EVALUATING THE FEDERAL COMMUNICATIONS COMMISSION'S NATIONAL TELEVISION OWNERSHIP CAP: WHAT'S BAD FOR BROADCASTING IS GOOD FOR THE COUNTRY†

STUART MINOR BENJAMIN*

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† This title is a modification of the statement attributed to Charles Wilson that "What's good for the country is good for General Motors, and vice versa." THE COLUMBIA WORLD OF QUOTATIONS 64,876 (Robert Andrews et al., eds.1996), *available at* http://www.bartleby.com/66/76/64876.html.

* Professor of Law, Duke University School of Law. B.A., Yale University, 1987; J.D., Yale Law School, 1991. I would like to thank Ellen Goodman and Doug Lichtman for valuable comments, and Kara Moorcroft for excellent research assistance.

INTRODUCTION

The Federal Communications Commission (FCC) issued a decision in June 2003 on a number of matters that might not seem likely to arouse much public excitement. Its order permits certain combinations of cross ownership for television stations, radio stations, and newspapers; relaxes the limits on ownership of local television stations; slightly tightens the rules on local radio ownership; and increases the national television station ownership limit.[1] But as it turns out, these changes—and in particular the change in the national television ownership limit, which increased the cap on the percentage of households in the nation reachable by a given company's stations from 35% to 45%—produced a firestorm of controversy. The FCC received more comments than it has for any other proceeding (more than 750,000), and the overwhelming majority urged the FCC not to relax its ownership limits.[2] After the FCC did so, the fight moved to Capitol Hill, where the FCC suffered a stunning rebuke: broad bipartisan majorities voted to rescind the FCC's increase in the national television cap—and in fact to codify the 35% limit and leave the FCC with no discretion to raise it.[3] This provision was included in the omnibus spending bill for the 2004 fiscal year.[4] The Bush administration responded by threatening to veto the omnibus bill (full of spending initiatives dear to both the President and members of Congress) if the 35% provision remained in the bill.[5] Eventually, Republican leaders in the House and Senate

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1. 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620 (2003) [hereinafter 2003 FCC Ownership Order].

2. *See, e.g.*, *id.* at 13,957 (Copps, Comm'r, dissenting). As Commissioner Copps stated:

> This proceeding has generated three-quarters of a million comments now—more than any other proceeding that I am aware of in the history of the FCC. Of those comments, all but a few hundred are from individual citizens. And of those, nearly every one opposes increased media consolidation—over 99.9 percent!

Id.

3. For example, the Senate passed a joint resolution in which it entirely "disapprove[d]" of the FCC's new broadcast ownership rules. S.J. Res. 17, 108th Cong. (2003) (enacted).

4. *See* 149 CONG. REC. H7248 (2003) (amending the appropriations bill that would have returned the national ownership cap to 35%).

5. *See* Louis Jacobson & Bara Vaida, *Broadcast Blues*, NAT'L J., Aug. 9, 2003 (noting that "President Bush has threatened to veto anything that overturns the FCC's decisions").

agreed to change the legislated national ownership level to 39%.[6] That, too, provoked outrage: many members of the House and Senate, from both parties, denounced the move from 35% to 39%. They noted that broad majorities in both houses wanted a 35% limit, and they vociferously opposed any increase.[7] By late January 2004, almost four months after fiscal year 2004 had begun, the pressure to pass the omnibus spending bill was too great, and the 39% compromise was enacted.[8] A significant number of senators, however, restated their outrage at the increase to 39%.[9]

This series of events raises a couple of questions. First, what is at stake in this increase in the national television ownership limit? Is the level of controversy justified, and, if so, why? Second, is the increase in the ownership cap a good idea? Upon what basis should we evaluate that cap, and what is the result of that evaluation?

This Article puts forward answers to these questions. The analysis reveals that most of the reasons proffered by opponents of the increase in the national ownership limit do not stand up to scrutiny—they are largely unrelated to the increase in the limit.[10] The main thing at stake in the ownership limit is the level of influence local affiliates will have in killing television shows. In other words, the question is whether the decision makers who choose to cancel a given television show will be the network executives, as is the case for cable programming, or will also include local television stations.[11] That is not an insignificant question. Those who mistrust the values and priorities of the network

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6. 150 CONG. REC. S142 (2004) (statement of Sen. Boxer).

7. *See, e.g.*, *id.* (arguing that the 39% cap "means that the door is opened to massive consolidation of the most important news outlets in local media markets" and that "the Omnibus appropriations bill defies the will of the Senate and House and provides a belated holiday gift to big corporations"); 149 CONG. REC. H12,315 (Jan. 22, 2004) (statement of Rep. Obey) (calling the 39% compromise "a national scandal," "a back room" deal, and "an arbitrary judgment").

8. Consolidated Appropriations Act, Pub. L. No. 108-199, tit. VI, § 629, 118 Stat. 3, 99-100 (2004). The rider specifically rids the FCC of its forbearance authority, 47 U.S.C. § 160 (2000), and requires divestiture, within two years, for entities exceeding the 39% cap. Tit. VI, § 629, 118 Stat. at 99.

9. *See, e.g.*, Bill McConnell, *New Ownership Cap Fits Fox, CBS Perfectly: But Foes of Big Media Threaten to Resume Legislative Fight Later*, BROADCASTING & CABLE, Jan. 26, 2004, at 5 (quoting Senate leaders who vowed to continue the fight against the higher 39% cap).

10. *See infra* Part II.A.

11. *See infra* Part II.B.

executives would prefer that local owners have some veto power over television shows. Those who focus on ensuring the long-term economic viability of network broadcast television, however, would prefer that local owners not have this power. Any difficulties that broadcast networks have in guaranteeing a national audience for their programs constitute a competitive disadvantage for broadcast networks vis-à-vis their cable counterparts.[12] Those who want local veto power and viable networks face a trade-off in which satisfaction of one aim endangers the other.

So how should we evaluate the choice? When local affiliates preempt network programming to send a message to the networks, as they often do, instead of simply to carry a popular local event, such as a local sports event, they often preempt shows they deem inappropriate for their communities.[13] This judgment of inappropriateness has consistently entailed shows that are perceived as beyond the bounds of good taste, as defined in that community.[14] That is, a large number of local vetoes of network programs have arisen because affiliates deemed the material offensive to their audience. Unsurprisingly, then, such vetoes have been a tool of, and have been embraced by, cultural conservatives.[15] If you believe that network executives are too ready to bring sex and violence onto the television screen, you may have sympathy for greater local veto power.

For those who are not sympathetic to the concerns of cultural conservatives, the choice may seem easy: increasing the national ownership limit will have a desirable result, enhancing the viability

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12. *See infra* Part II.C.

13. *See infra* notes 121-22 and accompanying text. In a few cases, affiliates have preempted shows with terrible ratings, regardless of offensiveness. By and large, however, those shows were already in a death spiral before those decisions were made; the affiliates' refusal to carry them just hastened their inevitable demise.

14. *See infra* notes 121-22 and accompanying text. Affiliates have no history of preempting a program because it is too tame for local consumption.

15. For example, the North Carolina Family Policy Council, an organization devoted to "advocating traditional family values," argued to the FCC that the owner of two local Raleigh/Durham, North Carolina affiliates should be applauded for preempting shows that "demean marriage" such as "Cupid," "Temptation Island," and "Married by America." John L. Rustin, Director of Government Relations, North Carolina Family Policy Council, Testimony at the Federal Communications Commission Public Hearing on Localism (Oct. 22, 2003); North Carolina Family Policy Council, Program Won't Run on Local TV Station (July 9, 2003), *available at* http://ncfamily.org/stories/030709s1.html.

of broadcast television networks, and keeping the cap at the same level will have an undesirable one—empowering cultural conservatives. But the matter is not so simple. In my view, the demise of broadcast television would be a salutary event.[16] It would free up valuable spectrum, lead to more innovative and more variegated programming, and limit the incentive for and scope of government control over communications. In other words, what is bad for the viability of broadcasting is good for the country.

In Part I of this Article, I briefly lay out the background to the increase in the ownership limit, and the response to that increase. In Part II, I consider the various arguments that one might put forward, and that opponents often did put forward, against the increase. I identify the contentions, evaluate their relevance to this rule change, and conclude that the only apt argument is that an increase in the ownership limit would diminish the likelihood of local affiliates preempting national programs and thereby sending a signal to the national network about the desirability of that program. Such a signal is a cost to networks, as it limits their ability to guarantee national airing of a given program. Thus the axis implicated by the increase in the ownership limit is enhancing the economic viability of broadcast television networks versus enhancing the ability of affiliates to veto programming that they do not want to carry.

In Part III, I evaluate this trade-off, finding that cultural conservatives should strongly favor a lower limit (as they do), but that everyone else—including the liberal groups that opposed the increase[17]—should prefer a lower limit as well. Increasing the ownership cap means not only enhancing the ability of national networks to air programs but also enhancing the networks' viability, and the latter effect is one that America would do well to avoid. The impact of national broadcast networks, I argue, has been more baleful than helpful. We should look forward to their demise, or at least their migration to cable and satellite, so that the spectrum can be devoted to the highest valued uses.

Part IV considers the implications of these arguments, finding that the demise of broadcasting, on its own, will have relatively

16. *See infra* Part III.
17. *See infra* note 47 and accompanying text.

little effect on the convergence of cable and satellite regulation with broadcast regulation. In addition, we should be able to avoid the worst of all worlds—spectrum dedicated to broadcasting (and only broadcasting), but no one watching via broadcast anymore. The larger point is that broadcasting is slowly dying. As matters stand, its death spiral will take many years. We should cheer developments that speed its demise.

I. BACKGROUND TO THE INCREASE IN THE NATIONAL TELEVISION OWNERSHIP LIMIT

The national television station ownership rule[18] prohibits any entity from controlling television stations, the combined potential audience reach of which exceeds a given percentage of the television households in the United States. Note that the limit is not on the percentage of households that actually watch one of the owner's stations, but instead is on the percentage of homes to which those stations' signals are available.[19] It is entirely possible that an entity owning stations that reach 35% of American television households is watched at any given time by less than 1% of Americans. Indeed, such a striking disparity between audience reach and actual audience is highly probable.[20]

A word on the structure of networks may be helpful. Each broadcast network (for example, CBS) puts together programming that it wants to send out to viewers. The network then sends that programming to local television broadcasters with whom it is affiliated. Those affiliates then broadcast the programming to their local viewers. Some of those local stations are simply affiliates (i.e., they are owned by a different entity), and others are both affiliated with and owned by the network.[21] The national ownership cap prevents any one company from owning (as opposed to merely affiliating with) local stations that reach more than a certain

18. This rule is sometimes abbreviated "NTSO," but this Article will generally eschew that form, as it is both needless and unfamiliar to those not steeped in the field.

19. *See* FCC Broadcast Radio Services 47 C.F.R. § 73.3555(d)(2) (2003) (defining national audience reach as the number of television households in a given market).

20. In order for a set of stations' market share to equal its audience reach, 100% of homes in every market would have to watch the relevant station.

21. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 600.

percentage of households.[22] Accordingly, what is directly at issue in the national ownership limit is the ownership of affiliates, and the perceived advantages that flow from having multiple owners of affiliates.

The companies that are in danger of owning stations that reach more than 35% of television households are the major broadcast television networks. In fact, two of them—CBS and Fox—already exceed the 35% limit.[23] They have purchased stations that reach about 39% of television households, thus leading to the legislative compromise noted above.[24] So a big concern is that not only will a single company own a significant number of stations, but also that that company will be a major broadcast network. Opponents suggest that the networks already have so much power over communications in this country that the prospect of the networks owning more stations is particularly troubling.[25] These opponents argue that if the entities owning stations reaching 45% of television households are major television networks, it raises greater concern than would be applicable if a garden-variety company owned such stations.[26]

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22. Because the 35% limit applies to the percentage of the national audience reached, the number of actual stations that one entity can buy will vary depending on the audience reach of each station. Under the 35% limit, a given entity might be able to buy a majority of the stations affiliated with any given network—even a national network like CBS—if it bought the stations in the smallest markets. In reality, the broadcast networks' strategy has been quite different: they have focused on the stations with the highest audience reach. As a result, they own far less than 35% of their affiliates, but their audience reach is 35%. The audience reach is higher in the case of CBS and Fox, which both fueled CBS's and Fox's opposition to the 35% limit and reflected their belief that the limits would be raised, either by the FCC or by the courts. *See infra* notes 23-24.

23. *See The Top 25 Stations Groups*, BROADCASTING & CABLE, Apr. 19, 2004, at 50 [hereinafter *Top 25*] (assessing CBS at 38.92% and Fox at 37.92%).

24. *See id.*

25. *See, e.g.,* 2003 FCC Ownership Order, *supra* note 1, at 13,953 (Copps, Comm'r, dissenting):

> This decision further allows the already massive television networks to buy up even more local TV stations, so that they control up to an unbelievable 80 or 90 percent of the national television audience. Where are the blessings of localism, diversity and competition here? *I see centralization, not localism; I see uniformity, not diversity; I see monopoly and oligopoly, not competition.*

Id.; *infra* note 72.

26. No non-network station group exceeds the 35% cap, although Tribune reaches 30.02% of the national audience reach by owning twenty-six stations, nineteen of which are not affiliated with a network. *Top 25*, *supra* note 23. Gannett, the next largest non-network station group, owns twenty stations covering 17.63% of the national audience. *Id.* By contrast,

The national ownership cap began as a limit on the number of stations an entity could own. In the early 1940s, the FCC promulgated a rule prohibiting common ownership of more than three television stations (later raised to seven).[27] In 1984, the FCC announced the repeal of any national ownership cap, subject to a six-year transition period during which the limit on common ownership would be twelve stations.[28] Many members of Congress opposed this repeal, and Congress passed legislation in 1984 blocking implementation of the FCC's order.[29] The FCC responded by reconsidering the national ownership limit and issuing a new order that prohibited common ownership of stations that, combined, reached more than 25% of the national television audience, and also prohibited common ownership of more than twelve stations regardless of their combined audience reach.[30] Congress revisited the issue in the Telecommunications Act of 1996, which directed the FCC to eliminate the twelve station rule and to raise the cap on audience reach to 35%.[31]

The Telecommunications Act of 1996 also contained a provision providing that the FCC "shall review ... all of its ownership rules biennially ... and shall determine whether any of such rules are necessary in the public interest as the result of competition."[32] The FCC conducted its first such biennial review in 1998 and, after some

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the big four networks reach 38.92% (CBS), 37.92% (Fox), 33.56% (NBC), and 23.48% (ABC) (all percentages were calculated using the FCC's UHF discount). *Id.*

27. *See* Broadcast Services Other than Standard Broadcast, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three television stations); Amendment of Section 3636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 F.C.C. 2797-2798, ¶ 3 (1954) (increasing the limit to seven stations).

28. Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, ¶¶ 109-10 (1984).

29. *See* Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984).

30. Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 74, ¶¶ 38-39 (1984).

31. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

32. *Id.* § 202(h), 110 Stat. at 111-12. The provision then states that "[t]he Commission shall repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

prodding from Congress to complete its review,[33] voted three to two in 2000 to keep the 35% national television ownership limit.[34] Broadcast networks brought suit challenging the FCC's refusal to increase the ownership cap in *Fox Television Stations, Inc. v. FCC*.[35] The FCC proffered several diversity rationales for the 35% limit,[36] but the circuit court was unpersuaded. The court concluded that "the Commission has adduced not a single valid reason to believe the NTSO [National Television Station Ownership] Rule is necessary in the public interest, either to safeguard competition or to enhance diversity."[37] The court remanded the rule to the FCC for reconsideration.[38]

By the time *Fox* was decided, the FCC had already initiated a reconsideration of two of its ownership rules. After *Fox* and another case[39] vacated one rule and remanded two others (including the national ownership limit), the FCC decided that it would comprehensively reexamine all six of its ownership rules. FCC Chairman Powell created a Media Ownership Working Group, which solicited twelve studies on matters relevant to the ownership rules. Those studies were issued in October 2002.[40] In 2003, the FCC began its deliberations on the ownership rules, and on June 2, 2003, the FCC issued its new rules. The new rules allowed some cross ownership among television, radio, and newspapers;[41] retained the ban on mergers among any of the top four national broadcast networks;[42]

33. *See* District of Columbia Appropriations Act, Pub. L. No. 106-113, § 5003, 113 Stat. 1501, 1501A-93 (1999) ("Within 180 days ... the ... Commission shall complete the first biennial review required by section 202(h) of the Telecommunications Act of 1996....").

34. *See* 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 F.C.C.R. 11,058, 11,072, ¶ 25 (2000).

35. 280 F.3d 1027 (D.C. Cir. 2002).

36. *See id.* at 1041-43.

37. *Id.* at 1043.

38. *Id.* at 1053.

39. Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

40. *See* Press Release, FCC, FCC Releases Twelve Studies on Current Media Marketplace (Oct. 1, 2002) (on file with author) (reviewing the studies' findings).

41. 2003 FCC Ownership Order, *supra* note 1, ¶¶ 327, 368-371, 456-481 (outlining guidelines for cross ownership rules).

42. *Id.* ¶ 592 (retaining the rule that permits common ownership of multiple broadcast networks but prohibits "a merger between or among the 'top-four' networks, *i.e.*, ABC, CBS, Fox, and NBC").

kept the radio ownership caps at the same levels;[43] increased the number of local television stations a given entity could control;[44] and, most controversially, increased the national television station ownership limit from 35% to 45%.[45]

These changes sparked a firestorm. Editorialists, citizens' groups, and members of Congress expressed outrage.[46] Opponents spanned the political spectrum. The FCC's changes managed to incur the wrath of such disparate groups as the ACLU, the National Rifle Association, the AFL-CIO, the Parents Television Council, the National Organization for Women, the Family Research Council, and MoveOn.org.[47] Few government decisions manage to unite so many disparate groups, but the FCC achieved that feat.

The opponents' ire was particularly focused on the increase in the national ownership limit. They saw this as a bad decision that had to be reversed. And, as I noted at the outset of this Article, they were partially successful: Congress voted to lower the limit to 35%, then in conference the final number was 39%—and even the increase from 35% to 39% provoked outrage.[48]

II. WHAT IS REALLY AT STAKE IN THE NATIONAL OWNERSHIP CAP?

The first question is that of the impact of raising the national television station ownership cap. What are the likely ramifications of this move? I begin with possible arguments against raising the cap, and then consider arguments for it.

A. What Is Not Really at Stake

We can imagine (and opponents of an increase in the national ownership cap have put forward) a number of arguments against

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43. *Id.* ¶ 239 (keeping current numerical limits but modifying the way in which a radio market is defined).

44. *Id.* ¶ 134 ("Our modified local TV ownership rule will permit an entity to have an attributable interest in two television broadcast stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations.").

45. *Id.* ¶ 500 (concluding that the 35% cap could not be justified as in the public interest and thus raising the cap to 45%).

46. *See supra* notes 2-3 and accompanying text.

47. *See* 2003 FCC Ownership Order, *supra* note 1, at app. A.

