pond have grown in size, the pond did grow too, and there have been new fish and new ponds."

What's the Magic Number?

So, what's the "right number" of media providers in each community or for the entire nation? What is the optimal HHI result for the media sector? And what's the optimal size for a media enterprise in today's marketplace? There are no correct answers to such questions. As the FCC has noted, "Innovation is not just a matter of preserving a 'magic number' of independent owners in a market. Such a scheme would ignore the fact that the most potent sources of innovation often arise not from incumbents but from new entrants."[208]

While Noam remains concerned about concentration in some information sectors, his general conclusion should assuage his own concerns: "[W]hile the fish in the pond have grown in size, the pond did grow too, and there have been new fish and new ponds."[209] In other words, as stated above, the media marketplace is very dynamic with new types of outlets and technologies developing constantly. Even if only five to ten large firms dominated the industry as some critics claim—although they can never quite agree on a number—that would hardly be synonymous with a "media monopoly." In fact, five to ten major competitors in many other markets would be considered a fairly competitive marketplace. But despite the existence of a handful of very large conglomerates in today's media marketplace, dozens of other important media companies continue to thrive and fill important niches missed by larger firms. There are, as Noam suggests some big fish, many smaller fish, and many ponds for them all to swim in. Table 9 illustrates this reality documenting almost 70 media companies and the niches they serve.

[207] Compaine and Gomery, p. 562.
[208] FCC, *Media Ownership Proceeding*, p. 14.
[209] Eli M. Noam, "Media Concentration Trends in America: Just the Facts," *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, January 2, 2003, p. 2, http://www.citi.columbia.edu/research/readings/mediaconcentration.pdf.

Table 9: Media Monopoly or Too Much Competition?

	TV Networks	TV Stations	TV Production / Distribution	Cable Systems / Channels	Radio Stations / Programs	Movie Prod. / Distribution	Newspapers / News Delivery	Magazines	Book Publishing	Music	Internet Access / Services	Sports Venues	Resorts / Theme Parks	Theaters	VoIP Telephony
Disney (ABC)	x	x	x	x	x	x		x	x	x	x	x	x		
Viacom (CBS)	x	x	x	x	x	x			x	x			x	x	
News Corp. (Fox)	x	x	x	x		x	x	x	x	x		x			
AOL / Time Warner	x			x		x		x	x	x	x	x	x		
Universal / NBC	x	x	x	x		x					x		x		
Sony		x	x			x				x	x				
Comcast	x										x	x			x
Cox		x		x	x		x								x
EchoStar				x							x				
XM Satellite Radio					x										
SIRIUS Satellite Radio					x										
Cablevision	x											x		x	x
Freedom Communications	x						x								
Belo		x	x	x			x								x
New York Times Co.		x		x	x		x					x			
Tribune Co.		x		x	x		x	x			x	x			
Dow Jones		x					x	x							
Washington Post Co.		x					x	x			x				
Gannett		x					x								
Hearst-Argyle		x		x	x	x	x	x			x				
Knight Ridder							x								
Media General		x					x								
E.W. Scripps		x		x			x								
Pulitzer Inc.							x								
Copley Press Inc.							x								
McClatchy Co.							x								
Liberty Group Publishing							x								
Associated Press							x								
Reuters							x								
United Press Intl.							x								
Liberty Media			x	x		x									
Bertelsmann (Ger)								x	x	x					
Primedia			x	x		x		x							
Sinclair Broadcasting		x													
Clear Channel		x	x		x					x		x			

Table 9: Media Monopoly or Too Much Competition? (Continued)

	TV Networks	TV Stations	TV Production / Distribution	Cable Systems / Channels	Radio Stations / Programs	Movie Prod. / Distribution	Newspapers / News Delivery	Magazines	Book Publishing	Music	Internet Access / Services	Sports Venues	Resorts / Theme Parks	Theaters	VoIP Telephony
Entercom					x										
Citadel Communications					x										
Radio One					x										
Susquehanna Radio				x	x						x				
Emmis Communications		x			x			x	x						
Discovery Communications			x	x											
Dreamworks SKG			x			x				x					
Landmark Comm		x		x			x								
McGraw-Hill		x						x	x						
Houghton Mifflin Company									x						
Meredith Corp		x						x	x						
MGM			x			x			x					x	
Scholastic			x					x	x						
EMI (U.K.)										x					
Virgin (U.K.)									x	x					
Community Newspaper Hldg.							x								
MediaNews Group		x			x		x								
Morris Comm.					x		x	x	x						
Advance Publications							x	x							
Lee Enterprises							x	x							
Pearson (Penguin / FT) (Br)			x				x		x						
Bloomberg			x	x	x			x	x						
Forbes Inc.			x					x							
Ziff-Davis								x							
Hachette Filipacchi (Fr)								x							
Reader's Digest Association								x	x	x					
American Media, Inc.								x							
Rodale, Inc.								x	x						
Wenner								x	x						
Vulcan				x	x			x				x			
Reed Elsevier								x	x						

Importantly, mergers represent just one of many strategies media companies utilize to meet consumer demand. Other strategies include spin-offs and line-of-business divestitures on the one hand, and new technological investments or expanded product or service offerings on the other. Of course, as Compaine correctly observes, "Break-ups and divestitures do not generally get front-page treatment."[210] Consider, for example, the late 2003 announcement by Cablevision that it was spinning off its satellite and national programming arm into an entirely new, distinct company, Rainbow Media Enterprises.[211] The move generated barely a whisper in the mainstream press and the few stories that were written about the divestiture were buried mostly in the back pages of business magazines. By contrast, if Cablevision had proposed the opposite—a takeover of a satellite distributor or a programming company—it likely would have garnered significant press coverage.[212] Similarly, Liberty Media's continuing push to break apart the firm into smaller, independent media operations has generated little attention.[213] Where, incidentally, are the cries of "media conspiracy" when such divestitures and spin-offs go all but unreported? (To be fair, when media giant Viacom announced in March of 2005 that is was considering breaking the company into smaller units, the media *did* provide fairly significant, front-page coverage).[214] Finally, as Compaine notes, the arrival of new players, the shrinkage of old ones, and the incremental growth of smaller companies from the bottom up do not attract the same press attention as mergers and acquisitions.[215]

The many strategies discussed above represent just a few ways media companies have sought to adapt and grow their businesses over time. But they don't always work, and new strategies are always being employed in this highly dynamic industry.[216] Moreover, the market will often act to punish joint media ventures and acquisitions that don't make sense. As James Owers, Rod Carveth and Alison Alexander note, "Although the notion of synergy is particularly pleasing conceptually, empirical research often fails to identify material evidence

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[210] Compaine, "Domination Fantasies," p. 28.

[211] Marc Gunther, "Cablevision's New Frontier" *Fortune*, June 14, 2004, pp. 144-50; Tara Murphy, "Cablevision To Spin Off Rainbow Media," *Forbes.com*, May 10, 2004, http://www.forbes.com/markets/2004/05/10/cx_tm_0510video2.html.

[212] Likewise, few paid any attention when, in November of 2004, AOL announced it was splitting into four separate units. See David A. Vise, "AOL to Be Split into Four Units," *The Washington Post*, November 9, 2004, p. E1.

[213] Martin Peers, "Liberty Media Unveils Plans to Spin Off Its Discovery Stake," *The Wall Street Journal*, March 16, 2005, p. A3.

[214] Joe Flint, "As Viacom Ponders a Breakup, Industry Rethinks Old Notions," *The Wall Street Journal*, March 17, 2005, p. A1.

[215] Compaine, "Domination Fantasies," p. 28.

[216] See: Frank Ahrens, "Media Firms Piece Together New Strategies," *The Washington Post*, March 22, 2005, p. E1. "After a decade of growth by acquisition, media conglomerates such as Viacom, Sony Corp. and Time Warner Inc. are beginning to reconfigure, pushed by new technologies and changing consumer habits. At the same time, the 1990s cookie-cutter model of a media giant—take one television network, add a movie studio, theme parks, music company and maybe a pro sports team—is falling from favor, as companies settle on their core identity, analysts said."

that it is realized, particularly in domestic mergers."[217] In fact, their research has found that approximately 75 percent of all mergers are at least partially reversed by divestitures within 10 years.[218]

On this point, these authors and others specifically cite the recent troubles of the AOL-Time Warner, which announced their plans to merge in early 2000. Despite grand pronouncements made at the time about the synergies of content and online services, those benefits largely failed to materialize, apparently due to infighting among various divisions.[219] Recall that when the AOL-Time Warner marriage was announced just five years ago, it made front-page news across the nation and generated a great deal of hand-wringing and hysteria. But despite claims that the AOL-Time Warner deal represented "Big Brother," "the end of the independent press," and a harbinger of a "new totalitarianism," it turns out that AOL-Time Warner was "the Big Brother who never was," in the words of *Reason* magazine's Matt Welch.[220] In fact, by April of 2002, just two years after the marriage took place, the firm had reported a staggering $54 billion loss.[221] Losses grew to $99 billion by January of 2003.[222] And then in September of 2003, Time Warner decided to drop AOL from its name altogether.[223] It would be an understatement to say that the merger failed to create the sort of synergies (and profits) that were originally hoped for.

Similarly, the Walt Disney Corporation's recent internal problems also point to the potential for ongoing shake-ups within large media operations.[224]

[217] James Owers, Rod Carveth, and Alison Alexander, "An Introduction to Media Economics Theory and Practice," in Alexander et. al., p. 39. Gary W. Ozanich and Michael O. Wirth concur: "The torrid pace of mergers and acquisitions [in recent years] were anchored in future plans centered on convergence and a belief in synergistic benefits on both the revenue and cost side. The short run financial results of these activities, two or three years after the transaction and in the aftermath of the stock market bubble of the late 1990s, have been negative, as indicated by the price of securities, changes in management, disappointing financial results, and plans to break-up merged companies." Gary W. Ozanich and Michael O. Wirth, "Structure and Change: A Communications Industry Overview," in Alexander et. al., pp. 81-82.

[218] Ibid.

[219] Although the company's problems have not generated much front-page or prime-time news, three recent books have summarized the ongoing problems with this deal. Nina Munk, *Fools Rush In: Steve Case, Jerry Levin, and the Unmaking of AOL Time Warner* (New York: Harper Business, 2004); Alec Klein, *Stealing Time: Steve Case, Jerry Levin, and the Collapse of AOL Time Warner* (New York: Simon & Schuster, 2003); Kara Swisher and Lisa Dickey, *There Must Be a Pony in Here Somewhere: The AOL Time Warner Debacle and the Quest for a Digital Future* (New York: Crown Business, 2003).

[220] Matt Welch, "The Big Brother Who Never Was," *The National Post*, July 27, 2002, http://www.mattwelch.com/NatPostSave/AOL.htm.

[221] Frank Pellegrini, "What AOL Time Warner's $54 Billion Loss Means," April 25, 2002, *Time Online Edition*, available at http://www.time.com/time/business/article/0,8599,233436,00.html.

[222] Jim Hu, "AOL loses Ted Turner and $99 billion," *CNet News.com*, January 30, 2004, available at http://news.com.com/AOL+loses+Ted+Turner+and+99+billion/2100-1023_3-982648.html.

[223] "AOL Time Warner drops 'AOL,'" *BBC News*, September 18, 2003, available at http://news.bbc.co.uk/1/hi/business/3121128.stm.

[224] Frank Ahrens, "Eisner Loses One Title in Disney Shake-Up," *The Washington Post*, March 4, 2004, p. A1, http://www.washingtonpost.com/wp-dyn/articles/A28630-2004Mar3.html.

After major battles on Disney's board of directors in the wake of a takeover threat by cable giant Comcast, there was talk of spinning off divisions to refocus on other priorities. For example, in late March 2005, Disney parted ways with is successful and critically acclaimed Miramax movie studio after years of feuding with its directors.[225]

These examples show that markets will act to counter business deals or corporate arrangements that may not make sense from either a shareholder or consumer perspective. "The notion that 'bigger is better' is not always correct and the degree of difficulty in running these behemoths is a major lesson for the industry," argue Owers, Carveth, and Alexander.[226] Moreover, Ozanich and Wirth argue that "evidence is mounting that the trend toward conglomeration has peaked and that the next trend may be spin-offs resulting in deconglomeration."[227]

Competition and concentration are not mutually exclusive; citizens can have more choices even as the ownership grows somewhat more concentrated or vertically integrated.

The Benefits of Scale

Nonetheless, mergers and acquisitions have played, and will continue to play, a very important role in the evolution of America's media sector. To become a *major* media presence and meet the demands of modern media consumers, firms will need significant economies of scale to compete. The choice and competition that consumers have at their disposal today are due, at least in part, to the fact that many smaller media operators have significantly ramped up the scale of their business operations to expand news coverage and entertainment options. Much of the consolidation we have seen in recent years has also been a response to rising competition from new outlets and technologies. As this competition has segmented the media market and given consumers more options, many traditional media outlets have used consolidation as one method of offsetting increased audience fragmentation. In this sense, consolidation can be viewed as a defensive, "circle the wagons" strategy by older media outlets.[228]

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[225] Merissa Marr, "As Weinsteins Exit Disney, A Murky Script," *The Wall Street Journal,* March 30, 2005, p. B1; Laura M. Holson, "Negotiating a Big-Screen Divorce," *The New York Times*, January 12, 2005, p. B1.

[226] James Owers, Rod Carveth and Alison Alexander, "An Introduction to Media Economics Theory and Practice," in Alexander et. al., p. 15.

[227] Gary W. Ozanich and Michael O. Wirth, "Structure and Change: A Communications Industry Overview," in Alexander et. al., p. 82.

[228] Christopher Dixon, managing director of Gabelli Group Capital Partners, has argued that consolidation was tantamount to a "circle the wagons" strategy by major media operators in response to audience declines and fragmentation. "The [ownership] consolidation offset the [audience] fragmentation," he says. Cited in Jon Ziomek, "Journalism Transparency and the Public Trust," Aspen Institute *Report of the Eighth Annual Aspen Institute Conference on Journalism and Society*, 2005, p. 17.

Importantly, competition and concentration are not mutually exclusive; citizens can have more choices even as the ownership grows somewhat more concentrated or vertically integrated. Some media critics, however, seem to imagine that the needs of the marketplace could be met by thousands of small "mom-and-pop" media outlets that each only owned and operate a single newspaper, television station, or cable company. But this atomistic view of media simply does not mesh with economic reality. The economics of mass media are not those of a lemonade stand. It takes significant scale and scope to provide the public with much of the information and entertainment they desire. For example, 98 percent of cities only have a single daily newspaper because the fixed costs associated with producing the very first copy of the paper can run as high 40 to 45 percent of the total cost of operating the paper.[229]

The economics of mass media are not those of a lemonade stand. It takes significant scale and scope to provide the public with much of the information and entertainment they desire.

Similarly, 24-hour national cable news channels, and even local broadcast stations to some extent, are expected to be able to provide coverage from the front lines of an overseas conflict one minute and then switch back to coverage of a local trial the next. That is not something a small "mom-and-pop" media outlet would be capable of producing. And consider the skyrocketing costs of sports and entertainment programming. The estimated cost of producing a one-hour-long drama episode for television is \$1.6 million-\$2.3 million per episode, and the most popular dramas can cost many multiples of that.[230] Likewise, a half-hour sitcom episode is estimated to run \$1 million–\$1.5 million per episode, with the most popular shows again costing much more than that.[231] And a recent FCC report on broadcast industry economics reported that ABC, CBS, NBC and Fox each spend over a \$1 billion annually just to acquire the rights to popular sports programming, and then must expend large sums to cover and produce sporting events.[232] It is unlikely that a "mom-and-pop" media provider could cover the costs of producing such programming.

These are the hard economic realities for which media providers must plan if they hope to survive in today's vigorously competitive marketplace. "During the past decade, the increase in competition in the television market has driven both broadcast networks and station groups to seek ever-greater

[229] Robert G. Picard, "The Economics of the Daily Newspaper Industry," in Alexander et. al., pp. 110, 115.

[230] "Broadcast Network Programming Development 101," *Submission of ABC, CBS, FOX, and NBC to Federal Communications Commission*, April 2003, p. 26, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514082666.

[231] Ibid.

[232] Jonathan Levy, Marcelino Ford-Livene, and Anne Levine, "Broadcast Television: Survivor in a Sea of Competition," Federal Communications Commission, *OPP Working Paper Series*, no. 37, September 2002, p. 122, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A22.doc.

economies of scale and scope to offset challenges to their revenue," summarizes Douglas Ferguson.[233] Jonathan Knee argues the same is true when it comes to the importance of scale for daily newspapers. "In the current industry structure, the real challenge to newspapers is not how to maintain multiple voices, but how newspaper's unique voice can be heard above the din of other media."[234] This is especially the case since newspaper readership continues a steady decline as younger consumers continue to opt for other media sources, such as the Internet and cable TV.[235] According to Newspaper Association of America surveys, while almost 73 percent of 18 to 24-year-olds read a daily newspaper in 1970, only 39 percent did in 2004.[236] Overall, the percentage of all Americans who read a daily newspaper has fallen from over 77 percent in 1970 to roughly 53 percent in 2004.[237] Meanwhile, from 1998 to 2004, revenue generated by Internet help-wanted ads grew by a whopping 400 percent while newspaper help-wanted advertising fell by 40 percent over that same period.[238]

[233] Douglas A. Ferguson, "The Broadcast Television Networks," in Alexander et. al., pp. 151-52.

[234] Knee, p. 20.

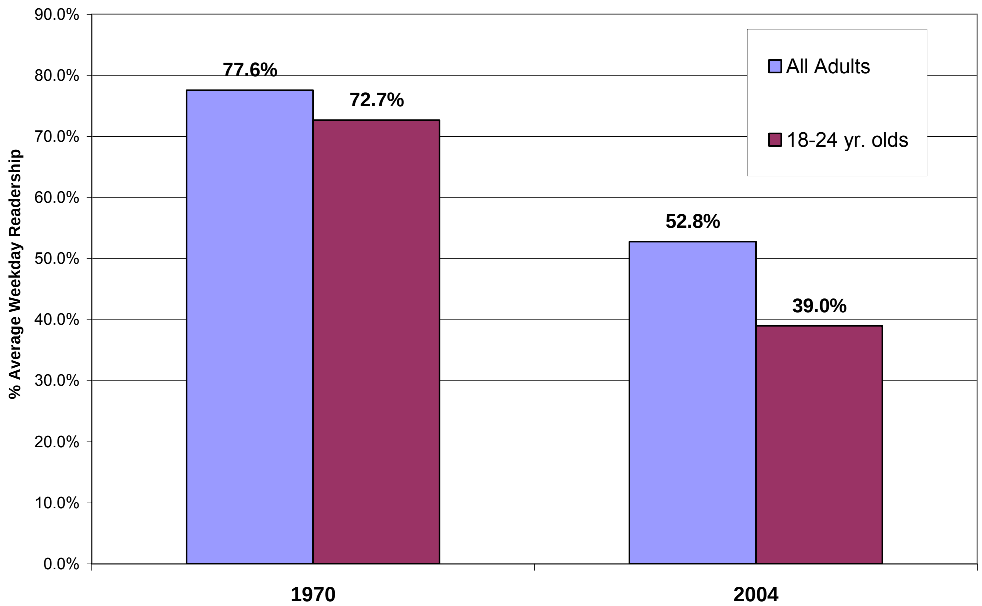
[235] "Underlying the declines in [newspaper] readership at many major newspapers are two ominous threats: The most-dedicated newspaper readers are aging. And they aren't being replaced with enough young readers, because many young people don't read papers for news but get their news instead from the Internet and 24-hour cable TV." Ray A. Smith, "$9 an Hour and All the News You Can Read," *The Wall Street Journal*, January 18, 2005, p. B1.

[236] "Readership Statistics," Newspaper Association of America website, http://www.naa.org/artpage.cfm?AID=1468&SID=1022.

[237] Ibid.

[238] Morgan Stanley data cited in Frank Ahrens, "Hard News: Daily Papers Face Unprecedented Competition," *The Washington Post*, February 20, 2005, p. F1.

Figure 3: Daily Newspaper Readership Continues Decline, Especially Among Young



Source: Newspaper Association of America

As technological and cultural changes continue to transform the way the public receives news and how businesses advertise, Knee argues that newspapers will need "sufficient critical mass to ensure that they are not reduced to mere spectators in this unfolding drama."[239] He concludes:

> Scale can provide the organizations with the financial flexibility to respond to changing circumstances and invest in new initiatives that may not be immediately profitable. Even something as simple as expanded news coverage of important topics can become financially challenging without a broader base of assets over which to spread the cost. Wire stories, rather than independent reporting, increasingly dominate the content of local papers. Having the combined resources of the newsrooms of both a local TV station and newspaper could facilitate more original reporting.[240]

Moreover, the claim made by some critics that relaxation of ownership rules will lead to disastrously one-sided news just doesn't square with logic or evidence. In many markets, newspaper-television cross-ownership currently exists because of waivers to the rules or grandfathering of older alliances before the rules went into effect. Those markets have robust competition and news coverage and there is no evidence the grandfathered entities are hopelessly biased. Indeed, the second of the FCC 12 Media Ownership Working Group

[239] Knee, p. 20.
[240] Knee, p. 19.

studies on viewpoint diversity in cross-owned entities revealed that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in the commonly owned outlets."[241]

Thus, increased scale and vertical integration should not be viewed as an evil, but rather a necessary strategic option firms can employ to attain the assets, skills, and financing necessary to remain a player in today's vigorously competitive media marketplace. The FCC prohibitions on vertical integration smacks of anti-capitalist industrial policy and puts the agency in the position of attempting to dictate efficient market structures *a priori*, something it has not had an impressive track record doing in this or other sectors in the past.

Getting Bigger, Getting Smaller

It is important, however, to recognize some countervailing trends that cut in the opposite direction. As illustrated in Chapter 1, the irony of the media marketplace circa 2004 is that, in a sense, it is getting both bigger and smaller at the same time.[242] That is, while major media providers are massive companies with numerous divisions, there also exist countless outlets for niche media in today's world of hyper-specialization or increased audience segmentation. For example, in predicting the leading trends in television over the next five years, Comcast CEO Brian Roberts argues that media personalization and "TV on your terms" will be a dominant theme.[243] Microsoft's Bill Gates predicts a future of highly personalized television "that will simply show what we want to see, when we want to see it."[244] And *Washington Post* columnist Steven Pearlstein predicts that, "For better or worse, the one-size-fits-all era is now history. In the future, readers and viewers will be able to get only the news and features they really want at a price they are willing to pay for them."[245]

Much of this media specialization and personalization has been fueled by the rise of the Internet, personal storage devices, and intense programming competition. As a recent report, *The State of the News Media*, noted, "Some argue that as Americans move online, the notion of news consumers is giving way to something called 'pro-sumers,' in which citizens simultaneously function

[241] David Pritchard, "Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign," Federal Communications Commission, *Media Ownership Working Group* no. 2, September 2002, p. 2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.pdf.

[242] As long ago as 1995, Nicholas Negroponte pointed this out in his brilliant book *Being Digital*. "In the information age, mass media got bigger and smaller at the same time." Nicholas Negroponte, *Being Digital* (New York: Knopf, 1995), p. 164.

[243] Brigitte Greenberg, "Roberts Says Comcast Will Stay Committed to Its Core Business," *Communications Daily*, March 9, 2004, p. 9.

[244] Quoted in Greg Levine, "Gates: DVDs Obsolete within Ten Years," *Forbes.com*, July 13, 2004, http://www.forbes.com/2004/07/13/0713autofacescan05.html.

[245] Steven Pearlstein, "News Media Grope for the Right Formula," *The Washington Post*, February 18, 2005, p. E1.

as consumers, editors, and producers of a new kind of news in which journalistic accounts are but one element."[246] Equally important, however, is the rise of "micro-papers" (such as community weeklies), specialized magazines, and niche newsletters. This trend toward specialization of media is at least partially driven by the falling costs of production for some media. Although major entertainment and news programming costs are rising, publishing smaller newsletters, papers, or magazines is easier than ever before. (These and other new media trends are discussed in much greater detail in Chapter 7).

The Internet certainly counts as the most exciting modern development in this regard. The Internet offers a significant departure from the media economics of the past since it allows virtually anyone with a little ingenuity and a small amount of money to setup an electronic soapbox on which they can speak to the world.[247] Of course, not everyone will be listening necessarily. And they especially won't be listening if that website offers little in the way of new or important fare. Recent academic research suggests that a few dozen websites attract the most attention online.[248] Thus, while there are millions of websites online, citizens and consumers tend to flock in large numbers to those that offer them the most value. This is unsurprising in that it only confirms what has been known by many other media providers serving other industry sectors: It takes high-quality content to be successful. There will never be anything resembling perfect equality of results in media so long as citizens have the freedom to choose what they watch or listen to. Regardless of how many channels, stations, newspapers, magazines or websites exist, people will always flock to certain sources of news and entertainment over others.

That raises an interesting question: Could it be that what media critics really fear is not a concentration of corporate ownership but a concentration of consumer tastes? The next chapter will explore that question in more detail. But first we turn to the radio and television industries and examine the state of competition in those two important media sectors since they have been the focus of such intense regulatory scrutiny.

Could it be that what media critics really fear is not a concentration of corporate ownership but a concentration of consumer tastes?

[246] *The State of the News Media 2004: An Annual Report on American Journalism* (Washington, D.C.: Project for Excellence in Journalism, 2004), p. 4, http://www.stateofthenewsmedia.org/index.asp.

[247] [T]he Internet came along and made it possible to take segmentation to a new level, dramatically lowering the cost to customize and distribute news and advertising and making it possible to sever the traditional link between the two." Pearlstein, "News Media Grope for the Right Formula."

[248] See Matthew Hindman, Kostas Tsioutsiouliklis, and Judy A. Johnson, "Googlearchy: How a Few Heavily-Linked Sites Dominate Politics on the Web," July 28, 2003, (draft dissertation), http://www.princeton.edu/~mhindman/googlearchy--hindman.pdf. The conclusions found in this study have been powerfully challenged by Jakob Nielsen of the Nielsen Norman Group. See Jakob Nielsen, "Diversity Is Power for Specialized Sites," June 16, 2003, http://useit.com/alertbox/20030616.html.

Radio and Concentration

The radio industry is commonly cited by media critics as a poster child for the supposed evils of media consolidation.[249] But what has really happened in the wake of the Telecommunications Act of 1996, which relaxed ownership restrictions on this sector? The Telecom Act completely removed a national ownership cap restricting the number of AM and FM stations a firm could own to 20 of each. The Act also allowed a signal firm to own 5 to 8 radio stations in a local market (depending on the size of the market).

Following this relaxation of the rules, a large number of acquisitions took place in the radio market and one firm in particular—Clear Channel Communications—amassed the largest holdings in subsequent years. Clear Channel now owns over 1,200 stations nationwide. Does that mean Clear Channel has a monopoly nationally (or even locally) in the radio marketplace? Hardly. As Figure 4 illustrates, even after the great acquisition push of the post-Telecom Act period, Clear Channel owns less than 10 percent of all radio stations in America. Meanwhile, dozens of other firms own significant holdings in the radio sector.

In fact, as George Williams and Scott Roberts made clear in the 11th of the 12 FCC *Media Ownership Working Group* studies, there are more radio stations today than existed prior to deregulation. The number of commercial radio stations has increased about 5.4 percent since March 1996.[250] Aggregate output in terms of the overall number of stations has not decreased despite industry consolidation. Thus, the modern radio marketplace cannot be labeled monopolistic.

Nonetheless, it remains true that the modern radio marketplace is more concentrated than it was in past years when ownership was highly splintered among hundreds of different owners. But two things about this increased consolidation are important to note. First, it is generally acknowledged that the splintered ownership created a great deal of financial instability in the sector. Consolidation helped many firms survive and regain stable footing in an increasingly competitive media marketplace. [251]

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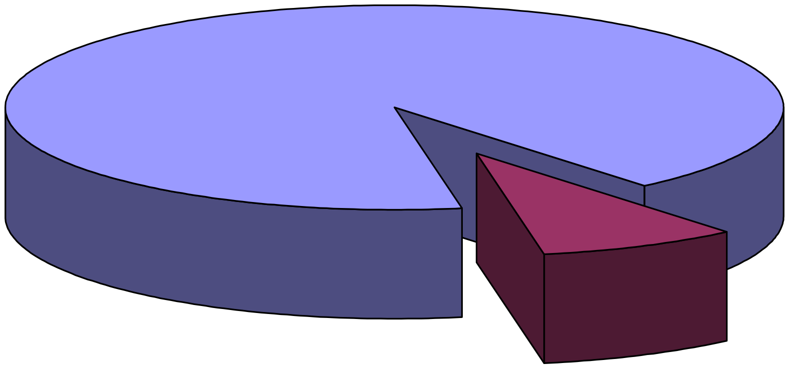
249 See Copps, pp. 9-10.

250 George Williams and Scott Roberts, "Radio Industry Review 2002: Trends in Ownership, Format, and Finance," Federal Communications Commission, *Media Ownership Working Group Study* no. 11, September 2002, p. 3, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc.

251 See generally Brett Pulley, "Gee, Thanks Dad," *Forbes*, October 18, 2004, pp. 106-112. Pulley notes that Clear Channel, for example, "has taken what was once a struggling business—full of poorly funded stations, broken equipment, offbeat characters and scant profits—and turned it into a beacon of predictability." Ibid., p. 109.

Figure 4: A Clear Channel Radio Monopoly?
Clear Channel Owns Less than 10 Percent of All Radio Stations in U.S.



