An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation

Paul Cowling
An Earthy Enigma:
The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation

by

PAUL COWLING*

I. Introduction .................................................................................. 259
II. Localism Today................................................................................ 263
III. The American Media Ownership Debate ........................................... 269
   1. The 2003 Order and 2004 Third Circuit Review.............................. 270
   2. Introducing Liberalization Proponents and Critics............................ 277
IV. The Content of Localism.................................................................... 279
   1. The Sources of Localism................................................................ 279
      A. Localism in Other Areas of Economic Regulation....................... 280
      B. Localism as Political Theory...................................................... 283
   2. Localism as the Foundation of Broadcast Regulation....................... 286
   3. American Localism and Canadian Nationalism............................... 293
   4. A Public Choice Contract: Localism as Protectionism...................... 300
V. Politics, Culture and Economics in Media Ownership
   Regulation.......................................................................................... 305
   1. The Political.................................................................................. 306
   2. The Cultural.................................................................................. 312
   3. The Economic............................................................................... 318
      A. The Economic Nature of Free TV and Media Products.................. 319
      B. Economic Answers to Political and Cultural Problems.................. 323
      C. Owner Identity........................................................................ 334
      D. The Limits of Antitrust................................................................ 341

* Associate, Corporate Department of Torys LLP (Toronto). I wish to express my sincere appreciation for Professor Lance Liebman's generous guidance and feedback throughout the drafting of this article. I also thank Professor Hudson Janisch for his insightful comments on this and other projects.
VI. The Ideological Dichotomy ................................................................. 345
   1. Consumer Sovereignty Versus Political Sovereignty ............... 345
   2. The Marketplace and Regulatory Models .................................. 346
VII. Conclusion .................................................................................... 353
I. Introduction

This article records my attempt to understand what localism means in American regulation of free, over-the-air TV ("free TV") station ownership. Although the notion is cliché, I cannot avoid starting off by acknowledging that, compared with other sectors of the economy, communications is constantly in flux. Conventional wisdom holds that we are living in the midst of a communications revolution. Yet, technological changes in the media have been reversing communications paradigms with a frequency and persistence that dispels the uniqueness of our current experience. The history of communications is a "narrative of revolution." This article focuses on the ownership of free TV broadcasters. However, broadcast TV exists among prior, current and potential functional equivalents, such as radio, cable, satellite, Internet, fiber optic video transmission and other yet-unknown technologies. While having a substantial impact on media markets, the rise and fall of these technologies are not quite the paradigm overhauls we associate with political and scientific revolutions. Why? A genuine communications revolution includes,


and derives from, profound social changes in addition to the technological dimension of media delivery. Social changes "may be slow in coming, hard to isolate from other contemporary developments, and related less to a medium’s intrinsic properties than to constitutive choices about its design and development."4 A genuine "communications revolution" thus covers changes to the "framework" of communications, including technological, political and cultural shifts.5

The concept of revolution ties in nicely with critiques of the American localist regulatory framework as protectionist in motive and self-perpetuating in function. This account describes localism as the device through which regulators and the regulated strike a mutually beneficial bargain that disregards the public interest legislatively entrusted to these stewards. According to this public choice critique, whatever legitimate aim localism may have had in promoting local content has been obfuscated by the now self-preserving and self-justifying bargain of political influence for monopoly rents.6 In Mancur Olson’s words, the entrenched coalition of regulators and station licensees hampers the dynamism of, and increases the regulation, bureaucracy, and political interference with, video distribution markets that can only be “emasculated” through significant political upheaval.7

The upheaval that Mancur Olson contemplates is on the scale of political occupation or revolution. I would like to extend his conception of upheaval to include a so-called communications revolution, on the basis that such revolution could have an impact comparable to political upheaval, albeit confined to the actors and relationships within the communications sector. Supposing this is possible, the question is whether the coalition of regulators and station licensees described above could be disbanded by a communications revolution. We already know that a genuine communications revolution includes both technological innovation

---

4. STARR, supra note 2, at 4.
5. Id.
6. See Thomas W. Hazlett, All Broadcast Regulation Politics are Local: A Response to Christopher Yoo’s Model of Broadcast Regulation [hereinafter Hazlett, Response to Yoo], 53 EMORY L.J. 233, 234 (2004) (“[E]ach policy comes to be dominated by a logic peculiar to its historical development.”).
and social change. With respect to localism, the factor of social change that this article explores is the importance of territory to the identity, autonomy and self-realization of communities. Despite the diversity of opinion on free TV station ownership, there is little controversy over the prominence of the TV medium’s role in enhancing the lives and constructing the identities of individuals, local communities and nations. TV’s influence ranges from the factual accounts of news dissemination, the viewpoints provided in editorials, and the aesthetic exposure offered by popular and niche entertainment. Through these influences, the media facilitates democracy and its institutions at the local, state/provincial and federal levels, while providing the means to culturally define these “imagined” communities.8

In the eighteenth century with the birth of nationalism in Europe, there was a deliberate attempt by cultural specialists . . . to discover and record the vernacular [ , or “local,”] customs and practices, legends and myths . . . in effect, the expanding strata of the indigenous intelligentsia sought to pull together and weave into a coherent form this body of popular cultural sources which could be used to give the past a sense of direction and construct a national identity. This can be linked to . . . a crucial factor in the construction of nationalism: the availability of a print culture which can interconnect people over time and space. The possibility of the nation therefore depends upon the development of the book, the novel, and the newspaper alongside a literate reading public capable of using these sources throughout the territorial area and thus able to imagine themselves as a community.9

At the same time, the media gives individuals the means to cultivate their own identities, affinities and associations, whether territorial or not. In other words, the media facilitates the self-determination of the individual, as well as local and national communities.10 Yet we also know that “imagined” communities

---


9. Featherstone, supra note 8, at 53-54.

10. As a much-debated right in international law, self-determination is elusive and controversial, but it captures the broad concepts of development, autonomy, definition and identity that I am contemplating here. See generally KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2002) (surveying the discourse of self-determination in international law and highlighting the challenge of diversity and the role of participation, identity and interpretation in interpreting the right of self-determination).
depend on territorial parameters for their definitions. This implies that, to the extent media helps to determine our local and national "selves," media may themselves need to be circumscribed by the territorial parameters of these local and national communities.

As a Canadian lawyer, I tend to compare American media regulation to that of my home-jurisdiction. Canadian and American regimes are each founded upon norms that privilege one "self" over the other. The Canadian broadcasting system is driven by nationalist content and ownership rules that are meant to promote the nation-state, while America's broadcasting system is founded on localism, where local communities are the focus of various content and ownership rules. The conventional explanation would be as follows. Canada's nationalist focus originates from a perceived threat of American cultural dominance over a fragile Canadian cultural identity stretched over a vast, under-populated geography and gulfs of ethnic, regional and linguistic difference. America's local focus follows from the country's historical predilection for atomistic economic and political structures that insure diversity, local color and a vibrant competitive landscape in economic and democratic terms. Although this article focuses on American localism, it suggests that there may be something else behind American localism and Canadian nationalism that the two regimes share. As intellectual property, media products are easily reproduced and transported across territorial boundaries through communications technologies, such as satellite, cable, the Internet, phone lines, and electro-magnetic spectrum, that range in their territorial scope but are increasingly indifferent to territory. In contrast, territorial parameters continue to play a profound role in local and national identity. It is this tension between territory-defying media products and technologies and territorially defined communities that prompts the impulse to territorially restrict media ownership. This tension is the essence of the localism norm in media ownership regulation.

11. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, Art. 1, TS No. 881, 165 LNTS 19 (providing that one of the essential characteristics of an independent state is that it has a defined territory). I acknowledge that there are examples of nations without geographical parameters, such as Canadian First Nations and other ethnic communities within nation-states. These raise interesting challenges to the classical territorial associations within a community's self-determination. The definition of locality is, obviously, also territorial: See BARBER, supra note 3, at 842 (defining locality as "an area or district considered as the site occupied by certain people or things as the scene of certain activities.").
The debate on media ownership and the role of localism has insufficiently addressed this obvious but important tension. By surveying the current debate on media ownership, this article shows the ways in which the debate is paralyzed by an irreconcilable dichotomy between advocates for ownership liberalization ("liberalization proponents") and those who counter it ("liberalization critics"). This dichotomy is reinforced by the proponents' affiliation with the marketplace model of realizing the public interest and the critics' affiliation with the regulatory model, as well as the vast academic and political institutions that have grown up beneath these models. Looking at the content of localism more closely, and finding therein a territorial impulse to control the media, we begin to understand the public's support for localism in media ownership regulation and why it may decline. The result is a fresh way of looking at an otherwise predictable debate. Beyond the maze of political, cultural and economic arguments raised by liberalization proponents and critics, the content of localism turns out to have the bland taste of earth. Localism and its manifestation in localist ownership rules, like the parallel norm of Canadian nationalism and its manifestation in foreign ownership restrictions, expresses a resolve to impose territorial limits on ideas, knowledge and entertainment, which by their nature and dissemination defy territory. The territorial content of the localism norm is thus its greatest weakness, as technology and global integration keep reminding us of the territorially disrespectful nature of information. While it may not offer practical policy answers, this exploration helps us understand how far along we may be in a genuine communications revolution where localist and nationalist regulations are losing their respective roles.

II. Localism Today

Localism, together with diversity and competition, form a triumvirate of principles that the Federal Communications Commission ("FCC") has ascribed to its mandate for regulating media ownership in the public interest.\(^\text{12}\) Confusion about what

\(^{12}\) See FCC, Strategic Goals, Media, available at http://www.fcc.gov/mediagoals/ (last visited Aug. 18, 2004) (describing the FCC mandate as rebuilding "the factual and analytical foundation of its media ownership regulations and competition policies" keeping in mind "the policy goals of competition, diversity, and localism."). See also FCC, Report and Order and Notice of Proposed Rulemaking on Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio
localism means increases with the tendency to tie diversity and competition in with localist concerns. And this is made more perplexing by the fact that localism is the most enigmatic of the three concepts. Competition is the most ascertainable because microeconomics is able to tell us, at least in theory, what competition looks like. An immense body of antitrust jurisprudence and regulation has used this economic theory and its focus on price and output manipulation to define the scope of anti-competitive practices and market structures. In this way, we have some sense of what “anti-competition” and its opposite look like. “Diversity” derives from the metaphor of the marketplace of ideas, whose aim is to promote “the widest possible dissemination of information from diverse and antagonistic sources.”13 Diversity resembles competition in its focus on the necessity for several suppliers (or voices), but because it lacks the scientific metrics of economic theory, it is more difficult to define than competition. Economists are able to tell us (at least theoretically) when a market is sufficiently lacking in competition to enable a supplier to manipulate price or output profitably, but we have no way of knowing when a market is insufficiently diverse so that we can say that the marketplace of ideas is malfunctioning. We do know that diversity is a function of the number of media voices in the market. To the extent that a less concentrated media market means more diversity, we have some metric for assessing whether diversity is high or low, relative to other markets. Indeed, the Third Circuit has affirmed its support for diversity metrics based on concentration scales from antitrust law.14 In contrast, localism confounds the measurement available to competition and diversity because there are more variables that figure into the health of localism, including control, content, local talent access, local democracy, local culture, and local economic development.


14. 2004 Third Circuit Review, supra note 1, at 73-74 (“We do not object in principle to the . . . reliance on the Department of Justice and Federal Trade Commission’s antitrust formula, the Herfindahl-Hirschman Index (“HHI”), as its starting point for measuring diversity in local markets. . . . In converting HHI to a measure for diversity in local markets, however, the commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type to equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results.”).
In recent regulatory documents, the FCC has explained that the localism obligation requires free TV stations to be, and carry programming that is, responsive to the needs and interests of their local communities. 15 The FCC derives legal authority for the localism feature of its public interest mandate as follows:

Title III [of the Communications Act] generally instructs the Commission to regulate broadcasting as the public interest, convenience, and necessity dictate, and section 307(b) explicitly requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Pursuant to this mandate, when the Commission allocates channels for a new broadcast service, its first priority is to provide general service to an area, but its next priority is for facilities to provide the first local service to a community. In carrying out the mandate of Section 307(b), the Commission has long recognized that "every community of appreciable size has a presumptive need for its own transmission service." Indeed, the Supreme Court has stated that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece." 16

This analysis provides authority for interpretations of localism as local control and/or ownership; local content 17 that is responsive to the community; 18 and the potentially unlimited obligation to serve the needs of the licensee's community. 19 Commissioners Copps' and Adelstein's remarks at the first FCC Broadcast Field Hearing on

---

19. CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT—ANOTHER LOOK 61 (2000). See also NBC v. United States, 319 U.S. 190, 224-25 (1943) (affirming the FCC's authority to regulate network influence on local programming and advertising through the chain broadcasting rules and to enforce the local station's obligation to "be ready, able, and willing to serve the needs of the local community." Id. at 203.)
Localism in Charlotte, North Carolina, reinforce this breadth of interpretation.\textsuperscript{20}

Every community has local needs, local elections, local news, local talent, and local culture. While localism reflects a commitment to local news and public affairs programming, it also means much more. It means providing opportunities for local self-expression and reaching out to, developing and promoting local talent. It means making programming decisions to serve local needs. It means allocating resources to address the needs of the community. Localism's many virtues are hard to capture, but may get easier to ignore as companies consolidate.\textsuperscript{21}

Are stations adding to the civic dialogue? Are they adhering to community standards, or are they airing excessive amounts of indecent and excessively violent programming? Are they encouraging local talents and local genius? Are they reaching out to minority groups within the community?\textsuperscript{22}

Traditionally, it was assumed that local owners were most capable of meeting these broad obligations, which is why, historically, geographically local owners were favored over remote owners.\textsuperscript{23} So, when the June 2003 Report and Order on media ownership ("2003 Order") raised the cap on the number of local free TV stations that networks could own, Commissioner Adelstein lamented the sacrifice of localism.\textsuperscript{24} A local constituent who participated in the Charlotte hearing expressed a similar view: "any conversation about localism

\textsuperscript{20} The Localism Task Force will hold a total of six public hearings to solicit input from consumers, industry, civic organizations and others to consider how broadcasters are meeting local needs. FCC, Localism Task Force, supra note 18.

\textsuperscript{21} Statement of Commissioner Jonathan S. Adelstein, dissenting, 2003 Order, supra note 12, at 880 [hereinafter Adelstein Dissent].


\textsuperscript{23} TILLINGHAST, supra note 19, at 77.