48. *See supra* text accompanying notes 3-9.

the increase, but most of them have little relation to the increase and thus are inapt. For instance, one possible argument against an increase is that it will lead to a lower quantity of local news programming. The idea is that large corporate owners would not air as much local news programming as a small and, ideally, local owner would.[49]

One point bears noting at the outset: insofar as this or any other argument regarding the ownership rules is based in part on an assumed distinction between local and non-local ownership, or between small owners and large corporate owners, such a position is undercut by the data on ownership. The vast majority of affiliates are owned by significant corporate groups that own stations in different markets.[50] Simply stated, the ownership of most local affiliates is not local. Or, as the networks put it in one of their submissions to the FCC, such group owners "are no more 'local' to their non-headquartered markets" than are the networks.[51] Arguments that rest on a contrary assumption are thus ill founded.[52]

The point above does not refute the possibility that affiliates might provide more news programming. The data, however, do. Staff members of the FCC conducted a study to measure the differences in news coverage provided by local stations owned by broadcast networks versus independently owned local affiliates. They found that network-owned stations broadcast 23% more local

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49. *See* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 216-18, 220-21 (6th ed. 2000) (discussing current influences on decisions to print or broadcast specific material).

50. *See* Fox Entm't Group, Inc. et al., Comments Before the FCC 38 (Jan. 2, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513400697; Marius Schwartz & Daniel R. Vincent, The Television National Ownership Cap and Localism: Reply Comments 2 (Feb. 3, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513406930.

51. *See* Fox Entm't Group, Inc. et al., *supra* note 50, at 38.

52. For instance, in defending media concentration limits, Ed Baker suggested that "owners living in the community where the media product is distributed and owners closer to journalistic/editorial process are generally likely to exercise more desirable decisionmaking control and to be relatively more concerned with quality and less single-mindedly focused on profit." C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 904 (2002). Assuming this to be true (Baker presents it as only a "suspicion[]," *id.*), it would have little significance in the context of the national ownership rules, as most local affiliates are not locally owned.

news and public affairs programming per week than affiliates.[53] A separate study done by Economists, Inc. for Disney looked at two different data sets, and in both cases found that network-owned stations broadcast more local news and public affairs programming than affiliates.[54] The most that the affiliates could muster was that, if one excluded the Fox stations, the quantity of local news and public affairs programming was similar for network-owned stations and affiliates.[55] As the FCC concluded, however, there is little reason to exclude the Fox stations.[56] In any event, there is no basis for concluding that ownership of stations by networks leads to less local news programming, and there is ample data demonstrating the converse.

This leads to a related argument: maybe network ownership results in a greater quantity of news and public affairs programming, but lower quality. One study gives a bit of support for this proposition. A study by the Project for Excellence in Journalism developed its own criteria for determining quality (e.g., that it "demonstrate enterprise and courage," "be fair, balanced and accurate," and "be highly local"), and then sought to apply those criteria to news programming provided by network-owned stations and ordinary affiliates.[57] The study found that the affiliates' news coverage was better on most of the components of quality that it identified.[58] As an analysis of that study pointed out, however, the differences were not statistically significant.[59] A more robust, and

53. Thomas C. Spavins et al., The Measurement of Local Television News and Public Affairs Programs, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.doc (last visited May 19, 2004). Network-owned stations broadcasted 22.8 hours per week, whereas non-network-owned stations broadcasted 18.5 hours per week. *Id.*

54. *See* 2003 FCC Ownership Order, *supra* note 1, ¶¶ 565-567. Interestingly, the disparity between network-owned stations and affiliates in terms of quantity of news programming was greatest in the smallest markets. *See id.* ¶ 565.

55. *See id.* ¶ 575.

56. *Id.*

57. *See* Project for Excellence in Journalism, *Does Ownership Matter in Local Television News?: A Five-Year Study of Ownership and Quality* (Feb. 17, 2003), *available at* http://www.journalism.org/resources/research/reports/ownership/default.asp (last modified Apr. 29, 2003).

58. The study found that affiliates generally demonstrate somewhat more enterprise, cite more sources, tend to be more local, and are more likely to air stories that affect the community. It found that network-owned stations air more points of view and score better in finding the larger implications of a story. *Id.*

59. *See* Bruce M. Owen et al., Economists Inc., The Project for Excellence in Journalism's PEJ Study of Ownership and Quality of Newscasts: A Critique 2 (Mar. 13, 2003), *available*

reliable, result was obtained by the FCC study that also measured quantity. This study looked at two measures of quality—awards and ratings. It found that the ratings for network-owned stations and affiliates were virtually identical, but that network-owned stations received more awards—both those chosen by industry peers and the Dupont Awards chosen by the Columbia School of Journalism—than did affiliates.[60] Both the local affiliates' group and the networks reinterpreted the data controlling for market size. This yielded ambiguous results, with network-owned stations receiving more awards chosen by industry peers but fewer Dupont awards.[61] These two studies thus gave little basis for finding a significant quality difference between the network-owned stations and the affiliates. In light of this, the FCC seems to have been on strong ground when it stated that "[f]rom the data, we conclude that network-owned stations provide local news and public affairs programming that is at least equal, and may be superior, to that of affiliates."[62]

Maybe the problem isn't quantity or quality but viewpoint: with fewer owners, viewers are more likely to see substantially similar viewpoints expressed. This concern could be apt with regard to a given entity owning two stations in a single market. If, for example, a single entity owned two affiliates of the four major networks, there might be a legitimate fear that members of the community who relied on local broadcast television for their news might hear the same perspective on local stories from both stations. The four viewpoints we might expect from the four networks would shrink to three. Assuming that such a reduction in viewpoints would occur if one entity owned two local stations,[63] it would still be largely

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at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document= 6513782283 (last visited Oct. 19, 2004).

60. *See* Spavins et al., *supra* note 53, at 5-6.

61. *See* Bruce M. Owen et al., Economists, Inc., Economic Study H: News and Public Affairs Programming: Television Broadcast Owned and Operated Stations Compared to Network Affiliated Stations 10 (Jan. 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513400699 (last visited Oct. 19, 2004); Schwartz & Vincent, *supra* note 50, at 3-4.

62. 2003 FCC Ownership Order, *supra* note 1, ¶ 574.

63. There is some reason to doubt this assumption. One of the studies commissioned by the FCC examined the "slant" of the coverage of the 2000 election by newspapers and television stations that were in the same market and had the same owner. *See* DAVID PRITCHARD, VIEWPOINT DIVERSITY IN CROSS-OWNED NEWSPAPERS AND TELEVISION STATIONS: A STUDY OF NEWS COVERAGE OF THE 2000 PRESIDENTIAL CAMPAIGN (FCC, Working Paper No.

irrelevant to the national ownership rules because the rules have nothing to do with ownership of multiple local stations in the same market.[64] The national television station ownership rules prevent the owner of a station in a given market (e.g., New York City), from buying a station in a different market (e.g., Atlanta). The rules do not change the total number of owners in either New York or Atlanta. If viewers were hearing X viewpoints on local issues when the national limit was 35%, they should hear X viewpoints on those issues after the limit was raised and one affiliate was bought by a network.[65]

It bears noting that the trade groups for local affiliates—the Network Affiliated Stations Alliance and the National Association of Broadcasters—suggested that it is possible for national ownership caps to have some impact on viewpoint diversity.[66] They argued

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2, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.doc. The study found that "in five of the 10 newspaper-television combinations studied, the overall slant of the coverage broadcast by a company's television station was noticeably different from the overall slant of the coverage provided by the same company's newspaper," and in the five others there was no noticeable difference. *Id.* Given the fact that each newspaper and television station had the same owner, we might have expected that the editorial slant of both entities would have been identical. But that was not the case in half of the admittedly small sample.

64. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 535 ("The national television cap ... ensures a larger total number of station owners *nationwide*, but it has no meaningful impact on viewpoint diversity within local markets.").

65. *See also* Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, ¶ 32 (1984). The Amendment states that:

> [V]iewers in San Francisco, St. Louis and Philadelphia each judge viewpoint diversity by the extent of sources of ideas available to them, not by whether those same or other ideas are available in other broadcast markets. Moreover, it is apparent that restrictions on the ownership of radio and TV stations at a nationwide level bear no necessary relationship to the number of independent viewpoints in a particular local market, nor does relaxation or abolition of this rule affect the Commission's local ownership restrictions. Consequently, the lack of relevance of the rule to local viewpoint diversity persuades us that elimination of the national ownership rule is unlikely to have an adverse impact on the number of independent viewpoints available to consumers.

Id.

66. These groups' main argument was that the national ownership caps would limit the effectiveness of affiliates' preemptions. *See infra* Part II.B. But they also suggested that the cap can affect viewpoint diversity. *See* Marius Schwartz & Daniel R. Vincent, The Television National Ownership Cap and Localism 12-13 (Jan. 2, 2003), *available at* http://www.nab.org/newsroom/pressrel/filings/NASAAtt1203.pdf.

that, even though a viewer in a given local market would see the same number of viewpoints regardless of the national cap level, that viewer might be affected by the national cap insofar as she reads or hears about programming offered by local stations in other cities.[67] The idea is that if, say, the local NBC station in city A is owned by a different entity than a station in city B, people in each city might be more likely to learn of a new viewpoint than would be the case if both stations were owned by NBC. A viewer might, for example, be exposed to a new viewpoint by hearing from a friend or relative about the viewpoint presented by a local television program. But this hypothesis relies on a number of contestable assumptions, and there is no evidence for it.[68] Notably, the affiliates do not argue otherwise; they merely suggest that this is a possible scenario. We could imagine that viewpoint diversity would be affected by the national ownership limit, but there is little basis for doing so.

The difference between the impact of the local ownership cap and the national ownership cap is central to other potential arguments against the latter. For instance, this difference undercuts any argument that an increase in the national ownership cap will lead to less diversity in types of programs. An example of such program diversity would arise when, in a given time slot, one station showed a program on sports and another showed a program on the arts. As with viewpoint diversity, there is no reason to expect that increasing the national ownership limit will have any effect on program diversity. In either case, there will be X television stations in the local market showing X programs. There is no a priori reason to expect that changing the identity of one or more owners will lead to less program diversity. In fact, and perhaps ironically, the main change in ownership rules that might have a chance of increasing program diversity would be to allow one entity to own all the stations in a given market.[69] If viewing preferences are skewed (e.g.,

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67. *Id.*

68. The FCC noted the same possibility in its 2003 order, but rejected the argument in light of its speculativeness. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 536 (noting the set of assumptions necessary for the affiliates' theory regarding a possible impact on viewpoint diversity to be plausible, and concluding that "[t]he national cap cannot be justified by reference to such a hypothetical scenario as this").

69. For demonstrations of this as an economic model, see Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J.

at a given hour 70% of viewers want to watch sports, 20% want to watch entertainment news, and 10% want to watch an arts program) and there are four local broadcasters, we would not expect any of them to broadcast an arts program.[70] Only if there were a monopolist would we expect one of these four stations to show the arts program.[71] In any event, all of this is far removed from the national ownership rules, which simply allow companies to buy single stations in several different markets.

But is it not true that increasing the national ownership cap will lead an already concentrated market to become even more concentrated, and isn't such concentration a major problem?[72] Let's unpack that a bit. Concentration in the abstract is not very significant. What matters is concentration that distorts a particular market. We immediately confront a tricky question, however, that the previous discussion highlights: Exactly what market will fewer station owners harm?

ECON. 194, 206 (1952) (presenting a model that shows how "a series of competing firms, each striving to maximize *its* number of listeners, will fail to achieve either the industry or the social good"). For a demonstration of this as an empirical reality, see Lisa George, What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets 23-28 (Aug. 1, 2001) (describing the increase in total content variety that results from increased ownership concentration in markets for daily newspapers), *available at* http://www.arxiv.org/ftp/cs/papers/0108/0108014.pdf.

70. We would expect three stations to show sports programs in the relevant time slot, with each station expecting to gain 23% of the viewers, and the fourth station to show entertainment news, expecting to gain 20% of the viewers.

Note that if there were only three stations, we would not expect any of them to show arts programming or entertainment news. This is because each of the three would show sports, expecting to gain 23% of the viewers.

71. *See* Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15, 35-36 (1977) (presenting a model to illustrate the circumstances under which monopoly will produce greater diversity in programming); Steiner, *supra* note 69.

72. Many of the comments to the FCC stated broad opposition to media consolidation. For example, Media Tank organized a massive e-mail campaign that encouraged the FCC to retain all the ownership limits to limit "the market power of already huge companies in the broadcast industry." Media Tank, Participate! Use This Form to Send a Message to the FCC and Other Key Decision-Makers, *at* http://www.mediatank.org/fcc_webform2.html (last visited Sept. 5, 2004) (form e-mail to FCC). The form e-mail then argues that "[t]he right to carry on informed debate and discussion of current events is part of the founding philosophy of our nation.... If the FCC allows our media outlets to merge, our ability to have open, informed discussion with a wide variety of viewpoints will be compromised." *Id.*

The markets for local broadcast stations are local, not national.[73] Local broadcast stations in San Francisco do not compete with those in Chicago. Indeed, in terms of actual viewing, national ownership caps have no obvious relevance to local stations. There is no evidence that some people move from one city to another in order to get better local broadcast television, and there is otherwise little basis for believing that the ownership of NBC stations in San Francisco and Chicago would make any difference to the viewers in either city.

So in what markets will an increase in national ownership caps lead to unhealthy concentration? One possible nominee is advertising markets. Local stations generally sell time to local advertisers, however, and the advertisers have no reason to care whether the station with which they are negotiating owns stations in other markets. The fact that a local station is owned by a network does not increase the value of the local advertisement; the relevant consideration for advertisers is the market position of that local station. And networks contract with national advertisers, who have little reason to care how many stations the network owns as long as their advertisements are played over all the stations on the network.[74]

There is a wrinkle, though. As the affiliates noted in their submissions to the FCC, local television stations sell advertising through agencies, and those agencies sometimes aggregate the available advertising time on local stations in different markets in order to allow national advertisers to buy spot advertising that can approximate a national advertisement on a single network.[75] There is, however, conflicting evidence as to whether network and spot advertisements are substitutes.[76] And it is far from clear that

73. As I discuss in more detail in Part III, it makes little sense to look at broadcast television in isolation from cable and satellite, but I leave that assumption undisturbed for now.

74. Note that advertisers do care if the networks fail to get a given program—and therefore its advertisements—carried by all the network's affiliates, as that makes the advertisement less valuable to them. This highlights the importance of preemption, which I discuss below. *See infra* Part II.B.

75. *See* Nat'l Ass'n of Broadcasters and the Network Affiliated Stations Alliance, Comments Before the FCC 59-63 (Jan. 2, 2003), *available at* http://www.nab.org/newsroom/PressRel/Filings?NASA1203.pdf.

76. *Compare* Alvin J. Silk et al., *Intermedia Substitutability and Market Demand by*

network ownership of more local stations will change any advertising practices. As the FCC noted in rejecting this concern about spot advertising, there is reason to expect that network-owned stations will accept spot advertising just as readily as affiliates do, and for the same reason—to maximize their revenue.[77] Importantly, the relevant empirical evidence supports the FCC's position. Recall that in 1996 the FCC raised the national ownership cap from 25% to 35%,[78] and there was an increase in ownership of stations by CBS, Fox, and NBC. But the annual growth rate for national spot advertising has been fairly steady since 1990, and did not diminish after 1996.[79] In addition, one of the studies commissioned by the FCC suggests that national caps do not limit the available outlets for advertising, as reflected by advertising rates. It looked at the effect of national concentration of radio ownership on advertising rates, and found that national concentration did not increase local advertising prices.[80] In fact, it found that "a greater presence of large national owners in a local market appears to decrease the advertising rates paid by national and regional advertising agencies."[81] As with viewpoint diversity, multiple ownership of local stations in a given market might make a difference in advertising markets, but multiple ownership of stations in different markets appears to make little, if any, difference.

Perhaps the real significance of lifting national ownership caps is that it will lead to a concentrated program acquisition market. The idea is that there will no longer be enough buyers of programs to constitute a competitive acquisition market, which will in turn allow the few remaining buyers to squeeze the program producers.[82]

National Advertisers, 20 REV. INDUS. ORG. 323 (2002) (finding that they are not substitutes), *with* B.D. McCullough & Tracy Waldon, *The Substitutability of Network and National Spot Television Advertising*, 37 Q.J. BUS. & ECON. 3 (1998) (finding that they are substitutes).

77. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 528.

78. *See supra* text accompanying notes 30-31.

79. *See* JONATHAN LEVY ET AL., BROADCAST TELEVISION: SURVIVOR IN A SEA OF COMPETITION 13 tbl.4 (FCC, Office of Plans and Policy Working Paper No. 37, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A22.doc.

80. Keith Brown & George Williams, Consolidation and Advertising Prices in Local Radio Markets 1 (Sept. 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A9.doc.

81. *Id.* at 1. Presumably, this is due to the increased ability of national advertisers to engage in one-stop shopping when there is greater national concentration.

82. *E.g.*, Am. Fed'n of Television & Radio Artists & Writers Guild of Am., Comments

This fear is not illogical. An increase in the national ownership cap would permit fewer companies to own the affiliates of any given network. That could mean fewer buyers of programming,[83] potentially reducing competition in the program acquisition market to unhealthy levels.

The ownership of broadcast television stations, however, is fairly unconcentrated, and the impact of a move from a 35% cap to a 45% cap on national broadcast ownership would be quite modest. Even if we examine the four major broadcast networks (ABC, CBS, Fox, and NBC) in isolation as constituting a market, that resulting market would not be concentrated. None of the four major networks currently owns as much as 10% of the total number of big four stations, and that number would rise to only 11 or 12% if the cap is raised to 45%.[84] Moreover, these numbers overstate the significance of the national ownership cap. In reality, the affiliates of the four major broadcast networks are in the same market as other broadcasters (e.g., the WB network)—not to mention cable networks—which highlights that the market is even more competitive than the numbers above suggest. More important, the number of stations owned and the percentage of households reached by those stations tell us fairly little about market power. What really matters is market share.[85] And the audience shares of each of the four major

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Before the FCC (Jan. 2, 2003), *available at*, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_ document=6513400862; Caucus for Television Producers, Writers & Dirs., A Response to the Federal Communications Commission Media Ownership Working Paper Number 5, Program Diversity and the Program Selection Process (Dec. 20, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document =6513398656; The Coalition for Program Diversity, Comments Before the FCC (Jan. 2, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_ document= 6513402090.

83. Whether this would happen in reality would depend on whether the new owner centralized program purchases.

84. This follows from the facts that none of the networks owns stations reaching more than 39% of television households, and that networks disproportionately own stations in large markets (so that the percentage of stations owned is lower than the percentage of households reached). With four networks, the ownership of each network represents only a fourth of the major broadcast stations (or about 10% of the total number of major network stations), and even less if you add the three smaller broadcast networks.

85. After all, my website is available to everyone who has access to the Internet, but that fact alone tells us nothing about its market power.