Source: FCC Audio Division, Inside Radio.com

Table 10: Radio Industry Concentration Relative to Other Major Sectors, 2002

Industry	Top Company Market Share	Herfindahl-Hirschman Index
Wireline Telecom	87.2% (8 companies)	2,188
Car Rentals	93.5% (6 companies)	1,906
Recorded Music	84.5% (5 companies)	1,680
Automotive	86.8% (6 companies)	1,676
Cable Television	67.4% (10 companies)	1,274
Wireless Telecom	78.7% (6 companies)	1,216
Airlines	91.3% (10 companies)	1,178
Film	84.0% (8 companies)	1,054
Pharmaceuticals	67.7% (10 companies)	606
Beverages	63.4% (10 companies)	546
Radio Broadcasting	43.1% (revenues) (10 companies) 16.8% (no. of stations) (10 companies)	**469** **92**

Source: Goldman, Sachs & Co.

Second, although concentration has risen in the radio sector in recent years, this industry is certainly not highly concentrated in an antitrust sense. As Table 10 illustrates, HHI surveys for this sector do not yield results that would raise much concern at the Department of Justice, especially when stacked up against other major economic sectors.

Importantly, such HHI surveys narrowly define the market for radio as just licensed radio stations. They do not include new competition from nationwide satellite radio providers or alternative technologies or media outlets such as the Internet radio providers shown in Table 11. (While some of these Internet radio websites simply direct listeners to traditional broadcast stations, by doing so they are giving local stations national reach. But many of the sites listed below offered independent radio service.)[252] As has already been shown, in the aggregate, the number of new media outlets today dwarfs those of the past, which means radio competes in a far more crowded media marketplace. In such an environment, consolidation becomes an inevitable survival strategy for older sectors like radio broadcasting.

Table 11: Internet Radio Stations

LaunchCast (radio.yahoo.com)
Rhapsody (www.listen.com)
Live 365 (www.live365.com)
Net Radio.com (www.netradio.com)
eoRadio (www.eoradio.com)
Totally Radio (www.totallyradio.com)
Soul Patrol (http://www.soul-patrol.net)
SnakeNet Metal Radio (www.snakenetmetalradio.com)
Recovery Net (www.recoverynetradio.com)
Beethoven.com (www.beethoven.com)
Web-Radio (www.web-radio.fm)
Radio@Netscape (www.spinner.com)
NPR Online (www.npr.org)
VH1's SonicNet.com (http://www.sonicnet.com/)

What has increased radio consolidation meant for consumers? The answer, of course, depends on what criteria are used to answer that question. It is not enough to make subjective evaluations of the quality of modern radio, as many media critics often do. Although few are available, objective measures are vital. The number of radio formats provides one such yardstick.

[252] See generally Katie Dean, "Forget Radio, Tune in to Net," *Wired News*, June 28, 2004, http://www.wired.com/news/digiwood/0,1412,63982,00.html; Daniel Terdiman, "Internet Radio, Without Drudgery," *Wired News*, August 2, 2004, http://www.wired.com/news/culture/0,1284,64402,00.html?tw=wn_story_related

Radio stations typically classify themselves into one format or another, making objective measures of changes in this regard possible. A 2002 report by Bear Stearns estimated that there were 7 percent more "core" formats available in the Fall of 2001 than in the Fall of 1996 after the Telecommunications Act of 1996 was passed. "There seems to [be] no shortage of programming variety in radio," the authors concluded.[253] Another survey by BIA Financial Network found that the average number of general formats increased 8 percent from 1999 to 2002.[254] Similarly, independent research by Jerry Hausman of MIT[255] and by Steven Berry and Joel Waldfogel[256] also finds that ownership consolidation has led to increases in the number of radio formats overall.[257]

While some critics of radio deregulation concede that format diversity has increased in both local and national markets, they argue that "format variety is not equivalent to true diversity in programming, since formats with different names have similar playlists."[258] But a recent FCC study and the Bear Stearns report analyzed this question as well and found that the evidence is inconclusive since some formats (such as country, alternative, and urban) have seen an increase in the number of unique songs played on the air while other formats (such as rock, adult contemporary and jazz) have seen less diversity in the number of songs played on-air.[259] According to Bear Stearns, the number of unique songs played across all formats fell by just 1 percent from 1996 to 2001. Of course, it is impossible to factor into such surveys the role of listener preferences as a possible explanation of why some formats experienced more or less song diversity.

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253 Victor B. Miller, Christopher H. Ensley, and Tracy B. Young, "Format Diversity: More from Less?" Bear Stearns, *Equity Research*, November 4, 2002, p. 1, http://www.nab.org/FormatDiversity/Format%20Diversity%20-%20More%20from%20Less.pdf.

254 "Has Format Diversity Continued to Increase?" BIA Financial Network, June 5, 2002, p. i.

255 Statement of Professor Jerry A. Hausman, *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317, October 15, 2002, pp. 12-14.

256 Steven Berry and Joel Waldfogel, "Do Mergers Increase Product Variety? Evidence from Radio Broadcasting," *Quarterly Journal of Economics*, vol. 116, no. 3, pp. 1009-25.

257 The results are consistent with a theory first advanced by economist Peter Steiner 50 years ago that consolidation, or even an outright monopoly, would maximize product diversity and economic welfare because a monopolist would want to capture every single viewer or listener, and thus would not want to duplicate programming. Under Steiner's theory, social welfare and consumer choice is therefore increased in a market characterized by greater consolidation of ownership. See Peter Steiner, "Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting," *Quarterly Journal of Economics*, vol. 66, no. 2, 1952, pp. 194-223.

258 Jenny Toomey, "Empire of the Air," *The Nation*, December 23, 2002, http://www.thenation.com/doc.mhtml?i=20030113&s=toomey

259 George Williams, Keith Brown, and Peter Alexander, "Radio Market Structure and Music Diversity," Federal Communications Commission, *Media Ownership Working Group Study* no. 9, September 2002, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A18.pdf; Victor B. Miller, Christopher H. Ensley, and Tracy B. Young, "Format Diversity: More from Less?" Bear Stearns, *Equity Research*, November 4, 2002, http://www.nab.org/FormatDiversity/Format%20Diversity%20-%20More%20from%20Less.pdf

It is important to note that America's radio marketplace is in the midst of significant structural changes as it faces formidable new threats. In particular, traditional terrestrial broadcast radio is being challenged by new forms of competition, especially digital audio radio services (DARS), or satellite radio.[260] The satellite radio industry, which did not even exist prior to late 2001, boasted over 4 million subscribers nationwide by the end of 2004 according to company reports by XM and Sirius, the two current providers.[261] Meanwhile, consumers are spending more time listening to portable media and downloading music online. As a result, radio listening by adults between the ages of 18 and 34 has declined by roughly 8 percent in the past five years.[262]

Consolidation has been one strategy older broadcast radio players have utilized to secure advertising revenues, maintain profitability, and meet these new competitive challenges.[263] But the increasingly crowded media landscape will make it more difficult for traditional radio to thrive as it once did. In recent financial quarters, for example, radio giants Clear Channel and Viacom-owned Infinity have sustained substantial losses due to the new competition they face.[264] They have also announced major changes to their programming formats and shortened the amount of advertising time to win consumers back.[265] With revenues falling for radio broadcasters in recent years, and competition from alternative sources so intense, this old industry will need to continue to reinvent itself to remain relevant. "Radio hasn't lost its primacy, but it has lost its critical mass," argues Sean Ross, a radio consultant for Edison Media Research.[266] "It doesn't mean it won't have a share of the audience. It just means that the share it gets will be smaller and smaller."[267]

[260] Andy Kessler, "Satellite Radio Gets Sirius," *The Wall Street Journal*, March 8, 2005, p. B2; Sarah McBride, "Two Upstarts Vie for Dominance in Satellite Radio," *The Wall Street Journal*, March 30, 2005, p. A1; Lorne Manly, "As Satellite Radio Takes Off, It is Altering the Airwaves," *The New York Times*, May 5, 2005, p. A1.

[261] See generally John Helyar, "Radio's Stern Challenge," *Fortune*, November 1, 2004, pp 123-28.

[262] Paul Fahri, "Rock, Rolling Over," *The Washington Post*, January 18, 2005, p. C1.

[263] As Alan Albarran summarizes: "[R]adio competes for attention in a very crowded media landscape, where individuals have many options for entertainment and information from other types of radio services (DARS, Internet), television, and other media forms. Consolidation has enabled radio to embrace economies of scale and financially stabilized the industry, but it has not guaranteed success in delivering audience." Alan B. Albarran, "The Economics of the Contemporary Radio Industry," in Alexander, et al., p. 217.

[264] See Joe Flint, "Viacom Reports a Big Quarterly Loss," *The Wall Street Journal*, February 25, 2005, p. A3; Geraldine Fabrikant, "Viacom Takes Big Write-Down, Creating a Loss," *The New York Times*, February 25, 2005.

[265] Sarah McBride, "Hit by iPod and Satellite, Radio Tries New Tune: Play More Songs," *The Wall Street Journal*, March 18, 2005, p. A1.

[266] Quoted in Fahri, "Rock, Rolling Over."

[267] Ibid.

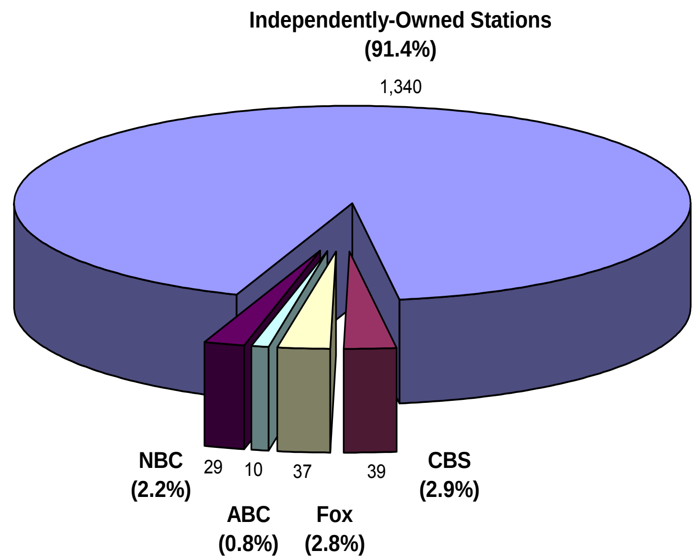
Television and Concentration

Turning to television, media critics argue that this sector is also uncompetitive and overly concentrated. But as Chapter 2 made clear, the debate over the national TV ownership cap serves as a prime example of how numbers routinely get distorted in the debate over media ownership regulation. This ownership cap is mistakenly perceived by some to be a limit on overall, actual market share. Thus, when some critics heard the FCC was slightly relaxing the overall TV ownership cap from 35 to 45 percent, many automatically assumed it meant a single company would be allowed to control 45 percent *of the entire TV market.* But that's not how the cap works. The cap is a limit on the percentage of eyes and ears that networks are able to reach with the combined broadcast properties they own. In other words, under such an *audience-reach* measure, numerous television networks could each reach 100 percent of the total viewing marketplace. As Bob Wright, CEO of NBC, analogizes, "This is like measuring Ford's actual market share by the percentage of Americans within driving distance of a dealership—regardless of how many cars Ford actually sells!"[268]

Of course, no network comes close to reaching 100 percent of the entire audience with its media outlets. In fact, only two—Fox and Viacom (which owns CBS)—currently reach more than 35 percent of the potential television audience, but their actual market shares illustrate just how irrelevant the audience-share test really is. According to FCC data, as of March 2003, there existed 1,721 full-power commercial and noncommercial TV stations in the United States. Of the 1,340 commercial stations, Viacom (CBS) owns only 39 stations (2.9%), Fox owns 37 (2.8%), NBC owns 29 (2.2%), and ABC owns 10 (0.8%). In the aggregate, the "Big 4" networks only own 8.6% of all commercial local television stations in the country, meaning that 91.4% of commercial stations remain independently owned. If both commercial and noncommercial stations are considered, then the Big 4's share of the total pie drops from 8.6% to 6.6%. Hardly cause for great concern.

[268] Bob Wright, "Big Isn't Bad," *The Wall Street Journal*, September 23, 2003, p. A14.

Figure 5: Network Domination?
Local TV Stations Owned by Networks
(March 2003)



Source: Federal Communications Commission

Meanwhile, competition from non-network station owners is quite intense. For example, non-network broadcast station operator Sinclair Broadcast Group, Inc., owns 62 TV stations (3.6% of U.S. TV stations). Paxson Communications owns 61 (or 3.54%), Hearst-Argyle owns 34 (1.98%), Tribune owns 27 (1.57%), Gannett owns 22 (1.28%), and Belo owns 19 (1.10%). Importantly, none of these companies face the artificial 35% audience-reach cap imposed on their TV network rivals. Given the competition that networks face from these rival station owners and other video competitors (cable, satellite, Internet, DVDs, etc.), the relaxation of the national TV ownership cap should not have generated such intense opposition. In fact, the national ownership cap gives these rival station owners an unfair advantage over the networks since the rival station operators face no artificial regulatory constraints when looking to expand their media operations.

Similarly, concerns over vertical integration in the television sector are unfounded. Vertical integration occurs when the distributor of video programming also owns the content flowing over its distribution systems. Some critics are concerned that excessive integration of content and conduit will destroy diversity or diminish competition. But while it is true in an absolute sense that there is more vertical integration of content and conduit today than in past years, it is also true that there are far more television networks than ever before. Consequently, measured against the aggregate number of networks, vertical integration has actually been steadily *decreasing* over the past decade.[269] In fact, as Table 12 illustrates, by 2004 the percentage of vertically integrated networks had hit a 14-year low at just 23 percent of all networks.[270]

Table 12: Vertical Integration of Video Programming Networks has Fallen
(National Network Growth and Vertical Programming Integration, 1990-2004)

Year	**Total Number of Video Programming Networks**	**Number of Vertically Integrated Networks (networks owned by cable or satellite distributor)**	**Percentage of Vertically Integrated Networks**
1990	70	35	50%
1994	106	56	53%
1995	129	66	51%
1996	145	64	45%
1997	172	68	40%
1998	245	95	39%
1999	283	104	37%
2000	281	99	35%
2001	294	104	35%
2002	308	92	30%
2003	339	110	33%
2004	388	89	23%

Source: Federal Communications Commission, *Eleventh Annual Video Competition Report*, January 2004.

In sum, television is a vibrantly competitive industry today and yet one particular type of video programming provider—broadcasters—remains shackled with a unique set of rules that put them at a disadvantage relative to new competitors such as cable and satellite distributors. As Robert Pepper, chief of the FCC's Office of Plans and Policy, noted in 1993, "Unless broadcast television is allowed to evolve in this new video marketplace and firmly establish its role, it—and its network suppliers—will not be able to keep up with competitors."[271] What was true a decade ago is more true today than ever before.

[269] FCC, *Tenth Annual Video Competition Report*, pp. 87-91.
[270] FCC, *Eleventh Annual Video Competition Report*, p. 78.
[271] Robert Pepper, "Broadcasting Policies in a Multichannel Marketplace," in Charles M. Firestone, ed., *Television for the 21st Century: The Next Wave*, (Washington, D.C.: Aspen Institute, 1993), p. 128.

<u>In Focus</u>: *The Financial Interest and Syndication (Fin-Syn) Rules*

Do restrictions on vertically integrated media really expand diversity and benefit consumers? An excellent case study can be found in what occurred in the wake of the FCC's repeal of the financial interest and syndication "Fin-Syn" rules.[272] The Fin-Syn rules, which were put into effect in 1970, "prohibited any network from acquiring financial interest in television programs produced wholly, or in part, by a person other than the television network; networks could only purchase rights from the producer to air such programming, or alternatively, they could produce programming entirely in-house."[273] Moreover, thanks to consent decrees the three major television networks were forced to enter with the Justice Department, their in-house program production activities were limited. In essence, the Fin-Syn rules and DOJ consent decree restrictions prohibited the vertical integration of broadcast television program creation and distribution. The logic behind these restrictions was that vertical integration of broadcast television program creation and distribution would allow broadcasters to gain excessive control over prime-time programming on their airwaves.

But by 1993, the FCC came to realize that the Fin-Syn rules were counterproductive and began dismantling them. The rules had come under attack in the courts and in 1992 the Unites States Court of Appeals for the Seventh Circuit vacated the Fin-Syn rules in a scathing decision, *Schurz Communications, Inc. v. FCC*.[274] FCC repeal of the rules thus became inevitable, therefore, and they were completely phased out by the end of 1995.

The result was a great deregulatory success story. In the wake of decontrol, media operators were free to structure new business arrangements and alliances to finance increasingly expensive new programs, as well as entirely new networks and cable stations.[275] (In particular, the UPN and WB television networks largely owe their existence to the repeal of Fin-Syn since the integration of studios and networks made it easier for them to get started).

Also, by eliminating Fin-Syn and allowing greater integration of programming and distribution, content providers were also able ensure that their shows were more widely distributed on not only network television but cable channels as well. A 2002 FCC report on the health of the broadcast industry noted that a broadcast-cable alliance, "makes it possible for network companies to spread their expertise in program selection, promotion, and advertising sales over a larger range of outputs (i.e., networks) and possibly realize some economies of scope in network operation."[276] Therefore, by having a financial stake in both production and distribution, programmers can "repurpose" or re-use broadcast programs many times over on both a broadcast network and then a cable channel, thereby ensuring additional revenue streams. The same FCC report also found that the aggregation of broadcast and cable networks helps control the escalating costs of certain types of programming, especially sports, and improves the companies' leverage when dealing with advertisers.

In addition to network-studio combinations, another important structural development has been the combination of broadcast and cable networks in the same company. This makes it possible for network companies to spread their expertise in program selection, promotion, and advertising sales over a larger range of outputs (i.e., networks) and possibly realize some economies of scope in network operation. The aggregation of broadcast and cable networks into a single company also apparently allows efficient sharing of the costs of the rights to some major sporting events and also has affected the manner in which advertising is bought and sold.

In the 5th of the FCC's 12 *Media Ownership Working Group* studies, Mara Einstein of the Queens College Department of Media Studies extensively surveyed broadcast television program diversity before and after the repeal of the rules and concluded that "The bottom line is this: diversity *increased* after the

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272 *In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Federal Communications Commission, Report and Order, Docket No. 12782 ("Fin-Syn"), 23 FCC 2d 382 (1970).

273 Levy, Ford-Livene, and Levine, p. 114.

274 *Schurz Communications, Inc. v. FCC*, U.S. Court of Appeals, Seventh Circuit, 982 F. 2d 1043 (1992).

275 Jim Rutenberg and Andrew Ross Sorkin, "Networks Embrace Cable, Their Longtime Threat," *The New York Times*, November 5, 2002, p. C1.

276 Levy, Ford-Livene, and Levine, p. 135.

In Focus: ***The Financial Interest and Syndication (Fin-Syn) Rules (Continued)***

repeal of Fin-Syn."[277] She goes on to note that "it does not matter who or how many people produce programming for network prime time schedules. Rather, it is economic factors that contribute to the variety of programming that will be available to audiences. As networks needed to be more creative in their financing, they found both new types of program genres and new ways of paying for it. This further supports our conclusion that program diversity on prime time broadcast television is unrelated to the number of firms producing the programming or whether the network has an ownership stake in the programming."[278]

And Benjamin Compaine notes there is no reason to consider vertical integration an evil in the television programming sector while treating it as an accepted norm in other media sectors:

"There is nothing inherently better or more 'diverse' about a media company buying its content from outside sources rather than from its vertically integrated production operation. The trend in recent mergers has been for distributors, i.e., broadcast networks, to align with production companies, i.e., film studios. Their decision to do so is a classic 'make vs. buy' case. No one has criticized newspapers for running their own content-creation businesses, even though they could rely on freelancers and independent contractors. Some do more than others. Magazines do some of both. TV networks and local stations have long had their own in-house news operations. But a combination of business models and (for two decades) regulation kept most entertainment production out-of-house at the three older networks. Over time the combined studios/TV networks are likely to find that they were better off being able to pick and choose programming from what outsiders offered them rather than being stuck with whatever their limited in-house operations offer. The economics offer powerful incentives: To cite one of many examples, Warner Brothers Television, part of AOL Time Warner, owner of the WB and HBO television networks, produces the top-rated television show, *ER*. It could run that show on either of those in-house networks, but instead sells it to NBC, based on a cold calculation that this is the better financial decision."[279]

Are Capitalism and Media Incompatible?

Finally, much of the anti-media literature argues that regulation is needed to overcome commercialization of media, or to ensure that a variety of noncommercial outlets and public broadcasting exist. The books of McChesney and Bagdikian, in particular, are anti-corporate, anti-capitalist manifestos from start to finish. McChesney asks, "Is the market appropriate to regulate media?"[280] and then concludes throughout his work that in almost every possible way the market fails, since "Our media system operates to serve the needs of owners, not… citizens."[281] And he repeatedly uses phrases such as "pummeled by commercialism,"[282] "commercial carpet-bombing of our children,"[283] "commercial indoctrination of children," and even "children's brains are marinated in commercialism"[284] to describe his contempt for commercialism in media. Similarly, Bagdikian repeatedly talks about the existence of a "media cartel" that

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[277] Mara Einstein, "Program Diversity and the Program Selection Process on Broadcast Network Television," Federal Communications Commission, *Media Ownership Working Group Study* no. 5, September 2002, p. 17, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.
[278] Einstein, pp. 36-37.
[279] Compaine, "Domination Fantasies," p. 30.
[280] McChesney, *The Problem of the Media*, p. 189.
[281] Robert McChesney, "Media Corporations Versus Democracy: A Response to Benjamin Compaine," *OpenDemocracy.net*, p. 3, http://www.opendemocracy.net/debates/article-8-24-60.jsp.
[282] McChesney, *Rich Media*, p. 35.
[283] McChesney, *Rich Media*, pp. 9, 35.
[284] Nichols and McChesney, p. 43.

"speaks with one voice."[285] Likewise, Croteau and Hoynes argue, "Rather than leaning toward the market ideal of diverse competition, our media system too often tilts in the direction of a homogenized monopoly, with a few giant firms producing remarkably similar media fare." [286]

Even famed CBS television anchorman Walter Cronkite has gotten in on the corporate media bashing: "With almost total unanimity, our big, corporate owners, infected with the greed that marks the end of the 20th Century, stretch constantly for ever-increasing profit, condemning quality to take the hindmost."[287] Cronkite is apparently longing for a return to the days when the media owners supposedly shunned profits and allowed him to dominate news telecasts each night since he squared off against just two primary competitors! (And apparently his reservations about "big, corporate owners" didn't weigh on his mind when he accepted an invitation from Viacom-owned MTV to contribute to a "Choose or Lose: Work It" program in 2004.)[288]

The claim that these critics are advancing is really quite radical. In essence, they are arguing that capitalism and media are incompatible.[289] Contrary to these assertions, the media industry *is* a business and that is not a bad thing. Unless we expect our media outlets to be entirely noncommercial and publicly financed, we have to accept the fact that media companies must worry about their financial health and adopt business strategies that will keep them operational. Many critics are seemingly in denial about the commercial nature of American media even though the industry has always sought profits and been accountable to shareholders. "Every publication is in business and they need to do well as a business," notes journalist James Fallows.[290] As the FCC found in its media ownership decision, "the need and desire to produce revenue, to control

[285] Bagdikian, p. 5.

[286] Croteau and Hoynes, p. 153.

[287] Walter Cronkite, *Remarks at the Radio-Television News Directors Association and Foundation Edward R. Murrow Awards Ceremony,* September 17, 1997, http://www.rtndf.org/resources/speeches/cronkite.html.

[288] Verne Gay, "Walter Cronkite Returns," *Newsday,* May 25, 2004, http://www.newsday.com/entertainment/tv/ny-ettel3816800may25,0,5595947.column?coll=ny-television-headlines.

[289] Cooper argues: "[M]arket forces provide neither adequate incentives to produce the high quality media product, nor adequate incentives to distribute sufficient amounts of diverse content necessary to meet consumer and citizen needs." Cooper, *Media Ownership and Democracy*, p. 43. And the *Free Press.org* website, which McChesney created, argues that, "There is a basic conflict of interest with running a business purely for profit that has so much influence on democratic debate, culture, and the social distribution of information. Government has historically been responsible for balancing these interests—but it has increasingly sided with business over the public, causing a serious imbalance." McChesney, "What's Wrong with Media," *FreePress.org*, http://www.freepress.net/guide/whatswrong2.php.

[290] Quoted in Compaine and Gomery, p. 21. "Economic principles must be embraced by media sector industries if viable firms are to continue in an ever more demanding economic context." James Owers, Rod Carveth and Alison Alexander, "An Introduction to Media Economics Theory and Practice," in Alexander et. al., p. 8.

costs, to survive and thrive in the marketplace is a time honored tradition in the American media…. Impair the ability of media outlets to profit and you choke off the capital to which their tap roots reach; strangle the press and the balance of our familiar rights and privileges wither and fall.[291]

> ***The media industry* is *a business and that is not a bad thing. Unless we expect our media outlets to be entirely noncommercial and publicly financed, we have to accept the fact that media companies must worry about their financial health and adopt business strategies that will keep them operational.***

By contrast, media critics prescribe a combination of meticulous regulation for commercial media with heavy doses of public financing for "alternative" or "educational" media. Their preferred media universe would apparently resemble an amalgam of the Public Broadcasting Service (PBS), National Public Radio (NPR), the British Broadcasting Corporation (BBC), and public access television stations on cable.[292] Nichols and McChesney state, "Our claim is simply that the media system produces vastly less of quality than it would if corporate and commercial pressures were lessened." [293] And on his *Free Press* website, McChesney argues, "If the government gave all the publicly owned radio and TV frequencies to nonprofit groups, rather than a relative handful of huge corporations, the content of our broadcasting system would probably be radically different from what exists today."[294] But as Compaine notes, "Content might well be different. But it wouldn't necessarily be better…. This might work only in a… world of enforced equality, where no democracy of content was allowed, where the voice of the audience was not heard." [295] He notes that PBS is instructive in this regard since, even in the days when it only had three primary rivals, it could rarely get the attention of more than 2 percent of the total TV audience. "[W]hen you no longer need the skills of a safecracker to find PBS in most markets, you have to realize that the reason people aren't watching is that they don't want to," notes television journalist Jeff Greenfield.[296]

Not only is PBS unable to garner more than a sliver of overall market share, but the audience it nets is not representative of a broad swath of the American public. Surveys of pubic television and radio consumers consistently reveal an audience that is more affluent and educated than audiences for commercial media. For example, a comprehensive 2003 survey of National Public Radio listeners by Medimark Research revealed that 73 percent have a household income over $50,000 and 49 percent have a household income of $75,000. The mean household income for NPR listeners is $85,675. In addition,

[291] FCC, *Media Ownership Proceeding*, p. 142.
[292] See Bagdikian, pp. 258-60.
[293] Nichols and McChesney, p. 75.
[294] Robert McChesney, "Does Free Press Advocate Censorship as a Means of Media Reform?" http://www.freepress.net/about/faqs.php#question1.
[295] Compaine, "Domination Fantasies," p. 31.
[296] Quoted in Krattenmaker and Powe, p. 314.

58 percent have a college degree and 28 percent have attended graduate school.[297] These numbers are all much higher than national averages. The survey also reported that NPR listeners "are much more likely than the general public to travel to foreign nations, to attend concerts and arts events, and… spend more on products and services."[298] PBS surveys produce similar results with audience demographics being well above national averages.

In one sense, therefore, it could be argued that public broadcasting subsidies are little more than welfare for the upper class. If all media were to look like a combination of NPR, PBS, and the BBC, then the desires of massive swaths of the American populace would be overlooked. At root, proposals to make the entire media universe look and sound like PBS or NPR are just more elitist thinking that again raises the question of whether the critics' real aim with media ownership regulation is to address concentration of ownership or concentration of consumer tastes. It appears the latter is more likely the case.

Finally, as Chapter 1 demonstrates, the claim made by Bagdikian and other critics that modern media is nothing more than a monopoly or cartel that only produces homogenized fare is contradicted by the evidence. Media providers today provide a diversity of news, information, and entertainment unimaginable even a generation ago. And the claim that "all media is the same today" is without merit. While it may have been easier to make such an argument in the distant past, such a thesis finds no empirical support today.

Still, some critics of media decontrol take this anti-capitalist attitude to an entirely different level by arguing that despite the obvious presence of so many new media technologies and outlets, citizens are still being force-fed news and entertainment by a handful of media barons hell-bent on controlling everything the public sees and hears. Chapter 5 will make it clear that such conspiratorial "puppet-master" theories of media manipulation are entirely without merit.

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[297] Medimark Research, *National Public Radio Stations Audiences, Profile 2003* (Washington, D.C.: National Public Radio, July 2003), p. 3, http://www.prss.org/docs/online_profile_2003.pdf.
[298] Ibid., p. 11.