\textsuperscript{24} Adelstein Dissent, supra note 21 ("The majority has not adequately justified the selection of a new 45% cap. It relies exclusively on evidence showing that the largest network station owners possess no greater bargaining power, measured by prime time preemptions, than the smallest network station. This is a thin reed on which to justify a 10-point increase. Moreover, without access to more data, this conclusion is unconvincing. In the end, we have yet another tradeoff between efficiencies and public interest goals such as localism. Guess who wins. The social benefit of locally originated and oriented programming and program selection to me outweighs the efficiencies of further vertical integration."). Adelstein may have exaggerated the significance of the increase because the 10-point increase would result in a network owning five more stations out of approximately 1400. See The 4% Solution, WALL ST. J., Nov. 28, 2003, available at http://online.wsj.com/article (last visited Dec. 19, 2003).
without regard to media ownership is absolutely avoiding the heart of this issue and certainly cannot render a sincere solution.²⁵

Yet the official view of the FCC suggests that ownership may not rank equally or at all with the other factors of localism. This skepticism is based on section 202 of the 1996 Telecommunications Act ("1996 Act"), which requires the FCC to review, every four years, all of its broadcast ownership rules to determine whether they continue to be "necessary in the public interest,"²⁶ as well as judicial remands of the FCC's localist rationales for preserving ownership regulation.²⁷ In announcing the formation of the Localism Task Force, Michael Powell confirmed his espousal of this skepticism:

Ownership rules have always been, at best, imprecise tools for achieving policy goals like localism. That is why the FCC has historically sought more direct ways of promoting localism in broadcasting. These include things such as public interest obligations, license renewals, and protecting the rights of local stations to make programming decisions for their communities.²⁸

And, in its Notice of Inquiry on Broadcast Localism, the FCC furthers this view that ownership regulation should be abandoned as the means for promoting localism:

This Notice of Inquiry ... will address behavioral rules that promote localism, regardless of identity of ownership. As stated by Senate Commerce Committee Chairman John McCain at a hearing last summer on localism and the public interest: "This Committee has spent considerable time examining and debating the role of ownership limitations to achieve public interest goals.... Today's hearing is to consider whether Congress should use other means to achieve these goals, such as putting 'teeth' in the public interest standard."²⁹

²⁵. Panelist Tift Merritt, Charlotte Localism Hearing, supra note 22, at 38.
²⁷. Fox Television Stations, Inc. v. Federal Communication Commission [hereinafter Fox I], 280 F.3d 1027, 1042 (D.C. Cir. 2002) (holding that the following reasons that the FCC provided in 1998 to justify retaining the National Television Ownership Rule ("NTSO rule") were insufficient: "to (1) observe the effects of recent changes in the rules governing local ownership of television stations; (2) observe the effects of the national ownership cap having been raised to 35%; and (3) preserve the power of local affiliates to bargain with their networks in order to promote diversity of programming.").
Coincident with ownership concerns being dropped from the official content of localism, localism's weighting in the public interest may be declining relative to diversity and competition. The FCC's Strategic Plan for 2003-2008\textsuperscript{30} ("Strategic Plan") does not include localism in its list of objectives,\textsuperscript{31} which is striking given the fundamental role attributed to localism since the inception of communications regulation.\textsuperscript{32}

However, ownership's irrelevance to localism and localism's relative decline in importance are inconsistent with the public's views. Michael Powell pointed out that in the proceedings leading up to the 2003 Order, "and in the months that followed . . . we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns," Powell said, "and we are going to tackle it head on."\textsuperscript{33} In the summary of public comments section of the FCC Strategic Plan, 61% of the comments focused on some aspect of the FCC's role in protecting the public interest. Within this subset, one of the primary focal points was the "need to ensure diversity by requiring local control of media."\textsuperscript{34} With this in mind, the 2003 Order "strongly reaffirmed [the FCC's] goal of promoting localism through limits on ownership of broadcast outlets."\textsuperscript{35} It is therefore difficult to

\begin{footnotes}
\footnote{30. See FCC, Strategic Plan FY 2003-FY 2008 [hereinafter Strategic Plan], available at http://www.fcc.gov/omd/strategicplan/strategicplan2003-2008.pdf (last visited Aug. 18, 2004)}\footnote{31. \textit{Id.} (listing the priorities as follows: "Enforce compliance with rules that foster competition and diversity; . . . Build and continually update a solid factual and analytic foundation for media ownership regulation.".)} \footnote{32. See 2004 NOI, \textit{supra} note 15, § 1 ("[T]he concept of localism was part and parcel of broadcast regulation virtually from its inception.")} \footnote{33. News Release, FCC, \textit{FCC Chairman Launches "Localism in Broadcasting Initiative"} (August 20, 2003) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf (last visited Aug. 18, 2004)).} \footnote{34. Strategic Plan, supra note 30, at 26.} \footnote{35. News Release, FCC, \textit{FCC Sets Limits on Media Concentration} (June 2, 2003) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.doc (last visited Aug. 18, 2004) ("[T]he FCC has sought to promote localism to the greatest extent possible through its broadcast ownership limits that are aligned with stations' incentives to serve the needs and interests of their local communities . . . To analyze localism in broadcasting markets, the FCC relied on two measures: local stations' selection of programming that is responsive to local needs and interests, and local news quantity and quality. Program selection is an important function of broadcast television licensees and the record contains data on how different types of station owners perform. A second measure of localism is the quantity and quality of local news and public affairs programming by different types of television station owners. This data helped the FCC assess which ownership structures will ensure the strongest local focus by station owners to the needs of their communities.".)}
\end{footnotes}
determine the official view on localism and ownership rules' relevance to tackling the issue of localism—"ambivalence" is probably the best word here. Stepping back for a moment, it is necessary to consider the elements of localism within the broader context of the debate on media ownership. The debate grew into controversy covered by the popular media when the FCC attempted to liberalize ownership rules in June 2003. I turn now to examine this controversy in detail.

III. The American Media Ownership Debate

Twelve voices were shouting in anger, and they were all alike. No question, now, what had happened to the faces of the pigs. The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which.36

In the late summer of 2003, newspapers, cable news shows and TV broadcasts reported that Capitol Hill and a federal appeals court in Philadelphia had blocked the FCC's deregulation of five of six media ownership rules37 through its 2003 Order.38 The voices of the media were reporting on the current and future status of the voices of the media. Within this content about content, the distinction between the story and the storyteller (or, in Orwellian terms, pig and man) fell away. Behind this power of the media to report on its own regulation lies another cliché that "media power is political power."39 The media reports on politicians and delivers political messages, prompting politicians to trade favorable regulatory treatment for endorsement, access or favorable presentation.40 We shall keep this in mind.

38. 2003 Order, supra note 12, at §74.
40. Id. at 204 (describing a 1969 letter from Richard E. Berlin, CEO of Hearst Corporation, to Richard M. Nixon, urging President Nixon to support the 1970 Newspaper Preservation Act of 1970, which exempted publishing companies from antitrust laws where one or more of the companies was failing). As I show later in the paper, public choice theory suggests the same idea by varying the terms and emphases.
1. The 2003 Order and 2004 Third Circuit Review

The first chapter of this controversy began with the requirement that the FCC review and justify its ownership rules on a biennial (now quadrennial) basis set out in §202(h) of the 1996 Act.\(^4\) The next chapter started with the FCC's first review of media ownership rules and finished with *Fox I* and *Sinclair* remanding and vacating various aspects of the 1998 FCC Report and Order.\(^4\) *Fox I* and *Sinclair* interpreted the §202(h) review requirement as carrying "with it a presumption in favor of repealing or modifying the ownership rules."\(^4\) On this view, ownership rules should have been repealed in 1998 unless they were justifiable as necessary for the public interest. *Fox I* held that that the FCC justifications for retaining two ownership rules were insufficient,\(^4\) while *Sinclair* took issue with the FCC's exclusion of non-broadcast media from the eight voices exception to the local television ownership rule.\(^4\) My focus is on the third chapter, opening in June 2003 when the FCC responds to the *Fox I* and *Sinclair* commands to remove or justify ownership regulation on the basis of marketplace conditions\(^4\) and reports on its second §202(h)

---

41. 1996 Act, *supra* note 26, §202(h). Originally, §202(h) required the FCC to review "its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest." In January 2004, Congress changed the review requirement from a biennial to a quadrennial basis. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §629, 118 Stat. 3, 99 (2004) [hereinafter 2004 Appropriations Act].


43. *Fox I*, *supra* note 27, at 1033; Sinclair Broadcast Group Inc. v. Federal Communications Commission, 284 F.3d 148, 159 (D.C. Cir. 2002) [hereinafter *Sinclair*].

44. The D.C. Circuit in *Fox I* concluded that the 1998 decision to retain the National Television Station Ownership Rule was "arbitrary and capricious in violation of the APA" on the basis that "the Commission has adduced not a single valid reason to believe the NTSO Rule is necessary in the public interest, either to safeguard competition or to enhance diversity" (*Fox I*, *supra* note 27, at 1043-44). The court found the FCC's preference to "wait and see" the competition and diversity effects of retaining the rule contrary to the deregulatory presumption of §202(h) (*Fox I*, *supra* note 27, at 1042). With respect to the FCC's determination that retaining the cable/broadcast cross-ownership rule was necessary in the public interest, the *Fox I* court vacated the rule, finding it a "hopeless cause" whose retention was arbitrary, capricious and contrary to §202(h) (*Fox I*, *supra* note 27, at 1053).


review of ownership rules. The chapter ends in June 2004, when the Third Circuit Court of Appeals hands down its judicial review of the 2003 Order.

Most of the controversy related to three of the six rules that were liberalized. First, the 2003 Order would liberalize the National Television Station Ownership Rule ("NTSO rule"), originally adopted in 1941, by increasing the number of free TV stations that networks could own. At the time of the 2003 Order, the NTSO rule prevented networks from owning any stations that would give them access to more than 35% of the national audience. The FCC justified keeping the cap on the basis that it promoted localism "by allowing a body of network affiliates to negotiate collectively with the broadcast networks on network programming decisions." However, finding that 35% "did not strike the right balance of promoting localism and preserving" free TV, the FCC increased the cap to 45% through the 2003 Order. A powerful coalition of small broadcasters and advocates from diverse platforms vocally challenged the 2003 Order’s impact on the NTSO rule. The coalition was bolstered by bipartisan Congressional threats through appropriations deliberations. This forced negotiations between the White House and Congress and resulted in the increase being legislatively set at 39% in January.

---

47. The Politics of Big Media, Turning it Off and Media Madness, ECONOMIST, Sept. 13, 2003, at 14, 55 and 56, respectively.
48. The rule prohibits any entity from controlling television stations the audience reach of which exceeds 39% of television households in the United States. See 47 C.F.R. § 73.3555(d) (2004) ("No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding [thirty nine (39) percent].").
49. In response to the D.C. Circuit in Fox I, supra note 27, the FCC decided to increase the audience cap from 35% to 45%. 2003 Order, supra note 12, at §499. The FCC did not repeal or modify the 50 percent discount that applies for UHF stations' audiences when determining the audience reach. 2003 Order, supra note 12, at §500.
51. Id.
This number did not really represent liberalization, however, because it accommodated those networks that had already been given exemptions to the cap. In addition, Congress immunized the 39% cap from the §202(h) review requirement, effectively freezing the NTSO rule in its current form and removing it from the FCC’s liberalization workload. This legislative move also made the NTSO rule a moot point for the Third Circuit’s review.

The second controversial reform under the 2003 Order was to replace cross-media ownership bans with a set of cross-media limits that applied depending on a market’s vulnerability to viewpoint consolidation, derived from an index calculated similarly to the Herfindahl-Hirschman Index (“HHI”) used in antitrust. Under the reform, in small markets (three or fewer full-power TV stations), newspaper/broadcast and TV/radio combinations are prohibited. In medium markets (between four and eight TV stations), there can be common ownership of a newspaper and either (a) one TV station or 50% of the radio stations that may be commonly owned under the separate local radio rule or (b) up to 100% of the radio stations allowed under the local radio rule. In large markets (more than eight TV stations), cross-ownership is unrestricted.

These cross-media limits replaced the Radio-Television Cross-Ownership rule, which restricted the common ownership of TV and radio stations, depending on the size of the market. More controversially, however, the cross-media limits replaced the Newspaper Broadcast Cross-Ownership ban (“NBCO rule”) on common ownership of a daily public newspaper and a full-service TV station in the same local market. The FCC decided to lift the NBCO

53. 2004 Appropriations Act, supra note 41 (amending § 202(c)(1)(B) of the 1996 Act to increase the NTSO rule cap from 35% to 39%).

54. It was enough to cover CBS’s and Fox’s share of national audiences, at 38.8% and 37.8%, respectively, both of which had been exempted from the NTSO cap. See The 4% Solution, supra note 24.

55. 2004 Appropriations Act, supra note 41.

56. 2004 Third Circuit Review, supra note 1 at 52.

57. See 1992 U.S. Department of Justice and FTC Joint Horizontal Merger Guidelines, 5 Trade Reg. Rep. (CCH) 13,104 (April 7, 1992) [hereinafter Horizontal Guidelines] at §1.51(c) (providing that the HHI is calculated by summing the squares of the individual market shares of all the participants in the market and that an HHI above 1800 will be viewed as illegal according to the guidelines.) The diversity index used in applying the cross-media limits are discussed in further detail below.

58. 47 C.F.R. § 73.3555(c) (2004).

59. 47 C.F.R. § 73.3555(d) (2004). See also Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and
ban for three reasons that the Third Circuit found sufficient. First, "the ban is not necessary to promote competition in local markets because most advertisers do not view newspapers and television stations as close substitutes." Second, "the ban undermines localism by preventing efficient combinations that would allow for the production of high-quality local news." And third, "there is not enough evidence to conclude that ownership influences viewpoint to warrant a blanket cross-ownership ban, thus making it unjustifiable on diversity grounds ... and moreover, the presence of other media sources—such as the Internet and cable—compensate for the viewpoint diversity lost to consolidation."

In determining the small, medium and large market categories and their respective cross-ownership limits, the FCC used a diversity index to identify market structures at risk to viewpoint consolidation and consolidation scenarios likely to threaten viewpoint diversity. The diversity index was calculated using the same sum of market share-squared formula as HHI. To determine what market shares to square, the FCC started by assigning a preference multiple to each media type based on its assessments of consumers' preferred media types for obtaining local news. This was multiplied by the number of suppliers within each media type, which, in turn, was squared. Surveys of consumers' preferred sources of local news showed that 33.8% of respondents preferred free TV, 20.2% preferred daily newspapers, 8.6% preferred weekly newspapers, 8.4% preferred radio, 2.3% preferred cable Internet and 10.2% preferred DSL, dial-up or other Internet connections.

