

The Question Remains—Can Government Intervention Promote Free Speech?: Revisiting Arguments for Structural Regulation

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When the Federal Communications Commission (FCC) approved both the merger of Viacom and CBS in May 2000 and News Corporation's (News Corp.) purchase of ten Chris Craft television stations in July 2001, it did so with conditions: Within a year, these companies were required to meet the National Television Station Ownership Rule (NTSO), otherwise known as the 35% Rule, a regulation that prohibited any one company from reaching over 35% of the U.S. television households. However, by the time the FCC approved the News Corp./Chris Craft acquisition, Viacom had challenged the condition and was granted a stay by a federal appeals court in April 2001. Viacom/CBS, along with Fox Television Stations, Inc. (owned by News Corp.) and NBC (owned by General Electric), took the matter to court, and in September 2001, the U.S. Court of Appeals for the District of Columbia heard their arguments. These conglomerates argued that the FCC did not review the NTSO Rule as mandated by the Telecommunications Act of 1996, and as such, they claimed the rule was no longer applicable. They also posited that the rule violated their First Amendment right to reach the remaining 65% of the audience. The FCC, on the other hand, argued that the rule protected competition and promoted diversity. The court agreed that the regulation was "arbitrary and capricious and contrary to law," but it did not agree that the rule violated the companies' First Amendment rights. The court ordered the FCC to review the rule and provide evidence to suggest that the rule safeguards competition and encourages diversity.¹

Although the Court of Appeals noted that ownership rules were constitutional, it also set forth a contentious interpretation of Section 202(h) of the Telecommunications Act of 1996, which stated that the FCC must review its ownership rules every two years and determine whether the rules are "necessary in the public interest as a result of competition." The court found that 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules."² This placed a much heavier burden on the FCC to defend media ownership rules that were intended to open access to the broadcast media: To justify regulations, the

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Commission would now need to provide “empirical” evidence that the rules promote public interest standards. Previous courts and FCC commissioners had accepted the justification that diversity of ownership leads to diversity of viewpoints, a notion that seemed to be taken as logical and commonsensical.³ Interpretations of the 2002 court’s presumption assume that empirical evidence means numbers, and it can be argued that the numbers are difficult to attain, for public interest principles such as diversity and localism cannot be quantified. Neither can the benefits of the First Amendment.

As Sut Jhally argued, for democracies to survive, robust and diverse public discourse is crucial, for without such debate, “it is all too easy to lapse into a homogenizing authoritarianism.”⁴ The First Amendment to the U.S. Constitution guarantees freedom of speech for this very reason. Indeed, the courts and the FCC in earlier days defended regulation of broadcast media in the name of the First Amendment right to speech.⁵ However, as Jhally noted, freedom of speech and the press has traditionally been defined as a negative freedom; that is, “freedom from control by *government*.”⁶ This definition of freedom disregards the fact that freedom of speech can be hampered by factors other than the government, including corporate control of the means of disseminating information. As such, corporations can censor speech and marginalize dissenting voices and alternative viewpoints and at the same time maintain that it is their First Amendment right to do so.

The approval of mergers such as Viacom/CBS and News Corp.’s purchase of additional television stations indeed demonstrates increased concentration of ownership of U.S. broadcast media. Further, in 2003, the FCC voted 3-2 upon party lines to increase the NTSO Rule from 35% reach to 45%, a decision that was eventually replaced by a compromise of 39%.⁷ In light of these developments and the court’s opinion in *Fox v. FCC*, I argue that we must revisit free speech arguments for structural regulation. Though structural regulation appears counter to liberalist interpretations of the First Amendment, several First Amendment scholars, including Owen Fiss, Alexander Meiklejohn, and Cass Sunstein, support the notion that government intervention via regulation is not only constitutional, but can also promote the FCC’s goals of diversity, competition, and localism, ideals necessary in a democratic society that depends on the media for information and entertainment.

Challenges to broadcast ownership rules continue, as newspaper and broadcast organizations argue that ownership rules are archaic in a time of media abundance. This

argument ignores two important points: questions of access (e.g., digital divide issues) and conglomeration (i.e., the same companies control a vast amount of media sources). Further, though the Court of Appeals in *Fox v. FCC* did not agree that the NTSO rule violated free speech rights, the First Amendment is often used by media conglomerates as a defense against regulatory challenges. However, when a few companies control a vast amount of media, including public airwaves, citizens have little access to the means of mass communication. And as will be discussed, the commodification that results from a commercialized press affects the range of information provided to the public. As such, this paper explores two arguments that justify the preferred position of freedom of speech—the “marketplace of ideas” and democratic self-governance—and argues that structural regulation can help to promote First Amendment ideals rather than hinder them.

The Marketplace of Ideas, Self-governance, and Access

The thing that I think is often overlooked is the minute you talk about media concentration, you're talking about another cherished American value that gets implicated, and that's the First Amendment to the Constitution.

