Efforts to regulate the media threaten quantity, quality, and diversity.

Architectural Censorship and the FCC

BY CHRISTOPHER S. YOO
Vanderbilt University

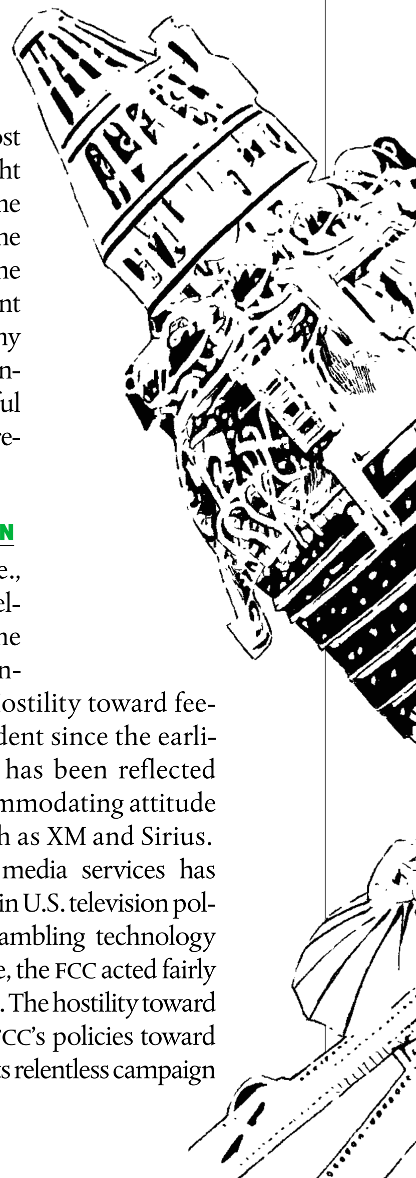
FIRST AMENDMENT ANALYSES OF MEDIA regulation have long focused on government efforts to influence media content directly, either by imposing restrictions on disfavored speech (such as indecency) or by mandating carriage of favored speech (such as campaign advertising and children's educational programming). In contrast, ownership restrictions and other forms of structural regulation have generally been thought to pose fewer First Amendment concerns. As a result, the constitutionality of structural regulation has received considerably less attention.

But structural regulation—such as efforts to foster free television over pay television, rate regulation of cable television, restrictions on the number of outlets one entity can own in any media market, and regulations limiting vertical integration in television and radio—have had a dramatic influence on program content. Not only can structural regulations reduce the overall quantity and quality of media programming, but they can also create biases against the diversity of media content. Put another way, structural regulation often represents a form of "architectural censorship."

One would hope that the First Amendment would provide a basis for identifying and redressing architectural censorship when it arises. Unfortunately, such hopes would be misplaced. Recent judicial decisions indicate that the most stringent standard of review that might be applied to structural regulation is the intermediate scrutiny announced in the 1968 case *United States v. O'Brien*. The failure of the Supreme Court's recent effort to put teeth in *O'Brien* scrutiny makes it unlikely that architectural censorship will be subject to meaningful First Amendment review in the foreseeable future.

Christopher S. Yoo is an associate professor of law at Vanderbilt University. He may be contacted by e-mail at christopher.yoo@vanderbilt.edu.

Yoo presents a more extensive discussion of these issues in an article by the same name in the March 2005 issue of the *Southern California Law Review*.



FREE RADIO AND TELEVISION

The desire to promote free (i.e., advertising-supported) radio and television over pay versions of the same media has long been one of the central tenets of U.S. media policy. Hostility toward fee-based radio services has been evident since the earliest days of radio regulation and has been reflected more recently in the FCC's unaccommodating attitude toward satellite radio services such as XM and Sirius.

