

A-B-C, SEE YOU REAL SOON: BROADCAST MEDIA MERGERS AND ENSURING A "DIVERSITY OF VOICES"

INTRODUCTION

On July 31, 1995, Michael D. Eisner, the chairman and chief executive officer of the Walt Disney Company ("Disney") and Thomas S. Murphy, the chairman of Capital Cities/ABC ("ABC"), announced the proposed acquisition of ABC by Disney for \$19 billion.¹ The following day, Laurence A. Tisch, chief executive officer of CBS Incorporated ("CBS"), announced the sale of CBS to the Westinghouse Electric Corporation ("Westinghouse") for \$5.4 billion.² The National Broadcasting Company ("NBC") is a subsidiary of the General Electric Corporation ("GE"), and the Fox Broadcasting Company ("Fox") is a division of the Australian-based communications giant News Corporation Limited ("News Corporation").³ The consummation of the ABC/Disney and CBS/Westinghouse mergers resulted in the ownership of all four major networks by large corporations.⁴

Beyond the jokes about whether Peter Jennings will don mouse ears for his nightly broadcasts or whether Snow White will replace Barbara Walters as the co-host of *20/20*, the proposed mergers raise serious questions about access to information in an age of massive media conglomerates.⁵ After all, if, as the ABC promotion says, "More Americans get their news from ABC News than from any other news source," what will be the impact on a well-informed public if that news is coming from the mouthpiece of a corporation with worldwide op-

¹ See Geraldine Fabrikant, *Walt Disney to Acquire ABC in \$19 Billion Deal to Build a Giant for Entertainment*, N.Y. TIMES, Aug. 1, 1995, at A1. The merger was consummated on February 9, 1996. See *Disney Closes Acquisition, Signals Interest in Another*, WALL ST. J., Feb. 12, 1996, at B3.

² See Judith H. Dobrzynski and Geraldine Fabrikant, *Tisch's Legacy: Healthy Profit, Ailing Network*, N.Y. TIMES, Aug. 2, 1995, at A1. Westinghouse completed the acquisition on November 24, 1995. See Albert R. Karr, *FCC Clears Westinghouse Bid for CBS, Settling Dispute on Children's Programs*, WALL ST. J., Nov. 24, 1995, at B5; *Westinghouse Corp.: CBS Purchase Completed in \$5.4 Billion Agreement*, WALL ST. J., Nov. 27, 1995, at B3.

³ See *Hoover's Company Profile Database—American Public Companies*, available in LEXIS, Company Library, Hoover File [hereinafter *Hoover—American*]; *Hoover's Company Profile Database—World Companies*, available in LEXIS, Company Library, Hoover File [hereinafter *Hoover—World*].

⁴ See *Hoover—American*, *supra* note 3; *Hoover—World*, *supra* note 3.

⁵ See Daniel Pearl, *Media Consolidation Has Left and Right Worried About Big Firms Gaining a Lock on Information*, WALL ST. J., Aug. 31, 1995, at A10.

erations? Although none of the partnerships creates a company that has a sufficiently large share of any market to raise traditional economic antitrust concerns, they do raise questions about the ability of the American people to hear from a diversity of voices.⁶ Representative Edward Markey of Massachusetts articulated this concern about the increasing concentration of media ownership when he stated that, although he saw nothing wrong with the merger of ABC and Disney, increasing concentration of media ownership would be "troubling."⁷ Markey expressed his fear that mergers "could potentially collapse the diversity of voices which we have in America into the control of a . . . small number of hands."⁸

When these proposed mega-mergers are announced, can the Government intervene? And if it can, should it intervene? This Note examines these questions and concludes that, although it may be in the public's interest for the Government to intervene, the Government, under the current regulatory scheme, probably will not do so. Section I surveys the parties who are involved in such mergers: the networks, their corporate partners and the governmental agencies charged with regulating television broadcasting.⁹ Section II discusses the competing societal interests of governmental noninterference with free speech and the ensurance of a diversity of voices.¹⁰ Section III examines the ability of the governmental agencies to structure a proposed merger before it is approved.¹¹ Section IV examines how those same agencies might regulate the resulting media conglomerates after the merger has been approved.¹² Finally, section V proposes some changes in the current regulatory structure that would further the public's interest in maintaining a diversity of media voices.¹³

⁶ See *id.*

⁷ See *ABC News Nightline: Disney, ABC Merge* (ABC television broadcast, July 31, 1995) (transcript on file with the *Boston College Law Review*) [hereinafter *Nightline*]. Markey sits on the Telecommunications and Finance Subcommittee of the House Commerce Committee. See JOINT COMM. ON PRINTING, 1995-1996 OFFICIAL CONGRESSIONAL DIRECTORY 104TH CONGRESS, S. PUB. NO. 104-14, at 395-96 (1995).

⁸ *Nightline*, *supra* note 7.

⁹ See *infra* notes 14-135 and accompanying text.

¹⁰ See *infra* notes 136-274 and accompanying text.

¹¹ See *infra* notes 275-304 and accompanying text.

¹² See *infra* notes 305-34 and accompanying text.

¹³ See *infra* notes 335-80 and accompanying text.

I. THE PLAYERS

A. *The Networks and Their Corporate Partners*

1. Basic Terminology

A television network provides programming services to individual broadcast stations.¹⁴ Until 1996, networks, like any other party, were limited in the number of stations they could own nationwide.¹⁵ The Federal Communications Commission ("FCC")¹⁶ permitted the networks to own up to fourteen television stations provided at least two were controlled by racial minorities.¹⁷ In the absence of minority control, a broadcaster could own up to twelve television stations.¹⁸ Additionally, FCC regulations limited the audience that any given owner could reach.¹⁹ A single owner could not control television stations that reached more than twenty-five percent of the national audience (or thirty percent if at least five percent of the stations were minority-controlled).²⁰ The FCC also prohibited ownership of more than one tele-

¹⁴ See 47 C.F.R. § 73.3613(a)(1) (1995). Section 73.3613(a)(1) defines a network as any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.

Id.

¹⁵ See *id.* § 73.3555(e)(1). Network *ownership* should be distinguished from network *affiliation*. See STANLEY M. BESEN ET AL., MISREGULATING TELEVISION 50 (1984); ROBERT M. AND MAXINE K. REED, THE ENCYCLOPEDIA OF TELEVISION, CABLE, AND VIDEO 14-15 (1992). Network ownership entails actual ownership of the individual station by the network company. See *id.* A network affiliate is an independent broadcast station that forms an agreement with a network company. See *id.* Under this agreement, the network provides programming and cash to the affiliate. See BESEN, *supra*, at 50; REED, *supra*, at 15. In return, the affiliate permits the network to sell advertising time within the programs and retain the resulting revenues. See BESEN, *supra*, at 50. Additionally, the affiliate airs local advertising and retains the revenues from those sales. See *id.* at 51. In general, for programs of one-half hour, the network retains control of all advertising time within the program, and the affiliate sells advertising time between programs. See *id.* For longer programs, the affiliate also retains advertising time within the program. See *id.*

¹⁶ For a discussion of the FCC and its powers, see *infra* notes 47-81, 278-96, 308-28 and accompanying text.

¹⁷ See 47 C.F.R. § 73.3555(e)(1)(ii)-(iii).

¹⁸ See *id.* § 73.3555(e)(1)(iii).

¹⁹ See *id.* § 73.3555(e)(2).

²⁰ See *id.* As of October 1995, ABC owned eight television stations and had purchases pending for two additional stations, reaching 23.62% of the U.S. market; NBC owned nine stations reaching 22.92% of the U.S. market; CBS owned seven stations reaching 18.68% of the U.S. market; and Fox owned eleven stations reaching 24.7% of the U.S. market. See Joe Flint et al.,

vision station in the same broadcast area.²¹ Finally, the FCC did not allow a party to own a radio or television station in a community in which that party already owned or operated a daily newspaper.²²

The Telecommunications Act of 1996 ("Telecommunications Act")²³ changed these limitations.²⁴ First, the Telecommunications Act instructed the FCC to eliminate restrictions on the number of television stations that a party may own nationwide.²⁵ Second, the Telecommunications Act increased the reach limitation for any given owner to thirty-five percent.²⁶ Third, the Telecommunications Act instructed the FCC to conduct a rulemaking proceeding to determine whether its restriction on local ownership to one station was necessary.²⁷ Although the Telecommunications Act does not address the FCC ownership rules prohibiting cross-ownership of stations and newspapers, members of the FCC indicated the possibility that the FCC would lift those restrictions as well.²⁸

2. The Big Four Networks

The major television networks in the United States are ABC, CBS, NBC and Fox.²⁹ The networks are owned by, respectively, Walt Disney, Westinghouse, GE and News Corporation.³⁰ The resulting partnerships have placed numerous media and business interests in the hands of a few individuals.³¹

a. ABC/Walt Disney

ABC and Walt Disney's merger placed a huge number of media outlets under the umbrella of one corporate entity.³² In addition to its

Special Supplement to Variety, VARIETY, Oct. 23–Oct. 29, 1995, available in LEXIS, News Library, Papers File [hereinafter VARIETY]. Group W, a division of Westinghouse, owned eight stations reaching 12.85% of the U.S. market. See *id.*

²¹ See 47 C.F.R. § 73.3555(b); MORTON I. HAMBURG & STUART N. BROTMAN, COMMUNICATIONS LAW AND PRACTICE, § 3.03[3][a] (1995).

²² See 47 C.F.R. § 73.3555(d); HAMBURG & BROTMAN, *supra* note 21, § 3.03[3][a].

²³ Telecommunications Act of 1996, Pub. L. No. 104–104, 1996 U.S.C.A.N. (110 Stat.) 56.

²⁴ *Id.* § 202.

²⁵ *Id.* § 202(c)(1)(A).

²⁶ *Id.* § 202(c)(1)(B).

²⁷ *Id.* § 202(c)(2).

²⁸ See Albert R. Karr & Thomas R. King, *FCC May Toss Out Rules on Owning Competing Media*, WALL ST. J., Feb. 9, 1996, at B13.

²⁹ See REED, *supra* note 15, at 385–86.

³⁰ See Hoover—American, *supra* note 3; Hoover—World, *supra* note 3.

³¹ See Hoover—American, *supra* note 3; Hoover—World, *supra* note 3.

³² See Hoover—American, *supra* note 3.

eight television stations, ABC owns ABC Radio Networks (including eleven AM and ten FM radio stations), 80% of cable network ESPN, 50% of the Lifetime Television cable network, 37.5% of the cable Arts and Entertainment Network ("A&E") and daily newspapers including the *Fort Worth Star-Telegram* and *The Kansas City (Missouri) Star*.³³ In 1994, ABC had affiliation agreements with 225 television stations that reached 99.9% of all households in the United States.³⁴ Walt Disney, which acquired ABC in February 1996, has varied ownership interests: theme parks (ownership of Disneyland, Walt Disney World and Epcot Center, part-ownership of Euro Disney, interest in Tokyo Disneyland); television production (Buena Vista, Touchstone and Walt Disney Television); film production (Hollywood, Touchstone and Walt Disney Pictures); film distribution (Miramax Film Corporation); the cable Disney Channel; video distribution (Buena Vista Home Video); Hollywood and Walt Disney Records; the Mighty Ducks of Anaheim ice hockey team; the Disney Stores; and Hyperion Press.³⁵

b. *CBS/Westinghouse*

CBS and Westinghouse's merger created a large organization with interests in numerous industries.³⁶ In addition to its seven television stations, CBS owns the CBS Radio Station Group (including eight AM and thirteen FM radio stations), CBS Entertainment (TV programming) and fifty percent of CBS Video (videocassette distribution).³⁷

³³ See *id.* In order to gain FCC approval of the ABC/Disney merger, Disney agreed to sell, within one year, either ABC-owned newspaper or radio interests in Detroit and Fort Worth. See *FCC OKs Disney-CapCities Deal*, MEDIA DAILY, Feb. 8, 1996, available in Westlaw, News/Topical News Library, Broadcasting Media File. ABC owned the *Fort Worth Star-Telegram* and the *Oakland Press* (Pontiac, Mich.) and two radio stations in each of those areas. See *id.* The FCC had allowed ABC to retain both newspaper and radio outlets because ABC owned them prior to the promulgation of the cross-ownership regulations and the properties were grandfathered. See *id.* Disney was not entitled to such grandfathered status. See *id.* As the FCC gave Disney one year in which to sell the properties, Eisner expressed hope that Disney would be able to retain the newspapers if the FCC lifted cross-ownership restrictions. See *id.*; Karr & King, *supra* note 28, at B13.

³⁴ See Hoover—American, *supra* note 3.

³⁵ See *id.* In order to gain approval for the merger from the Department of Justice, see *infra* note 130–35 and accompanying text, Disney agreed to sell Los Angeles television station KCAL. See Thomas R. King & Bryan Gruley, *Disney is Cleared by Justice Agency on Cap Cities Deal*, WALL ST. J., Jan. 17, 1996, at B9. Disney was responding to an investigation by the Department of Justice as to whether the ownership of both KCAL and ABC's Los Angeles KABC would "reduce competition and raise the price of advertising" in Los Angeles. See *id.* Rather than wait for a decision, Disney announced its intention to sell KCAL. See *id.* The FCC also based its approval for the merger on the sale of KCAL. See Karr & King, *supra* note 28, at B13.

³⁶ See Hoover—American, *supra* note 3.