--Michael Powell, Chairman of the Federal Communications Commission, August 2001⁸

The “marketplace of ideas” justification posits “that humankind’s search for truth is best advanced by a free trade in ideas.”⁹ In theory, when a diversity of viewpoints and ideas are presented into the “marketplace,” truth will inevitably emerge. Conversely, censorship would prevent truth from emerging. As Justice Oliver Wendell Holmes succinctly explained in an oft-cited quote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market...¹⁰

However, as Rodney Smolla argued, “the marketplace image...is tempered by experience...The marketplace of ideas is a marketplace, and like all markets, it may experience positive and negative cycles.” The promise of the “marketplace of ideas,” an ideal “grounded in laissez-faire economic theory” and libertarian notions of the role of the press, could theoretically work; that is, when ideas compete in a “free” market, the search for truth can be waged, and rational decisions can be made. But, “The marketplace of ideas, no less than the marketplace of commerce, will inevitably be biased in favor of those with the resources to ply their wares.”¹¹

Because the wealthy and powerful have greater access to the means of dissemination, their ideas are predominantly heard. As Owen Fiss noted:

The market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.¹²

To promote a vibrant and open theoretical “marketplace of ideas,” citizens must have access to the means of producing and disseminating information. In today’s media climate, though, in which a few companies own the means of communication, access is a serious problem.¹³ Even the Internet, hailed by many scholars as a “true” marketplace of ideas, has been overrun by corporations that are using copyright protection as a strategy for eliminating access to voices, particularly critical voices, in the marketplace.¹⁴ Further, as William Bailey succinctly argued, “The modern marketplace of ideas is a commercial, mass-media pandemonium where the role of the ordinary citizen is little better than that of a consumer in a supermarket.”¹⁵ Without access to diversity of voices and ideas, reasoned decision-making is hampered, as the mainstream commercial media more often teach us how to be “good” consumers and treat politics as a horserace than provide access to essential political, economic, social, and cultural information and accessible public forums that allow *citizens* the opportunity to debate ideas and positions. As such, the status quo remains largely uncontested.

Additionally, Smolla posited, “The hope that the marketplace will lead to truth is further eroded by the infiltration of emotional distortions into the realm of ‘ideas.’”¹⁶ Although irrational appeals have often beleaguered understanding of alternative viewpoints, this may occur, in part, because other voices are eliminated or silenced. For people to stand up to hate speech, for example, hate needs to be transparent. In order to teach tolerance, one needs to know why intolerance exists. As Holmes stated, truth is always provisional, and the benefit of the “marketplace of ideas” is the *process* rather than end.

However, coverage of the Bush Administration’s case for the 2003 war in Iraq, for example, demonstrated that this process can be usurped. Dissent and critique were marginalized and ridiculed in the rhetoric of the press. For instance, while Fox News propagated its pro-war position throughout its newscasts and talk shows, it maintained its “fair and balanced” theme, even as one of its correspondents called war protesters “the great unwashed,” and anchor Neal Cavuto told those who opposed the war that ““You were sickening then, you are sickening

now.”¹⁷ In another instance, after a Fox reporter in Jordan suggested that Arabs may regard Americans as aggressors rather than liberators, anchor David Asman stated, “There is a certain ridiculousness to that point of view.”¹⁸ When Princeton’s Peter Singer equated the lives of slain Iraqi citizens to those of American military personnel fighting in Iraq, Bill O’Reilly stated: “I believe you are on the wrong side of this politically and morally, but I’m going to give you the last word.” O’Reilly, however, had the last word, stating: “You’re doing a great disservice to your country, sir.”¹⁹ In another example, O’Reilly pointed out in one of his “Talking Points” that an ABC News/Washington Post poll found that 71% of Americans felt that Colin Powell’s speech to the United Nations was a “convincing case for war.” He opined:

The dissenting 30 percent are an interesting group. As Talking Points has pointed out, some of them simply hate their country and/or President Bush...Now, I’m getting real tired of ignorant Americans blasting their country when they’re clueless about history and geopolitics. Many of the loudest voices of dissent are also the dumbest voices.²⁰

Questioning the current power relations and economic factors motivating the war in Iraq became equated with stupidity and spite and was dismissed with disdain.

Further examples of marginalization in war coverage include MSNBC’s Michael Savage accusing war protesters of “absolutely committing sedition, or treason.” His partner, Joe Scarborough, a former Republican congressman, replied, “These leftist stooges for anti-American causes are always given a free pass. Isn’t it time to make them stand up and be counted for their views?”²¹ As anti-war protesters were reduced to ridicule and marginalization, it can be argued that access to *diversity* of ideas and *uninhibited* public debate of political, economic, social, and cultural issues were clearly lacking as pro-war voices were predominantly heard and anti-war voices were silenced.

Smolla did note, however, that “[i]t is possible to be both a realist and an optimist” when it comes to the “marketplace of ideas” ideal. He stated that although “[h]umanity may be fallible and truth illusive,” truth can still prevail, as “it gets rediscovered and rejuvenated, until it finally flourishes.” Therefore, “doubts about the purity of the marketplace should lead [the government and citizens] to be *more* protective” of the First Amendment.²² To promote the promise of a “marketplace of ideas,” citizen access to the deliberations must be protected.