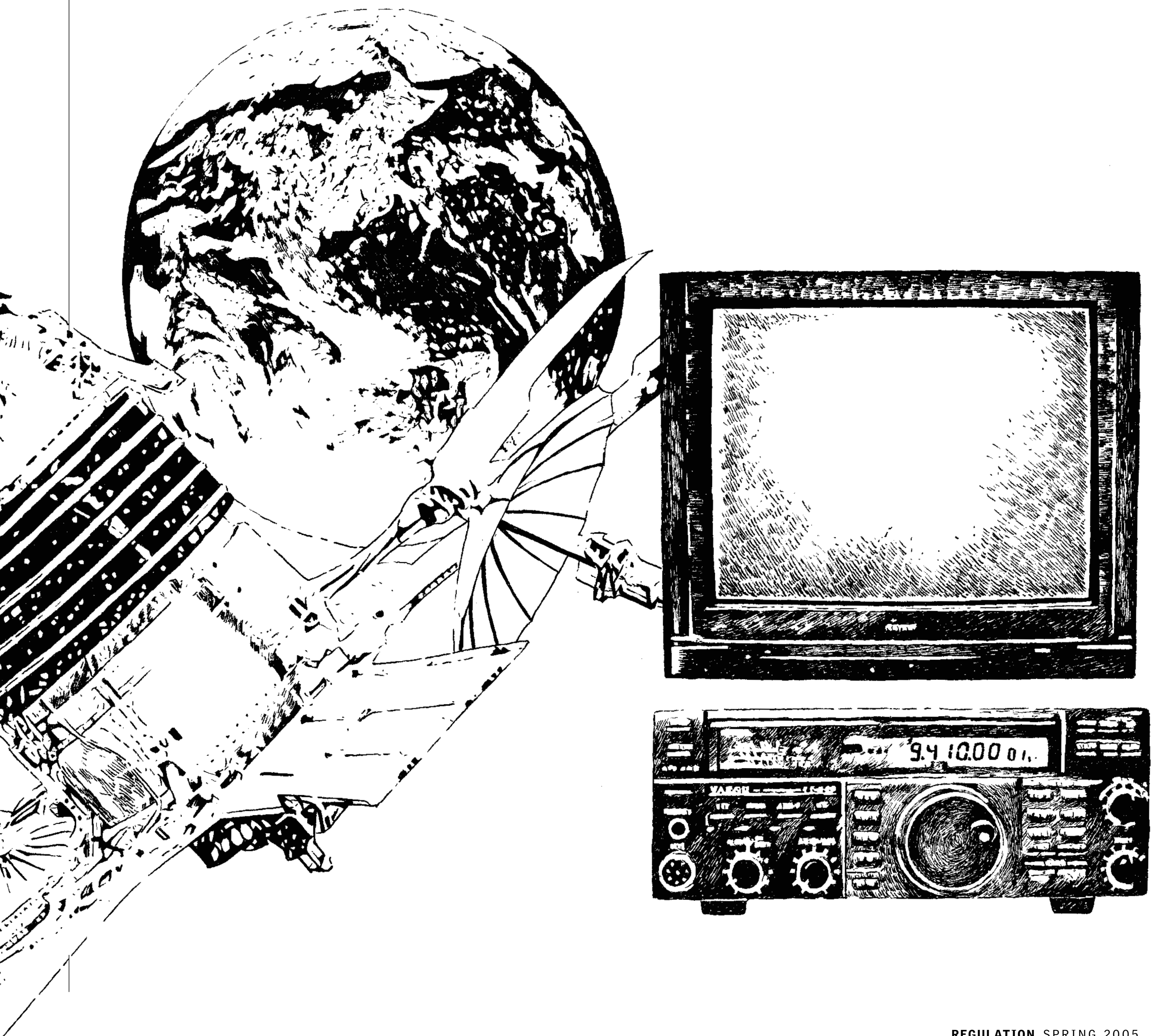
Antagonism toward fee-based media services has played an even more prominent role in U.S. television policy. When the development of scrambling technology made subscription television feasible, the FCC acted fairly quickly to stifle the industry's growth. The hostility toward pay television was manifest in the FCC's policies toward cable television, most particularly in its relentless campaign

to require local cable operators to provide free carriage to all full-power broadcast stations operating in their service area (commonly known as "must carry"). The desire to foster free television is further reflected in the steps taken to regulate direct broadcast satellite systems like DirecTV and Dish Network. It also underlay the FCC's decision to deploy digital television through broadcasters rather than through cable and satellite providers.