³⁷ See *id.*

CBS also has affiliation agreements with 206 television stations.³⁸ Westinghouse owns subsidiaries Aptus, Incorporated (environmental services), Electronic Systems (advanced electronics), Energy Systems (waste-to-energy projects), Thermo King Corporation (refrigerated transport), WCI Communities, Incorporated (real estate development) and Westinghouse Broadcasting Company (broadcasting), which owns eight television stations.³⁹

c. *NBC/General Electric*

GE acquired NBC in 1986 as part of a \$6.4 billion deal in which it bought Radio Corporation of America ("RCA"), which owned NBC.⁴⁰ In addition to its nine NBC-owned television stations, GE owns the CNBC cable network, interests in seventeen other cable channels in the United States (including A&E, Court TV, American Movie Classics, Bravo and the History Channel) and cable channels in Europe and Asia.⁴¹ GE also produces aircraft engines and replacement parts, kitchen and laundry appliances, industrial products and systems, materials (such as plastics, silicones, laminates and abrasives) and technical products and services (such as medical and network-based information services).⁴²

d. *Fox/News Corporation Limited*

Fox is a division of the Australia-based communications giant News Corporation.⁴³ Run by media mogul Rupert Murdoch, News Corporation is the world's largest newspaper publisher.⁴⁴ In addition to its own eleven television stations, the Fox division of News Corporation has contracts with 139 affiliates throughout the United States.⁴⁵ News Corporation also has interests in newspapers in Australia (*The Australian* and 100 other Australian newspapers), New Zealand (Independent Newspapers), the United Kingdom (*The Times* and four other newspapers) and the United States (*New York Post*); Twentieth Century Fox Film Corporation; British Sky Broadcasting; the Asian satellite network

³⁸ See *id.*

³⁹ See *id.*; VARIETY, *supra* note 20.

⁴⁰ See Hoover—American, *supra* note 3.

⁴¹ See Bill Carter, *Broadcast Networks Come Back Strong: An Old Medium Holds New Luster for Buyers*, N.Y. TIMES, Aug. 2, 1995, at D1.

⁴² See Hoover—American, *supra* note 3.

⁴³ See Hoover—World, *supra* note 3.

⁴⁴ See *id.*

⁴⁵ See *id.*

Star Television; magazines *TV Guide* and *Mirabella*; and HarperCollins Publishers.⁴⁶

B. *The Federal Communications Commission*

1. Origins

The Government's involvement in the communications industry has its roots in the nature of the broadcast spectrum. Radio and television operate by transmitting and receiving messages along frequencies of the electromagnetic spectrum.⁴⁷ One problem facing the broadcast industry is that when two transmitters use the same frequency, a receiver capable of receiving both transmitters will hear neither clearly.⁴⁸ In order to prevent interference on the broadcast spectrum, the Government has long been involved in the regulation of telecommunications.⁴⁹ The United States first regulated radio transmission in the Wireless Ship Act of 1910.⁵⁰ This act required any steamer that could carry fifty or more persons to be equipped with radio apparatus and skilled personnel to operate the equipment.⁵¹ By 1912, ship-to-shore communication encountered significant interference; thus, the armed services began to demand regulation of the broadcast spectrum.⁵² The April 1912 sinking of the *Titanic* and the resulting revelations that radio had been instrumental in assisting survivors further prompted an outcry for regulation of the airwaves.⁵³ Additionally, the United States, as a signatory to the first international radio treaty, negotiated in 1912, was obliged to conform to treaty regulations to further wireless conformity and compatibility.⁵⁴ In response to these developments, Congress enacted the Radio Act of 1912 ("1912 Radio Act").⁵⁵ The 1912 Radio Act required broadcasters to

⁴⁶ See *id.*

⁴⁷ See THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY* 3 (1994).

⁴⁸ See HAMBURG & BROTMAN, *supra* note 21, § 2.06[1][a].

⁴⁹ For a good discussion of the history of the regulation of the broadcast spectrum, see *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-13 (1943).

⁵⁰ See Act of June 24, 1910, ch. 379, 36 Stat. 629 (requiring apparatus and operators for radio communication on certain ships); JOHN R. BITTNER, *LAW AND REGULATION OF ELECTRONIC MEDIA* 20 (2d ed. 1994); HAMBURG & BROTMAN, *supra* note 21, § 1.01[2][a].

⁵¹ 36 Stat. at 629-30.

⁵² See HAMBURG & BROTMAN, *supra* note 21, § 1.01[2][a]; KRATTENMAKER, *supra* note 47, at 3.

⁵³ See BITTNER, *supra* note 50, at 20; KRATTENMAKER, *supra* note 47, at 3.

⁵⁴ See ROBERT L. HILLIARD, *THE FEDERAL COMMUNICATIONS COMMISSION: A PRIMER* 61 (1991).

⁵⁵ Act of Aug. 13, 1912, ch. 287, 37 Stat. 302 (regulating radio communications); see HAMBURG & BROTMAN, *supra* note 21, § 1.01[2][a]; KRATTENMAKER, *supra* note 47, at 3-4.

obtain licenses and forbade the operation of radio equipment without a license but did not set aside frequencies for private broadcast.⁵⁶ At the time, such an allocation was unnecessary, as there were sufficient frequencies for all broadcasters who wanted to be on the air.⁵⁷

World War I accelerated the use of radio, and in the early 1920s there was a rapid increase in the number of radio stations broadcasting and, subsequently, in the amount of interference along the radio spectrum.⁵⁸ In an attempt to decrease interference caused by the large number of stations sending out competing signals, the Government, through the Department of Commerce, limited the number of license applications it processed.⁵⁹ The Secretary of Commerce also established a policy of requiring broadcasters to share frequencies.⁶⁰

In 1926, in *United States v. Zenith Radio Corp.*, however, the United States District Court for the Northern District of Illinois held that although the 1912 Radio Act required the Secretary of Commerce to issue broadcast licenses, the Secretary did not have the authority to impose any additional restrictions such as those relating to broadcast frequency or hours of operation.⁶¹ In *Zenith*, the Secretary of Commerce charged that the Zenith Radio Corporation ("ZRC") operated radio apparatus in violation of the terms of its license.⁶² Specifically, the Secretary alleged that ZRC operated its station on a wavelength and at times not authorized by the license.⁶³ The court reasoned that the terms of the 1912 Radio Act did not empower the Secretary to regulate the hours in which a broadcaster could operate because the statute did not provide the Secretary an adequate standard by which he could make that regulation.⁶⁴ The court thus held that the Commerce Secretary's imposition of the frequency and hours regulations exceeded his authority under the 1912 Radio Act.⁶⁵

Rather than appeal the *Zenith* decision, the Secretary of Commerce, Herbert Hoover, sought an opinion from Acting Attorney General William Donovan interpreting the 1912 Radio Act.⁶⁶ On July 8,

⁵⁶ 37 Stat. at 302-08; HAMBURG & BROTMAN, *supra* note 21, § 1.01[2][a].

⁵⁷ See HAMBURG & BROTMAN, *supra* note 21, § 1.01[2][a].

⁵⁸ See *id.* § 1.01[3][a].

⁵⁹ See KRATTENMAKER, *supra* note 47, at 4-5.

⁶⁰ See *id.* at 5.

⁶¹ 12 F.2d 614, 617 (N.D. Ill. 1926); see HAMBURG & BROTMAN, *supra* note 21, § 1.01[3][b].

⁶² 12 F.2d at 615.

⁶³ See *id.* at 617.

⁶⁴ *Id.* at 618.

⁶⁵ *Id.* at 617-18.

⁶⁶ See BITTNER, *supra* note 50, at 24; HAMBURG & BROTMAN, *supra* note 21, § 1.01[3][b]; KRATTENMAKER, *supra* note 47, at 7.

1926, Donovan issued an opinion stating that the *Zenith* decision regarding the scope of the 1912 Radio Act was correct.⁶⁷ The next day, Hoover urged broadcasters to exercise self-restraint so as to avoid broadcast interference.⁶⁸ The result was chaos, with so many broadcasters transmitting on the same frequency that stations could not be heard.⁶⁹

Responding to this chaos, Congress passed the Radio Act of 1927 ("1927 Radio Act").⁷⁰ The 1927 Radio Act was broader than its 1912 predecessor, allowing for regulation of programming and licensing rather than merely aiming at controlling interference.⁷¹ The 1927 Radio Act made it clear that the airwaves could only be used with the Government's permission.⁷² Consequently, the 1927 Radio Act also established the Federal Radio Commission ("FRC") and charged it with allocating frequencies among applicants in consideration of the "public convenience, interest, or necessity."⁷³

In 1934, Congress recognized broad support for a body with stronger authority to regulate the means of all foreign and interstate communications including radio, telegraph and any other new technologies that might develop.⁷⁴ Congress thus enacted the Communications Act of 1934 ("Communications Act").⁷⁵ The Communications Act established the FCC.⁷⁶ In broad terms, the Communications Act charged the FCC with regulating all interstate radio and wire communications.⁷⁷

⁶⁷ See 35 Op. Att'y Gen. 126 (1926).

⁶⁸ See HAMBURG & BROTMAN, *supra* note 21, § 1.01[3][b].

⁶⁹ See HAMBURG & BROTMAN, *supra* note 21, § 1.01[3][c]; KRATTENMAKER, *supra* note 47, at 7.

⁷⁰ Radio Act of 1927, ch. 169, 44 Stat. 1162; see HAMBURG & BROTMAN, *supra* note 21, § 1.01[3][a]; HILLIARD, *supra* note 54, at 64; KRATTENMAKER, *supra* note 47, at 7.

⁷¹ 44 Stat. at 1162.

⁷² *Id.*

⁷³ *Id.* at 1162-63. Congressman White (R-Me.), a sponsor of the 1927 Radio Act, stated: [I]n the present state of scientific development there must be a limitation upon the number of broadcasting stations and . . . licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. . . . We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

See 67 CONG. REC. 5479 (1926).

⁷⁴ See BITTNER, *supra* note 50, at 30; HAMBURG & BROTMAN, *supra* note 21, § 1.02.

⁷⁵ 47 U.S.C. § 151-613 (1988).

⁷⁶ *Id.* § 151.

⁷⁷ *Id.* Section 151 of the Communications Act states:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property

2. Basis of FCC Authority: "Public Convenience, Interest, or Necessity"

The FCC acts as a public trustee, issuing licenses to broadcasters in exchange for the broadcasters' promise to serve the public interest.⁷⁸ The basis of the FCC's authority lies in its mandate to provide for the "public convenience, interest, or necessity."⁷⁹ The Communications Act gives the FCC wide discretion in defining the public interest, and the FCC has consistently rejected calls to adopt concrete standards defining the public interest.⁸⁰ The FCC has, however, consistently acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints.⁸¹

through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Id. Although the Communications Act does not refer to television, it has been consistently interpreted to apply to television as well as radio. See *infra* notes 278–80 and accompanying text.

⁷⁸ See 47 U.S.C. §§ 307(a), 309(a); 47 C.F.R. § 73.3591(a)(4) (1995); *Red Lion Broad. v. FCC*, 395 U.S. 367, 389 (1969); HAMBURG & BROTMAN, *supra* note 21, § 1.01[4]. Section 307(a) of the Communications Act states "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter." 47 U.S.C. § 307(a).

Section 309(a) of the Communications Act states the following:

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Id. § 309(a).

⁷⁹ See 47 U.S.C. § 303. Section 303 provides an inventory of the FCC's powers, all of which are to be exercised within the context of safeguarding the "public convenience, interest, or necessity." *Id.*

⁸⁰ See HAMBURG & BROTMAN, *supra* note 21, § 2.01[2][b]; see also *Rainbow Broad. Co. v. FCC*, 949 F.2d 405, 410 (D.C. Cir. 1991) ("[T]he Supreme Court has validated broad parameters within which the FCC may further its view of the public interest without interference from the courts. The Supreme Court has held that Congress delegated to the FCC the task of making the initial determination of how its policies may best serve the public." (citations omitted)).

⁸¹ See HAMBURG & BROTMAN, *supra* note 21, § 3.03.

C. *The Federal Trade Commission*

1. Origins

In 1890, Congress passed the Sherman Act to ensure competition in the marketplace.⁸² Congress enacted the Sherman Act because of its concern that a few corporations were concentrating economic power and that those corporations could use this excessive power to oppress individuals and injure the public generally.⁸³ In order to prevent such oppression, the Sherman Act prohibited monopolies and attempts to monopolize business in restraint of trade.⁸⁴ Between 1890 and 1914, enforcement of the Sherman Act was lax due to its vague wording, a judiciary committed to free market economics, an unconcerned Presidency and a Congress that did not provide the administrative mechanism to enforce the statute.⁸⁵ At the same time, there was growing public concern about the emergence of large business combinations in the United States.⁸⁶ As a result, Congress attacked the antitrust problem on two fronts.⁸⁷ First, Congress passed a statute, the Clayton Act, to supplement the Sherman Act.⁸⁸ Unlike the Sherman Act, the Clayton Act did not prohibit general practices.⁸⁹ Rather, it prohibited specific business activities such as price discrimination, exclusive dealing and interlocking directorates.⁹⁰ Second, Congress created an administrative agency empowered to enforce the Sherman Act, the Clayton Act and the agency's own enabling statute.⁹¹ To that end, Congress passed the Federal Trade Commission Act ("FTC Act") which established the Federal Trade Commission ("FTC").⁹²

⁸² See 15 U.S.C. §§ 1-7 (1994); THOMAS V. VAKERICS, *ANTITRUST BASICS* § 1.01 (1995). Section 1 declares that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1. Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . ." *Id.* § 2.