The selection of media types was the first point of controversy for liberalization proponents: The FCC excluded cable TV as a source of local news, but the Third Circuit upheld this exclusion because "of serious doubts as to the extent that cable provided independent local news." At the same time, the Third Circuit found that the FCC should have discounted the Internet as a source of local news because


60. 2004 Third Circuit Review, supra note 1, at 60.
61. Id. at 59-60.
62. Id. at 80.
many Internet sites are merely supply outlets for newspapers, TV
stations and their repackaged content or are the sites of individuals,
government or other organizations that do not serve the intermediary
function of media outlets. A second source of controversy was that,
within each media type, the FCC allocated equal market shares to
each supplier regardless of actually significant variations. This meant
that an ABC TV station and the Dutchess Community College
station had the same share within the TV category, amplifying the
role of the college station as a source of diversity significantly beyond
reality. The FCC justified this by saying that actual market share,
which depends on seasonal programming, is too fluid to be the basis
for regulation. The Third Circuit rejected this and reasoned that the
equal weighting approach was “inconsistent with the Commission’s
overall approach to its Diversity Index and also makes unrealistic
assumptions about media outlets’ contributions to viewpoint diversity
in local markets.” The Third Circuit also found inconsistency in the
FCC’s use of the diversity index to derive its cross-media limits
because “cross-media limits allow some combinations where the
increases in Diversity Index scores were generally higher than for
other combinations that were not allowed.” Not surprisingly, the
diversity index determination and its role in the design of cross-media
limits were remanded to the FCC. However, the Third Circuit did not
question the legitimacy of the index per se, stating that it does not
“object in principle” to the FCC’s use of an HHI-type index to
measure diversity.

The third controversial reform under the 2003 Order was to
allow a single firm to own three stations in markets with 18 or more
TV stations and two stations in markets with 17 or fewer TV
stations. This revised limit under the Local Television Ownership
rule (“LTO rule”) is subject to a ban on any firm owning more than
one station among the four-largest. Prior to the 2003 Order, the

63. Id. at 85.
64. Id. at 87-88. Compare id. with 2004 Third Circuit Review, supra note 1, at 268-271
(Chief Judge Scirica dissenting on this point, arguing that “interactive possibilities on the
Internet . . . permit virtually unlimited viewpoint dissemination from a multitude of
independent ‘sources.’”).
65. 2004 Third Circuit Review, supra note 1, at 90.
66. Id. at 98.
67. Id. at 73-74.
68. 2003 Order, supra note 12, at §134.
69. Id. at §186.
LTO rule allowed a single firm to own two stations if one of the stations was not among the market's four largest and if the market had at least eight independent full-power TV stations. The Third Circuit dismissed liberalization proponents' assertions that the LTO rule duplicates antitrust on the basis that the FCC "ensures that license transfers serve ... diversity, competition and localism, while the antitrust authorities have a different purpose: ensuring that merging companies do not raise prices above competitive levels." At the same time, the Third Circuit dismissed liberalization critics' counters to the FCC's findings that localism would benefit from "consumer welfare enhancing efficiencies" following consolidation under a looser LTO rule. There was sufficient evidence showing that "commonly owned ... stations are more likely to carry local news than other stations." However, the Third Circuit remanded the FCC's numerical limits under the revised LTO rule because the FCC derived these limits from an assumption of equal market shares that disregarded market actualities. Here again, the Third Circuit dismissed the argument that actual market shares are too fluid to serve as a regulatory basis and found "the modified rule similarly unreasonable in allowing levels of concentration to exceed further [the FCC's] own benchmark for competition (1800)—a glaring inconsistency between rationale and result."

A final point of controversy that arises from the Third Circuit's review is its take on the deregulatory presumption that Fox I and Sinclair read into the 1996 Act's §202(h) requirement for ownership rule review:

We do not accept that the "repeal or modify in the public interest" instruction must ... operate only as a one-way ratchet, i.e., the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both "modify" and the requirement that the Commission act "in the public interest." What

70. 47 C.F.R. § 73.3555(b) (2004).
72. Id. at 112, citing Bruce M. Owen et al., Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality, in Comments of Fox Entertainment Group, Inc. et al., MB Docket 02-277 (Jan. 2, 2003).
73. 2004 Third Circuit Review, supra note 1, at 120-21 (citing 2003 Order, supra note 12, at §§192-93 and explaining that the FCC determined the limits with the aim of having six equal-sized competitors in most markets, because an HHI score of a six-competitor market (1667 (6 x (100 / 6)^2) would be the 1800 threshold associated with highly concentrated markets. Triopolies in markets with 18 or more stations and duopolies in markets of 17 or fewer stations best realized this aim).
if the Commission reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise . . . 75 The Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis.

The Third Circuit's decision thereby removes a strong legal authority for liberalization proponents and opens up opportunities for liberalization critics to propose new regulatory interventions at subsequent quadrennial reviews.

Having summarized the 2003 Order and its review by the Third Circuit, how do the three reforms discussed above relate to localism? Because they are both concerned with viewpoint diversity and consolidation, the NBCO and LTO rules relate more to diversity than to localism, even though the diversity in question is at the local level. In the case of both rules, the FCC and the Third Circuit found that localism benefited from their removal or relaxation. Evidence showed that greater common ownership under the revised LTO rule would provide the "ability and incentive" to offer an "amount and quality of local news and public affairs programming" that would be "responsive to the needs and interests" of local communities. 77 Similarly, evidence showed that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations. 78 Therefore, preserving the NBCO and LTO rules can hardly be said to promote localism. In sharp contrast, the sole reason that the FCC provided for retaining the NTSO rule was localist:

We have concluded that an audience reach cap of 35% is not necessary to promote diversity or competition in any relevant market. We are persuaded, however, that a national cap at some level is needed to promote localism by preserving the balance of power between networks and affiliates. We found that affiliates' incentives are more attuned to their local communities than are those of networks, which seek to assure that the largest audiences

75. Id. at 49-50.
76. Id. at 135.
77. 2004 Third Circuit Review, supra note 1, at 111-12; 2003 Order, supra note 12, at §164; and Owen, et al., supra note 72.
78. 2004 Third Circuit Review, supra note 1, at 61. See also 2003 Order, supra note 12, at §344 (citing Thomas C. Spavins et al., The Measurement of Local Television News and Public Affairs Programs (Media Ownership Working Group ("MOWG") Study No. 7) at 3 (Sept. 2002) for the finding that newspaper-owned television stations "provide almost 50% more [local news and public affairs programming] than other stations.")
possible are watching their programming at the same time. We conclude from the record that preserving a balance of power between a network and its affiliates promotes localism, and accordingly, we will continue to restrict the national audience reach of station owners.\footnote{2003 Order, \textit{supra} note 12, at \S 578.}

Because the NTSO rule most closely relates to localism, I focus on the issues raised by this rule over others. However, given the links among diversity, competition and localism noted above, the other media ownership rules, their issues and regulatory and judicial treatment certainly run through the discussion that follows.

2. Introducing Liberalization Proponents and Critics

I suggest above, and argue throughout this article, that the media ownership debate is characterized unsurprisingly by an irreconcilable dichotomy between liberalization proponents and critics. This dichotomy is reinforced by an institutional divide between the regulatory and marketplace models of realizing the public interest, which, in turn, is reinforced by political and academic affiliations with these models. This polar divide is also reflected in the Third Circuit's review of the 2003 Order where the petitioning positions are referred to as Citizen Petitioners (liberalization critics) and Deregulatory Petitioners (liberalization proponents).\footnote{2004 Third Circuit Review, \textit{supra} note 1, at 10, 12.} What does each side have to say?

Before Congress intervened in the fate of the NTSO rule, and within a week of the Third Circuit's stay on the 2003 Order, FCC chairman Michael Powell made his case for liberalizing the NTSO rule in the Wall Street Journal:

To survive, free TV must improve its competitive position against pay television and find a way to innovate and offer \textit{personalized television experiences} that today's viewers have come to enjoy and expect. The future of free television is, at best, uncertain and, at worst, in peril...\footnote{\textit{supra} note 12, at \S 578.}

[W]e absolutely need to maintain a viable free television service for the welfare of our citizens. Free broadcast television remains an important service for those citizens that cannot afford pay television... and continues to play a vital role in informing the public during national and local emergencies and in serving the interests of their local communities...\footnote{\textit{supra} note 1, at 10, 12.}

[B]y setting a slightly revised national television ownership limit, the FCC will help the networks attract and maintain quality programming, from the World Series and Olympics to the next...
great TV series like “Everybody Loves Raymond” or “The West Wing.”

If our efforts do not provide free television with the ability to better compete in today’s vibrant media marketplace, we risk losing its services for the next 50 years. And that’s the way it is.81

Powell touches on a number of the economic, political and cultural issues at stake in the media ownership controversy. His reference to “personalized television experiences” alludes to the rapidly changing nature of consumer demand for TV. Powell argues that the economics of free TV require consolidation in the face of pay TV’s increasing role. Powell also addresses the political issue of universal access for those who cannot afford pay television, which is increasingly dominating the TV market.

A week after Powell’s op/ed piece, William Pike, a citizen from Wellesley, Massachusetts, responded to Powell in a letter to the editor:

FCC Chairman Michael Powell’s Sept. 11 editorial-page piece “And That’s the Way It Is” is right on about the importance of free TV. But he’s wrong about the solution being easing media ownership rules. TV stations, despite their adamant denials, are highly political in both subtle and not-so-subtle in their manipulation of news and programming to further their political agendas. Increased ownership will only give them increased power to those ends. Pay TV, Internet and print media are not alternatives to many who watch the evening news. And that’s the way it is.82

Pike’s critique picks up on the universal access point and, reminding us that media power is political power, warns of the increase in political power that would follow from consolidation of large media companies. The Michael Powell and William Pike dialogue introduces the gulf between liberalization proponents and critics on consolidation, the nerve-center of the NTSO rule controversy. In the Powell/liberalization proponent view, consolidation will save local free TV stations, while the Pike/liberalization critic view sees consolidation as a political threat. Liberalization proponents and critics seize on political, cultural and economic arguments for advancing either cause that go well beyond the Powell and Pike debate. I describe these in Part V. below.

While Chairman Powell and Citizen Pike disagree on the merits and perils of consolidation, they do agree that regulators should save

free TV from extinction. We will see later in the article how some liberalization proponents go further than Powell and dismiss the fundamental importance of free TV.\(^3\) Cable has clearly eclipsed free TV as the primary means of video distribution, and satellite, the Internet, fiber optic networks and other technologies not yet deployed or known provide increasing alternatives to cable. Thus, underlying the prominent disagreement on how we can best preserve free TV are the questions of why and whether we should preserve free TV. Liberalization proponents who share this view reject Michael Powell's contention that we must absolutely maintain free TV. While this distinction between factions of the liberalization proponent camp is crucial to understanding the debate on media ownership, it does not dissolve the entrenched dichotomy between proponents and critics. As alluded to above, Powell does not share liberalization critics' fundamental assumption that free TV station licensees are the embodiments of localism. To see how this assumption evolved, it is helpful to trace the content of localism back to its origins.

**IV. The Content of Localism**

This section is retrospective, exploring the sources of localism and its role in the history of media regulation. Acknowledging the importance of localism in American regulatory, constitutional and media history provides insight into the normative impulse for localism today.

1. The Sources of Localism

Localism has exerted considerable influence in America beyond the realm of media regulation. This is most evident in other regulatory arenas such as antitrust and banking. In addition, localism has a long history as an American political value that is reflected in the country's constitutional arrangements and history. This suggests one possible account for localism as stemming from a localist/centrist balance that ineluctably animates American political decision-making. As we will see, the flaw with this account is its failure to

---

83. Powell may be more properly classified as a moderate liberalization proponent because he does not express the purist abandonment of the regulations altogether. His assumption that free TV has to be saved for universal access reasons is inconsistent with a pro-liberalization argument that there are other ways for insuring universal access, such as a cable, satellite or fiber optic subsidy.
explain why localism persists in media ownership regulation, while it has become irrelevant in other regulatory fields.

A. Localism in Other Areas of Economic Regulation

Antitrust regulation was originally motivated by economic and political concerns, which overlapped with concerns of localism. This was most obvious following the 1950 Celler-Kefauver Act’s amendments to the Clayton Act, which governs the legality of horizontal mergers. In *Brown Shoe*, the first case to come before the Supreme Court after the amendments, Chief Justice Warren acknowledged “Congress’ desire to promote competition through the protection of viable, small, locally owned businesses” even though “higher costs and prices might result from the maintenance of fragmented industries and markets.”84 The Court persisted in this approach in *Von’s Grocery*,85 where a merger was invalidated because “the grocery business was being concentrated into the hands of fewer and fewer owners [and] the small companies were continually being absorbed by the larger firms through mergers.”86 The facts of *Von’s Grocery* presented “exactly the threatening trend toward concentration which Congress wanted to halt.”87

Localism lost its role in challenging industry consolidation as the analytical priorities of antitrust law shifted from politics to economics. This shift crystallized with *General Dynamics*,88 adoption of a functional approach that deflated the importance of structural analysis based on concentration ratios. Nowadays, the Department of Justice, Antitrust Division and the Federal Trade Commission have primary authority over reviewing industry consolidation under the pre-merger notification regime provided for in the Hart-Scott-Rodino Act.89 The principles that guide these antitrust regulators in their reviews of horizontal mergers, which are set out in the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, 199290 (“Horizontal Guidelines”), follow the

86. Id. at 273.
87. Id. at 277.
88. United States v. General Dynamics Corp., 415 U.S. 486 (1974). This was the last horizontal merger case decided by the Supreme Court.
90. See generally Horizontal Guidelines, supra note 57.
General Dynamics functional approach. The Horizontal Guidelines do not mention either localism or the trend to concentration concerns that ran through Brown Shoe and Von's Grocery. Instead, the Horizontal Guidelines focus on the potential for anti-competitive harm through collusion or monopolistic behavior, once concentration thresholds that relate to sustainable monopoly pricing have been overcome. This potential is then balanced against the potential for new entry into the market, for efficiencies to be realized through the merger and/or for assets to leave the market as a result of one of the merging party’s business failure. Nowhere do the agencies consider local ownership as an ideal unto itself. Thus, while antitrust law historically considered localism as an important value, current antitrust law ignores it.

Antitrust’s original, though substantially abandoned, ideal of promoting small, local ownership of business is also evident in the U.S. banking regulatory regime. The 1864 National Bank Act restricted bank expansion through branching prohibitions and replicated this atomistic model of the industry in the regulatory regime by diffusing regulatory power among the states and the federal government.91 Because of the services they provide, banks were traditionally thought of as distinctively local businesses. Philadelphia National Bank92 highlights this by defining the relevant geographic market in the case very locally. The Court reasoned that “the factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries.”93 However, localism’s influence in banking regulation flows from something deeper than the local nature of the banking business, which is itself disputable. Localism in banking regulation evolved out of the “ideology of the local bank”94 that prompted, and was reinforced by, the National Bank Act and the unit banking system that it conceived. The ideology contends that locally owned banks would provide the financial lifeblood necessary for their local communities to progress and succeed by re-investing profits in local endeavors. In contrast, big-city banks with extensive branch networks would have no incentive to invest in local development and thus became viewed as “urban leviathans” seeking “only to siphon capital

93. Id. at 358.
94. See MACEY ET AL., supra note 91, at 13.
and maximize profits." Buttressing the ideology of the local bank was the fear of bigness. Because of the power associated with controlling financial streams, concentrating banking business within one institution would be tantamount to concentrating power over that community. Excessive concentrations of power invite abuses of power.