QUANTITY The key problem is that the policy preference for "free" television and radio is likely to lead to a systematic underfinancing of media programming. When radio and television broadcasters are prevented from charging directly for their services, advertising support represents their only source of revenue. Although it is theoretically possible that the audiences' responsiveness to advertising might yield the same net revenue as direct payments for the underlying programs, there is no theoretical reason to expect those levels to be the same.

In fact, the available empirical evidence indicates that advertisers place a significantly lower value on programming than do viewers and listeners. One study conducted in the 1970s estimated that viewers were willing to pay seven times more for television programming than were advertisers. Those early results have been confirmed by a pair of recent event studies, one by Steinar Holden and the other by Claus Thustrup Hansen and Søren Kyhl, showing that television programs financed by pay-per-view generate significantly greater revenue than programs financed by advertising support. Thus, the decision to favor advertising-supported programming over user fee–based programming is systematically starving television and radio of resources, reducing the total amount of television and radio programming produced.

QUALITY AND DIVERSITY The policy preference for free television has also adversely affected the quality and diversity of



MORGAN BALLARD

media programming. In ordinary markets, low-volume sellers exist by targeting consumers who place a particularly high value on specific product niches and charging them more for those products, as evidenced by the survival of specialized boutiques in a world dominated by mass-market discounters.

Advertising support effectively forecloses audiences from using prices to signal the intensity of their preferences. Viewers are left with only two options: they can either view the programming offered by the network, in which case the network derives revenue equivalent to the viewers' responsiveness to advertising, or choose not to watch, in which case the network receives nothing. This makes total program revenue largely a function of the program's audience size and renders it impossible for small audiences to obtain the programming they want no matter how much they are willing to pay for it. Reliance on advertising support thus tends to reduce the diversity of the programming mix by preventing the survival of economically viable programs that appeal only to small audiences. In addition, to the extent that program quality is correlated with the amount spent on producing each program, one would expect the preference for advertising support to degrade program quality as well.

The recent success of the cable channel HBO provides an eloquent demonstration of these dynamics. Viewers' ability to use direct payments to signal the intensity of their preferences allows HBO to generate roughly eight times more revenue per viewer than broadcast network CBS, which makes it far easier for HBO to produce programs that appeal to relatively small audiences. HBO's dominance of the most recent Emmy awards underscores the accompanying impact on program quality.

ADVERTISERS AS INTERMEDIARIES A further problem is how advertising support encourages television and radio programmers to be consumerist in focus and makes them overly responsive to those demographic groups that are the most susceptible to advertising. Conversely, it tends to bias the market against programming preferred by those who are the least responsive to advertising. It may thus be no accident that most of the best children's educational programming on commercial television appears on cable.

Reliance on advertising support also allows the biases of particular advertisers to influence the program mix. Anecdotal evidence suggests that some advertisers have discouraged networks from offering programming that addresses controversial issues or that casts their products in an unflattering light. In addition, reliance on advertising support leaves programmers vulnerable to the political biases of advertisers and special interest groups. Consider, for example, the controversy surrounding the 2003 miniseries *The Reagans,* originally scheduled to air on CBS. When dissatisfaction with the portrayal of the former president threatened to erupt into a consumer boycott of any products advertised during the miniseries, Viacom shifted the program from CBS to Showtime, a premium movie channel that does not depend on advertising support. Similarly, when NBC tried to air the movie *Roe v. Wade* in 1989, it faced such a backlash from advertisers that the network eventually opted to show the movie without commercials, which in turn caused it to incur significant economic losses on the project. That contrasts sharply with the relative ease with which HBO was able to air a documentary on the same subject. As one HBO executive explained, "We're not any braver than the networks. It's just that our economic basis is different."

The FCC's historical commitment to promoting a radio and television industry supported by advertising and its hostility toward subscription services thus represents a form of architectural censorship that has had the unintended consequence of reducing the overall quantity, quality, and diversity of radio and television programming.

CABLE TELEVISION

Another common feature of U.S. media policy has been the imposition of rate regulation on the cable television industry, which is widely regarded as a failure. If a regulated entity sells a product that varies in terms of quality, price represents only one of several dimensions along which it can interact with consumers. Unless the regulator imposes comprehensive regulation over quality as well as price, the regulated entity will be able to evade any price restrictions imposed by rate regulation simply by degrading its product offerings.