The traditional measurement of concentration is the sum of the squares of the market share of the firms in the market, known as the Herfindahl-Hirschman Index. *See* Stephen broadcast networks is below 15% of the audience it reaches, and those shares are declining.[86] A network that owned stations reaching 45% of households would thus capture less than 6.75% of the national audience.[87]

Simply stated, the program acquisition market is fairly unconcentrated, and it is becoming less concentrated as more cable channels become viable bidders for programming (because they are gaining viewers).[88] More importantly, there is no reason to believe that an increase in the national ownership cap would lead to unhealthy levels of competition—or anything close to it. As the FCC noted in its 2003 order, even "worst case," "highly unrealistic" assumptions of the effects of increasing the ownership cap would not justify keeping the cap in order to protect competition.[89]

That still leaves the possibility of some concentration, even if it would not be enough to justify regulation. The fear might be that, even without significant concentration, the big buyers will prefer their own programming and thus knock other producers out of business. Ownership limits are a poor proxy for protecting non-network producers, however. With respect to each local station, the owner (whoever that might be) has an interest in purchasing the programming that will most appeal to the local audience. If our goal is that broadcasters buy programming from non-network producers, the obvious way to achieve this is to mandate that they do so, rather than hope that more owners will translate into more purchases from non-network producers. Indeed, the FCC once did have such a mandate, via the Prime Time Access Rule (PTAR) and its rules limiting networks' ability to syndicate the programming they carried.[90] The PTAR limited the major broadcast networks (then

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Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CAL. L. REV. 402, 408-15 (1983); Albert O. Hirschman, *The Paternity of an Index*, 54 AM. ECON. REV. 761 (1964).

86. *See* Cynthia Littleton, *2003-04 Primetime Wrap*, THE HOLLYWOOD REPORTER, May 28, 2004, *available at* http://www.hollywoodreporter.com/thr/television/feature_display.jsp?vnu_content_id=1000521355; *infra* notes 153-57.

87. This number is obtained by multiplying 45% by 15%.

88. 2003 FCC Ownership Order, *supra* note 1, ¶¶ 120-124.

89. *Id.* ¶ 523.

90. The latter were known as "finsyn," which was shorthand for "financial interest and syndication rules." They were adopted in Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382 (1970) (report and order), *aff'd*, Mt. Mansfield

ABC, CBS, and NBC) to supplying their affiliates with no more than three hours of programming during the four hour "prime time" block.[91] The financial interest and syndication rules prevented ABC, CBS, and NBC from either acquiring profit-sharing positions in network programs produced by independent companies or licensing to independent stations the rights to show reruns of program series that had concluded their network runs.[92] The former regulation was designed to ensure that non-network producers could sell directly to network affiliates, and the latter was designed to prevent networks from using their power either to pay excessively low fees to non-network producers or to prevent competition from reruns. Both rules thus sought to directly help independent producers and to limit the ability of broadcast networks to squeeze them out of existence.[93]

In any event, there are a number of empirical problems with this assertion that higher national ownership limits lead to fewer producers. First, the evidence shows that the rules that *did* prevent networks from buying their own programming exclusively (the PTAR and finsyn rules) actually tended to constrict the number of program sources. As Judge Posner suggested in his opinion on these rules, the networks' inability to participate in this programming hurt small producers the most, because they are the ones who needed the networks' financial support in order to get their programs made.[94] Posner noted that "[t]he sale of syndication rights

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Television, Inc. v. FCC, 442 F.2d 470, 489 (2d Cir. 1971). The rules were revised in Broadcast Services; Financial Interest and Syndication Rules, 56 Fed. Reg. 26,242 (June 6, 1991), then they were again amended in Broadcast Services; Evaluation of the Syndication and Financial Interest Rules, 56 Fed. Reg. 64,207 (Dec. 9, 1991) (subsequently codified at 47 C.F.R. pt. 73). The finsyn rules were repealed in Evaluation of the Syndication and Financial Interest Rules, 8 F.C.C.R. 3282, 3282-84 (1993).

91. Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d at 384, app. I at 402.

92. *See id.*

93. Groups advocating for greater source diversity (i.e., more program producers) generally tailored their arguments away from arguing against a higher national ownership cap, instead of being in favor of structural changes resembling a modified, scaled down version of the finsyn and PTAR rules. *See, e.g.*, The Coalition for Program Diversity, *supra* note 82, at 24 (advocating that a requirement that independent producers provide at least 25% of network programming "would limit, if not prevent, the diminished diversity caused by cross ownership or the undesirable further relaxation of rhe [sic] 35% broadcast cap").

94. Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1046 (7th Cir. 1992) (finding that many small producers were hurt under the rules because they were unable to shift risk to

to a network would enable a producer to shift risk to a larger, more diversified entity [the network] presumptively better able to bear it."[95] The FCC also reviewed the data and reached a similar conclusion.[96]

Second, the national ownership cap has been raised in the past,[97] and yet there is no evidence to support the proposition that these increases resulted in fewer producers. In fact, the limited empirical data suggests that increases and decreases in the number of program producers have not been related to the national ownership cap.[98]

B. The Importance of Preemption

If raising the national television station ownership cap does not change the quantity or quality of local programming, diminish viewpoint diversity, or create unhealthy market power vis-à-vis local stations' viewers, advertisers, or program producers, then what difference does the ownership limit make? The answer to this question is that raising the ownership cap changes the relationship between the national networks and their affiliates—specifically by diminishing the likelihood and effectiveness of local stations' decisions to reject network programming.

Indeed, this was the main argument made by the central opponents of an increase in the national ownership cap—the network affiliates. As I noted above, there were over 750,000 comments submitted to the FCC, but most of these were short form letters that did not discuss any of the limits in detail.[99] For those comments that did discuss the limits, most lumped the national ownership limit with other ownership limits and then presented the arguments discussed in the previous section.[100] Few commenters

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networks by selling syndication rights).

95. *Id.*

96. *See* Evaluation of the Syndication and Financial Interest Rules, 8 F.C.C.R. 3282, 3286 (1993).

97. The cap was raised most recently in 1996. *See supra* note 31 and accompanying text.

98. *See* MARA EINSTEIN, PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS ON BROADCAST NETWORK TELEVISION 36-37 (FCC, Working Paper No. 5, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf.

99. *See supra* note 2 and accompanying text.

100. *See, e.g.*, Rev. Robert Chase, Remarks at FCC Press Roundtable (May 27, 2003) ("The

focused in a serious way on the national ownership limit and the arguments for and against it, and many of those relied on conclusory statements and bald assertions.[101] But two groups (and only two) commissioned studies by economists to establish the basis for each side's position, and then engaged in a sustained discussion of the impact of raising the national limits. Unsurprisingly, these were the two groups that had the most at stake in the ownership cap: the national broadcast networks (represented by NBC, CBS, and Fox)[102] and the local affiliates (represented by their trade groups, the Network Affiliated Stations Alliance and the National Association of Broadcasters).[103] Networks and the affiliates' trade groups have long been the main players in debates over the national ownership cap (and the main lobbyists), and they took on that role in this debate as well.[104] In contrast to the anecdotal approach of

relaxation of ownership rules limits diversity and adds to the burden of media ownership and decision-making by women, people of color, linguistic minorities and others who seek a public voice in our society."), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514182066.

101. *See, e.g.*, Don Schellhardt, *What Section 202(h) of the Telecommunications Act of 1996 Actually Requires* 13 (Jan. 31, 2003), *reprinted in* The Amherst Alliance, Reply Comments Before the FCC 13 (Feb. 1, 2003) ("Given the losses of broadcasting jobs from 'market consolidation'—*plus* the disappearance of many entrepreneurs, and/or 'Mom and Pop' teams, ... further media ownership deregulation is likely to further undercut the nation's stated goals of full employment, upward mobility for all who are willing to work...."), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document= 6513406342.

102. *See, e.g.*, Fox Entm't Group, Inc. et al., *supra* note 50 (first of twenty-seven joint comments). ABC, which is owned by Disney, filed separate comments that did not consider the rules in any detail. *See* Walt Disney Co., Comments Before the FCC (Jan. 2, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513400837 (advocating deregulation). ABC did join the other networks in advocating against the implementation of new finsyn rules. Ex parte Notice (Apr. 25, 2003) (No. 02-277), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513984356; *see also* Letter from Jared S. Sher, Skadden, Arps, Slate, Meagher & Flom LLP, to Marlene Dortch, Secretary, FCC (Apr. 25, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513984354.

103. *See, e.g.*, Nat'l Ass'n of Broadcasters and The Network Affiliated Stations Alliance, *supra* note 75 (first of 11 joint comments).

104. Many non-network station groups filed comments separately from NAB and NASA. These comments rarely argued against the national ownership caps; instead, the comments advocated repeal or modification of the cross ownership or duopoly rules. *See, e.g.*, Belo Corp., Comments Before the FCC (Jan. 2, 2003) (arguing against duopoly and cross ownership rules), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513400819; Media Gen., Inc., Comments Before the FCC vii-viii (Jan. 2, 2003) (arguing that because diversity of ownership is not linked to viewpoint diversity, cross ownership rules should be repealed), *available at* http://gullfoss2.fcc.gov/

most commenters, the networks and the local affiliates sought to present a theoretical and empirical grounding for their position, and solicited studies by economists for that purpose.

The central argument in the affiliates' submissions was that an increase in the national ownership cap would limit the likelihood and effectiveness of affiliates' preemption of network programming. According to the affiliates, the battle was not about affiliates' profits, but instead about their ability to shape the programming that their viewers saw.[105] And the main argument in the networks' responses was that there was no reason to believe that the national ownership cap would have any significant effect on preemptions.[106]

This was also the focus of the discussion of the national ownership limit in the FCC. The central reason for the national ownership limit, according to the FCC, is "to preserve a body of independently-owned affiliates" as a means of protecting localism.[107] The FCC

prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513411104; *see also* Newspaper Ass'n of Am., Comments Before the FCC (Jan. 2, 2003) (advocating repeal of newspaper/broadcast cross ownership rules), *available at* http://gullfoss2.fcc.gov/prod/ecfs/ retrieve. cgi?native_or_pdf=pdf&id_document=6513400613. Most consumer groups, in turn, directed the majority of their comments to responding to those rules. *See, e.g.*, Consumer Fed'n of Am. et al., Comments Before the FCC (Jan. 2, 2003) (exhaustively reviewing the media landscape, but focusing on the effects of consolidation as a whole), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve. cgi?native_or_pdf=pdf&id_document= 6513400922.

105. The Schwartz and Vincent study summarized their points as follows:

> While network-affiliate disputes over the Cap are sometimes portrayed as "just a fight about money," economic analysis contradicts this portrayal for two reasons. First, as noted above, the Cap alters the choices of stations and, hence, the programming viewed by local communities. Second, the Cap confers no obvious power to a typical affiliate in negotiations with its network, and therefore appears to have no systematic effect on boosting affiliate profits. Indeed, it may well reduce the profit the affiliate could collect through selling the station to the network (or through unconstrained contracting).

Schwartz & Vincent, *supra* note 66, at 1.

106. Fox Entm't Group, Inc. et al., *supra* note 50, at 39-40; *see also* Bruce M. Owen et al., Economists, Inc., Economic Study G: Preemption by O&Os Compared to Affiliates (finding that the difference in preemptions by network-owned stations as opposed to affiliates was relatively small, and "of little policy consequence"), *available at* http:// gullfoss2.fcc.gov/prod/ ecfs/retrieve. cgi?native_or_pdf=pdf&id _document=6513400699 (last visited Oct. 19, 2004).

107. 2003 FCC Ownership Order, *supra* note 1, ¶ 546. The FCC did articulate one other justification for a national ownership cap (though not specifically for the 35% cap versus the 45% cap): that having such a cap will encourage innovation in the rollout of digital broadcasting. *See id.* ¶ 532 ("[W]e conclude that a national television cap is necessary to preserve a number of separately-owned television station groups, including non-network groups, that will increase the types of digital transition experiments and ultimately facilitate

elaborated that such affiliates would promote localism by preempting network programming in favor of "programming better suited to its community" and by collectively influencing network programming.[108] The most vociferous FCC opponent of the increase in the national ownership cap, Commissioner Michael Copps, similarly focused on the importance of preemption as a means of allowing local communities to veto unsuitable programming.[109]

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a rapid and efficient transition to digital broadcast television."). The FCC presented little evidence in support of this conclusion, and it seems fair to say that it was not central to the FCC's decision. Not only was the discussion brief and the conclusion modest, but in its briefs in the lawsuit brought challenging the FCC's 2003 order, in which the affiliates contended that the FCC improperly increased the national ownership cap to 45% and the networks contended that the FCC improperly retained any cap at all, the FCC does not mention the innovation argument and instead relies exclusively on affiliates' role in influencing network programming. *See* Brief for Respondents at 92-103, Prometheus Radio Project v. FCC, 2003 U.S. App. LEXIS 18390 (3d Cir. 2003) (No. 03-3388).

It also bears noting that the FCC's innovation argument is problematic because it assumes, and relies on, the desirability of a transition to digital broadcasting. It is understandable that the FCC so assumes: the Commission is more than ten years into a transition that has gone poorly and is embarrassingly far behind schedule. *See* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 332-60 (2001). For the sake of its own credibility (the FCC was the main entity that pushed for this transition), and because its official policy is one of helping broadcasting remain viable, the FCC wants to push the transition forward. *See* Eugene Rome, Comment, *Regulatory Overreaching: Why the FCC Is Exceeding Its Authority in Implementing a Phase-In Plan for DTV Tuners*, 23 LOY. L.A. ENT. L. REV. 533, 538-48 (2003). But there is little reason for the rest of us to assume the wisdom of pushing the transition forward. On the contrary, abandoning the transition to digital broadcasting would save a massive amount of money while imposing few costs. Cable and satellite are making the transition to digital transmissions much more quickly even as a growing majority of households receive their signals via cable or satellite, so the benefit of digital broadcast (as opposed to digital transmission of cable and satellite signals) is fairly small. *See infra* Part III.

108. 2003 FCC Ownership Order, *supra* note 1, ¶ 546; *see also* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,932, 13,941 (2003) (Statement of Michael K. Powell, Comm'r):

> We found that a national TV ownership limit on the percentage of potential TV households the networks may reach continues to be necessary to promote localism. We determined that a national ownership cap serves localism by preserving a balance of bargaining power between the networks and their affiliates; ensuring the affiliates play a meaningful role in the selection of programming that serves the interests of their local audiences.

Id.

109. *See* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,951, 13,960 (2003) (Copps, Comm'r, dissenting):

> The record evidence demonstrates, among other things, that independently

In fact, one striking aspect of both the network affiliates' study and the FCC's defense of its decision to keep a national ownership cap (in response to the networks' arguments that there should be no cap at all) is that neither relies on any of the arguments I listed in the previous section.[110] Indeed, the FCC considered, and rejected, each of the arguments regarding diversity and competition laid out in the previous section.[111] Instead, both the affiliates' study and the FCC argued that the central justification for the ownership cap was as an aid to localism—because it would leave more affiliates with the opportunity to preempt (on the grounds that network-owned stations preempt less than do affiliates), and because it would make the preemptions of the remaining stations more effective. The main players in the debate—the affiliates, the networks, and the FCC—agreed that the national ownership cap would not change bargaining power, but instead would change the likelihood of preemption (for the stations that were bought by a network) and the effectiveness of preemption (for the affiliates that were not bought). Simply stated, the main interested parties as well as the main government actors all recognized that the central issue in the national television station ownership cap was the effect it would have on affiliates' preemptions of network programming.[112]

Of course, the fact that the main opponents of raising the cap and the FCC focused on this issue does not mean that they were correct in suggesting that raising the national ownership cap would limit

> owned affiliates are better able to preempt network programming networks based on community standards and needs; that the 35 percent cap ensures a critical mass of affiliates necessary to perform this role effectively; and that a substantial majority of affiliates are experiencing increasing pressure from the networks not to preempt network programming. Yet, the majority largely ignores this evidence and arbitrarily chooses a number that tips the balance further in favor of the national networks and away from the local stations.

Id.

110. The one exception is that the Schwartz and Vincent study suggested that the ownership limit can advance viewpoint diversity. *See supra* note 66. As I noted above, the affiliates presented no evidentiary basis for this suggestion, and it played a small role in their submissions. *See supra* notes 67-68 and accompanying text.

111. *See supra* Part II.A.

112. *See* Matthew Rose & Joe Flint, *Behind Media-Ownership Fight, An Old Power Struggle is Raging: As TV Networks Get Bigger, Their Local Affiliates Fear a Loss of Autonomy—A 'Plott Hound,' Takes on FCC*, WALL ST. J., Oct. 15, 2003, at A1.

preemptions. In order to understand why the cap affects preemptions, we first need to understand why affiliates preempt at all.

1. Why, and When, Do Preemptions Occur?

The interests of affiliates and networks are not aligned. Their interests diverge in two ways. The first flows from the fact that their broad sources of profit are different. Networks make money by selling advertising time during programs they air across the nation. Their profits depend on the hours that they program (e.g., prime time). All the hours that affiliates program (e.g., mid-afternoon until prime time) do not directly benefit the networks, but they are essential to the affiliates, as that is when the affiliates make much of their money. Networks regard affiliates' profitability during non-network hours as helpful but not essential. What is essential to each side is to have profitable programming—and the source of profits for networks is different from the source of profits for affiliates. Affiliates benefit when the network is strong, but that benefit is fairly diffuse. What is of immediate benefit to affiliates is the advertising revenue they receive, most of which comes from the programming that they control (although some comes from local spots inserted in network programming).[113]

113. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 514.

> Broadcast television networks have a single, strategic focus, namely, the maximization of the number of television viewers that are attracted to mass audience and niche audience programming. This strategic focus is crucial to broadcast television networks, since the sale of audiences to national advertisers provides their only stream of revenue from broadcast operations in contrast to cable networks which may receive both advertiser and subscriber revenue. By contrast, local broadcast television stations pursue a more complex business strategy as licensed broadcast facilities. First, the local station seeks to maximize the size of its audience it attracts within its local television market. If the local station is a network affiliate, then the local station will promote the network's program schedule together with syndicated programming the station may acquire to help fill out its daily program schedule. Second, the local station will also promote its own locally-produced programming, such as news and public affairs programming, that it believes is responsive to issues or viewer preferences in the communities served by the station. Station management may vary the allocation of time devoted to any particular type of programming, including network programming, to respond to emerging preferences or news events in the communities located in its local television market.

Id. (footnotes omitted).

Second, and more importantly for our purposes, even with respect to network programming, the interests of affiliates and networks are not aligned. Networks have an interest in aggregating viewers around the country for their programs. Some advertisers want to advertise nationally; that is why the networks were created in the first place.[114] Stated differently, broadcasters realized that they could receive more revenue for a single national advertising package than for 200 local ones, and that is why networks arose.[115]

Affiliates receive relatively little benefit from the networks' national advertising. The national advertising revenue benefits the network as a whole, but for a given affiliate that benefit is quite diffuse and attenuated. Affiliates directly benefit from the advertising they sell.

The problem for the networks is that on some occasions a local station will gain a higher viewership if it preempts the network's program and substitutes another one. The substitute may be more popular in that community, and therefore more attractive to the affiliate. But the network loses, because its program is worth less to its advertisers. Importantly, the affiliate may make this decision even though the cost to the network is greater than the benefit to the affiliate. The reason for this is simple: for affiliates, the costs of preemption are widely shared and therefore diffuse, but the benefits are concentrated on them. They might well prefer to preempt (and both satisfy their local viewers and bring in additional revenue) even if it harms the network, because they alone receive the benefits of that preemption.