As will become obvious throughout this article, these concerns underlying localism in banking are very similar to those of localism in media regulation. Banking and the media are both "special" industries because they provide the infrastructure that facilitates commerce. Because of their special status, localism dictates that these sectors should be controlled at the local level. And, because of the power associated with their special status, media and banking institutional growth must be curtailed to avoid concentrations of banking and media power. When comparing localism in banking and the media, one could argue that the media are even more distinctive businesses because, unlike banks, the media play crucial political and cultural roles. That may be, but as we explore the concept of localism in media ownership regulation, it is important to keep the history and future of banking localism in mind.

In particular, it is important to note the way that localism has lost its footing as a pillar of banking regulation, mimicking the decline of localism in antitrust described above. The Riegle-Neal Act of 1994 lifted restrictions on interstate branching, which, in effect, liberalized ownership opportunities and prompted a wave of unprecedented bank consolidation. From 1980 to 1998, approximately 8,000 bank mergers occurred, involving about $2.4 trillion in assets. Recently, consolidation in banking has picked up again.\textsuperscript{96} The deregulation of bank ownership and the abandonment of localism in antitrust reveal a pattern of relegating localism to an \textit{ancien regime} of regulatory intervention over ownership. Instead, the ownership of banking and other sectors are determined by market ordering constrained only by antitrust’s restrictions on consolidation that would harm the market’s pricing mechanism. As recent controversy shows, the media sector is not immune from this trend to market ordering of ownership. But it is also clear that the media have not followed (or kept up with) this trend to the same degree—its ownership structures continue to be

\textsuperscript{95} Id.

governed by a regulatory model most recently affirmed by the Third Circuit.\textsuperscript{97} Having sketched localism's influence in other regulatory arenas, and having noted localism's decline in antitrust and banking, we are left to wonder whether the persistent scope and breadth of localism's influence in media ownership regulation can only be explained by something more fundamental than an American predilection for locally owned businesses. This is revealed by the tenets of political theory that were debated, adopted and rejected in allocating political power in America.

\textbf{B. Localism as Political Theory}

Localism has been characterized as "an important value in the distribution of governmental control in the United States" that promotes "political participation and education among the citizenry."\textsuperscript{98} But where did this value come from? Carol Rose provides a useful guide to localism in American constitutional history, arguing that there is an American tradition of localism with profound historical well-springs.\textsuperscript{99} Rose takes us back to the 1787-88 debate between the Federalists, with their monarchical, centralized, cosmopolitan approach, and the Anti-Federalists, with their oligarchical, particularistic and parochially privileged approach.\textsuperscript{100} The Federalists' constitutional model would consolidate political power through direct taxation\textsuperscript{101} and enlarge markets through "free exchange that would be guaranteed by the commerce clause," focusing the country's efforts on economic progress and wealth generation that would make the nation powerful.\textsuperscript{102} In contrast, the Anti-Federalists' position, rooted in the political culture of the "Ancient Constitution," "recognized the special and particularized customary privileges of provinces, guilds, municipalities, families, ecclesiastical groups, nobles of varying gradations, assemblies of states, and on and on."\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{97} 2004 Third Circuit Review, \textit{supra} note 1, at 12.
\item \textsuperscript{98} Philip M. Napoli, \textit{Access and Fundamental Principles in Communication Policy}, L. REV. M.S. U.-D.C.L. 797, 801 (2002).
\item \textsuperscript{100} \textit{id.} at 82.
\item \textsuperscript{101} \textit{id.} at 85.
\item \textsuperscript{102} \textit{id.} at 76 and 87.
\item \textsuperscript{103} \textit{id.} at 79.
\end{itemize}
Thus, the historical moment of the 1787-88 debate mimicked the "conflicts between centralizing monarchs and longstanding local privilege" witnessed in the French Revolution and English civil war. Even the American Revolution "was in some ways just another in a long line of revolts of provincial privilege against centralizing royalist pretensions." The Anti-Federalists argued that "a national, 'consolidated' government would necessarily quell liberty, because a national government would be too large and its representative bodies too far removed from the people to reflect their multiform mores and natures." In the media ownership debate, liberalization critics modify this argument to criticize consolidation of media and encourage local control of free TV stations. The idea is that an overly consolidated media enterprise is too large and too far removed from the local community to reflect local particularities.

Rose's observations have parallels with the media ownership debate in other respects. Liberalization critics argue that consolidated ownership will harm localism because the economics of media production incentivise programming which appeals to broad, cosmopolitan markets whose demand may have no correlation with the parochial tastes of a local market. Similarly, as Rose points out, consolidated governments mean large electoral districts requiring candidates to be sufficiently wealthy to gain the necessary fame and publicity for election—"persons quite dissimilar from and unrepresentative of those for whom they purportedly" speak. In contrast, the idealized citizen that would stand for election under the particularistic model of anti-federalism was "the yeoman . . . the respectable, knowledgeable, frugal, and public-spirited individual, who acts upon deliberation and cooperation with other citizens of similarly modest means and independence." This idealized anti-federalist yeoman provides the prototype for an idealized local broadcast licensee that shares the parochial sensibilities of his/her

104. Id. at 82.
105. Id. at 81.
106. Id. at 84.
107. See infra notes 273, 414-417 and accompanying text (discussing the need to amortize the costs of media products over the biggest market possible).
neighbors and sets the station programming accordingly, while investing in local talent and projects.\footnote{110}

Rose argues that the Anti-Federalists did not entirely lose in the eighteenth century and America did not entirely abandon the particularistic model, as shown in the recurrent influence of localism in constitutional doctrine.\footnote{111} Rose contends that the lasting influence of localism stems, in part, from the unique features of local government, local community identity, and the opportunities for "voice" and "exit" that are uniquely available to local citizens.\footnote{112} As I describe in Part V.2., the uniquely local features of "voice" and "exit" are the bases on which local communities build their idiosyncratic cultural identities, in contrast with homogenized national identity. Rose explains that the "voice" and "exit" features of local communities serve as the checks against corruption and oppression that may result from local privileges. Voice and exit are thereby correlates to the checks within state and federal government that are absent at the local level.

Both voice and exit are facilitated by the media. The media can supply the means for local voices to be heard, potentially checking local oppression and corruption and contributing to the idiosyncratic identity of the local community. As information sources, the local media are also agents in the positive and negative advertising that figures in the "regulatory competition" among local communities promoted through the "exit" option. This can cut both ways. The media might be more objective in supplying "voice" and facilitating the information necessary for "exit" if it were owned remotely. However, liberalization critics assert that "voice" and "exit" functions

\footnote{110. See infra notes 358-361 and accompanying text (discussing Licensee Goodmon in Charlotte, North Carolina).}

\footnote{111. See Rose, supra note 99, at 99 ("Lest it be thought that all American government has been "consolidated" in principle through the operations of the Federalist Constitution, and that we are simply awaiting the eventual and inevitable demise of local self-rule, we should recall that our history reflects a tenacious and continuous countercurrent to most efforts to centralize local functions. Thus, the later nineteenth century's judicial doctrine of "Dillon's Rule," which held that municipal powers should be read narrowly, was answered in the early twentieth century by Euclid v. Ambler Realty, which gave back, under land use auspices, the local authority supposedly taken away by Dillon's restrictive reading. Similarly, in the 1970s, the mechanisms of the "Quiet Revolution" in land use controls, supposedly subjecting local decisions to much greater state control, were just as quietly redominated by local governments. In these and other instances of stubborn local particularism, one sees the evolution of a kind of Anti-Federalist praxis, almost invisible in an intellectual environment of overwhelming Federalist theory.").}

\footnote{112. Id. at 96-98.}
are better served by locally owned media that have better access to, and perspective on, the local community. I return to this argument later in the article. At this stage, I want to acknowledge the insights that Rose’s conclusions offer in tracing the lineage of regulatory localism in antitrust, banking and communications back to politically particularistic aspirations of anti-federalism, which continue to offer a counter to the cosmopolitan, federalist model of consolidated political power.

2. Localism as the Foundation of Broadcast Regulation

To round out my retrospective view of localism’s normative impulse, I now turn from the parentage of regulatory localism to localism’s role as a building block of American communications regulation. In contrast to Europe and Canada, the early regulatory stance of American radio avoided concentration of media control in the state by refusing to give prominence and privilege to a state-funded public broadcaster. This aversion to state control of media was reinforced by diffusing regulatory authority among several bureaucracies, in a spirit similar to banking’s diffused regulatory regime. At the same time, incumbent media suppliers could not enter the emerging medium of broadcasting, which reflected an American tendency to contain dominant media suppliers within their technological categories to promote inter-modal competition:

The Post Office lost its bid to control the telegraph in 1846, Western Union abandoned the telephone in 1879, and AT&T withdrew from broadcasting in 1926. In 1913, the federal government had used antitrust prosecution to separate control of the telegraph and telephone networks; the year after AT&T sold its broadcast interests, the 1927 Radio Act barred telegraph and telephone companies from holding radio licenses if the purpose or effect would be to “substantially lessen competition or to restrain commerce.” In short, the United States had a checks-and-balances paradigm for communications just as it did for government itself.

This preference for diffused media control worked in conjunction with a regulatory stance that favored local stations over national network entities, establishing the maxim that localism formed the foundation of American communications regulation. This was most

113. See infra notes 361-363 and accompanying text.
114. STARR, supra note 2, at 345-46.
evident in initial decisions on how spectrum would be allocated, the
chain broadcasting rules and the cable/DBS must-carry regime.

In deciding between a locally driven versus a nationally driven
model, the initial deliberations on spectrum allocation looked similar
to the Federalist/Anti-Federalist debate on constitutional powers.
Regulators had to choose between a nationally oriented, centralized
source of supply that had clear-channel stations with signals strong
enough to reach remote listeners versus a locally oriented model with
several moderate or low power stations dispersed regionally and
locally. In 1927, the Federal Radio Commission (“FRC”) rejected
the national model, disregarding an expert committee’s
recommendations and lending support to Rose’s argument that anti-
federalist localism survived the 18th century. The expert committee
had suggested a split of 50 clear-channel stations, 90 regional stations
and 100 local stations. Instead, the FRC allocated spectrum to only 40
clear-channel stations, which freed up spectrum for more local
stations. Combined with the Communications Act of 1934 (“1934
Act”), this cast localism as the foundation of broadcasting regulation,
a role referred to as recently as the FCC’s 2003 Order:

In the Communications Act of 1934, Congress directed the
Commission to “make such distribution of licenses, frequencies,
hours of operation, and power among the several States and
communities as to provide a fair, efficient, and equitable
distribution of radio service to each of the same.” In the earliest
government regulation of radio, the Commission embraced
localism. In the Federal Radio Commission’s 1927 Report to
Congress, it wrote: “The Commission found it possible to reassign
the allocated stations to frequencies which would serve as many
communities as possible to ensure those communities had at least
one station that would serve as a basis for the development of good
broadcasting to all sections of the country . . . .”

After the localist allocation of spectrum in 1927, the FCC
naturally adopted a localist gloss on the 1934 Act’s §307(b). However,
Christopher Yoo has convincingly disputed this gloss. There is no
reference to “local” or “localism” in §307(b) and the section could

116. STARR, supra note 2, at 349-50. See generally id., for the historical description in
the first half of this paragraph.
117. Id. at 350-51.
118. 2003 Order, supra note 12, at §74.
119. Christopher Yoo, On Television Regulation: The Role of Politics and Policy in
Television Regulation [hereinafter Yoo, Response to Hazlett], 53 EMORY L.J. 255, 264
considering applications for licenses, and modifications and renewals thereof, when and
insofar as there is demand for the same, the Commission shall make such distribution of
therefore be interpreted as requiring that each part of the country receive "an equitable distribution of service," that is national or local in content and not "that each part of the country receive programming originating in or tailored to the interests of each local community."\footnote{Yoo, Response to Hazlett, supra note 119, at 264.} As I describe below,\footnote{See infra, Part IV.4.} this lays the groundwork for the public choice account of localism provided by Yoo and Thomas Hazlett.

After the spectrum allocation decision and the localist interpretation of the 1934 Act founded a particularistic broadcasting framework on a licensing scheme favoring local owners,\footnote{TILLINGHAST, supra note 19, at 77 (asserting that the FCC implemented localism "by favoring license applicants who were familiar with, or residents of, the local service area and who were knowledgeable about and would cover locally important problems.").} the next development for localism was the Report on Chain Broadcasting issued in 1941.\footnote{FCC, Report on Chain Broadcasting [hereinafter Report on Chain Broadcasting], Commission Order No. 37, Docket No. 5060 (May 1941).} With increasing network power, national cosmopolitanism was beginning to eclipse FCC-favored local particularism:

During the 1930s, the networks extended their reach throughout the country. The NBC-Red, NBC-Blue, and CBS networks grew from 21 percent to 38 percent of all stations, but these numbers understate the true picture. NBC and CBS had nearly all of the high-powered stations, accounting for more than 85 percent of the nation's nighttime wattage. In 1934, independent broadcasters created a fourth national network, the Mutual Broadcasting System, which grew to include a large number of mostly low-power stations, lagging far behind the leaders in total wattage and audience share. Partly in response to Mutual, NBC and CBS tightened their control of affiliated stations, requiring them to sign five-year (instead of one-year) affiliation contracts that excluded the use of programming from any other network.\footnote{STARR, supra note 2, at 367-68.}

The FCC interpreted this shift in power to networks as upsetting a delicate balance between "local self-expression, whereby matters of local interest and benefit are brought to the communities served by broadcast stations" and "access to events of national or regional interest and to programs of a type which cannot be originated by local licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.").
communities.” To redress the imbalance, the chain broadcasting rules quarantined network power by first limiting network involvement in programming through affiliation agreements. The new rules limited the networks’ abilities to “preempt prime time” and to ban “restrictions on affiliates’ rights to accept programming from other networks.” Second, the rules limited the vertical integration of networks with local stations by preventing networks from owning more than one station in any market and from owning stations in markets with so few stations that competition would be substantially restrained. This was the earliest incarnation of the NTSO rule.

From a regulatory point of view, a chief concern with a shift in programming power from licensees to networks was that FCC jurisdiction was (and is) limited to the licensee and does not apply to networks. The FCC therefore had to curtail network power to preserve its regulatory influence. Newton Minow, the chairman of the Kennedy administration’s FCC, offered a less cynical motivation for the rules, asserting that they gave “radio and network affiliates greater discretion in their local program schedules, . . . foster[ing] more local service and mak[ing] American broadcasting more competitive.” With local control, there would be more locally produced content, resolving the FCC’s concerns that existing “networks enjoyed so much power over stations that they were not only blocking new networks from developing but also preventing stations from serving the interests of their local communities.”