The empirical evidence strongly suggests that this is precisely what occurred in the cable industry. Although rate regulation caused nominal cable prices to drop, once other characteristics—such as the total number and quality of channels offered—are taken into account, the empirical evidence indicates that rate regulation caused quality-adjusted rates to increase and that deregulation caused quality-adjusted rates to fall. This implies that consumers would have preferred larger, higher-quality bundles of channels than they received under rate regulation, even if doing so meant paying higher prices. In other words, placing a cap on cable rates degraded the quality of existing cable offerings and foreclosed the emergence of higher-quality channel packages despite viewers' willingness to pay for them.

HORIZONTAL CONCENTRATION

The FCC has long restricted the number of media outlets that one entity can own in any local media market. The principal horizontal ownership restrictions have historically included:

- the "duopoly" rule, which prohibited owning two television stations or two radio stations in the same local market;
- the "one-to-a-market" rule, which prohibited cross-ownership of a radio and a television station in the same local market;
- the newspaper/broadcast cross-ownership rule, which banned common ownership of a newspaper and broadcast station in the same local market;
- the cable/broadcast cross-ownership rule, which effectively prohibited the owner of a local cable system from owning a broadcast station in the same local market; and
- the cable/local telephone company cross-ownership rule, which prohibited local telephone companies from providing video programming to subscribers in their local service area.

A series of deregulatory initiatives launched during the administrations of Ronald Reagan and George H.W. Bush led to the relaxation of the duopoly and the one-to-a-market rules, and to the outright repeal of the network/cable cross-ownership rule. A series of lower federal court decisions handed down during the mid-1990s struck down the cable/local telephone company

cross-ownership rule on First Amendment grounds. The issue had been briefed and argued before the Supreme Court when a provision of the Telecommunications Act of 1996 rendered the case moot by eliminating the rule. The 1996 Act also contained a number of other provisions raising many of the thresholds needed to trigger various horizontal ownership restrictions. In addition, Congress directed the FCC to conduct biennial reviews of its ownership rules and to "repeal or modify any regulation it determines to be no longer in the public interest."

The FCC amended a number of its horizontal concentration rules during its initial biennial review, but left most of them intact. The commission was soon shaken out if its languor by a pair of decisions issued by the D.C. Circuit in 2002 striking down the FCC's refusal to revisit the cable/broadcast cross-ownership rule and the revised duopoly rule. The judicial invalidation of the ownership restrictions prompted the commission to undertake a massive reassessment of its ownership regulations as part of its 2002 biennial review proceeding. Rejecting calls for the repeal of most of its ownership rules, the FCC instead replaced its hodgepodge of local ownership restrictions with a new, integrated approach based on a "diversity index" designed to take into account all media when assessing the overall competitiveness of the local market. The FCC supplemented the traditional concerns of competition and diversity of viewpoints with an additional policy consideration: localism. Interestingly, in each instance, the FCC concluded that relaxation of the horizontal ownership restrictions would have no adverse impact on the responsiveness of media outlets to the needs and interests of their local communities. In many cases, the record suggested that permitting greater horizontal concentration would actually promote localism by allowing media outlets to realize the efficiencies associated with co-ownership.

DIVERSITY Many commentators warn that increases in media concentration are likely to reduce the quantity and diversity of media content. It has been recognized since the groundbreaking work of Peter Steiner in the 1950s that this view of the relationship between media concentration and program diversity may be too simple.

The reason is that an independently owned station may find it profitable to enter a market even if its audience consists entirely of viewers stolen from an existing station, an outcome that would not significantly increase economic welfare. If, however, one entity were permitted to own both stations, it would have no interest in simply cannibalizing viewers from the existing station. It would instead target the second station toward an audience segment that was not currently being satisfied, which would cause program diversity to increase. To the extent that joint ownership prevents the fragmentation of audiences, it may also have an impact on program quality as well. There are refinements and limitations that render this conclusion contingent on other considerations. That said, this analysis makes clear that the relationship between media concentration and program diversity and quality is more complex than generally believed.

COST SHARING Horizontal integration can promote the quantity, quality, and diversity of programming offered by enabling entities owning multiple outlets to economize on costs and invest a larger proportion of revenue in programming. In 1987, the FCC recognized that the consolidation of administrative, marketing, and production functions made possible by cross-ownership can reduce costs by 30 to 35 percent.

