THE LEGAL CASE FOR DIVERSITY IN BROADCAST OWNERSHIP

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Broadcast ownership regulation dates to the Radio Act of 1927, yet it was not until 2003 that media concentration became an issue of broad general concern. FCC Chairman Michael Powell's effort to lift many of the FCC's broadcast ownership limitations sparked an extraordinary bipartisan grassroots reaction that was unprecedented in size, duration and impact.[1]

The Powell FCC was repudiated in the Courts as well. An appeal challenging the decision was filed under the case name *Prometheus Radio Project* v. FCC.[2] On September 3, 2003, a panel of the United States Court of Appeals for the Third Circuit in Philadelphia issued an order blocking the new ownership rules from going into effect. On June 24, 2004, the Court reversed the FCC's ownership decision, sending the case back to the FCC for a top-to-bottom revision.

As of this writing, it is impossible to predict what will happen next. Supreme Court review is possible, but congressional legislation to block the FCC's decision may supercede further judicial or FCC action. What is more certain is this: there is now broad public opposition to increased media ownership consolidation, and future FCC chairpersons are likely to wish to follow a far less deregulatory course of action.

What the FCC Did

The 1996 Telecommunications Act was a product of the Republican takeover of Congress in 1994. Although congressional Democrats and the Clinton administration were able to blunt some of the worst aspects of the bill, the multipart legislation is highly deregulatory in nature. Enactment of the 1996 law led to the greatest wave of media consolidation in history. The worst provision of the new

law lifted all limits on how many radio stations one company could own. Within five years, Clear Channel Communications, Inc., grew from about forty stations nationally to about twelve hundred. Television chains bulked up to the new maximums as well, and TV "duopolies" (ownership of two stations in one community) became common.

Having received slightly less than what they wished, big broadcasters left a time bomb buried in the new law. Section 202(h) directed the FCC to review all its ownership rules every two years and to consider eliminating any provisions which might become outdated. While this review requirement appears to be a relatively benign measure which calls for little more than reporting to Congress, Rupert Murdoch's News Corporation (whose lobbyist was reported to have had a major hand in drafting this part of the law) convinced a panel of the Reagan-Bush dominated Court of Appeals in Washington, D.C., to turn Section 202(h) into a powerful instrument for deregulation. In its February 2002 decision, *Fox Television Stations, Inc.* v. FCC, the Court ruled that Section 202(h) "upended" traditional legal principles so that the FCC was expected to apply a "presumption in favor of deregulation."

FCC Chairman Powell and his Republican colleagues enthusiastically accepted their new mission. In the fall of 2002, they started a new proceeding intended to apply the Court of Appeals' "presumption" to all existing broadcast ownership rules. Their request for written comments signaled a desire to repeal or relax almost all of these rules. Spurning calls for public hearings and pressing for rapid action, they voted on June 2, 2003, to adopt an order drastically cutting back existing restrictions. The two Democratic Commissioners voiced powerful dissent; Commissioner Michael Copps said:

> The majority . . . chooses radical deregulation . . . . This decision allows a corporation to control three television stations in a single city. Why does any corporate interest need to own three stations in *any* city, other than to enjoy the 40-50 percent profit margins most consolidated stations are racking up? What public interest, what diversity, does that serve? This decision also allows the giant media companies to buy up the remaining local newspaper and exert massive influence over some communities by wielding three TV stations, eight radio stations, the cable operator, and the already monopolistic newspaper. What public interest, what new competition, is enabled by encouraging the newspaper monopoly and the broadcasting oligopoly to combine? 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.* [Emphasis in the original]

The intensity of negative public reaction to the FCC's decision stunned observers on all sides. Several measures to overrule all or part of the new scheme were introduced in Congress, receiving favorable votes despite efforts of the Republican leadership to derail them. Backing down on a veto threat, President Bush signed one such measure that was attached to an appropriations bill in January 2004. This measure rolled back the limit on national TV ownership to a 39-percent share. (Under the 1996 deregulation, TV broadcasters were allowed to own stations reaching no more than 35 percent of the nation's TV homes; the FCC had raised that limit to 45 percent. Loopholes continue to exist. According to an outdated regulation, UHF stations' audience is "discounted" by 50 percent, so that an all-UHF broadcaster can now reach 78 percent of the nation's homes.) The measure also cut back the review required under Section 202(h) to a quadrennial rather than biennial schedule.