⁸³ See VAKERICS, *supra* note 82, § 1.01.

⁸⁴ See 15 U.S.C. §§ 1, 2; VAKERICS, *supra* note 82, § 1.01.

⁸⁵ See STEPHANIE W. KANWIT, *FEDERAL TRADE COMMISSION* § 3.02 (1995); PETER C. WARD, *FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE* § 1.01 (1992).

⁸⁶ See WARD, *supra* note 85, § 1.01.

⁸⁷ See KANWIT, *supra* note 85, § 3.02.

⁸⁸ See 15 U.S.C. §§ 12-27 (1994); KANWIT, *supra* note 85, § 3.02; VAKERICS, *supra* note 82, § 1.02[2].

⁸⁹ 15 U.S.C. §§ 12-27; see KANWIT, *supra* note 85, § 3.02.

⁹⁰ See, e.g., 15 U.S.C. § 13 (prohibiting price discrimination); *id.* § 14 (prohibiting exclusive dealing); *id.* § 19 (prohibiting interlocking directorates).

⁹¹ See KANWIT, *supra* note 85, § 3.02; VAKERICS, *supra* note 82, § 1.02[4].

⁹² See 15 U.S.C. § 41-58 (1994).

2. Basis of FTC Authority: "Unfair Method of Competition or Unfair or Deceptive Act or Practice in or Affecting Commerce"

The FTC Act prohibits unfair competition and empowers the FTC to enforce that prohibition.⁹³ The FTC's discretion is broad, with "section 5" of the FTC Act granting the FTC power to prevent parties from committing unfair acts in commerce.⁹⁴ Since its creation, the FTC has been the object of an "ideological tug-of-war" between those who think that section 5 of the FTC Act was intended only to codify antitrust principles existing at the time of the statute's passage and those who believe that the FTC must have discretion to define unfair business practices and pursue appropriate remedies.⁹⁵ Those in the former group believe that the FTC Act should not extend beyond the common law principles and statutory provisions embodied in the Sherman Act in effect at the time of the passage of the FTC Act.⁹⁶ Those in the latter group believe that because there is no limitation to human inventiveness, the FTC Act was meant to be a flexible instrument, applicable to unfair practices of trade that had not yet been imagined at the time of the statute's passage.⁹⁷ Early decisions of the courts sided with the former group and interpreted the authority of the FTC narrowly.⁹⁸

⁹³ *Id.* § 45(a)(1)-(2). Section 45(a)(1) states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.* § 45(a)(1). Section 45(a)(2) states that "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." *Id.* § 45(a)(2).

⁹⁴ Although codified as 15 U.S.C. § 45, section 5 of the FTC Act is generally referred to as "section 5." See *id.* § 58. Section 5 states the following:

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon [the party] a complaint stating its charges

. . . .

Id. § 45(b).

⁹⁵ See KANWIT, *supra* note 85, § 3.03. Compare *FTC v. Gratz*, 253 U.S. 421 (1920) (holding FTC Act only prohibits violations of common law antitrust principles and of Sherman Act), with 51 CONG. REC. 11,593 (1914) (remarks of Senator Saulsbury (D-Del.) that "[c]ourts have always recognized the customs of merchants, and it is my impression that under this act the commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers, and traders, and probably prohibit many practices and methods which have not heretofore been clearly recognized as unlawful." (emphasis added)). See *infra* notes 99-104 and accompanying text for a discussion of *Gratz*.

⁹⁶ See KANWIT, *supra* note 85, § 3.03.

⁹⁷ See H.R. CONF. REP. NO. 63-1142, at 19 (1914).

⁹⁸ See, e.g., *Gratz*, 253 U.S. at 427-28; WARD, *supra* note 85, § 5.01.

In 1920, in *FTC v. Gratz*, the United States Supreme Court held that a merchant did not engage in unfair competition by tying the sale of one of its products to the sale of another of its products.⁹⁹ In *Gratz*, the respondents were in the business of selling steel ties for binding bales of cotton and bagging used to wrap the bales.¹⁰⁰ As part of its sales agreements, the respondents refused to sell ties unless the purchasers bought a corresponding amount of bagging; thus, a purchaser had to buy a yard of bagging for each tie purchased.¹⁰¹ The Court reasoned that the respondents did not hold a monopoly on either ties or bagging, and that, in the absence of a monopoly, it is permissible for a merchant to require closely related articles such as ties and bagging to be bought in conjunction with each other.¹⁰² In coming to its determination, the Court concluded that the FTC Act's language "unfair method of competition" referred only to those actions that violated common law or statutory principles prior to the passage of the FTC Act.¹⁰³ Thus, because the sale of closely related products did not violate the common law or statutory principles in existence when Congress enacted the FTC Act, the Court held that the FTC could not issue a cease and desist order.¹⁰⁴

In 1934, in *FTC v. R.F. Keppel & Bro.*, the United States Supreme Court held that the FTC did not act improperly in determining that a candy producer acted unfairly when it adopted a sales strategy that encouraged gambling by children; the FTC ruled that other manufacturers would not adopt the strategy because it was contrary to public policy, and thus it was unfair.¹⁰⁵ In *Keppel*, the respondent was a manufacturer of "break and take" candy packages.¹⁰⁶ Because certain packages contained bonus candy and prizes, purchase of break and take packages involved an element of chance.¹⁰⁷

The Court observed that the break and take packages did not involve fraud or deception.¹⁰⁸ Furthermore, the Court noted that com-

⁹⁹ 253 U.S. at 428.

¹⁰⁰ *Id.* at 426.

¹⁰¹ *See id.*

¹⁰² *Id.* at 428.

¹⁰³ *Id.* at 427-28 ("The words 'unfair method of competition' . . . are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.").

¹⁰⁴ *Gratz*, 253 U.S. at 424, 427-29.

¹⁰⁵ 291 U.S. 304, 313-14 (1934). The Court has since cited *Keppel* as the first in a series of cases rejecting the narrow interpretation of the *Gratz* Court. *See* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21, 321 n.3 (1966).

¹⁰⁶ 291 U.S. at 306.

¹⁰⁷ *See id.* at 307-08.

¹⁰⁸ *Id.* at 309.

petitors could adopt the packaging and concluded that the practice therefore did not involve a monopoly.¹⁰⁹ The Court stated that the FTC's jurisdiction did not extend only to those cases, such as *Gratz*, in which the FTC alleged a violation of the common law or Sherman Act.¹¹⁰ The Court reasoned that Congress designed the FTC Act to fashion relief broader than that available under the common law and statutes existing at the time of the FTC Act's passage.¹¹¹ The Court noted that Congress left open the definition of "unfair methods of competition" in order to allow for changing interpretation.¹¹²

The Court concluded that enticing children to gamble is contrary to public policy.¹¹³ Because other manufacturers refused to contravene public policy and adopt the break and take packaging, the Court determined that the effect of this method of packaging was "unfair."¹¹⁴ Thus, the Court held that although the respondents did not restrict competitors from using break and take packaging, the use of that packaging was contrary to public policy and therefore other manufacturers would not adopt the packaging.¹¹⁵ The Court thus held that the use of such packaging was unfair and a violation of section 5 of the FTC Act.¹¹⁶

In 1972, in *FTC v. Sperry & Hutchinson Co.*, the United States Supreme Court held that the FTC could not issue a cease and desist order where the FTC based its decision to issue the order on an incorrect determination that a company had acted in contravention of principles of fair competition.¹¹⁷ In coming to its conclusion, however, the Court stated that the FTC Act empowers the FTC to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, nevertheless violate the FTC Act.¹¹⁸ In *Sperry*, the respondent, Sperry & Hutchinson ("S&H"), was the largest and oldest company in the trading stamp industry.¹¹⁹

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 309-10.

¹¹¹ *Keppel*, 291 U.S. at 310.

¹¹² *Id.* at 311-12.

¹¹³ *Id.* at 313.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Keppel*, 291 U.S. at 313-14.

¹¹⁷ 405 U.S. 233, 249-50 (1972).

¹¹⁸ *Id.* at 239.

¹¹⁹ *Id.* at 234. In the trading stamp industry, a company sells stamps to retailers. See Brian J. Strum, Note, *Trading Stamps*, 37 N.Y.U. L. REV. 1090, 1092 (1962). In order to reward a consumer for his or her patronage, retailers give stamps to the consumer based on the amount of the consumer's purchase. See *id.* The consumer pastes the stamps in a book. See *id.* After the consumer

The FTC charged S&H with suppressing the operation of trading stamp exchanges and other "free and open" redemption of stamps.¹²⁰ In order to deter such "unofficial" exchanges, S&H placed a notice on the inside cover of every S&H stamp book advising the consumer that S&H retained title to the stamps and that transfer of the stamps without S&H's written permission was prohibited.¹²¹ Although S&H did not take action against individual consumers, it did file for injunctions against merchants who redeemed or exchanged stamps without authorization.¹²²

The Court stated that when Congress created the FTC, it declined to tie the concept of unfairness to a common law or statutory standard; rather, Congress gave the FTC broad discretion in interpreting that concept.¹²³ Citing *Keppel*, the Court noted that the FTC acts properly when it acts as a court of equity, considering public values beyond those enshrined in the letter or encompassed in the spirit of the antitrust laws.¹²⁴ In a footnote, the Court implicitly adopted the FTC policy for determining whether a practice that does not violate the antitrust laws is nevertheless unfair.¹²⁵ Among the factors the FTC looks at is whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or other established concepts of unfairness.¹²⁶ Thus,

has collected a specified number of stamps, the consumer can then exchange the books for "gifts" at a redemption center operated by the trading stamp company. *See id.*

¹²⁰ *See Sperry*, 405 U.S. at 234. As an incomplete book has no redemption value and many "gifts" require more than one book, consumers sought to obtain books through exchange with other consumers. *See id.* at 236-37. In response to these needs, professional exchanges arose in which middlemen would sell books of S&H stamps previously acquired from consumers or, for a fee, would give a consumer another company's stamps for S&H's or vice versa. *See id.* at 237. Furthermore, in order to compete with merchants issuing S&H stamps, some merchants offered discounts on their goods in exchange for S&H stamps. *See id.*

¹²¹ *See id.* at 237-38.

¹²² *See id.* at 238.

¹²³ *Id.* at 239-40 (citing S. REP. NO. 63-597, at 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.") and H.R. CONF. REP. NO. 63-1142, at 19 (1914) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.")).

¹²⁴ *Id.* at 242-44.

¹²⁵ *Sperry*, 405 U.S. at 244 n.5.

¹²⁶ *See id.*

the Court held that the FTC, through the FTC Act, can prohibit activities that are contrary to public policy.¹²⁷ The Court noted, however, that the FTC had based its cease and desist order on a determination that S&H had prevented competition and therefore restrained trade.¹²⁸ Because the order could not be sustained on this ground, the Court held that the FTC could not issue the cease and desist order.¹²⁹

The FTC's power to act as a court of equity, considering public policy, distinguishes the FTC from the Antitrust Division of the Department of Justice ("Antitrust Division"), with whom the FTC shares antitrust power.¹³⁰ Both agencies have the authority to investigate violations of the Sherman and Clayton Acts.¹³¹ The Antitrust Division, however, does not have the power to enforce section 5 of the FTC Act, from which the public policy enforcement mechanism arises.¹³² Therefore, the Antitrust Division can act only if there has been a violation

¹²⁷ *Id.* at 239, 244. The courts are, however, likely to be skeptical when the FTC uses its power beyond the scope of the Sherman or Clayton Acts. See *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984) ("As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review.").

¹²⁸ *Sperry*, 405 U.S. at 246-47.

¹²⁹ *Id.* at 248-49.

¹³⁰ See VAKERICS, *supra* note 82, §§ 2.01, 2.03[2]. For a discussion of how the FTC and Antitrust Division allocate oversight responsibilities, see David L. Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 BUS. LAW. 2075 (1976).

¹³¹ See VAKERICS, *supra* note 82, §§ 2.01, 2.02[2].

¹³² See *id.* § 2.03[2]. For a particularly relevant discussion of the policies behind antitrust enforcement, see Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979). Pitofsky's views are especially important in light of his recent appointment to the chairmanship of the FTC. Pitofsky argues that if the antitrust agencies give capitalism free rein, subject only to economic considerations, there could be undesirable results. See *id.* at 1051. First, an economic structure dominated by a few companies could facilitate the overthrow of domestic institutions and the installation of a totalitarian regime. See *id.* at 1053-55. Second, the welfare of the country would be placed in the hands of a few economically powerful individuals. See *id.* at 1056-57. Finally, Pitofsky maintains that the economy could become so dominated by a few corporate giants that the Government would be forced to intervene in such companies' affairs. *Id.* at 1057-58. Pitofsky argues that these issues should be taken into account in the "antitrust equation." *Id.* at 1075. Pitofsky has indicated that those individuals who want to know about his thinking on media mergers should read his 1979 article. Bryan Gruley, *Pitofsky Will Test Marketplace of Ideas Theory in FTC's Review of Time Warner-Turner Deal*, WALL ST. J., Oct. 9, 1995, at A14. But see *Roundtable Discussion with Enforcement Officials*, 63 ANTITRUST L.J. 951, 970 (1995) (statements of Pitofsky that he is not "the greatest advocate for aggressive enforcement of Section 5 beyond the Sherman Act and the Clayton Act").