In addition, like all forms of television and radio programming, local news has public good characteristics. Consumption of local news is nonrival, in that consumption of it by one person does not reduce the supply available for consumption by others. In other words, once the up-front costs needed to gather local information have been incurred, that information can be shared almost costlessly with any number of consumers. The dominance of fixed costs means that economic success depends on spreading the costs of gathering that information over as many paying customers as possible. Allowing media companies to disseminate the news they collect over a wider range of media outlets can thus be critical to ensuring the economic viability of local newsgathering. Empirical studies have largely borne this out. Thus, analysis of industry structure and cost efficiencies both suggest that horizontal ownership restrictions represent a little-recognized but important form of architectural censorship.

VERTICAL INTEGRATION

The FCC has long been concerned that vertical integration in the radio and television industry would harm competition. Such concerns animated the FCC's first major regulatory initiative, known as the Chain Broadcasting Rules, which limited radio networks' ability to own broadcast stations and restricted the networks' ability to use network affiliation agreements to tie up local stations. The rules were sustained by the Supreme Court in the landmark decision in *NBC v. United States.* The FCC extended the Chain Broadcasting Rules to television in 1946. Over time, the FCC would repeal the rules with respect to radio and roll them back with respect to television, but certain television-related provisions still remain in effect.

Congress has also taken steps to limit vertical integration in the cable industry. For example, the "channel occupancy" provision of the 1992 Cable Act authorized the FCC to limit the capacity that cable operators could devote to networks with which they are vertically affiliated. The "leased access" provision requires all cable systems with more than 35 channels to set aside part of their channel capacity for use by unaffiliated programmers. The "program access" provisions prevent vertically integrated programmers from discriminating against unaffiliated operators or from entering into exclusive dealing contracts. The "must-carry" provisions require cable operators to provide free carriage to all full-power television stations broadcasting in their service area.

The FCC has also limited the number of television stations and cable operators that any one entity can own nationwide. Congress codified those requirements in the 1990s, permitting ownership of any number of television stations so long as the total reach of the group does not exceed 35 percent of the national audience and authorizing the FCC to establish a limit to the number of cable subscribers that any one company can reach nationwide, which the FCC even-

tually set at 30 percent of the national audience.

The first round of judicial challenges to those provisions proved unsuccessful. More recent decisions have exhibited a greater willingness to invalidate vertical ownership restrictions. In its 2001 decision in *Time Warner Entertainment Co. v. FCC,* the D.C. Circuit invalidated the 30 percent cable subscriber limit on the grounds that the FCC failed to implement the provision in the manner prescribed by the statute. The court also struck down the FCC's channel occupancy limit on First Amendment grounds. Furthermore, in the 2002 decision in *Fox Television Stations, Inc. v. FCC,* the D.C. Circuit overturned the FCC's decision not to eliminate the national television station ownership cap during its first biennial review, holding that refusal to repeal the rule violated both the Administrative Procedure Act and the FCC's obligations under the Telecommunications Act of 1996. The FCC responded in 2003 by revising the national television station ownership rule to permit companies to own any number of stations so long as the station group could reach no more than 45 percent of the nation's television households. The ensuing controversy led Congress to enact legislation resetting the national television station ownership cap to 39 percent and exempting the national television station ownership restriction from the FCC's biennial review process.

THREAT TO COMPETITION? The nature of the economic threat posed by vertical integration has long been one of the most hotly contested issues in competition policy. Although proponents of the leading schools of antitrust law and economics have often disagreed sharply over the extent to which vertical integration can harm competition, they do share common ground on some basic points. Both sides of the debate agree that certain structural preconditions must be satisfied before vertical integration can threaten competition. Specifically, the leading vertical integration models explicitly or implicitly acknowledge that the primary market must be concentrated before vertical integration can even plausibly harm competition. If this precondition is not met, the allegedly anticompetitive firm has no dominant position to use as leverage. Furthermore, the secondary market must be protected by barriers to entry if attempts to reduce competition in the secondary market are to have any hope of success. In addition, even if those structural preconditions are met, both approaches acknowledge the possibility that efficiencies may exist that nonetheless make vertical integration economically desirable.