What the Court Did

The Court of Appeals majority decision reversing the FCC's ownership deregulation action is 121 pages in length; one judge, who disagreed with substantial portions of the opinion, wrote another 92 pages in dissent. A complete summary is neither possible nor necessary to show how decisively the Court repudiated Chairman Powell. The Court was even more forceful in unanimously rejecting some broadcasters' claims that the FCC's deregulation had not gone far enough and that ownership rules were unconstitutional.

It is difficult to overstate the political significance of the Court's ruling. The decision rejects the legal premise of the FCC majority's action, the FCC's application of the facts to the law and even the fact-finding itself, criticizing its failure to obtain meaningful public participation in the decision-making process. These actions, combined with the extraordinarily negative reaction of a Congress controlled by the FCC Chairman's own party, will have a lasting impact on how broadcast ownership will be addressed in the future by any FCC.

From a technical standpoint, the most important part of the Court of Appeals decision is the holding that Section 202(h) of the 1996 Communications Act does *not* contain within it a "presumption in favor of deregulation." This means that the next quadrennial review (in 2006), will be conducted without the built-in bias that infused the 2003 decision.

From a practical standpoint, the most important aspect of the decision was the Court's rejection of Chairman Powell's elaborate "diversity index" mechanism, which purported to substitute a single formula to guide decisions on ownership of TV-radio and newspaper-broadcast combinations in a single community. While the majority left room for the FCC to adopt a different replacement formula, any

further FCC action will likely make few if any changes to these rules. (This includes newspaper/TV combinations; although the Court ruled that the FCC could properly end the previous rule which nominally banned newspaper owners from buying broadcast properties, the practical effect of the Court's decision is that such combinations probably will not be permitted in the future.)

One especially interesting aspect of the Court of Appeals action is its clear awareness of the increased public concern about media concentration. This is not to say that the Court was simply acceding to the public will, but its understanding of the importance attached to this question clearly affected its decision to stay the FCC's decision as well as its assessment of the way that the FCC compiled and analyzed the factual record on which it acted.

Why Broadcast Ownership Matters

One can fairly ask why progressives have devoted so much effort to preserving diversity in ownership of over-the-air broadcasting. After all, over-the-air broadcasting (which is today more accurately referred to as "terrestrial" broadcasting) is a very mature industry. Commercial radio broadcasting is more than eighty years old, while television service has been available to most of the nation for almost sixty years.

Satellite technology has decreased dependence on terrestrial broadcasting by bringing vastly increased choice to the public over the last three decades. While about half the programming viewed by cable TV and direct broadcast satellite (DBS) subscribers on an average night remains available through over-the-air channels, this situation is a far cry from the state of affairs twenty-five years ago, when ABC, CBS, and NBC typically shared nearly 90 percent of the prime-time TV audience. Satellite-delivered radio service is just beginning to come to market, but many people believe that commercial radio has become fat and lazy since deregulation began under the Reagan administration and that it will rapidly lose much of its audience in the coming years.

Another reason that broadcasting seems less important to activists is the growth of the Internet. The open architecture of the Internet offers unlimited content choice, unless and until policymakers impose restraints upon it. Broadband technology will eventually permit audio and video programming to be available on demand, thus greatly vitiating the importance of whatever remains of broadcasting's power and influence.

All of that is true enough, but it does not really change the need to address broadcast ownership as one of the most important influences on democratic self-governance in America. Here is why progressives should continue to regard consolidation in broadcast ownership as one of the greatest challenges to democratic self-governance.

First, however insignificant broadcasting may become some day, it remains for the foreseeable future the most powerful political, social, and cultural force shaping American thought. Cable news networks are increasingly important for those motivated to follow news and public affairs issues, but the vast majority of Americans get most of their news, information, and culture from over the air TV and radio channels, including local and network newscasts and talk radio. (Most consumers now receive this broadcast video programming through cable or satellite systems, but that does not change its influence.)

Second, television and radio form the centerpiece of most major media empires. Broadcasting is the cash cow which has funded the expansion of NBC, Disney, Fox, Viacom, and Clear Channel into new media. Cable giant Time Warner is the only major content provider for which broadcasting is a minor component. (As evidenced by its unsuccessful attempt to acquire Disney, Comcast owns a vast distribution system but produces very little of its own content.)