CHAPTER FOUR
DEMOCRACY, CIVIC DISCOURSE, AND THE "PUBLIC INTREST"

Upon release of the new media ownership rules in June of 2003, FCC Commissioner Abernathy noted that "Democracy and civic discourse were not dead in America when there were only three to four stations in most markets in the 1960s and 1970s, and they will surely not be dead in this century when there are, at a minimum, four to six independent broadcasters in most markets, plus hundreds of cable channels and unlimited Internet voices."[299] Nonetheless, if we are to believe critics of media deregulation, even the slightest loosening of federal ownership controls will have a detrimental impact on the health of our democracy. Indeed, much of the rhetoric employed by the media critics focuses on ambiguous talk about why regulation is needed to foster greater "deliberative democracy" or "civic discourse."[300]

While most media critics toss around these terms without ever defining exactly what they mean by them, McChesney's and Bagdikian's work do the best job of clarifying what these regulatory advocates really have in mind. Their books offer a polemical call to arms to alter media structures in the name of advancing social change or "social justice."[301] "Media reform cannot win without widespread support and such support needs to be organized as part of a broad anti-corporate, pro-democracy movement," says McChesney.[302] He speaks of the need "to rip the veil off [corporate] power, and to work so that social decision making and power may be made as enlightened and as egalitarian as possible."[303] To McChesney "democracy" or the "democratizing" of our society means, "that we should create mechanisms that make the rule of the many possible. This means among other things… reducing social inequality and establishing a media system that serves the entire population and that promotes democratic rule. In structural terms, that means a media system that has a significant nonprofit and noncommercial component."[304] And along with co-author John Nichols, he asserts that "The need to promote an understanding of the urgency to assert *public control over the media* has never been greater."[305]

According to Bagdikian's reading of U.S. history and the Constitution, "citizens are presumed to have the sole right to determine the shape of their democracy. But concentrated media power in news and commentary, together

[299] Statement of Commissioner Kathleen Abernathy, p. 3.
[300] For example, in a September 2004 *Washington Post* editorial, Frank A. Blethen opens with the warning that "Democracy is in crisis—not in far parts of the world but right here in the United States." Because media mergers apparently pose the "greatest threat" to our democratic process. See Frank A. Blethen, "Stop the Media Mergers," *The Washington Post*, September 19, 2004, p. B7.
[301] Bagdikian, pp. ix, 257; McChesney, *Rich Media*, p. xxxi.
[302] McChesney, *Rich Media*, p. xxxiv.
[303] Ibid., p. 3.
[304] Ibid., pp. 5-6.
[305] Nichols and McChesney, p. 34 (emphasis added).

with corporate political contributions in general, have diminished the influence of voters over which issues and candidates will be offered on Election Day."[306] McChesney concurs: "[E]ven if one accepts that the U.S. economy functions more effectively with a highly commercialized media system, it does not mean that democracy is best served by such a system. In liberal and democratic theory, democracy must be in the driver's seat, and the type of media system and economy that develop can be justified only to the extent that they best meet the needs of the people, not vice versa."[307] In other words, according to Bagdikian and McChesney, "democracy" trumps property rights, private decision-making and voluntary contracts.

Democracy Does Not Mean Untrammeled Majoritarianism

A more faithful reading of the Constitution, however, would reveal that the Constitution did not endorse such an absolutist view of unfettered, majoritarian democracy. Fearing the tyranny of untrammeled majoritarianism, James Madison and the other Founding Fathers took great pains to guard the rights of those in the minority. Madison made this clear in a 1788 letter to Thomas Jefferson:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.[308]

"Madison understood, perhaps better than some others of the period, that majorities were as great a danger to the rights retained by the people as a corrupt minority or individual despot," notes Randy E. Barnett, author of *Restoring the Lost Constitution*.[309] "When power is given to majorities operating through their representatives, the interest of majorities becomes a greater source of danger to minorities and to the general welfare under popular government than under other forms. So great a danger needs to be carefully guarded against."[310]

And, indeed, this danger was guarded against in the Constitution and the Bill of Rights. Madison and the Founders took steps to ensure that the inalienable rights and liberties retained by the people were not open to casual abuse by the majority. Property rights and personal liberties could not just be legislated away by an act of Congress. Our government would not be a majoritarian, popular democracy, but rather a constitutional republic, a government of limited,

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[306] Bagdikian, p. 10.
[307] McChesney, *The Problem of the Media*, p. 23.
[308] Letter from James Madison to Thomas Jefferson, October 17, 1788.
[309] Randy E. Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004), p. 33.
[310] Ibid.

enumerated powers.[311] Thus, majoritarian democracy can't just trump liberty or property rights all the time.

No doubt, media critics like McChesney and Bagdikian would argue that either Madison and the Founder's vision for a constitutional republic is utterly out of vogue or was long ago superseded by their "anything goes" school of popular democracy thinking. Sadly, in some ways, they would be correct. Since the Progressive Era, and especially thanks to the jurisprudence of the New Deal era, liberty, property rights, and constitutionally limited government have often given way to exactly the sort of untrammeled majoritarian rule that Madison and the Founders so rightly feared. But the Madisonian vision of things has not completely disappeared from our landscape, nor should it. Thanks to the existence of the Bill of Rights and other clearly enumerated limits on the power of government over the people, even the most fanatical "progressive" thinkers and jurists have not been able to completely eviscerate the limits set forth in the Constitution protecting the rights of those in the minority.

The right to speak freely and the right not to have one's home subjected to random search by authorities are still honored today for the most part. Although Congress sometimes acts as if it has the authority to dispense with such constitutionally protected rights, the courts typically check such efforts by striking down over-zealous legislative encroachments on our liberties. A reinvigoration of the founding vision of a limited, constitutional republic is still possible. And such an effort would begin with an explicit rejection of the corrupt view of democracy set forth by McChesney and Bagdikian, which argues that untrammeled majoritarianism should be the central organizing principle of society.

Likewise, their belief that "democracy" means that government can ordain any ownership structures or business arrangements it wishes is fundamentally at odds with the principles of limited government and a free society. Competitive Enterprise Institute vice president Clyde Wayne Crews has argued, "Government restrictions on ownership are themselves censorship, and a coercive impediment to speech and a threat to democracy and wide scale expression."[312] Diversity and democracy do not spring from government control of the means of speech, but from a separation between government and media.[313]

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[311] See generally Roger Pilon, "Madison's Constitutional Vision: The Legacy of Enumerated Powers," in John Samples, ed., *James Madison and the Future of Limited Government* (Washington, D.C.: Cato Institute, 2002), pp. 25-41.

[312] Clyde Wayne Crews, "A Defense of Media Monopoly," *Communications Lawyer*, vol. 23, no. 1, Fall 2003, p. 14, http://www.cato.org/research/articles/crews-fall2003.pdf.

[313] Adam Thierer and Clyde Wayne Crews Jr., "The Media Ownership Debate: Who Are the Real Media Masters?" Cato Institute *TechKnowledge* no. 51, June 16, 2003, http://www.cato.org/tech/tk/030616-tk.html.

Civic Discourse and a "Duty to Discuss"

Many media critics also refer to the importance of media ownership regulation as a method of preserving a "forum for democratic discourse" or assert that media outlets have an affirmative "duty to discuss" issues of public import. On a related note, critics argue that because of various supposed media failings, citizens are not watching or listening to enough of the right content in order to effectively participate in a deliberative democracy. The work of Cooper and Sunstein, in particular, stress these civic discourse or "duty to discuss" arguments at great length.[314]

But what does all this mean? Again, much of this anti-media agenda smacks of a seeming desire for publicly enforced cultural elitism. The critics make a series of assertions and assumptions about the way the media should operate that at root assume that the citizenry essentially don't know what's good for them. The critics pretend to know what constitutes a healthy or appropriate level of "democratic discourse" but, perhaps unsurprisingly, never get around to defining it. Instead they simply offer up amorphous terminology that offers us no objective guidelines or measurements. Cooper even admits as much but then goes on to say that it makes little difference: "The fact that [these goals] are less precise, however, does not make them less important. The fact that the goal is intangible should not prevent us from striving to define it with greater vigor."[315]

To supposedly help define these terms with "greater vigor," Cooper approvingly cites the words of Cass Sunstein: "The objective of the forum for democratic discourse is to promote a 'robust exchange of views' that produces 'participation, understanding and truth.'"[316] Again, this is of little help since those concepts merely provoke grand metaphysical debates (i.e., What is "truth"? What is "understanding?") In the absence of any greater level of specificity, one is forced to conclude that Cooper and Sunstein are asking government to "strive to define" this concept in accordance with what *they* think the media marketplace should look like. As Chapter 5 discusses in much greater detail, this sort of thinking drives much of the debate over media ownership regulation.

Civic discourse is the byproduct of a free and open society unconstrained by government restrictions on media structures or content.

In reality, however, the critics will never be able to define these terms or concepts with "greater vigor" because, as James T. Hamilton aptly notes, "The social sciences currently do not provide good answers on how much news is

314 See Cooper, *Media Ownership and Democracy*; Sunstein.
315 Cooper, p. 13.
316 Ibid.

enough to make democracy's delegated decision making work well."[317] Moreover, the fundamental problem with this thinking is that it assumes that civil or democratic discourse only develops when government mandates it. In reality, civic discourse is the byproduct of a free and open society unconstrained by government restrictions on media structures or content. Chapter 6 critiques such thinking and the corrupt "media access" interpretation of the First Amendment that underlies this notion that the state must compel speech.

The Critics' Contradictory Views on Diversity and Democracy

Additionally, as even Sunstein's recent work illustrates, there are good reasons to question the assumption that there is too little democratic discourse today, or less than there was in the past. As Chapter 1 mentions, some psychologists and sociologists fear that the fracturing or segmentation of media may be having a profound sociological impact on our society by destroying the opportunity to have the same number of "shared experiences" we might have had in the past. Cass Sunstein's recent book, *Republic.com*, has stressed this point and applied it to the Internet in particular.[318] The Internet, says Sunstein, is destroying opportunities for a mingling of the masses and shared social experiences. The hyper-customization that specialized websites and online filtering technologies (blogs, portals, list servs, political websites, etc.) offer Americans is allowing citizens to create the equivalent of a highly personalized news retrieval service that Sunstein contemptuously refers to as "The Daily Me." Actually, the phrase "The Daily Me" was coined by Nicholas Negroponte in his brilliant 1995 book *Being Digital* to describe what he argued would be a liberating break from traditional, force-fed media.[319] But what irks Sunstein about "The Daily Me" is not the amazing new array of choices that the Internet offers Americans, it's that the Internet and all these new technologies allow citizens to filter information and tailor their viewing or listening choices to their own needs or desires.

While Negroponte welcomes that filtering and specialization function, Sunstein lives in fear of it, believing that it creates extreme social isolation and alienation. He argues that unrestrained individual choice is dangerous and must be checked or countered in the interests of "citizenship" and "democracy." In his own words: "A system of limitless individual choices, with respect to communications, is not necessarily in the interest of citizenship and self-government. Democratic efforts to reduce the resulting problems ought not be rejected in freedom's name."[320]

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[317] James T. Hamilton, *All the News That's Fit to Sell: How the Market Transforms Information into News* (Princeton, NJ: Princeton University Press, 2004), p. 3.
[318] Sunstein.
[319] Nicholas Negroponte, *Being Digital* (New York: Knopf, 1995), pp. 152-156.
[320] Sunstein, p. 123.

Sunstein's argument is highly elitist. To Sunstein, the Internet is apparently guilty of the unspeakable crime of offering citizens and consumers too much of exactly what they want. But, according to his logic, the masses just don't know what's good for them so they must be aggressively encouraged (and potentially forced) to listen to things that others—namely, Sunstein—want them to hear. As Thomas Krattenmaker and Lucas Powe, authors of *Regulating Broadcast Programming*, argue "Sunstein has dressed an older argument in more modern garb, but at bottom it is the persistent belief of some elites that if only they could gain power, they would use it to impose their views of the good on those who are less enlightened."[321]

How does Sunstein suggest his vision could be translated into public policy? He suggests that mandatory "electronic sidewalks" might be part of the answer, where government imposes the equivalent of "must carry" mandates on popular or partisan websites forcing them to carry links to opposing viewpoints.[322] Thus, the National Rifle Association (NRA) would be forced to run links or editorials by anti-gun groups, and abortion rights groups would be forced to contend with links and editorials from pro-life organizations. Apparently in Sunstein's world, people have many rights, but one of them, it seems, is not the right to be left alone or seek out the opinions one desires.

Problems abound with such a philosophical paradigm. It is impossible to know how or where to draw regulatory lines under such a regime. For example, under Sunstein's model, how many links to opposing viewpoints should citizens be subjected to on the Net before he believes they are fully assimilated into democratic society? If the NRA only offered one or two links to anti-gun groups, would that be enough? Moreover, it remains unclear who in government is really in the a position to dictate or referee all of this and how they will go about enforcing it. Whether any of this will pass constitutional muster is another question not explored by Sunstein.

Beyond these practical issues, however, Sunstein isn't even correct in his argument that the Internet is potentially detrimental to democracy or communities. To the contrary, argues Richard Saul Wurman, "[T]he Digital Age hasn't mechanized humanity and isolated people in a sterile world of machines. Rather, it has expanded our sense of community."[323] Wurman notes that the Net has allowed humans from across the globe to band together into new communities and communicate in ways previously unthinkable. He also cites a recent study by the Pew Internet & American Life Project that found that millions of Americans have used e-mail to communicate regularly with distant family

[321] Krattenmaker and Powe, p. 315.
[322] Ibid., p. 189.
[323] Wurman, p. 1.

members or local community groups.[324] "That hardly suggests a loss of community or family bonds," argues Wurman.[325] Similarly, a recent *Wall Street Journal* article entitled "Blogs Can Tie Families," discussed how many families are using blogs to "keep up on each other's doings" sharing stories, photos, movies, and other developments.[326]

Regardless, the important point to take away from the preceding discussion is that media critics appear to be making two contradictory arguments in their work regarding media diversity and democracy:

(1) On one hand, they fear that media is too concentrated and *too few* choices are available for citizens. Modern media is not diverse enough to serve the interests of the citizenry, prohibiting them from fully participating in a deliberative democracy.

(2) On the other hand, *too many* choices are available to us, so much so that we no longer have the ability to share common thoughts or feelings about what we see and hear in the media marketplace. This hinders our ability as citizens to fully participate in a deliberative democracy.

Well, which is it? It certainly can't be both!

Too Much Media Diversity for Deliberative Democracy?

Interestingly, Sunstein's concerns were echoed in a June 2004 front page *Washington Post* story in which numerous political campaign advisers and experts bemoaned, as the headline implied, that "Voters Are Harder to Reach As Media Outlets Multiply."[327] The story even included the subtitle: "Campaigns Struggle against Media Overload." *Post* staff writer Paul Fahri argued, "With TV viewers dispersed among more than 100 channels, with more ads of every kind cluttering the air and more ways to zap them at home, it has become tougher each year for politicians to reach the masses with their messages. … Each message channel is more crowded, and hence less effective, in reaching people than in preceding elections."[328]

One of the political campaign experts quoted in the article was Bill Carrick, a media adviser for former Democratic presidential candidate Richard Gephardt. Commenting on how the rise of the Internet, cable, and other newer forms of

[324] Pew Internet & American Life Project, *Online Communities: Networks That Nurture Long-Distance Relationships and Local Ties*, October 31, 2001, http://www.pewinternet.org/PPF/r/47/report_display.asp.
[325] Ibid.
[326] Kevin J. Delaney, "Blogs Can Tie Families, and These Services Will Get You Started," *The Wall Street Journal*, June 10, 2004, p. B1.
[327] Fahri.
[328] Ibid.

media have impacted the political campaign process, Carrick complained, "The danger for democracy is that we're losing the universal campfire," in which all voters see and hear common ads and messages from candidates over common media sources.[329] Similarly, Kathleen Hall Jamieson, Dean of the Annenberg School of Journalism at the University of Pennsylvania, told the *Post*, "You can't force people to pay attention to news and [political advertising], of course, but there was a great benefit to being exposed to it. You picked up the message of what was important, or at least what the national conversation was, even if you weren't paying very close attention.... We're losing that common understanding."[330]

Arguments such as those made by Jamieson and Carrick bemoaning the loss of a "common understanding" or "universal campfire" in American society implicitly argue that the nation was somehow better off when only a handful of media outlets provided most of the political campaign and issue coverage. But it is hard to believe that America really had a more "deliberative democracy" when the "Big 3" television networks dominated the nightly news and a handful of other media sources fed us all our political information. Again, Jonathan Knee's comments are worth repeating on this point: "One cannot help wonder what 'golden age' of news and information those who would block further industry consolidation are attempting to return us to. If it is the era when almost all Americans got their news from a combination of Walter Cronkite, David Brinkley, Howard K. Smith, and their local monopoly paper, then theirs is "an argument for homogeneity hiding under the pretext of diversity."[331]

For example, in an apparent plea for sympathy, Dan Rather, Cronkite's successor as anchor of the *CBS Evening News*, told *Brill's Content* in 1998, "Fear runs in every newsroom in the country right now, a lot of different fears, but one fear is common—the fear that if we don't do it, somebody else will, and when they do it, they will get a few more readers, a few more listeners, a few more viewers than we do."[332] Rather's paranoia sounds like exactly the sort of thing society should hope for in media: enough competition to keep all outlets and journalists on their toes. Apparently, however, he sees this as a negative development.

Rather is probably is even more negative about these new sources of competition in light of the role Internet blogs played in exposing his reliance on questionable documents about President Bush's military service record during a September 2004 report on *60 Minutes II*.[333] Even if Rather isn't down on the bloggers, some of his former colleagues certainly are. During an October 2004

[329] Quoted in Ibid.
[330] Quoted in Ibid.
[331] Knee, p. 20.
[332] "Dan Rather on Fear, Money, and the News," *Brill's Content*, October 1998, p. 117.
[333] See Adam Thierer, "The 'Rathergate' Incident: Remembering Why Separation of Press and State Is Vital," Cato Institute *TechKnowledge*, no. 88, September 30, 2004, http://www.cato.org/tech/tk/040930-tk-2.html.

panel discussion sponsored by *The New Yorker* magazine, network anchors Tom Brokaw, formerly of NBC, and Peter Jennings of ABC lambasted Internet bloggers and Web-based journalism in general. Brokaw said the blogging response to the CBS documents scandal was tantamount to a "political jihad."[334] Similarly, Walter Cronkite has called Internet bloggers "scandalmongers."[335] Such generalizations indicate that old media personalities are so paranoid about new media pressures and competition that they must engage in unfair demagoguery of their own. While there certainly is plenty of demagoguery and scandal-mongering taking place online, that cannot serve as an indictment of all the wonderful new sources of journalism that blogging and online reporting have put at our disposal as a society.

Returning to the relationship between media homogeneity and politics, we can concede that the more homogenous media environment of Cronkite's era may have made it easier for campaigns and politicians to deliver messages to a mass audience. But that does not mean homogeneity was necessarily better for our democracy.

First, new media technologies and options have empowered the citizenry and enabled them to become more involved in politics than ever before and ensured that their opinions are heard in ways unimaginable a few decades ago. E-mail letter campaigns, political blogs and websites, homemade press releases and newsletters, and cable and satellite programs and advertising are just a few of the innovative new ways citizens can communicate their opinions and desires today that they could not in the past. Mark Rozell reports that the typical House of Representative office receives 8,000 e-mails per month and Senate offices receive an average of 55,000.[336] And then, of course, there is C-SPAN, which "has provided a different means by which citizens can keep in touch with their government," that wasn't even available 20 years ago.[337]

New media technologies and options have empowered the citizenry and enabled them to become more involved in politics than ever before and ensured that their opinions are heard in ways unimaginable a few decades ago.

Second, with so many new media outlets available to citizens, politicians have been forced to better tailor their message to niche audiences that may have been largely ignored in the past. Political consultant Tad Devine, an adviser to president candidate John Kerry in 2004, notes that, "If you want to reach a

[334] Quoted in Marguerite Reardon, "Network TV Bigwigs Rail against Bloggers," *CNet News.com*, October 4, 2004, http://news.com.com/Network+TV+bigwigs+rail+against+bloggers/2100-1025_3-5395911.html.
[335] Quoted in Ibid.
[336] Rozell, "Congress and the Media,", p. 37.
[337] Ibid., p. 36.

certain demographic group, you can do it now in a way you couldn't before," he says.[338]

Indeed, as Howard Dean's run for the Democratic presidential nomination in 2004 illustrated, new media outlets, and the Internet in particular, offer candidates exciting new methods of organizing grassroots campaigns and mobilizing voters. Dean tapped the power of the Internet, e-mail, and blogs to mount an impressive run for the nomination that few could have predicted. Joe Trippi, the "Dean for America" campaign manager and the person largely credited for impressing upon Dean the importance of these new media tools, released a book in late 2004 entitled *The Revolution Will Not Be Televised: Democracy, The Internet and the Overthrow of Everything*, in which he argued: "Dean for America is a sneak preview of coming attractions—the interplay between these new technologies and our old institutions. The end result will be massive communities completely redefining our politics, our commerce, our government, and the entire public fabric of our culture."[339]

Even if it is true that politicians and journalists might have to work harder in this new media environment to contend with "information overload" and the multiplicity of media outlets, these developments should be celebrated as way to expand "deliberative democracy" and bring new voices and issues into the political system. David Westin, president of ABC News, sums up: "We've moved from a media oligarchy to a media democracy. We've gone from a few programmers in New York and Los Angeles deciding what people will watch to the people themselves voting with their remote controls every night, really every minute, on what they want."[340] Instead of celebrating this consumer empowerment and increased choice, however, many media critics bemoan these developments as somehow being detrimental to our collective "shared experiences."

Was Democracy Really Stronger in the Past?

There are also good reasons to question the assumption that there is less deliberation and citizen participation in our democracy today than in the past. Unfortunately, there are few reliable or objective measures of citizen deliberation and participation in the political process throughout history. Some critics would point to declining voter turnout in elections as proof positive that citizen participation has shrunk in recent decades. But recent political science research

338 Fahri.
339 Trippi, p. 203.
340 David Westin, "Don't Blame the Networks," *The Washington Post*, September 30, 2004, p. A19. Westin continues: "[W]hether you see it as good or bad, [these changes are] surely inevitable. Technology made possible the choice that we're confronting, and the American people have resoundingly voted in favor of that choice. We're not going back, any more than we're returning to a time before automobiles or electricity."

has revealed that the much-discussed "vanishing voter" problem is based on faulty methodology.[341]

In an important recent study entitled "The Myth of the Vanishing Voter," political scientists Michael P. McDonald and Samuel L. Popkin argued that "the apparent decline in voter participation in national elections since 1972 is an illusion," because the results have been calculated using the entire voting-age population in the denominator.[342] This has produced aberrant results since the entire voting-age population includes millions of individuals who are ineligible to vote, such as recent immigrants and convicted felons. Once adjusted to account for this, electoral turnout rates are much higher than typically reported and fairly flat overall in the post-World War II period.

Similar problems exist with historical data, especially the results of elections that took place prior to 1900. The government's most authoritative handbook for historical statistics is the Census Bureau's *Historical Statistics of the United States: Colonial Times to 1970*, a publication that contains statistics on politics and elections going back to the 1820s.[343] Noted political scientist Walter Dean Burnham of MIT. was asked by the Census Bureau to assist their effort to cobble together historical data on presidential elections running back to 1824.

The data generally show electoral turnout rates in presidential elections over 70 percent, much higher than today. But in the explanatory notes that accompany the data, Burnham stressed that the data were riddled with methodological problems that called the veracity of the turnout results into question. For example, on the numerator side of the equation, Burnham bemoaned compilation or reporting errors, lost or sporadic records or returns, and blatant electoral fraud or ballot-box stuffing. Problems also exist with the denominator side of the equation, namely, the same overestimation of the eligible population base that McDonald and Popkin argue still plagues calculations today. Excluding immigrant and noneligible voters from the calculation today has proven quite difficult, but a century ago it was an even bigger challenge. Moreover, prior to 1870, many citizens younger than 21 were included in certain state estimates because of the calculating procedures some states used. Finally, because women and blacks were not allowed to vote in the nineteenth century, it makes electoral turnout results and historical comparisons suspect. There are many other problems associated with these electoral results, but the point has been made: these numbers are far from reliable. Overall, Burnham was forced to conclude that given these many statistical deficiencies, "it is not possible to

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341 John Samples, "Three Myths about Voter Turnout in the United States," Cato Institute *Policy Analysis*, no. 524, September 14, 2004, http://www.cato.org/pubs/pas/pa-524es.html.

342 Michael P. McDonald and Samuel L. Popkin, "The Myth of the Vanishing Voter," *American Political Science Review*, vol. 95, no. 4, December 2001, p. 963.

343 "Government: Elections and Politics," *Historical Statistics of the United States: Colonial Times to 1970* (Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, Bicentennial Edition, September 1975), Part II, Chapter Y, pp. 1067-72.

achieve precise statements of the eligible electorate."[344] Thus, it may be impossible to make sweeping conclusions about "deliberative democracy" in the past versus today. Any media critic who proposes to do so bears the burden of mustering at least some shred of evidence that points to any empirical basis for such a conclusion.

In the absence of conclusive empirical data to measure the nature and extent of "deliberative democracy" throughout American history, however, from what we know of our nation's historical development it would be difficult to conclude that democracy was somehow more alive and well in the past than it is today. Prior to the Industrial Revolution, America's agrarian economy meant most citizens toiled in the fields for long hours, many of them too far removed from major town centers to ever consider engaging in serious political discussions with anyone outside their family or nearby friends.

Thus, we again witness the power of myth in this debate. Many of today's media critics are fond of employing "public square" or "town hall" analogies when discussing how to improve modern media. They wax nostalgic about the days when we supposedly all hung out in town parks, read the same city newspapers, got our news from common media sources, and then all ran to the polls in large numbers to cast our votes for public officials after a great deal of discussion and debate. Somehow, democracy was more alive back in this mythical time, since citizens were more likely to have unexpected encounters while also sharing a range of common experiences. Today, by contrast, media critics argue, in McChesney's words, that there has been an "implosion of public life."[345]

Again, there is far more myth than reality in this Norman Rockwell view of America's past. The reality is that only a small handful of Americans were able to gain access to *any* sort of media in past centuries. Most citizens likely did not have the luxury of participating actively in "town square" debates because they lacked the leisure time or economic means to do so. Moreover, is "town square" news really good news? It conjures up the image of young town criers standing on a soapbox shouting sensational headlines to passersby. Is this the ideal to which modern media should really aspire? (Obviously, many modern "tabloid" newspapers take this approach, but they are widely ridiculed for doing so).

But it is important not to lose sight of the real issue here. It has already been shown that there are far more media outlets and options today than in the past. Combine this with changing lifestyles and the rise of more leisure time for most Americans and citizens can now participate more actively than ever before in the political process if they so desire. To the extent there ever has existed a "Golden Age" of

To the extent there ever has existed a "Golden Age" of media and deliberative democracy, it is today, not some mythical time in the past.

[344] Quoted in: Ibid, p. 1067.
[345] McChesney, *Rich Media*, p. 3.

media and deliberative democracy, it is today, not some mythical time in the past.[346]

Finally, some critics admit that there are more media outlets today but stubbornly insist that at least the limited media outlets in the past were of higher quality or at least more objective than the press of today. That rose-colored view of the old days is simply more mythology. The next chapter addresses it in detail.

“The Public Interest?” and a Concentration of Public Tastes

As mentioned in the previous chapter, many media critics seem to long for a world in which everything looks or sounds like a combination of National Public Radio, the Public Broadcasting Service, and public access cable channels. But regardless of the quality of such networks or the programming on them, the viewing and listening public have voted with their eyes and ears year after year and shown a clear desire for programming of a commercial nature. While critics might lament what they regard as the “low-brow” entertainment or supposedly lower-quality news seen or heard on some commercial networks or stations, there is no denying that citizens tune into commercial programs in very large numbers. Whether media critics care to admit it or not, supply and demand are at work in America’s media marketplace and citizens vote with their eyes and ears all the time. Compaine focuses on the real issue here, choice:

> If large segments of the public choose to watch, read, or listen to content from a relatively small number of media companies, that should not distract policy makers from the key word there: *choose*.… It may indeed be that at any given moment 80 percent of the audience is viewing or reading or listening to something from the 10 largest media players. But that does not mean it is the same 80 percent all the time, or that it is cause for concern.[347]

Similarly, in her powerful separate statement accompanying the release of the media ownership rules, FCC Commissioner Kathleen Abernathy argued:

> Those opposing today’s order have also emphasized that four companies air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines. Given these other viewing options, I can only presume that this means that Americans are watching these providers because they prefer their content,

[346] Krattenmaker and Powe note that media critics are always fond of arguing that “The grass is always greener elsewhere. No matter what stations do, they could do it better—as they used to, assuming the Golden Era was in fact golden.” Krattenmaker and Powe, *Regulating Broadcast Programming*, p. 308.
[347] Compaine, “Domination Fantasies,” p. 33.

> not because they lack alternatives. It would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming. By the same token, concerns about the degradation of broadcast content do not justify government manipulation of consumer choice. "Degradation" is just an elitist way of saying programming that one does not like. While I support adopting prophylactic regulations in the interest of ensuring that consumers have ample choice — as we have done today — I refuse to pour one ounce of cement to support a structure that dictates to the American people what they should watch, listen to, or think.[348]

If the result of consumer choice is that millions of Americans flock to certain news and entertainment providers over others, should government really be taking steps to counter the popularity of those programs or the providers of those programs? Such a proposal smacks of blatantly elitist thinking, yet for decades this thinking has driven mass media policy in America. As former FCC Chairman Newton Minow argued during his famous 1961 "vast wasteland" speech to the National Association of Broadcasters, "I am here to uphold and protect the public interest. What do we mean by 'the public interest'? Some say the public interest is merely what interests the public. I disagree."[349]

Minow's statement is a rare admission by a policymaker that what really lies behind "public interest regulation" of media in this country is a series of elitist assumptions about the way the world should work. The "public interest" has been primarily based on what policymakers—legislators in Congress and regulators at the FCC—believe is in the public's best interest. The public has had very little to say about it and has not benefited from Washington-led, top-down interpretations of what supposedly lies in "the public interest," since, more often than not, public interest regulation has been used to limit, not expand, media choices.[350]

Nonetheless, many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of media (and broadcasting in particular) toward a nobler end; a sort of *noblesse oblige* for the communications age. At times, their rhetoric takes on a fairy-tale quality as lawmakers and regulators speak of the public interest in reverential and fantastic terms, all the while deftly evading any attempt to define the term. For example, while testifying before the Senate Commerce Committee in January of 2003, FCC Commissioner Michael Copps paid homage to the public interest standard:

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348 Statement of Commissioner Kathleen Q. Abernathy, p. 3.