The market for television programming can be characterized as a multilevel distribution chain with the uppermost level occupied by the networks and movie studios that create television programs, the intermediate level occupied by the local television stations and local cable operators who acquire programming from program suppliers and deliver them locally, and the bottommost level occupied by viewers. Suppose the FCC banned vertical integration in the television industry and required every television station owner and cable operator to divest any ownership interests that they held in any network or program supplier. Would doing so decrease the ability of television stations and cable operators to exercise market power vis-à-vis viewers? Clearly the answer is no. The market power at that level exists by virtue of the relatively small number of sources from which any particular household can obtain television service. Forcing owners of television stations and cable operators to sell off their proprietary interests in television programming would have no impact on a market in which viewers interact with television stations and cable operators. Note that this market is a local one. Its competitiveness is determined by the number of options available in a specific geographic region and not the number of options available nationwide.

> Restrictions on ownership and contracting limit producers' ability to protect themselves from strategic behavior by local TV stations and cable operators.

Although vertical disintegration would have little impact on the downstream market in which television stations and cable operators meet viewers, it has a more dramatic impact on the upstream market in which television stations and cable operators purchase programming from networks and program suppliers. National ownership restrictions alter the relative bargaining positions of the parties by reducing the purchasing power of television station and cable operator groups. In addition, producing television programming requires the incurrence of substantial up-front costs that leave program producers vulnerable to strategic behavior by local television stations and cable operators. Federal restrictions on ownership and contracting limit program producers' ability to use vertical integration or vertical contractual arrangements to internalize those risks.

Restrictions on vertical integration can thus be justified only as a means for promoting competition in the market in which television stations and cable operators bargain with networks and program suppliers. Even in the extreme case in which a local cable operator possessed monopoly power over viewers in a particular city, the cable operator would not be able to exert significant market power against a television network so long as the network can reach a sufficient number of other viewers located elsewhere in the country. A program producer cares less about whether it is able to reach viewers in any particular city and more about how much of the national market it is able to access. In other words,

it is the network's national reach, not its local reach, that matters. The network would, of course, prefer to be able to reach all viewers nationwide. The fact that it may be unable to reach certain customers is of no greater concern than the fact that manufacturers of particular brands of cars, shoes, or other conventional goods typically are not able to gain access to the entire country. Their inability to reach certain customers should not threaten competition so long as they are able to obtain access to a sufficient number of customers located elsewhere. The proper question is thus not whether the television stations and cable operators wield market power in the local market for television viewers in any particular city, but rather whether groups of television stations and cable systems possess sufficient market power to harm competition in the nationwide market for obtaining television content.

When viewed in this manner, it becomes relatively clear that the relevant primary market is unconcentrated. Consider, for example, the current national television station ownership rule, which prohibits television station groups that can reach more than 39 percent of the U.S. television audience. It would be a mistake to assume that this limit would permit a television station group to control 39 percent of the market. According to the most recent Nielsen ratings, no television network is able to capture more than 15 percent of the audience that it reaches. Thus, even if a group of televisions stations were able to reach 39 percent of the U.S. market, it would only be able to capture less than one sixth of those viewers. Setting the national audience cap at 39 percent effectively guarantees that no group of television stations will control more than 6 percent of the national audience. In that case, there would be at least 16 independent players bidding in the national market for television programming, more than enough to ensure that the market does not suffer from competitive harms. Indeed, those numbers suggest that there would have been little danger in setting the national audience cap at a level substantially higher than the 45 percent limit that was overturned by Congress.

Similar reasoning applies to the national cable subscriber limits. As of June 2002, no multichannel video program distributor controlled more than 15 percent of the national market. Even after Comcast's acquisition of AT&T's cable properties, the market for multichannel distributors remains too diffuse to give rise to anticompetitive concerns. The non-emergence of any significant harm to competition following mergers between America Online and Time Warner, Disney and ABC, Viacom and CBS, and Time Warner and Turner Broadcasting, despite dire predictions to the contrary, attests to the ease with which concerns about vertical integration can be exaggerated.