The most striking consequence of the rules was NBC’s sale of its less profitable Blue network to the new American Broadcasting Company, prompted by the rules’ prohibition on licensees to contract with any network organization that maintains more than one

126. TILLINGHAST, supra note 19, at 61. See also NBC v. United States, 319 U.S. 190 (1943).
129. TILLINGHAST, supra note 19, at 74 (citing NEWTON MINOW AND CRAIG L. LEMAY, ABANDONED IN THE WASTELAND 88 (1995)).
131. STARR, supra note 2, at 381.
132. Id. at 381.
network. The FCC argued that this would restore "fair competition." The theme of competition certainly ran through the Report on Chain Broadcasting. Yet, by shackling the networks' ability to control, and vertically integrate with, local stations, the Report was clearly also motivated by the normative impulse of localism. In NBC v. United States, the Supreme Court affirmed the chain broadcasting orders and the FCC's view that "local program service is a vital part of community life" and "a station should be ready, able, and willing to serve the needs of the local community." Localism was a counter-balance to the growth of the networks that the FCC nonetheless recognized as "essential" to the "profitable operation of stations." The FCC wanted to "increase competition among networks and to give local stations some independence—in short, to deny NBC and CBS the nearly complete dominion over radio they had previously enjoyed." Thus, localism offered the means to extend "the long-standing American checks-and-balances model of democratic communications," promoting its regulatory siblings, competition and diversity.

However, historians and critics have downplayed the rules' localist impact by "noting, for example, that the proportion of radio stations with network affiliations rose to 95 percent by 1945." Robert Britt Horwitz follows this interpretive vein, suggesting that localism merely veiled "the actual practices and consequences of a commercially organized, national system of network broadcasting." Horwitz dismisses the idealism of a checks-and-balances approach that coupled localism with the centralized cosmopolitanism of the network system, arguing that "the combination of the Commission's conservatism and its commitment to a chimeric localism meant that many of its well-intentioned policies either had little effect on the

134. Id. ("With two out of the four major networks managed by one organization, a station which affiliates with that organization thereby contributes to the continuance of the present noncompetitive situation in the network-station market. The reestablishment of fair competition in this market is contingent upon ending the abuses inherent in dual network operation; our regulation is a necessary and proper means of reestablishing that fair competition.").  
136. Id. at 203 (citing Report on Chain Broadcasting, supra note 123, at 65).  
137. STARR, supra note 2, at 381.  
138. Id.  
139. HORWITZ, supra note 115, at 194.
industry, or reinforced the power of the major broadcast players and the services they provided.\textsuperscript{140}

Localism's qualified role in early communications regulation may also have been because the localism and diversity norms evolved through communications regulation in a way that made these public interest siblings look like identical twins. The diversity norm was first manifested in the 1953 multiple ownership restrictions limiting common ownership to seven AM, seven FM and seven TV stations. This so-called "rule of sevens" was upheld by the Supreme Court.\textsuperscript{141} And, in a later decision,\textsuperscript{142} the Court found that rules barring cross-ownership of newspaper and broadcast entities did not offend the First Amendment because they "enhance[d] the diversity of information" and were "a reasonable means of promoting the public interest in diversified mass communications,"\textsuperscript{143} thus hearkening back to the seminal Associated Press assumption.\textsuperscript{144}

The seemingly infallible logic behind these regulations equated diversity of ownership with diversity of voices and diversity of programming.\textsuperscript{145} This followed from the idea that ownership meant control over the voice: "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation."\textsuperscript{146} In espousing this view, the FCC and the courts engendered an assumption that ownership mattered to content and service and that an array of various owners would imply a commensurate variety of voices. This link between ownership and

\textsuperscript{140} Id.


\textsuperscript{143} Id. at 801-02.

\textsuperscript{144} Id. at 795 (citing Assoc. Press v. U.S., 326 U.S. 1, 20 (1945)).

\textsuperscript{145} See Tillinghast, supra note 19, at 77. ("[T]he Commission believed that programming diversification was necessary to maximize public service. It also believed that the greater the number of independent licensee broadcasters, the greater the chances for achieving the desired diversity; the more concentrated ownership of stations, the poorer such chances. It therefore adopted rules restricting common ownership of broadcast stations, and of broadcast stations in combination with other media forms.").

content/service applied equally to the principle of localism. In the same way that diversity of ownership led to diverse voices, local control of the license would promote the "local voice." Diversity and localism were thus a combined force in the regulation of media ownership. The chain broadcasting rules' promotion of localism was complemented by the diversity norm in the rule of sevens and cross-ownership rule. Diverse ownership meant less consolidation, which meant more opportunity for local control, and vice versa.

Following the chain broadcasting rules and diversity-motivated ownership rules, the next big boost for localist regulation came with the growth of new technologies. As cable broadcasting grew, Congress, regulators and the courts perceived a threat to the economic viability of local free TV stations and therefore required cable operators to carry all full-power television stations for free. The regime was copied and applied to satellite with equal vigor. These rules were justified by a need to preserve free TV because of its unique role in advancing localism, a controversial notion that I discuss in Part V.3.B.

Localism plays a very prominent role in American communications regulation when we juxtapose the American milieu against other jurisdictions. Unlike Europe, where "state and nation-building" drove media policy, and often led "to state monopolies or

---
147. See Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359 (D.C. Cir. 1963) (affirming the FCC's denial of a license on the basis that importing distant signals would put the local broadcast station out of business, which would hurt those were unwilling or unable to pay for cable). See also Turner Broadcasting System v. Federal Communications Commission, 520 U.S. 180, 192 (1997), citing H.R. Rep. No. 102-628, p.51 (1992) (House Report) for the proposition that the absence of must-carry "will result in a weakening of the over-the-air television industry and a reduction in competition").


other direct state involvement,"150 the FCC and the judiciary were preoccupied with localism, to insure a decentralized media market and check the developing network system.151 Like Europe, Canada also pursued a nationalist media policy, even though it has always had a lot in common with the United States: Both countries are federal states with geographically vast and multicultural societies and similar legal traditions. In comparing the American system with other jurisdictions, there is an obvious caveat. The United States is the undisputed media superpower, and, to some extent, many regulatory regimes, including Canada's, have been constructed in reaction thereto. But this is irrelevant to the important features that American localism and Canadian nationalism share. The alleged aim of each norm is to promote a particular community.152 They also share the common effect of protectionism. The question then becomes one of identifying the impulse for this protectionism—is it a legitimate way of promoting local/national content, a way to preserve an entrenched, mutually beneficial coalition of broadcasters and regulators, or a blunt way of imposing a territorial commonality on those who control the media and the territorial parameters of communities that we hope to develop through the media?

3. American Localism and Canadian Nationalism

While the localist "image of the broadcaster in the mythic haze of the small-town Jeffersonian public sphere"153 drove spectrum

---

150. STARR, supra note 2, at 389.

151. Id. at 388-391 (describing the unique American approach to nation-building in communications through a private, commercially driven, de-centralized structure that allowed concentration of ownership within any mode of communications, with "intermodal" competition as a check). But see Peter S. Grant & Chris Wood, Blockbusters and Trade Wars, Popular Culture in a Globalized World 278 (2004) (pointing out that there has been convergence in the last half of the 20th century among European and American perspectives on media ownership concentration and citing the 1989 Television without Frontiers directive, Article 5, which requires "member states to "ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 percent of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternately at the discretion of the Member State, at least 10 percent of their programming budget, for European works created by producers who are independent of broadcasters.").

152. Featherstone, supra note 8, at 52 ("Could a nation be considered a local community? If we examine the origins of the term, it refers not only to the modern nation-state, but also draws on the meaning of "ratio," a local community, a domicile family condition of belonging.").

153. HORWITZ, supra note 115, at 194. See also supra notes 109 and 110 and accompanying text (discussing the origins of the mythic ideal of the local licensee).
allocation and restrictions on network growth in the United States, Canada embarked on a mission to build a "national consciousness" through its communications regime.\footnote{Gordon Fearn, The Role of Communications Policy in Modern Culture, in Reflections on Cultural Policy, Past, Present and Future 122 (Evan Alderson, Robin Blaser, and Harold Coward, eds., 1993) (explaining the early development of communications policy in Canada, including the formation of The Canadian Broadcasting Corporation ("CBC"), which was created by the 1936 Canadian Broadcasting Act).} At first, Conservative Prime Minister R.B. Bennett established a federal commission to both regulate and operate a broadcaster that produced and distributed national programming to already existing private stations. \"Four years later, a Liberal government established the Canadian Broadcasting Corporation ("CBC"), modeled after the BBC in that it received greater autonomy and more ample funding than the earlier commission.\" Taking advantage of the already established private stations across the country, CBC used affiliation agreements to "rapidly extend CBC coverage across the nation." Soon, the CBC had a public national network of its own high-power stations, coupled with affiliations with the majority of low-powered private stations.\footnote{Starr, supra note 2, at 361.}

The rationale behind the nationalist orientation of Canadian communications regulation is widely known (if not widely accepted) but merits repeating:

Before 1932, Canadian radio developed along American lines as a private industry, except that stations in Canada were typically smaller and weaker enterprises than their American counterparts. Radio ownership in Canada ran at about half the rate in the United States, partly because broadcasters outside of Toronto had only low-power transmitters, putting many Canadians, especially in sparsely populated areas, beyond the range of any of the country's stations. In the more densely populated areas, generally close to the United States, listeners tended to tune in American stations because of Canadian broadcasters' weak signals, limited schedules, and relatively unexciting programs.\footnote{Id. at 340-41 (describing the BBC's focus on national programming produced in London and the conception of the BBC "as a force for integrating the nation and elevating its cultural standards").}

The Canadian concept of broadcasting as a means for national integration and edification was certainly influenced by a similar approach in Great Britain,\footnote{Id. at 340-41 (describing the BBC's focus on national programming produced in London and the conception of the BBC "as a force for integrating the nation and elevating its cultural standards").} but the unique geographic positioning of
Canada's population to the burgeoning American media market stoked the fires of the nationalist agenda.

This found expression in legislation inspired by a need for "Canadian control of broadcasting from Canadian sources, free from foreign interference or influence."\(^{160}\) Canadian control would allow broadcasting to become "the agency by which national consciousness may be fostered and sustained and national unity still further strengthened."\(^{161}\) As I mention above, "local" and "localist" priorities are not clearly evident in the American Communications Act.\(^{162}\) In contrast, nationalism permeates Canadian communications legislation. The Canadian Telecommunications Act states that "telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives . . . to promote the ownership and control of Canadian carriers by Canadians."\(^{163}\) At the same time, the Broadcasting Act states that "[i]t is hereby declared as the broadcasting policy for Canada" that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians."\(^{164}\)

Canada is not unique in regulating foreign ownership of communications firms. As Peter Grant and Chris Wood observe, "most countries in the world insist that their free-to-air radio and TV stations be owned and controlled by their own citizens."\(^{165}\) Even the United States, under section 310 of the Communications Act,\(^{166}\) regulates foreign ownership of communications firms. However, with exceptions ostensibly attributed to national security concerns,\(^{167}\) this

\(^{160}\) Fearn, \textit{supra} note 154 (quoting Prime Minister R.B. Bennett in Parliament in 1932).

\(^{161}\) \textit{Id.}

\(^{162}\) See \textit{supra} note 119 and accompanying text.

\(^{163}\) Telecommunications Act [hereinafter Canada's Telecommunications Act], S.C., ch. 38, § 7 (1993) (Can.). \textit{Cf.} id., § 16(3)(b) (prohibiting a foreign investor from owning more than 20% of a telecommunications common carrier).


\(^{165}\) GRANT \& WOOD, \textit{supra} note 151, at 237.


\(^{167}\) See 2001 Patriot Act, Pub. L. 10756, § 218, 115 Stat. 272, 382-84 (providing broad scope for monitoring communications in the interest of national security, which may be perceived as hard to enforce against foreign-owned carriers). \textit{Cf.} Hudson Janisch, \textit{Telecommunications in Turmoil: New Legal, Regulatory and Policy Challenges}, 37 U. BRITISH COLUMBIA L. REV. 1, 23-25 (2004) (describing how, even before September 11, the FCC was unwilling to agree to foreign investment by NTT and Deutsche Telekom until the FBI was comfortable with the security impact; how Hutchison Whampoa's
foreign ownership cap is "more a matter of form than substance, since indirect ownership of a radio licensee—that is, ownership through one or more US companies—is unlimited. In this manner, a foreign company would, in fact, be able to own up to 100% of any US supplier of basic telecommunications services." In comparison with Canada's legislative and regulatory emphasis, foreign ownership is not as prominent an issue in American media regulation. The nationalist ownership norm is so predominant in Canada that it is the only OECD nation with foreign ownership restrictions on cable distribution companies.

Because of the hegemonic role of nationalism, localism has not played the prominent role in Canadian media ownership debates that it has in the United States. First, the nationalist influence of the powerful CBC infrastructure defied the principle of localism. Second, even for the private stations not affiliated with the CBC, Canada has no codified ownership regulations comparable to the NTSO rule or the other rules at issue in the 2003 Order. The only ownership rules in Canada are the nationalist foreign ownership restrictions described above. According to some American observers, such as Cheryl Leanza and Harold Feld, the absence of formal ownership regulations makes Canada an example of what not to do:

Examples of other Western democracies that do not have ownership limitations provide object lessons of the danger of concentrated ownership to democratic discourse. In Canada, for example, CanWest, which owns more than fourteen metropolitan daily newspapers, 120 community newspapers, sixteen television stations, seven networks, and an Internet news portal, ordered all investment in Global Crossing was blocked by concerns that Global Crossing lines could become vulnerable to tapping by Chinese government and business; and how such security concerns could be used as "a smokescreen for protectionism.

168. Mark Clough, Trade & Telecommunications at 90 (2002). But cf. J. Gregory Sidak, Foreign Investment in American Telecommunications (1997) (providing a full-blown analysis and critique of the regulation of foreign investment in American telecommunications, including its protectionist elements, and, in particular, a counter to Mark Clough's description of 47 U.S.C., § 310 (Id. at 77-79 and 156-57)).

169. See Paul Corriveau, Regulation of Foreign Ownership of Broadcasting Distribution Undertakings: A Comparative Study of International Markets, A Study for the Canadian Cable Television Association 19 (January 20, 2003), available at www.ccta.ca/english/news-information/news-releases/2003/pdf/26-03-corriiveau.pdf (last visited Aug.19, 2004) ("[A]lone amongst developed countries in the world, Canada continues to place restrictions on foreign investments in BDU assets. If the Canadian policy is meant to rest on some form of cultural policy rationale, it is exceedingly tenuous. International experience with such foreign-investment has demonstrated how culturally uneventful it has been. Regulators the world over continue to effectively regulate foreign-owned BDUs as if they were indistinguishable from domestic-owned competitors.