For a contrary view, i.e. that price theory is the sole basis for antitrust law, see ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). Judge Bork suggests that antitrust law should be limited to prohibiting (1) suppression of competition by horizontal

of traditional economic concerns of antitrust.¹³³ Because the mergers of networks with large corporations do not implicate these traditional concerns, the Antitrust Division cannot be of much assistance in ensuring a diversity of voices.¹³⁴ The FTC, however, with its ability to consider public policy, may act to constrain such mergers if it finds that they are not in the public interest.¹³⁵

II. THE COMPETING CONCERNS

The merger of a television network with a corporation implicates competing policy concerns. The nation's democratic traditions require that the Government respect the free speech rights of its citizens.¹³⁶ The Government also has an interest, however, in ensuring that the public has access to numerous viewpoints.¹³⁷

A. Free Speech Rights

Freedom of expression has particular significance in the realm of public affairs because speech concerning matters of public interest is necessary for the exercise of self-government.¹³⁸ The United States Supreme Court has recognized that only through the exchange of ideas can an educated populace make decisions about its political destiny.¹³⁹ Because the United States Government recognizes the special role of free speech in the nation's democracy, the Government is wary of intruding on the journalistic judgments of the media.¹⁴⁰

In 1969, in *In re Complaints Concerning Network Coverage of the Democratic National Convention*, the FCC concluded that the networks afforded a reasonable opportunity for the presentation of opposing

agreement, (2) horizontal mergers creating very large market shares and (3) deliberate predatory practices designed to drive rivals out of the market. *Id.* at 405-06.

¹³³ See VAKERICS, *supra* note 82, §§ 2.01, 2.03[2].

¹³⁴ See Pearl, *supra* note 5, at A10.

¹³⁵ See Sperry, 405 U.S. at 239, 244.

¹³⁶ See U.S. CONST. amend. I; *infra* notes 138-236 and accompanying text.

¹³⁷ See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *Associated Press v. United States*, 326 U.S. 1 (1945); *infra* notes 237-74 and accompanying text.

¹³⁸ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970). For a discussion of the role free speech plays in the democratic process, see R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 316-35 (1993).

¹³⁹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹⁴⁰ See *Complaints Concerning Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 654-55 (1969).

viewpoints on issues that arose at the 1968 Democratic National Convention.¹⁴¹ In its decision, the FCC emphasized that it will not review a broadcaster's news judgment or the quality of its news presentation.¹⁴² In *Democratic National Convention*, the FCC received hundreds of complaints concerning network coverage of the 1968 Democratic National Convention.¹⁴³ For the most part, these complaints alleged that the networks slanted their news coverage against the administration's policies regarding the Vietnam War and in favor of the individuals that demonstrated against the war.¹⁴⁴ The FCC noted that although its mandate is to license station owners upon a finding that they operate in the "public interest," there is a tension between that mandate and the nation's democratic tradition of free speech.¹⁴⁵ Therefore, the FCC refused to review the broadcasters' news judgment, their taste or the quality of their news and public affairs reporting.¹⁴⁶ Such questions, the FCC opined, although appropriate for critics or students of the mass media, are not appropriate for a government agency.¹⁴⁷ The FCC stated that it will act, however, to ensure that broadcasters provide reasonable opportunities for contrasting viewpoints.¹⁴⁸ Because the FCC concluded that there was no basis for the contention that the networks failed to afford proponents of opposing views such an opportunity, the FCC decided to take no further action.¹⁴⁹

In 1978, in *First National Bank of Boston v. Bellotti*, the United States Supreme Court held that a Massachusetts statute prohibiting corporations from making expenditures to influence a referendum violated the First Amendment.¹⁵⁰ In so holding, the Court recognized that corporations, as well as individuals, can exercise the right of free speech in the public sphere.¹⁵¹ In *Bellotti*, the Court held that the Government cannot restrict the free speech rights reserved by the First Amendment of the United States Constitution, regardless of the source

¹⁴¹ *Id.* at 658.

¹⁴² *Id.* at 654.

¹⁴³ *Id.* at 650. Although the FCC does not license networks, it does license broadcast stations, including stations owned by the networks. See *infra* notes 284-89 and accompanying text. Because of this licensing power, the FCC was able to ask the networks to respond to the complaints. See *Democratic Nat'l Convention*, 16 F.C.C.2d at 650.

¹⁴⁴ See *Democratic Nat'l Convention*, 16 F.C.C.2d at 650-51.

¹⁴⁵ *Id.* at 650.

¹⁴⁶ *Id.* at 654.

¹⁴⁷ *Id.* at 655.

¹⁴⁸ *Id.* at 654.

¹⁴⁹ *Democratic Nat'l Convention*, 16 F.C.C.2d at 658.

¹⁵⁰ 435 U.S. 765, 767-68, 795 (1978).

¹⁵¹ *Id.* at 784.

of that speech, absent a compelling state interest.¹⁵² In *Bellotti*, the appellants, banking associations and business corporations, wanted to publicize their opposition to a referendum proposal to amend the Massachusetts Constitution to authorize the legislature to enact a graduated income tax on individuals.¹⁵³ A Massachusetts statute, however, prohibited corporations from spending money for the purpose of influencing a vote on any question other than those materially affecting the interests of the corporation.¹⁵⁴ The statute also explicitly stated that no question submitted to the voters concerning income taxation could be construed as materially affecting corporate interests.¹⁵⁵

The Court stated at the outset that the question it faced was not whether corporations have First Amendment rights, but whether the statute abridged the type of expression that the First Amendment was designed to protect.¹⁵⁶ Because the referendum question was a matter of public concern, the Court reasoned that expression of opinion regarding that question was safeguarded by the First Amendment.¹⁵⁷ The Court further stated that the value of the speech lay in its capacity to inform the public rather than in its source.¹⁵⁸ Because of its importance, the Court reasoned, such speech did not lose its First Amendment protection simply because its source was a corporation.¹⁵⁹ The Court expressed its concern that if the legislature confined business corporations to business-related topics, it could limit other corporations—religious, charitable or civic—to their respective area of expertise when engaging in public discourse, and this, the Court found, was impermissible.¹⁶⁰

Massachusetts offered two justifications for its limitations on corporate speech.¹⁶¹ First, Massachusetts asserted an interest in sustaining the individual citizen's role in the electoral process.¹⁶² Massachusetts argued that corporate participation in discussion of the referendum would exert undue influence on the outcome, eroding voter confidence in the political process.¹⁶³ Second, Massachusetts argued that the stat-

¹⁵² *Id.* at 784, 795.

¹⁵³ *Id.* at 767–68, 769, 770 n.4.

¹⁵⁴ *See id.* at 767–68.

¹⁵⁵ *See Bellotti*, 435 U.S. at 768.

¹⁵⁶ *Id.* at 775–76.

¹⁵⁷ *Id.* at 776.

¹⁵⁸ *Id.* at 777.

¹⁵⁹ *Id.* at 784.

¹⁶⁰ *Bellotti*, 435 U.S. at 785.

¹⁶¹ *See id.* at 787.

¹⁶² *See id.*

¹⁶³ *See id.* at 789.

ute protected the rights of corporate shareholders who do not share the views that the corporations intended to espouse.¹⁶⁴

The Court stated that the statute would be upheld only if Massachusetts's justifications survived the strict scrutiny investigation a court must undertake in the face of a state-imposed restriction of freedom of speech.¹⁶⁵ The Court stated that as important as Massachusetts's justifications may be, they were neither implicated in this case nor adequately protected by the statute and therefore could not justify a prohibition on free speech.¹⁶⁶ Thus, the Court held that the statute was unconstitutional because it prohibited protected speech, regardless of its source, in a manner unjustified by a compelling state interest.¹⁶⁷

Despite governmental recognition of the importance of free expression, the courts have recognized that broadcasters' freedom of expression is not absolute.¹⁶⁸ In 1943, in *National Broadcasting Co. v. United States*, the United States Supreme Court held that in furtherance of the public interest, the FCC could limit the rights of network companies in their relations with radio stations without impinging on the networks' First Amendment rights.¹⁶⁹ In *National Broadcasting*, NBC and CBS challenged FCC regulations governing relations between radio networks and radio broadcast facilities.¹⁷⁰ The Court rejected the

¹⁶⁴ See *id.* at 787.

¹⁶⁵ *Bellotti*, 435 U.S. at 786.

¹⁶⁶ *Id.* at 787-88. The Court pointed out that there was no empirical data to support Massachusetts's contention that corporate participation in referenda jeopardized the electoral process. *Id.* at 789-90. The Court also found that, if the State's interest was in protecting shareholders who did not agree with the position the corporation would take, the statute was both underinclusive and overinclusive. *Id.* at 792-93. The Court reasoned that the statute was underinclusive because although it prohibited corporate expenditures on referenda, it did not forbid other corporate activity that would express the corporation's views. *Id.* at 793. The Court reasoned that the statute was overinclusive because it would prohibit a corporation from supporting or opposing a referendum proposal even if all of the shareholders authorized the expenditure. *Id.* at 794.

¹⁶⁷ *Id.* at 784, 795. In a concurring opinion, Chief Justice Burger specifically addressed the issue of media conglomerates. *Id.* at 795-802 (Burger, C.J., concurring). Chief Justice Burger stated that the Massachusetts statute was especially disquieting because it could limit the First Amendment rights of media corporations. *Id.* at 796 (Burger, C.J., concurring).

¹⁶⁸ See, e.g., *Red Lion*, 367 U.S. at 395; *National Broad. Co. v. United States*, 319 U.S. 190 (1943).

¹⁶⁹ 319 U.S. at 227.

¹⁷⁰ *Id.* at 193-209. The regulations provided that (1) networks could not bind affiliates' programming choices through exclusivity clauses, (2) networks could not enter into agreements with stations that would prohibit them from supplying programming to other stations serving the same area, (3) the term of network affiliation contracts was limited to two years, (4) networks could not bind affiliates' programming choices through option time clauses, (5) an affiliate could not be prevented from rejecting any network program that it believed was not in the public interest, (6) networks were prohibited from owning more than one station in each market, (7) a standard broadcast station could not affiliate with any network organization that owned more

idea that the FCC is limited to mere technological considerations when granting licenses.¹⁷¹ The Court hypothesized a situation in which one person attempted to obtain the licenses for the only two radio stations in an area and concluded that the situation would be subject to the FCC's licensing and regulatory powers.¹⁷² Noting that the FCC's mandate is to protect the public interest, the Court stated that there was no evidence to indicate that Congress did not intend for the FCC to have sweeping authority.¹⁷³

The Court also noted that the Communications Act was passed at a time in which the radio industry was in a state of dynamic change and that the Communications Act gave the FCC expansive powers.¹⁷⁴ The Court therefore concluded that the FCC was justified in promulgating regulations designed to correct abuses revealed by its investigation of network broadcasting.¹⁷⁵ The Court noted that the regulations were not irrevocable, and, for each license application that comes before the FCC, the FCC must still exercise an ultimate judgment as to whether the grant of a license would be in the public interest.¹⁷⁶

The Court addressed two constitutional challenges made by NBC and CBS.¹⁷⁷ First, the networks contended that the "public interest" standard was so vague as to be an impermissible delegation of legislative power to the FCC by Congress.¹⁷⁸ The Court rejected this contention, stating that the standard was not a general reference that lacked criteria to guide the FCC in its determination.¹⁷⁹ Second, the networks argued that their First Amendment free speech rights were proscribed by the regulations.¹⁸⁰ The Court dismissed this argument, reasoning that because the broadcast spectrum is limited, some who wish to use it must be denied licenses.¹⁸¹ The Court stated that the question was whether the FCC's denial of licenses to parties who engage in specified network practices is a denial of the constitutional right of free speech.¹⁸² The Court reasoned that the First Amendment right to free

than one networking operation and (8) networks could not introduce any clause in an affiliate contract that would give them the power to control station rates. *See id.*

¹⁷¹ *Id.* at 216.

¹⁷² *Id.* at 217-18.

¹⁷³ *Id.*

¹⁷⁴ *National Broad.*, 319 U.S. at 219.

¹⁷⁵ *Id.* at 224.

¹⁷⁶ *Id.* at 225.

¹⁷⁷ *Id.* at 225-27.

¹⁷⁸ *See id.* at 225-26.

¹⁷⁹ *National Broad.*, 319 U.S. at 226.

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 226-27.

speech does not include the right to a broadcast license and that the denial of a license for valid reasons under the Communications Act is thus not a denial of free speech.¹⁸³ The Court held, therefore, that the Communications Act authorized the FCC to promulgate the broadcast regulations and that the regulations were a lawful exercise of the FCC's power.¹⁸⁴

In 1969, in *Red Lion Broadcasting Co. v. FCC*, the United States Supreme Court upheld the FCC's application of the Fairness Doctrine.¹⁸⁵ The Fairness Doctrine is a twofold requirement that broadcasters present public issues on broadcast stations and give each side of those issues fair coverage.¹⁸⁶ The Fairness Doctrine is the product of the FCC's interpretation of section 315(a) of the Communications Act.¹⁸⁷ The FCC codified the Fairness Doctrine in 47 C.F.R. § 73.1910.¹⁸⁸ Traditionally, the Commission has used the Fairness Doctrine to ensure that licensees, having chosen to cover a controversial issue of public importance, afford a reasonable opportunity for the presentation of contrasting viewpoints.¹⁸⁹ The purpose of the doctrine is to maintain broadcasting as a medium of free speech for all American people, rather than for just a few licensees.¹⁹⁰

In *Red Lion*, the Court held that the FCC could require a broadcaster to provide free rebuttal airtime to an individual who had been verbally attacked on the broadcaster's station.¹⁹¹ In *Red Lion*, the Red Lion Broadcasting Company ("Red Lion") operated a Pennsylvania radio station, WGCB.¹⁹² WGCB aired a broadcast in which a commentator attacked the character of an author, Fred J. Cook.¹⁹³ When Cook

¹⁸³ *Id.* at 227.