Third, the political and financial muscle of television broadcasters has assured them important future roles. In what was perhaps its greatest legislative accomplishment since its founding, the National Association of Broadcasters inserted into the 1996 Communications Act an extraordinary provision giving existing TV licensees exclusive use, free of charge, of a huge swath of prime spectrum for digital TV transmission. Access to this spectrum assures placement on cable TV systems from the "must-carry" and "retransmission" rights granted in the 1992 Cable Act. Thus, however vestigial over-the-air TV technology may become in the future, over-the-air TV stations will have top billing on the nation's cable TV systems. The same is essentially true for radio; the FCC has authorized a "digital audio" technology that locks in the rights of existing broadcasters and makes it almost impossible for new commercial competitors to obtain spectrum.

None of this is to say that cable television ownership, newspaper dominance of local markets, the supremacy of a few companies in the music industry, and the threat of content control over the Internet are unimportant now, or in the future. But those who say that broadcasting is a dead industry, and that the fight over broadcast ownership is best left to the last century, are very wrong.

Why the Public Needs Competitive, Diverse Media

The Supreme Court of the United States has stated that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." The Court has applied this principle of diversity of views as a necessary stimulus of democracy and vigorous public debate to entertainment as well as news production.

Many citizens fear a world in which a few media gatekeepers control access

to the mass media. At best, these multimedia conglomerates will homogenize news and entertainment into a single "infotainment" package leveraged across multimedia platforms and targeted primarily at advertiser-coveted demographics. At worst, the few media gatekeepers may suppress news or perspectives that run counter to their economic or ideological interests, or they will do so to curry favor with the government.

These problems are not new. However, the threat they pose is more palpable today. Indeed, the public's perception that this already began appearing earlier probably accounts for the public's visceral reaction against further relaxation of the rules.

Contrary to the assertions of those favoring deregulation, the media marketplace is not open and competitive. The government prohibition on broadcasting without a license, together with the economic structure of the cable industry, has created a highly concentrated market with effectively impenetrable barriers to entry. Moreover, even if the media marketplace were competitive, legal principles as old as this country state that the news and information deserve treatment as something more than mere commodities. Democracy depends upon a competitive marketplace of ideas; it is a compelling governmental purpose "of the highest order" to take prophylactic steps to ensure that market does not fail.

Ownership restrictions offer a far more effective means of achieving the needed diversity to ensure a robust democracy with less damage to the First Amendment. Because the connections that allow large corporate interests to influence content are complex and subtle, structural rules that protect diversity by fragmenting ownership are essential. Indeed, if media ownership restrictions were removed, the only way to ensure diversity would be to impose explicit content mandates and access rules.

Media Concentration Will Exacerbate Existing Market Failures

Contrary to the arguments of those favoring deregulation, the current "market" in news and entertainment is not characterized by competitive entry or abundance. Further, the majority of media owners are vertically integrated, multinational conglomerates with diverse economic interests. Accordingly, the economic incentives of media content suppliers do not necessarily align with the interests of viewers and citizens.

Critically, broadcasting remains a government-controlled monopoly, and only those with a government license can broadcast. No matter how much money one wants to invest to develop better or more popular television or radio programming, these productions will not reach potential audiences unless someone with a federal license agrees to carry them. When these local broadcast licenses become concentrated in a few hands, those few hands decide what is aired. Cable television operators are monopolies in virtually every market, and they are typically vertically

integrated. Thus, cable viewers who want a different type of programming have no competitive options if they do not like the selections available on their cable systems. They cannot pick and choose to pay for only one or two channels; they must pay for a whole package in order to receive most channels.

The development of the Internet does not change this calculus. Because of the economics of news production, only a handful of websites control the bulk of news generation and distribution over the Internet. Although anyone remains free to set up a website and post or send information to the rest of the world, this freedom does not equate with an ability to effectively compete with existing media companies. The question is not whether news is somehow discoverable, but whether it enters into the public's awareness. Finally, fights over access to content and technological limitations have prevented streaming media from emerging as serious competitors to either radio or television. In addition, as even supporters of deregulation agree, neither cable networks nor the Internet provide local news.

Although consumers display a considerable interest in local news, and local news remains critical to maintaining an informed local electorate, increased concentration harms, rather than enhances, the production of local news. An independent study from the Pew Foundation's Project for Excellence in Journalism (PEJ) found that stations owned by small companies (three stations or less) were more than twice as likely than the largest owners to receive the PEJ's highest news quality score.