Although we cannot “*empirically* test the proposition that truth will triumph over error, because that would itself require some objective measure of what ideas are true and what ideas are false,” the “leap of faith” necessitated by the marketplace ideal is “its deepest strength, for it

spurs us to accept the noblest challenge of the life of the mind: never to stop searching.”²³ But without access to a diversity of viewpoints, the search for truth, for many people, is unproductive, as the same voices and messages found in the mainstream media are persistently and loudly heard.²⁴ Government intervention can help to ensure diversity of ideas. As Cass Sunstein noted, government regulations created the “free market” state of the media with laws regarding such issues as property rights, contracts, and torts.²⁵ Thus, the government can also intervene to change the rules of the marketplace in order to provide greater access to the means of communication and to promote true diversity. In the current “free” media market, variety or multiplicity rather than diversity is advanced, as the same news, for example, can be found on network and cable news programs, as well as in print and online newspapers and on radio, with little variation other than the medium. In a democratic society, it is imperative that a wide array of viewpoints, ideas, and information is available for citizens to self-govern.

According to Smolla, freedom of speech is related to self-governance in at least five ways: (1) “Speech is a means of participation, the vehicle through which individuals debate the issues of the day, cast their votes, and actively join in the processes of decision-making that shape the polity”; (2) “The self-governance interest served by free speech is the pursuit of political truth”; (3) Free speech stresses “the importance of speech as a means of ensuring that collective policy-making represents, to the greatest degree possible, the collective will”; (4) Free speech also works to curtail “tyranny, corruption, and ineptitude”; and (5) Free speech contributes to stability; “a society will be both more stable and more free in the long run if openness values prevail.”²⁶ For citizens to participate in politics, information must be readily available and accessible. For a few conglomerations to own the means of communication and promote their interests through these outlets, though, the collective will of the citizenry often succumbs to or becomes the collective will of big business and the power elite.²⁷

Rather than narrowly interpreting the First Amendment as merely protection from the government, Sunstein argued the state should use regulation to perpetuate and cultivate political diversity of ideas.²⁸ In practice, though, it appears that liberalist interpretations of the First Amendment often protect the autonomy of media outlets whose primary goal of profit maximization does not necessarily contribute to political discourse and participation. Without access to a diversity of viewpoints, it is difficult for citizens to take part in rigorous political debate, which, if one agrees that democracy should include citizen access, participation, and

deliberative decision-making, is detrimental in a democratic society. And while media conglomerates want the few remaining ownership regulations abolished, they are more than willing to accept regulations that protect and/or increase their profit margins and please their stockholders. As history demonstrates, corporate control and commercialization of news have had detrimental consequences for both the notion of a “free” marketplace of ideas and democratic self-governance.

Profitable News

While the commodification of the press largely took place in the nineteenth century,²⁹ the earliest forms of pre-printing press newsheets were developed and contained content to support the commercial interests of early merchant capitalists.³⁰ Like the early handwritten newsheets, post-printing press newspapers and journals were primarily produced to disseminate information about commerce. In fact, “the traffic in news,” Jürgen Habermas posited, “developed not only in connection with the needs of commerce; the news itself became a commodity.”³¹ That is, within capitalist logic, the news became a commodity, a product to be bought and sold in the market, for as the cost of printing news increased, publishers expected a return on their investment—the cost of the printing press, paper, ink, and labor, for example. Indeed, in the eighteenth century in the United States, Benjamin Franklin, while “accorded the position of a hero of the first rank among the statuary of the Press Hall of Fame,” conducted his press for commercial profit.³² Unfortunately, as J. Herbert Altschull argued, in a commercial media system, the truth, hailed as one of the primary rationales for First Amendment protections for free speech, is “assigned a position inferior to that of financial gain.”³³

Indeed, a tension exists between ideological/mythological notions of the press’ importance in democracy and the praxis of journalism in the United States. To argue that “the news media are indispensable to the survival of democracy” is problematic because this assumption presumes that the press is free. In fact, Altschull argued, the press is not free, for the Western press has always been in part controlled by commercialized interests, albeit to varying extents.³⁴ Habermas and Baldasty both lament the passing of the partisan press, a press that disseminated diverse political arguments and facilitated public debate about political issues. From this perspective, it could be argued that for the partisan press, the transmission of political information overshadowed commercial interests. In fact, the early U.S. press is hailed as an agent of change, one that was central to the U.S. Revolution and enlightenment thinking.

However, one might argue that Habermas and Baldasty are simply nostalgic for a utopian ideal of a partisan press that in fact was quite concerned with producing a profit, careful about criticizing those in power, and geared toward the wealthy elite.³⁵ Further, the “folklore” of an independent press fails “to recognize that the news media are agencies of someone else’s power.”³⁶ Whether the partisan press indeed existed as Habermas and Baldasty suggest or is instead an idealistic conception of what the press should be, it can be argued that in today’s political economy, mainstream news media are the agents of big business.