¹⁸⁴ *National Broad.*, 319 U.S. at 224.

¹⁸⁵ *See Red Lion*, 395 U.S. at 386-90.

¹⁸⁶ *See* 47 U.S.C. § 315(a) (1988); 47 C.F.R. § 73.1910 (1995).

¹⁸⁷ *See* 47 U.S.C. § 315(a). Under section 315(a), broadcasters are obligated "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." *Id.* (emphasis added).

¹⁸⁸ 47 C.F.R. § 73.1910. Section 73.1910 states:

The Fairness Doctrine is contained in section 315(a) of the Communications Act of 1934, as amended, which provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Id.

¹⁸⁹ *See, e.g., Democratic Nat'l Convention*, 16 F.C.C.2d at 654.

¹⁹⁰ *See, e.g., id.* at 655.

¹⁹¹ *Red Lion*, 395 U.S. at 372-73, 401.

¹⁹² *Id.* at 371.

¹⁹³ *See id.* The commentator, the Reverend Billy James Hargis, alleged that Cook, author of *Goldwater—Extremist on the Right*, had been fired by a newspaper for making false charges, had

heard of the broadcast, he sought free reply time on WGCB.¹⁹⁴ The FCC determined that Cook was entitled to the free air time.¹⁹⁵ On appeal, after the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision, the Court concluded that the plain language of section 315 of the Communications Act indicates that the "public interest" is served by discussion of both sides of controversial public issues thus vindicating the view that the Fairness Doctrine is inherent in the FCC's mandate.¹⁹⁶ The Court thus held that the Fairness Doctrine was a legitimate exercise of congressionally delegated authority.¹⁹⁷

The Court then considered Red Lion's challenge to the Fairness Doctrine under a First Amendment rationale.¹⁹⁸ Red Lion contended that the Fairness Doctrine's requirement that it air certain viewpoints abridged its First Amendment rights.¹⁹⁹ The Court noted that although broadcasting is a medium affected by the First Amendment, differing First Amendment standards are applied to different kinds of media.²⁰⁰ The Court recognized a necessary limitation on the First Amendment rights of broadcasters that does not inhere in the cases of individuals who are speaking, writing or publishing.²⁰¹ The Court acknowledged that one individual's right of free speech does not embrace a right to suppress another's free speech.²⁰² The Court reasoned, however, that the radio spectrum does not allow access to all individuals who desire to use it; the number of available frequencies is simply too limited.²⁰³ The Court stated that if individuals used the spectrum without direction, there would exist a "cacophony of competing voices, none of which could be clearly or predictably heard."²⁰⁴ The Court observed that no one has a First Amendment right to a broadcast license.²⁰⁵ Furthermore, the Court reasoned, those who are granted licenses do

worked for a Communist-affiliated periodical, had defended Alger Hiss and had attacked J. Edgar Hoover and the Central Intelligence Agency. *See id.*

¹⁹⁴ *See id.* at 371-72.

¹⁹⁵ *See id.* at 372.

¹⁹⁶ *Red Lion*, 395 U.S. at 372-73, 380.

¹⁹⁷ *Id.* at 385.

¹⁹⁸ *Id.* at 386.

¹⁹⁹ *See id.*

²⁰⁰ *Id.* As an example, the Court cited permissible restrictions on sound trucks due to the high levels of noise they can produce. *Id.* at 387 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

²⁰¹ *Red Lion*, 395 U.S. at 388.

²⁰² *Id.* at 387.

²⁰³ *Id.* at 388.

²⁰⁴ *Id.* at 376.

²⁰⁵ *Id.* at 389.

not have a right to monopolize a frequency to the exclusion of others.²⁰⁶ The Court stated that the First Amendment does not prevent the Government from requiring licensees to share their broadcasting rights with others.²⁰⁷ The Court noted that by so requiring, the Government ensures a "marketplace of ideas."²⁰⁸ Thus, the Supreme Court upheld the FCC's implementation of the Fairness Doctrine as a constitutionally delegated exercise of power that does not abridge licensees' First Amendment rights.²⁰⁹

In 1983, the United States Supreme Court again considered a limitation on free speech in the context of a restriction on broadcast media outlets.²¹⁰ In *FCC v. League of Women Voters of California*, the United States Supreme Court held that Congress cannot forbid non-commercial broadcast stations that are recipients of federal funds from editorializing.²¹¹ The Court stated that the Public Broadcasting Act of 1967 ("Public Broadcasting Act") established the Corporation for Public Broadcasting ("CPB") for the purpose of disbursing federal funds to noncommercial broadcasting facilities.²¹² Section 399 of the Public Broadcasting Act forbade the disbursement of funds to stations that engaged in editorializing.²¹³ The League of Women Voters of California challenged the constitutionality of section 399.²¹⁴ The Court, citing *Bellotti*, noted that speech concerning public affairs is entitled to an exacting degree of First Amendment protection.²¹⁵ The Court stated, however, that regulation of broadcast media differs from regulation of other media and that the Court's decisions have never required that such regulations serve a "compelling" state interest.²¹⁶ The Court noted

²⁰⁶ *Red Lion*, 395 U.S. at 389.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 390.

²⁰⁹ *Id.* at 400-01. Five years after *Red Lion*, in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida Supreme Court decision enforcing a Florida statute that was roughly equivalent to the Fairness Doctrine but applied to newspapers. 418 U.S. 241, 244, 258 (1974). In its ruling, the Court did not discuss the *Red Lion* decision. *See id.* at 243-59. The Florida statute provided that if a candidate for nomination or election is attacked by any newspaper, that candidate has the right to demand that the newspaper print, free of charge, any reply the candidate wishes to make. *See id.* at 244. The Court reasoned that the statute compelled publishers to publish that which they would not otherwise publish. *See id.* at 256. Because the statute intruded on the functions of editors, the Court held that the statute was unconstitutional. *Id.* at 258.

²¹⁰ *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

²¹¹ *Id.* at 366, 402.

²¹² *Id.* at 366.

²¹³ 47 U.S.C. § 399 (1982) (amended 1988).

²¹⁴ *See League*, 468 U.S. at 371.

²¹⁵ *Id.* at 375-76.

²¹⁶ *Id.* at 376.

that it has upheld requirements that broadcasters present contrasting viewpoints and that broadcasters provide airtime access to federal candidates.²¹⁷ These requirements, the Court noted, further the public's First Amendment interest in receiving a balanced presentation of matters of public concern.²¹⁸ The Court reasoned that the public's interest necessarily outweighs the individual station owner's right to advocate one position without advocating an opposing view.²¹⁹ Nevertheless, the Court noted that the Government is restricted in the extent to which it may curtail broadcasters' free speech rights.²²⁰ The Court said that it would uphold a free speech limitation on a broadcaster only if the limitation was tailored to further a substantial state interest, such as ensuring adequate and balanced coverage of public issues.²²¹ The Court distinguished the editorial prohibition from the fairness requirement of *Red Lion* by stating that section 399 prohibited broadcasters from speaking out on public issues while the Fairness Doctrine simply required broadcasters, if they engage in discussion of public issues, to air opposing viewpoints.²²²

The Government offered two rationales for the editorial ban.²²³ First, the Government contended that the ban was necessary to ensure that the Government did not coerce stations receiving funding from the CPB to editorialize in the Government's favor.²²⁴ Second, the Government argued that the ban ensured that funding recipients did not become targets for capture by private interest groups seeking to espouse their own agendas.²²⁵

The Court dismissed the first argument, stating that the Public Broadcasting Act already contained statutory provisions designed to insulate broadcasters from government pressure.²²⁶ Unlike the ban on editorializing, the Court concluded, these provisions do not infringe on First Amendment rights.²²⁷ Furthermore, the Court stated that the

²¹⁷ *Id.* at 378–79 (citing *Red Lion*, 395 U.S. at 367 (upholding Fairness Doctrine) and *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding right of access for federal candidates)).

²¹⁸ *Id.* at 380.

²¹⁹ *League*, 468 U.S. at 380.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 385.

²²³ *See id.* at 384–85.

²²⁴ *See League*, 468 U.S. at 384–85.

²²⁵ *See id.* at 385.

²²⁶ *Id.* at 388–89. For example, the Public Broadcasting Act prohibits the CPB from supporting political candidates, requires that the CPB disburse funds in a neutral manner and forbids the CPB from owning stations. 47 U.S.C. § 396(f)(3), (g)(1)(A), (g)(3)(A) (1988).

²²⁷ *League*, 468 U.S. at 390.

individualized voices of many small station owners would not invite retaliation by the Federal Government.²²⁸

The Court then addressed the second argument that the ban on editorializing prevented private interests from capturing fund recipients.²²⁹ Assuming that private groups did capture a station, the Court reasoned that they could propagate their views, via program content, interviews or guest commentators, regardless of the ban.²³⁰ The Court therefore reasoned that the ban was akin to the underinclusive statute of *Bellotti*, which prohibited corporations from influencing referenda but did not address other means by which corporations could affect public policy.²³¹ Furthermore, the Court expressed its view that there are other methods, such as the Fairness Doctrine, to ensure that stations do not become propaganda tools of private groups.²³²

In closing, the Court did not address whether the Government's asserted goals were sufficient to justify an abridgment of speech.²³³ The Court did note, however, that the statute was not narrowly tailored to address any of those goals.²³⁴ The Court concluded, therefore, that even if the dangers at which the ban on editorializing was aimed were sufficiently substantial to justify a limit on speech, the restriction was not crafted with sufficient precision to justify such an abridgment.²³⁵ The Court thus held that section 399 of the Public Broadcasting Act was unconstitutional because it impermissibly intruded on free speech rights.²³⁶

B. Public Policy of Maintaining Diversity of Information Sources

1. Statutory Language

In both the Communications Act and the Telecommunications Act, Congress adopted language favoring the maintenance of a diversity of voices.²³⁷ Although the stated purpose of the Communications Act, as codified in section 151, does not specify diversity as a goal of the Communications Act, sections 309, 521, 532 and 548 indicate that

²²⁸ *Id.* at 390-91.

²²⁹ *Id.* at 396.

²³⁰ *Id.*

²³¹ *See id.*; *Bellotti*, 435 U.S. at 793.

²³² *League*, 468 U.S. at 397-98.

²³³ *Id.* at 398.

²³⁴ *Id.* at 398-99.

²³⁵ *Id.* at 398.

²³⁶ *Id.*

²³⁷ *See infra* notes 238-47 and accompanying text.

Congress intended the maintenance of diversity to be a goal of the Communications Act.²³⁸ Section 309 details the application process for a broadcast license.²³⁹ This section specifically states that in granting licenses, the FCC should grant licenses so as to promote diversity in media communications.²⁴⁰ Section 521, which defines the goals of the FCC in regard to cable communications, similarly states that the FCC should act to assure that the public has access to the widest possible diversity of information sources.²⁴¹ Section 532, like section 521, details the goals of the FCC concerning cable communications and reiterates the purpose of the FCC to secure a diversity of information sources.²⁴² Finally, section 548, which deals with cable and satellite programming, declares its purpose to promote diversity in the multichannel video programming market.²⁴³

The recent Telecommunications Act also emphasizes the goal of maintaining a diversity of media voices.²⁴⁴ In section 257(a), Congress instructs the FCC to conduct a proceeding to identify and eliminate market entry barriers to the telecommunications market.²⁴⁵ The section is specifically targeted to aid entrepreneurs and other small businesses who would otherwise encounter difficulties in entering the telecommunications market.²⁴⁶ Congress instructed the FCC, in holding these proceedings, to promote the purposes of the Telecommunications Act favoring diversity of media voices.²⁴⁷

²³⁸ See 47 U.S.C. §§ 532, 548 (Supp. V 1993); 47 U.S.C. §§ 151, 309, 521 (1988). See *supra* note 77 for the text of section 151.

²³⁹ 47 U.S.C. § 309.

²⁴⁰ *Id.* § 309(i)(3)(A) ("The Commission shall establish rules and procedures to ensure that . . . significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications.").

²⁴¹ *Id.* § 521 (noting, in relevant part, that one of the purposes of the subchapter is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public").

²⁴² *Id.* § 532(a) ("The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.").

²⁴³ *Id.* § 548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market . . .").

²⁴⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, § 257(b), 1996 U.S.C.C.A.N. (110 Stat.) 56, 77.

²⁴⁵ *Id.* § 257(a).

²⁴⁶ *Id.*

²⁴⁷ *Id.* § 257(b).