349 Newton Minow, "Television and the Public Interest," *Speech to the National Association of Broadcasters,* May 9, 1961, http://www.americanrhetoric.com/speeches/newtonminow.htm.

350 See generally Randolph J. May, "The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?" *Federal Communications Law Journal*, vol. 53, pp. 427-68.

> At all times, I strive to maintain my commitment to the public interest. As public servants, we must put the public interest front and center. It is at the core of my own philosophy of government…. The public interest is the prism through which we should always look as we make our decisions. My question to visitors to my office who are advocating for specific policy changes is always: how does what you want the Commission to do serve the public interest? It is my lodestar.[351]

If the result of consumer choice is that millions of Americans flock to certain news and entertainment providers over others, should government really be taking steps to counter the popularity of those programs or the providers of those programs?

That is nice rhetoric, but Commissioner Copps' public interest "lodestar" ultimately provides little practical guidance. Public interest proponents assume that their values or objectives—which, in their opinion, are consistent with the needs and desires of the public—should ultimately triumph within the public policy arena. Consequently, volumes of government rules and speeches have been penned advocating a large and expanding role for government in terms of defining "the public interest." But while public interest regulation has been the cornerstone of communications and media policy since the 1930s, enabling regulators to control industry structures and outcomes, at no time during these seven decades of public interest regulation has the term been defined.

Even today, efforts are made to read new powers or responsibilities into the term in order to provide regulators with the flexibility to control modern electronic media (i.e., broadcasting, cable) in ways they could not control older print media (i.e., newspaper, magazines).[352] For example, during the late 1990s, the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters was formed by an executive order of President Bill Clinton to investigate expanding public interest obligations for television broadcasters.[353] The group came up with numerous recommendations to impose new burdens on broadcasters, even as broadcasters struggle to remain competitive with other media outlets that are not burdened with similar public interest regulatory requirements.

Similarly, many academics have advocated a much broader role for government in dictating media outcomes. For example, even though they admit

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[351] *Statement of Michael J. Copps before the Senate Committee on Commerce, Science, and Transportation*, January 14, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A4.doc.

[352] See John Samples and Adam D. Thierer, "Why Subsidize the Soapbox? The McCain Free Airtime Proposal and the Future of Broadcasting," Cato Institute *Policy Analysis* no. 480, August 6, 2003, http://www.cato.org/pubs/pas/pa-480es.html.

[353] *Charting the Digital Broadcasting Future*, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, December 18, 1998, http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf.

that "One of the dangers in evaluating the media in a public interest framework is that it can easily take on an elitist tone," David Croteau and William Hoynes go on to pen an entire book dedicated to expanding public interest regulation of media.[354] Among the expanded public interest responsibilities Croteau and Hoynes and other regulatory supporters endorse: public service announcements; expanding coverage of political campaigns, debates and developments; free (or lower-cost) campaign ad time; expanded "educational" or cultural programming (especially aimed at children); and expanded coverage of community affairs.[355]

The problem with all this "public interest" thinking, as Compaine aptly notes, is that "In democracies, there is no universal 'public interest.' Rather there are numerous and changing 'interested publics.'"[356] The viewing public is likely to have a broad array of interests and desires that cannot be adequately gauged by what five FCC commissioners believe to be in the public interest. Nobel Prize-winning economist Ronald Coase argued 40 years ago that "The phrase… lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation."[357] That is still true today. The public interest standard is not really a "standard" at all since it has no fixed meaning; the definition of the phrase has shifted with the political winds to suit the whims of those in power at any given time.[358]

354 Croteau and Hoynes, p. 151.

355 Also see David Bollier, *In Search of the Public Interest in the New Media Environment*, A Report of the Aspen Institute Forum on Communications and Society (Washington, D.C.: Aspen Institute, 2002), http://www.aspeninstitute.org/AspenInstitute/files/CCLIBRARYFILES/filename/0000000100/publicinterest.pdf.

356 Benjamin M. Compaine, "The Myths of Encroaching Global Media Ownership," http://www1.primushost.com/~bcompain/WOTM/media_myths.htm.

357 Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics*, vol. 2, October 1959, pp. 8-9. Even Taylor and Ornstein admit that, "neither in the 1927 [Radio] Act nor in the 1934 [Communications] Act, nor subsequently, did Congress define clearly what actions by broadcasters would represent managing their stations in the public interest." Paul Taylor and Norman Ornstein, "A Broadcast Spectrum Fee for Campaign Finance Reform," New America Foundation, *Spectrum Series Working Paper* #4, June 2002, p. 6.

358 See Adam D. Thierer, "Is the Public Served by the Public Interest Standard?" *The Freeman*, vol. 46, no. 9, September 1996, pp.618-20. Likewise, Lawrence J. White has noted that, "The 'public interest' is a vague, ill-defined concept. Under the 'public interest' banner the Congress and the FCC have established far too many protectionist, anticompetitive, anti-innovative, inflexible, output-limiting regulatory regimes and unnecessarily infringed on the First Amendment rights of broadcasters." See Lawrence J. White, "Spectrum for Sale," *The Milken Institute Review*, 2nd Quarter, 2001, p. 31. Also see William T. Mayton, "The Illegitimacy of the Public Interest Standard at the FCC," *Emory Law Journal*, vol. 38, 1989, p. 719.

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Nonetheless, while the public has very little say about what lies in the politically defined public interest standard, they have made it clear what they demand in the actual media marketplace. Broadcast commercial television and radio, for example, *do* reflect what the public really wants to see and hear. Broadcasters know their audience even though some cultural elitists might not want to acknowledge that fact. Television and radio are probably the most thoroughly surveyed and studied communications and entertainment mediums that have ever existed. Generally speaking, viewers are being offered the programming they desire whether policymakers care to admit it.

Thus, what "public interest" proponents are perhaps afraid to answer is: Does the public really want to watch more campaign commercials, politically oriented programming and debates, and other "civic-minded" programming, or would they rather tune into a rerun of *American Idol*, *Fear Factor*, or *Survivor*? "Viewers vary in the degree that they want to know about the details of politics and government," argues Hamilton.[359] Indeed, given the choice, many if not most viewers will opt for what many public interest regulatory supporters would consider to be "low-brow" entertainment offerings over the supposedly culturally enriching programming that policymakers seek to mandate. Public interest supporters will bemoan the lack of civic spirit and claim that this represents the end of democracy as we know it. Yet, this choice may be a rational reaction by a citizenry that is simply tired of cliché-ridden political advertising or campaign debates that feature a tiresome series of prepackaged one-liners and sound bites. "The notion that Americans are starving for more exposure to politics is cockeyed," argues *Boston Globe* columnist Jeff Jacoby. "Americans have never been less interested in campaigns and elections. The more they see and hear of political candidates, the more their interest wanes. And yet some people are convinced Americans would be better off if only there were more politics on TV."[360]

In fact, recent surveys conducted by the polling firm Wirthlin Worldwide reveal that the public is apparently getting all the political campaign coverage they desire. Four separate Wirthlin polls conducted during the 2000 and 2004 election cycles asked voters: "How do you feel about the amount of time broadcast TV and radio stations spend reporting on political campaigns, debates and the issues? Is it too little time, too much time or about the right time?" As Table 13 reveals, voters overwhelmingly responded that broadcasters provider "about the right amount" or "too much" campaign coverage during both election cycles. On average, across the four polls, 86 percent of respondents said they

[359] Hamilton, p. 14.

[360] Jeff Jacoby, "More Politics on TV? No Thanks," *Boston Globe*, January 31, 2000, p. A17. Also see Steve Chapman, "You *Will* Watch the Debates," *Chicago Tribune*, October 15, 2000, p. 19.

thought broadcasters provided "too much" or "about the right amount" of campaign coverage. Less than 10 percent thought there was "too little" coverage.

Table 13: Citizens Not Clamoring for More Coverage of Elections
(Poll question: "How do you feel about the amount of time broadcast TV and radio stations spend reporting on political campaigns, debates and the issues?)

Percentage Who Answered…	**February 2000 (New Hampshire Primary)**	**March 2000 (Super Tuesday Primaries)**	**October 2002 (General Primary)**	**October 2004 (General Primary)**
About the right amount of time	50	39	40	47
Too much time	37	46	43	42
Too little time	6	7	15	10
No answer	7	7	2	1

Source: Wirthlin Worldwide.

In sum, no matter how hard regulators try to regulate, or legislators try to legislate it into being, there is just no way for them to create "perfect" media outcomes in terms of the product mix that the public ultimately chooses.[361] People will flock to the media they desire (potentially in very large numbers) even when policymakers believe citizens should be watching or listening to something that is supposedly more enriching or enlightening. Media economist Bruce Owen, author of *Television Economics* and *The Internet Challenge to Television*, has summarized this point quite nicely:

> In this world of potential plenty, there might well be quite a lot of "concentration," attributable to consumer demand. That is, the nature of popular culture is that it is popular, which means lots of people pay attention to its components, whatever they may happen to be. Some channels would be quite popular, and people who are good at anticipating (or creating) popular cultural icons would try to keep them so, and be well rewarded for success. Their success, of course, has a feedback effect on itself, because what is successful is often popular. In the end, a relatively few channels, and owners, would have the lion's share of the audience and the revenues.
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> … If the prediction is correct, it follows that we would experience a degree of media "concentration" even in the absence of anything that might be called a market imperfection or entry barrier. Such media concentration simply would be the result of demand-side forces combined with the likely natural distribution of specialized entrepreneurial skills relevant to any distribution of tastes, rather than supply-side monopolies or government giveaways of our treasured national resource, the spectrum. Equality of *access* to transmission resources would not produce equality of *result* in audience size and revenue, just as competition among book publishers produces a few best sellers and thousands of failures.[362]

[361] "Competition in the provision of broadcast programs does not produce perfect results, but there is no evidence that regulation does so either." Krattenmaker and Powe, p. 286.
[362] Bruce Owen, "Confusing Success with Access," p. 8.

Is Media Too "Special" to Allow Decontrol?

Finally, many proponents of structural ownership rules also argue that information and media industries are "special" or "unique" and must be regulated differently than other economic sectors or technologies in our society. According to Croteau and Hoynes, because "media are resources for citizens with important informational, educational, and integrative functions," they must be treated differently by lawmakers.[363] This theme appears throughout the work of almost all of the media critics.

Another variation on this theme is that certain media segments or outlets are too important to allow decontrol. In particular, traditional television and radio broadcasting outlets are considered more important than other media outlets because so many citizens have relied on them in the past, and because those outlets are supposedly more "scarce" than other types of media. Critics also argue that because broadcasters are licensed operators their spectrum "belongs to the American people" and, therefore, policymakers can apply special rules to those providers. Cooper argues, "Broadcast licenses are severely limited compared to the number of people who would like to be broadcasters. Because electronic voices are so scarce and powerful, the licenses have been subject to limits and obligations."[364]

As Chapter 6 discusses in greater detail, such "scarcity rationales" have been used in communications policy circles for decades to justify regulation of electronic media, but these theories are radically misguided. The problem with the logic behind them is that everything in this world is scarce in some sense, but it does not justify government control or regulation of all resources. Indeed, the best way to alleviate scarcity and ensure that more options develop in any market is to use markets and property rights to assign and allocate those resources. The "scarcity rationale" for unique regulation of electronic media has long since been debunked by numerous legal scholars and economists on these grounds. Finally, the recent history of the American media marketplace has been one of amazing innovation and intense competition. As was illustrated above, there are more media outlets and opportunities for the citizenry today than ever before. Thus, the scarcity rationale has absolutely no validity in today's media marketplace with its cornucopia of choices.

Moreover, to the extent information and media are "special" or "unique," that is all the more reason why government should not be allowed to control them in the first place. As the next chapter discusses in detail, if the First Amendment is to retain its force as a bulwark against government control of speech and content, media critics must not be allowed to convert assertions of the importance of media into an ambitious regulatory agenda for certain media outlets. "Government regulators are… in no position to judge the correct balance

[363] Croteau and Hoynes, p. 26.
[364] Cooper, *Media Ownership and Democracy*, p. 3.

of views and content, and reregulating content would drive viewers to alternative media," editorializes *The Economist* magazine.[365]

As the next chapter will show, what's really going on here is that media critics are looking for more say over media outputs and outcomes; they want to retilt or reorient media in their preferred direction. Thus, they concoct elaborate "public interest" rationales for government to control media outcomes so they do not have to admit their true intent. As *Wall Street Journal* columnist Holman Jenkins argues, "There's almost a neurosis at work here: What critics want is Big Brother, but saying so would be the ultimate political incorrectness, so they phrase their agenda as *fear of Big Brother*, usually bearing a resemblance to Rupert Murdoch."[366]

To the extent information and media are "special" or "unique," that is all the more reason why government should not be allowed to control them in the first place.

Finally, equally as misguided is the related argument that some forms of media (namely, television and radio broadcasting) are more important than others and must be regulated differently because of their pervasiveness or importance to society. Some media critics claim that broadcast media should be regulated differently simply because citizens spend more time watching or listening to those outlets than to others. But such a quantitative argument fails for a simple reason, as was aptly noted in a joint filing to the FCC by Fox, NBC and Viacom:

> [T]he fact that consumers may spend more time with traditional media, because they are slower and more cumbersome means of obtaining information or expressing viewpoints, cannot obscure the ultimate, indisputable conclusion that consumers are utilizing all of the many options available to them and that each media source is equally important from the standpoint of democratic discourse and the marketplace of ideas.[367]

Thus, amorphous arguments about media (or certain media outlets) being "too special" or "too important" to be left to operate freely, fail on many grounds.

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365 "The Politics of Big Media," *The Economist*, September 11, 2003, http://www.economist.com/displayStory.cfm?Story_id=2054729.

366 Holman W. Jenkins Jr., "Comcast-Disney: One Big Talking Point?" *The Wall Street Journal*, February 18, 2004, p. A15. (emphasis in original).

367 *Comments of Fox Entertainment Group, National Broadcasting Company / Telemundo, and Viacom*, "In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996," MB Docket No. 02-277, February 3, 2003, p. 15, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513406776.

CHAPTER FIVE
MEDIA QUALITY, "BIAS," AND THE THIRD-PERSON-EFFECT HYPOTHESIS

Another very popular myth circulated by the critics of media liberalization is that the loosening of ownership controls will lead to more media "bias" and lower-quality journalism and entertainment. Critics claim that ownership rules are needed to preserve the quality of journalism, especially the diversity of local reporting, and to preserve the "watchdog role" of competing media outlets.[368]

In a similar vein, they argue that ownership controls will help ensure informative, high-quality content, which media outlets will not provide absent government intervention. "Corporate control and hypercommercialism are having what may be their most devastating effects in the realm of journalism," argue Nichols and McChesney.[369] They accuse the entire U.S. media of underreporting major conspiracies or government failures, including the 2000 presidential election vote-counting controversy, the war against terrorism and the conflict with Iraq.[370] More generally, media critics like Bagdikian often assert that today's media glorifies "individual human tragedies" and ignores "problems that afflict millions."[371]

Much of the conspiratorial thinking in the work of media critics owes its intellectual genesis to the work of Noam Chomsky, famed leftist activist and professor of linguistics at MIT. Chomsky has developed the most elaborate and eloquent theories of media manipulation based on his "propaganda model" of how various forces in our democracy "manufacture consent" for purposes of "controlling the public mind."[372]

In sum, media critics are working on the assumption that the market has failed miserably to provide citizens what they want—or, rather, what they need—and that structural ownership controls provide an indirect way of improving the quality of media or countering supposed bias. Alternatively, critics go further and claim that there is no market at work here at all; instead, we are all merely pawns in a propaganda game led by forces inside government and corporate media. Structural regulation, therefore, becomes a way to dismantle "the system" and overthrow the supposed media overlords.

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[368] See Cooper, p. 6.
[369] Nichols and. McChesney, p. 57-58.
[370] They go so far as to claim that "The most essential debate—the one about whether to go to war—never really occurred in Congress or the media." Ibid., p. 65.
[371] Bagdikian bemoans the fact that "national stories about a distant kidnapped child can continue on front pages and television news for weeks" while "the unrelenting tragedy that more than 41 million Americans remain without health care" or "that deterioration threatens Planet Earth as a human habitat" or "the growth of nuclear weaponry" in his view all go unreported. Bagdikian, p. 20.
[372] See Chomsky, pp. 18-23.

This chapter will argue that these assertions are outrageous and that what is really going on here is that media critics are attempting to impose their own values and preferences on the public through government control of media.

News and Quality

Government should have no say over, or even attempt to influence the quality of, journalism in America. If the First Amendment is to retain it's force and meaning as a restraint on government control of the media, we must ensure that government has no ability to directly or indirectly influence journalism. Even indirect controls on underlying ownership structures raise troubling questions about the impact of government on free speech and expression. If government were to propose a limit on the number of printing presses that *The New York Times* or *The Washington Post* could own and use to communicate with the public, those companies and most citizens would likely be outraged. But, in essence, that is what existing media ownership rules do to other media companies. The rules essentially limit the size of the soapbox a speaker can build to speak to the American public.

Media ownership rules essentially limit the size of the soapbox a speaker can build to speak to the American public.

It is a dubious proposition that structural ownership rules improve the quality of newscasts or journalism, but these are inherently subjective determinations best left to private parties to judge anyway. What is a "high-quality newscast"? What counts as "good reporting"? And who should decide these things? While some media critics will lambaste the current state of American journalism for supposed low-brow reporting and "info-tainment," others can just as easily praise the sheer diversity of formats and breadth of issue coverage available today. While *60 Minutes* was once considered the king of investigative tele-journalism or newsmagazines, it now competes against the likes of *20/20, Dateline NBC, Primetime Thursday, 48 Hours Investigates, 60 Minutes II,* and countless similar news stations and programs on cable and satellite TV. A September 2002 FCC study confirmed that television newsmagazines have rapidly grown in popularity in recent years. "In fact, for the first time in 1998 this genre overtook movies as the third most prominent genre in prime time [after dramas and comedies]."[373] And plenty of newspaper, magazine, and Internet sources of news still exist that produce what most citizens would regard as high-quality journalism. Again, the key question here is: Do citizens have more choices today than they did in the past? They do, and that means that even when they do not like some of what they see or hear, there's always another option out there to which they can turn. The bottom line: while there may be more superficial or sensational news programs today, there are also more high-quality programs and newscasts than ever before.

[373] Einstein, p. 35.

Critics of media ownership liberalization also believe that allowing media companies to bring multiple outlets under a single corporate umbrella will negatively impact the quality of modern journalism. This theory of media control states that when a given owner is allowed to control several media affiliates, its "corporate line" will dominate all those outlets. Bad news for the company will be quashed; journalistic and editorial independence will be disallowed. Moreover, the owner will supposedly force the same undifferentiated fare on all its affiliates.[374]

But media critics offer little evidence that this sort of phenomenon is taking place today on a widespread basis today, and with good reason: It is not in the best interest of a media owner to demand that all affiliates or subsidiaries take the same line on all their programs. For example, if the executives of Time Warner told all their subsidiaries to only run segments of a particular slant or perspective, those subsidiaries would end up being in competition with one another for the same advertising dollars and viewer base. It makes more sense for media providers like Time Warner to diversify their programs and offer subscribers many different types of programs and viewpoints. No doubt, on occasion, some media owners or branch directors may attempt to influence other news or entertainment divisions. But there is no evidence to suggest that this is a systemic problem that riddles *all* media outlets today. And as the historical discussion below notes, compared to the past—with its partisan newspapers and media owners who attempted to use them to advance personal agendas—today's media outlets are remarkably independent and objective.

Conspiratorial Puppet-Master Theories of Media Control and "Bias"

Just for the sake of argument, what if there were something to this "puppet-master" theory of media control? Could it be the case that a handful of corporate media executives sit in their offices each day attempting to influence the thoughts of the American public by dictating what each of their news divisions reports? Nichols and McChesney take this notion to truly absurd extremes when they argue in their book *Our Media, Not Theirs*: "No wonder conspiracy theories are so popular in America; no wonder, when the makers of James Bond movies look for believable villains these days, they eschew Eurotrash bad guys for more credibly threatening villains such as the Rupert Murdoch-like media baron of 1997's *Tomorrow Never Dies*."[375]

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[374] See, for example, Croteau and Hoynes, pp. 162-82
[375] Nichols and McChesney, p. 31.

The James Bond "bad guy" analogy is appropriate in this case because such conspiratorial puppet-master theories of media control are almost as preposterous as some of the plots found in the Bond movies. If there really do exist CEOs or corporate boards that are hell-bent on dictating opinions from above, they will have a very tough time of it given the sheer scope of the task at hand. Trying to control the thoughts and actions of the thousands of reporters and editors who work under them will be difficult enough considering how independently minded most journalists are. Even if that worked, however, it would quickly become apparent to others in competing media outlets what was going on and such overt bias would be reported and roundly ridiculed.

If there really do exist CEOs or corporate boards that are so hell-bent on dictating opinions from above, they will have a very tough time of it given the sheer scope of the task at hand.

Moreover, while some media critics like to paint the American citizenry as naïve fools that lap up every word delivered to them, the reality is that Americans tend to be far more savvy about such things and are quick (perhaps too quick at times) to identify potential bias in media. As Mary Stuckey rightly notes, "Blaming the media [for political ills] is also tantamount to arguing the voters are somehow dupes, incapable of recognizing the efforts to manipulate them that are so obvious to scholars and to media critics. This argument gives us the image of voters trapped in a 'news prison,' unable to break free (or able to do so only with great difficulty) of the ideological and informational chains with which the media bind them."[376] Again, regardless of what some media critics believe, voters and viewers are smarter than that.

For example, in October of 2004, just weeks before the national elections, news leaked out that the Sinclair Broadcasting Group, owner of 62 TV stations nationwide, planned to televise a documentary critical of Democratic presidential candidate John Kerry's Vietnam war record.[377] Some politicians blasted Sinclair's decision and questioned whether the program represented "news" at all. Two prominent Democratic members of Congress called it "propaganda" meant to influence the outcome of the presidential election and asked the FCC to consider revoking Sinclair's licenses.[378]

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[376] Stuckey, pp. 168-69.

[377] Elizabeth Jensen, "Conservative TV Group to Air Anti-Kerry Film," *Los Angeles Times*, October 9, 2004, http://www.latimes.com/news/printedition/la-na-sinclair9oct09,1,3472617.story.

[378] Representatives John Dingell and Ed Markey, the ranking Democrats on the House Commerce Committee and Telecommunications Subcommittee, respectively, sent a letter to FCC Chairman Michael Powell asking for a formal investigation into Sinclair's activities and asked whether a licensed television broadcaster had the right to air "a one-sided propaganda piece against one of the Presidential candidates two weeks before the election is held." The letter went on to repeatedly raise the threat of license revocation. Quoted in Bill McConnell, "Hill Dems Push Sinclair Probe," *Broadcasting & Cable*, October 13, 2004.

But if it was Sinclair's intent to influence the election, they certainly faced an uphill battle. The firm's 62 television stations only represented 3.6 percent of all U.S. television stations. In terms of aggregate audience reach, those stations only reached 24 percent of all U.S. households. Thus, even though Sinclair is one of the largest station owners in America, it is still difficult to imagine how the firm could sway enough voters by airing just one documentary to less than a quarter of U.S. homes.

While it should certainly be Sinclair's right to broadcast whatever they wish, whenever they wish—even "propaganda" in the days leading up to an election—the firm's editorial judgment in this case can certainly be called into question. Airing alternative viewpoints and granting attacked parties equal response time is generally a better editorial or programming policy than one-sided reporting. (To their credit, Sinclair apparently did invite Sen. Kerry to respond to the accusations made in the documentary.) Of course, regardless of a media outlet's intentions, politicians should never be able to dictate the editorial content of what is reported.[379]

But the real story in the Sinclair episode was just how effectively the market responded to the incident. The firm lost major advertising support, was threatened with a class-action shareholder lawsuit, and came under intense scrutiny from other media outlets, especially online sources.[380] In the days following the announcement that Sinclair intended to air the documentary, a "StopSinclair.org" website including an online petition was up and running, and the firm's stock price tumbled by more than 15 percent.[381] A Legg Mason analyst estimated that the firm would lose $5 million in sales due to the uproar.[382] Combined with the unwanted political scrutiny the documentary invited, this pressure from private forces eventually forced the firm to cancel the documentary and instead broadcast a program about the interaction of media and politics.[383] In essence, Sinclair aired a documentary about the documentary!

If Sinclair's actions in this case represented the sort of "media manipulation" that critics have warned us of, then it seems we have little to fear, especially considering the market response to the episode. If there is anything to be feared from such cases it is politicians attempting to define "news," or using

[379] See generally "Sinclair and Watergate," *The Wall Street Journal*, October 22, 2004, p. A16.

[380] See Bill Carter, "Risks Seen for TV Chain Showing Film about Kerry," *The New York Times*, October 18, 2004, p. C1.

[381] Noted in Frank Ahrens and Howard Kurtz, "Anti-Kerry Film Won't Be Aired," *The Washington Post*, October 20, 2004, p. A7. Also see Jerry Knight, "TV Company Takes a Hit on Stock, Ethics," *The Washington Post*, October 25, 2004, p. E1. The article also quotes a representative of Legg Mason saying, "It's not yet clear that the company has completely defused the backlash from bloggers, boycotts and concerned shareholders."

[382] Noted in Bill McConnell and John Higgins, "Sinclair under Siege," *Broadcasting & Cable*, October 25, 2004, p. 21.

[383] See Howard Kurtz, "Softened Strike: Sinclair Program Critical of Kerry, But More Balanced," *The Washington Post*, October 23, 2004, p. C1.

the "propaganda" label to subtly dissuade media outlets from airing programs of their choosing. Whether it represented "news" or "propaganda," the documentary was provocative programming that encouraged a great deal of debate even though it was never aired in full. Regardless of Sinclair's intentions in planning to broadcast the documentary, the airing of such controversial viewpoints is something that we should generally encourage. And plenty of opportunities and outlets exist for dissenters to be heard.

But what about bias more generally throughout the media? Does it exist? Is it such a bad thing? While bias certainly does exist throughout media—as it always has—media today is still more objective than the press of the past. Moreover, the bias that we do see is likely a product of increasing competition for viewers and listeners, who in many cases desire more opinionated journalism.

Is it really so horrible for media providers to have a slight tilt to their programs? Americans are generally able to identify such biases, and many of us actually desire such bias in the programs we consume.

Consider the cases of two polar opposites on the media spectrum—Fox News Channel and PBS outlets. It has long been argued that PBS has a liberal tint while Fox News is more conservative in its general worldview. There are programs and viewpoints that air on both of those networks that call such assertions into question, but generally speaking, it is widely acknowledged that there is some truth to these claims. But what of it? Is it really so horrible for media providers to have a slight tilt to their programs? Americans are generally able to identify such biases, and many of us actually desire such bias in the programs we consume. "[I]s anybody really confused by which approach to journalism Bill O'Reilly takes?" asks Jonathan Knee. "[I]f the goal is really to increase diversity of thought, the public is better served by filling the news outlets with provocative analysis and opinion-encouraging debate rather than more of the same 'just the facts ma'am journalism,'" he concludes.[384]

To the extent that there really is increased bias in media today, it could be viewed as a response to heightened competitive pressures in a constantly expanding media marketplace. With the media landscape crowded with myriad voices and viewpoints, many media outlets, programs, and personalities are now forced to appeal to a particular niche audience to generate attention, ratings, and advertisers. In this sense, "Media bias is product differentiation," says James Hamilton.[385]

For example, in response to what they view as the conservative bias heard on talk radio, a group of liberal entertainers and financiers started the Air America Radio network in the Spring of 2004 and started broadcasting in

[384] Knee, p. 20.

[385] Quoted in Robert J. Samuelson, "Bull Market for Media Bias," *The Washington Post*, June 23, 2004, p. A21; also see Hamilton, pp. 103-11.

America's top radio markets.[386] And in May of 2004, former Vice President and Democratic presidential candidate Al Gore launched a new cable news channel to presumably offer more left-of-center viewpoints and programming.[387] Contrary to what many media critics contend, there are good reasons to believe that many citizens enjoy such partisan programs and will desire more of them in the future. While some citizens will seek out what they regard as completely independent, objective journalism, many others flock to media providers who offer a particular slant to their reporting. As George Mason University economist Tyler Cowen explains:

> Why do the major media sometimes slant to the left, and other times slant to the right? The answer is simple: viewers want them to. We look to the media for entertainment, drama, and titillation before objectivity. Journalists, to get ahead, must produce marketable stories with some kind of emotional slant, which typically will have broader political implications. The result: it looks like media bias when in fact journalists, operating in a highly competitive environment, are simply doing their best to attract an audience.[388]

The emerging online media marketplace—especially blogs—reflect this reality. "Readers are hungry for bias," argues Henry Copeland, CEO of Blogads, which sells advertising space on popular blogs.[389] Copeland notes that bloggers "have no hidden agenda," and "They wear their biases on their sleeves," making it easy for readers to find many distinct viewpoints among the estimated 10 million blogs already online.[390]

With all the alternative news options available, it is unnecessary to get worked up about the political leanings or bias of any one particular program, paper, network, station, channel or website.