Under the logic of capitalism, business interests eclipsed the need to inform the public of political issues and events. Baldasty argued that “changes in society and the press” in the nineteenth century, including the industrialization of the press and the rise of mass advertising as the primary revenue source for newspapers, “gave rise to news values that exalted profit-making at the expense of older notions of news as political information or persuasion,” leading to a “de-emphasis” on political news and advocacy.³⁷ While earlier papers were supported by political parties and organizations as well as reader subscriptions, the price of producing a newspaper increased with industrialization, and advertising emerged as the replacement revenue source. With a “new” emphasis on profit maximization and advertising “subsidies,” newspaper content aimed “to assemble the largest ‘quality’ audience” and “to attract advertisers who would pay high advertising rates to reach those quality readers.”³⁸ As such, news was often reduced to entertainment, which would attract mass audiences and more advertising dollars. Newspapers that focused primarily on political news would not attract enough readers, it was assumed, so newspapers “diversified” content, adding sports, crossword puzzles, comics, gossip, and the like to attract larger audiences for advertisers. Partisan papers were marginalized, and the need to produce large profits overshadowed the need to provide the political news necessary for “an enlightened electorate.”³⁹ Content aimed toward women also increased during this time period, for such content would potentially lure women, who were considered to be the primary shoppers, to read newspapers and see the ads. “Puffs,” or articles that would promote advertisers, became prevalent, as well as the use of demographic information to attract affluent subscribers, a process that neglects the information needs of the poor.⁴⁰ Publishers also began to use such devices as patent insides, or pre-printed news and advertisements, and wire stories, a product of the introduction of the telegraph, to reduce the cost of news production.⁴¹

The transformation of news from political advocate to a profitable entertainer was beneficial for both publisher and advertiser, but detrimental for a society that relies on the news media for information necessary to make informed political decisions. If the normative goals of a media protected by the First Amendment are to inform the citizenry, to provide diversity of viewpoints, and to serve as a watchdog on decision-makers (i.e., government and big business), then the decrease of political news and an increase in advertising reveals a central flaw in the libertarian theory of the press: The government is not the only institution that can censor speech.

In fact, mass advertising, Ben Bagdikian argued, is an “affliction” that has been killing off newspapers since the mid-1900s, leaving many towns with only one newspaper, if they have a paper at all.⁴² For television, advertising is crucial. Because advertisers are more concerned with circulation and ratings than with quality journalism, newspapers or television stations with the lowest cost per thousand are more profitable investments for corporations’ advertising spending.⁴³ Thus, when advertisers allocate advertising budgets to news outlets that have the lowest cost per thousand and that reach the “right” audience (i.e., a young and affluent audience), we see a rise in one newspaper towns, chain newspapers, and finally large group, and increasingly network-owned, television stations. Newspaper chains, such as Gannett and Tribune, primarily concerned with the bottom line, are also positioning themselves to be influential in broadcasting as they purchase television stations that will allow for synergy and economies of scale. What concentration of the media leaves us with are fewer voices and alternatives, and more news that sells in the media marketplace.

Investigative news is expensive; it requires time and labor to provide in-depth coverage of political issues. Thus, in our local news outlets we find more “soft” news, such as human interest stories, wire or national news reports, syndicated columns and video news releases, and sensational stories about crime, violence, and sex because they are relatively inexpensive, require less staff, and generally do not offend advertisers. News divisions are expected to provide higher and higher profit rates, at the expense of news. For example, a Gannett paper in Salem, Oregon, was told by its main office in Rochester, New York, to “double its previous profits. Or else.”⁴⁴ These profit-driven directives come from administrators who have no idea what the people of Salem, Oregon, need or want from their local news. This ties the hands of editors and publishers: reach the profit quota or else. Often, reaching the profit quota means more advertising, staff layoffs, and cuts in news and news production.

Broadcasting in the United States followed the trajectory of newspapers, adopting the advertising revenue model and a need to produce a profit. Indeed, while many communities lack a local newspaper, many more lack access to local television news: That is, the United States is carved up into 210 television markets (out of approximately 65,000 voting districts⁴⁵). As such, local news suffers, especially local political news, due in part to time and space constraints.⁴⁶ The needs of citizens are neglected as television news, the primary source citizens use to obtain news about their world and their communities, becomes caught up in the need to maximize profits.⁴⁷ As Bagdikian argued, “Mass advertising made television a profitable spectacle called ‘a license to print money.’” As such, television has “maximum advertising power as long as it offends or bores as few viewers as possible,” and in its promotion of consumerist culture, television news, like newspapers, tends to choose “noncontroversial, light, and nonpolitical” news and programming.⁴⁸

As Robert McChesney argued, “Virtually all defenses of the commercial media system for the privileges they receive—typically made by the media owners themselves—are based on the notion that the media play an important, perhaps a central, role in providing the institutional basis for having an informed and participating citizenry.”⁴⁹ Commercial broadcast media owners were given scarce spectrum space with the promise that they would serve the public interest.⁵⁰ This is one of the primary distinctions to be made between newspaper ownership and television ownership: Theoretically, anyone with the monetary means could publish her/his own newspaper, but this is not the case with broadcasting, as finite spectrum space led to broadcast licensing and the notion that the airwaves were publicly owned. It can certainly be argued that the broadcast media have failed to fulfill their end of the bargain. Indeed, as Neil Postman contended, “[I]n saying that the television news show entertains but does not inform, I am saying something far more serious than that we are being deprived of authentic information. I am saying we are losing our sense of what it means to be well informed,” for we are, he stated, “amusing ourselves to death.”⁵¹