169. See Paul Corriveau, Regulation of Foreign Ownership of Broadcasting Distribution Undertakings: A Comparative Study of International Markets, A Study for the Canadian Cable Television Association 19 (January 20, 2003), available at www.ccta.ca/english/news-information/news-releases/2003/pdf/26-03-corriiveau.pdf (last visited Aug.19, 2004) ("[A]lone amongst developed countries in the world, Canada continues to place restrictions on foreign investments in BDU assets. If the Canadian policy is meant to rest on some form of cultural policy rationale, it is exceedingly tenuous. International experience with such foreign-investment has demonstrated how culturally uneventful it has been. Regulators the world over continue to effectively regulate foreign-owned BDUs as if they were indistinguishable from domestic-owned competitors.

169. See Paul Corriveau, Regulation of Foreign Ownership of Broadcasting Distribution Undertakings: A Comparative Study of International Markets, A Study for the Canadian Cable Television Association 19 (January 20, 2003), available at www.ccta.ca/english/news-information/news-releases/2003/pdf/26-03-corriiveau.pdf (last visited Aug.19, 2004) ("[A]lone amongst developed countries in the world, Canada continues to place restrictions on foreign investments in BDU assets. If the Canadian policy is meant to rest on some form of cultural policy rationale, it is exceedingly tenuous. International experience with such foreign-investment has demonstrated how culturally uneventful it has been. Regulators the world over continue to effectively regulate foreign-owned BDUs as if they were indistinguishable from domestic-owned competitors."
of 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.170

The CanWest example even made its way into the 2003 Order and the Third Circuit’s review as an illustration of the “the peril of national ownership and corporate centralization of media services,”171 highlighting the divergent approaches of the two jurisdictions.

Although there were calls in Canada for explicit ownership guidelines in 1987, they have not been issued.172 Instead, a benefits test has evolved where the Canadian Radio-Television and Telecommunications Commission (“CRTC”) assesses license transfers on a case by case basis. The test recognizes the importance of local benefits but balances them against “system-wide benefits, such as research and development, particularly in light of the rapid pace of change in the broadcasting and cable environments.”173 In 1989, the CRTC acknowledged the importance of “local participation in ownership” as a factor to consider in reviewing license transfers.174 Ownership concentration concerns have also figured in historically important CRTC transfer decisions, most notably the 1978 denial of Baton Broadcasting’s application to acquire CFCF in Montreal. In denying the application, the CRTC referred to preserving the “local


171. 2004 Third Circuit Review, supra note 1, at 63.

172. See Final Report, Standing Committee on Communications and Culture (Gormley Committee), Concentration of Ownership in the Media, available at http://www.pch.gc.ca/progs/ac-ca/progs/esm-ms/prin4_e.cfm#tfbp (last visited Aug. 19, 2004) (“Policies to achieve financial strength in the private sector of the Canadian broadcasting system must be compatible with a clearly enunciated ownership policy and guidelines on the limits of ownership. Rules must be established and applied—and be seen to be applied.”).


identity" of the stations within the alternative English language TV service, but the dominant flavor of the reasoning was to promote diversity of programming from Canadian sources.\textsuperscript{175} Behind the scenes, Québec nationalism was threatening to unravel Canada. As the threat of Québec separation was cresting, it would have been politically intolerable from a national unity perspective for a Toronto corporation to acquire Montreal's largest English-language TV station.\textsuperscript{176} Canada's relative indifference to localism and localist ownership rules, drowned out by an overwhelming nationalist preoccupation, is transparent in the nationalist mandate that the Broadcasting Act lays out for the broadcasting system. With this legislation as its cue, a regulator choosing between a national or local orientation has to weigh in on the national side of the balance.\textsuperscript{177} The CRTC has recently demonstrated this in its promotion of national networks and encouragement of consolidation.\textsuperscript{178}

\begin{itemize}
\item \textsuperscript{175} CRTC, Application to transfer effective control of Multiple Access Limited to Baton Broadcasting Incorporated, Decision CRTC 1978-669 (Oct. 12, 1978) at 4, 5-6.
\item \textsuperscript{176} SUSAN GITTINS, CTV: THE TELEVISION WARS 143 (2000); see also \textit{id.} at 137-47 (describing generally the politics and policies behind the CRTC's decision on Baton's acquisition of CFCF).
\item \textsuperscript{177} \textit{See} Broadcasting Act, supra note 164, at §3 (1)(d):
\begin{itemize}
\item (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
\item (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
\item (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and
\item (iv) be readily adaptable to scientific and technological change.
\end{itemize}
\item \textsuperscript{178} \textit{See} CRTC, Public Notice CRTC 1998-8, available at http://www.crtc.gc.ca/archive/eng/Notices/1998/PB98-8.htm (last visited Feb. 20, 2004). ("Over the past two decades, ownership consolidations and the licensing of new local stations have resulted in the development of strong, multi-station ownership groups with a presence in most Canadian provinces and major markets. These groups have come to possess the resources required to produce high-quality programming or to acquire national rights for the
Other fields of Canadian economic regulation, such as banking, are also lukewarm to localism. As I have described, American banking regulation was historically preoccupied with localism and branching restrictions, and the atomistic banking market reflected this. In contrast, Canadian banking regulation has been preoccupied with Canadian national ownership and the development of a national banking infrastructure to link the country together. Canada's major banks, for most of the past century, have numbered fewer than ten, and have always carried on business throughout the country. Reflecting the concentrated, national market, banking regulatory authority is highly concentrated at the federal level. This discussion suggests that the conventional wisdom I describe in my introduction is correct: the Canadian system exists in reaction to American dominance and the American system exists as a reflection of the localist foundation of the country. While there may be truth to the conventional wisdom in explaining the differences between the two jurisdictions, my interest is more in the similarities. Remarkably, the Canadian tendency toward nationalism in banking and communications and the American tendency towards localism in the same sectors reveal a strong point of commonality: protectionism. Ownership rules insulate owners from the threat of takeover and competitors from more efficient owners entering the market. The next section looks more closely at the public choice account of localism as protectionism.

distribution of such programming on a national scale. As a result, their importance and effectiveness as tools for achieving the programming objectives of the Broadcasting Act have increased relative to the national networks.” (See CRTC, Public Notice CRTC 1998-8, available at http://www.crtc.gc.ca/archive/eng/Notices/1998/PB98-8.htm (last visited Feb. 20, 2004)).

179. See R.W. McDowell, R.E. Elliott, D.E. Milner, H.J. Thompson, S.B. Kerr and J. M. Robinson, Q.C., Canada's New Financial Institutions Legislation: New Ownership Opportunities in Canada, 2000 C.N.B.L.R. LEXIS 4, 4 (arguing that, although formal foreign ownership restrictions on Canadian banks have been abolished, the widely-held rule, which restricts ownership to less than 20 percent of a bank's voting shares, represents a de facto foreign ownership cap). See also Bank Act, R.S.C., ch.46, § 374(1)(1991).


181. M. H. OGILVIE, CANADIAN BANKING LAW 221 (2d Ed. 1998) (“The administration of the Bank Act, and therefore general supervision over the banking system in Canada, is the responsibility of the Superintendent of Financial Institutions... Canada is perhaps the only country in the world to provide for a single regulatory office for virtually all of its financial institutions.”). See also Office of the Superintendent of Financial Institutions Act, R.S.C., ch. 18 (3d Supp.), §§ 1-25 (1985).
4. A Public Choice Contract: Localism as Protectionism

Localism is the most sacred cow of communications policy. More sacrifices have been laid at the altar of this beast than at that of any other in the history of communications regulation.182

In the opening pages of this article, I refer to Michael Powell’s commitment to free, local TV. Christopher Yoo183 and Thomas Hazlett184 provide an account of localism that reinterprets this commitment as benefiting incumbent licensees, the alleged embodiments of localism, as opposed to the interests of consumers. Yoo deconstructs the commitment to free TV into four preferences: (1) local programming over national programming, (2) free (advertisement supported) television over pay television, (3) incumbent television providers over new entrants and emerging television technologies, and (4) single-channel television technologies over multi-channel bundles. Yoo traces a long-standing tradition of protecting the incumbency of free TV station licensees back to the original influence of localism in communications regulation. First, the initial spectrum allocation decisions harmed the development of networks.185 The licensing mandate that gave the FCC power to control whose voice was heard was immunized from First Amendment scrutiny through the spectrum scarcity doctrine.186 According to the doctrine, spectrum is the public domain, and, because of its scarcity, spectrum needs to be managed by a licensing authority, in order to insure public access to as many voices as possible.187 Otherwise, “with everybody on the air, nobody could be heard.”188 While entailing “a degree of governmental control over the content of speech,” the scarcity doctrine provided no guidance on the...
criteria for awarding licenses (and, thus, for regulating content).\textsuperscript{189} As I describe above,\textsuperscript{190} the FCC assigned this role to localism, and the Supreme Court upheld the FCC's decision.\textsuperscript{191} Yet, Yoo properly reminds us that there is nothing in the legislation that would prevent the FCC from exercising its discretion to pursue a national model of "equitable distribution of . . . service" rather than a local one.\textsuperscript{192} Hazlett critiques the choice as "driven entirely by politics" with "no philosophical attachment."\textsuperscript{193}

After spectrum allocation shackled network growth in favor of local licensees, "renewal expectancy" insured that incumbent licensees would never lose their privileged positions of stewardship over the public interest.\textsuperscript{194} When marketable technologies surfaced to compete in video distribution markets, the incumbents were still preferred. The FCC abandoned its shift to UHF technology because of the disadvantages this would cause incumbent VHF local broadcasters.\textsuperscript{195} Protecting the local broadcaster's interest has also been a clear objective of the FCC's approaches to cable, DBS and digital broadcasting.\textsuperscript{196} This is most evident in the must-carry regime applicable to cable and DBS described above.\textsuperscript{197} Must-carry protects free TV broadcasters and "crowds out additional cable networks, beginning with those serving the smallest audiences." Must-carry preempts channel capacity and thereby chokes off cable offerings of localism, such as "locally oriented, all-news channels." Consequently, "must-carry promotes marginal broadcasters at the expense of marginal cable channels even though it is the marginal cable channels that are more likely to provide diverse (including local) programming."\textsuperscript{198}

On this account of localism's protection of incumbent licensees, the FCC chose, and continues to choose, localism as the "foundation" for its public interest mandate because it is the lifeblood of an alignment of interests among politicians and regulated entities. Under

\begin{itemize}
\item \textsuperscript{189} Yoo, \textit{Response to Hazlett, supra} note 119, at 263.
\item \textsuperscript{190} \textit{See supra} notes 116-120 and accompanying text.
\item \textsuperscript{191} \textit{Pottsville Broadcasting Co.}, 309 U.S. at 138.
\item \textsuperscript{192} 47 U.S.C. § 307(b) (2004).
\item \textsuperscript{193} Hazlett, \textit{Response to Yoo, supra} note 6, at 244-45.
\item \textsuperscript{194} Yoo, \textit{Rethinking Free TV, supra} note 183, at 1684-85.
\item \textsuperscript{195} \textit{Id.} at 1686.
\item \textsuperscript{196} \textit{Id.} at 1688-92.
\item \textsuperscript{197} \textit{See supra} notes 147, 148, 149 and accompanying text.
\item \textsuperscript{198} Yoo, \textit{Rethinking Free TV, supra} note 183, at 1661.
\end{itemize}
a localism structure, "regulators and incumbents carve up markets such that entry barriers imposed by law" and the regulatory moves described above "guarantee super-competitive returns for privileged firms (licensees)." The quo that benefits the political source of the quid has two aspects. First, the deal requires a portion of the super-competitive profits to be redirected "toward the policymaker's political objectives," such as "additional restrictions on indecent and violent programming, increased support for children's educational programming, and the provision of free air time for political candidates." Second, with localism as the guide for carving up markets, each market is "no larger than the size of a congressional district," ensuring "that candidates could buy advertising time without paying for audiences who were not voters."

Localism is thus a public choice contract with a "life of its own," generating regulation divorced from consumer welfare and stifling "emerging wireless networks in order to protect the broadcast technologies of the 1940s." If we apply Mancur Olson's theory here, the only way this entrenched alignment of interests can be dissolved is through a revolution or some comparable source of upheaval:

[T]hose organizations that have secured selective incentives to maintain themselves will often survive as organizations even if the collective good they once provided is no longer needed. As the sociologist Max Weber pointed out long ago, the leader who is making a living out of an organization may keep it alive even after its original purpose has disappeared; an organization set up to represent the drivers of teams of horses, for example, will take on the task of representing drivers of trucks, an organization set up to help the veterans of one war will outlive these veterans by representing veterans of subsequent wars. Selective incentives make indefinite survival feasible. Thus, those organizations for collective action, at least for large groups, that can emerge often take a long time to emerge, but once established they usually survive until there is a social upheaval or some other form of violence or instability.

Despite the narrative of technological revolution over the past half-century (UHF, cable, DBS, fiber optic), there has been insufficient momentum to cause the type of upheaval that Olson

---

199. Hazlett, Response to Yoo, supra note 6, at 234.
200. Yoo, Response to Hazlett, supra note 119, at 265-66; Hazlett, Response to Yoo, supra note 6, at 237.
201. Yoo, Rethinking Free TV, supra note 183, at 1700.
202. Yoo, Response to Hazlett, supra note 119, at 265.
203. Hazlett, Response to Yoo, supra note 6, at 237.
204. OLSON, supra note 7, at 40.
contemplates. Amazingly, free TV broadcasters have not faced the need to re-invent their roles that challenged the teamster representatives to which Olson refers. Instead, these licensees have been protected from the technologies that have challenged their incumbency. According to Hazlett and Yoo, this protection has the name of localism.

As suggested above, viewed as "protectionism," localism shares many of the qualities and faults of nationalist ownership restrictions that protect Canada's communications firms. Like localism, the Canadian regime has been criticized in recent years. Before the June 2004 re-election of Paul Martin's Liberals, the nationalism norm appeared to be losing ground as the government began reviewing Canada's foreign ownership restrictions on telecommunications common carriers. Because of the more obvious cultural issues involved in broadcasting, there has been less movement here. Yet, the Conservatives have been in favor of liberalizing these restrictions for some time and called for a reduced CRTC mandate in the recent election, while the Liberals have been divided between Industry Canada's push for eliminating ownership limits and Canadian Heritage's preference for the status quo. Public choice rubric might say that prominent media families would happily sell because it would mean obtaining a premium price for a business whose chief asset, the license, was given to them for free.

Despite the governing Liberals' recent policy initiatives that consider foreign ownership liberalization, the nationalism norm is

205. The victory was qualified in that the Liberals won a minority government. While the Liberals won the most House of Commons seats of any party, they failed to win a majority of the seats. This subjects the success of Liberal legislative initiatives to the support of individual Members of Parliament from various opposition parties.