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386 John Eggerton, "Liberals Tune in Radio," *Broadcasting & Cable*, March 15, 2004, p. 20; Howard Kurtz, "Left on Your Dial: Radio Network Sets March Debut," *The Washington Post*, March 11, 2004, p. C1.

387 Ken Belson, "Gore and Investors Buy Cable News Channel," *The New York Times*, May 5, 2004, p. A20.

388 Tyler Cowen, "Media Bias Comes from Viewers Like You," *Tech Central Station*, November 11, 2003, http://www.techcentralstation.com/111103A.html. He continues: "In sum, media bias may not be as harmful as many people think. It is perhaps sad that we do not look much to the news for objective information, but this same fact limits the damage that slanted coverage can cause. Keep in mind that many definitions of media bias mean that the media think one way, and the citizenry thinks another way. So clearly the media have not succeeded in forcing us all into the same mold. We should resist the temptation to think that the TV screen, or the newspaper Op-Ed page, or the blogosphere for that matter, is the critical arena deciding the fate of the world. In reality, these media are a sideshow to the more general human preoccupation with stories. We use TV and other media to suit our personal purposes, not vice versa. No, the media are not fair, but they are unfair in ways different than you might imagine. They are unfair because you, collectively, as viewers, want them to be unfair."

389 Mark Baard, "The News, One Entry at a Time," *Wired News*, April 19, 2004, http://www.wired.com/news/culture/0,1284,63120,00.html?tw=wn_tophead_5.

390 Ibid.

Again, with all these alternative news options available, it is unnecessary to get worked up about the political leanings or bias of any one particular program, paper, network, station, channel or website. There remain plenty of more objective, independent-minded journalistic sources to look to when citizens demand them. Even if media were hopelessly biased today and many citizens were seeking out overly partisan sources of news, it is not the role of government to "retilt" the bias in one direction or the other. This issue will be discussed below, but first it is important to evaluate claims that media are more biased today than in the past.

Media Bias Yesterday and Today

While some critics admit that there are more media outlets today they still stubbornly insist that at least the limited media outlets of the past were of better quality or more objective. This is simply more mythology. Indeed, as Duke University law professor David L. Lange has pointed out, "the press of [the colonial period] was almost entirely partisan. The economic and political circumstances in which publishers found themselves invited, if they did not require, an alliance between each publisher and some patron in power."[391]

The patronage-dependent and highly partisan press of the colonial era started passing out of existence in the middle of the nineteenth century. But it was not replaced by an entirely bias-free press system. While the new "penny-press" operators discovered that mass circulation revenues could be a profitable alternative to patronage, they also realized that a certain amount of sensationalism or even overt bias was necessary to attract audiences. As Lange concludes of this era: "When the smoke cleared, the partisan journals were gone, and their places were taken by a new institution comprised of major business enterprises. With all its faults the new press might have been defended as having contributed indirectly to a somewhat greater sophistication and awareness among the masses. It certainly could not be described as balanced."[392]

Nonetheless, it was more objective than the press of the colonial period. Hamilton concludes that "objective news coverage is a commercial product that emerges from market forces."[393] His research reveals that in the late nineteenth century the rise of advertising, innovations in printing technology that increased the importance of scale economies, and demographic change in the size of the reading public made it more profitable for newspapers to adopt more "objective" or nonpartisan approaches to public affairs.[394]

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[391] David L. Lange, "The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," *North Carolina Law Review*, vol. 52, no. 1, 1973, pp. 13, http://eprints.law.duke.edu/archive/00000074/01/52_N._C._L._Rev._1_(1973-1974).pdf.

[392] Lange, pp. 13-14.

[393] Hamilton, p. 37.

[394] Hamilton, p. 25.

But, again, the partisan press wasn't entirely dead. It had merely been liberated from the control and influence of a few individual benefactors and transferred to individual owners or families, some of whom used their outlets to advance their personal agendas. Indeed, some powerful newspaper chain owners of the late nineteenth and early twentieth centuries—most notably William Randolph Hearst and Joseph Pulitzer—began using their newspapers to advance very specific political causes. Pulitzer's papers stressed sensationalism in tone and look, giving rise to the era of "yellow journalism," which journalism historians Michael Emery and Edwin Emery describe as a "shrieking, gaudy, sensation-loving, devil-may-care kind of journalism."[395] "Pulitzer's striking success had demonstrated once again the appeal of the age-old technique of sensation," they argue.[396]

Hearst took yellow journalism to the extreme with his *San Francisco Examiner* and *New York Journal*. Like Pulitzer and other yellow journalists, he used his papers to whip up support for the Spanish-American War; some historians even claim Hearst had a guiding hand in bringing the war about. At the height of the conflict, Hearst's *New York Journal* actually ran a headline asking, "How do you like the *Journal*'s war?"[397] As Knee concludes of Hearst in particular and the era in general, "The original patriarchs of the great newspaper dynasties of the late nineteenth and early twentieth centuries… did not share contemporary notions of journalistic objectivity and independence…. Instead of conducting impartial investigative reporting, those papers' writers and editors worked with an explicit political agenda."[398]

Lange thus concludes, "The concepts of fairness and responsibility that we now routinely demand of the media did not emerge until [the twentieth century]."[399] Indeed, it was well into the twentieth century before most daily papers and then journalism schools began stressing the notions of fairness, objectivity, and independence that we understand today. This brief survey makes it clear that it is impossible to conclude that media is more biased today than it was in past centuries. Indeed, compared to the media of colonial times and the yellow journalism period, the media of recent decades has exhibited far more independence and objectivity than ever before.

This is not to say that media bias is an unambiguous journalistic evil to be avoided at all cost.[400] Indeed, Pulitzer's emphasis on sensationalism and social

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[395] Michael Emery and Edwin Emery, *The Press and America: An Interpretive History of the Mass Media* (Englewood Cliffs, NJ: Prentice Hall, 6th Ed., 1988), p. 227.
[396] Ibid.
[397] Ibid., p. 241.
[398] Knee, p. 17.
[399] Lange, p. 14.
[400] See, for example, Philip Meyer's fascinating discussion of why journalistic objectivity is not necessarily as important as other values. Philip Meyer, "As Media Audience Fragments, Trust—Not Objectivity—Is What Matters," *USA Today*, September 20, 2004, p. 23A, http://www.usatoday.com/news/opinion/editorials/2004-09-19-opcom_x.htm.

crusades in reporting enabled his papers to gain profitability and stay afloat. It also helped them expand coverage of many important events and issues of the day and gave rise to greater editorializing and special interest reporting. Yellow journalism may have had its warts, but it also had the net effect of expanding coverage and encouraging greater news competition.

Much the same might be said of some of the news and reporting we see in modern media; there's both good and bad reporting, and bias might appear in the equation in either regard. Indeed, it could very well be the case, as Hamilton argues, that increased competition might actually increase the incidence of media bias and "soft news" given that many in society actually demand more of both. Nonetheless, Hamilton also concludes that "Consumers today can choose from a wide spectrum of news products that vary in their emphasis of news about government and politics (hard news) or human interest and entertainment figures (soft news)."[401] In a sense, therefore, the concern about how biased news is today is largely irrelevant given all the options at our disposal.

But just for the sake of argument, it's worth asking a question historians, journalism professors, and media critics have debated for decades: Can "biased" news be good news? If some in the press take up certain causes, or choose to associate themselves with various political figures or viewpoints, is this really an unmitigated evil that must be countered by government action? Buried in the FCC's media ownership rulemaking was a particularly interesting dissertation that addressed this issue at length:

> [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.
>
> Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do so, nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing. The media are not common carriers of speech. It is hardly an indictment of the media to point out that an outlet may be a proponent of an identifiable editorial viewpoint. And the fact that such viewpoints may reflect popular opinion or have widespread appeal is not a ground for government intervention in the marketplace of ideas. Indeed, the very notion of a marketplace of ideas presupposes that some ideas will attract a following and achieve wide currency, while others quietly recede having failed to conquer the hearts and minds of the citizenry. Our Constitution

[401] Hamilton, p. 4.

> forbids government action to pre-select the winners in this competition or to guarantee the circulation of any particular set of ideas.[402]

This gets it exactly right. Government policies should remain neutral with regard to media preferences and practices. Even if a handful of media outlets exhibit what many regard as overt bias, the First Amendment commands that government not pass laws aimed at influencing press behavior or content. (The next chapter addresses these issues in greater detail). Luckily, however, we now live in a world of media abundance that renders much of this debate meaningless and unnecessary.

[402] FCC, *Media Ownership Proceeding*, pp. 141-2.

<u>In Focus</u>: *Rooting Out "Bias" and Bad Reporting Yesterday and Today: The "Blood Brothers" Story*

In May 1964, *The New York Times* published two front-page articles by Junius Griffin entitled "Anti-White Harlem Gang Reported to Number 400"[403] and "Harlem: The Tension Underneath."[404] The articles documented the activities of a new gang "whose training and indoctrination (came) from dissident members of the Black Muslim sect."[405] Members of the gang, who apparently called themselves the "Blood Brothers," had reportedly already murdered four white people and were supposedly being investigated for other murders. According to Griffin's articles, the Blood Brothers were "taught to steal" and be "drug pushers" and had "infiltrated many community centers."[406] Griffin stressed how the group was influenced by Malcolm X but that they broke with him "because they considered him too mild in his denunciation of whites."[407]

Griffin's story was intriguing and quite disturbing, but it is also unlikely that any of it was true. At the time, the N.A.A.C.P. strongly protested the report and encouraged the *Times* or anyone else in the press or government to prove the allegations were true.[408] No proof was forthcoming from Griffin, the *Times*, or anyone else. Sadly, apparently no other media outlets that existed at the time challenged the report's authenticity either. Of course, few media institutions at the time sought to challenge the hegemony of the *Times*, America's most respect paper of record.

Subsequent analysis by others in the press and in academia failed to uncover any evidence of the Blood Brothers gang.[409] "[T]he story is now generally acknowledged to be wildly exaggerated, if not completely made up," notes Seth Mnookin, author of *Hard News: The Scandals at* The New York Times *and Their Meaning for American Media*.[410] To this day, however, *The New York Times* has never printed a retraction or an apology for the incident.

Compare that incident with recent reporting scandals, such as the Jayson Blair scandal at the *Times*, or the Rathergate and Sinclair incidents discussed above. In each of those cases, media bias, or the misreporting of important facts, was identified very quickly by independent parties. Within a matter of months, for example, *The New York Times* had published a two-page, 7,100-word analysis of the Blair scandal documenting the mistakes editors at the paper had made. Another two-page story totaling almost 6,500 words was printed the same day to correct all the errors in Blair's past reports.[411] This was an unprecedented *mea culpa* in the history of journalism.

Similarly, in the Rathergate incident, questions about the authenticity of the documents in question got out in a matter of hours, with bloggers quickly identifying flaws in CBS' analysis. And Sinclair's announcement that it intended to run an anti-John Kerry documentary just weeks before the presidential election led to an immediate backlash.

The moral of the story: We have more checks and balances in journalism today than ever before. If the Blood Brothers story were printed today, it would be subjected to intense, instantaneous fact-checking and critiques. It is likely it would have been retracted by the *Times* within weeks (perhaps even days) of its publication. Just 40 years ago, however, the story not only ran, but it was never retracted or corrected.

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[403] Junius Griffin, "Anti-White Harlem Gang Reported to Number 400," *The New York Times*, May 6, 1964, p. A1.
[404] Junius Griffin, "Harlem: The Tension Underneath," *The New York Times*, May 29, 1964, p. A1.
[405] Griffin, "Anti-White Harlem Gang Reported to Number 400."
[406] Griffin, "Anti-White Harlem Gang Reported to Number 400."
[407] Griffin, "Anti-White Harlem Gang Reported to Number 400."
[408] See Junius Griffin, "N.A.A.C.P. Assails Reports of Gang," *The New York Times*, May 11, 1964.
[409] Robert H. Phelps, "Friendship, Feuds and Betrayal in the Newsroom," *Nieman Reports*, Spring 2004, pp. 70-72.
[410] Seth Mnookin, *Hard News: The Scandals at* The New York Times *and Their Meaning for American Media* (New York: Random House, 2004), p.147.
[411] Ibid., p. 173.

Quality and Entertainment

Government should also have no say over, or even attempt to influence the quality of, media or entertainment in America. Again, the First Amendment should guide policymakers here as well. Legislators or regulators should not be in a position to use the machinery of government to dictate speech standards or cultural norms. Even indirect media ownership controls can influence what media sources produce.

Moreover, the underlying assumption behind this claim is that government could actually improve the quality of media and entertainment. But legislators or regulators should not sit as a veritable Ministry of Culture and decide by what measure or standard "quality" should be evaluated, or what constitutes "informative, high-quality content." Under the public interest regulatory regime of the past, the FCC *did* try to sit in judgment of television and radio broadcasters in exactly this way. In particular, for many years lawmakers attempted to use the so-called Fairness Doctrine to dictate media outcomes. The disturbing results of this policy are discussed in the case study in the following chapter.

> ***Legislators or regulators should not sit as a veritable Ministry of Culture and decide by what measure or standard "quality" should be evaluated, or what constitutes "informative, high-quality content."***

Again, much of the argument about the quality of modern media entertainment reeks of blatant cultural elitism and an attempt by interests on both the political left and right to control the nature of programming. Stanford law professor Lawrence Lessig would have us believe that "Today, another Norman Lear with another *All in the Family* would find that he had the choice either to make the show less edgy or to be fired."[412] Such a statement doesn't even pass the laugh test. Indeed, if we are to believe many of the other critics of media today, quite the opposite is the case. For many media critics—especially conservative critics—today's network dramas and sitcoms are *too* "edgy" and push the envelope in ways few would have imagined or tolerated when *All in the Family* hit the airwaves in the early 1970s.

NYPD Blue, ER, *Seinfeld* and *Will and Grace* are just a few examples of provocative network programs that call Lessig's thesis into question. And even if there were any merit to Lessig's argument about *All in the Family* not being able to find a home on network television today, there are countless cable networks would be happy to take the show. *The Sopranos, The Shield, South Park, Sex and the City,* and *Queer as Folk* would seem to prove that point quite well. Indeed, broadcast television networks would likely develop even "edgier" programs if not for fear of government censorship and indecency fines. (The same goes for broadcast radio stations, which are losing popular personalities such as Howard Stern due to concerns about increased "indecency" regulation

[412] Lawrence Lessig, p. 165.

and fines).[413] This is one reason cable television programmers are receiving so much praise and audience attention.[414] The FCC has documented just how significant this threat has become for traditional broadcasters:

- In 2002, for the first time, cable television collectively had more prime-time viewers on average over the course of the year than broadcast programming (48 percent share for cable programming versus 46 percent share for broadcast programming). In June 2002, cable networks for the very first time collectively exceeded a 50 percent share for the month (54 percent prime-time share), while the broadcast networks collectively registered a 38 percent prime-time share.[415] Since then, the FCC reports that broadcast television stations' audience shares have continued to fall.[416]

- The September 2002 season premier of The Sopranos on HBO was the most-watched original program in HBO history and was the week's most-watched program among adults aged 18 to 34. The season finale in December was the top-rated program that night with 12.5 million viewers, besting the 12.2 million viewers for the top-rated network broadcast program.[417]

- Furthermore, HBO had more 2002 Golden Globe nominations than any other network (broadcast and nonbroadcast alike), and went on to win twice as many awards as any other network. At the 2002 Emmys, HBO won 24 awards, tying NBC for the most awards given to a single network.[418]

And things just keep getting better for HBO, which received a record 124 Emmy nominations in 2003, double the number of its closest competitor, NBC.[419] The headline of a July 2003 *New York Times* article on the network's

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[413] See Sarah McBride and Joe Flint, "Radio's Stern Leaps to Satellite in $500 Million Deal," *The Wall Street Journal*, October 7, 2004, p. A1; Bill Carter and Jeff Leeds, "Howard Stern Signs Rich Deal in Jump to Satellite Radio," *The New York Times*, October 7, 2004, p. A1; Howard Kurtz and Frank Aherns, "Sirius Lands a Big Dog: Howard Stern," *The Washington Post*, October 7, 2004, p. A1; Sabrina Tavernise, "The Broad Reach of Satellite Radio," *The New York Times*, October 4, 2004, p. C8; Peter Johnson, "Sacked, and Now They're Back," *USA Today*, October 4, 2004, p. 5D.

[414] A recent *Broadcasting & Cable* cover story noted: "Broadcast sitcoms are in the dark ages. Viewers want comedy with an edge. Welcome to cable's comic renaissance." Allison Romano and Paige Albiniak, "Funny Business," *Broadcasting & Cable*, June 28, 2004, p. 1.

[415] FCC, *Media Ownership Proceeding*, p. 48.

[416] FCC, *Eleventh Annual Video Competition Report*, p. 50.

[417] Ibid.

[418] Ibid.

[419] Tom Shales, a media critic for *The Washington Post*, has referred to HBO as "America's most prestigious TV channel." Tom Shales, "The Mobster Shift," *The Washington Post*, March 7, 2004, p. N1.

achievements said it all: "The Emmys: HBO Batters Broadcasters."[420] In fact, that story noted that HBO's domination is now so complete that it controls *entire categories* at the Emmys, such as best writing for a drama series, in which every nominee was an HBO program.[421] Overall, cable's dominance of traditional broadcasting now seems irreversible. "Unless something extraordinary happens, broadcast networks will not win another sweeps," argues Jack Wakshlag of Turner.[422]

In sum, cutting-edge or provocative programming can find a home on numerous media outlets today. There is no evidence to support the notion that such programs or viewpoints are being crowded out in today's marketplace due to ownership patterns. And critics fail miserably in their attempt to paint modern media as hopelessly biased and their contention that only a single "corporate line" dictates all news and entertainment programs.

Third-Person Effect Hypothesis as an Explanation

Nonetheless, media critics on both the political left and right continue to propagate puppet-master theories of media manipulation. What explains this strange phenomenon? One powerful theory comes from the field of human psychology. "The first accusation of press bias surely flew the day the first newspaper was published," notes press critic and *Slate* editor-at-large Jack Shafer.[423] Indeed, media critics abound in our society and they always have. Today, whether discussing news or entertainment, what is most ironic about the strange alliance of interests who oppose media decontrol is how they all simultaneously claim that media are too homogenous for their tastes and all controlled by the same corporate masters.

For example, liberals argue there is too much right-wing bias in media today, and cite conservative radio talk show host Rush Limbaugh or cable TV's Fox News Channel as evidence.[424] Eric Alterman, a media columnist for *The Nation* magazine, wrote an entire book in 2003 entitled *What Liberal Media?* to respond to accusations by conservatives of liberal bias in media.[425] And in November 2002, former Senate Minority Leader Tom Daschle (D-S.D.) went so

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[420] Bill Carter, "The Emmys: HBO Batters Broadcasters," *The New York Times*, July 16, 2004, p. B1.

[421] Also see Gary Levin, "HBO Met its Match in Itself," *USA Today*, September 28, 2004, p. 1D.

[422] Quoted in Anne Becker, "Cable Wins Big in 2004," *Broadcasting & Cable*, January 3, 2005, p. 14.

[423] Jack Shafer, "The Varieties of Media Bias, Part 1: Who Threw the First Punch in the Press Bias Brawl?" *Slate*, February 5, 2003, http://slate.msn.com/id/2078200/.

[424] See Joe Conason, *Big Lies: The Right-Wing Propaganda Machine and How It Distorts the Truth* (New York: Thomas Dunne Books, 2003); Al Franken, *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right* (New York: Dutton Books, 2003); Al Franken, *Rush Limbaugh Is a Big Fat Idiot: And Other Observations* (New York: Dell Publishing Company, 1999).

[425] Eric Alterman, *What Liberal Media? The Truth about Bias and the News* (New York: Basic Books, 2003).

far as to argue that conservative radio hosts like Limbaugh were cultivating dangerous attitudes in the minds of the public, so much so that it posed a threat to his life. When asked if he believed there was a link between such conservative talk radio criticism and his personal security, he said: "I do. Oh, absolutely…. [C]ertainly in terms of threats, I think that there's no question."[426] Some liberals have also recently decried the supposed pro-Bush Administration media bias associated with the conflict in Iraq.

Meanwhile, conservatives have spent decades grumbling about the supposed liberal slant to virtually all news and entertainment programs on television and radio.[427] The phrase "liberal media" seems to fall off the tongues of many conservative politicians and pundits with the greatest of ease. For example, early in the 2004 presidential campaign season, L. Brent Bozell of the Media Research Center accused the national media of "Bush-bashing and Kerry-boosting" and a "litany of Democratic favoritism."[428] Bozell has made a career out of crying "liberal bias" at any news program he does not favor and even edited an entire book about supposed left-leaning slant of modern media.[429]

Thus, media critics on both the political left and right claim that bias is rampant in media today. As James Fallows says, "One great truth of political life is that each side is absolutely convinced that the other has an unfair advantage in getting its views out."[430] But if such divergent interests on the left and right can today look out at the media marketplace and find something to gripe about, then, by definition, today's overall media offerings must be quite diverse. As former FCC Chairman Michael Powell argued at the height of the debate over the media ownership rules, "You can't have the NRA in the debate saying there are gun-hating media liberals, and at the same time, I've got Code Pink screaming about the conservative pro-war bias of the media. And then I'm supposed to somehow reconcile that?"[431]

Indeed, Mr. Powell doesn't need to reconcile anything; rather, it is the opponents of media deregulation who must reconcile these facts in their own minds and learn to look beyond their own personal biases when it comes to evaluating media. As Jack Shafer notes, "Whenever conservatives talk to liberals about press bias—or vice versa—they talk right past one another. Both factions

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[426] Quoted in "Daschle Blasts Limbaugh, Religious Right," *World Net Daily*, November 20, 2002, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=29730.

[427] See L. Brent Bozell and Brent H. Baker, *And That's The Way It Isn't: A Reference Guide to Media Bias* (Alexandria, VA: Media Research Center, July 1990); Ann H. Coulter, *Slander: Liberal Lies about the American Right* (New York: Three Rivers Press, 2002).

[428] L. Brent Bozell, "Six Stories You Won't Hear from Kerry's Media Toadies," *Investors' Business Daily*, March 9, 2004, p. A17. Also see L. Brent Bozell, "Boston 'Rock' Show Gets a Jolt of Juice with Network Help," *Investors' Business Daily*, July 29, 2004, p. A13.

[429] Bozell and Baker.

[430] James Fallows, "The Age of Murdoch," *The Atlantic*, September 2003, http://www.theatlantic.com/issues/2003/09/fallows.htm.

[431] Quoted in Chris Baker, "FCC Chief Says Tech Is Wild Card," *The Washington Times*, July 8, 2003, http://www.washtimes.com/business/20030707-101146-5642r.htm.

seem to work backward from their conclusions to the evidence and damn what the other side says."[432] Therefore, Shafer concludes that "it's hard to put much stock in what left and right press critics say because their views are so patently motivated by ideology. In other words, the intense and public biases of the press critics make them unreliable readers of press bias."[433] And as *The Economist* editorialized in 2003: "Behind almost every argument about why the FCC endangers democracy lurks a grudge about content: it is too conservative; it is too liberal; it is too violent; it under-represents feminists, or the Catholic Church. Merely cataloging these conflicting grievances shows the impossibility of ever resolving them."[434]

Simply stated, critics sometimes seem to see and hear in media only what they want to see and hear.[435] "The farther a product is from an individual's worldview, the more likely the person will be to say that the media outlet is biased," notes Hamilton.[436] Consequently, when they encounter viewpoints at odds with their own, they will likely be more concerned about the impact of those programs on others throughout society and come to believe that government must "do something" to correct the supposed bias. In other words, many people desire regulation because they think it will be good for others, not necessarily for themselves.

As Jack Shafer notes, "Whenever conservatives talk to liberals about press bias—or vice versa—they talk right past one another. Both factions seem to work backward from their conclusions to the evidence and damn what the other side says."

[432] Jack Shafer, "The Varieties of Media Bias, Part 2: The Old Litmus Tests That Sort Journalists into Left and Right Don't Work Anymore," *Slate*, February 12, 2003, http://slate.msn.com/id/2078494/.

[433] Jack Shafer, "The Varieties of Media Bias, Part 1." Shafer also notes that, "if both liberals and conservatives are partly right about the media, as I suspect they are, bias of an ideological nature should cancel itself out in the long run, nudging the press toward rough balance if not absolute fairness on the political spectrum." Thus, he concludes, "Just because you can excavate a political component from any accusation of press bias doesn't mean all press criticism is partisan or motivated by self-interest. Clearly, unadulterated bias contaminates many stories and can even infect the entire Washington press corps from time to time. But because most charges of bias are never distant from somebody's active political agenda, no discussion about press bias—specific or general—should begin without this extended throat clearing." Similarly, *Washington Post* reporter Dana Milbank has said that when he covered the White House for the paper, he would frequently receive heated complaints from readers accusing him of being biased both for and against the administration. He notes that any attempt to ask a political leader hard-nosed questions will often be viewed as biased instead of just good reporting. See Dana Milbank, "My Bias for Mainstream News," *The Washington Post*, March 20, 2005, p. B1.

[434] "Media Madness," *The Economist*, September 11, 2003, http://www.economist.com/displayStory.cfm?Story_ID=2052042.

[435] See, for example, the way both parties complain of supposed press bias in Greg Hitt, "Media-Bias Charges Rally Republican Base," *The Wall Street Journal*, October 28, 2004, p. A4.

[436] Hamilton, p. 106.

Psychologists label this phenomenon the “third-person effect” and it provides a powerful explanation for what drives much of the fanaticism behind the recent media backlash. The third-person-effect hypothesis was first formulated by W. Phillips Davison in a seminal 1983 article. He noted:

> In its broadest formulation, this hypothesis predicts that people will tend to overestimate the influence that mass communications have on the attitudes and behavior of others. More specifically, individuals who are members of an audience that is exposed to a persuasive communication (whether or not this communication is intended to be persuasive) will expect the communication to have a greater effect on others than on themselves.[437]

Davison went on to argue that:

> One possible explanation for the fact that people on both sides of an issue can see the media as biased against their own point of view is that each observer assumes a disproportionate effect will be achieved by arguments or facts supporting the “wrong” side of the issue. Others (the third persons), the observer reasons, will be unduly impressed by these facts or argument; they do not have the information that enables me to form a correct opinion. *It is probable that, from the point of view of the partisans, balanced media presentation would require a sharp tilt toward the “correct” side of the issue*. This would compensate for the intellectual frailty of third persons and would, according to the partisan, ensure that the media achieved a truly balanced presentation. But, if the third-person effect hypothesis is correct, why are not the facts and arguments on the “correct” sides as well as the “wrong” side seen as having a disproportionate effect on others?[438]

This point is worth emphasizing. As Davison notes, so powerful is this phenomenon in the minds of many that for them to believe that media was truly balanced or unbiased “would require a sharp tilt toward the ‘correct’ side of the issue.” In other words, to rectify what they feel is the overt bias of the media, they would want to see more overt bias in their direction.[439] But which direction is that? And if the scales were somehow tilted in one direction or another by the

[437] W. Phillips Davison, “The Third-Person Effect in Communication,” *Public Opinion Quarterly*, vol. 47, no. 1, Spring 1983, p. 3.
[438] Davison, p. 11 (emphasis added).
[439] Davison’s third-person-effect hypothesis offers a powerful explanation for censorship as well: “The phenomenon of censorship offers what is perhaps the most interesting field for speculation about the role of the third-person effect. Insofar as faith and morals are concerned, at least, it is difficult to find a censor who will admit to having been adversely affected by the information whose dissemination is to be prohibited. Even the censor’s friends are usually safe from the pollution. It is the general public that must be protected. Or else, it is youthful members of the general public, or those with impressionable minds.” Ibid., p. 14.

government, the First Amendment would be betrayed. Whether it's overt or indirect, it's still government censorship.

In conclusion, claims of media bias or diminished media quality are typically based on highly subjective evaluations of what constitutes "good" news, "fair" coverage, or "high-quality" entertainment. In a free society, government should have no role in influencing such media attributes.[440] Any attempt by government to even subtly define these terms raises the specter of censorship. Indeed, when media critics argue that government must take a far more activist role in checking supposed media bias (even if it's only indirectly through media ownership controls), it raises a host of troubling First Amendment issues that will be discussed in the next chapter.

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[440] "In general, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation," argues the FCC. FCC, *Media Ownership Proceeding*, p. 13.

CHAPTER SIX
THE FIRST AMENDMENT AND MEDIA ACCESS THEORY

Another myth advanced by critics of media decontrol is that the First Amendment demands widespread and continuous intervention by government in the media marketplace. Specifically, they claim that only individuals, not corporations, have First Amendment rights, and, therefore, there are no constitutional concerns with structural ownership regulations. They also claim that structural ownership rules offer a content-neutral method of checking market power without running afoul of the First Amendment. Even more extreme is their claim that the First Amendment should serve as an affirmative grant of power to the government to force media owners to provide access to their facilities. They often make this argument under the theory that it is the rights of *listeners*—not *speakers*—that are truly paramount under the First Amendment.