The First Amendment as a Shield

Alexander Meiklejohn argued that the principle of free speech “springs from the necessities of the program of self-government.”⁵² This is not to say that the First Amendment protects “unregulated talkativeness,” but that it protects ideas, even “unwise, unfair, [or] un-American” ideas in the name of the public good. For Meiklejohn, public debate is imperative in

order for the public to make wise, informed decisions, and thus, freedom of speech is essential to promote such debate. He argued that prior to the solidification of radio as a commercial enterprise, radio had the potential to contribute to community-building and enriching public debate, but commercial radio failed to do so in its pursuit of profits. Commercial radio was not entitled to First Amendment protection, he argued, because radio was in the business of making money, not sharing ideas, and thus not contributing to democratic self-government.⁵³ In short, “Private profit is *not* the goal of free speech.”⁵⁴ Media conglomerates continue to use the First Amendment as a shield in order to gain a larger market share and higher profits.⁵⁵

Corporations have indeed been granted free speech rights. In *First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts*, the Supreme Court stated:

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.⁵⁶

As Fiss argued, although business may have viewpoints that can enrich public discourse, when a news media giant like CBS or NBC “adds something to public debate, something is also taken away. What is said determines what is not said.”⁵⁷ The richness of the public debate is diminished because CBS or NBC can speak much louder than a citizen on a soapbox. As such, Meiklejohn would suggest that, “Congress may create legislation designed to ‘enlarge and enrich’ free speech on public issues and to facilitate ‘the unhindered flow of accurate information,’ so long as such legislation does not take away from the presentation of diverse perspectives.”⁵⁸ The First Amendment, then, should not only discourage government restraint on speech, but also “affirmatively *encourage*...Americans to speak, to take stands, to demand to be heard, to demand to *participate*.”⁵⁹ However, when the means of communication are owned by a few corporations, access is limited and participation is difficult to achieve, as the “marketplace of ideas” is actually an oligopoly of ideas. Media ownership regulations, such as the NTSO Rule, aim not to restrain speech but to encourage robust debate, as more voices should, in theory, result in diversity of ideas and ensure competition.

It should be noted, however, that several dichotomies, or conflicting values, arise when the First Amendment is used as a justification for speech. These dialectics are not mutually

exclusive, but they are beneficial for describing values and concerns surrounding First Amendment debates and decisions, particularly as they relate to structural regulation.

First Amendment Dichotomies

First, one must consider whose rights the First Amendment protects: audience's rights or speaker's rights. As Fiss explained, the courts have traditionally upheld speaker's rights, as they attempted to protect the street corner speaker from being silenced by the government. Thus, the state could not silence a speaker or regulate content because it did not like what was being said, but it could regulate time, place, and manner of speech. As such, "the freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker." However, as prescribed by the self-governance theory, speech should be protected when it enhances public debate, "not because it is an exercise of autonomy;" in fact, Fiss argued, "autonomy adds nothing [to the public debate] and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination."⁶⁰ However, media corporations are often bestowed the same rights of those afforded the street corner speaker, but unlike the street corner speaker, media companies can reach a much larger audience. And as speakers, these corporations can shield themselves with the First Amendment, arguing that they have the right to exclude voices to the detriment of alternative or dissenting viewpoints.⁶¹ Further, unlike the street corner speaker, media corporations have the power to set the national agenda. They also can and do provide entertainment-driven rather than information-driven news in attempts to attract advertisers and gain higher profit margins. In this case, the news media are not necessarily enriching the public debate, as information such as local, national, and international news is imperative for self-governing decision-making. Thus, they should not be afforded protection just because they are labeled autonomous entities. Rather, the First Amendment should also vehemently protect audience rights to access a diversity of ideas and viewpoints and to have their voices heard.

To these ends, Fiss hailed the fairness doctrine as a regulation that promoted audience rights. The fairness doctrine required that "public issues be presented by broadcasters and that each side of those issues be given fair coverage."⁶² This regulation promoted the public interest rather than the rights of the corporation as speaker: As the Court stated, "the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public," noting that, "It is the right of the viewers and listeners,

not the right of the broadcasters, which is paramount.”⁶³ However, the fairness doctrine has been abandoned, which makes it more difficult for alternative voices to be heard.