BENEFITS When the structural preconditions needed for vertical integration to harm competition are not met, it is generally presumed that vertical integration represents an attempt to realize efficiency gains. The cost structure of media programming makes this possibility quite plausible. Because the creation of television programming typically requires the incurrence of substantial sunk costs, program producers can be vulnerable to hold-up, free riding, and other forms of strategic behavior. The classic solution to such problems is through vertical integration or some form of vertical contractual restraint. Empirical studies confirm that, on balance, vertical integration in the cable industry tends to be welfare enhancing.

It thus appears that the structure of the television industry makes it unlikely that vertical integration will harm competition. This implies that the existing limits on vertical integration only serve to prevent industry participants from realizing the available efficiencies, which, in turn, reduces total quantity, quality, and diversity of speech. As a result, the regulatory restraints on vertical integration appear to represent still another form of architectural censorship.

THE FIRST AMENDMENT

Many structural regulations thus affect the quantity, quality, and diversity of radio and television programming. One might expect that structural regulation would be subject to meaningful scrutiny under the First Amendment. But recent Supreme Court decisions indicate that the types of architectural censorship that I have identified will effectively be insulated from judicial review.

STRICT SCRUTINY The most stringent First Amendment standard, known as "strict scrutiny," is typically reserved for regulations that impose differential burdens upon speech because of its content. One line of decisions, associated with the 1983 Supreme Court decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* appeared to entertain the possibility of subjecting structural restrictions to strict scrutiny even in the absence of facial content discrimination or a content-based motive. In that case, the Court applied strict scrutiny to strike down a generally applicable tax whose burden fell disproportionately on a small group of speakers. In so doing, the Court framed the issues in a manner almost ideally suited for redressing the problem of architectural censorship. As the Court recognized, strict scrutiny was not limited to instances in which the government acted out of an illicit motive. Instead, the Court recognized that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." As a result, any restriction "that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." This language suggests that the doctrine is not designed to ferret out regulations that are mere façades for suppressing speech of a particular content or by particular speakers. Rather, the *Minneapolis Star* ruling could be construed as targeting innocently enacted economic regulation that has an adverse impact on the content of speech as an unintended byproduct.

The Supreme Court would soon foreclose any prospect that *Minneapolis Star* and its progeny would serve as a check on architectural censorship. In its 1991 decision in *Leathers v. Medlock,* the Court upheld a sales tax that applied to cable television but exempted satellite television providers as well as certain newspapers and magazines. The Court regarded the tax as a law of general applicability that did not single out the press for differential treatment. Even though the exemption for satellite television providers effectively created differential treatment for media that were functionally similar, the fact that the tax affected approximately one hundred cable suppliers obviated any

suggestion that it penalized any particular speaker or the expression of any particular idea.

The Court reaffirmed the idea that the *Minneapolis Star* line of cases only applies when a statute of general application affects a small number of speakers in its 1994 decision in *Turner Broadcasting v. FCC* (often referred to as *Turner I*). In rejecting the argument that must-carry should be subject to strict scrutiny, the Court distinguished *Minneapolis Star* by pointing out that the restriction in question applied to large numbers of cable systems. As a result, the Court ruled that must-carry does "not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star*" and its progeny. This reasoning effectively foreclosed the prospect that *Minneapolis Star* would serve as a basis for redressing the problem of architectural censorship.

RATIONAL BASIS/INTERMEDIATE SCRUTINY Given that the Supreme Court has foreclosed any real possibility of subjecting structural regulation to strict scrutiny, courts have struggled to determine the proper level of scrutiny to apply. One possibility is the heightened level of scrutiny associated with *United States v. O'Brien* (typically called "intermediate scrutiny"), which requires that the regulation advance "an important or substantial governmental interest" and that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest." The other possibility is the lowest form of constitutional review (known as "rational basis scrutiny"), which only requires that the regulation in question be rationally related to a legitimate state interest. Previous court decisions leave considerable doubt as to which standard should apply.