The critics rest their case primarily on some of the ambiguous language from the Supreme Court's controversial 1945 decision in *Associated Press v. U.S.*, in which the Court began fashioning a new theory of the First Amendment as the guarantor of a certain amount or type of speech. The Court concluded that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[441] Many policymakers and media critics have subsequently interpreted this particular quote and case—as well as the Court's decisions in *NBC v. United States*[442] and *Red Lion Broadcasting Co. v. FCC*[443]— as supposed proof that ownership regulation and other press controls were *demanded* by the First Amendment to guarantee a certain level of diversity. As argued below, this is a preposterous reading of the plain language of the First Amendment given it's clear "Congress shall make no law" ultimatum.

Nonetheless, scores of media critics have relied upon the logic of the *Associated Press, NBC,* and *Red Lion* decisions when attempting to concoct First Amendment-based rationales for media regulation. For example, Nichols and McChesney argue that "The highly concentrated market makes a mockery of the freedom of press clause in the First Amendment, which was predicated on the ability of citizens to create their own media if they so desire."[444] They believe that the First Amendment allows the government to mold media in whatever form it wishes. Of course the First Amendment says nothing of the sort. Undeterred, Nichols and McChesney go on to argue that the First Amendment can be used as a tool of social and economic change: "[W]e think efforts to reduce the power of Wall Street and Madison Avenue, and to increase the role of Main Street and every other sector of the population, in the running of our media system are

[441] *Associated Press v. U.S.* 326 U.S. 1 (1945).
[442] *NBC v. United States*, 319 U.S. 190 (1943).
[443] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
[444] Nichols and McChesney, p. 49.

entirely consistent with the meaning of the First Amendment."[445] Again, it is impossible to find any support for this leveling-of-voices notion in a strict reading of the First Amendment. If the First Amendment is to retain its force and true purpose of protecting speech from government censure, structural ownership rules and "media access" mandates must be rejected.

Will the Real First Amendment Please Stand Up

The First Amendment does have a bearing on this debate, but not in the manner the "media access" proponents claim. First, corporations are nothing more than collections of individuals with First Amendment / free speech rights. As Cato Institute Vice President for Legal Affairs Roger Pilon argues:

> [I]n the end, the rights of the corporation just are the rights of the corporate owners…. The right of the corporation to exist is nothing more—nothing less—than an entitlement of their rights of property, association, and contract. In this fundamental way are the rights of the corporation bound up with the rights of the individual. Those who challenge the basic right of the corporation do nothing less than challenge those basic rights of individuals.[446]

Moreover, the plain language of the First Amendment makes it clear that the Founders believed the press itself had rights; the First Amendment is the only amendment to mention a specific industry and single it out for special protection. If media corporations had no free speech rights, think what our government could have done to censor the press in the past. The famous "Pentagon Papers" case, for example, might have had a very different outcome.[447]

Second, structural ownership rules are not a purely content-neutral method of media regulation. Vanderbilt University law professor Christopher S. Yoo has coined the term "architectural censorship" to describe "the tangential, but important adverse impact on speech" that media ownership regulations can have.[448] By artificially limiting market structures or outputs, structural controls can limit the quantity and quality of media created.[449] The experience with Fin-Syn

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[445] Ibid., p. 74.

[446] Roger Pilon, "Corporations and Rights: On Treating Corporate People Justly," *Georgia Law Review*, vol. 13, 1979, p. 1319. "The corporation has been created by private individuals in pursuit of their own private ends; and of course others may subsequently have joined the association for the same reason. Unless individuals have an obligation to serve 'the public interest'—and they do not—then the corporation has no such obligation either."

[447] See *New York Times v. United States,* 403 U.S. 713 (1971).

[448] Christopher S. Yoo, "Architectural Censorship and the FCC," Vanderbilt University Law School *Working Paper* no. 04-10, June 2004, p. 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=555821.

[449] Clyde Wayne Crews of the Competitive Enterprise Institute has argued that "Government restrictions on ownership are themselves censorship, and a coercive impediment to speech and a threat to democracy and wide scale expression." Clyde Wayne Crews, "A Defense of Media

regulations (discussed above) and the Fairness Doctrine (discussed below) illustrates how media ownership regulations can raise serious First Amendment concerns.

Third, and most important, the First Amendment was not written as a constraint on private speech or actions, but rather as a direct restraint on government actions as they relate to speech. "[T]he First Amendment does not guarantee a fair press, only a free press," argued former FCC Chairman Dennis Patrick in his concurring opinion overturning the Fairness Doctrine in 1987. "The larger point is that every freedom carries with it a potential for abuse; a potential for misuse. The founding fathers, nevertheless, placed their faith in freedom. They understood that fairness and balance and truth were concepts too subjective, and too important, to be defined by government."[450]

Thus, the First Amendment does not serve as an affirmative grant of access to privately owned media.[451] As Jonathan Emord, author of *Freedom, Technology and the First Amendment*, notes: "The First Amendment does not *require* any set amount of diversity in the marketplace. If everyone were to choose to remain silent, the First Amendment would not be violated, for the amendment's purpose is to deprive government of a power over the press and to leave to private citizens the decision of when to speak or not to speak and what to say."[452] Bruce Owen elaborates: "The modern political dimension of media concentration appears to be based fundamentally on an assumption, certainly *not* found explicitly in the First Amendment, that competition among ideas and opinions is a useful basis for public policy decisions and for the effective exercise of political freedom."[453]

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Patrick, Emord, and Owen are responding to an increasingly prevalent, but wholly unsubstantiated, interpretation of the First Amendment that stresses *access to media* as the central function of the First Amendment. This was the logic behind the *Associated Press* decision, which was then broadened into a far more wide-ranging legal theory by George Washington

Monopoly," *Communications Lawyer*, vol. 23, no. 1, Fall 2003, p. 14, http://www.cato.org/research/articles/crews-fall2003.pdf.

[450] *Separate Statement of Dennis R. Patrick*, "FCC Ends Enforcement of Fairness Doctrine," Federal Communications Commission, Report No. MM-263, August 4, 1987.

[451] "The First Amendment precludes government's dictating the content of speech; it does not dictate structural regulations." Krattenmaker and Powe, p. 226.

[452] Jonathan Emord, *Freedom, Technology and the First Amendment* (San Francisco: Pacific Research Institute, 1991), p. 228 (emphasis in original).

[453] Owen, "Confusing Success with Access," p. 9. "The First Amendment was intended, originally, to prevent the government from censoring the press and individual speech. The First Amendment does not condemn media concentration per se, but only concentration resulting from government action that restricts freedom of press or speech or concentration used as a means of such restriction. An example would be government grants of monopoly press licenses, denied to political opponents of the incumbent party."

University law professor Jerome A. Barron in a 1967 *Harvard Law Review* article entitled "Access to the Press—a New First Amendment Right."[454] Barron's title really said it all—he was proposing the creation of a new right that did not find any support in a strict reading of the First Amendment. Yale University law professor Owen Fiss has endorsed Barron's reading of the First Amendment and shows how extreme this "media access" thinking can be. He argues that a proper reading of the First Amendment requires "a change in our attitude about the state" such that we learn "to recognize the state not only as an enemy, but also as a friend of speech… [that should act] to enhance the quality of public debate."[455] "What is more, when on occasions it fails to, we can with confidence demand that the state so act," he argues. "The duty of the state is to preserve the integrity of public debate… to safeguard the conditions for true and free collective self-determination. It should constantly act to correct the skew of social structure…[456]

This is a truly radical conception of the First Amendment; radical not only in how much it diverts from the Founders' original understanding and intent, but radical also in the sweeping scope of government intervention it counsels for our society. Contrary to Fiss's assertion that the state is "[just] like any social actor," it is not. The state has coercive powers that no other social actor possesses. It can deny us our liberties, take our property, and imprison us. No other social actor wields such power over the citizenry. And that power was so feared by the Founders that they made it clear "Congress shall make no law... abridging the freedom of speech, or of the press…" The Founders did not then continue on to say "except to preserve the integrity of public debate," or "except to safeguard the conditions for true and free collective self-determination," or " except to correct the skew of social structure." It is hard to understand what these terms even mean. But it is not hard to understand the plain language of the Bill of Rights, and it says nothing along the lines of what Fiss or Barron suggest. Their conception of the First Amendment and government's role as a private speech referee is pure jurisprudential fantasy built upon eloquent, but ultimately empty and indefensible, rhetoric.

What is most troubling about media access theories is that they presume the existence of a mythical "right to be heard," or a "right to respond publicly." In essence, media access advocates are arguing that once a given media provider becomes popular enough, everyone has a "right" to use it.

What is most troubling about such media access theories is that they presume the existence of a mythical "right to be heard," or a "right to respond

[454] Jerome A. Barron, "Access to the Press—a New First Amendment Right," *Harvard Law Review*, vol. 80, 1967, pp. 1641-78, http://www.umit.maine.edu/%7Eshannon.martin/Barron1967.pdf.

[455] Also see Owen M. Fiss, "Free Speech and Social Structures," *Iowa Law Review*, vol. 71, 1986, p. 1416, http://www.law.yale.edu/outside/html/faculty/omf2/pdf_files/freespeech_socialstructure.pdf.

[456] Ibid.

publicly." In essence, media access advocates are arguing that once a given media provider becomes popular enough, everyone has a "right" to use it. By this logic, if you build a large soapbox in your backyard, and are informative or entertaining enough to attract and retain an audience, the media access advocates apparently believe that the government should mandate that you share time on your soapbox with others in the name of "diversity." They care little about the property rights you have in that soapbox, the effort and cost associated with your efforts to build that soapbox, or your editorial freedom to determine what is uttered on that soapbox. As Emord summarizes:

> In short, the access advocates have transformed the marketplace of ideas from a *laissez-faire* model to a state-control model. For them, if the marketplace of ideas can be viewed as the contents of a cauldron, it is not enough to await random stirring; government must burn an eternal flame beneath the cauldron, keeping it at the boiling point. Silence is not an option; the government implores: Let there be speech![457]

While citizens certainly are at liberty to speak freely and communicate their views to others who will listen to them or air them, they do not have a right to demand access to the property of others to do so.[458] If lawmakers could mandate that anyone who has taken the time and expense to build a soapbox to speak on must allow the rest of the world to stand on that soapbox with them in the name of "access" and "fairness," it would contort the First Amendment into a tyrannical government mandate. This would retard, not expand, genuine freedom of speech and expression. Indeed, when such media access theories have been translated into public policy—as was the case with the Fairness Doctrine—the effect has been generally to chill speech and expression throughout media. (See the case study below.)

Again, the third-person effect is what is really at work here. Media access advocates are really looking to transform the First Amendment into a tool for social change to advance specific political ends or ideological objectives. "Rather than understanding the First Amendment to be a *guardian* of the private sphere of communication, the access advocates interpret it to be a *guarantee* of a preferred mix of ideological viewpoints," notes Emord.[459] "When the access advocates speak of minority views, they are almost always referring to views *they* believe to be inadequately represented in our society."[460] Again, as noted in the introduction, former FCC Chairman Powell has made a similar argument worth quoting at length:

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[457] Emord, p. 293.

[458] "A truly free and unrestricted marketplace of ideas does not guarantee the speaker access to another's private property to propound a message," argues Emord. Jonathan W. Emord, "The First Amendment Invalidity of FCC Ownership Regulations," *Catholic University Law Review*, vol. 38, 1989, p. 463.

[459] Ibid., p. 293.

[460] Ibid., p. 294.

> Here's the truth: the ownership debate is about nothing but content. Don't be fooled. I mean, this is my greatest warning to the American public. It's easy to go after every ill in society by claiming it's the media's fault. It's the American pastime, right? Anything you don't like, it's the media's fault. What scared me in that debate is that it's not about the ownership rules at all. The vast majority of people don't even know what the rules say, to be perfectly candid. Name all six of them. Name what they actually do. Nobody can. They became a stalking horse for a debate about the role of media in our society. I can expect and understand consumer anger and anxiety about that. But the ownership rules are not the cause or the cure. It was really an invitation for people with particular viewpoints to push for a thumb on the scale, for content in a direction that people preferred. The danger with that? It's easy to say, 'I'm comfortable with that when the government's doing it for something I like. But I get really scared when it's something I don't.'[461]

Thus, the danger with media access mandates is that they ultimately transform the First Amendment into "an affirmative tool of the state"[462] that legislators and regulators can wield to control content and influence the editorial judgments of the press. As Justice Owen Roberts presciently warned 50 years ago in his dissenting opinion in *Associated Press v. U.S*, the case that helped spawn the media access movement:

> The decree here approved may well be, and I think threatens to be, but a first step in the shackling of the press, which will subvert the constitutional freedom to print or to withhold, to print as and how one's reason or one's interest dictates. When that time comes, the state will be supreme and freedom of the state will have superseded freedom of the individual to print, being responsible before the law for abuse of the high privilege. It is not protecting a freedom but confining it to prescribe where and how and under what conditions one must impart the literary product of his thought and research. This is fettering the press, not striking off its chains.[463]

Misplaced Concerns about Scarcity and Private Censorship

In response to these arguments, proponents of mandatory media access typically rely on two counterarguments: (1) Some media outlets are scarce, and therefore special rules must apply; and (2) private restraints on speech are as important as government restraints on speech and must be checked.

[461] Ken McGee, *Gartner Interview with FCC Chairman Michael Powell*, June 15, 2004, http://www4.gartner.com/research/fellows/asset_91308_1176.jsp.
[462] Emord, "The First Amendment Invalidity of FCC Ownership Regulations," p. 459.
[463] Dissenting opinion of Justice Owen J. Roberts, *Associated Press v. U.S.*, 326 U.S. 1, 48 (1945).

<u>Scarcity Myths</u>: Let's tackle the scarcity argument first. This is Liebling's old "freedom of speech only belongs to those who own one" myth at work again. As already discussed, there was never any truth to this assertion. Journalists and citizens have the protection of the First Amendment without actually owning a media outlet. Lack of outlet ownership does not nullify one's right to speak freely.

Critics argue that scarcity nonetheless remains a serious problem, at least with regard to the broadcast radio and television spectrum, which is still licensed by the federal government. Spectrum scarcity was used to justify the broadcast licensing scheme enshrined in the Radio Act of 1927 and Communications Act of 1934. And Supreme Court decisions such as *NBC v. United States*[464] and *Red Lion Broadcasting Co. v. FCC*[465] then made the scarcity rationale sacrosanct and used it to fashion a two-tiered theory of First Amendment scrutiny for broadcast versus print media: Print media are plentiful and receive strict First Amendment protections, whereas electronic media are scarce and thus have far less protection from government regulation or censorship.

Regardless, the continued existence of this licensing regime leads to oft-repeated claims that broadcast spectrum is "owned by the American people" or "belongs to the American people." Therefore, or so this line of reasoning continues, any set of rules can be adopted for broadcasting that Congress or the FCC deems appropriate.

But if scarcity is the unifying rationale for such regulation and federal licensing of broadcast spectrum, then it is a very weak one. Even if spectrum is scarce, that hardly makes the case for government control. Every natural resource is inherently scarce in some sense.[466] For example, there is only so much coal, timber, or oil on the planet. While some resources are more abundant or scarce in nature than others, most economists agree that property rights, pricing mechanisms, contracts, and free markets provide the most effective way to determine who values resources most highly as a way of allocating them to their best use. In fact, the government created artificial scarcity within the spectrum by exempting it from market trading and the pricing system.[467] Even the

[464] *NBC v. United States*, 319 U.S. 190 (1943).

[465] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[466] See *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986). In overturning the FCC's "Fairness Doctrine" then-Judge Robert Bork argued that, "All economic goods are scarce… Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing characteristic leads to analytical confusion."

[467] "[I]t can be argued that the spectrum was scarce because demand exceeded supply. This is almost invariably the case when a good with value is given away for free. If a market price had been assigned to spectrum from the start (which in effect is done when licenses are bought and sold later on), then it would be no more or less scarce than are pencils, VCRs or Lexus automobiles. Moreover, it may have been put to better uses initially if those who obtained it had to pay for it." Benjamin M. Compaine, "Distinguishing Between Concentration and Competition," in Compaine and Gomery, p. 557.

FCC has recently acknowledged these arguments in an important recent report from the agency's Media Bureau.[468]

Simply stated, government ownership and control of spectrum exacerbates rather than solves the scarcity problem. Ithiel de Sola Pool explained this eloquently in *Technologies of Freedom*, his classic 1983 study of technology and free speech: "The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity."[469] And as spectrum engineer Charles L. Jackson argued during a 1982 Senate Commerce Committee hearing, "If there ever was any scarcity of electronic communications outlets that scarcity was artificial and legalistic. It grew out of policy constraints and not out of fundamental technological limitations."[470]

Markets, by contrast, would encourage the maximum amount of spectrum use and innovation possible, diminishing the effect of any inherent scarcities within the medium. Ironically, compared to physical resources, electromagnetic spectrum may actually be less scarce since engineers continue to find new ways to push out the boundaries of usable spectrum and develop applications for spectrum frequencies previously thought to be uninhabitable.[471] Many scholars have argued that, in an absolute sense, newsprint is actually far more scarce than electromagnetic spectrum. Indeed, statistics show that daily newspapers are now more "scarce" than broadcast television stations. As Figure 6 illustrates, the aggregate number of broadcast TV stations has doubled since *Red Lion* was decided in 1969, while daily newspapers have been in a steady state of decline since that time. Despite this, policymakers would never think of regulating the newspaper industry as they do the broadcast sector.

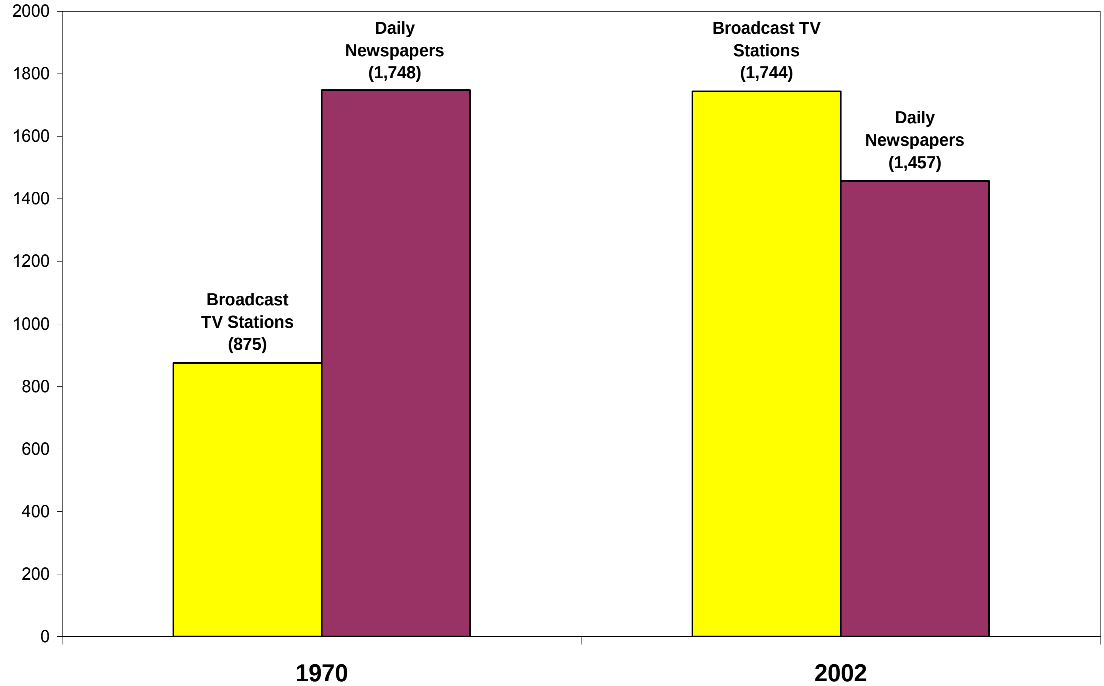
[468] John W. Berresford, "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed," Federal Communications Commission, *Media Bureau Staff Research Paper*, 2005-2, March 2005.

[469] Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, MA: Harvard University Press), 1983, p. 141. "Clearly it was policy, not physics, that led to the scarcity of frequencies. Those who believed otherwise fell into a simple error in economics," Pool concluded.

[470] Charles L. Jackson, "Statement of Charles L. Jackson," *Transcript of Hearing on "Freedom of Expression" Before the U.S. Senate Committee on Commerce, Science and Transportation*, September 28, 1982, p. 50.

[471] "[F]requencies are divisible (or expandable) in ways that [physical goods] are not. The spectrum can be mined more intensively, using less separation between frequencies with more (or higher quality) broadcast transmitters and better receivers, or more extensively, deploying more sophisticated sending and receiving equipment so as to exploit progressively higher and lower wavelengths." Thomas W. Hazlett, "Physical Scarcity, Rent Seeking, and the First Amendment," *Columbia Law Review*, vol. 97, no. 4, May 1997, p. 926 http://www.aei.org/ra/rahazl7.pdf.

Figure 6: Daily Newspapers Now More "Scarce" Than Broadcast TV Stations



Source: FCC data; *Editor & Publisher International Year Book*

If the property rights model is rejected for broadcast spectrum, the alternative allocation mechanism is the collective ownership and centralized planning model employed within numerous socialist economies throughout the past century. In that model, the wisdom of bureaucrats was substituted for the wisdom of markets; it was assumed that public officials could accurately gauge supply and demand within a complex economy and allocate scarce resources efficiently. The result of this experiment was clear: chronic shortages and gross misallocation of resources. Socialist economies experienced bread lines, oil shortages, and extremely limited technological innovation. Amazingly, however, this model of resource allocation continues to guide spectrum policy in the United States. Talk of converting to a property rights paradigm remains taboo, though a few brave souls in Congress sometimes wonder aloud at hearings why America hasn't given it a shot.[472]

[472] "Rep. [Chris] Cox (R-Cal.) said broadcast spectrum should be auctioned since it's used for commercial purposes, which he said would take Congress out of the game of regulating broadcast content." Terry Lane, "House Commerce Committee Raise 'Indecency' Fines to $500,000," *Communications Daily*, March 4, 2004, p. 2.

Finally, practically speaking, even if scarcity was once a legitimate issue within the broadcast marketplace, it certainly is not today with the explosion of media options. "[T]here simply exists no true scarcity of outlets for mass communication," argues Emord.[473] "[I]t is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment."[474] What Emord said in 1991 is even more true today. "Scarcity is the last word that would come to mind in regard to the vast array of communications outlets available today," concludes *Chicago Tribune* columnist Steve Chapman.[475] In short, information and entertainment are commodities that are abundant and cannot be monopolized, and scarcity can no longer serve as a rational basis for government regulation of broadcast content or ownership.[476]

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Private restraints on speech. The argument that private restraints on speech are as dangerous as government restraints on speech is absurd. As mentioned in the previous chapter, critics are fond of painting conspiratorial "puppet-master" pictures of the way the modern media marketplace operates. When they do so, a recurring theme is that private media owners are routinely engaged in journalistic cover-ups and private censorship. "The chilling effect is no less powerful when the private sector is doing the threatening," argue Leanza and Feld of the Media Access Project.[477] In their view, private media owners are the real Big Brother threat to free speech in our republic. Jerome Barron makes similar arguments in his work.[478]

This is exactly backwards. Again, the real "Big Brother" censorship problem is coercive government controls, not private media actions. Media access proponents would do well to remember law professor Louis Jaffe's quip: "If one private person suppresses a fact, there are many others who may publish. Not so if the government forbids!"[479] Indeed, there is a profound difference between private and public censorship, and only one of them is addressed directly by the First Amendment. Citizens are always at liberty to seek out alternative media distribution methods if they feel they cannot obtain the information they desire, or believe they cannot get their viewpoints aired by a

473 Emord, p. 282.
474 Ibid., p. 284.
475 Steve Chapman, "You *Will* Watch the Debates," *Chicago Tribune*, October 15, 2000, p. 19.
476 For more discussion see Richard T. Kaplar, *Cross Ownership at the Crossroads: The Case for Repealing the FCC's Newspaper / Broadcast Cross Ownership Ban* (Washington, D.C.: Media Institute, 1997).
477 Leanza and Feld, p. 20.
478 See Barron, pp. 1162-63.
479 Louis Jaffe, "Free Speech and the Mass Media," *Virginia Law Review*, vol. 57, 1971, p. 636.

certain media outlet. There is simply no way for a single private entity, or even a collection of large entities, to monopolize the dissemination of information.

And just because a critic might be able to cite one example of a media outlet supposedly censoring a particular story or viewpoint, that hardly means widespread private suppression is at work. Indeed, *all* decisions about what to report in a given media outlet inherently involve editorial discretion and an endless series of judgment calls about what constitutes "news." As David Lange aptly notes, "Private suppression unquestionably exists; the very essence of the editorial function is to decide what shall be published. But to acknowledge this fact is not to diminish the larger reality: all power to affect the content of the press is of necessity the power to suppress as well as to publish."[480]

Finally, there is a more practical issue to take into account here regarding the enforcement of media access mandates. Namely, media outlets simply cannot guarantee time or space to everyone who wants speak. Stated differently, all news decisions involve trade-offs: Should they have run this story or that one? Should they have covered that event or another? Should they have shown more programming with this particular point of view or something else? These are private editorial judgments for editors and reporters to carry out. Under the alternative scheme envisioned by the "media access" proponents, the government would be entrusted with a "supereditorial authority over speech and press,"[481] since the state would have the final say over what constitutes "fair" coverage of the issues and "access" to media. As Emord correctly concludes, "It fundamentally shifts the marketplace of ideas from its private, unregulated, and interactive context to one within the compass of state control, making the marketplace ultimately responsible to government for determinations as to the choice of content expressed." Again, such a result would be completely at odds with an original understanding of the First Amendment.

In conclusion, "media access" mandates do not flow from the First Amendment; they are squarely contradicted by the plain language of the amendment. "Congress shall make no law" means Congress shall make no law. It does not stand for any of the other bogus propositions the media access proponents suggest. The danger remains very real, however, that such thinking will not only continue to influence the debate over traditional media policy, but gradually extend to new media technologies and outlets as well.

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[480] Lange, pp. 73-4.
[481] Emord, "The First Amendment Invalidity of FCC Ownership Regulations," p. 463.

For example, as Chapter 4 noted, in his book *Republic.com* Cass Sunstein suggests that government consider requiring “electronic sidewalks” in cyberspace to encourage more balance on Internet websites. The state would impose the equivalent of “must carry” mandates on popular or partisan websites, forcing them to carry links to opposing viewpoints.[482] In the name of “media access” or “fairness,” Sunstein and others are apparently willing to let the state impose tyrannical mandates on private website operators, forcing them to open their private property to use by others. Essentially it’s a Fairness Doctrine for the Internet Age. As the adjoining case study illustrates, one Fairness Doctrine was bad enough; we don’t need another one for cyberspace.

[482] Ibid., p. 189.

In Focus: ***The Fairness Doctrine***

The so-called Fairness Doctrine was put in place by the FCC in 1949 to require broadcasters to "afford reasonable opportunity for the discussion of conflicting views of public importance." Luckily, the FCC was never able to apply such a standard to print media since they received strict First Amendment protection from such regulatory shenanigans. But because the electronic media of the time—broadcast television and radio—were licensed by the federal government, the FCC gained the ability to control speech on those outlets.

After coming under attack by the courts in subsequent decades, the FCC finally discarded the rule in 1987 because, contrary to its purpose, the doctrine failed to encourage the discussion of more controversial issues. Still, regulatory revisionists seem to pretend that the world would be a better place if government officials sat in judgment of "fairness" on the broadcast airwaves, and have attempted to resurrect the Fairness Doctrine a few times since it was abolished. By requiring, under threat of potential license revocation, that broadcasters "fairly" represent both sides of a given issue, advocates of the doctrine argue that more opinions will be aired while the editorial content of the station may remain unaltered.

But the notion that the threat of regulation will encourage a greater diversity of viewpoints is flatly contradicted by the facts. After decades of academic and judicial scrutiny, it was revealed that instead of expanding the range of viewpoints on the airwaves, the Fairness Doctrine had a chilling effect on free speech. With the threat of potential FCC retaliation hanging over their heads, many broadcasters were more reluctant to air controversial opinions because it might require them to air alternative perspectives that their audience did not want to hear. On the other hand, they feared they would not be able to air enough, or the right type of, responses to make regulators happy. After all, what exactly constitutes "enough" time for a "fair" exchange of views? And how many viewpoints deserve equal time? There are many sides to each issue and numerous interest groups who would like free access to someone else's soapbox to deliver those views. For these reasons, the Fairness Doctrine had the exact opposite effect that lawmakers intended. As the FCC noted in repealing the doctrine in 1987, it "had the net effect of reducing, rather than enhancing, the discussion of controversial issues of public importance."[483]

More disturbingly, the Fairness Doctrine was used by public officials to threaten suppression of political opposition. Manhattan Institute fellow Thomas Hazlett has found that under the Nixon administration, "License harassment of stations considered unfriendly to the administration became a regular item on the agenda at White House policy meetings."[484] And a 1997 study of the Fairness Doctrine by Hazlett and David Sosa revealed that "in an attempt to affect network programming, administration staffers used threats of Fairness Doctrine challenges in meetings and phone calls with top [network] executives." There is also evidence that the Kennedy administration used the Fairness Doctrine to intimidate opponents.[485]

Finally, practically speaking, how would a revived Fairness Doctrine apply to today's media marketplace with its countless partisan radio and TV programs? Presumably Al Franken and his colleagues would not take kindly to the proposition that Rush Limbaugh and Bill O'Reilly are entitled to equal response time on their liberal Air America network in the name of "fairness." And vice versa. Such partisan talk shows have become very popular in the years following the abolition of the Fairness Doctrine. Aren't these exactly the sort of distinct and antagonistic viewpoints that policymakers desire? As a 2003 *Economist* magazine editorial aptly noted, "With the repeal of the Fairness Doctrine in 1987, the FCC took a big step away from this nannyish approach, and it opponents have never forgiven it."[486] But that didn't stop members of Congress from attempting to resurrect the Fairness Doctrine several times after its repeal.[487] Even recently, as part of Rep. Maurice Hinchey's (D-N.Y.) "Media Ownership Reform Act of 2004," the reimposition of the Fairness Doctrine was proposed. Apparently, some bad ideas just refuse to die.