This dialectic of speaker’s rights versus audience’s rights also leads to the dichotomies of private rights versus public rights and government censorship versus private censorship. CBS, for example, is not a government entity nor is it a private citizen; rather, it is “something of both.”⁶⁴ CBS is a profit-driven corporation that owns stations licensed by the government. CBS benefits from other government regulations, such as taxation, but at the same time, it is supposed to act in the “public interest.” Fiss argued that we need to reevaluate this dichotomy, which is based on the notion that autonomy means freedom from government interference, an argument advanced by corporations trying to make a profit, and instead consider that the government can help to enrich public debate. He stated:

A shift from the street corner to CBS compels us to recognize the hybrid character of major social institutions; it begins to break down some of the dichotomies between public and private presupposed by classical liberalism...The state of affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state. A corporation operating on private capital can be as much a threat to the richness of public debate as a government agency, for each is subject to constraints that limit what it says or what it will allow others to say.⁶⁵

The constraints produced by the market dictate that profit is the end, and thus, decisions made regarding what the public sees, hears, and reads are reliant upon what will sell in the economic marketplace rather than what citizens need to know to make political and daily decisions. We can no longer think of the state as *the* instrument of censorship; private corporations can and do censor information as well. Although Smolla put forth the argument that censorship is the nature of the state, Fiss argued that government regulations can help promote the public debate, starting with more funding for public media systems. However, government intervention is necessary *only* if it contributes to public debate:

Autonomy will be sacrificed, and content regulation sometimes allowed, but only on the assumption that public debate might be enriched and our capacity for collective self-determination enhanced. The risks of this approach cannot be ignored, and at moments they seem alarming, but we can only begin to evaluate them when we weigh in the balance the hidden costs of an unrestricted regime of autonomy.⁶⁶

Traditionally, though, content-based regulations have been frowned upon by the courts unless there is a compelling reason, such as in the case of obscenity. Content-neutral structural

regulations, such as media ownership regulation, attempt not to hinder speech but to open space for additional voices.

Another dichotomy in First Amendment debates includes economic markets versus speech markets. For example, Kathleen Sullivan noted that in the “marketplace of ideas,” the Court tends to protect speech unlike the way it protects property:

While economic arrangements are remitted to politics, First Amendment default rules leave speech presumptively to the private order. Content-based laws are virtually *per se* invalid, and even content-neutral laws face stricter tests of rationality than do general regulations of the economic market.

Thus, the Court generally “places far greater burdens on government to defend such laws than it does in the realm of economic regulations.”⁶⁷ This is evidenced in the 2002 Court of Appeals mandate that the FCC review and unambiguously justify the NTSO Rule. However, this is contrary to previous court rulings: “[F]rom the 1940s through the 1970s, the Supreme Court gave broad deference to the F.C.C. to take measures to promote diversity even though the justices acknowledged the difficulty of finding clear empirical evidence that the regulations achieved such ends.” On the contrary, the 2002 appeals court decisions have not given the FCC such latitude, requiring “a far greater level of evidence to justify the regulations.”⁶⁸ FCC Chairman Michael Powell’s reaction to the court’s decision reiterated this stand: “It’s a tough environment... The judges have raised barriers significantly, and are making it much tougher to justify some of the rules. They are skeptical of theoretical justifications for rules, without more empirical support and greater analytical rigor.”⁶⁹ However, abstract concepts such as diversity, access, localism, and competition are difficult to quantify numerically.

Sunstein also presented the dialectic of positive rights, or freedom for speech (or access) versus negative rights, or freedom from government intervention. He argued that the conventional view of the First Amendment contends that “the Constitution does not create positive rights and should not be understood to do so.” For example, many free speech cases involve proposed regulations that impose limitations on “who can speak and where they can do so.” However, the First Amendment is also a positive right, and as such, the government can “take steps to ensure that the system of free expression is not violated by legal rules giving too much authority to private persons,”⁷⁰ or, it should be added, corporations. Structural regulations such as the NTSO Rule aim to promote greater access to the media, an access that is currently denied as a few large conglomerations own the means of production and dissemination.

Although (almost) anyone could technically apply for a broadcasting license, not everyone can afford to purchase the resources necessary, and, certainly, conglomeration creates barriers to entry that make it difficult for new outlets to successfully operate and compete in the current marketplace. Various consumer groups have argued that continued deregulation “will further concentrate media power in many markets with limited competition, sharply reducing the diversity of viewpoints on the airwaves and diminishing the number of companies distributing such services.”⁷¹ Viewing the First Amendment as a negative right is detrimental to the notion that access is essential in the “marketplace of ideas” and for self-governance.

Another dichotomy involving free speech and government regulation is abridgment of speech versus the promotion of speech. Opponents of regulation argue: (1) The government is an adversary of free speech; (2) “[T]he First Amendment should be understood as embodying a commitment to a certain form of neutrality”; (3) Free speech extends to all speech; and (4) “[R]estrictions on speech...have a sinister and nearly inevitable tendency to expand.”⁷² Proponents of government regulation argue that government intervention, rather than hindering speech, can promote speech. In what Sunstein called the “New Deal” for speech, an approach that parallels the 1930s New Deal, he posited that “many imaginable democratic interferences with the autonomy of broadcasters or newspapers are not ‘abridgments’ of free speech at all. It would also argue that such autonomy, created and guaranteed as it is by law, may sometimes be an abridgment.”⁷³ The laws of the market are not “natural”; rather, they were created by the same government that created property and copyright laws, both of which can abridge free speech. And, instead of primarily protecting the First Amendment rights of the speaker, i.e., media conglomerates, the audience’s rights should be promoted, and access to a diversity of viewpoints and to the means of communication should be safeguarded to promote public debate and enrich democratic political decision-making.