The structure of the industry bears this out. Local stations generate local news from local revenues. Because typical margins on a well-run television station in a top market are 60 percent (and even weak performers earn between 50 and 55 percent), owners of large groups of stations view them as cash cows and absorb the local revenue for other corporate purposes, such as servicing debt.

As a result, deregulation and increased concentration result in failures in local news markets. Even on a national level, economic incentives lead to market failure in news production. Several PEJ studies support the conclusion that major networks prefer to produce soft news about the entertainment industry or "infotainment" stories dwelling on the misdeeds of celebrities than report hard news on significant public policy issues.

Even where broadcasters or other providers of programming rely solely on their interests in the broadcast markets, the results can still be detrimental to the broader concerns of democracy and civic discourse. Two recent cases—ABC-Disney's attempt to replace the popular news show *Nightline* with *Late Show with David Letterman* because of the desirability of the latter's perceived viewer demographic, and CBS-Viacom's attempt to interview former Iraqi prisoner of war Jessica Lynch—demonstrate the fallacy of relying on economic incentives to ensure a mass media market that produces accurate, unbiased, and detailed news programming, even when such news programming is both popular and profitable.

First, in 2002, ABC attempted to replace Ted Koppel's news program *Nightline* with *Late Show with David Letterman*. Although more people watch Koppel than Letterman, Letterman draws a younger demographic that is more desirable to advertisers, which will pay a premium for shows that are less popular overall but that concentrate on that desirable demographic.

By the same token, a cable company has a greater incentive to air its own programming than to give access to another company's product. In the second, more disturbing, example, there is a demonstration of how economic incentives of vertically integrated media conglomerates can warp news coverage, as in the recent attempt by CBS, a subsidiary of Viacom, to secure an interview with U.S. Army Private First Class Jessica Lynch. PFC Lynch attracted public attention during the Iraq war when a squad of Marines apparently rescued her after her capture by Iraqis. To land the first interview, CBS offered to leverage PFC Lynch across Viacom's media properties. In addition to a news interview promoting Lynch, Viacom offered to provide a two-hour CBS news documentary, a reunion with her rescuers, and a publicity campaign. The latter would feature segments on several CBS news programs including the *CBS Evening News*, an MTV appearance, a Country Music Television concert in her hometown, a two-hour made-for-TV movie produced by CBS Entertainment, and book publication with the imprimatur of Viacom's Simon & Schuster.

Although this proposed deal made economic sense for Viacom, it represents a serious breakdown in the ability of the public to receive news with confidence that it meets high standards of journalistic integrity (rather than simply being a cross-promotional advertisement). The same incentives problem exists in the production of entertainment. Because media conglomerates have multiple platforms, the industry has increasingly come to rely on "repurposing," i.e., reusing entertainment developed on one property for another.

Although this practice saves costs, it severely undercuts the argument that greater concentration leads to an increase in original programming, or that more outlets without ownership limitations guarantee more programming variety. In one case study of the Los Angeles market, where television stations increasingly have come under common ownership, the quantity of children's programming in the market decreased (as stations stopped competing with each other and segmented the market), and the quantity of original children's programming declined precipitously (as commonly owned stations repurposed children's programming from their sister stations and affiliated cable networks).

Indeed, a company may prefer to air a show of poorer quality that the company produces itself than to air a higher-quality, independent show. The same company may continue to air its own show despite low ratings, solely because it can reuse the programming. Programming in such situations does not have to be the best to succeed, as would be necessary in a competitive market. It merely has to be good enough to prevent viewers from abandoning television altogether. Finally, as illustrated by the Letterman-Koppel example, relying on market forces will leave underserved those markets that advertisers see as less desirable from a demographic standpoint. Society should not have to tolerate a media market in which programming is aimed almost exclusively at eighteen- to thirty-five-year old white males. Increasing the diversity of owners by limiting horizontal and vertical integration creates a greater likelihood that minority demographics will be served. Studies show that minority owners are more likely to program for minorities and that local owners are more likely to program for the local community than the national demographic.

Accordingly, the Supreme Court has consistently recognized that the broadcast and cable markets are not functioning free markets; rather, they are a system of government broadcast monopolies and "natural" cable monopolies. A privileged few are free to make programming decisions based not on free market principles and genuine audience interest, but on the ability to control captive customers.

We Must Distinguish Between Toasters and Information

Ronald Reagan's FCC chairman, Mark Fowler, famously said that television was "simply another appliance . . . a toaster with pictures." While Chairman Fowler can be complimented for having a direct and clear philosophy, he was utterly wrong in his belief.