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483 "FCC Ends Enforcement of Fairness Doctrine," Federal Communications Commission, Report No. MM-263, August 4, 1987, p. 1.

484 Thomas W. Hazlett, "The Fairness Doctrine and the First Amendment," *The Public Interest*, Summer 1989, p. 105.

485 Thomas W. Hazlett and David W. Sosa, "Chilling the Internet? Lesson for FCC Regulation of Radio Broadcasting," Cato Institute *Policy Analysis* no. 270, March 19, 1997, pp. 10-11, http://www.cato.org/pubs/pas/pa-270es.html.

486 "Media Madness," *The Economist*, September 11, 2003, http://www.economist.com/displayStory.cfm?Story_ID=2052042.

487 See Adam Thierer, "Why the Fairness Doctrine is Anything But Fair," Heritage Foundation *Executive Memorandum* no. 368, October 29, 1993, http://www.heritage.org/Research/Regulation/EM368.cfm.

CHAPTER SEVEN
NEW TECHNOLOGIES AND THE FUTURE

The media sky is very bright and getting brighter with each passing year. There is no reason to believe that this trend will be halted or reversed. As this chapter shows, the pace and nature of technological change in recent decades has been staggering and all signs are that it will increase exponentially in coming years.

Despite this, many media critics argue that the emergence of new communications and media technologies—even the Internet—has very little bearing on the debate over public policy and should not be used to justify the relaxation of traditional media ownership rules. Alternatively, critics argue that older media companies will simply come to dominate the new technological landscape and use the new tools or outlets to control public dialog, just as they supposedly have done with the old technologies or outlets.[488] For example, Farhad Manjoo of *Salon* claims that "it's hard to find anyone in the media world… who can furnish proof that new technologies are shaking the foundations beneath entrenched media giants. If anything, the Web and cable and satellite have *expanded* the reach of media conglomerates."[489] Using similar conspiratorial rhetoric, FCC Commissioner Copps argues that "those who believe the Internet alone will save us from this fate should realize that the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers, and cable."[490]

And the ever-pessimistic Mark Cooper has complained that "the Internet has not lived up to its hope or hype. It has become more of an extension of two dominant, 20th century communications media [television and telephony] than a revolutionary new 21st century technology."[491] Cooper is just getting started. His diatribe against the Net almost perfectly connects all the anti-media dots discussed in this book. He lambastes the Internet for supposedly being overly concentrated, too commercial in nature, not serving "the public interest," hurting deliberative democracy, not serving local communities, and for failing to enhance the citizens' ability "to define themselves and their place in everyday life."[492]

These arguments seem short-sighted at best and wildly misguided at worst, as is the case with Cooper's outlandish theories. Media critics ignore the amazing strides that have already been made in terms of media innovation and

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488 Bagdikian argues that "New technology has expanded the commercial mass media's unprecedented power over the knowledge and values of the country." Bagdikian, p. 53.

489 Farhad Manjoo, "Can the Web Beat Big Media?" *Salon*, May 21, 2003, http://www.salon.com/tech/feature/2003/05/21/web_vs_big_media/index_np.html.

490 Copps, p. 3.

491 Cooper, pp. 92-93.

492 Cooper, pp. 100-101. Cooper is quoting Vincent Mosco, *The Pay-Per-View Society: Computers and Communications in the Information Age* (Norwood, N.J.: Ablex, 1989), p. 115.

competition and pretend that we can expect little more change in the future even though so many others acknowledge this inevitability. No amount of sociological mumbo-jumbo like that espoused by Cooper can hide the amazing changes the Internet and other new communications and media technologies have brought about.

Ten Trends to Watch

Indeed, America's media sector—as well as the entire global media marketplace—are in the midst of profoundly disruptive technological change and industrial transformation. Traditional players face significant threats from new industry players, new technologies, and new customer demands. Many of the trends have already been discussed in this book but they bear repeating and summarizing here alongside other important media trends.

(1) *Supply-Side Explosion*

As extensively documented in Chapter 1 and throughout this book, there are now many substitutes for traditional media. Compared to the past, the overall media pie has grown much larger with far more outlets and options for citizens.

(2) *Demand-Side Personalization, Audience Segmentation, and the Death of the Mass Market*

The supply-side explosion has meant increased rivalry for "attention share." With so many options at their disposal, citizens can be far more demanding about how they dedicate their time and money. "Today's media marketplace provides choices to the public on an entirely new, personal level," concludes the FCC.[493] As media becomes more personalized, audiences become more segmented as well, encouraging media providers to develop more niche programming. "In the post-information age, we often have an audience the size of one," noted Nicholas Negroponte in his prescient 1995 book *Being Digital*.[494] "Everything is made to order, and information is extremely personalized."[495] This personalization and audience segmentation has been driven by many of the other trends or developments summarized below.

As media becomes more personalized, audiences become more segmented as well, encouraging media providers to develop more niche programming.

What we are witnessing, as the title of a July 2004 *Business Week* cover story by Anthony Bianco notes, is "The Vanishing Mass Market." The subtitle of that *Business Week* article summarized why this is the case: "New technology.

[493] FCC, *Media Ownership Proceeding*, p. 49.
[494] Negroponte, p. 164.
[495] Ibid.

Product proliferation. Fragmented media. Get ready: It's a whole new world."[496] Indeed it is, because as Bianco goes on to explain, "America today is a far more diverse and commercially self-indulgent society than it was in the heyday of the mass market. The country has atomized into countless market segments defined not only by demography, but by increasingly nuanced and insistent product preferences."[497]

Thus, media outlets have been forced to tailor their offerings to appeal to more niche audiences and maintain advertising revenues. For example, magazine industry expert Samir Husni of the University of Mississippi estimates that only 10 percent of the 6,200 consumer magazines published today are "general-interest" titles, a 30 percent decrease from two decades ago.[498] And *Business Week*'s Bianco has found that "In the 1960s, an advertiser could reach 80 percent of U.S. women with a spot aired simultaneously on CBS, NBC, and ABC. Today, an ad would have to run on 100 TV channels to have a prayer of duplicating that feat."[499]

This increased personalization and segmentation is also allowing (or perhaps forcing) citizens to engage in "media multitasking," something they did not do in the past. "Consumers are increasingly using two or more media simultaneously with the plethora of media choices and competition for attention accelerating," noted James Rutherford, executive vice president and managing director of Veronis Suhler Stevenson.[500] "The result is a media generation that is consuming more information in less time than ever before," he says. For example, Stephen Baker of *Business Week* recently reported that more than half of 13-to-24-year-olds watch TV and surf the Net at the same time.[501]

(3) *Shifting Generational Expectations about Media*

The most important type of audience segmentation taking place may be generational in nature. Bryan Keefer, a 24-year-old author of *All the President's Spin: George W. Bush, the Media, and the Truth*, argues that "the mainstream media don't give my generation what we want. We want the new and we want it now…"[502] "For the younger generation growing up today, 'whenever, wherever' [media] has become a way of life," notes freelance writer Catie Getches.[503] The FCC has also concluded that the "digital migration" under way in media means

[496] Anthony Bianco, "The Vanishing Mass Market," *Business Week*, July 12, 2004, pp. 61-8.
[497] Ibid., p. 61.
[498] Quoted in Ibid., p. 64.
[499] Ibid., p. 62.
[500] Quoted in "Veronis Suhler Stevenson Forecasts Broad-Based Recovery to Be on Track in the Communications Industry," *Communications Industry Forecast Highlights*, August 11, 2003, http://www.vss.com/publications/forecast/highlights.html.
[501] Stephen Baker, "Channeling the Future," *Business Week*, July 12, 2004, p. 71.
[502] Bryan Keefer, "You Call That News? I Don't," *The Washington Post*, September 12, 2004, p. B2.
[503] Catie Getches, "Wired Nights," *The Washington Post*, October 17, 2004, p. B1.

that "The current generation of teens… have come to expect immediate and continuous access to news, information, and entertainment. Their world has never been different."[504] Pedro J. Ramirez, editor of Spain's *El Mundo*, has used the term "thumb generation" to describe how cell-phone and other portable devices are increasingly being used by youngsters to convey news, gossip, and entertainment.[505]

These developments obviously have profound implications for how media gets delivered, consumed, and funded in the future. The new generation of media consumers will be far more demanding. "Coaxing a generation who swim in information to focus on one ad," argues *Business Week*'s Baker, is like "getting a fish to concentrate on one particular patch of water."[506] Baker notes that marketers and advertisers refer to the current generation as "millennials"—60 million youth born between 1979 and 1994 born into a world "jam-packed with information and entertainment…. They practically grew up with the Internet, so they're far more likely to regard information as something they can control."[507]

(4) *Shortened Attention Span / Increased Media Compression*

For whatever reason—perhaps precisely because of the media supply-side explosion and all the outlets and programs vying for our attention—Americans seem to be suffering from a shortened national attention span. Author Joseph Epstein argues that "People have lost patience, endurance, tolerance for the lengthy, possibly even the leisurely, presentation of culture, teaching, entertainment and much else."[508] This phenomenon is obviously having an influence on how media is created, packaged, and delivered to the public. Thus, while media critics might lament the rapid-fire delivery of news in snippets and sound-bites, some of this is certainly likely to occur and indeed already has. But because it is impossible to force people to spend more time than they wish watching or listening to certain media programs, media outlets will respond to such market demands with more compact and "on the go" news options.

(5) *Increasing Ubiquity of Wireless Devices and Connectivity*

"On the go" media have been assisted greatly by the rise of wireless technologies and networks, leading to a world of near-perfect media mobility in which we can access and consume the media we want wherever we want, whenever we want, and however we want.[509] A March 2004 survey by The Pew

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504 FCC, *Media Ownership Proceeding*, pp. 29-30.

505 "Text Messages Killing Radio Star," *Associated Press*, May 7, 2004, http://www.wired.com/news/technology/0,1282,63383,00.html.

506 Stephen Baker, "Channeling the Future," *Business Week*, July 12, 2004, p. 70.

507 Ibid., p. 70.

508 Joseph Epstein, "Read This, It's Short," *The Wall Street Journal*, June 23, 2004, p. A16.

509 See generally Kevin Maney, "Next Big Thing: The Web as Your Servant," *USA Today*, October 1, 2004, p. 1A, http://www.usatoday.com/tech/news/techinnovations/2004-10-01-cover-web_x.htm; Also, Negroponte predicted in 1995 that "On-demand information will dominate

Internet & American Life Project reported 56 million (28 percent) of American adults are "wireless ready" in the sense that they use either laptop computers with wireless modems and wi-fi cards or cell phones to go online and surf the Web or check e-mail.[510] And the younger generation is again blazing the way. *Business Week* reports that four out of five college students carry cell phones and 36 percent of them use them to send and receive instant data messages—twice the national average.[511]

Personal digital assistants (PDAs), "Blackberry" e-mail readers, and other portable handheld media devices are also gaining widespread use. A June 2004 *Reuters* story with the telling title "Media Companies Take Wireless Route" noted that media firms "already ply their wares in cinemas, on television and over the Internet. Now they're reaching into the mobile phone in your pocket. Some phones can already display pictures and replay video clips, but as networks get faster, it will be possible to watch live newscasts or even a whole movie on wireless gadgets. With such advancements, at least half a dozen media companies are looking at new ways they can use wireless to boost their profits and extend the reach of their brands," the story noted.[512] Communications firms are making multi-billion-dollar investments in "third generation" mobile phone networks and technologies to make this happen.[513] And many television programmers are eyeing mobile phones as the next major media growth opportunity.[514] Already several major programmers are delivering video news reports to cell phones,[515] as well as mini-dramas and soap operas called "mobisodes" (short for "mobile episodes").[516] *Business Week Online* recently reported that Mark Mays, the interim CEO of Clear Channel Communications, expressed concern that "it will become that much harder to capture consumers' attention when a cell phone evolves into more of a media player, enabling people to read news reports, watch video, or play games."[517] Of course, that world is

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digital life. We will ask explicitly and implicitly for what we want, when we want it." Negroponte, *Being Digital*, p. 169.

[510] John B. Horrigan, "28% of American Adults Are Wireless Ready," *Pew Internet Project Data Memo*, Pew Internet & American Life Project, May 2004, http://www.pewinternet.org/pdfs/PIP_Wireless_Ready_Data_0504.pdf.

[511] Baker, p. 70.

[512] Sinead Carew, "Media Companies Take Wireless Route," *Reuters*, June 23, 2004, http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=5498032.

[513] Seth Schiesel. "For Wireless, the Beginnings of a Breakout," *The New York Times*, January 13, 2005,

[514] Valerie Milano, "TV Programmers See Big Opportunities in Mobile Phones," *Communications Daily*, January 25, 2005, p. 3.

[515] Ken Kerschbaumer, "Dialing for News," *Broadcasting & Cable*, January 2, 2005, p. 43.

[516] Yuki Noguchi, "Gone in 60 Seconds: Mobile-Phone TV Demands Quick Shows," *The Washington Post*, January 30, 2005, p. A1; Noah Robischon, "Thanks to Cellphones, TV Screens Get Smaller," *The New York Times*, February 15, 2005, p. B1.

[517] Tom Lowry, "Media's New On-the-Go Consumers," *Business Week Online*, July 12, 2004, http://www.businessweek.com/magazine/content/04_28/b3891012_mz001.htm.

already upon us, with many now referring to cell phones as the "Swiss Army knife" of consumer electronics.[518]

Coupled with computing and Internet / online technologies, the potential for wireless technology to revolutionize media becomes obvious and conjures up images of a future imagined only in sci-fi novels and movies. Dick Tracy-esque wireless watches are already upon us, for example.[519] "Wearable computing" is also set to go mainstream. Companies are already marketing clothing items with built-in communications and computing capabilities. Soon, in true Star Trek fashion, we will be able to make a phone call by tapping a button on our shirt and using voice recognition to call family and friends.[520] And many firms are attempting to develop miniature computer screens for the inside of eyeglasses or sunglasses to provide instant information. More practically speaking, the "wireless home" is already a reality thanks to "wi-fi" networks and routing technology.[521] Very soon, people will bee able to tap media connections almost anywhere inside or outside of their homes thanks to wi-fi.

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(6) *Growth or Foreign Language Programming and Internationalization of Media*

Chapter 1 pointed out that numerous foreign language television and radio stations exist today to cater to foreign language audiences. Among the foreign language or international cable channels available to many households today: *Telemundo* (Spanish), *Univision* (Spanish), *Deutsche Welle* (German), *BBC America* (British), *TV Asia, ZEE-TV Asia* (South Asia) *ART: Arab Radio and Television, The Filipino Channel* (Philippines), *Saigon Broadcasting Network* (Vietnam), *The International Channel, HBO Latino*.

The next leap in foreign language media could be the full-blown internationalization of media through satellite and undersea fiber optic technologies. If the Internet foreshadows what is to come, all media may soon become far more ubiquitous across the globe. With distribution costs falling as

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[518] Two recent news stories referred to cell phones as technological "Swiss Army Knives": Christopher Rhoads, "Cell Phones Become 'Swiss Army Knives' as Technology Blurs," *The Wall Street Journal*, January 4, 2005, p. B1; Stephanie N. Mehta, "It Even Makes Calls!" *Fortune*, January 10, 2005, p. 55.

[519] "Thanks to Microsoft, now you can buy a watch that receives news, weather, e-mail, sports scores, stock prices, and more—all for under $300, plus the low subscription price of $9.95 a month." Grainger David, "Subscription Burnout," *Fortune*, February 23, 2004, p. 86.

[520] "Science Fiction? Not Any More," *The Economist Technology Quarterly*, September 18, 2004, p. 4.

[521] See David Carnoy, "How to Really Network Your Home," *ZD Net AnchorDesk*, July 9, 2004, http://reviews-zdnet.com.com/AnchorDesk/4520-7298_16-5142980.html?tag=adts.

the number of media outlets and distributors increases, it is not unthinkable to imagine a future in which citizens of almost any country will be able to instantaneously access media channels and content from their home countries in their native language. While some media providers and especially repressive governments will take steps to block such advances, such a development seems unstoppable as technology makes it possible.

(7) *The Electronic Gaming Business (and Its Customers) Grow Up*

Although the electronic gaming sector did not exist as a distinct media sector 30 years ago, it has grown to be a $10 billion industry and become so popular that it is now growing 3 times faster than the motion picture industry.[522] And industry analysts expect that revenues will triple by 2007.[523] Part of the key to this success is an expanding audience that now includes more than just kids. Of the 50 percent of Americans that are playing video games today 39 percent are women, and the average age of a computer or video game player is 29.[524] Meanwhile, increasingly interactive and online video game networks are beginning to develop that allow games to be played simultaneously by multiple participants across the nation or even the globe.

The impact of these developments are of enormous import to other media sectors for an obvious reason: with young adults and children spending so much time and money on electronic games, attention, audience share, and advertising dollars are being drawn away from traditional media.[525] All signs are that this phenomenon is just getting warmed up and we are seeing the rise of what MIT professor Henry Jenkins refers to as "transmedia storytelling."[526]

A July 2004 *Wired* magazine article noted that the video game industry has now become so important to the overall success of certain media outlets or developers that the production of games and the production of major motion pictures now proceed on parallel development schedules.[527] Union

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[522] "A striking measure of the impact of the computer and video game software publishing industry on the U.S. economy was its 15 percent annual growth in sales between 1997 and 2000. In contrast, over the same period the U.S. economy grew only 6 percent per year and sales in the motion picture production, distribution, and allied services industry grew 4.6 percent per year." Robert Damuth, *Economic Impacts of the Demand for Playing Interactive Entertainment Software*, Entertainment Software Association, 2001, p. 5, http://www.theesa.com/pressroom.html.

[523] Scott Kessler, "Hot Players in Online Gaming," *Business Week Online*, May 24, 2004, http://www.businessweek.com/investor/content/may2004/pi20040524_2927_pi044.htm.

[524] *Essential Facts about the Computer and Video Game Industry, 2004,* Entertainment Software Association, Media Center, http://www.theesa.com/pressroom.html.

[525] See Kevin J. Delaney, "Ads in Videogames Pose a New Threat to Media Industry," *The Wall Street Journal*, July 28, 2004, p. A1.

[526] Quoted in Jose Antonio Vargas, "Video Games Getting the Star Treatment," *The Washington Post*, February 2, 2005, p. C1.

[527] John Gaudiosi, "Double Barreled Development," *Wired*, July 2004, http://www.wired.com/wired/archive/12.07/play.html?pg=2.

Entertainment, a new hybrid Hollywood production studio, was recently formed to develop movies and games in tandem under one roof. “These aren’t games based on movies or movies based on games. There’s no chicken or egg here. A story is developed as a screenplay and a game concept simultaneously. This makes it easier to synchronize development cycles” and clear intellectual property rights and licenses at the same time, reports *Wired*.[528] Other movie studios are already actively engaged in this same sort of parallel track content development, with movies and games being developed concurrently.[529] The popular video game *Resident Evil* was developed into two movies recently, for example. And many major motion picture directors and actors are now actively engaged in developing electronic games based on their movies.[530] It would not be surprisingly to see even more movie studios develop more in-house electronic gaming units or purchase existing developers to facilitate this process.[531]

(8) *The Continuing Internet Revolution*

The rise of the Internet, the World Wide Web, and “cyberspace” is ushering in a veritable media revolution. The Pew Internet & American Life Project has found that as of February 2004, 73 percent of American adults (18 and over) used computers, the highest computer usage rate Pew has ever measured. The same study found that 63 percent of American adults (128 million) use the Internet and 65 percent of those Internet users have bought products online. “This is the highest reading on e-shopping we have ever recorded and the growth has occurred across all demographic groups,” Pew reported.[532] The FCC’s numbers are very similar, estimating that 72 percent of Americans are now online and they spend an average of nine hours weekly on the Internet.[533]

The amount of information already on the Internet is simply astounding. Scholars at the School of Information Management and Systems at the University of California-Berkeley estimate that the World Wide Web contains about 170 terabytes of information on its surface; in volume this is 17 times the size of the Library of Congress print collections.[534] And the Internet Archive “Wayback Machine” (www.archive.org) offers 30 billion Web pages archived from 1996 to the present. It contains approximately 1 petabyte of data and is currently

[528] Ibid., p. 60.
[529] Laura M. Holson, “Blockbuster with a Joystick,” *The New York Times*, February 7, 2005, p. C1.
[530] See Vargas.
[531] Microsoft, for example, recently hired movie screenwriter Alex Garland to develop its popular “Halo 2” X-Box video game into a motion picture. Cited in Holson.
[532] Lee Rainie, “Latest Internet Tracking Data,” *Pew Internet Project Data Memo*, Pew Internet & American Life Project, April 13, 2004, http://www.pewinternet.org/pdfs/PIP_April2004_Data_Memo.pdf.
[533] FCC, *Media Ownership Proceeding*, p. 148.
[534] Peter Lyman and Hal R. Varian, *How Much Information? 2003*, School of Information Management and Systems, University of California at Berkeley, 2003, http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf.

growing at a rate of 20 terabytes per month. The site notes, "This eclipses the amount of text contained in the world's largest libraries, including the Library of Congress. If you tried to place the entire contents of the archive onto floppy disks… and laid them end to end, it would stretch from New York, past Los Angeles, and halfway to Hawaii."[535] And one of the more amazing online collaborations is the "Wikipedia" open-content encyclopedia. Started in January 2001, the site allows anyone to freely access and alter any of the over 300,000 entries in multiple languages.[536] Each entry contains dozens of hyperlinks to other Wikipedia entries for easy cross-reference. Essentially, Wikipedia is an organic, spontaneous information archive that owes it success to a bottom-up, user-driven model of data organization.

The growth of the Internet is already having a profound impact on the way traditional media operates in this country and the expectations citizens have about how news and entertainment are produced, packaged, distributed, and consumed. Indeed, "[T]he FCC would be hard-pressed to find in history a more fundamental change in the forum for public discourse than the sweeping transformation engendered by the Internet," argues Fox, NBC and Viacom in a joint filing to the FCC.[537] The FCC agreed with them, noting, "Today the Internet affects every aspect of media, from video and audio, to print and personal communications. Whereas other forms of media allow for only a finite number of voices and editorially-controlled viewpoints, the Internet provides the forum for an unlimited number of voices, independently administered.[538]

The growth of the Internet is already having a profound impact on the way traditional media operates in this country and the expectations citizens have about how news and entertainment is produced, packaged, distributed and consumed.

Importantly, as discussed below, the Internet has created entirely new forms of media, or "multimedia," which encourage a much greater degree of interaction than previous mediums. Consider the fact that online auction giant E-Bay has grown so massive that it handles more daily trading traffic than the Nasdaq Stock Market.[539] As Hamel and Switzer argue, "With its 95 million registered users, all of who seem to be captivated by the interactive allure of

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[535] "Frequently Asked Questions," Internet Archive Wayback Machine, http://www.archive.org/about/faqs.php.
[536] See http://en.wikipedia.org/wiki/Main_Page.
[537] *Comments of Fox Entertainment Group, National Broadcasting Company / Telemundo, and Viacom*, "In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996," MB Docket No. 02-277, February 3, 2003, p. 17, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513406776.
[538] FCC, *Media Ownership Proceeding*, p. 43.
[539] Leslie Walker, "EBay Gathering Puts Highs, Lows on Full Display," *The Washington Post*, July 1, 2004, p. E1, http://www.washingtonpost.com/wp-dyn/articles/A17604-2004Jun30.html.

online auctions, eBay is as much an entertainment company as it is a retailer."[540] And online search giant Google recently reported that its collection of 6 billion items includes "4.28 billion web pages, 880 million images, 845 million Usenet messages, and a growing collection of book-related information pages."[541]

Of course, while the Internet is creating amazing new media outlets and empowering citizens in ways previously unimaginable, it is also creating a great deal of instability and uncertainty for traditional media providers. Finding successful and profitable business models in an online environment is proving to be a major challenge. With so much free material available in cyberspace, asking citizens to even pay a small fee for news, information or entertainment can sometime be a losing proposition. Moreover, as mentioned below, intellectual property—the core ingredient of information industries—is remarkably difficult to protect in an online environment.

(9) *Disintermediation and the Rise of the "Pro-sumer"*

What strikes fear in the hearts of traditional media providers is the disintermediation that lies at the core of the technological revolution the Internet has spawned. As the Internet evolves and continues to wean citizens from their traditional dependence on large mediating media institutions, it could have a debilitating impact on those older media outlets and their prospects for long-term survival.

New technologies are already giving citizens the ability to be media producers and distributors. Online services, Web pages, and blogs foreshadow the rise of a new "pro-sumer" media era in which millions of average citizens can act as a powerful check on traditional media providers by making or distribution news and entertainment themselves. Joe Trippi has argued that blogging is now transforming the way traditional media outlets and reporters do their job each day. "The little-known secret in newsrooms across the United States is that *right now* reporters are beginning every day by reading the blogs. They're looking for the pulse of the people, for political fallout, for stories they might have missed."[542] *San Jose Mercury News* columnist Dan Gillmore, author of *We the Media: Grassroots Journalism By the People, For the People*, notes just how profound the impact of blogs and new online media will be on traditional journalism:

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[540] Gary Hamel and Lloyd Switzer, "The Old Guard vs. the Vanguard," *The Wall Street Journal*, February 23, 2004, p. A17, http://www.strategos.com/articles/old_guard.htm. Joe Trippi, the head of Democratic presidential candidate Howard Dean's unsuccessful campaign, goes even further, arguing: "eBay is more than a multibillion dollar business; it is a community, a city of people, broken into neighborhoods by hobby and interest and commerce, a community of people who, if they banded together, could rise up, and in a single day change the world all by themselves." Trippi, p. 13.

[541] "Google Achieves Search Milestone with Immediate Access to More than 6 Billion Items," *Google Press Release*, February 17, 2004, http://www.google.com/press/pressrel/6billion.html.

[542] Ibid., p. 229 (emphasis in original).

> Tomorrow's news reporting and production will be more of a conversation, or a seminar. The lines will blur between produces and consumers, changing the role of both in ways we're only beginning to grasp now. The communications network itself will be a medium for everyone's voice, not just the few who can afford to buy multimillion-dollar printing presses, launch satellites, or win the government's permission to squat on the public's airwaves.[543]

Indeed, consider the power of blogs in our society already.[544] In May 2004, *The New York Times* profiled Brian Stelter, the author of the increasingly influential "Cablenewser.com" Web blog, which discusses cable news networks and issue coverage.[545] The blog attracts about 3,500 readers daily including some top cable news executives and personalities who read or even comment on his posts. And then the *Times* article revealed the jaw-dropping fact that Mr. Stelter is an 18-year old-college student! More impressively, in July 2004, *The Wall Street Journal* reported on the impact of the "Sentencing Law and Policy" Web blog operated by 35-year-old Ohio State University law professor Douglas Berman. His judicial blog has grown so influential that it is now cited in congressional testimony and by federal judges in major decisions and speeches.[546] And in January of 2005, several news reports documented the impact of Nicholas Ciarelli's "ThinkSecret.com," an online magazine focused on breaking news about Apple Computer products.[547] Ciarelli and his blog have come under frequent fire from Apple for breaking leaked news about new product development, and a lawsuit was eventually filed accusing him of illegally misappropriating trade secrets. Amazingly, Ciarelli, currently a 19-year old freshman studying at Harvard University, started the website when he was just 13 years old.

Keeping Stelter, Berman, and Ciarelli's blogging impact in mind, we can recall Farhad Manjoo's argument that "it's hard to find anyone in the media world… who can furnish proof that new technologies are shaking the foundations beneath entrenched media giants." Well, what would Mr. Manjoo say about Mr. Stelter, Mr. Berman, and Mr. Ciarelli? Likewise, what would Mr. Manjoo and other critics say about the role blogs played in exposing Dan Rather and CBS News' reliance on questionable documents about President Bush's military service

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[543] Dan Gillmore, *We the Media: Grassroots Journalism By the People, For the People* (Sebastopol, CA: O'Reilly Media, Inc., July 2004), p. xiii.

[544] See David Kirkpatrick and Daniel Roth, "Why There's No Escaping the Blog," *Fortune*, January 10, 2005, pp. 44-50.

[545] See http://www.cablenewser.com/.

[546] Laurie P. Cohen, "Law Professor's Web Log Is Jurists' Must-Read," *The Wall Street Journal*, July 19, 2004, p. B1.