2. Congressional History

Congress has repeatedly expressed its intent to maintain a diversity of media viewpoints.²⁴⁸ In floor debates on the passage of the Communications Act, there was a heated discussion of a Senate amendment, ultimately rejected, that would have allocated one fourth of all radio broadcasting facilities to nonprofit associations.²⁴⁹ In discussing the amendment, Senator Hatfield (R-W. Va.) expressed concern that if large companies continued to dominate the spectrum to the exclusion of others, Congress would be forced to seize broadcast facilities for the benefit of the American people as a whole.²⁵⁰ House representatives expressed similar sentiments in discussing the House version of the amendment to the Communications Act.²⁵¹ Members of the House also expressed concern over power of the existing networks to control the broadcast spectrum to the detriment of other parties who wanted to use it.²⁵²

Congressional intent to preserve a diversity of voices has continued throughout the history of the enforcement of the Communications Act.²⁵³ In 1985, a House Telecommunications, Consumer Protection and Finance Subcommittee hearing specifically addressed the question of media mergers.²⁵⁴ Although Congressional members neither supported nor opposed corporate acquisitions of broadcast net-

²⁴⁸ See *infra* notes 249-55 and accompanying text.

²⁴⁹ See 78 CONG. REC. 8828-37, 8842-46 (1934). Although many senators expressed support for the goals of the amendment, they did not think an amendment was the proper means by which to achieve those goals. See *id.* Rather, members of Congress expressed the belief that the licensing agency should make the determination as to the allocation of frequencies. See *id.*

²⁵⁰ See *id.* at 8834. During the same session, Senator Dill (D-Wash.) expressed his concern about one individual obtaining all the broadcasting facilities in a given community. See *id.* at 8851. Because of his concerns, Senator Dill proposed an amendment that would prohibit monopolization of radio facilities by one licensee. See *id.* During discussion of the amendment, Senator Dill and Senator Fess (R-Ohio) had the following exchange:

Mr. Fess: This [amendment] would not interfere with [Cincinnati radio station] WLW?

Mr. Dill: Only if WLW reached out and undertook to get control of all the other stations in Cincinnati.

Mr. Fess: After that station had been given the frequency it would not be interfered with if operating within the law?

Mr. Dill: No; but if it went out and secured all the other stations in Cincinnati, then someone else might get a license.

Id. The amendment was agreed to. See *id.*

²⁵¹ See, e.g., *id.* at 10319 (statement of Rep. Maloney (D-Conn.)).

²⁵² See, e.g., *id.* at 10326-27 (statement of Rep. Truax (D-Ohio)).

²⁵³ See, e.g., *Media Mergers and Takeovers: The FCC and the Public Interest: Hearing Before the Subcomm. on Telecomm., Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. (1985) [hereinafter *Hearing Before Subcomm.*].*

²⁵⁴ See *id.*

works, they made it clear that diversity of viewpoints is an important public policy.²⁵⁵

3. Supreme Court Rulings

Just as the Legislature has expressed a desire to maintain a diversity of voices in broadcasting, judicial concern about assuring a multitude of sources of public information has been reflected in the rulings of the United States Supreme Court.²⁵⁶ In 1945, in *Associated Press v. United States*, the United States Supreme Court held that a district court did not err in granting summary judgment enjoining members of a press association from acting in restraint of trade.²⁵⁷ In *Associated Press*, newspaper publishers were members of the Associated Press ("AP"), a cooperative association established for the collection and dissemination of news.²⁵⁸ AP's bylaws prohibited its members from selling information to anyone other than AP and from furnishing information provided by AP to nonmembers prior to publication.²⁵⁹ The district court found that the bylaws were restraints on trade because they stifled competition in the newspaper publishing field, and on appeal by AP, the Supreme Court upheld the district court's finding.²⁶⁰ In the course of the decision, the Court addressed AP's contention that to apply antitrust principles to AP constituted an abridgment of the freedom of the press guaranteed by the First Amendment.²⁶¹ The Court rejected this argument, stating that freedom of the press from governmental interference does not sanction oppression of that freedom by private interests, such as those represented by AP.²⁶² In reaching this conclusion, the Court noted the importance of maintaining diverse sources

²⁵⁵ See *id.* at 2 ("[We have a] concern about diversity in the marketplace of ideas to make sure that the American public have the broadest array of ideas from which to choose. I think that is perhaps a basic public policy concern from which we examine the procedures of the FCC." (statement of Rep. Wirth (D-Colo.))); *id.* at 56 ("[E]nriching the programming available to the American public . . . [and] providing more choices to the American public . . . are the broad themes and the broad public policy goals that I think we all share." (statement of Rep. Wirth)); *id.* at 63 ("The [FCC] has broad authority under the [Communications Act] to consider broad policy questions in proposed transfers. The [FCC] can consider . . . whether a proposed transfer would impede the development of diverse and antagonistic sources of information to the American public" (statement of Rep. Dingell (D-Mich.))).

²⁵⁶ See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *Associated Press v. United States*, 326 U.S. 1 (1945).

²⁵⁷ 326 U.S. at 5, 12, 23.

²⁵⁸ *Id.* at 3-4.

²⁵⁹ See *id.* at 9.

²⁶⁰ *Id.* at 11-12.

²⁶¹ *Id.* at 19.

²⁶² *Associated Press*, 326 U.S. at 20.

of public information.²⁶³ Because the bylaws represented restraints on trade, the Court upheld the district court's grant of summary judgment enjoining members of AP from observing the bylaws.²⁶⁴

In 1978, in *FCC v. National Citizens Committee for Broadcasting*, the United States Supreme Court held that the FCC could promulgate regulations prohibiting joint ownership of a newspaper and a television or radio broadcast station in the same community.²⁶⁵ In *National Citizens Committee*, various parties, including the National Citizens Committee for Broadcasting, the National Association of Broadcasters and several broadcast licensees, petitioned for review of the regulations described above.²⁶⁶ The Court reasoned that it was not inconsistent for the FCC to conclude that maximum benefit for the public interest would follow from allocation of broadcast licenses so as to promote diversification of the mass media.²⁶⁷ The Court thus held that the promulgation of regulations was a permissible exercise of the FCC's authority.²⁶⁸

In 1990, the United States Supreme Court yet again expressed the public policy goal of maintaining diverse broadcast ownership.²⁶⁹ In *Metro Broadcasting, Inc. v. FCC*, the Court held that the FCC's policies favoring minorities were valid exercises of FCC authority.²⁷⁰ In *Metro Broadcasting*, parties challenged FCC policies that favored minorities in the granting of new licenses and permitted a limited category of existing broadcast stations to be transferred only to minority-controlled firms.²⁷¹ The plaintiffs contended that the policies violated the equal protection component of the Fifth Amendment.²⁷² The Court reasoned

²⁶³ *Id.* ("[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 . . .").

²⁶⁴ *Id.* at 5, 12, 23.

²⁶⁵ 436 U.S. at 779.

²⁶⁶ *Id.* at 789.

²⁶⁷ *Id.* at 795. In the course of its discussion, the Court reasoned that there may exist factors more important than diversity in the FCC's determination of whether to renew a license. *Id.* at 805-06. The Court noted with approval the FCC policy of renewing broadcast licenses for those broadcasters who have acted meritoriously during the course of the licensing period. *Id.* at 806. The Court observed that such a policy brings proven broadcast service to the public and rewards licensees who have invested money and effort to produce quality performance. *Id.* at 805. The Court stated that "[e]ven where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the [FCC's] general practice has been to go with the 'proved product' and grant renewal if the incumbent has rendered meritorious service." *Id.* at 806.

²⁶⁸ *Id.* at 802.

²⁶⁹ See *Metro Broad.*, 497 U.S. at 547.

²⁷⁰ *Id.* at 552.

²⁷¹ *Id.*

²⁷² See *id.*

that the policies promoted programming diversity and that such diversity was an important governmental objective that can serve as a constitutional basis for those policies.²⁷³ The Court thus held that the policies were a legitimate application of FCC power.²⁷⁴

III. GOVERNMENT INVOLVEMENT IN STRUCTURING THE MERGER

When a corporation acquires a television network, it necessarily acquires, subject to FCC approval, the broadcast licenses granted to the stations owned by the network.²⁷⁵ Because there is a transfer of the licenses to the new corporate entity, the FCC may approve, condition or deny the merger.²⁷⁶ Similarly, if the FTC (as opposed to the FCC) determines that the merger violates public policy, it can act as a "court of equity" to condition the merger.²⁷⁷

A. FCC

Congress created the Communications Act to regulate radio.²⁷⁸ The original text does not mention television, and Congress has not specifically amended the Communications Act to include television.²⁷⁹ Nevertheless, the regulations for radio have been consistently interpreted to apply to television as well as to radio.²⁸⁰

Among the FCC's powers are the powers to grant licenses,²⁸¹ renew licenses²⁸² and promulgate rules and regulations.²⁸³ The FCC only li-

²⁷³ *Id.* at 566.

²⁷⁴ *Metro Broad.*, 497 U.S. at 566. In *Adarand Constructors, Inc. v. Peña*, the Court overruled *Metro Broadcasting* to the extent that it was inconsistent with *Adarand's* holding that all racial classifications are subject to strict scrutiny and will only be constitutional if they are narrowly tailored to further a compelling governmental interest. 115 S. Ct. 2097, 2113 (1995). This decision does not, however, disturb the Court's determination that diversity is an important governmental objective. *See id.*; *Metro Broad.*, 497 U.S. at 566.

²⁷⁵ *See* 47 U.S.C. § 310(d) (1988).

²⁷⁶ *See infra* notes 278-96 and accompanying text.

²⁷⁷ *See* *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

²⁷⁸ *See* 47 U.S.C. § 151 (1988); HAMBURG & BROTMAN, *supra* note 21, § 3.01[1].

²⁷⁹ *See* 47 U.S.C. §§ 151-613; HAMBURG & BROTMAN, *supra* note 21, § 3.01[1].

²⁸⁰ *See* HAMBURG & BROTMAN, *supra* note 21, § 3.01[1].

²⁸¹ *See* 47 U.S.C. § 307(a). *See supra* note 78 for the text of section 307(a).

²⁸² *See id.* § 307(c). Section 307(c) states the following:

(c) Terms

[U]pon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed five years in the case of television broadcasting licenses, for a term of not to exceed seven years in the case of radio broadcasting licenses, and for a term of not to exceed ten years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby.

Id. § 307(c).

²⁸³ *See id.* §§ 154(i), 303. Section 154(i) states the following:

censes individual stations; it does not license networks.²⁸⁴ The FCC does, however, exercise control over the networks by virtue of its regulations concerning station affiliation agreements, programming policies and other matters involving stations and networks.²⁸⁵ By preventing stations from engaging in network agreements that it believes are harmful to the station or to the public interest, the FCC can exert pressure on the operations of a network.²⁸⁶

As part of its mandate, the FCC controls not only initial licensing procedures, but also transfers of licenses.²⁸⁷ It is through this authority that the FCC can influence corporate takeovers of networks.²⁸⁸ Each network owns at least seven television stations, and the transfer of ownership of a network necessarily entails the transfer of ownership of those stations subject to FCC approval under section 310(d).²⁸⁹

Even if a proposed merger does not violate any of the FCC's specific regulations, the FCC may condition a merger in order to ensure that the merger is in the public interest.²⁹⁰ The FCC may do so

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

Id. § 154. Section 303 provides the following:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall— . . .

(i) Have authority to make special regulations applicable to radio stations engaged in [network broadcasting] . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter

Id. § 303.

²⁸⁴ See HILLIARD, *supra* note 54, at 33.

²⁸⁵ See 47 U.S.C. § 303(i); HILLIARD, *supra* note 54, at 33.

²⁸⁶ See 47 U.S.C. § 303(i); HILLIARD, *supra* note 54, at 33.

²⁸⁷ See 47 U.S.C. §§ 309(a), 310(d). See *supra* note 78 for the text of section 309(a). Section 310(d) mandates prior FCC authorization before a licensee may transfer control of its license or assign it to another party. *Id.* § 310(d). Section 310(d) provides that:

No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application . . . for the permit or license in question

Id. § 310(d).

²⁸⁸ See *id.* § 310(d).

²⁸⁹ See *id.*; VARIETY, *supra* note 20. For a discussion of the station holdings of the various networks see *supra* note 20.

²⁹⁰ See 47 U.S.C. § 301 (Supp. V 1993); 47 U.S.C. §§ 154(i), 307, 309. See *supra* notes 78, 282

by denying the grant or transfer of the license applications necessary to operate the broadcast facilities if the companies do not take certain steps determined by the FCC.²⁹¹ Despite this broad-based power, some individuals have expressed the belief that the FCC need only act if there has been a violation of a specific regulation.²⁹²

At the most extreme, the FCC can deny the grant or transfer of a license.²⁹³ If the FCC does not find that granting or permitting the transfer of a particular license serves the public interest, it will designate the application for hearing.²⁹⁴ The burden of proceeding with the

and 283 for the relevant text of sections 154(i), 307 and 309. In relevant part, the text of section 301 is as follows:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

Id. § 301.

²⁹¹ See *id.* §§ 309(a), 310(d). An application for the transfer of a license is treated as if it were an original application for the license. See *id.* § 310(d).

²⁹² This attitude was reflected in comments made by former FCC Chairman Fowler at a 1985 House subcommittee hearing in which Chairman Fowler indicated that the FCC's regulations in themselves ensure the existence of a diversity of voices. *Hearing Before Subcomm.*, *supra* note 253, at 69. Representative Bryant (D-Tex.) and Chairman Fowler had the following exchange:

Mr. Bryant: What are the principles that you understand from the [Communications Act] that you are to apply to your decisions regarding a license transfer?

Mr. Fowler: We have to make sure that they comply with the alien ownership requirements, that they have the requisite character, that they are financially qualified. As to rules, we want to make sure that they comply with our multiple-ownership rules. We want to make sure that they file a proper Equal Employment Opportunity Program proposed when they take over the operation of the stations in question.