A Means to an End: A Need to Create Access

To ensure that diversity and competition survive, audience access must be considered, and the intentions of the media conglomerates must be scrutinized. As many First Amendment scholars argue, the “marketplace of ideas” and democratic self-governance are reason enough to propose and implement regulations that attempt to protect audience access and needs, as the public must be informed by a diversity of competing voices in order for self-governance to effectively occur. While one could argue that the Internet opens space for public debate, access to the Internet,

commercialization of the Web, and computer literacy are three important caveats to the digital “public sphere.” The current state of media ownership and the possibility of more conglomeration and concentration if ownership regulations continue to be modified hinder the right of access to the means of communication as well as access to a diversity of ideas. To meet the needs of citizens, the First Amendment should serve as a promoter of citizen access rather than a protector of corporate speech, for as media consultant Norman Horowitz rightfully suggested, “Our nation could speak with many voices, but regrettably, it doesn’t. Scary, isn’t it?”⁷⁴

Notes

1 See *Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1033 (D.C. Cir. 2002).

[Herein *Fox v. FCC*]

2 *Ibid.*, 1048.

3 For example, when the FCC granted the transfer of NBC’s Blue network to the American Broadcasting Company (ABC) in 1943, the Commission opined that the transfer “should aid in the fuller use of the radio as a mechanism of free speech.” It continued: “The mechanism of free speech can operate freely only when the controls of public access to the means for the dissemination of news and issues are in as many responsible ownerships as possible and each exercises its own independent judgment. The approval of the transfer will promote such diversification.” *Decision and Order In the Matter of Radio Corporation of America and American Broadcasting System, Inc.*, 10 FCC 212 (1943): 213. In *National Broadcasting Co., Inc. v. United States*, NBC argued that ownership regulations abridged their First Amendment rights. The Supreme Court disagreed, noting that spectrum scarcity rendered this argument null: “Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.” *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943).

4 Sut Jhally, “The Political Economy of Culture,” in *Cultural Politics in Contemporary America*, ed. Ian H. Angus and Sut Jhally (New York: Routledge, 1989), 65.

5 See *National Broadcasting Co. Inc. v. United States*, 319 U.S. 190 (1943); *Decision and Order In the Matter of Radio Corporation of America and American Broadcasting System, Inc.*, 10 FCC 212 (1943).

6 Jhally, “The Political Economy,” 65.

7 See *Report and Order and Notice of Proposed Rulemaking: In the Matter of 2002 Biennial Regulatory Review*, FCC 03-127 (2003); Frank Ahrens, “Compromise Puts TV Ownership Cap at 39%,” *Washington Post* (25 November 2003): A19.

8 “FCC Chairman Powell,” *Online NewsHour* (9 Aug. 2001): http://www.pbs.org/newshour/bb/media/july-dec01/powell_8-9.html (27 June 2002).

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- 9 Rodney A. Smolla, *Free Speech in an Open Society* (New York: Vintage Books, 1992), 6.
- 10 *Abrams et al. v. United States*, 250 U.S. 616 (1919): 630.
- 11 Smolla, *Free Speech*, 6.
- 12 Owen M. Fiss, "Free Speech and Social Structure," *Iowa Law Review* 7 (1986): 1412-1413.
- 13 Ben Bagdikian argues that there are just five companies that dominate U.S. media. See Ben Bagdikian, *The New Media Monopoly* (Boston, Beacon Press, 2004), chapter two.
- 14 For example, see Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001).
- 15 William Bailey, "Corporate/Commercial Speech and the Marketplace First Amendment: Whose Right Was It, Anyway?" *Southern Communication Journal* 61 (Winter 1996): 122.
- 16 Smolla, *Free Speech*, 6-7.
- 17 In Jim Rutenberg, "Cable's War Coverage Suggests a New 'Fox Effect' on Television," *New York Times* (16 April 2003): B9.
- 18 In Howard Rosenberg, "Objectivity is Lost to Fox News' Barbs," *Los Angeles Times* (11 April 2003): E1.
- 19 Ibid.
- 20 Bill O'Reilly, "Tough Times for the USA," *Fox News* (7 February 2003):
<http://www.foxnews.com/story/0,2933,77875,00.html>.
- 21 In Rutenberg, "Cable's War Coverage," B9.
- 22 Smolla, *Free Speech*, 7.
- 23 Ibid., 8.
- 24 For example, FAIR found that the majority of sources in network news are white, male, and Republican. See "Who's on the News? Study Shows Network News Sources Skew White, Male & Elite," *Extra!* (1 January 2001): <http://www.fair.org/press-releases/power-sources-release.html>. Another FAIR study found that "Washington's elite politicians were the dominant sources of opinion on the network evening news, making up one in three Americans (and more than one in four of all sources) who were quoted on all topics throughout the year." While 75% of these sources were Republican, only 1% of these sources were independents or third-party representatives. See Ina Howard, "Power Sources: On Party, Gender, Race and Class, TV News Looks to the Most Powerful Groups," *Extra!* (May/June 2002): http://www.fair.org/extra/0205/power_sources.html.
- 25 Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University, 1993), 203, 230.
- 26 Smolla, *Free Speech*, 12-13.
- 27 For example, in the weeks after the events of September 11, 2001, politicians' rhetoric equated shopping to patriotism. See Kate Nelson, "Does Green Equal Red, White and Blue?" *Pittsburgh Post-Gazette* (23 October 2001): C2.
- 28 See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993).
- 29 Gerald J. Baldasty, *The Commercialization of News in the Nineteenth Century* (Madison, WI: University of Wisconsin Press, 1992), 139.