This divergence would exist even if an affiliate had to share its revenue from its substitute program with its network in the same way that it shares revenue from network programming: If Show A would provide the local station with X dollars and Show B would provide it with X minus Y dollars, then it will air Show A, even if Show B is much more popular in every other market. Show B's

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114. *See* Schwartz & Vincent, *supra* note 66, at 3 ("[T]he network's defining feature is its role as a supplier of a national programming schedule to stations in numerous markets, and its income from national advertisers depends on obtaining widespread and synchronized 'clearance' of its program schedule.").

115. *See id.*

national popularity will not have much impact on the affiliate if it is not popular locally.

In fact the situation is even more divergent, in that FCC rules limit the networks' ability to interfere with affiliates' preemption decisions once they have the contractual right to preempt. These rules—in particular the Time Optioning and Right to Reject rules[116]—have been construed to allow networks and affiliates to bargain over the number of hours an affiliate will be allowed to preempt, but not to allow networks to penalize stations by, for example, seizing some of the advertising revenue the local stations receive when they preempt.[117]

Affiliates thus have an interest in preempting because their profit calculation differs from that of the network. Any given local broadcaster might be tempted to defect when it can make more money in a given instance. Due to the collective action problem (affiliates that preempt gain all of the benefit of the preemption and pay only a small portion of the long-term cost), we can expect affiliates to engage in such behavior even if it is not in the interest of the network as a whole.[118]

Significantly, the different positions and incentives of local affiliates and networks give rise to another reason why local

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116. FCC Broadcast Radio Services 47 C.F.R. § 73.658(d)-(e) (2003). Subsection (e) reads:

> (e) Right to reject programs. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from:
>
> > (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or
> >
> > (2) Substituting a program which, in the station's opinion, is of greater local or national importance.

117. Bruce M. Owen et al., Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules 10 (Apr. 21, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513983376; *see* Schwartz & Vincent, *supra* note 66, at 8.

118. *See* Owen et al., *supra* note 117, at 10 ("The [local] station's private profit calculation whether to clear or preempt a particular show does not take into account the economic loss that preemption imposes on other network affiliates and on the network."); Schwartz & Vincent, *supra* note 66, at 8 ("In making its individual profit calculation when rejecting a network's show, a station does not take into account the full harm that such rejection causes to the effectiveness of network advertising, and hence to the network's revenue and incentives to invest in programming.").

affiliates might want to preempt—to influence network programming. If a network airs programming that an affiliate believes will be unpopular in its viewing community, the affiliate has two reasons to preempt it. The first is the collective action issue noted above, and the second is that it can send a message to the network that it should stop airing the program. Refusing to air a network program reduces the program's revenue (advertisers will pay less, because they will reach fewer viewers) but does not reduce its cost (which has already been paid), so the network's profit declines. Every lost viewer represents lost revenue.[119] Thus, if a network is choosing between Show A, which will be carried by all its affiliates, and Show B, which will be rejected by some of them, it will choose Show A unless Show B is so popular in the markets where it is carried that the extra revenue is greater than the revenue lost to preemption. The net result is that local stations know that they can influence programming choices by their rejection of network shows.

If a network program will garner low ratings in every market, there is little need for local stations to send any signal via preemption: the show will likely be cancelled anyway. The situation in which affiliates' rejections can actually affect network behavior will arise instead when a program is popular in some markets. If a show does well in most markets and adequately in others, the network will likely keep it. If the show does well in most markets but is preempted in a few others, that may be enough to doom it.[120]

Under what circumstances, though, would a show do well in most markets but be so unwelcome in a few markets that it would be preempted in them? The main situation where this arises is in

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119. I discuss this point in greater detail *infra*, notes 139 and 147-48 and accompanying text.

120. *See* Owen et al., *supra* note 117, at 11.

> Networks compete to sell commercial advertising based partly on their reach—the percentage of all television households that are available to view the commercial. Even a small loss of geographic coverage can put a network at a significant competitive disadvantage in this competition. For many years, for example, ABC had great difficulty competing on equal terms with CBS and NBC because it was only a few percentage points lower in its reach. Therefore, stations that collectively can impose even modest reach reductions on a network can succeed in blocking transmission of an offensive program to all affiliated stations.

Id.

programming that affiliates consider to be unsuitable for their communities—and that judgment of unsuitability is almost always based on the perceived offensiveness of the programming. Local affiliates decide that a program is beyond the bounds of good taste for their communities, and they preempt the program.

It turns out that many of the affiliates' preemptions are based on the offensiveness of the program. There are literally hundreds of examples of affiliates preempting on such grounds.[121] Recent examples include affiliates' preemption of Fox's "Temptation Island" and "Cupid" (both deemed too racy by some affiliates), CBS's "Victoria's Secret Fashion Show" (same), and ABC's "NYPD Blue" (which used some adult language and had brief nudity).[122] In none of these cases did any network-owned stations object or preempt. In fact (and strikingly), there is no evidence of a network-owned station preempting on unsuitability grounds.[123] The networks could not furnish a single example of a network-owned station preempting because it deemed the program inappropriate for its audience.[124]

Even if the affiliate gained no additional revenue from its preemption in a given situation, and thus the manifestation of divergent incentives described in the first portion of this Part did not apply, preemption on local unpopularity grounds might be in the affiliate's economic interest. There remains an incentive for the affiliate to raise the cost of unsuitable programming so that there will be less of it in the future.[125] This means that the community will

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121. *See* Nat'l Ass'n of Broadcasters and the Network Affiliated Stations Alliance, *supra* note 75, at iii.

122. 2003 FCC Ownership Order, *supra* note 1, ¶¶ 543, 544 n.1137; *see also* Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 871 n.386 (listing examples of affiliates' preemptions of network programming and adding that "[t]hese localized programming decisions would be far less likely to exist in a regime characterized by effectively nationalized ownership of broadcast stations"); *supra* notes 13-15 and accompanying text.

123. *See* Nat'l Ass'n of Broadcasters and the Network Affiliated Stations Alliance, *supra* note 75, at 40-45.

124. This is unsurprising, of course, because such preemption will never be in the network's interest. If a show has sufficient popularity for it to remain on the air, the network has little reason to care that in some markets it has a 50% audience share and in others it has a 10% share. Network-owned stations still preempt on occasion (though 40% less often, on average, than affiliates do), but they preempt for reasons other than offensiveness—or, more generally, "sending a message" to the network. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 544; *supra* notes 22-23 and accompanying text.

125. It is important to distinguish this hypothetical from the one involving Show A and

get programming better suited to its interests, which will in turn increase the ratings for the affiliate. In other words, putting aside the short-term benefit that affiliates may receive from preempting (gaining revenue at the expense of the network), the affiliate might gain a long-term benefit in the form of programming that will be more popular in its local community and thus more remunerative for the local station.

This might be true even if preemptions have the effect of pushing networks toward programming that will have lower ratings nationwide. What matters most immediately to affiliates is the local ratings of the programs they carry, because that will be central to their profits. This is analogous to the divergence discussed above: If ten or twenty stations can, by preempting, push a network to switch from a program that is popular nationally but unpopular in their communities to one that is less popular nationally but popular in their communities, they will accrue most of the gains from that switch but share the costs with the entire network.[126]

Even in situations where preemption might cost the preempting affiliates more than they gain,[127] the affiliate might have non-

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Show B above. *See supra* p. 467. The point I noted above was that if an affiliate ordinarily received X% of the advertising time in a given network show, it would be in the station's immediate economic interest to preempt that show even if it was able to keep only X% of the advertising in the substitute show, if the substitute was more popular in the viewing community than the network program. The more popular program would produce higher advertising revenues when it aired, so the amount of revenue yielded by X% would be higher for that show.

My point here, by contrast, is that even if a particular preemption decision yielded the same revenue for the affiliate in that time slot as the network program would have yielded, the local station would have an interest in preempting because of a longer-term strategy of influencing the network to provide programming in the future that would be more popular. The immediate revenue would be the same, but the long-term benefits for the affiliate might be greater with preemption than without.

It is important to note that this happens. When an affiliate preempts programming it deems unsuitable and substitutes a show that has long been in reruns—as has sometimes occurred, see Nat'l Affiliated Stations Alliance, Petition for Inquiry Into Network Practices 25 (Mar. 8, 2001) (noting substitution of reruns of "The Andy Griffith Show" for programming deemed unsuitable)—the affiliate has no illusions that the substitute program will have high ratings. The affiliate does not pursue additional revenue through the substitution so much as it pursues gains in the future flowing from the impact of its preemption decision.

126. *See* Schwartz & Vincent, *supra* note 66, at 4 n.9.

127. This would occur if, for example, the network's profits decrease so significantly that its programming becomes much weaker, and less popular, both nationally and in the local station's viewing area.

economic reasons for preempting. Affiliates might value non-economic benefits such as: the influence on the local community, and the community's values, that the power to preempt confers; the gratitude of the local citizenry; and/or the power to influence network bigwigs.

Vetoing a program via preemption is the main form of influence that stations can exercise over network programming (short of ending their relationship with the network). Affiliates have a hard time, for example, playing the affirmative role of guaranteeing the success of a program. If stations covering 80% of television households were to voice their support for a given program, a network would not likely be moved unless it had reason to believe that the remaining 20% would be interested as well. Without national coverage (or something very close to it), national advertisers will look elsewhere. But if stations covering 15 or 20% of households expressed their unwillingness to carry a given program, that would be sufficient to doom almost any program.[128] A small group of stations, in other words, has the power to veto a given program, but not to give the green light to one.[129]

Note also that affiliates are disproportionately likely to be in small- or medium-sized cities. The stations that networks have purchased are heavily concentrated in the biggest cities, leaving affiliates more heavily concentrated in smaller markets.[130] This highlights the role that preemption can play: stations in smaller communities know that the only way they can influence network behavior is if they and other small-market stations band together to block programming they consider offensive.

2. How Does Raising the Cap Affect Preemptions?

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128. *See* Les Brown, *Self-Regulation in American Television in Areas Aside from Program Content*, 13 CARDOZO ARTS & ENT. L.J. 705, 713 (1995) (noting that "[l]ocal broadcasters were implicitly encouraged to preempt network programming they deemed unsuitable for their audiences" and that "[t]hese restrictions gave the stations a small but not insignificant voice in network programming, since substantial rejection by the affiliates could doom a new series").

129. *See id.*

130. *See Top 25*, *supra* note 23.

The discussion above indicates why preemptions might occur, but it does not explain why raising the cap has any impact on them. It is not intuitively obvious why there would be an impact. Indeed, the networks argued that, although preemption was the only thing that the ownership caps could conceivably affect, in reality the ownership caps would not have any significant effect on preemptions. The networks' contention was that the number of stations owned by a network does not affect the behavior of a given local affiliate—regarding preemption or anything else.[131] In light of the points I made in the previous section, a reader might be tempted to agree: since local stations are just local, why should they care whether the network with which they are affiliated owns one of the network affiliates or 100? Why does that affect the local affiliate's position in its home market, and therefore the value to it of remaining affiliated with that network? After all, the fundamental choice for any affiliate is whether to remain affiliated with the network or to separate from that network (by either becoming an independent or affiliating with another network). Similarly, the choice for a network is whether to remain affiliated with that station or to abandon the relationship (and either forego an affiliate in that community or choose another station). How does the number of stations owned by the network change the affiliate's or the network's reservation price? However many stations the network owns nationwide, the affiliate is still its only entrant in that market, and the network is no more or less attractive to the affiliate if it owns more stations. The negotiations would be affected by the presence of other non-network local stations (as they would give the network alternatives in that market) and by the presence of other national networks (as they would give the local station alternatives with which to affiliate), but it is not clear why the network's ownership of stations in other cities would affect the negotiations.

The short answer to this question is that the number of local stations owned by the network indeed has little effect on the basic economic relationship between affiliates and the networks. Notably, the FCC found that "the largest network station owners possess no greater bargaining power—as measured by prime time preemp-

131. *See* Fox Entertainment Group, Inc. et al., *supra* note 50, at 39-40; *see also* Owen et al., *supra* note 106, at 1-2.

tions—than the smallest network station owner."[132] Perhaps more strikingly, the affiliates' study discussed at some length its conclusion that a low national ownership cap does not appear to increase affiliates' bargaining power or profits. As the study stated,

> The [national ownership] Cap does not appear to systematically strengthen the bargaining power of individual affiliates in negotiations with their network—for renewal of the affiliation or, absent a binding cap, for sale of the station to the network—and, hence, does not appear to increase the profit that affiliates can attain.[133]

The longer answer to the question is that raising the national ownership cap reduces the likelihood and effectiveness of preemption without affecting the bargaining power, or the bargains struck, by either side. The reduction in the likelihood of preemption is fairly straightforward: each additional station that a network can buy is one more station that the network can control. To put the point differently, purchasing a station lets a network overcome the divergence described above so that it can maximize joint profit.[134] As

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132. 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,932, 13,941 (2003).

133. Schwartz & Vincent, *supra* note 66, at 4; *see also id.* at 9-11 (discussing this proposition at length in a section of the study entitled "The Cap Has No Obvious Impact on Affiliates' Profits"). The study elaborated in the remainder of the paragraph quoted in text:

> Briefly, the logic is as follows. The economic theory of bargaining predicts that, when an affiliate bargains with its network, the profits that will be attained by the two parties will depend on (a) their strategic power, (b) the total profit that results if agreement is reached, and (c) the profit each party could earn if there is no agreement—their "outside options." The Cap is likely to affect items (b) and (c). Regarding (c), the network's outside option if negotiations fail with its preferred station, A, is to reach an affiliation agreement with another local station, B, or (absent the Cap) to integrate with B. By denying the possibility of integration, the Cap reduces the value of the network's outside option when negotiating with A, an effect that favors station A in the bargaining. However, the Cap also reduces (relative to no Cap) item (b), the joint profit available to be shared between the preferred station A and the network, because they too are precluded from integration. This effect works to the station's detriment, and is more likely than not to outweigh the first effect. Thus, the profit that an initial affiliate could collect by selling the station to its network absent a binding cap is likely to exceed the profit the affiliate could earn by remaining an affiliated station under a binding cap.

Id. at 4.

134. *See id.* at 4 (noting that joint ownership "would allow the network and its affiliates to

the affiliates' study noted, "[i]mportantly, a move toward such joint-profit maximization would reduce the number of rejections in each market and, because all stations would now air a larger portion of the network's schedule, would increase the degree of uniformity in programming decisions across markets."[135] Strikingly, the networks emphasized both the costs that preemptions created for them and the fact that joint maximization of revenue would lead to fewer preemptions, but nonetheless sought to downplay the obvious conclusion that greater network ownership would likely yield fewer preemptions.[136] The facts, however, follow the logic: clear data (which no one disputed) showed that affiliates preempt 40% more often than network-owned stations do.[137] So one effect of raising the cap is fairly straightforward—the stations that are bought by the networks will preempt less often, and thus the total number of preemptions will decrease.[138]

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make decisions—including about what gets shown when—that maximize their combined profit").

135. *Id.* at 8.

136. *See* Fox Entm't Group, Inc. et al., *supra* note 50, at 38-40, 39 n.132.

137. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 544.

138. The affiliates suggested that broadcast networks allow fewer preemptions than they did in the past, and that networks that own more of their stations allow fewer preemptions than other networks do. On this basis they posited that increasing the national ownership caps will lead to less preemption among affiliates. *See* Schwartz & Vincent, *supra* note 50, at 4. This is different from the arguments previously discussed—namely that network purchases of additional stations, first, will likely lead those particular stations to preempt less often (because network-owned stations preempt less frequently), and, second, will leave fewer affiliates who might preempt and thus will make their preemptions less effective in influencing the network (because it is less likely that there will be a sufficient number of affiliates preempting to veto a program). The affiliates intimate that the lower number of preemptions in recent years suggests that bigger networks will be able to bully their affiliates into preempting less.

There are two problems with this argument. First, the data on this are conflicting and, as the FCC noted, unclear. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 560. There is little evidence bearing on this issue—some of it supports the affiliates' position and some of it does not. *See id.*

Second, the affiliates' reasoning is in considerable tension with their own economic study. Recall that the study indicated that the cap does not strengthen local affiliates' bargaining position. *See supra* note 133 and accompanying text. If that is so, why does its retention help affiliates keep their preemption power? Schwartz and Vincent persuasively argue, and the networks agree, that the negotiations between the parties will be guided by the value that each receives from the relationship and the availability of other possible partners—another network (for affiliates) or another local station (for networks). *See supra* notes 131-33 and accompanying text. A change in the ownership cap does not change those negotiating benchmarks in any appreciable way.

Why, though, does this have any impact on the affiliates who are not bought by the network? A network's purchase of station A has no direct effect on station B, and a reduction in preemptions by station A has no direct effect on station B. The answer is that it has an effect on station B insofar as that station hopes to use preemption to influence network programming.

There may be some network programs so marginal that preemption by a single affiliate will be enough to force the network to change course, either by changing the show or cancelling it. There may be other network programs so popular in some regions of the country that preemption by many stations will not affect network behavior. But many shows will fall into the middle ground —sufficiently popular to withstand one affiliate's preemption, but not sufficiently popular to withstand preemptions by multiple affiliates.[139]

Note finally, that even if preemptions have decreased—and have decreased more for networks that own more stations—it is not clear what conclusion we should draw. There is reason to believe that these two phenomena simply tell us that some networks are willing to devote more of their resources to reducing preemptions because of the disproportionate costs that preemptions create for networks. Put somewhat differently, a network would be willing to sacrifice other sources of value for the sake of limiting preemption for the same reason that it would be interested in buying more local stations—as a way of reducing the costs of preemption. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 514.

139. *See* Fox Entm't Group, Inc. et al., *supra* note 50, at 39-40; *see also* 2003 FCC Ownership Order, *supra* note 1, ¶ 543 (noting situations in which preemptions by multiple affiliates have led networks to alter shows); FCC, Network Inquiry Special Staff, *An Analysis of the Network Affiliate Relationship in Television* (1980); Owen et al., *supra* note 106.

There is some reason to believe—and the networks do believe—that almost all shows will fall into this last category, because the diminution in national advertising revenue will not be linear. As noted in the previous section, preemptions reduce network revenue by making the preempted program less attractive to national advertisers because fewer viewers will see it. The problem of preemption may extend further. Part of the value of national networks for advertisers is precisely that their coverage is national. National advertisers place a premium on (and pay a premium for) advertisements that offer one-stop shopping for a national audience—and national television networks offer the best opportunity for it. *See* Schwartz & Vincent, *supra* note 66, at 7 n.20.

> [T]he fact that broadcast network advertising is the most efficient way to target virtually 100 percent of television homes gives it a unique value to advertisers. To the extent that advertisers are unable to cover nearly all television homes with a single network buy, the attractiveness of broadcast networks as a vehicle for national advertising will be diminished and prices will erode.