Why do the American people have an interest in maintaining a competitive and diverse mass media? Antitrust law applies to the media, so why does the public need more protection? Since the founding of the nation, believers in our democratic form of government have argued that the public must remain informed of the news and stimulated with debate. No less a figure than James Madison, who regarded deliberative debate as a necessary element of democracy, articulated the principle that the government has an obligation to protect the marketplace of ideas when private interests threaten it.

In the words of the Supreme Court, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal." As a result, Congress and the Supreme Court have identified the maintenance of a competitive media marketplace as a "government purpose of the highest order."

Because the broadcast media remain the primary means by which the public receives information and entertainment, the government has a vital interest in maintaining competition and diverse ownership in this sector. Proponents of deregulation respond that competition has replaced the need for regulation. When these ownership

rules were made, they argue, three networks were broadcasting and most Americans had access to only a handful of local channels. Now anyone can subscribe to systems that provide access to hundreds of channels. This argument misses the mark for several reasons. As discussed above, Americans depend on their local broadcasters and newspapers for local news. To allow local news to become dominated by a single provider would undermine democracy as much as a monopoly on national news would. Even without an owner consciously slanting the news, the deterioration of local news coverage from concentration justifies ownership limits that preserve multiple local outlets. More important, the First Amendment command that the government ensure a robust marketplace of ideas is, like the world of communication itself, an expanding ideal, not a minimum threshold. The continued availability of newspapers did not negate the need to ensure diversity in broadcasting, nor did the continuation of broadcasting negate the need to preserve diversity in cable. Rather, as the Supreme Court has stressed, the government has a duty to preserve more than a "rump" information market, and should instead promote "the widest possible dissemination of information from diverse and antagonistic sources."

The Threat Is Real, If Subtle

Proponents of deregulation make their argument in a *reductio ad absurdum*. Because information cannot be completely suppressed, it follows that fears of media concentration are unfounded. At the FCC hearing adopting the deregulation order, GOP Commissioner Kathleen Abernathy mocked "speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people."

This demand for absolute proof that news outlets will be influenced in all cases by the economic interests of the news outlets' parent companies creates a diversion, as Commissioner Abernathy failed to confront the realities of public debate served by the First Amendment. The question is not whether information is somehow discoverable, but whether the public at large has sufficient information to stimulate debate on public affairs and to ensure an informed and active electorate.

As a practical matter, because the public generally relies on daily newspapers and broadcast media for its news and entertainment, these outlets generally set the public agenda. As for irrefutable evidence, rarely do corporate heads send notices directing their staffs to cover only one side of a story or to omit coverage of an issue. As with all social-policy issues, the question of cause and effect is subtle, and it is not always easy to measure it empirically. Further, the impact on our news and culture from large media owners is many-layered. Nevertheless, the Supreme Court has found that the FCC can, and indeed must, consider the effects of concentration on public discourse.

Moreover, there is powerful evidence that ownership influences media coverage in both gross and surreptitious ways. A survey by the Pew Research Center and the *Columbia Journalism Review* (CJR) demonstrated that 25 percent of local and national journalists have intentionally avoided newsworthy stories, the same number have softened the tone of stories to benefit the interests of their news organizations, and 41 percent have done both. Of those surveyed, "one-third (35 percent) say news that would hurt the financial interests of a news organization often or sometimes goes unreported, while slightly fewer (29 percent) say the same about stories that could adversely affect advertisers."

Indicative of the subterranean nature of the problem, 26 percent of local reporters in the Pew-CJR study believed that a directive to avoid a story for other reasons was really a pretext to protect the financial interests of the corporate owner. Anecdotal examples abound to support the link between the size and identity of a station's owner with that station's content and quality. For example, newspapers' and cable news' coverage of the broadcast provisions of the 1996 Telecommunications Act directly correlated with whether the corporate parent derived significant income from broadcasting properties. Those that derived significant income from broadcasting properties supported the measure; those that did not opposed it. Similarly, local radio-station managers sponsored prowar rallies when they suspected that their efforts would be greeted with welcoming telephone calls from corporate headquarters that invested mightily in shoring up links with the current administration.