[547] See Jonathan Finer, "Teen Web Editor Drives Apple to Court Action," *The Washington Post*, January 14, 2005, p. A1.

record in a September 8th, 2004, report on *60 Minutes II*?[548] Rather's report wasn't even a few hours old before many Internet websites and independent Web blogs were buzzing with critical commentary.[549] Soon, the trickle of online criticism turned into a flood, and everyone was debating the issue online, on the radio, on cable and satellite TV, in newspapers and magazines, and, eventually, even on CBS News itself.[550] This controversy shows the remarkable effectiveness of media to police itself and, in particular, the ability of new media outlets—and the audience itself—to act as a check on the traditional media.[551]

Consider, by contrast, how this incident might have played out 30 years ago when just three networks dominated television news and no cable, satellite, or online outlets were available. Newspaper and magazine journalists were the most reliable (and perhaps only) check on suspect reporting by TV news organizations at the time. But many errors were probably never caught. Today, thanks to the relentless march of new communications and media technologies, citizens have access to hundreds of other outlets and can, on occasion, even help break news themselves.

This is a truly remarkable development that many in government still fail to appreciate, but it has ushered in a veritable revolution in the way news is gathered, delivered and—as we see with the "Rathergate" controversy—reviewed and verified. It is unlikely that any other society has ever had such a diversity of checks and balances in place to guard against misrepresentation or misreporting of the facts.[552] Indeed, what is most remarkable about the Rathergate controversy is its duration. Rather and CBS admitted their mistake just 11 days after the original report aired. Thirty years ago, it would likely have taken much longer for the facts to surface, if they

It is unlikely that any other society has ever had such a diversity of checks and balances in place to guard against misrepresentations or misreporting of the facts.

[548] See Adam Thierer, "The 'Rathergate' Incident: Remembering Why Separation of Press and State Is Vital," Cato Institute *TechKnowledge*, No. 88, September 30, 2004, http://www.cato.org/tech/tk/040930-tk-2.html.

[549] Peter Wallsten, "No Disputing It: Blogs Are Major Players," *Los Angeles Times*, September 12, 2004, http://www.latimes.com/news/nationworld/politics/la-na-blog12sep12,1,2645873.story?coll=la-news-politics-national; Howard Kurtz, "After Blogs Got Hits, CBS Got a Black Eye," *The Washington Post*, September 20, 2004, p. C1, http://www.washingtonpost.com/wp-dyn/articles/A34153-2004Sep19.html.

[550] Ed Carson, "Blogs Take Lead Role in CBS Memo Furor," *Investors' Business Daily*, September 15, 2004, p. A1.

[551] "The venerable profession of journalism finds itself at a rare moment in history where, for the first time, its hegemony as gatekeeper of the news is threatened by not just new technology and competitors but, potentially, by the audience it serves." Shayne Bowman and Chris Willis, "We Media: How Audiences Are Shaping the Future of News and Information," The Media Center, *Thinking Paper*, 2003, p. 7, available at http://www.mediacenter.org/mediacenter/research/wemedia/.

[552] See Philip Meyer, "Closely Watched Media Humbled," *USA Today*, January 13, 2005, p. 11A.

did at all. Indeed, many were quick to label the episode "a media watershed"[553] that highlights the "de-massification of the media"[554] and "the final collapse of network television's dominance over the news."[555]

While blogging and Web reporting are still in their infancy, camcorders, digital cameras, and even cell phone cameras have already given citizens the ability to personally capture history at any given moment and then distribute it across the globe on the Internet. And the Web could help revolutionize entertainment as well. New audio and video "streaming" technologies already allow citizens to be micro-programmers. A July 2004 *New York Times* article revealed that over 100 independent television stations currently stream video over the Net.[556] Analogizing to wireless pioneer Guglielmo Marconi, who in 1901 transmitted the first wireless signals across the Atlantic,[557] independent Web TV programmer Robert Cortese boasted to the *Times*, "I am a modern day Marconi. People may mock it, but 10 years from now, all content is going to be delivered like this."[558]

Thus, traditional media do have much to fear. Traditional broadcast television, in particular, "is suffering from a slow economic decline"[559] because of competition from new video delivery platforms and technologies (cable, DBS, DVD, webcasting, etc.) and a declining advertising base.[560] Some of these latter threats are addressed below about the search for new revenue streams and the impact of technologies like TiVo and personal video recorders on broadcast television.

[553] "A Media Watershed," *Wall Street Journal*, September 16, 2004, p. A16.

[554] James P. Pinkerton, "As Rather Goes, So Goes Network News," *Newsday.com*, September 21, 2004, http://www.nynewsday.com/news/opinion/columnists/ny-vppin213979566sep21,0,2945833.column?coll=ny-opinion-columnists.

[555] Anne Applebaum, "Rather Irrelevant," *The Washington Post*, September 22, 2004, p. A31, http://www.washingtonpost.com/wp-dyn/articles/A40119-2004Sep21.html.

[556] Tim Gnatek, "Internet TV: Don't Touch That Mouse!" *The New York Times*, July 1, 2004, p. E5.

[557] See "Guglielmo Marconi – Biography," *Nobel e-Museum,* http://www.nobel.se/physics/laureates/1909/marconi-bio.html. Adapted from *Nobel Lectures. Physics 1901-1921* (Amsterdam: Elsevier Publishing Company, 1967).

[558] Quoted in Gnatek, p. E5.

[559] Joseph Kraemer of the Law & Economics Consulting Group told a crowd of broadcast station operators in April 2004 that broadcast TV "is suffering a slow economic decline as a total industry" and that they "have to do something now" to reverse that trend. Quoted in "Mass Media," *Communications Daily*, April 1, 2004, p. 16.

[560] Summarizing the disintermediation threats that broadcast television providers face today, Douglas A. Ferguson of the College of Charleston finds: "The structure of choices in television broadcasting is under two pressures. One is the competition of distribution technologies, including cable television, direct-to-home satellites, home video (DVDs), and digital interactive television. The other is pressure to broaden their market base to pay for the increased cost of competing with others." Douglas A. Ferguson, "The Broadcast Television Networks," in Alexander, et. al., p. 153.

But, regarding the former threat of increased competition from new distribution technologies, history is finally catching up with technology guru George Gilder's prediction of the impending "death of television" and "rise of the "tele-puter."[561] As a January 2005 *New York Times* headline argued, the "PC Wants to Be the Center of All Media."[562] That prospect looks more realistic now than ever before with the entry of the computer sector into media business and the rise of hybrid distribution and receiving technologies emanating out of the computer sector.[563] It's no accident that Microsoft named its latest software platform "Media Center."[564] In the summer of 2004, the computing giant also announced that it was forming a new internal division to focus on the convergence of media technologies and entertainment.[565] Similarly, Intel's next generation of chips is aimed at turning PCs and other electronic devices into "media servers" that will allow consumers to better manage their media content.[566]

Comcast Cable president Stephen Burke predicts that "The television industry is going to change more in the next five years than it has in the last 20."[567] Indeed, even major cable providers like Comcast will face major disintermediation threats in coming years, especially from the Internet.[568] Penelope Patsuris of *Forbes* wonders "just how long it will be before most folks

[561] George Gilder, *Life after Television: The Coming Transformation of Media and American Life* (New York: W.W. Norton & Company, 1994).

[562] Sean Captain, "TV Room's PC Wants to Be the Center of All Media," *The New York Times*, January 13, 2005, p. E4.

[563] See generally Scott Woolley, "The Television Will Be Revolutionized," *Forbes*, November 29, 2004, pp. 162-71.

[564] Patrick Seitz, "Microsoft Media Center Goes Hollywood," *Investors' Business Daily*, October 13, 2004, p. A4; Robert A. Guth, "Bill Gates, Entertainer," *The Wall Street Journal*, October 13, 2004, p. B1; Jay Greene, Heather Green, and Andy Reinhart, "Microsoft May Be a TV Star Yet," *Business Week*, February 7, 2005, http://www.businessweek.com/magazine/content/05_06/b3919124_mz063.htm.

[565] Microsoft's newly formed Media / Entertainment & Technology Convergence Group, "will consolidate and drive the company's strategies for the digital convergence of home entertainment technologies, personal computing and media, particularly in the areas of business and market development, technical and IP policy, and industry-standards initiatives." See "Microsoft Forms New Group to Drive Global Strategies and Relationships with Media and Entertainment Industries," Microsoft *PressPass,* July 19, 2004, http://www.microsoft.com/presspass/press/2004/jul04/07-19GlobalStrategyGroupPR.asp.

[566] Don Clark, "With New Chips, Intel Hopes PCs Turn into 'Media Servers,'" *The Wall Street Journal*, June 17, 2004, p. B1.

[567] Quoted in David Lieberman, "Comcast Forecasts Digital TV, PC, Phone Convergence," *USA Today,* July 1, 2004, p. 1B.

[568] Hamel and Switzer argue: [C]able's role as an intermediary will undoubtedly be challenged. Before long, it may be easier for a consumer to download a news clip from CNN.com than turn on a TV set. Film companies may deliver first-run movies directly to consumers via the Internet. And instead of buying a season pass from their cable company, sports fans may buy programming directly from the NFL or their local team—to be delivered over a broadband connection. In this scenario, cable operators may be more like trucking companies, charging for transport of bits, and less like shopping malls, aggregating goods and services." Hamel and Switzer, p. A17.

skip using any kind of pay-TV set-top box altogether and just plug their broadband straight into their shiny new flat-panel TVs."[569]

To summarize, as *Wall Street Journal* technology columnist Lee Gomes argues, "[T]he Web is… likely to open up entirely new and previously unimagined programming possibilities. In the end, 'watching TV' is likely to take on all sorts of new meanings… Kids today, who send instant messages to friends while watching music videos while doing their homework, are already tuned into this emerging multiscreen, multimedia world."[570]

(10) *The "TiVo-ization" and the "Napster-ization" of Media and the Great Advertising Squeeze*

On a related note, new technologies such as TiVo (personal video recorders or "PVRs") and Napster (peer-to-peer file sharing services) have started a media revolution of their own. These technologies or networks have given media consumers the ability to decide exactly how and when they will consume, store, or share media. In some cases, they have given citizens the ability to ignore altogether the intellectual property rights of media providers or individual artists. As a result, legal action has been pursued against individuals who share copyrighted files online.[571]

Regardless of the outcome of such legal battles, these technologies have already irrevocably changed society's attitudes and expectations about how media is delivered, consumed and stored. For example, just five years ago few in the recording industry would likely have imagined the day would soon come when they would have to voluntarily unbundle albums and sell each song individually for 99 cents. And yet that day has arrived thanks to the rise of file sharing and peer-to-peer (P2P) networks, which challenged traditional industry pricing schemes and business models. Even if the recording industry is successful in litigating many of these P2P networks out of existence, traditional recording industry business models have probably been changed forever due to

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[569] Penelope Patsuris, "Will Pay TV Soon Be Imperiled?" *Forbes.com*, April 8, 2004, http://www.forbes.com/columnists/2004/04/08/cx_pp_0407patsuris.html. Patsuris argues that experiments with direct downloads are already under way that potentially foreshadow a day when online markets and technologies eliminate traditional media middlemen. "These endeavors may be long shots now, but what happens when the technology gets to the point where most televisions have high-speed Internet connections? Consumers may start wondering why they should pay $100 a month to DirecTV or Comcast for a bunch of channels they never watch, when they can just maintain their broadband connection at $40 a pop and only watch exactly what they want to watch."

[570] Lee Gomes, "Web TV Is Changing the Way Programming Is Watched and Sold," *The Wall Street Journal*, May 10, 2004, p. B1.

[571] See Adam Thierer, "Copyright Enforcement Revisited," Cato Institute *TechKnowledge* no. 92, November 4, 2004, http://www.cato.org/tech/tk/041104-tk.html; Adam Thierer, "On Drawing Lines in Copyright Law," Cato Institute *TechKnowledge* no. 75, March 5, 2004, http://www.cato.org/tech/tk/040305-tk.html.

these recent developments and changing consumer expectations about how music is packaged and delivered.[572]

Similar disruptive events could be in store for video programming providers as broadband connectivity expands and file sharing invades the video space.[573] PVRs have already shown that they will have the same profoundly disruptive or transformative impact that VCRs and even remote controls had before them. As Jack W. Plunkett, author of *Plunkett's Entertainment & Media Industry Almanac 2004,* argues: "Gone are the days when television and radio programmers enjoyed captive audiences who happily sat through ad after ad or planned their schedules around a favorite show. Consumers, especially consumers in younger demographics, now demand more and more control over what they watch, read or listen to.… The implications of these changes are staggering. The business models upon which most entertainment companies have traditionally run are becoming obsolete."[574]

In particular, the traditional advertising-supported business model for broadcasting may be at risk if current trends continue.[575] In mid-2004, investment banking house Morgan Stanley predicted another bleak year for both broadcast television networks and stations, with 30-second prime-time spots being flat.[576] Cable ad revenue has also slowed, but thanks to subscriber revenues, the lack of advertising growth doesn't pose the same threat to cable or satellite as it does to traditional broadcasters with their single revenue stream.[577] "Put simply, TV advertisers are going to find it ever more difficult to hold a consumer's attention," argue Hamel and Switzer. "This may put a big dent in media-industry profits."[578]

Thus, much of the media change and consolidation that has taken in recent years has been driven by these trends and the realities of the intensely competitive marketplace in which companies find themselves.

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[572] See Adam Thierer and Clyde Wayne Crews, *Copy Fights: The Future of Intellectual Property in the Information Age* (Washington, D.C.: Cato Institute, 2002), http://www.catostore.org/index.asp?fa=ProductDetails&pid=1441127.

[573] See Adam D. Thierer, "Pipe Dreams: Why 'Dumb Pipe' Models Make for Poor Public Policy," in *Free Ride: Deficiencies of the MCI 'Layers' Policy Model and the Need for Principles that Encourage Competition in the New IP World* (Washington, D.C.: New Millennium Research Council, July 2004).

[574] Jack W. Plunkett, *Plunkett's Entertainment & Media Industry Almanac 2004* (Houston, TX: Plunkett Research, 2004), p. 7.

[575] "Change in ad media and marketing is happening at a faster rate than ever before," argues Troy Mastin, an analyst with William Blair & Co. Quoted in Doug Tsuruoka, "Advertising at a Crossroads," *Investors' Business Daily*, August 9, 2004, p. A20.

[576] Noted in John M. Higgins, "Broadcast Ad World Is Flat," *Broadcasting & Cable*, July 12, 2004, http://www.broadcastingcable.com/article/CA435232?display=Breaking+News&promocode=SUPP.

[577] For an outstanding overview of this issue and these threats to traditional advertisers and broadcasters in particular, see Frank Rose, "The Lost Boys," *Wired*, August 2004, pp. 115-19.

[578] Hamel and Switzer, p. A19.

Rejecting Public Policy "Snapshots" and Crystal Ball Gazing

Indeed, the implications of these changes are truly staggering and will leave many media companies scrambling to find new business models and revenue streams. Manuel Castells, author of *The Rise of the Network Society*, predicts that the impact of the disintermediation we are witnessing could be the demise of mass audiences as media becomes increasingly specialized. Thus, contrary to the famous assertion of media analyst Marshall McLuhan that "the medium is the message," Castells argues that "because of the diversity of media and the possibility of targeting the audience, we can say that in the new media system, the message is the medium. That is, the characteristics of the message will share the characteristics of the medium…. This is indeed the present and future of television: decentralization, diversification, and customization. Within the broader parameters of the McLuhanian language, the message of the medium (still operating as such) is shaping different media for different messages."[579]

Given these amazing changes, it is vitally important that the debate over media ownership not be cast in static "snapshot" terms as some critics seemingly are prone to do. Public policy often becomes preoccupied with the issues of the past and ends up regulating to optimize market structures that are on their way out the door. And even when regulation is supposedly "forward-looking," things go wrong since the predictive powers of regulators are notoriously poor. Even respected business leaders sometimes don't see the future coming. In fact, they can be wildly off the mark.

It is vitally important that the debate over media ownership not be cast in static "snapshot" terms as some critics seemingly are prone to do.

Indeed, on a personal note, one of the most enjoyable things about writing this book has been the opportunity it has afforded me to peruse older papers and books about media history, law, and economics with their many failed prognostications about the future. In reviewing this literature, a researcher finds a great deal of hand-wringing about how to deal with the industries and technologies of each era. First it was "What are we going to do about this thing called radio?" Later it was "What are we going to do about this thing called television?" Then it was cable, then satellite, and now the Internet. Each new innovation is greeted with fear and trepidation and treated as a threat to be dealt with instead of an opportunity to be embraced.

This static, myopic mentality is ever-present in the media literature of the past. How do we explain it? Part of the answer certainly must be the seemingly insatiable desire of humans to want to micromanage media outlets or outputs. As previous chapters noted, government has always sought to control the press in

[579] Manuel Castells, *The Rise of the Network Society* (Oxford, U.K.: Blackwell Publishers, 2nd Ed., 2000), p. 368. Negroponte agrees, arguing that, "The medium is no longer the message." Negroponte, *Being Digital*, p. 61.

one way or another and many citizens will always accuse the media of bias whether any is really present or not.

Thus, it's safe to conclude that today's many media critics and skeptics are really nothing new. So long as there is media, there will be media critics. But policymakers and the public would be wise to consider just how far we've come in the past few decades and be more optimistic about the prospect for even more beneficial change in the near future. Waves of Schumpeterian "creative destruction" have rolled through America's media landscape in the past, decimating many businesses and business models. For a brief time in the 1970s, CB ("citizen band") radio was the hottest fad in the land, and then a few short years later it was as passé as disco and bell-bottom jeans. Today we are witnessing the death of one of the older and more popular storage mediums—print film. In February 2004, the 100-year-old Eastman Kodak Company announced 15,000 more job cuts on top of the thousands already announced the year before. "Traditional film is moving swiftly toward antiquity," notes *Wired News* reporter Kari Lynn Dean, and as it does traditional print film firms like Kodak and Fuji will need to reinvent their business models or die.[580] As David Forman of *Small Times.com* eulogizes, "You don't have to be a professional futurist to see that the days of conventional film are numbered."[581]

Music stores may be going under too because of the recent upheaval caused by digital music, online music networks, and file sharing. Tower Records, Sam Goody, and Music Network (owner of Kemp Mill Music, Turtle's Music, and Willies Music) are just a few music chains that have recently announced they are filing for bankruptcy or closing several stores.[582] Several video game platform developers and personal computer (PC) hardware and software manufacturers have already passed in and out of sight in the short histories of those two industries. And the Internet sector has already seen one "Dot.com Deathwatch" take place in it's short history, with thousands of firms experiencing a fall almost as meteoric as their rise.[583]

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[580] Kari Lynn Dean, "Film Firms Fight to Stay Afloat," *Wired News*, February 19, 2004, http://www.wired.com/news/technology/0,1282,62274,00.html.

[581] David Forman, "Kodak's New Image: Century-Old Firm Develops Nano Strategy," June 9, 2004, http://www.smalltimes.com/document_display.cfm?section_id=46&document_id=8039.

[582] See Pam Eggemeier, "Will Small Music Retailers Survive Industry's Slump?," *The Journal-Standard*, February 28, 2004, http://www.journalstandard.com/articles/2004/02/28/local_news/news23.txt; "Tower Records Files for Bankruptcy," *CBS News.com*, February 9, 2004, http://www.cbsnews.com/stories/2004/02/09/entertainment/main599008.shtml; Eleni Kretikos, "Music to Die Any Day Now at Kemp Mill," *Washington Business Journal*, August 15, 2003, http://www.bizjournals.com/washington/stories/2003/08/11/daily36.html.

[583] Janelle Brown, "Dot-com Deathwatch," *Salon,* June 6, 2000, http://dir.salon.com/tech/log/2000/06/06/deadpool/index.html; John Cook, "Dot-com Deathwatch is Latest Internet Sport," *Seattle Post-Intelligencer*, January 19, 2001, http://seattlepi.nwsource.com/business/vc192.shtml.

What will the next wave of creative destruction bring? Who will fall? What new technologies will dominate? Obviously, no one knows what's next, but chances are it is something most of us simply cannot fathom today. Just 15 years ago, for example, few of us could have imagined or even understood the Internet and cyberspace. Imagine a time traveler returning to 1990 and trying to explain to someone what Google was all about. It might go something like this: "OK, so there's going to be this company called Google—started by two college kids, by the way—that will become one of the most popular companies in the world with the biggest IPO ever. And all because they offer the equivalent of a *free* data retrieval service that will allow us to look up billions of pages of information from across the globe at the click of a button!" Many people would have scratched their heads in puzzlement or just refused to believe it. Others would have laughed. And it's unlikely many would have been interested in investing.

The same would be true if we traveled back to 1980 and foretold of millions of homes in even the remotest areas having satellite dishes on their rooftops that could access 500 channels of television. Few would have believed it. And if we traveled back to 1970 and told them the day would soon be upon us when even small children would be walking around with wireless phones in their pockets and people would be "cutting the cord" entirely at home, few would have believed that either. And how would we explain a BlackBerry personal digital assistant to them? And so, if a time traveler from 2020 or perhaps even 2010 visited us today, what might they tell us about the media and communications future to come? Would we believe it?

The moral of the story here is that the "traditional" media sectors no longer exist. Convergence is now a reality and all new technologies and services are blurring the traditional lines between formally distinct sectors. Many citizens have come to take our many modern media choices for granted, and now even view many of them as virtual necessities. A recent *Fortune* magazine cover story on emerging technology trends appropriately noted that, "'Need' is such a subjective term. TiVo, Netflix, DirecTV, satellite radio, BlackBerry, cellphone, DSL, long distance, mortgage. Which, you may find yourself asking, is expendable?"[584] Indeed, many people are reluctant to give up any of these services once they have acquired them, but this exemplifies just how sophisticated the modern media marketplace has become. The dream gadgets that graced the covers of *Scientific American* and *Popular Science* just a few years ago are now mainstream products used by millions of consumers. And so the cycle continues with no end in sight for the relentless march of technological change in the media sector.

Viewed in this light, it is very difficult to understand why the FCC's ownership decision created such a ruckus. The media universe has undergone radical changes, but public policy remains firmly rooted in a 1950s mindset.

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[584] David, p. 86.

CONCLUSION
WHY BIT CONVERGENCE COMPELS MEDIA FREEDOM

A Personal Note on Media Diversity and Multitasking

In thinking about how to conclude this amazing story about just how much media has changed in America over the past few decades, I came to realize that my own personal experience with media was as almost as compelling as some of the empirical evidence presented in this book. In particular, the "media multitasking" I engaged in while writing this book would have been unthinkable to the previous generation of media consumers.[585]

For example, while I was writing this book, I spent many nights in front of my desktop and laptop PCs. I used those computers to revise and reorder paragraphs and entire chapters using simple cut-and-paste techniques that would have required endless hours if I had been handwriting the manuscript or using a typewriter. The resulting time savings are incalculable. (I honestly cannot comprehend how anyone wrote a book in less than two years before the advent of the PC, word processors, and the Internet.)

While using my PC, I did a great deal of research on-the-fly with multiple Internet browsers open in the background so that I could locate and integrate materials into my book very rapidly. I would estimate that more than 75 percent of the research done for this book was compiled from online sources. Books, journal and newspaper articles, and laws and regulations that would have required endless trips to the Library of Congress—and hours in front of a copying machine—were instead almost all available to me via the Net. Most of them were free of charge. Again, more time (and money) savings.

While I was working on the book, I was almost always listening to music from one of four sources: my personal CD collection, the MP3 music files I have burned on my PC hard drives, my XM satellite radio receiver, or traditional broadcast radio stations. Much of the time, I would also be keeping my eye on a television set in the other room with a 24-hour news station or a ballgame running in the background. My cable provider offers hundreds of channels to sample, including some wonderful high-definition television (HDTV) offerings. I'd also be monitoring some of my online auctions on E-Bay, where I have traded four cars over the past three years. (I can't imagine ever having to deal with a used car salesman again!)

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[585] See, generally, Getches. Also, Jim Lentz, group vice president of marketing of Toyota Motor Sales USA, recently explained to *Wired* magazine how important this "multitasking" is in terms of the changes it will bring about. "This younger generation has a filter mechanism. They can be doing their homework, listening to music, watching TV, on the PC, and on the phone, all at the same time…. You assume they're just screwing around—but they're not… They have a total ability to block out anything they don't want to get through." Quoted in Rose, p. 119.

For relaxation, I would sometimes switch over to an online chess site and play a quick game with players from all across the globe. I once lost a grueling match against someone who said they were from Poland and won another playing against someone who claimed to be in Sydney, Australia. (While playing a game, players can type notes to each other at the bottom of the screen and discuss who they are and where they are from.) As someone who has cherished playing chess since the 4th grade but had few friends in my small town interested in playing when I wanted, I never thought I'd see the day when I could play a match anytime I wanted with opponents located on the other side of the planet. It's an amazing development when you stop and think about it.

On occasion, I would also be "burning" copies of my home movies to DVD so I could send my parents videos of their grandchildren, or backing up pictures of my family on an online photo storage and processing service. (I haven't seen the inside of a professional film processing store in over three years.)

Finally, while I was doing all of this, my email box would be pinging constantly informing me new that messages had arrived, and my cell phone would still be ringing non-stop as it always has. (I had instant messaging too but gave it up as too much of a distraction.)

Again, I did all this while I was researching and writing this book. If that isn't a sign of just how much the times have changed for the better, than I don't know what is.

It is easy to take all of this for granted once you have had it at your disposal for a time. Indeed, it has become difficult for me to imagine life without these modern media options and technologies.[586] Many in the younger generation probably cannot fathom what life in "the old days" must have been like at all. But as someone who grew up flipping a clunky metal dial on a crummy black-and-white TV to tune in three television stations and one or two fuzzy distant UHF channels (on a good day!), and who typed all my college papers on a boxy black typewriter with plenty of "white out" handy, and who thought he was lucky to be able to read the baseball box scores and statistics *on a weekly basis* in the only newspaper available in my small rural town, I can honestly say that "the good old days" were just awful compared to today.

The Facts Speak for Themselves

In conclusion, as the FCC noted when publishing its new media ownership rules in 2003: "In short, there are far more types of media available today, far

[586] On this note, an entertaining June 2004 article in *Popular Science* magazine featured an author who tried to live for 10 days in a big city using the technologies of 50 years ago. It proved to be a trying experience for him. See Larry Smith, "Tech '54 Where Are You?" *Popular Science*, June 2004, http://www.popsci.com/popsci/computers/article/0,12543,642505-1,00.html.

more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before."[587] This book has attempted to verify this assertion and gone further to suggest that the claims to the contrary made by media critics are completely at odds with empirical reality and based almost entirely on their subjective sociopolitical viewpoints and desires. For far too long, media critics have gotten away with making broad, unfounded generalizations about America's media marketplace. Facts, not fear-mongering, must govern the debate over media policy in the future.

To the extent there was ever a "Golden Age" of American media, we are living in it. There has never been a time in our nation's history when the citizens had access to more media outlets, more news and information, or more entertainment. Abundance, not scarcity, is the defining fact of our current media age.[588] These statements are supported by a solid factual record, whereas the media critics continue to base their case for government control on emotional appeals and unfounded "Chicken Little" scenarios.

In such an age of abundance and hyper-choice, the question of who owns what or how much they own is utterly irrelevant. No matter how large any given media outlet is today, it is ultimately just one of thousands of sources of news, information and entertainment that we have at our collective disposal. "Indeed, the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans," concluded the FCC when releasing its revised media ownership rules.[589]

In such an environment, it is fundamentally unfair to impose asymmetrical regulations and ownership controls on one class of information providers while leaving others completely free to arrange their affairs—and, by extension, their speech—as they wish. Ten years ago, Nicholas Negroponte put it eloquently in his splendid paean to the digital age, *Being Digital*:

> Should it really be unlawful to own a newspaper bit and a television bit in the same place? What if the newspaper bit is an elaboration of the TV bit in a complex, personalized multimedia information system? The consumer stands to benefit from having the bits commingle and the reporting be at various levels of depth and display quality. If current cross-ownership rules remain in existence, isn't the American citizen being deprived of the

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[587] FCC, *Media Ownership Proceeding*, p. 49.

[588] "Twenty-first-century consumers have dramatically increased options for getting the personal and community information they want and need to get them through their day and week." Jon Ziomek, "Journalism Transparency and the Public Trust," Aspen Institute *Report of the Eighth Annual Aspen Institute Conference on Journalism and Society*, 2005, p. 28.

[589] FCC, *Media Ownership Proceeding*, p. 149.

> richest possible information environment? We are shortchanging ourselves grotesquely if we forbid certain bits to commingle with others.[590]

"Bits are bits," argued Negroponte, but in today's heavily regulated media marketplace, sadly, some bits are more free than others.[591] Some media critics might welcome the sort of industrial policy that handcuffs analog age providers while protecting digital-age upstarts from onerous government mandates. But such a system is not only unfair, it is increasingly unworkable. The world of technological and media convergence, which visionaries like Negroponte and George Gilder predicted long ago, is now upon us. With each passing day, the old industry definitions make less and less sense as everyone attempts to compete in everyone else's backyard. Newspapers are less about paper than ever before; it's the digital world they care about now. The same goes for the old analog broadcasting giants. They are migrating services and assets to the digital space as quickly as they possibly can. Cable and satellite companies are already there, of course.

In other words, everyone is finally realizing that bits are bits are bits, and they are changing their business models accordingly. But if we allow the old analog media ownership controls to live on, at some point they will start to spill over into the digital realm and impact those bits too. If we as a society care about freedom, and freedom of information in particular, we must end all media ownership controls before technological and market convergence create regulatory convergence as well.

Free the bits! Free the information! Free the media!

[590] Negroponte, p. 57.
[591] Ibid., p. 9.

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