Id. (quoting a 2001 Viacom statement). Networks believe that they can lose a small portion of their viewers (e.g., an affiliate that reaches one percent of households) without eliminating this premium, but that once a few stations preempt, the percentage reduction in advertising revenue will be greater than the percentage reduction in coverage. Advertisers will no longer

For this last category of programs, station B's preemption alone will not lead the network to act differently. If, though, other stations joined station B in preempting, their collaboration could have an impact. In many cases, then, for an affiliate to be able to influence network programming, it will need to have like-minded sister stations in other markets. And, importantly, the more local stations the networks control, the smaller the pool of stations that might buck the network. A network's movement from owning stations reaching 35% of television households to 45% does not prevent some combination of the remaining affiliates from preempting programs in a way that influences the network. But the move from 35% to 45% does make such effective preemptions less likely, simply because it will be harder for a critical mass of affiliates to form; there will be fewer affiliates who might send this message.

So, merely by purchasing station A, the network mitigates station B's ability to influence network programming. The network does not have to expend resources negotiating with station B to reach this result; it comes with the purchase of station A.

Note that in some situations the network still might have an interest in limiting station B's preemptions directly (so that it can further reduce preemptions), but in some situations it might not. That is, holding aside the barrier to control posed by the Time Optioning and Right to Reject rules,[140] and holding aside the value that the network would have to sacrifice in order to obtain that control (it will have to give up something else in its negotiations), there might be circumstances under which its control of station *A* (and others like it) would leave it unconcerned about the preemption decisions of an individual affiliate. As I mentioned above, in many situations a single preemption will have little impact on the network. If, with respect to a given program or slate of programs the network knows that virtually all of its affiliates will not preempt, the prospect of preemption by one affiliate in a medium-sized market, or a couple of affiliates in small markets, might be of fairly little consequence to the network.[141] This could be good news for the

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pay a premium for the program's advertising, so the advertising revenue will drop more steeply than the viewership does. *See id.*

140. *See supra* note 116 and accompanying text.

141. *See* Fox Entm't Group, Inc. et al., *supra* note 50, at 39-40; *see also* Owen et al., *supra* note 106. Recall that affiliates are more likely to be in smaller markets. *See supra* note 130

affiliate that wants to be able to preempt for its own revenue enhancement: if the affiliate wants to make more money by broadcasting other programming, the network might let it do so when the network knows that such preemption would apply to only one or two small stations. Rendering preemption unimportant to the network's bottom line, however, also means that the local station has lost a potential lever for influencing the network—in fact, the only lever the local station has (short of ending its affiliate relationship). The hypothetical affiliate might be able to preempt to its heart's content, but that preemption would have no real effect on network programming. And the prospect of losing that lever—really a collective veto—is disturbing to many affiliates.[142]

In any event, the bottom line is that raising the ownership caps results in, first, fewer stations that are inclined to preempt at all (because they are now owned by the network) and, second, the diminished likelihood of affiliates successfully influencing the network to change course (by preempting a given program in large enough numbers to make the program unprofitable). Accordingly, a lower national ownership cap tends to protect affiliates' ability to veto programming. The bigger networks become, the less they have to listen to their affiliates.

In light of the way those preemptions are used (i.e., that affiliates often seek to veto programming they deem offensive), a lower cap should please those who distrust the values of network executives.[143] Cultural conservatives have good reason to like a lower cap, and its attendant potential for more frequent and effective preemptions, because the affiliates' decisions will often be to preempt programming that they deem offensive.[144] No local station has ever pre-

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and accompanying text.

142. *See, e.g.*, Pappas Telecasting Cos., Comments Before the FCC 11-12 (Jan. 2, 2003) (arguing that if a local affiliate preempts the network because, "in its judgment [the network programming] does not conform with the local standards of decency or is not of local importance, ... the network could purchase another station in the market, and unilaterally cancel the network affiliation agreement"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513401727; Hank Price, Statement Before the FCC 5 (Mar. 31, 2003) ("If you raise the cap, the networks will simply use their leverage to buy more stations, take away more control from local communities and centralize control of the nation's terrestrial broadcast system."), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id _document=6514085275.

143. *See supra* notes 121-24 and accompanying text.

144. *See supra* notes 13-15 and accompanying text.

empted a program because it was too banal. This usually translates into culturally "liberal" programming being preempted.[145] More generally, this ensures that national networks will not just be programmed in their headquarters and then beamed to the rest of the country, as cable networks are.

C. The Costs of Preemption (and Therefore the Benefits of Raising the National Ownership Cap)

The discussion so far has focused on the potential dangers of raising the television station ownership limit, and has found one—in the form of reducing preemptions and depriving affiliates of the ability to effectively veto network programs. But what is on the other side? Why do the networks want so badly to have the ownership limit set higher?

The discussion above provides much of the answer to this question: having a network program that is aired by all the network's affiliates is valuable to advertisers and therefore valuable to networks. Insofar as the networks can reduce the chances of their programming being preempted, they can maximize their advertising revenue.[146] Raising the national ownership cap is important in this regard, because the higher the ownership cap the more stations a network can control—ensuring a lower preemption rate. Obviously, the networks would like no cap whatsoever (and have lobbied for that), but from their perspective an increase in the cap is better than no movement at all.

Part of the problem with preemption for the networks involves uncertainty. If a network knew that a given station would not air any of its programs on, say, weeknights, then it could charge national advertisers less money (because they were not being aired

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145. For example, the Parents Television Council, an organization devoted to bringing back "positive, family-oriented television programming," Parents Television Council, *About US*, *available at* http://www.parentstv.org/PTC/aboutus/main.asp (last visited Sept. 5, 2004), sent letters to CBS affiliates urging them to preempt the Victoria's Secret Fashion Show. *See* Press Release, Parents Television Council, PTC Urges CBS Affiliates to Preempt Victoria's Secret Fashion Show: PTC President Brent Bozell Says Show Crosses Decency Line (Nov. 18, 2003), *available at* http://www.parentstv.org/PTC/publications/release/2003/1118.asp. The Council's president wrote, "[w]hen will CBS learn that this broadcast is altogether a sleazy exhibition that is best relegated to the local strip joint, and not a network television broadcast?" *Id.*

146. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 514.

in that community) or seek to affiliate with a station that would run their programming. Preemption, though, is not so predictable. As a result, networks sometimes lose money when unexpected preemptions occur.

A second problem with preemption exists even if there is total certainty about which nights an affiliate will preempt: the network's costs of production do not decrease when a station preempts a program, but the revenue does decrease (because the advertiser gains the attention of fewer viewers).

The study commissioned by the affiliates aptly summarizes the costs of affiliates' preemptions:

> [I]ndependent programming decisions by affiliates come at a cost. The network's shows will fail to secure nationwide coverage, thereby reducing the total profits that potentially could be shared by the network and the affiliates relative to what could be achieved if each station aired every show. In making its individual profit calculation when rejecting a network's show, a station does not take into account the full harm that such rejection causes to the effectiveness of network advertising, and hence to the network's revenue and incentives to invest in programming.[147]

The local affiliates concede that they may preempt programs in ways that harm the network but that benefit individual stations solely because of the fact that the harms are widely shared and the benefits are concentrated on the particular affiliate. In this way, affiliates' independence imposes costs that diminish the network's revenue and incentives to invest. As the affiliates' study noted, "the [national ownership] Cap is likely to reduce the total profit of networks and stations and may well reduce network investments in programming."[148]

The affiliates note that this is part of a trade-off—networks have lower profits, but at the same time there is a greater likelihood of local stations blocking programming that the community does not want. But the important point for purposes of this section is that the costs exist.

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147. Schwartz & Vincent, *supra* note 66, at 8.
148. *Id.* at 4.

The costs of preemption are particularly great for networks given the available alternatives. For most viewers, broadcast stations are just another option on the cable or satellite lineups, and cable stations are steadily gaining market share.[149] These two facts combine to make cable and satellite networks more viable competitors with broadcast networks. And one big difference is that cable and satellite networks do not have to worry about preemption decisions made by local stations, because they are not carried by local stations. Once they are carried by a cable operator, they know that their signal will reach viewers.

Broadcast networks argue that raising the national ownership cap, by making preemptions less effective, puts them closer to a level playing field with cable operators. Both will be programmed by the network and either accepted or rejected *in toto* by a local station (in the case of a broadcast network) or a local cable operator (in the case of a cable network).[150]

Moreover, there is good reason to believe that, absent a higher ownership cap, broadcast networks will continue to lose ground to cable and satellite networks. Not only will higher caps help broadcast networks' profits, but those profits will help to prevent a further loss of programming, and viewers, to cable and satellite networks. As the FCC noted in its ownership order, "the economies of scale and scope made possible by network expansion of station ownership will contribute to the preservation of over-the-air

149. *See infra* notes 153-55 and accompanying text; *infra* notes 214-15 and accompanying text.

150. Schwartz and Vincent put forward one way of understanding the value to the networks of a stable national schedule:

> The provision of a schedule of programs allows networks to internalize an externality known as "audience flow"—the tendency of audiences to remain watching the same channel across shows. It also creates an incentive for the network to engage in "branding" activities that may help differentiate it from other programmers. As for bundling across regions, some programs such as many sports events, awards shows and perhaps even some entertainment shows obviously receive their maximum audience through simultaneous exhibition. Simultaneous broadcasting may also be a response to the desire of national advertisers for a predictable audience demographic and a particular time of viewership. Whatever the reason, the networks stress that their ability to ensure simultaneous airing of the great majority of their programs in various markets is very important.

Schwartz & Vincent, *supra* note 66, at 7 (footnotes omitted).

television by deterring the migration of expensive programming, such as sports programming, to cable networks."[151]

The networks' bottom-line argument is that overcoming the danger of preemptions is necessary to their long-term viability. They know that their audience is shrinking, and that it is becoming increasingly difficult for them to compete with cable networks (not to mention other forms of communication, like the Internet). They believe that they need to increase their long-term profitability, and that the most effective way to achieve this is by being able to "clear" their programs nationally—that is, by avoiding local preemption and thus being able to guarantee advertisers a national audience. This, in their view, will help enable them to continue to gain the revenue necessary to compete with cable networks and provide an attractive product.[152]

III. EVALUATING THE RULES: ADVANTAGES OF HASTENING THE DEMISE OF BROADCASTING

The discussion so far might seem to lead to a fairly straightforward analysis: an increase in the national ownership cap will have one effect that is bad or good depending on your degree of cultural conservatism (reducing the ability of affiliates to veto programming), and a second, related effect that is more obviously good (enhancing the viability of broadcasting). In my view, the first half of that analysis is correct, and the second half has it backwards: enhancing the viability of broadcasting is a bug, not a feature.

The share of the television market captured by broadcast television has been steadily decreasing for decades. In the 1970s, over 90% of viewers watched one of the then-three major broadcast television networks (ABC, CBS, and NBC).[153] Since that time, cable and satellite television have changed the television landscape dramatically. The broadcast networks' share of television viewers

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151. 2003 FCC Ownership Order, *supra* note 1, ¶ 583.

152. If raising the national ownership cap helps broadcast networks stay viable, why don't local broadcasters see this benefit and support raising the cap? The answer to this question is that local stations have different interests than networks do. *See supra* Part II.B.

153. Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1693 (2003).

has steadily declined as the cable channels' share has increased.[154] In fact, cable channels now have a majority of the audience share: the now-seven broadcast networks combined garner less than a 50% share of hours viewed.[155] This does not mean that broadcasters' ratings are similar to those for cable and satellite networks. The ratings for the four most popular broadcast networks (ABC, CBS, Fox, and NBC) still exceed the ratings for the most popular cable networks.[156] But the gap between the big broadcasters and the big cable networks decreases every year. (For instance, the 2003 season finale of *The Sopranos* was the highest rated program that evening, even though less than 30% of households subscribe to HBO.)[157]

Even as the broadcast networks' percentage of the television market is declining, the whole notion of a separate "television market" is becoming less tenable. Consumer substitution among media is increasing.[158] More and more, consumers find that they can get the same sorts of communications from a variety of sources. Indeed, one of the studies commissioned by the FCC found just such

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154. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 19 F.C.C.R. 1606, ¶ 94 (2004).

> [I]n the 1993-1994 television season, broadcast television stations accounted for a 71 share of all-day viewing. By the 1997-1998 season, the broadcast stations' share dropped to 58. This trend continues, with broadcast stations achieving a 45 share of all-day viewing during the 2002-2003 season, down from a 47 share the previous season.

Id.; *see also id.* ¶ 26 (noting numbers for cable networks that are the mirror image of those above (i.e., rising from a 29 share to a 55 share during the same time period)).

155. *See id.* ¶ 94. The seven broadcast networks are ABC, CBS, Fox, NBC, UPN, WB, and PaxTV. *See id.* ¶ 93.

156. *See id.* ¶ 26 n.69 ("For the 2002-2003 TV season, Nielsen Media Research reports that the top-rated cable network for all-day audience was Nickelodeon/Nick-At-Nite with a 4 share compared to a 7 share for Fox affiliates, the lowest rated of the four major networks during the 2002-2003 TV season.").

157. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 124; *see also* Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 19 F.C.C.R. at ¶ 26 n.69 ("Although broadcast networks ratings tend to be large compared with any single cable channel, it is getting more common for a cable show to garner audiences similar to broadcast network shows.").

The disparity between the audience share of an average program on one of the big four broadcast networks and the audience share of an average cable network is even greater than the disparity between the top broadcast and cable programs. This just highlights another difference between cable and broadcast programming—namely, that some cable networks aim at niche markets. *See, e.g.*, *id.* at app. C, tbl. C-1 & C-2 (offering examples of current niche market stations, such as The Weather Channel and AMC).

158. *See* 2003 FCC Ownership Order, *supra* note 1, ¶¶ 126-28.

a phenomenon, and in particular that "there is clearest evidence of substitution between Internet and broadcast TV, both overall and for news."[159] So broadcast television is declining in importance in its own market as that market declines in importance and coherence.

In light of the above, we might wonder whether broadcast television will soon become irrelevant and die on its own no matter what happens, so that there is no reason to worry about ownership limits. This argument ignores two distinguishing features of broadcasting, however. First, television broadcasting occupies hundreds of megahertz of valuable spectrum—and that spectrum cannot be used for other purposes.[160] The licenses for that chunk of spectrum are limited to broadcasting. So even if a local television station wanted to move exclusively to cable television and sell its spectrum to a higher valued use (e.g., wireless telephony), it would not do so.[161] It could not take the latter step, and therefore would have no reason to take the former one.

This restriction on alternative uses is a matter of law, not physics. Congress could enact legislation permitting other uses of the spectrum currently devoted to television broadcasting. But we have reason to expect that Congress will resist such a move even if it is in the public interest, because of the second distinguishing feature of broadcasting: there is a principal/agent problem. Government officials (and in particular members of Congress) have reasons to want to preserve broadcast television that have nothing to do with what their constituents want.[162] The lifeblood for elected officials—and one of the biggest advantages of incumbency—is free advertising, for example coverage of an official's visits to local

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159. Joel Waldfogel, *Consumer Substitution Among Media* 3, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A8.doc (last visited Sept. 5, 2004).

160. *See* Gerald R. Faulhaber & David Farber, *Spectrum Management: Property Rights, Markets, and the Commons* 4, *reported in* Gerald R. Faulhaber & David Farber, Comments Before the FCC (July 18, 2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513282647 (stating that the FCC has not allowed other uses of the broadcast spectrum); Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 18 (2002) (stating same).

161. Benjamin, *supra* note 160, at 18.

162. *See* Charles Platt, *The Great HDTV Swindle*, WIRED, Feb. 1997, at 57 ("So long as broadcasting is protected from the free market by legislators who depend on TV to get themselves reelected, Congress will continue giving broadcasters special treatment and favors, and consumers will suffer.").

community events.[163] The easiest and most effective way for members of Congress to reach their constituents without having to pay for advertising is to appear at a community event that is covered by the local television station. Constituents have little reason to value this coverage, but politicians do.[164] Because the interests of government representatives and their constituents are not aligned in this respect, we have reason to expect that government actors will aim to protect broadcast television beyond what their constituents would want.[165]

Indeed, the history of broadcast regulation is characterized by coziness between government actors and incumbent broadcasters.[166] This has led to government policies that have created barriers to entry for potential competitors and given valuable goodies to broadcasters.[167]

The FCC's response to cable television is a case in point. The Commission put explicit limits on the growth of cable television, as well as implicit ones.[168] Examples of the latter include: tight restrictions on cable operators' ability to import signals from other

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163. *See* Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 973 (1988) (stating that incumbents are generally better known than challengers because of free advertising, including local television coverage of the incumbent).

164. *See, e.g.*, Stephen Labaton, *F.C.C. Chief Talks of Frustration and Surprise*, N.Y. TIMES, Sept. 22, 2003, at C2 (noting that local broadcasters "have considerable influence because they are in every Congressional district and control most of the television and radio outlets that are vital to political life").

165. Polling regarding the national ownership cap supports this point. *See* Matthew Rose, *TV Networks Join Forces to Fight Backlash over Station Ownership*, WALL ST. J., Sept. 2, 2003, at A1 (noting a survey showing "that only 11% [of respondents] believe network ownership of their local station is a bad thing and 68% think the market should decide whether that should happen or not" and quoting a pollster as saying "I have never seen a situation where politicians have a greater disconnect from the people they represent").

166. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING (1994).

167. *See* Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53, 62-63 (1999) (suggesting that "regulators' real interest in perpetuating the existing spectrum administration stems from their desire to maintain the steady flow of political rents generated by control over spectrum").

168. *See* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 81-91 (1981) (noting FCC actions that limited growth of cable in an attempt to protect local broadcast stations); *see also* Amendment of Subpart L, Part 91, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725, ¶¶ 123-30 (1966) (placing limits on the growth of cable, in light of concerns about local UHF broadcasters) [hereinafter Amendment of Subpart L].

markets;[169] rules ensuring that broadcasters alone could show certain movies and sports events;[170] and a requirement that cable operators carry all local broadcast stations.[171] Broadcasters sought all of these rules, and the FCC—motivated by a desire to protect broadcasting from the competition that cable represented—imposed them.[172] As the FCC Chairman frankly noted in 1971, the FCC had interpreted its public interest mandate to include "protectionism for over-the-air broadcasting."[173]

A more recent example of policy makers' favors for broadcasters involves digital television. Beginning in the 1980s, broadcasters lobbied vigorously for the FCC to devote unused broadcast spectrum to high-definition television, which the broadcasters said would be a great boon to consumers.[174] The FCC decided that a conversion to

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169. *See* Amendment of Subpart K, Part 74, of the Commission's Rules and Regulations Relative to Community Antenna Television System and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 36 F.C.C.2d 143, ¶ 66 (1972); Amendment of Subpart L, *supra* note 168, ¶¶ 141, 155; Amendment of Subpart L, Part 11, To Adopt Rules & Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683, ¶¶ 44-48 (1965).

170. *See* Amendment of Subpart K, Part 74, of the Commission's Rules and Regulations Relative to Community Antenna Television System and Inquiry Into the Development of Communications Technology and Services To Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 23 F.C.C.2d 825, app. A (1970). Commentators have argued the rules "were designed to protect broadcasting from the perceived threat presented by early cable television but ended up stifling cable's development for no good reason." Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1196 (1993). In 1977, the D.C. Circuit Court of Appeals struck down the rules as outside the FCC's authority. Home Box Office, Inc. v. FCC, 567 F.2d 9, 29-31 (D.C. Cir. 1977).