- 30 J. Herbert Altschull, *Agents of Power: The Role of the News Media in Human Affairs* (New York: Longman, 1984), 6.
- 31 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: MIT Press, 2001 ed.), 21.
- 32 Altschull, *Agents of Power*, 24.
- 33 *Ibid.*, 25.
- 34 *Ibid.*, 19. It can also be argued that the press has also been controlled by the interests of the government to legitimize its power, for dissent has been prosecuted, or at least tempered, in the United States under sedition and libel laws.
- 35 See for example Altschull, *Agents of Power*, 23-26.
- 36 Altschull, *Agents of Power*, 19.
- 37 Baldasty, *The Commercialization of News*, 4.
- 38 *Ibid.*, 138.
- 39 *Ibid.*, 143.
- 40 *Ibid.*, 140-142.
- 41 *Ibid.*, 91-93. See also Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* (New York: Penguin Books, 1984), chapter 5, for a discussion of the telegraph's effects on news, and James W. Carey, "Technology and Ideology: The Case of the Telegraph," in Jack Salzman, ed., *Prospects, An Annual of American Cultural Studies* (Cambridge: Cambridge University Press, 1983) for discussion of the telegraph's effects on communication more generally and news in particular.
- 42 Ben H. Bagdikian, *The Media Monopoly*, 6th ed. (Boston: Beacon Press, 2000), 119.
- 43 See for example Bagdikian, *The Media Monopoly*, chapter 7.
- 44 Bagdikian, *The Media Monopoly*, 79.
- 45 *Ibid.*, 175.
- 46 For newspapers, the space that remains after advertisements are placed in the newspaper is called the newshole. For television, approximately 23 minutes of a half hour news program contains non-commercial content.
- 47 Bagdikian, *The Media Monopoly*, 175, 177, 188.
- 48 *Ibid.*, 132-133.
- 49 Robert W. McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (Urbana, IL: University of Illinois Press, 1999), 2.
- 50 The notion that spectrum space was limited was one reason why commercial broadcasters lobbied the government to develop a licensing system. Commercial broadcasters, amateur broadcasters, educational and religious broadcasters, and labor stations vied for space on the spectrum, interfering with one another's signals and programming. With the passing of the Radio Act of 1927 and the subsequent Communications Act of 1934, commercial broadcasting emerged the winner, while amateur, educational, and labor stations were relegated to marginal frequencies or forced off the air. See Robert W. McChesney, *Telecommunications, Mass Media, and Democracy: The Battle for the Control of U.S. Broadcasting, 1928-1935* (New York: Oxford University Press,

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- 1993); Erik Barnouw, *A Tower in Babel: A History of Broadcasting in the United States, Vol. 1—to 1933* (New York: Oxford University Press, 1966).
- 51 Postman, *Amusing Ourselves*, 107-108.
- 52 Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1965), 27.
- 53 Meiklejohn, *Political Freedom*, 26-27, 87.
- 54 Clay Calvert, "Meiklejohn, Monica, & Mutilation of the Thinking Process," *Pepperdine Law Review* 26 (1998): 42.
- 55 See for example *Time Warner Entertainment v. Federal Communications Commission*, 240 F. 3d 1126 (2001).
- 56 *First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts*, 435 U.S. 765 (1978): 777.
- 57 Fiss, "Free Speech and Social Structure," 1411.
- 58 In Calvert, "Meiklejohn," 43.
- 59 Smolla, *Free Speech*, 11.
- 60 Fiss, "Free Speech and Social Structure," 1408-1411.
- 61 For example, cable companies are protected by the First Amendment if they choose to exclude new cable channels or refuse to renew incumbent channels.
- 62 *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission et al.*, 395 U.S. (1969): 367.
- 63 *Ibid.*, 385, 390.
- 64 Fiss, "Free Speech and Social Structure," 1414.
- 65 *Ibid.*
- 66 *Ibid.*, 1415.
- 67 Kathleen M. Sullivan, "Free Speech and Unfree Markets," *UCLA Law Review* 42 (1995), 949-951.
- 68 Stephen Labaton, "Media Companies Succeed in Easing Ownership Limits," *New York Times* (16 April 2001): A1.
- 69 Stephen Labaton, "Impatient Court Presses the F.C.C. to Deregulate," *New York Times* (25 Feb. 2002): C2.
- 70 Sunstein, *The Partial Constitution*, 209-210.
- 71 Labaton, "Media Companies," A1.
- 72 Sunstein, *The Partial Constitution*, 199-202.
- 73 *Ibid.*, 202-203.
- 74 Norman Horowitz, "Too Few Control Too Much Information for the Rest of Us; Merger Mania Puts a Few Moguls in a Position of Deciding What We Know About Our Culture and Our Politicians," *Los Angeles Times* (3 Jan. 2000): B5.