Mr. Bryant: *What about diversified ownership?*

Mr. Fowler: *Diversity in ideas or competition is subsumed and included within our multiple-ownership rules. For example, the rule of 12, which is designed to both foster diversity and also to encourage competition to make sure that each market is workably competitive.*

Mr. Bryant: *You believe once they have not violated that kind of a rule with regard to multiple ownership, that there is no further need for the FCC to inquire into the effect of a transfer on diversification?*

Mr. Fowler: *There is a whole panoply of ownership rules, including local ownership rules, cross-interest, and those are a package. Yes, I am satisfied that if they meet all of the multiple-ownership rules, that we can be reasonably assured that we will have diversity in ideas as well as workable competition.*

Id. (emphasis added).

²⁹³ See 47 U.S.C. §§ 309(a), 310(d).

²⁹⁴ See *id.* §§ 309(e), 310(d).

introduction of evidence and the burden of proof are on the applicant.²⁹⁵ Because the burden of proof is on the applicant and the FCC has a broad underlying mandate to ensure that the public interest is satisfied, the FCC thus has wide discretion in granting or permitting the transfer of licenses, which the courts will not lightly dismiss.²⁹⁶

B. FTC

Similarly, the FTC has broad discretion in the exercise of its mandate to prevent unfair competition.²⁹⁷ The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires that parties to mergers file a premerger plan with the FTC and the Antitrust Division and wait a specified period of time before consummating the merger.²⁹⁸ The purpose of the filing is to give both of these governmental entities an opportunity to determine whether or not the proposed merger violates the antitrust laws.²⁹⁹ If the FTC has reason to believe that the proposed merger will violate the antitrust laws, it may seek an injunction to prevent the merger.³⁰⁰ Alternatively, the FTC may require that the merging companies modify the transaction so as to conform to the antitrust laws.³⁰¹ Finally, the FTC may permit the merger to proceed provided that the merging parties agree to a consent order designed to satisfy the antitrust objections.³⁰² Although orders of the FTC are

²⁹⁵ See *id.*

²⁹⁶ See *id.* §§ 309, 310(d); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the [FCC's] judgment regarding how the public interest is best served is entitled to substantial judicial deference."); *National Broad. Co. v. United States*, 319 U.S. 190, 224 (1943) ("Our duty is at an end when we find that the action of the [FCC] was based upon findings supported by evidence, and was made pursuant to authority granted by Congress."); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 (D.C. Cir. 1989) ("In making a public interest judgment under the Communications Act, the [FCC] is exercising both its congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy.").

²⁹⁷ See 15 U.S.C. §§ 45, 46 (1994); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946).

²⁹⁸ 15 U.S.C. § 18a. Section 18a limits the filing requirement to those parties engaged in interstate commerce and those entities of a certain monetary value. *Id.* § 18a(a). Even if 15 U.S.C. § 18a does not require the merging entities to file a premerger report, the FTC may initiate an investigation upon receiving notice of the merger. See *ROLL*, *supra* note 130, at 2084; *VAKERICS*, *supra* note 82, § 9.03[2]; see also 15 U.S.C. § 45.

²⁹⁹ See 15 U.S.C. § 18a(d) ("The [FTC], with the concurrence of the Assistant Attorney General [of the Antitrust Division] . . . shall require that the notification . . . be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [FTC] and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws . . .").

³⁰⁰ See *id.* § 53(b); *FTC v. Dean Foods Co.*, 384 U.S. 597, 599 (1966) (FTC seeks injunction to maintain status quo until FTC can make a determination as to legality of merger).

³⁰¹ See *VAKERICS*, *supra* note 82, § 9.03[2].

³⁰² See *id.* Typically, the FTC permits the merger subject to a consent agreement. See *id.*

subject to judicial review, the FTC's discretion in structuring a merger is broad.³⁰³ Courts will interfere with an order only if it bears no "reasonable relation" to the unlawful practices found by the FTC.³⁰⁴

IV. CONTROL OF THE BROADCAST CORPORATION AFTER THE MERGER

Many of the powers that the FCC and the FTC exercise before a media merger can also be employed after the merger.³⁰⁵ The FCC must still ensure that the broadcast corporation acts in the public interest.³⁰⁶ Similarly, Congress has authorized the FTC to prohibit unfair practices after the merger as well as before.³⁰⁷

A. FCC

Just as the Communications Act grants the FCC broad authority to enforce its mandate of protecting the public interest in issuing and permitting transfers of broadcast licenses, the statute likewise grants the FCC enforcement authority after the licensing.³⁰⁸ In addition to its review of license renewals³⁰⁹ and its ability to promulgate rules and regulations,³¹⁰ the FCC may revoke station licenses³¹¹ and issue cease and desist orders.³¹² Although the FCC has broad powers to revoke

³⁰³ See 15 U.S.C. § 45(c) ("Any [party] required by an order of the [FTC] to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . ."); *Siegel*, 327 U.S. at 611 ("The [FTC] has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce.").

³⁰⁴ See *Siegel*, 327 U.S. at 613 ("[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.").

³⁰⁵ See *supra* notes 275-304 and accompanying text.

³⁰⁶ See *infra* notes 308-28 and accompanying text.

³⁰⁷ See 15 U.S.C. § 45(b).

³⁰⁸ See *infra* notes 309-28 and accompanying text.

³⁰⁹ See 47 U.S.C. § 307(c) (1988).

³¹⁰ See *id.* §§ 154(i), 303(i), (r).

³¹¹ See *id.* § 312(a). Section 312(a) states the following:

(a) Revocation of station license . . .

The Commission may revoke any station license . . .

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter . . .

Id. § 312(a).

³¹² See *id.* § 312(b). Section 312(b) states the following:

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in this license,

(2) has violated or failed to observe any of the provisions of this chapter . . . or (3) has violated or failed to observe any rule or regulation of the Commission author-

licenses or issue cease and desist orders, there is a presumption in favor of the licensee once a license has been issued, and both the burden of proceeding and the burden of introduction of evidence are on the FCC in such actions.³¹³ Therefore, the revocation proceedings differ from the application proceedings, in which the burden of proof is on the applicant.³¹⁴ Nevertheless, the FCC has broad discretion in determining the public interest, and courts are unlikely to overrule an FCC adjudication that a broadcaster has acted contrary to the public interest.³¹⁵

A particular policy that the FCC has followed in its control of broadcast outlets is the Fairness Doctrine.³¹⁶ In recent years, however, the Fairness Doctrine has fallen into disfavor with the FCC and the FCC has refused to enforce it.³¹⁷ The courts have deferred to the FCC's decision to abandon the Fairness Doctrine.³¹⁸

In 1987, in *In re Complaint of Syracuse Peace Council*, the FCC concluded that the Fairness Doctrine contravenes the First Amendment and thereby disserves the public interest.³¹⁹ In *Complaint of Syracuse Peace Council*, the FCC considered whether the Fairness Doctrine obligated a television station to air opposing viewpoints after the broadcaster aired a series of editorials advocating the construction of a nuclear power plant.³²⁰ The FCC reasoned that the Fairness Doctrine inhibits broadcasters from covering controversial issues because to do so opens the broadcaster to litigation.³²¹ The FCC therefore concluded that enforcement of the Fairness Doctrine was no longer in the public interest.³²²

In 1989, in *Syracuse Peace Council v. FCC*, the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's

ized by this chapter . . . , the Commission may order such person to cease and desist from such action.

Id. § 312(b). In *Syracuse Peace Council v. FCC*, the United States Court of Appeals for the District of Columbia Circuit noted that the power to issue cease and desist orders represented the FCC's ability to continue to impose an obligation on a licensee to operate in the public interest after the issuance of the license. 867 F.2d 654, 658 n.2 (D.C. Cir. 1989).

³¹³ See 47 U.S.C. § 312(d).

³¹⁴ See *id.* §§ 309(e), 312(d).

³¹⁵ See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981); *National Broad. Co. v. United States*, 319 U.S. 190, 224 (1943); *Syracuse Peace Council*, 867 F.2d at 658.

³¹⁶ See *supra* notes 185-209 and accompanying text.

³¹⁷ See *Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057 (1987).

³¹⁸ See *Syracuse Peace Council*, 867 F.2d at 669.

³¹⁹ 2 F.C.C.R. at 5057.

³²⁰ *Id.* at 5044.

³²¹ *Id.* at 5049, 5052.

³²² *Id.* at 5052.

decision not to enforce the Fairness Doctrine.³²³ The court reasoned that the FCC's decision reflected the agency's policy judgment which was entitled to substantial judicial deference.³²⁴ The court thus concluded that the FCC's decision that the Fairness Doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion.³²⁵ Because the FCC's determination that the Fairness Doctrine was no longer in the public interest was rational, the court did not consider the constitutionality of the doctrine itself.³²⁶ The court thus held that the FCC acted within its discretion in ceasing enforcement of the Fairness Doctrine.³²⁷ Therefore, the Supreme Court's *Red Lion Broadcasting Co. v. FCC* ruling that the Fairness Doctrine is constitutional is still good law, even though the FCC has declined to enforce the doctrine because the FCC believes the doctrine disserves the public interest.³²⁸

B. FTC

The FTC's power to seek an injunction for behavior that violates the FTC Act continues after a merger has been consummated.³²⁹ Similarly, the FTC may issue cease and desist orders after a merger has been completed.³³⁰ For example, in *FTC v. Keppel & Bro.*, the FTC issued a cease and desist order forbidding candy manufacturers from selling candy packaged in a certain manner to children.³³¹ In *FTC v. Sperry & Hutchinson Co.*, the FTC issued a cease and desist order forbidding trading stamp manufacturers from attempting to suppress the operation of trading stamp exchanges.³³² Although couched in the injunction or "cease and desist" terminology, FTC orders may require one company to divest itself of another company.³³³ As with actions taken before a merger, the courts will only interfere with such orders if they

³²³ 867 F.2d at 669.

³²⁴ *Id.* at 660.

³²⁵ *Id.* at 669.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400-01 (1969); *Syracuse Peace Council*, 867 F.2d at 669; *Complaint of Syracuse Peace Council*, 2 F.C.C.R. at 5057.

³²⁹ See 15 U.S.C. § 53(b) (1994); *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 (1966).

³³⁰ See 15 U.S.C. § 45(b).

³³¹ 291 U.S. 304, 306 (1934). For a full discussion of *Keppel*, see *supra* notes 105-16 and accompanying text.

³³² 405 U.S. 233, 234 (1972). For a full discussion of *Sperry*, see *supra* notes 117-29 and accompanying text.

³³³ See *Dean Foods*, 384 U.S. at 606 n.4 (noting that FTC can order divestiture of company).

bear no reasonable relation to the activity that the FTC hopes to proscribe.³³⁴

V. ACTIONS THE GOVERNMENT AGENCIES SHOULD TAKE

As the Supreme Court recognized in *First National Bank of Boston v. Bellotti*, the dissemination of information concerning public affairs is protected by the First Amendment regardless of the source of the speech.³³⁵ The FCC's decision in *In re Complaints concerning Network Coverage of the Democratic National Convention* expressed the view that in a democracy, the Government does not have the right to determine how information regarding public affairs should be expressed.³³⁶ The United States Supreme Court has acknowledged, however, that in regard to broadcast outlets, the right to speak freely is not absolute.³³⁷ Rather, as the decisions in *Red Lion Broadcasting Co. v. FCC* and *National Broadcasting Co. v. United States* make clear, courts have recognized that broadcast outlet owners act as trustees for the public and have thus carved out an exception to the protection of free expression for broadcast outlets and placed limitations on broadcasters in exchange for the grant of a license.³³⁸

Courts, however, have the right to review those limitations, and in *FCC v. League of Women Voters of California*, the United States Supreme Court stated that in order for the Court to uphold a restriction on broadcast outlets, the Government must have a valid reason for implementing the restriction.³³⁹ Although the Government need not articulate a compelling interest for mandating the restriction, it must have a substantial governmental goal and the restriction must be narrowly tailored to further that goal.³⁴⁰

Maintaining a diversity of voices qualifies as a substantial governmental goal.³⁴¹ Both the legislature and judiciary have recognized society's need for various information sources.³⁴² Given the number of outlets owned by the corporations and networks involved in today's media mergers, the public has good cause to be wary of such conglom-

³³⁴ See *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

³³⁵ 435 U.S. 765, 776-77, 784 (1978).

³³⁶ See *Complaints concerning Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 650, 654 (1969).

³³⁷ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

³³⁸ See *id.* at 389; *National Broad. Co. v. United States*, 319 U.S. 190, 224 (1943).

³³⁹ 468 U.S. 364, 375-76, 380 (1984).

³⁴⁰ See *id.* at 376, 380.

³⁴¹ See *supra* notes 237-74 and accompanying text.

³⁴² See *supra* notes 237-74 and accompanying text.

erates. The Government therefore satisfies a substantial governmental interest by monitoring such conglomerates carefully.