171. *See* 47 U.S.C. § 534(a) (2000) ("Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section."); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) (upholding legislation under intermediate scrutiny because the record supported "Congress' predictive judgment that the must-carry provisions further important governmental interests").

172. *See* Amendment of Part C, Part 91, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C. 2d 725, ¶¶ 25-26 (1966); *see also* Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFF. L. REV. 615, 700 (1991) (concluding that in the early regulation of cable, the FCC "sought to preserve the market position of the over-the-air broadcasters, its long-term clients").

173. *Cable Antenna Television (CATV): Hearing Before the Subcomm. on Communications & Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. 34 (1971).

174. *See* JOEL BRINKLEY, DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION

high-definition television was in consumers' interest, but (interestingly, and in accordance with broadcasters' wishes) that high-definition television would not be sufficiently remunerative unless the government gave additional spectrum to broadcasters.[175] So the FCC gave additional spectrum to each broadcaster for purposes of broadcasting in high-definition television, doubling the amount of spectrum devoted to each broadcaster during the lengthy—and indefinite—"transition" period during which consumers would be expected to buy new television sets or converter boxes.[176] Meanwhile, the mission changed. The main players agreed on a standard that was digital, and the FCC later decided not to require that they transmit in high definition.[177] This means that each broadcaster now occupies two six-megahertz swaths of spectrum, and each broadcaster is permitted to transmit digitally with the same picture quality as its current analog signal.[178]

What is particularly striking is that other countries have moved toward digital television not through digital broadcasting but

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3-27 (1997) (chronicling the interplay between the development and promotion of HDTV and broadcasters' efforts to retain their spectrum).

175. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 7 F.C.C.R. 6924, ¶ 2 (1992).

176. Broadcasters are supposed to return one of their two spectrum allotments by the end of 2006 and stop transmitting in NTSC (the current, analog mode), but only if at least 85% of households can receive a digital signal via broadcast. *See* 47 U.S.C. § 309(j)(14)(B) (2000). As members of Congress have noted, no one believes that NTSC broadcasting will stop by the end of 2006—so, of course, no one expects the spectrum allotments to be returned by then. *See* BENJAMIN, *supra* note 107, at 144-46 (Supp. 2004); Jenna Greene, *Digital TV a Remote Possibility*, LEGAL TIMES, July 30, 2001, at 1 (quoting representative Ed Markey as saying, "[t]here's no longer a soul in the industry who thinks the transition will be over by 2006"); J.H. Snider & Michael Calabrese, *Speeding the DTV Transition: A Consumer Tax Credit Can Unplug Analog TV, Reduce the Deficit and Redeploy Low-Frequency Spectrum for Wireless Broadband* 4 (New Am. Found., May 2004) (noting that "many savvy insiders believe that the broadcast DTV transition, as defined under current law, won't be complete until 2025 at the earliest"), *available at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File_ 1575 _1.pdf.

177. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 11 F.C.C.R. 17,771 (1996); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information and Law*, 76 N.Y.U. L. REV. 23, 98-101 (2001).

178. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 7 F.C.C.R. 3340 (1992); BENJAMIN, *supra* note 107, at 359-60 ("Overall, a system that once started out as 6 megahertz for HDTV (either digital or analog) has become 6 megahertz for a number of services, one of which will be DTV [digital television]—but perhaps not 'high definition' television at all.").

instead through digital cable and satellite.[179] And in the United States, cable and satellite have transitioned to digital signals on their own, without any government subsidies.[180] That is, millions of American households already receive digital signals—from cable or satellite. Sales of digital televisions have been disappointing thus far, but those that have been purchased are overwhelmingly receiving their signals from cable and satellite providers. So a huge amount of otherwise available spectrum is set aside for the broadcasting of digital signals, even though only slightly more than 500,000 households actually watch digital signals from broadcasters.[181]

But focusing on specific, and relatively recent, decisions like these overlooks the more fundamental ways in which government actors shaped broadcast to meet their own goals and desires, and broadcasters influenced government officials for their own benefit. Government decisions helped to ensure that broadcasters would have great influence over viewers but would remain beholden to government officials. For instance, Congress and the FCC designed the broadcast network to protect incumbents and to create a few big television networks. Early regulations favored the existing players over new entrants (and denied licenses to many upstarts).[182] This

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179. *See* BENJAMIN, *supra* note 107, at 344-46.

Interestingly, in 2003 Berlin had a rapid transition to digital broadcasting. Berliners who relied on analog over-the-air broadcasting had to choose among foregoing television service, buying a new television, buying a digital-to-analog converter box, or signing up for cable or satellite service. The German government subsidized the purchase of converter boxes for low-income individuals. The entire process went remarkably smoothly, and Berlin was able to open up the formerly analog airwaves to more services with minimal disruption and little expense (approximately $500,000 to buy the 6,000 converter boxes for low-income individuals). *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GERMAN DTV TRANSITION DIFFERS FROM U.S. TRANSITION IN MANY RESPECTS, BUT CERTAIN KEY CHALLENGES ARE SIMILAR (2004), *available at* http://www.gao.gov/new.items/d04926t.pdf; Snider & Calabrese, supra note 176; Thomas Hazlett, *Finally, Something Good on German TV: Berlin Has Digital Television. Why Can't the U.S. Follow?,* SLATE (Oct. 7, 2003), *at* http://www. slate.com/id/2089424.

180. *See* U.S. GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS: ADDITIONAL FEDERAL EFFORTS COULD HELP ADVANCE DIGITAL TELEVISION TRANSITION 7 (2002) ("Like broadcasters, cable television systems are also transitioning to digital, although they are under no government mandate to do so."); Hazlett, *supra* note 179; Snider & Calabrese, *supra* note 176, at 2 (noting that "a DTV transition is happening—but it is occurring almost entirely via satellite and cable subscription services").

181. *See* Allison Romano & Ken Kerschbaumer, *Brighter, Clearer, Wider*, BROADCASTING & CABLE, Jan. 25, 2004, at 14.

182. *See generally* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST

reflected an alliance between government actors and the major incumbents. The latter received protection from competition, and the former got a few broadcasters in their communities who would have large market shares.[183] The government also created a strong renewal presumption, which meant that incumbents had little reason to fear losing their licenses to competitors.[184] At the same time, government policy emphasized localism—each community having three or four television stations of its own.[185] That policy ensured that there would be only three or four national broadcast networks.[186] So we got a few big networks, and few channels in each city.[187]

Having a few incumbents beholden to government actors for their licenses both enabled and created an incentive for significant government control. The paucity of channels in each city made the networks a tempting (irresistible?) political target. Unsurprisingly, government actors often attempted to meddle in their operation.[188]

AMENDMENT 13-51 (1987); *see also* KRATTENMAKER & POWE, *supra* note 166, at 22.

183. *See* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 151, 166-71 (1990).

184. *See* BENJAMIN, *supra* note 107, at 111-22; POWE, *supra* note 182, at 50-51.

185. *See* Thomas L. Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875, 921-26, 929 tbl. 10, 938-39, 939 tbl. 16 (1981).

186. This flows from the danger of interference. If channel three (a specific portion of the radio spectrum) is allocated to a station in Philadelphia, it cannot also be allocated to a station in New York. The technology existet—then and now—to allow stations to cover much more territory. If the allocation scheme had allocated stations so that they simply covered the country, there would have been enough room on the spectrum for thirteen networks. *See* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 275-79, 279 n.175 (2003).

187. *See* Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1736 (1995) (noting that the FCC's allocation plan "gave great weight to factors such as placing at least one transmitter in as many communities (and, therefore, congressional districts) as possible.... The allocation plan sacrificed viewer interests in access and diversity to narrow political concerns and entrenched industry goals.").

188. The examples are legion. Among the more prominent: Nixon's White House talk about threatening not to renew the license of the Washington Post's television station as a way of punishing the newspaper for breaking the Watergate story; the Nixon White House setting up meetings with the heads of the broadcast networks to complain about their allegedly anti-Nixon coverage and to threaten them with denial of licenses if this continued; and Congress including in a massive continuing resolution a rider forbidding the FCC from extending any current grants of temporary waivers from its multiple ownership rules, which affected only an affiliate of Rupert Murdoch's News America Publishing, Inc. *See* News Am. Publ'g, Inc. v.

In a world with many voices, the gain from influencing any given broadcaster is diminished, and thus the incentive to meddle is reduced.

Few networks also led to insipid programming that sought to appeal to everyone and avoid catering to any particular interests.[189] With only three national networks, this was the rational programming strategy. Just to be safe, the FCC required that programs be aimed at a broad audience. Among the FCC's important early decisions were its denial of licenses to several broadcasters (including Eugene V. Debs and the Chicago Federation of Labor) on the grounds that "there is no place for a station catering to any group. All stations should cater to the general public and serve public interest against group or class interest."[190] Again, if there had been many networks, we would have expected greater segmentation among networks, catering more to particular interests.

This highlights an important point regarding the response to the FCC's ownership rule changes: many of the opponents of the changes emphasized that they were worried about powerful voices drowning out smaller ones.[191] They expressed a great fear that homogenization of discourse would result from narrower ownership groups. Insofar as that was their fear, they should have welcomed the shrinking of broadcast television's ratings and importance. It is hard to see how anything could compare with television broadcasting as a powerful source of homogenization and pablum.[192] Indeed,

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FCC, 844 F.2d 800, 814 (D.C. Cir. 1988) (noting that the rider "strikes at Murdoch with the precision of a laser beam" and invalidating it on First and Fifth Amendment grounds); JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 227 (1991); POWE, *supra* note 182, at 130-32.

189. *See* Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961), *in* NEWTON M. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 185 (1995); Ralph Nader & Claire Riley, *Oh, Say Can You See: A Broadcast Network for the Audience*, 5 J.L. & POL. 1, 24-46, 55 (1988). Indeed, a central argument for the creation of PBS was that the three commercial television networks produced uninspired programming because they "[are] obliged for the most part to search for the uniformities within the general public, and to apply [their] skills to satisfy the uniformities [they have] found." THE REPORT AND RECOMMENDATIONS OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION: PUBLIC TELEVISION, A PROGRAM FOR ACTION 13-14 (1967).

190. Great Lakes Broadcasting Co., 3 F.R.C. 36 (1929); *see* BENJAMIN, *supra* note 107, at 20-23.

191. *See supra* note 25 and accompanying text; *supra* note 72 and accompanying text.

192. *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 44-70 (1994); CASS R.

I don't think that any other form of communication has had anywhere near the homogenizing effect that broadcast television has had.

A decrease in the audience share of broadcast television will likely reduce homogenization—whether the lost viewers move to cable and satellite networks, the Internet, or nothing at all. It is possible, of course, that most or all of the viewers who abandon broadcast networks will go to the same cable network, or the same website. If so, the move from broadcast television would not result in people viewing programs from more networks (they would just be different networks). They would have the choice to access a wide variety of sources, but would fail to do so. If this occurred, it is not clear that homogenization would be reduced (depending on whether we focus on the practical choices available, which would increase, or the actual choices made). But this scenario is highly unlikely, and inconsistent with the empirical data. The increase in cable viewing that has occurred concomitant with the decrease in broadcast viewing has been spread over a wide range of cable networks.[193] The cable audience is highly fractionated—much more so than is the audience that relies on broadcast television (i.e., who do not subscribe to cable or satellite), which overwhelmingly watches one of the four major broadcast networks.[194] There is every reason to believe that the next set of migrants from broadcasting to cable will act like all the other sets and divide themselves among a wide variety of stations, rather than migrating to just one or two cable networks. People will likely view all sorts of niche networks, thereby reducing homogenization.[195] A similar point applies to the Internet.[196] Studies of Internet traffic show a highly fractionated

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SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 59-66 (1993); Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1097-1107 (1990); Reed Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1096-99 (1996).

193. *See supra* notes 154-57.

194. *See* Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 19 F.C.C.R. 1606, ¶ 26 n.69 (2004) (noting the large number of cable channels and their relatively low viewership as compared to the big network broadcasters).

195. *See id.* at app. C, tbl. C-1 & C-2 (listing myriad niche cable channels).

196. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833 (1995).

universe. Homogenization on the Internet pales in comparison to that on broadcast television.[197]

It bears emphasizing that this point about homogenization also relates to fears about the influence of powerful interests. If no broadcast (or other) outlet garners more than, say, 5% of the audience, there is no single lever that a powerful interest—whether private or government—can pull. Controlling the top three broadcast networks means one thing when their combined audience share is 90%, and something else entirely when their combined share is 30%. It is harder for anyone to monopolize the attention of masses of people when those masses are getting their information from so many different sources.

One other problematic aspect of broadcasting bears mention: its reliance on advertising.[198] This creates a kink in the feedback loop between viewers and programmers. Broadcasters air what we are willing to watch, not what we actually want to pay for out of our own pockets.[199] Put differently, viewers' intensity of preference does not register. This increases the likelihood of least-common-denominator programming. If people could register their strength of preferences (e.g., via willingness to pay), then the strong preferences of relatively small groups would likely result in programming that responded to those preferences. Reliance on the advertising model, however, reduces the chances of such niche programming being

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197. *See* BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITON AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 575-79 (3d ed. 2000).

198. Transmission of television signals did not have to develop this way. On a number of occasions television and radio companies have sought to engage in subscription television—signals that only subscribers could decode, like modern cable and satellite television. From the earliest days of spectrum regulation until relatively recently, however, the FCC has opposed subscription services, pushing instead for broadcasting that would be freely available to all. *See* KMLA Broad. Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 41 (C.D. Cal. 1967); Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage,"* 97 COLUM. L. REV. 1055, 1055-57 (1997); Yoo, *supra* note 153, at 1669-71. Even when allowed, the few subscription services have been heavily restricted. *See* Christopher S. Yoo, Architectural Censorship and the FCC 6 nn.22, 24 (unpublished manuscript), *available at* http://papers.ssrn.com/so/3/papers.cfm?abstract_id =555821. Transmitters, acting as broadcasters because they could not offer subscription services, had to get revenue from somewhere and that produced reliance on the advertising model.

199. Indeed, advertisers focus not on a generalized "we," but on viewers whom they deem to have the biggest payoff for advertising—those demographic groups that are likely to be persuadable and to have the income to spend.

aired. Moreover (and relatedly), the advertising model appears to do a worse job of capturing, and therefore reflecting, the value of programming to viewers.[200] This is not surprising: there is no reason to expect that the revenue generated by advertising would equal the revenue generated by viewer payments.[201] As it turns out, people's willingness to buy products advertised on a program does not approximate the value they place on that program.[202] Studies suggest that, relative to pay-per-view, the advertising model results in less informational programming as well as lower revenue and lower output.[203]

Most of the arguments against the role of television programming in a democratic society are really based on (justified) concerns about the primacy of advertising in the broadcast model. The argument is that there is a market failure because programmers respond not to the market signal that we want to send (our strength of preference for a particular program), but rather to the signal sent by us to advertisers (our willingness to watch their program, and its advertisements, instead of cutting the grass).[204] The fear is that we get programming that we tolerate, rather than programming we affirmatively want.[205] Broadcasters care that viewers watch a given program and see the commercials, but so long as a viewer is willing to watch, broadcasters do not care how much the viewer enjoys the program. Intensity of viewer preference, in other words, is neither

200. *See* ROGER G. NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION REGULATION 23 (1973) (estimating that the advertising model understates viewers' willingness to pay by a factor of about seven).

201. *See* Jona R. Minasian, *Television Pricing and the Theory of Public Goods* 7 J.L. & ECON. 71, 74-75 (1964).

202. *See id.*

203. *See* Claus Thustrup Hansen & Soren Kyhl, *Pay-Per-View Broadcasting of Outstanding Events: Consequences of a Ban*, 19 INT'L J. INDUS. ORG. 589, 590, 601-04 (2001) (finding lower revenue for advertising-supported television); Steinar Holden, *Network or Pay-Per-View?: A Welfare Analysis*, 43 ECON. LETTERS 59, 62-64 (1993); Harvey J. Levin, *Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings*, 61 AM. ECON. REV. 81, 82 (1971) (finding that pay television produces more informational programming than does advertising-supported television); Yoo, *supra* note 153, at 1680-81.

204. *See* SUNSTEIN, *supra* note 192, at 62-63 (describing the failure of the advertising driven model of broadcasting to reflect consumer preferences); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 319-21 (1997) (describing the conflict between viewers' and advertisers' interests).

205. *See* Benkler, *supra* note 177, at 98, 101.

very relevant to, nor very apparent in, the advertiser-supported system.[206]

The main argument in favor of the advertising-based model is that it gives access to those unable to afford subscription fees. But assuming that access to programming is a net good, the obvious solution is to subsidize the provision of programming to those who are too poor to afford cable or satellite.

Some will be persuaded by the arguments laid out above in this Part of the Article and others may not. Even if you ignore the points I have made so far in this Part, however, there is a powerful argument that does not depend on them in any way: There is little justification for the massive allocation of a tremendously valuable resource—radio spectrum—to broadcasting (and only broadcasting).

The government auctions virtually all spectrum, and the proceeds fund government operations. The main exception is spectrum allocated for broadcasting, which the government licenses free of charge.[207] This distorts the competitive playing field: all forms of communication would welcome having their means of transmission, or any other key input (e.g., wire for cable operators, spectrum for satellite companies, or delivery trucks for newspapers and magazines) provided by the government *gratis*, but only broadcast spectrum has been consistently so provided.[208] People rely on broadcasting, but people also rely on cable, satellite, newspapers, shelter, and clothing, yet none of those is subject to this sort of

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206. It is no coincidence that cable programming, particularly on HBO, has gained a loyal following and numerous awards for programming that is bolder than the offerings on broadcast television. HBO does not depend on advertisers, but instead can appeal more directly to viewers. As an HBO executive explained, "[w]e're not any braver than the networks. It's just that our economic basis is different." Jan Hoffman, *TV Shouts 'Baby' (and Barely Whispers 'Abortion')*, N.Y. TIMES, May 31, 1992, at H1, H27.

207. *See* 47 U.S.C. § 309(j) (2000) (requiring the use of auctions for nearly all initial spectrum licenses and construction permits, but making exceptions for licenses and construction permits for digital television service, public safety radio services, and noncommercial educational or public broadcast stations).

208. Some satellite (and other) services received some spectrum licenses before auctions were authorized (and subsequently mandated), and thus did not pay the FCC for them. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 (HR 2264) (1993) (authorizing auctions for common carrier and private radio licenses); 47 U.S.C. §309(j) (statute passed in 1997 mandating auctions for almost all spectrum licenses). Post-1997 applicants for those services have paid for their spectrum licenses, however, whereas broadcasters have never paid for their licenses.

subsidy.[209] And note that the degree of reliance may be a function of this market distortion: reducing the costs of broadcasting (via free spectrum) increases demand.[210]

In addition, devoting spectrum to broadcasting constricts the amount of spectrum available for other services, raising their costs. Every bit of spectrum can be used by more than one service, and many services can operate via wire instead of wirelessly. The main advantage of spectrum over wire is mobility. Commentators have long noted that the best nominee for wire is broadcast television: fewer people move their televisions while using them than is true of other telecommunications devices. Indeed, few people move their televisions while watching them, period. This fact led Nicholas Negroponte to posit that all television should be delivered via wire (and all telephony should be delivered wirelessly).[211]

This argument is particularly strong in light of the fact that the television band is underutilized in two ways. First, much of the megahertz devoted to broadcasting is not used. One aspect of such underutilization is that in many areas spectrum dedicated to television broadcasting is unused because broadcasting on those frequencies is not sufficiently valuable to entice any broadcasters.[212]

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209. *See* Yoo, *supra* note 186, at 354 (discussing problems with giving away the broadcast spectrum).