Ultimately, it may not matter precisely how this dispute is resolved because even the more stringent of the two tests—intermediate scrutiny under *O'Brien*—has long been criticized as too deferential. The first prong—requiring that the regulation further a "substantial" governmental interest—has been construed to require only that the interest be nontrivial without requiring that it be particularly significant. *O'Brien*'s second prong—requiring that the regulation be somewhat closely tailored to the problem it was designed to solve—has proved to be equally permissive. Although stated in rather restrictive terms, the Court has subsequently reinterpreted it to be satisfied whenever the underlying government interest "would be achieved less effectively absent the regulation." This reconstruction of the second prong in effect represents a comparison of the various means available to the government. In the process, it omits any assessment of whether the strength of the government interest justifies the intrusion on individual liberty. As a result, *O'Brien* doctrine devolves into a regulatory inquiry that focuses solely on the government's ability to achieve its goals and fails to assess whether those goals are of sufficient significance to justify the resulting impingement upon free speech.

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The result is a level of scrutiny that has been repeatedly criticized as tantamount to a presumption of nonprotection that reaches only "laws that engage in the gratuitous inhibition of expression." Unless *O'Brien* scrutiny were given more bite, it should be of little practical consequence whether, as a formal matter, any particular instance of structural regulation is subject to rational basis scrutiny, intermediate scrutiny, or something in between.

POSSIBLE SOLUTIONS Current First Amendment doctrine thus does not provide for meaningful judicial review of structural regulation. Can the *O'Brien* doctrine be reconstructed to allow for more meaningful judicial review? A plurality of the Supreme Court in *Turner I* experimented with a way to give the courts a larger role in checking architectural censorship when it adopted the requirement that courts exercise "independent judgment" to ensure that the "recited harms [be] real, not merely nonconjectural, and that the regulation . . . alleviate these harms in a direct and material way."

To determine whether the legislative findings satisfied that requirement, the Court balanced two opposing considerations. On the one hand was the fact that the legislative branch is better institutionally suited to make predictive judgments and is not required to produce the kind of record required of administrative agencies. On the other hand was the recognition that blanket deference to legislative findings would constitute abdication of the judiciary's role in protecting the Constitution. To balance those two considerations, the Court borrowed the administrative law principle requiring the government to draw "reasonable inferences based on substantial evidence." Many commentators speculated whether this new requirement would turn *O'Brien* scrutiny into a more meaningful form of judicial review.

Subsequent developments have substantially reduced the likelihood that the level of review announced by the *Turner I* plurality will serve as a significant check against architectural censorship. When the Court restated those principles in a second *Turner v. FCC* decision in 1997 (commonly referred to as *Turner II*), it employed a far different tone. The Court indicated that its "sole obligation is 'to assure that in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" Noticeably missing from the opinion was any reference to judicial exercise of "independent judgment" or inquiry into whether the harm was "nonconjectural." Instead, the language and the structure of the opinion emphasized deference.

In any event, even if the substantial evidence requirement put forward by the *Turner I* plurality were construed to provide a basis for more searching scrutiny under the *O'Brien* standard, it is unlikely to redress architectural censorship. Commentators have long regarded *O'Brien* doctrine as being designed to uncover restrictions that are driven by an improper government motive. As such, the addition of this element is unlikely to solve the problems of architectural censorship, which are generally unintended byproducts of governmental actions. Even under this invigorated form, *O'Brien* scrutiny would do little to balance the importance of the governmental interest asserted vis-à-vis the individual's interest to engage in speech. Nor would it lead courts to inquire whether alternative avenues of communication exist or whether the same goals could be accomplished in a less intrusive manner. Architectural censorship would be better addressed through a test focusing on the effects of the regulation in question on speech. Such tests are generally disfavored, largely out of concern that employing an effects test would open an unacceptably large swath of governmental action to constitutional scrutiny.

CONCLUSION

The current debate has taken far too simplistic an approach to the impact that media ownership has on television and radio programming content. The relationship between structural regulation and media content is much more complex than is generally recognized. Even worse, the current regulatory regime has often had the unintended consequence of degrading the quantity, quality, and diversity of available programming.

Unfortunately, current First Amendment doctrine effectively immunizes such architectural censorship from meaningful constitutional scrutiny. As a result, either Congress or the FCC must bear the primary responsibility for safeguarding free speech values against those dangers, or else the courts must revise *O'Brien* doctrine to permit for more searching review that is capable of protecting the important speech interests that are at stake. Neither outcome appears to be very likely at this point. R

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