208. Id. ("There is no opportunity for other broadcasters to compete for the license every so often, as is the case in other countries. So scrapping the CRTC would effectively give the private broadcasters the opportunity for a double win—the first because of the free license, the second from the opportunity to start an international bidding war.".)
pervasively, if passively, supported across partisan lines.\(^{209}\) With the minority government requiring the Liberals to seek support from all parties, imminent reform of communications ownership regulation is unlikely.\(^{210}\) There is no groundswell support for dismantling the foreign ownership restrictions and even the Conservatives have been cautious about their proposals for liberalization. The nationalism norm itself provides a plausible but disputable account of foreign ownership restrictions. Cultural sovereignty (particularly in the face of American cultural imperialism) requires that Canadian media be controlled by Canadians because Canadians are more reliable than foreigners in delivering and supporting Canadian culture. It is difficult to say whether most Canadians actually believe this conventional wisdom because the topic is obscured from popular political discourse. The remarkable point for this article’s purpose is the degree of similarity between the conventional wisdom justifying the nationalism norm and the conventional wisdom that justifies localist ownership restrictions in American communications. Indeed, Peter Grant and Chris Wood use the word “local” to describe the conventional arguments underpinning the Canadian nationalism norm:

(1) “Local companies are more likely to identify, develop and promote a diversity of expression by local cultural creators.”

(2) “Local companies are more likely to reinvest returns from those rare successes in the cultural casino in future bets on local talent.”\(^{211}\)

On the basis of this conventional wisdom, can we construct a plausible consumer welfare justification for localism as “protectionism”\(^{212}\) that goes beyond conventional wisdom and dispels the Yoo/Hazlett public choice account? We have to consider the premise itself and explore whether locally owned media providers are necessarily more likely to promote, and re-invest in, local voices. However, behind the premise that local ownership promotes local

\(^{209}\) Id. ("No country in the West, other than the United States, has an Open Skies policy in broadcasting. Cultural sovereignty is not on the table. During the Canada—U.S. free-trade negotiations in the late 1980s, only culture was not open for negotiation. And that was under a Tory government.").

\(^{210}\) See Patrick Brethour, Big bank mergers may top list of casualties, THE GLOBE AND MAIL, June 30, 2004 at B12 and B6 (discussing the implications of the election of Paul Martin’s Liberal minority government for various regulated industries, including financial services, transportation, communications and energy).

\(^{211}\) GRANT & WOOD, supra note 151, at 254.

\(^{212}\) Yoo, Response to Hazlett, supra note 119, at 255. See also Thomas Hazlett, Physical Scarcity, Rent Seeking, and the First Amendment, 97 COLUM. L. REV. 905 (1997).
voices lies another premise that local voices require, and are worthy of, promotion. This should also be scrutinized, but, in doing so, we return to the broader topic of giving content to the localism norm and its "deep roots in American political ideology,"213 inviting the risk that this becomes a tediously circular exercise. (Localism means local control, which promotes local voices and interests, which is what localism means.) To dissect the content of localism without getting trapped in this circle, this section has attempted to trace the roots of localism through particular manifestations in early communications regulation, other regulatory venues and the comparative norm of Canadian nationalism. Another microscope that we can use to examine the premises behind the localism norm is the debate on media ownership and the NTSO rule. Referring to political, cultural and economic perspectives, the article now returns to this debate with a broader analytic than the technical introduction in Part III.1. We will see that, while there is something undoubtedly special about the media, there is also something special about territory and its role in the construction of community identity. It is the latter that provides the missing link in helping us understand the importance of localism in media ownership regulation and whether it is declining.

V. Politics, Culture and Economics in Media Ownership Regulation

The media ownership debate is infused with political, cultural and economic perspectives that parallel the media's concurrent political, cultural and economic roles as news reporters, entertainers, and businesses providing shareholder returns. The first thing to note about the political, cultural and economic perspectives is their overlap. Political critiques about consolidation's impact on media diversity and democracy find indispensable support from economic analysis. Similarly, economic arguments for liberalizing ownership restrictions are often based on cultural demand shifts intertwined with technological innovations, such as video on demand ("VOD"), fiber optic video delivery and others. This overlap is reflected in the way that the diversity, competition and localism norms inform, and are informed by, political, cultural and economic perspectives. For example, diversity requires competition that may be defined economically. But, diversity also includes political and cultural

213. Yoo, Response to Hazlett, supra note 119, at 273.
objectives. The political objective asserts that diverse sources and ideas are “essential to the well-informed political decision making that underlies a well-functioning democracy.” The cultural objective states that “audience access to culturally diverse sources and content” promotes “greater cultural understanding and social cohesion.” These political, cultural and economic perspectives on media ownership coexist with, and are used by, the irreconcilable positions of liberalization proponents and critics. I begin with political concerns about universal access and consolidation of media voices. I then introduce increasing demand for personalized cultural consumption and its impact on cultural cohesion and development at the national and local levels. Lastly, I deal with the economic perspective on the debate. This discussion is more elaborate than the cultural and political sections because of the controversies that abound within the economic approach. However, these controversies help balance my analysis, because they raise potential limits of economic considerations, re-invoking politics and culture. In this way, we gain a complete picture of the political, cultural and economic justifications and criticisms of media ownership regulation.

1. The Political

In his Wall Street Journal letter to the editor, William Pike raises two key political values at stake in the debate on media ownership regulation. First, broadcast media should be universally accessible to all citizens. Free, over the air TV provides video distribution for the small percentage of the population that does not have access to cable or DBS. As an advertising-supported medium, free TV involves no subscription fees or discrete transaction payments for media products. On this view, free TV licensees were cast in the role of being uniquely capable of providing universal access to video distribution. Courts and regulators invoked this universal access role to impose and uphold some of the protectionist measures that Yoo and Hazlett criticize, such as the cable and DBS must-carry regime.

While Pike mentions universal access to promote regulation of broadcast ownership, Powell’s op/ed piece uses universal access to justify consolidation and liberalization. Neither perspective considers

215. Id. at 800.
216. See supra note 82 and accompanying text.
Yoo's challenge to "justify why society should subsidize the consumption of television programming rather than the consumption of other media." Nor do they consider the possibility for other technologies to share or assume local broadcasters' universal access role. For example, a subsidy scheme comparable to the universal service regime for wireline telephone could be imposed on cable, the most pervasive form of video delivery, or DBS.

The second political value that Pike raises is the unique educative function that media play in promoting democracy. Broadcasting is no ordinary business because it is uniquely pervasive of the American home. Primarily a source of entertainment, it also supplies news and political analysis. It is in the performance of the latter functions that more than 90 percent of the American electorate say they rely on broadcasting as the source of most of their information about the world. It is that fact which provides the best evidence of the medium's uniquely pervasive position in American homes, and it is that fact which should make us aware of the awesome power of broadcasting to mold public opinion.

Historically, concerns about TV's political influence were addressed by promoting the "widest possible dissemination of information from diverse and antagonistic sources." Conventional wisdom in communications regulation holds that we promote the marketplace of ideas with a diversity of voices/media outlets, and we

217. Yoo, Rethinking Free TV, supra note 183, at 1675.
218. Id. at 1676, citing Ross E. Ericksson et al., Targeted and Untargeted Subsidy Schemes: Evidence from Postdivestiture Efforts to Promote Universal Telephone Service, 41 J.L. & ECON. 477, 481-82 (1998) and Yoo, The Rise and Demise of the Technology-Specific Approach to the First Amendment, 91 GEO. L.J. 247, 275-77, 354-55 (2003) ("[P]roviding low-income households with discounts for pay television services in the manner currently used to promote indigent access to telephone service should promote access to television far more efficiently than the system of implicit cross-subsidies currently employed, which effectively lowers the price of television for all households regardless of ability to pay.").
219. TILLINGHAST, supra note 19, at xvii.
encourage a diversity of outlets if we require diversity of their ownership.\textsuperscript{221}

This conventional wisdom developed from the assumption that economic power of ownership correlated with political power of influencing public opinion, which was reinforced by the political valences of antitrust policy. Prominent antitrust scholars, such as Robert Pitofsky, point out that, even in an industry without the media's educative function, ownership concentration can have antidemocratic consequences.\textsuperscript{222} However, Pitofsky has also acknowledged that the political consequences for ownership concentration are particularly high in the media:

It's important . . . that business consolidations not be a barrier to the free flow of ideas and opinions . . . if you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to be more careful and thorough in your investigation than if the very same problems arose in cosmetics, or lumber, or coal mining. I mean, if somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be.\textsuperscript{223}

This sentiment reverberates in critiques\textsuperscript{224} of NTSO rule liberalization and the marketplace model of realizing the public


\textsuperscript{222} Robert Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051-66 (1979) in ROBERT PITOFSKY, HARVEY J. GOLDSCHMID AND DIANE P. WOOD, TRADE REGULATION CASES AND MATERIALS [hereinafter TRADE REGULATION] 7 (Foundation Press 5th ed. 2003) (“It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By 'political values,' I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and, second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.”).

\textsuperscript{223} Alec Klein, A Hard Look at Media Mergers, WASHINGTON POST, Nov. 29, 2000, at E01.

\textsuperscript{224} See C. Edwin Baker, Media Concentration: Giving Up On Democracy [hereinafter Baker, Media Concentration], 54 FLA. L. REV. 839, 917 (2002) (arguing that, even if antitrust law should be “largely restricted to economic efficiency concerns and monopolistic power over pricing,” generally, “it should not be so limited in the media arena”).
interest in media. In my section below on economic perspectives, I return to these critiques.

The political concern about undue concentration of ownership/political power supports the argument that ownership should be regulated to preserve diversity. So where does localism fit in? As noted above, the FCC justifies retaining the NTSO rule as a means to maintain the balance of power between networks and affiliates because “affiliates’ incentives are more attuned to their local communities than are those of networks.” Here, local control maintains the balance. However, under the NTSO rule and the diversity theory, local stations could all be owned by various networks so long as there were sufficient networks to enable a diverse market.

There is a link missing between the political diversity rationale and the ideal of promoting local control to counterbalance network power through the NTSO rule. This missing link lies in the territorial bases of political institutions.

In the late 1990s, as increasing Internet use spurred on “communications revolution” rhetoric, Eben Moglen and Pamela S. Karlan considered the alleged revolution’s impact on the role of territory in political representation.

“Geographic boundaries have served traditionally, and perhaps intuitively, as the most common basis” for representation because “there is a spatial dimension to human organization.” But one of the central features of the Internet is that it demonstrates quite concretely the possibility of organizing human beings in nonspatial ways, and that it allows human beings to organize themselves, rather than having an organizational structure imposed on them by a central authority. As individuals grow comfortable with the idea that important communities may be entirely nongeographic and that individuals may affiliate for important purposes along dimensions that have little or nothing to do with where they live, they may become both more skeptical of a purely geographic way of defining political constituencies and more open to election systems that allow voters to affiliate along dimensions other than residence.

The traditionally territorial orientation of the electoral process necessarily privileges localism because it presumes that communications limitations require political activity to take place

225. 2003 Order, supra note 12, at §578.
226. See supra note 48.
within local geographic limits.\textsuperscript{228} However, “as we spend greater and more meaningful portions of our lives in computer-mediated communications with other people, three pervasive changes occur: location doesn’t matter, our interests determine our communities, and we do not have to use our feet to vote with them.”\textsuperscript{229} With everyone “adjacent to everyone else” as “email, instant messaging, Internet phone” and other communications technologies defy territorial boundaries,\textsuperscript{230} “locality ceases to have a normative significance: our neighborhood pub is less likely to contain our friends than a chat room” and “[a]n accessible Congressman is one who gives us a quick substantive answer to our email, not someone who comes back to the district for the weekend and hangs around the mall that we no longer shop at.”\textsuperscript{231} In the Internet age, geographic localism’s role as the normative guide to commercial and political activities is displaced by the power of “affinity:”

The network’s media allow us to locate others who share our interests and concerns with ease. Thus, we increasingly occupy the locality of the like-minded. Nor is our locality in these terms singular: We are simultaneously part of communities of sea kayakers, gamelon musicians, ex-Bahai atheists, melanoma survivors, lukewarm libertarians (not yet ready to eliminate public libraries and slightly queasy about do-it-yourself howitzer construction) and shiatsu fanciers. A conclave of the people who share all our affinities would be more depopulated than a New Hampshire village meeting on a blizzard evening—in fact, it is almost guaranteed to be a solo event. But each of the communities comprising our social context will be vibrant, noisy, and disputatious.\textsuperscript{232}

In Hazlett’s view, these communities of affinity “are every bit as ‘local’ as communities in space,” for “many in a religious community feel ‘closer’ to church services of their faith broadcast from across the country than they would to a broadcast of services of another faith from just across town.” This reveals “a conflict between the divergent views” of localism\textsuperscript{233} which can be alternatively perceived as devoid of

\textsuperscript{228} Moglen & Karlan, supra note 227, at 1093. \textit{Cf. id.} at 1094, \textit{citing} CHARLES R. BUCKALEW, PROPORTIONAL REPRESENTATION 62-63 (1872) (explaining that emerging democracies in Eastern and Central Europe, Asia and Africa have not adopted the “United States’ exclusive use of winner-take-all, geographically defined single-member districts to elect” their national legislatures).

\textsuperscript{229} Moglen & Karlan, supra note 227, at 1098.

\textsuperscript{230} Id.

\textsuperscript{231} Id. at 1098-99.

\textsuperscript{232} Id.

\textsuperscript{233} Hazlett, Response to Yoo, supra note 6, at 248.
geographic content where communities of affinity replace communities of space. The Internet revolution allows these communities of affinity to be represented institutionally in non-geographic virtual legislative districts and unmediated Internet voting on public policy issues, replacing the current paradigm of geographical representative government.

The negative implication here is the potential loss of an important intermediary function. While "immediate, unmediated access" has the positive effect of removing the shadow cast by "anything that falls between the idea and the reality," the "slow and creaky" process of representative government and media involvement permits deliberative and mediated decision making that avoids "quick, certain and wrong" outcomes. Moglen and Karlan argue that an Internet driven dis-intermediated democracy will be particularly problematic for dis- and under-enfranchised citizens. This is first because "representative bodies are relatively intimate groups—at the local level they rarely contain more than two dozen members." Second, the fact that legislators have far more voting opportunities than would the citizenry under any conceivable form of direct democracy also makes representative democracy potentially more responsive to minority interests. And finally, voting within legislative bodies occurs in an institutional setting that increases the possibilities for deliberation through debates, amendment processes and mark-ups, and hearings in which representatives participate actively. Yoo is also hesitant to endorse an Internet democracy, asserting that "the proper way to constitute a political community is an empirical question," and "to the extent that geographically localized interests dominate issues that affect the entire nation, a policy of [geographic] localism might well make sense." If this is the case, and, if the media serves an important intermediary function within this process, this offers an explanation for why "the regulatory

234. Yoo, Response to Hazlett, supra note 119, at 272. (citing Moglen and Karlan, supra note 227, at 1098.)
235. Moglen & Karlan, supra note 227, at 1105-06.
236. Id. at 1107.
237. Id. at 1113.
238. Id.
239. Moglen & Karlan, supra note 227, at 1111.
240. Id. at 1112.
241. Id.
242. Hazlett, Response to Yoo, supra note 6, at 248.
apparatus for broadcasting is wedded to a geographic grid . . . not terribly distinct from that used to define 535 electoral votes." 243 This territorial explanation offers a plausible alternative to the public choice account provided by Yoo and Hazlett. Cass Sunstein takes these insights on the media’s intermediary function further in the context of the cultural perspective, to which I now turn.