Both the FCC and the FTC can condition the acquisition of a network by a corporation so as to ensure that the merger comports with the public interest.³⁴³ For example, in the case of the ABC/Disney merger, the FCC conditioned its approval of the deal on Disney's promise to sell, within a year, newspaper or radio interests in Fort Worth and Detroit as well as a television station in Los Angeles.³⁴⁴ In the case of CBS and Westinghouse, the FCC considered conditioning the merger on a requirement that Westinghouse television stations air at least three hours of children's educational programming each week.³⁴⁵ Although the FCC, by a vote of 3-2, decided not to take such action when concerns arose that such a requirement would violate First Amendment free speech rights, the FCC's consideration of the restriction demonstrates the broad power that the FCC wields in structuring media mergers.³⁴⁶

The FTC has not yet asserted jurisdiction in the case of corporate takeovers of television networks because the Antitrust Division supervised previous acquisitions of networks.³⁴⁷ The Antitrust Division authorized the GE takeover of RCA and NBC in 1986.³⁴⁸ The Antitrust Division likewise reviewed the ABC/Disney and CBS/Westinghouse mergers.³⁴⁹

The differing determinations by the FCC in the ABC and CBS cases reflect the problem that lies at the heart of the FCC's interaction with the networks: in regulating activities of the networks, the FCC acts solely where there is a violation of an established rule or regulation.³⁵⁰ In the ABC/Disney situation, cross-ownership of diverse media outlets would have violated FCC ownership rules and thus the FCC required divestiture of media interests.³⁵¹ In regard to the CBS/Westinghouse

³⁴³ See 15 U.S.C. §§ 45(b), 53(b) (1994); 47 U.S.C. § 310 (1988); *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244 (1972).

³⁴⁴ See Karr & King, *supra* note 28, at B13. See *supra* notes 33 and 35 for details on these agreements.

³⁴⁵ See Karr, *supra* note 2, at B5.

³⁴⁶ See *id.*; *Commissioners, Hundt Argue Over Kid TV in Westinghouse Purchase of CBS*, COMM. DAILY, Nov. 16, 1995, available in WESTLAW, News/Topical News Library, Broadcasting Media File. Westinghouse did, however, voluntarily agree to air more educational programming for children. See Karr, *supra* note 2, at B5.

³⁴⁷ See Roll, *supra* note 130, at 2075; Karr, *supra* note 2, at B5; King & Gruley, *supra* note 35, at B9; Johnnie L. Roberts & Peter W. Barnes, *RCA Holders Clear \$6.28 Billion Sale to GE; NBC Radio Unit May Be Sold*, WALL ST. J., Feb. 14, 1986, at 5.

³⁴⁸ See Roberts & Barnes, *supra* note 347, at 5.

³⁴⁹ See Karr, *supra* note 2, at B5; King & Gruley, *supra* note 35, at B9.

³⁵⁰ See *Hearing Before Subcomm.*, *supra* note 253, at 69 (statements of Chairman Fowler).

³⁵¹ See 47 C.F.R. § 73.3555(b), (d) (1995); Karr & King, *supra* note 28, at B13.

situation, the FCC has not promulgated regulations requiring educational programming. Therefore, the FCC seemed to reason, there was no need to condition the merger on the provision of such programming.³⁵² It is worth noting that two of the United States Supreme Court decisions that recognized the power of the FCC to constrain the free speech rights of broadcasters, *National Broadcasting* and *Red Lion*, involved FCC enforcement of specific regulations.³⁵³ The history of the FCC's actions indicates that the FCC acts only where there has been a violation of a specific regulation.³⁵⁴

There are two problems with the FCC's heavy reliance on specific regulations. First, the FCC's mandate is not a narrow one, confined to enforcing the FCC's rules and regulations; rather, it is a broad-based mandate to provide for the "public interest, convenience or necessity."³⁵⁵ A view that the FCC may only enforce narrow regulations does not allow for the creativity and flexibility necessary for monitoring the constantly changing communications industry. Second, the passage of the Telecommunications Act places the existence of the current regulations in jeopardy and does not bode well for future regulation.³⁵⁶ The Telecommunications Act eliminates the prohibition on the number of television stations a single party can own.³⁵⁷ The Telecommunications Act also increases the national audience reach limitation to thirty-five percent.³⁵⁸ Additionally, the Telecommunications Act instructs the FCC to conduct hearings on whether the FCC should retain its limitations on the number of stations that a party may control within the same television market.³⁵⁹ Finally, in the spirit of the Telecommunications Act, members of the FCC have indicated that the FCC may, under its own impetus, revoke some of its cross-ownership restrictions.³⁶⁰ If specific regulations are the only means by which the FCC can monitor the broadcast industry, the Telecommunications Act's relaxation, if not

³⁵² See Karr, *supra* note 2, at B5.

³⁵³ See *Red Lion*, 395 U.S. at 369-70, 400-01 (enforcing Fairness Doctrine); *National Broad.*, 319 U.S. at 193, 198, 227 (enforcing eight regulations governing relations between networks and broadcast stations).

³⁵⁴ See, e.g., *Red Lion*, 395 U.S. at 373-75; *National Broad.*, 319 U.S. at 193. See *supra* note 253 for former FCC Chairman Fowler's expression of this view.

³⁵⁵ See 47 U.S.C. § 307 (1988).

³⁵⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c), 1996 U.S.C.A.N. (110 Stat.) 56, 111.

³⁵⁷ *Id.* § 202(c)(1)(A).

³⁵⁸ *Id.* § 202(c)(1)(B).

³⁵⁹ *Id.* § 202(c)(2).

³⁶⁰ See Karr & King, *supra* note 28, at B13.

outright elimination, of those rules eliminates the FCC's ability to ensure a diversity of voices.³⁶¹

Suggestions to ensure a diversity of viewpoints have generally centered on regulation.³⁶² Some individuals have suggested that Congress codify the Fairness Doctrine into law in order to ensure that the public has access to various points of view.³⁶³ Such regulatory schemes, while facially desirable in expanding the knowledge of the public through various sources, ultimately fail because they do not address the underlying tension between a broadcaster's free speech rights and the Government's power to issue licenses.³⁶⁴ As *League of Women Voters* makes clear, courts are wary of governmental intrusion into public affairs programming decisions made by broadcast media outlets.³⁶⁵ For the most part, such regulatory schemes represent the type of impermissible content regulation that *League of Women Voters* prohibits because it calls for broadcasters to take an active part in scheduling specific forms of public affairs programming.³⁶⁶ Furthermore, such proposals do not have much chance of success in the political environment that spawned the deregulatory Telecommunications Act.

³⁶¹ See *Hearing Before Subcomm.*, *supra* note 253, at 69 (exchange between Chairman Fowler and Rep. Bryant).

³⁶² See, e.g., Rainey, *supra* note 138, at 331-35. For example, Professor Rainey suggests a three-part regulatory structure to ensure that the media serve the democratic process. *Id.* First, media companies should make available information necessary for the making of informed political judgments. *See id.* at 331-32. To that end, the media could schedule increased coverage of candidates and ballot issues during the campaign cycle and reports on topics of public interest during other periods. *See id.* at 332. Second, the media could contribute to the general political knowledge of the public by producing programs that educate viewers on the operation of various democratic processes. *See id.* Third, the media should broadcast public forums much like those made popular during the 1992 presidential campaign. *See id.* at 332-33. Such public affairs programming would serve to educate the electorate, increase public discourse and promote a sense of unity among the public. *See id.* at 333-35. Because of the intrusiveness of FCC monitoring, Professor Rainey suggests that compliance should only be reviewed during license renewal procedures. *Id.* at 349.

³⁶³ *See id.* at 351; Kim McAvoy, *Who's to Blame for Cable Rereg Mess? (Cable Television Regulations)*, BROADCASTING & CABLE, Oct. 4, 1993, at 60 (quoting Rep. Markey as being committed to "putting fairness back on the books").

³⁶⁴ *See supra* notes 136-274 and accompanying text. For a view that such schemes do adequately address the tension, see Rainey, *supra* note 138, at 336-51 (arguing that (1) broadcast license gives rise to regulable fiduciary duty to preserve the public trust; (2) current licensing regime, in which only certain parties gain licenses, necessitates substantive public rights duties; (3) nothing in First Amendment prohibits Congress from legislating to diversify speech; and (4) public interest obligations are constitutional condition of electronic speech).

³⁶⁵ See *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 380 (1984).

³⁶⁶ *See id.*; Rainey, *supra* note 138, at 331-35.

Indeed, attempts to codify the Fairness Doctrine have not been successful.³⁶⁷ Although it was long presumed that a Democratic administration would move to codify the Fairness Doctrine, recent events in Washington, discussed above, indicate that neither Congress, the President nor the FCC is likely to impose a fairness obligation on the media industry anytime soon.³⁶⁸ Other attempts to promulgate more regulation will probably face similar opposition.³⁶⁹

Recognizing the reality that the current atmosphere in Washington militates against more regulation of the broadcast industry, any attempt to ensure a diversity of voices should not be in the form of more regulation. Congress should, however, stress the importance it places on networks maintaining a marketplace of ideas. Three suggestions would make that policy clear without expanding the scope of the Government's authority to restrict broadcasters' free speech.

First, section 303 of the Communications Act, which sets forth the powers and duties of the FCC, should be amended to provide expressly that the FCC shall have the authority to grant licenses and pass rules and regulations in order to ensure a diversity of information sources.³⁷⁰ Although such a provision would not require the FCC to act any differently than it currently acts, the provision would codify the importance Congress places on a variety of voices. Although the FCC, Congress and the courts have expressed their strong desire to maintain diverse viewpoints in the media industry, a codification of that position would serve to impress that ideal on those who run media outlets.³⁷¹

Second, the Communications Act should be amended to require that networks be granted licenses by the FCC. Currently, the FCC does not license individual networks.³⁷² Rather, the FCC has indirect control over the networks through its power to grant and transfer licenses of network-owned broadcast facilities.³⁷³ The FCC can also issue regulations governing relations between networks and their affiliates.³⁷⁴ Some commentators have argued that direct licensing of networks is not necessary because these powers allow the FCC to regulate networks

³⁶⁷ See Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 62 n.66 (1994); *House Panel Gives Strong Support for Broadcast Fairness Legislation*, DAILY REP. FOR EXECUTIVES, July 27, 1993, available in LEXIS, News Library, Archival News File.

³⁶⁸ See Rod Dreher, *Congress Cowers to Conservatives on Fairness Doctrine*, WASH. TIMES, July 3, 1994, at A4.

³⁶⁹ See *id.*

³⁷⁰ See 47 U.S.C. § 303 (1988).

³⁷¹ See *supra* notes 237-74 and accompanying text.

³⁷² See HILLIARD, *supra* note 54, at 33.

³⁷³ See 47 U.S.C. §§ 309, 310.

³⁷⁴ See *id.* § 303(i); *National Broad.*, 319 U.S. at 224.

indirectly.³⁷⁵ Although such arguments are valid, a grant of power to license networks directly would, like the enunciation of a clear policy goal of ensuring diversity of voices, send a clear message that network communications are a matter of governmental concern.

Third, the power to approve network mergers, currently shared between the FTC and the Antitrust Division, should be explicitly granted to the FTC alone. Currently, situations may arise in which the merger of a network and major corporation does not implicate traditional economic antitrust concerns.³⁷⁶ In such situations, the Antitrust Division, constrained as it is to consider only economic values, would approve the merger.³⁷⁷ Nevertheless, the merger may not be in the public interest based upon a consideration of noneconomic values.³⁷⁸ Unlike the Department of Justice, the FTC, under its FTC Act mandate, can act as a "court of equity" and disapprove a merger based on public policy grounds.³⁷⁹ Placing the approval power solely with the FTC may not ensure that public policy concerns will be decisive, but such placement would at least allow such concerns to be considered.³⁸⁰

CONCLUSION

Mergers between television networks and large corporations have resulted in the creation of large media entities that control television stations, radio stations, newspapers and other media outlets. In a democracy, the people must have access to diverse opinions about public affairs in order to ensure that they are making informed decisions in the political realm. Concentration of ownership in the hands of a few places that access in jeopardy.

Because of the role of television networks in keeping the public informed, it is in the public interest to ensure that the owners of the networks present varying viewpoints. Equally important in a democracy, however, is the right of free expression. The Government should neither censor opinions nor force people to say that which they do not believe. The role of the Government in the regulation of media outlets

³⁷⁵ See, e.g., Lance S. Davidson, *Extension of the Federal Communication Commission's Jurisdiction to the Television Networks*, 4 COMM/ENT 235, 266-67 (1981-82); see also *Hearing Before Subcomm.*, *supra* note 253, at 81 (statement of Thornton F. Bradshaw, Chairman of the Board, RCA Corporation).

³⁷⁶ See Pearl, *supra* note 5, at A10.

³⁷⁷ See VAKERICS, *supra* note 82, § 2.03[2].

³⁷⁸ See Pitofsky, *supra* note 132, at 1051.

³⁷⁹ See *Sperry*, 405 U.S. at 244; VAKERICS, *supra* note 82, § 2.03[2].

³⁸⁰ See *Sperry*, 405 U.S. at 244; VAKERICS, *supra* note 82, § 2.03[2].

is, therefore, analogous to walking a tightrope between the evils of censorship and the evils of presenting only one view of public issues.

Three changes in the current administrative scheme would highlight the importance of television networks' dissemination of alternative viewpoints. First, the Communications Act should be amended to authorize explicitly the FCC to consider the public interest in a diversity of broadcast voices when exercising its powers. Second, the FCC should be given the power to license networks. Third, the power to approve mergers between networks and other entities, currently shared between the FTC and the Antitrust Division, should be explicitly granted to the FTC alone.

None of these changes would present a radical change in the current regulatory plan. Indeed, adoption of these changes may not change the activities of the interested parties at all. Nevertheless, these suggestions, if implemented, would send a clear signal to network owners that the continued presentation of multiple viewpoints in public affairs programming is of the highest societal interest.

Mike Harrington