210. *See id.* ("[A]ltering the relative prices of the various spectrum-based services makes broadcasting artificially appealing from an economic standpoint.").

211. *See* NICHOLAS NEGROPONTE, BEING DIGITAL 24 (1995) (identifying the "Negroponte Switch" as the idea that "the information currently coming through the ground (read, wires) will come in the future through the ether, and the reverse. Namely, what is in the air will go into the ground and what is in the ground will go into the air.").

212. *See* Benjamin, *supra* note 160, at 16-17 (discussing this underutilization); Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 37-38 (1995) (citing UHF frequencies as an example of a market where scarcity does not exist because broadcasters prefer VHF frequencies); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 224-25 (1982) (discussing low market demand for spectrum outside large cities, especially "in the UHF band, where some channels have remained unclaimed for decades"); *see generally* Public Notice, FCC, Television Channel Utilization (Sept. 9, 1997), 1997 WL 557928 (listing commercial channel utilization around the country); Faulhaber & Farber, *supra* note 160, at 4 (noting that the UHF band "is extremely underutilized"). The FCC is in the process of diminishing this underutilization by reallocating some of the existing channels for other purposes and using some existing allotments for digital television purposes, but thus far the process is far from complete and has been beset by delays. *See, e.g.*, Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 542

Another form of underutilization arises from government-mandated spectrum buffers between television broadcasters (i.e., unused frequencies between the frequencies used by two different broadcasters). It appears that low-power services could operate in these buffers while causing little or no interference with existing uses, but the government has permitted very little use of these buffers.[213] This spectrum would be of great value to other users (such as cellular telephony providers), but other services have not been permitted on the spectrum.

A different form of underutilization arises from the fact that the vast majority of television households receive their local broadcast stations via cable or satellite. Specifically, over 88% of households get their television via cable or satellite.[214] For those viewers, broadcasters are just one more cable channel. If the broadcasters ceased to broadcast and simply sent their signals to cable and

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(2001) (noting that "[d]espite the existence of abundant unoccupied bandwidth after the digital TV license awards, transitional concerns (moving UHF-TV stations) continue to delay the implementation of new services").

213. *See* An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, 47 Fed. Reg. 21,468, ¶¶ 3, 29 (May 18, 1982) (stating that "interference to communications services" was one of six "decision criteria," and permitting low power television between channels two and sixty-nine); IRA BRODSKY, WIRELESS: THE REVOLUTION IN PERSONAL TELECOMMUNICATIONS 17 (1995) ("[T]he spectrum shortage is a manufactured problem. For example, the UHF-TV band comprises 336 MHz of bandwidth. Few cities have more than a half dozen active UHF-TV stations (each occupying just 6 MHz). The rest of the UHF-TV band has been sitting around for years collecting electromagnetic dust."); Benjamin, *supra* note 160, at 12-16 (noting that low-power uses have put forward strong arguments that they could operate in buffers and cause de minimis interference, but that the FCC has allowed very little utilization of these buffers); Thomas W. Hazlett & Matthew L. Spitzer, *Digital Television and the Quid Pro Quo*, 2 BUS. & POL. 115, 124 (2000) (stating that it is "unnecessary to use vacant slots [buffers] for interference control because of the possibility of using newer technologies ... or of allowing non-interfering wireless services other than TV to utilize unoccupied frequencies"); Paul Baran, Is the UHF Frequency Shortage a Self Made Problem?, Speech at the Marconi Centennial Symposium (June 23, 1995), *available at* http://www.interesting-people.org/archives/interesting-people/199507/msg00023.html.

> Tune a spectrum analyzer across a band of UHF frequencies and you encounter a few strong signals. Most of the band at any instant is primarily silence, or a background of weaker signals. The spectrum analyzer connected to an antenna reveals that much of the radio band is empty much of the time!

Id.

214. *See* FCC, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 19 F.C.C.R. 1606, app. B, tbl. B-3 (Jan. 28, 2004).

satellite companies (as cable channels do), the vast majority of users would find no change in their service.[215]

The cost of opening all spectrum currently devoted to broadcast to other uses would be fairly small, and the benefits very great.[216] The main benefit would be the value of the spectrum that would be opened to other uses.[217] Television broadcasting occupies hundreds of megahertz of "prime beachfront" spectrum. This spectrum would be quite valuable for a wide variety of uses, including many forms of point-to-point communication (e.g., wireless telephony). Indeed, in 1992 two FCC economists calculated that allowing cellular services on a single UHF television channel in Los Angeles would increase social welfare from 1992-2000 by over $1 billion.[218] The

215. Furthermore, the 12% who do not subscribe to cable or satellite are by no means confined to those who cannot afford it. This number includes many people who could afford cable or satellite but choose not to subscribe. *See* Robert Kieschnick & B.D. McCullough, *Why Do People not Subscribe to Cable Television?, A Review of the Evidence* 3-4 (Telecommunications Policy Research Conference 1998) (finding that "even for households in the lowest income bracket, the decision not to subscribe to cable television is more often the result of a preference than an inability to afford services"), *available at* http://www.tprc.org/abstracts98/kieschnick.pdf .

216. *See* THOMAS W. HAZLETT, THE U.S. DIGITAL TV TRANSITION: TIME TO TOSS THE NEGROPONTE SWITCH 21 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper No. 01-15, 2001).

217. Note that the government would not have to prohibit broadcasting in order for this migration to occur. If the government allowed licensees to sell their spectrum and allowed the owner to use its spectrum for any service that it desired, we would have every reason to expect that most broadcasters would migrate to cable and satellite and then use their spectrum for other purposes (e.g., wireless telephony). *See infra* Part IV.B. If the government did not condition the must-carry regime on local stations actually broadcasting or rescinded must-carry for stations that continued to broadcast, then the broadcast model would be even more unattractive. Of course, broadcasters' happiness with the migration—and perhaps its political viability—would depend in significant part on the degree to which they received the proceeds from the sale of the spectrum for these higher-valued uses. *See infra* Part IV.B.

It bears noting, though, that in a world of total spectrum flexibility, some broadcasters might be the highest bidders for some spectrum. As Hazlett has stated,

> [w]hile unlikely, it is not impossible that television broadcasting would emerge a net demander in an auction of TV Band spectrums. If channels were packed efficiently by the full complement of digital transmission and receiving techniques now available, additional bandwidth to create large packages of [over-the-air] programming could promote rivalry with subscription video systems. Allowing liberal use of TV Band radio spectrum would test such opportunities in a competitive marketplace.

HAZLETT, *supra* note 216, at 20.

218. *See* EVAN R. KWEREL & JOHN R. WILLIAMS, CHANGING CHANNELS: VOLUNTARY REALLOCATION OF UHF TELEVISION SPECTRUM vii (OPP Working Paper Series, Working Paper No. 27, 1992), *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp27. pdf.

revenue generated by selling the spectrum would depend on auction prices, of course, but the estimated range is $52 billion to $470 billion.[219] Another benefit to this transition would be avoiding the costly mandated transition to televisions that can receive digital broadcasting signals. Thomas Hazlett estimates the cost of that transition, and thus the savings from avoiding that transition, as another $49 to $147 billion.[220]

The main cost of moving broadcasters to cable or satellite would be the dislocation of those who rely on broadcast television and cannot afford the alternatives. There is, however, a fairly easy way to shift this cost to the government for those people who are too poor to afford cable or satellite: Hazlett estimates that the government could pay for satellite dishes or cable hook-ups and a basic set of channels (slightly better than they were getting via broadcast) for about $300 per household.[221] This would produce a total cost of $3 billion, and everyone who could not afford cable or satellite would be able to move to satellite.[222] Even if Hazlett is wrong and the cost is $1000 per household, this would still yield a total cost of $10 billion, far less than the spectrum would bring at auction.[223]

Without the high levels of cable and satellite subscribership, and the relatively low cost of subsidizing those without cable or satellite to get it, ending broadcasting would be a much less attractive

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219. *Id.* Another estimate of the auction value of the broadcast spectrum, based on the auctions for spectrum for third generation wireless services, is $367 billion. *See* MICHAEL CALABRESE, BATTLE OVER THE AIRWAVES: PRINCIPLES FOR SPECTRUM POLICY REFORM 4 (New Am. Found., Working Paper, 2001); Thomas Lenard, *No More Delays on Digital TV* (May 4, 2004), *available at* http://news.com.com/2010-1040-5203382.html.

Hazlett has further noted that the auction value would not capture all the value, as there would be considerable consumer surplus—indeed he suggests that the *annual* consumer surplus could be as high as the total auction bids (i.e., $52 billion to $470 billion). *See* HAZLETT, *supra* note 216, at 21.

220. *See* HAZLETT, *supra* note 216, at 14.

221. *See id.* at 16.

222. J.H. Snider and Michael Calabrese note that we could complete the conversion to digital television, and thus reclaim half the spectrum devoted to broadcast (because right now, broadcasters have two six-megahertz allotments) even more cheaply. If the United States followed the Berlin model and provided (via tax credits) digital-to-analog converter boxes for those low-income people who currently rely on analog over-the-air receivers, the projected cost would be $578 million. Even if all over-the-air households were subsidized (and the low-income households still received their boxes *gratis*), the cost would be only $942 million. *See* Snider & Calabrese, *supra* note 176, at 6 tbl. 3.

223. *See supra* note 219 and accompanying text.

proposition. The obvious comparison is radio broadcasting. Satellite radio is widely available and has had a fairly successful introduction, but the vast majority of radio listeners still rely on broadcast: More than 95% of radio listeners tune in to broadcasters via antennas. If all the radio stations stopped broadcasting, there would be massive dislocation. This is quite different from television broadcast networks, as they could cease broadcasting tomorrow and 88% of viewers would see no alteration in their service.[224]

Note that the decrease in viewing of broadcasting channels does not directly increase the 88% figure, and it is an increase in the percentage of households subscribing to cable or satellite that makes the argument for a switch to cable or satellite all the more compelling.[225] But reducing the viewership of broadcasters will make the migration to cable and satellite more likely and more palatable, for three reasons. First, there will be fewer people who care very much what happens to broadcasters (because, by hypothesis, they are not watching the broadcast stations). Second, lower broadcast viewing means fewer homes to migrate to cable or satellite. As fewer people watch broadcast television, we can expect that more who want to watch television will sign up for cable or satellite service.[226] These viewers will have signed up for cable or satellite on their own. Third, it will be harder for Congress or anyone else to justify occupying broadcasting's valuable spectrum to benefit a smaller and smaller number of people who rely on that spectrum.

Although a decline in broadcasting viewership makes it easier to move broadcast channels to cable and satellite, this does not mean that moving the channels to cable or satellite will bring about the demise of the stations that currently broadcast. On the contrary, there is good reason to expect that the stations that currently broadcast will continue operating as they have been—the only

224. Also, radio has more diversity in its programming, because there have always been lots of radio stations in each market. *See* Karl A. Groshaufmanis, Comment, *What Films May We Watch: Videotape Distribution and the First Amendment*, 136 U. PA. L. REV. 1263, 1277 n.107 (1988).

225. As the percentage of television households who subscribe to cable or satellite increases and the percentage of households who rely on broadcasting concomitantly decreases, the opportunity cost of devoting valuable spectrum to reach people rises.

226. It bears noting that the rate of cable and satellite subscribership has been inversely related to broadcasters' market share. *See supra* note 154 and accompanying text.

difference will be that all viewers, instead of most, will see them via cable or satellite rather than via an antenna. For the vast majority of households, the broadcast component of their local station is irrelevant. The local broadcast stations are carried over the cable wire or via satellite. So if everyone receives television via cable or satellite, instead of almost everyone, the local stations should be able to operate as before.

But won't cable and satellite networks exclude these local stations, thereby depriving viewers of a station that they would want to see? In fact, the history of cable and satellite networks indicates otherwise. Both have sought to carry popular local stations, and satellite in particular has been hurt by its failure to carry them.[227] The larger answer, though, is that insofar as we have any fear that cable or satellite providers will want to exclude major local stations, or insofar as we want to ensure that even marginal

227. There are two empirical bases for believing that cable and satellite networks would want to carry such local channels. The first is the experience of local network stations in their relations with cable networks. The must-carry statute gives local broadcasters two options: they can opt for must-carry (in which case they must be carried but they receive no compensation), or they can opt instead for retransmission consent. If they choose the latter, they can negotiate for compensation from the cable network, but if the negotiations fail they have no right to be carried. Importantly, they make this decision at the outset. Thus, stations that choose to negotiate for retransmission consent do not rely in any way on must-carry; it has no impact on them. As it turns out, in almost every instance an affiliate for ABC, CBS, Fox, or NBC has opted for retransmission consent. The local stations believe that they add so much value to the cable operators that they can demand compensation from those operators; and the operators provide that compensation—demonstrating that the local stations' calculation is correct. Must-carry, as it turns out, is utilized only by marginal stations with low viewerships.

The second empirical basis arises from satellite television. Until recently, satellite providers did not have sufficient satellite capacity to allow them to provide local channels to their subscribers, who had to rely on their antennas for local stations. This proved to be a significant problem for satellite providers. Cable networks made much of this difference, emphasizing in their advertising that only cable would provide premium channels as well as all the local ones. It turned out that this really did matter to many customers: the most common reason given for customers rejecting satellite was that they could not receive their local channels through the same satellite receiver. People wanted to see local broadcast channels even when they used cable or satellite.

Admittedly, this experience applies only to local broadcast stations that are at least as popular as the less popular cable stations. Cable and satellite companies like to carry such stations (e.g., the network stations), because it makes their service more attractive. Note that this is a fairly low threshold, as the less popular cable stations have low ratings. Some local broadcasters, however, have very few viewers. If some local broadcasters have so few viewers, however, it is not clear why we would care about their demise. If we do care about their well being, however, that would be an argument for continuing the must-carry regime.

local broadcasters are carried, there is an obvious solution: the statutory regime already in place that mandates carriage of local broadcast stations.[228] All that would be required is for Congress to eliminate the reference to broadcasting (as the stations would not broadcast anymore) and replace it with whatever criteria Congress deemed suitable.[229]

Maybe the fear is that the shift to cable and satellite transmission will make the local stations' programming and/or the networks'

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228. *See supra* note 171 and accompanying text.

229. Note that this need not produce any difference in the number or identity of the stations carried. The statute could, for instance, simply require carriage of all broadcast stations operating as of the date of passage of the revised legislation. This would grandfather those stations indefinitely, which in practice is no different from the situation that currently applies to broadcast stations. Although the FCC retains the authority to deny renewal to a station and thus force it off the airwaves, Congress narrowed the bases for non-renewal in the Telecommunications Act of 1996, and the FCC has not denied renewal to a single television license since then (and the one radio license it attempted to revoke—because the station claimed to be minority controlled when it was not—was reinstated on appeal. Trinity Broad. of Fla., Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000)). Formats are freely changeable and licenses freely transferable (and the transferee gets the same renewal expectation as the original incumbent had), so the ability of a station to change its format or ownership could remain as is.

It bears noting, however, that this would give Congress an opportunity to choose other options that might serve different—and perhaps better—goals. Cable operators' major complaint about must-carry is that it requires them to carry stations that have very low market shares, and that can operate successfully only because they are guaranteed carriage on the cable network. Congress could mitigate this phenomenon by requiring, for example, carriage of only stations that exceeded a certain level of viewer support.

This might be appropriate given the attempts by unpopular stations to utilize the DTV transition to force cable companies to carry them. Most notably, KVMD television in Twentynine Palms, California decided to cease analog broadcasting and switch to digital-only, apparently because the reach of its digital signal was greater and thus it could demand that cable companies that had not carried its analog signal be forced (under the must-carry regime) to carry its digital signal. *See, e.g.*, Mediacom California LLC, 2003 WL 22682107 (FCC Nov. 14, 2003) (discussing KVMD's demand that a cable operator, which had not carried its analog signal, carry its digital signal in light of the broader reach of that signal); KVMD Licensee Co. v. Comcast Cable Communications, Inc., 19 F.C.C.R. 5245 (2004) (discussing same). In this endeavor, it has met some success: the FCC has required that some companies carry its digital signal in light of its greater reach. *See, e.g.*, *id.* ¶ 17. The irony is that KVMD is not only unpopular, but also is a creature of must-carry. In fact, KVMD averred in its petition to stop broadcasting its analog signal that "there is no over-the-air viewing of KVMD(TV)." KVMD(TV), Twentynine Palms, CA Second Request to Discontinue Analog Operations, 18 F.C.C.R. 9131, 9131 (2003). KVMD explained that "nearly all of those who view the station receive KVMD(TV) through cable and direct broadcast satellite, not through over-the-air transmission." *Id.* KVMD did not need to worry about losing over-the-air viewers when it ceased analog broadcasting, because it had none. In other words, KVMD is just another cable station—one that would not exist but for the must-carry regime.

programming less popular, resulting in local stations and/or the networks losing viewers even though they will still be available to every television household. But why would that be? Local stations, and the network programming they carry, are already just another cable channel for the vast majority of viewers, and yet local cable and satellite subscribers view their local stations in disproportionate numbers.[230] Why would that change once the relatively few remaining broadcast viewers transition to cable or satellite viewing?[231]

More fundamentally, why should we expect the evaporation of local or network viewership with cable/satellite going into 100% of television households when it has not happened at 88%? For if the feared change did not occur in the earlier transition from 30% to 40%, or 50% to 60%, why would it happen in the transition from 88% to 100%?

In any event, the bottom line is that increasingly few people watch broadcast television (whether via cable or via old-fashioned antennas), and even fewer people rely on old-fashioned antennas for their television service. The massive allocation of societal re-

230. *See supra* note 156 and accompanying text (noting that the average local network station carried on cable has higher viewership than does any cable or satellite channel).

231. We can imagine situations in which the television stations that currently serve as local broadcasters do not fulfill that function when they no longer utilize the spectrum. Perhaps the local broadcasters' spectrum is put to a higher-valued use and the local broadcasters decide not to operate as local channels on cable and satellite because they can make more money operating as, for example, home shopping channels. Or maybe they do want to operate as cable and satellite channels but there is no must-carry legislation, and I am wrong that the cable and satellite companies will want to carry these local stations. Or, finally, maybe the local broadcasters decide to abandon television altogether, and provide, for instance, wireless telephone service. What would happen in one of those situations?