Furthermore, although they may be rare, centralized decisions do occur, and the instances that become public should raise concerns about what happens behind closed doors. For example, at one talk-radio station, a corporate policy prohibits airing any callers who sound "old" in order to better target the more profitable twenty-five- to fifty-four-year-old age group. There is also strong evidence that General Electric exercised corporate influence over its subsidiary, NBC, not to cover governmental investigations of GE's pollution of the Hudson River.

Owners may also make central decisions to support government policy as a means of currying favor, further compromising the critical role of the media in democracy. For example, Clear Channel management sent a list of 160 songs to its stations that were deemed inappropriate for air time after 9/11, among them antiviolence songs such as John Lennon's "Imagine" and Bob Dylan's "Blowin' in the Wind." After a member of the Dixie Chicks criticized the Bush administration's Iraq policy at a concert, radio stations owned by Cumulus and Clear Channel banned the group from airplay. Although the Dixie Chicks have survived (after lead singer Natalie Maines apologized for her remarks), the chilling message to less popular musicians was quite clear: "toe the corporate party line, or else."

Examples of other Western democracies that do not have ownership limitations provide lessons of the danger of concentrated ownership to democratic discourse.

In Canada, for example, CanWest, which owns more than 14 metropolitan daily newspapers, 120 community newspapers, 16 television stations, 7 networks, and an Internet news portal, ordered all its daily newspapers to carry the same national editorials as of December 2001 and prohibited editorials or letters to the editors that contradicted an approved editorial on Palestinian-Israeli relations. In Italy, Prime Minister Silvio Berlusconi's ownership of the three commercial Italian broadcast networks (as well as his influence over the content of the three government-owned networks) gives him effective control over news programs, which inevitably support the position of the government.

Finally, politicians who set national and local policy believe that broadcasters are in a unique position to control their access to constituents. They therefore will rarely oppose policies favored by the broadcast industry. Consider again the TV spectrum giveaway in the 1996 Telecommunications Act, which gave broadcasters $70 billion in spectrum for free. Bob Dole, then a candidate for the Republican nomination for president, opposed the giveaway. On the eve of the Iowa caucus, Dole received a letter from the owner of several Iowa television stations threatening to support other candidates if he did not change his stand. A few days later, Dole withdrew his opposition.

As broadcast outlets concentrate in the hands of fewer interests, these few owners wield a proportionately greater influence. When these owners are not merely broadcasters, but multinational, vertically integrated corporations with a multiplicity of interests, the ability of these few media giants to shape national policy through their direct influence on legislators (at both the national and the local level) becomes frightening indeed. Decentralizing ownership defuses the threat to democracy. Maximizing the number of media owners does not eliminate the influence of economic interests, but at least multiple owners will have different interests. In a world with many media owners, if one refuses to cover a newsworthy story, rivals will do so instead, and the public will ultimately be informed. If a news manager is fired for certain practices, he or she may be able to find a job elsewhere. But if a few owners with similar economic interests dominate the media, stories will go uncovered and will essentially be suppressed.

Structural Rules Facilitate the First Amendment

Those who oppose ownership restrictions accuse opponents of attempting to control content. If a station owner supports the Iraq war and therefore chooses to ban the Dixie Chicks from having airtime, the First Amendment protects this choice; no one has claimed otherwise. Rather, what the U.S. Supreme Court and supporters of ownership regulation have pointed out is that the First Amendment also requires that no one person or oligarchy can act as censor for the rest of the

country. Ownership restrictions thus protect the rights, assured under the First Amendment, of broadcasters to make independent editorial choices and of the public to have a diversity of views.

Media ownership rules are like a breakwater or anchor that keeps some boundaries on the decision-making process. They preserve a minimum level of competition sufficient to encourage the production of quality news and entertainment, serving diverse segments of our society without imposing content mandates. More important, they protect our society from corporate censorship as inimical to our democratic society as government censorship. At a minimum, if one corporation has a conflict of interest with respect to a story, at least another outlet is available to investigate it. As a result, media ownership rules free those who depend upon the media—not merely performers like the Dixie Chicks or others in the entertainment industry, but politicians as well—to speak their minds. First Amendment analysis recognizes that even small threats to speech can have a chilling effect on speech.

This effect is no less powerful when the private sector is doing the threatening.

Notes

1. A portion of this chapter appeared in *Communications Lawyer*, Fall 2003, at pp. 12, 18–22 under the title: "More Than 'A Toaster With Pictures': Defending Media Ownership Limits," by Cheryl A. Leanza and Harold Feld.
2. The authors served as counsel to the Prometheus Radio Project.