The answer is that if there is a desire among viewers for such stations, we should expect that cable and satellite companies will provide them. This is what economic theory would predict. *See* BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 86-87 (1992) (stating that a provider will always carry a particular station as long as it is economically viable). It is already happening, in that many cable operators carry local stations, with programs focusing on local issues, that do not broadcast. Cable operators carry such stations without any obligation to do so, for the same reason they carry any station: because it enhances the cable company's profits. Indeed, if anything cable and satellite providers might carry *more* locally oriented programming once the migration to cable and satellite is complete, as the increase in channel capacity leads to more niche programming—including, of course, programs aimed at the local market. *See* Yoo, *supra* note 153, at 1661-62. Simply stated, we are likely to get local stations one way or the other—as long as there is a demand for them. So even if we lose particular stations, we have every reason to expect that others will rise in their places.

sources—principally in the form of spectrum—for broadcast is getting harder to defend. Accordingly, I suggest that America would be best served by policies that hasten the demise of broadcasting—or, more precisely, by the opening of the spectrum currently devoted to broadcasting to other uses.

IV. RAMIFICATIONS

A. Will the Migration of Broadcast Channels to Cable and Satellite Produce a Convergence of Broadcast and Cable/Satellite Regulation?

The transition from local stations' distribution to 12% of the viewers via broadcasting to their distribution exclusively via cable or satellite may spur a change in what stations are required, or forbidden, to air: once local stations are no longer broadcasting, policy makers may find it difficult to support the existence of different regulatory regimes for broadcast and cable/satellite. There are fewer divergences between the regulatory schemes for cable and broadcast television than once existed. For instance, the FCC repealed the Fairness Doctrine in 1987,[232] and the D.C. Circuit mandated the repeal of the personal attack and political editorial rules in 2000.[233] But a number of regulations remain that apply to broadcasting and not to cable or satellite—notably, limitations on the airing of indecency, guidance on children's television, and equal access and equal time requirements for elections.[234]

The full migration of local broadcasters to cable might speed up a convergence of broadcast and cable/satellite regulations, but it need not, of its own force, change the regulatory terrain. The fact of the move from 88% to 100% alters little that courts have found to be

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232. Complaint of Syracuse Peace Council Against Television WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987). *See generally* BENJAMIN, *supra* note 107, at 168-84.

233. Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000). The court did not reach the question of whether the rules were consistent with the First Amendment, and it stated that the FCC could still institute a new rulemaking proceeding "to determine whether, consistent with constitutional constraints, the public interest requires the personal attack and political editorial rules." *Id.* at 272. Instead the Court based its decision on the FCC's response (or lack thereof) to the court's orders. *Id.* The FCC has declined, however, to reinstate the rules.

234. *See* BENJAMIN, *supra* note 107, at 189-278.

relevant in justifying the distinction between broadcast and cable/satellite regulation. It may, though, have the salutary effect of encouraging courts and policy makers to recognize the reality that already exists at 88%—namely that most of the bases on which they rely in distinguishing broadcast from cable and satellite are not tenable.

Let's begin with what might seem like the most obvious change—the imperiling of regulations that rely on the fact that broadcasters use the spectrum. In *Red Lion Broadcasting Co. v. FCC*,[235] the Supreme Court upheld the personal attack and political editorial rules against a First Amendment challenge based on the rationale that the spectrum was scarce and subject to interference.[236] As a result of *Red Lion*, regulations designed to ensure that certain content appears on the airwaves—currently, this comprises regulations on children's television and on candidates' access to television time—might be construed as relying on the fact that spectrum is scarce and that broadcasters utilize spectrum in their transmissions.[237] If so, the migration advocated in this Article would seem to undercut those regulations.

One problem with this reasoning is that these days very few people take spectrum scarcity seriously as a rationale for broadcast regulation. As numerous commentators (beginning with Ronald Coase in 1959 and continuing to the present day) have pointed out, there is nothing special about spectrum in terms of scarcity or interference.[238] All rivalrous goods are subject to interference and the various ways in which spectrum is scarce are shared by most other goods.[239] Lower courts, scholars, and even the FCC at one

235. 395 U.S. 367 (1969).

236. *Id.* I discuss the rationale of *Red Lion* in greater depth in Benjamin, *supra* note 160, at 39-41.

237. *See* BENJAMIN, *supra* note 107, at 204-39, 263-78; Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007, 2010 n.6 (2003) (noting cases and FCC materials relying on the scarcity rationale as justifying broadcast regulation).

238. *See, e.g.*, MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 7-18 (1986); Benjamin, supra note 160, at 41-43; R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959); Hazlett, *supra* note 183, at 138 n.15; Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 213 (1987).

239. *See* KRATTENMAKER & POWE, *supra* note 166, at 53-54 (comparing the spectrum to labor, steel, and land); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*,

point,[240] have persuasively contended that the scarcity affecting spectrum is no different from the scarcity affecting newsprint or printing presses.[241] Indeed, these arguments are so widely accepted today that the commentators who defend special treatment of broadcasters do so on other grounds.[242] Scarcity has been so thoroughly discredited as a rationale that its demise seems inevitable.

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64 N.Y.U. L. REV. 990, 991 (1989) (asserting that neither the scarcity argument nor the government property rationale justifies government ownership of the broadcast spectrum).

240. *See* Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043, ¶ 65 (1987):

> We ... believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore ... we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.

But see Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 F.C.C.R. 19,973, ¶ 17 (2000) (repudiating "the dicta in Syracuse Peace Council regarding the appropriate level of First Amendment scrutiny" for broadcast), *vacated by* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000). *See also* Separate Statement of Harold W. Furchgott-Roth, Guidance on the Commission's Case Law Interpreting 18 U.S.C. Section 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 8020, 8020-21 (2001) (noting that the "continuing validity" of *Red Lion* and *Pacifica* "is highly doubtful from both an empirical and jurisprudential point of view" and arguing that "as alternative sources of programming and distribution increase, broadcast content restrictions must be eliminated").

241. *See* Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 n.4 (D.C. Cir. 1986) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose ... and it appears that currently 'the number of broadcast stations ... rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried.'") (quoting Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983)) (second alteration in original); Coase, *supra* note 238, at 14 ("[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce...."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 903-04 (1998) (stating that it no longer makes sense to base regulation of the radio spectrum on scarcity); Spitzer, *supra* note 239, at 1012-20 (identifying different versions of the scarcity rationale and arguing that "none of these basic scarcity arguments provides a relevant difference between print and broadcast that justifies treating the two differently").

242. *See* Benjamin, *supra* note 160, at 5 ("The few commentators who defend the markedly weaker judicial scrutiny of broadcasters' regulation than of newspapers' regulation have justified that distinction on grounds other than scarcity." (footnote omitted)); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1688-92 (1997) (arguing that the scarcity rationale does not justify government regulation of the spectrum, but that such regulation can be justified as a quid pro quo for the government's granting of spectrum licenses).

The main holdout thus far has been the Supreme Court. In *Red Lion* and in *National Broadcasting Co. v. United States*,[243] the Court invoked scarcity. Although in a later case the Supreme Court suggested that it would reconsider its scarcity rationale upon a "signal from Congress or the FCC,"[244] and although "[the Court] has not lately given the distinction [between broadcast and other media] an enthusiastic endorsement,"[245] the Court has not revisited the scarcity rationale since *Red Lion* was decided in 1969.[246]

If the Supreme Court concludes that spectrum scarcity is still relevant, there is a straightforward answer to the question whether the migration of the remaining 12% of viewers from broadcasting would prevent operation of the scarcity rationale and thus imperil broadcast regulation: no. The projected shift would switch many of the 12% to satellite—and satellites, of course, use the spectrum. The percentage of viewers whose service uses the spectrum would thus decline only modestly. So if we think that spectrum scarcity really is a valid rationale, then it can still apply, because it would apply to satellite broadcasting.[247] In fact, the D.C. Circuit so ruled in *Time Warner Entertainment Co. v. FCC*.[248]

Many will respond to the previous paragraph the way that five judges of the D.C. Circuit did (in an unsuccessful attempt at rehearing *Time Warner Entertainment*): it would be absurd for spectrum scarcity to apply to satellite broadcasting's use of the spectrum.[249] This reinforces my larger point about the likely demise

243. 319 U.S. 190 (1943) (upholding the chain broadcasting rules, which restricted the contractual arrangements that radio networks could have with broadcasters).

244. FCC v. League of Women Voters, 468 U.S. 364, 377 n.11 (1984) ("We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.").

245. Action for Children's Television v. FCC, 58 F.3d 654, 674 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

246. I discuss the implications of the scarcity rationale for government decisions that create unused or underused spectrum in Benjamin, *supra* note 160, at 38-45.

247. I am not advocating such a result. Treating cable and satellite differently would create the same sort of (unfortunate, in my view) regulatory distortions that treating broadcast different from cable and satellite already creates. I am simply observing that the notion that spectrum scarcity justifies regulation would seem to apply to all spectrum services.

248. 93 F.3d 957 (D.C. Cir. 1996).

249. *See* Time Warner Entm't Co. v. FCC, 105 F.3d 723, 724 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc); *see also* Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 355 (4th Cir. 2001) (applying intermediate scrutiny, rather than

of the scarcity rationale. Of course spectrum is no longer meaningfully scarce in the way that *Red Lion* seemed to conceive of it—and the profusion of broadcast satellite offerings highlights that fact.[250]

Even if the scarcity rationale was affected by the migration of local stations from the broadcast spectrum to the satellite spectrum, this might have limited significance, for two reasons. First, the regulations that the Supreme Court has justified on scarcity grounds might be justified on other grounds. Second, many broadcast regulations have not been justified on the scarcity rationale in the first place.

The first point flows from the fact that some commentators have sought to justify a wide range of broadcast regulations on grounds other than those invoked by the Supreme Court. The most widely suggested alternative to spectrum scarcity is that regulation is a quid pro quo for the government giving something of value (the spectrum) to broadcasters free of charge.[251] The Supreme Court has not adopted the quid pro quo rationale, and there are good reasons not to adopt it.[252] But the Supreme Court might well embrace it, especially as it seems more tenable than scarcity.[253] If so, the movement from spectrum to cable and satellite would not necessarily undermine broadcast regulation. The quid pro quo rationale could retain its force if the government gave these new channels special status (e.g., the new form of must-carry), or allowed

lower scrutiny of *Red Lion*, to a statute obliging satellite operators to carry *all* local stations if they choose to carry *any* local stations).

250. Indeed, the reasoning of Judge Williams' dissent from the denial of rehearing en banc in *Time Warner Entertainment* would imperil the scarcity rationale as applied to any use of spectrum—a conclusion he elided by suggesting that it was the role of the Supreme Court, not a court of appeals, to "announce its death." *See* 105 F.3d at 724 n.2.

251. *See, e.g.*, Logan, *supra* note 242, at 1688-92 (arguing that the scarcity rationale does not justify government regulation of the spectrum, but that such regulation can be justified as a quid pro quo for the government's granting of spectrum licenses).

252. *See* SUNSTEIN, *supra* note 192, at 108-09 (arguing that "the fact that [the government] chooses to allocate licenses as it does, rather than through ordinary markets, ought not to give it power that it would not otherwise have"); Spitzer, *supra* note 239, at 991-92 ("The government property rationale also should fail because the government, limited by the First Amendment and other constitutional provisions, cannot do 'anything' it likes with its resources.").

253. *See* Logan, *supra* note 242, at 1700-05, 1725-46 (arguing that the quid pro quo rationale is stronger than the widely debunked scarcity rationale).

broadcasters to receive some of the funds that come from selling the spectrum that they formerly occupied.[254]

The second point is that some regulations have not been justified on scarcity grounds. A major example is the regulatory scheme that Janet Jackson has made newly hot—indecency. The Supreme Court upheld the regulation of broadcast indecency in *FCC v. Pacifica Foundation*,[255] but in doing so it eschewed reliance on scarcity and instead relied on broadcasting's "uniquely pervasive presence in the lives of all Americans" and its finding that "broadcasting is uniquely accessible to children."[256] The Court's failure to rely on the scarcity rationale is striking given that the FCC, in its order penalizing Pacifica and in its brief to the Supreme Court in *Pacifica*, relied in part on scarcity.[257] The Court invoked other rationales that the FCC suggested (i.e., pervasiveness and accessibility), but the Court did not then, or in any later case, suggest that scarcity was relevant to the validity of indecency regulations.[258] Significantly, the rationales on which the Court did rely apply just as well to cable or satellite as they do to broadcasting. It is hard to distinguish broadcast from cable and satellite on grounds of pervasiveness and accessibility to children.[259] For the vast majority of children (and adults), cable and satellite are the means by which television signals come into their houses and allow them to sample material as they surf channels. This is exactly the role broadcasting played for the overwhelming majority of users when *Pacifica* was decided in 1978, and for a relatively small minority today. Once one chooses to bring a television into the home and subscribe to cable or satellite, those services are just as pervasive and accessible as broadcast. Accord-

254. I am not in favor of the government granting licensees anything of value for purposes of retaining its regulatory authority, but I do note that it could occur.

255. 438 U.S. 726 (1978).

256. *Id.* at 748-49.

257. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94, ¶ 9 (1975); Brief for the Federal Communications Commission at 39-40, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528).

258. *See, e.g.*, *Pacifica Found.*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) ("The opinions of my brothers POWELL and STEVENS rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. As Chief Judge Bazelon noted below, 'although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.'" (quoting Pacifica Found. v. FCC, 556 F.2d 9, 29 (D.C. Cir. 1977)).

259. *See* Action for Children's Television v. FCC, 58 F.3d 654, 676-77 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

ingly, the migration of the remaining 12% of viewers should not change the constitutional status of indecency regulation for broadcast.

Other regulations are justified on competition grounds based on the still significant market share of the major broadcasters. Indeed, that is how the ownership rules issued on June 2, 2003 are justified.[260] As I have noted, there is every reason to expect that the audience shares of local stations will be just as high after the migration as before.[261] So, insofar as that market position opens the door to some forms of regulation, the migration to satellite and cable would not change anything.

This is not to suggest that either policymakers or judges should conclude that broadcast should continue to be regulated differently from cable and satellite even after the migration to cable and satellite is complete. On the contrary (and as the discussion above indicates), I believe that, both as a matter of policy and constitutional law, there is little basis for distinguishing broadcast from cable and satellite; and I would hope that policymakers and judges would agree. But the mere existence of a move from 88% of households relying on cable or satellite to 100% so relying has relatively little legal significance in terms of the regulations currently applicable to broadcasting. The legal differences between a world of 88% cable or satellite subscribership and a world of 100% are fairly modest.[262]

That said, one advantage of 100% migration is that it would make it more difficult for policymakers or judges to ignore the great deal of convergence that has already occurred. As I noted above, cable

260. *See* 2003 FCC Ownership Order, *supra* note 1, ¶ 58.

261. *See supra* notes 227-31 and accompanying text.

262. The move from 88% to 100% for cable and satellite increases the importance, and perhaps the desirability, of competition rules applicable to cable and satellite operators. The move from 88% to 100% may be no more important than the move from 76% to 88%, but the ever-increasing role of two pathways—cable and satellite—tends to strengthen regulations designed to ensure competition.

Note, though, that the trend is not quite so simple. The increasing substitution of the Internet for television programming weakens the argument for regulating cable and satellite. Insofar as there is a single market for news and entertainment that includes both cable and the Internet, control over cable seems less scary.

In any event, insofar as my proposals would, in fact, lead to greater market power for cable and/or satellite, that would tend to support regulations designed to prevent harms to competition.

and satellite have long shared with broadcast many of the characteristics that were thought to be unique to broadcast. The similarities that would be painfully obvious at 100% migration already exist at 88%. The main effect of 100% migration, then, would likely be to spur a long overdue reassessment of the differences in regulatory regimes.

B. Will the Practical Demise of Broadcasting Lead to Spectrum Flexibility?

Part II.C suggested that networks have persuasively argued that raising the national television station ownership limit will enhance their profitability, and Part III argued that the demise of broadcasting would be good for the country. This does not necessarily mean, however, that the best choice is to keep the ownership caps low. It might be that, even if the networks continue to lose audience share—and maybe even go out of business entirely (or become cable networks and abandon their local broadcast stations[263])—members of Congress still would refuse to put that spectrum to other, more valuable uses. That is the risk of the position that this Article advocates. The practical demise of broadcasting would occur, but the government still would be dedicating enormously valuable spectrum to it. This would be the worst possible outcome: network television would be moribund, and the policymakers would still be unwilling to allow society's resources to shift to a better use.

My view is that this risk is fairly small. If few people watch local television, the pressure on Congress to put that spectrum to better uses will be intense. There would be significant interests supporting a change in spectrum usage. Two bear mention. The first is new and expanding wireless communications companies—who would relish the opportunity for spectrum with great propagation characteristics that would probably be cheaper to buy than spectrum has been in the recent past, precisely because so much new spectrum would become available. The second is whomever would get the revenue

263. Michael Eisner of Disney threatened to do exactly that with ABC when the ABC affiliates balked at contributing money for Monday Night Football. That is, he proposed the "nuclear" option to the affiliates—if they didn't agree, he would turn ABC into a cable channel. Steve McClellan, *ABC Affils Bristle at Brush-off*, BROADCASTING & CABLE, Oct. 5, 1998, at 10.

from spectrum auctions. The obvious possible recipients of this revenue are the broadcasters themselves (if they were allowed to keep their licenses and resell them) or the government (if it chose either not to renew the licenses or to seize them in eminent domain and pay their fairly small value as broadcast licenses—remember that the licenses can be used only for broadcasting, and that we are positing that broadcasting is attracting few viewers). The value created by allowing the licenses to be used for any purpose is very great, and with any luck the license holders and government officials would be able to divide this value in a way that would give a sufficient incentive to both groups to support opening up the spectrum to other services. As the ratings for broadcasters decline, and as more and more users receive the broadcasters' signal via cable or wire, the divergence between the value of the licenses for broadcasting only and the value of the licenses for a wide range of services will increase. In light of this widening divergence of broadcasting-only versus flexible licenses, the political viability of a change in the license restrictions should increase. With any luck the desire (and lobbying power) of the license holders to receive greater value and the desire of members of Congress for new sources of revenue would overwhelm whatever remaining sentiment existed in favor of keeping spectrum devoted to broadcasting. My hope, and belief, is that with plummeting ratings for broadcast, the pressure on the government to reallocate that spectrum would become overwhelming. If I am right in so asserting, then the demise of broadcasting would, indeed, lead to a better allocation of society's resources, and we could root wholeheartedly for that demise.

CONCLUSION

From the affiliates' perspective, the main effect of an increase in the national television station ownership limit will be to reduce the likelihood and importance of their preemptions of network programming. From the networks' perspective, the main effect of an increase in the ownership cap will be to enhance their profitability. My suspicion is that most readers of this Article are not sympathetic to the decisions of local stations to preempt network programming that the local station deems likely to offend the sensibilities of its audience. Indeed, I suspect that many would affirmatively prefer that cultural conservatives lack that power. For such people (some of whom spoke out in opposition to the increase in the national ownership limit[264]), the case for raising the ownership cap might seem strong: Who could oppose a measure that would strengthen broadcasting?

In this Article, I take up that cudgel, arguing that the country would be better off reallocating the valuable resources currently devoted to broadcasting to other purposes. In my view, the best policy option is one that allows the spectrum to be used for other services and avoids an expensive mandate for digital broadcasting. And the best way to achieve that goal is to hasten the demise of broadcasting. It is, I acknowledge, in some ways a cynical proposal. But it is no more cynical than the hardball political economy of the broadcasters (and government actors) that has gotten us into this position in the first place.

264. *See supra* note 47 and accompanying text.