2. The Cultural

Within the cultural perspective on media ownership, there are several tensions: local versus cosmopolitan content; local reinvestment versus centralized redeployment of revenue; the media’s democratic role in educating citizens versus its commercial role in supplying consumers with what they want; and national culture versus local culture. TV is the most important venue for cultural expression in our society, and cultural expression is fundamental to how we form community:

cultural expression is the essence of how we imagine our way into the future. Circumstances change. We adapt or perish—one and all. And neither societies nor individuals adapt without a capacity for self-discovery, an ability to orient themselves to the forces around them. That is the irreplaceable function of culture: to exchange our visions of ourselves and how we fit with others, to help us each navigate towards our complex hopes, dreams and destinies. 244

The localism norm builds on this function of culture to assert that local variations on cultural taste need access to media dissemination for local community development.

In the early days of broadcasting, African-American hosts, stars and programming, such as The All-Negro Hour, could gain access to broadcast at the local level, 245 together with “talk, ethnic nationality hours, labor news, church services, and vaudeville-type musical entertainment by hometown, often ethnic talent.” However, with the growth of the networks, there was a shift to more cosmopolitan entertainment “created for a national audience: comedy and variety shows with national celebrities, soap operas, westerns and detective shows, and sports programs.” 246 The localism norm, as it is used by liberalization critics, associates networks with a decline of local cultural expression. Liberalization critics point to studies of how local

---

243. Id. at 271.
244. GRANT & WOOD, supra note 151, at 20.
245. STARR, supra note 2, at 369-70.
246. Id. at 367, quoting LIZBETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1918-1939, 135 (1990).
news content suffers under chain ownership of newspapers, as well as studies showing how minority owners program for minorities and local owners program for their local communities. Liberalization critics explain that, with many stations owned by one entity, the stations are perceived as cash cows that provide resources for corporate purposes, such as servicing debt, rather than for reinvestment in local content. This is the basis for assuming that an owner's location matters to the content of the cultural and political products of the media. As I discuss in Part V.3.C., this assumption is controversial and has been undermined with empirical evidence.

TV's role is to concurrently supply commercially viable entertainment and politically edifying exposure to information and insight. In his op/ed piece quoted above, Michael Powell discusses the importance of giving consumers what they want, which, he suggests, is a personalized cultural experience. The trends in demand for entertainment products display a shift away from situation comedies, news-magazine shows and other forms of entertainment during prime-time. There is an accelerating decline in viewership of prime-time TV by young adults, a crucial segment of the population for advertisers. The nature of the products demanded is also shifting towards reality shows and games. This changes the business model of video entertainment delivery significantly. Reality shows, while relatively inexpensive to produce, are more exhaustible than situation comedies, whose syndication provides a substantial future return. At the same time, games provide no revenue from standard commercials, while technological innovations such as video on demand (VOD), personal video recorders (PVR), digital video recorders (DVR) and time shifting allow viewers to eliminate commercials. These and other

247. BAGDIKIAN, supra note 39, at 195-96, citing Pam Eversole, Consolidation of Newspapers: What Happens to the Consumer? JOURNALISM QUARTERLY 245 (1971). Cheryl Leanza and Harold Feld, other prominent liberalization critics who work with the Media Access Project, a nonprofit public interest law firm that represents consumer and citizens groups on telecommunications issues, also point to evidence that local ownership affects the quality of local content production, thus influencing local culture. Leanza and Feld cite an independent study by the Pew Foundation Project on Excellence in Journalism (PEJ) as more recent empirical proof of Bagdikian's and their assertion that concentration harms rather than enhances the production of local news. Leanza & Feld, supra note 170, at 18.


249. See supra note 81 and accompanying text.

shifts in demand can be encapsulated in the concept of “personalized cultural consumption.” Because of time constraints and the fragmentation of tastes, consumers are demanding the ability to streamline their culture consumption with their tastes and schedules. The comedian Jerry Seinfeld recently said that he is “definitely watching less TV, and spending more time on the Internet at night, because the Internet is . . . so personal” and he can see things that are of interest “only to [him] . . . .”

Personalized cultural consumption may have negative cultural implications:

Imagine, that is, a system of communications in which each person has unlimited power of individual design. If people want to watch news all the time, they would be entirely free to do exactly that. If they dislike news, and want to watch football in the morning and situation comedies at night, that would be fine too. If people care only about America, and want to avoid international issues entirely, that would be very simple indeed; so too if they care only about New York . . . If people want to restrict themselves to certain points of view, by limiting themselves to conservatives, moderates, liberals, vegetarians, or Nazis, that would be entirely feasible with a simple “point and click.”

The capacity to control your cultural experience through unlimited filtering brings with it the comfort of being able to reaffirm your preexisting knowledge, taste, perspective and opinion. My discussion of the political perspective shows how this cultural phenomenon very quickly assumes political form where “affinities” replace geographies in defining communities. If a citizen can “filter” her cultural experience, s/he reinforces her personal, professional and socio-economic associations in a way that binds her to these associations and fragments society as a whole into these associations. People are now “exposed to louder echoes of their own voices, resulting, on occasion, in social fragmentation, misunderstanding, and sometimes even enmity.” Fragmentation thus leads to polarization, which, in turn, leads to “social cascades,” where groups move rapidly and dramatically towards one or another belief or action.

253. See supra notes 227-243 and accompanying text.
254. Sunstein, ETERNALLY VIGILANT, supra note 252, at 298.
255. Id. at 299.
While personalized cultural consumption has these negative implications, cultural products that draw heterogeneous consumers, such as the final episode of Friends or the Super Bowl, have several positives. First, we may enjoy a media product more if we know that many others are also enjoying it. (This may be the reason why announcers mention how many people are sharing the experience of watching the Super Bowl.) Second, the shared experience may ease social interaction by providing people with something to communicate or commonly care about whether or not they have anything else in common. This has a third effect of allowing people who see others as “unfamiliar” for racial, socio-economic or linguistic reasons “to regard one another as fellow citizens with shared hopes, goals, and concerns.”

For these reasons, Sunstein advocates a regulatory scheme that encourages exposure to cultural products that consumers may not choose on their own and products with heterogenous rather than idiosyncratic appeal: the “shared cultural experience.” A misinterpretation of Sunstein’s shared cultural experience would accuse it of a totalitarian requirement that we watch what the state thinks is good for us. Sunstein would respond that his is “hardly a suggestion that everyone should be required to watch the same thing.” Sunstein’s “claim is that a common set of frameworks and experiences is valuable for a heterogenous society, and that a system with limitless options... will compromise the underlying values.” In addition, any initiatives designed to “provide better programming for children and better coverage of public issues” to facilitate “deliberative democracy” would be “subject to democratic control.”

The link from the shared cultural experience back to ownership regulation lies in Sunstein casting media outlets as “general interest intermediaries” in the production of culture that binds heterogeneous

257. Sunstein, ETERNALLY VIGILANT, supra note 252, at 301.
258. Id.
259. Sunstein, ETERNALLY VIGILANT, supra note 252, at 302.
260. Sunstein, TV and Public Interest, supra note 1, at 564.
elements of a diverse society. Through the public forum doctrine, speakers can gain access to several types of people in public parks. However, these geographic locales provide limited access to large numbers of heterogeneous consumers of culture. In contrast, the media, particularly TV outlets, have an immense scope of access to consumers across geographic boundaries and therefore serve as effective intermediaries. To the extent that new media are based on filtration mechanisms that personalize cultural consumption, they do not serve the general interest intermediary function that Sunstein has in mind. Indeed, as I explain above, the beauty of the Internet is that it eliminates the role of intermediaries.

Does this intermediary function within the shared cultural experience offer a plausible rationale for localist protections of free TV licensees? The problem here is that the intermediary function seems to be played by TV, whether distributed over the air, cable, satellite or a phone company's fiber optic network. The medium may be the message, but the technological tools for deploying the medium are irrelevant. While TV may be unique, there is nothing to justify different treatment (i.e., protection) of particular delivery technologies. Another problem here is that Sunstein's shared cultural experience is by no means localist; it focuses on the national rather than local context. His arguments could be effectively used by liberalization proponents to assert that strong networks are better able to deliver a shared cultural experience to a heterogenous group than locally owned stations because such stations face geographic and relevancy limits comparable to a public park. Yet, Sunstein's concerns about the loss of intermediaries resemble those described by Moglen and Karlan in the local context. Internet affinities, and other manifestations of the "communications revolution" may be replacing the national and local intermediaries that Sunstein, Moglen and Kaplan praise. Their parallel critiques coalesce in a dark vision where democratic and cultural institutions are dominated by personalized cultural experiences and narrowed political perspectives that fragment geographic communities into individually determined affinities.

This dark picture may be the stuff of Orwellian fiction, however. Even in 2001 (the peak of the communications bubble/revolution), certain academics concluded that seemingly outdated notions of

---

261. Sunstein, ETERNALLY VIGILANT, supra note 252, at 290. See also STÄRR, supra note 2, at 380.
territorial orientation, particularly localism, are increasingly influential in the face of the communications revolution:

Despite postmodern assertions that non-geographic communities will replace "chats across white picket fences," evidence suggests that an inherent connection exists between geography and cultural values. Even on the Internet, activity generally centers around geographically-based interests. Recent studies of "virtual communities," for instance, show that most interactions are between people who are seen in-person at work or at leisure, and website providers have responded to increased demands for regional and local focuses. Given the continued importance of geographic communities, individuals are likely to turn first to their community's laws for resolution of conflicts that occur in cyberspace but manifest themselves in real-space.262

The idea that territorial parameters are still fundamentally important for cultural development is also evident in my discussion of the Canadian nationalism norm. But this is not surprising, given that national sovereignty, by definition, relates to geographic confines.263 What then, if anything, is special about local geographic confines and local cultural development?

Carol Rose contends that the role of local culture is very different from that of national culture because "[p]ublic life at the local level is much more idiosyncratic than national public life, and much less homogenized: it is primarily at the local level that we are given to wild enthusiasms about sports teams, parades, and bizarre public art..."264

Local culture idiosyncracies develop and are sustained because of the opportunities for "voice" and "exit" uniquely available to local citizens. In addition to voting, local communities afford voice through "informal constituent contacts, the PTA meetings, the civic groups' banging on the door at city hall, the cub reporters' scandal-mongering, [and] the highly issue-oriented jawboning that is the very

---

262. David Johnson and David Post, Cyberspace Regulation and the Discourse of State Sovereignty, 112 Harv. L. Rev. 1680, at 1694-95. (analyzing the concept of sovereignty in the debate on the regulation of the Internet, using the political theory tools of the realist conception, the representational conception and the postmodern conception and highlighting "the persistent question about how to balance pluralism and order within a territorial state").

263. See supra note 11.

stuff of local controversy." Complementing these extra chances to express one's "voice," one can also "exit:"

There is a reason for the heterogeneity of local communities vis-à-vis each other: people have a choice about the community in which they live, in a way that they do not have so much choice about the state or especially nation in which they are citizens. . . . the Anti-Federalists themselves were accustomed to American communities in which dissatisfied persons could and did exit, in order to form communities more to their own liking.

With opportunities for exit and diverse interaction, the local community provides means for individual self-determination unavailable at the national level, and more akin to Internet affinities. Particularistic idiosyncracies that develop through local communities and Internet affinities exist in tension with the more cosmopolitan and homogenous shared cultural experience required for a national community. Yet, the local community, unlike an Internet affinity, resembles the national community in its territorial definition. As I suggest above, territorial communities are "imagined." While the "voice" and "exit" functions contribute to the idiosyncratic nature of a local community, a shared cultural experience still plays a role in developing the imagined local community. And this locally shared cultural experience needs a general interest intermediary, as much as a national community does. Liberalization critics can pick up the thread of this argument to claim that free TV licensees are the obvious candidates for this intermediary role. Their most important obstacle, which I come to in the next section, is to show why locally owned licensees are necessarily better able to serve this intermediary function than licensees otherwise owned. Questions about the incentives derived from ownership inevitably point us in the direction of economics, the perspective that I move to now.

3. The Economic

This section shows how economic arguments limit and advance the political and cultural perspectives, beginning with a discussion of the economic nature of free TV and media products generally. I then introduce the tensions between and within the economic, political and


266. Rose, supra note 99, at 97.

267. See supra note 8 and accompanying text.
cultural perspectives. In particular, I explore the question of whether antitrust analysis and its economic precepts are sufficient for monitoring and promoting the diversity of viewpoints in the media marketplace; the cultural development associated with media transactions; and, of course, localism.

A. The Economic Nature of Free TV and Media Products

A media product such as free TV is a public good. Public goods are characterized by their “lack of excludability,” meaning that “producers cannot restrict the benefits provided by their products only to those consumers that are willing to pay for them,” and their “lack of rivalry,” meaning that, when I watch the local news, this will not subtract from my neighbor’s ability to consume the local news nor add to the broadcaster’s production cost.

Free TV’s non-rivalry explains several aspects of the TV business. Because of non-rivalry, my consumption of the local news does not affect the producer’s costs in the same way that my consumption of burgers will increase the ingredient costs of the burger-monger (i.e., those costs that vary with output or variable costs). This results in a unique situation where variable costs do not affect marginal cost (i.e., the cost of making one more item of output), “and the sole determinant of marginal cost is the amortization of fixed costs” among all consumers (i.e., average cost). In the classic case, marginal cost is solely determined by variable cost rather than fixed costs, because fixed costs do not vary with output. In the classic case, a marginal cost based on variable cost is also an effective way to determine the price to charge the consumer. But, in the case of media products, average cost is all that is available. Charging average cost to media consumers may result in underproduction because some consumers may not be willing or able to pay the average cost even though they demand the product and would be willing to pay a price based on variable rather than fixed cost. As an alternative to

---

268. Yoo, Rethinking Free TV, supra note 183, at 1594.
270. Yoo, Rethinking Free TV, supra note 183, at 1596. For a description of the various types of costs mentioned here, see PHILLIP AREEDA AND DONALD F. TURNER, ANTITRUST LAW ¶ 712-15 (1978) in PITOFSKY, GOLDSCHMID AND WOOD, TRADE REGULATION, supra note 222, at 866-68.
271. Baker, Giving the Audience, supra note 269.
charging average cost, a media business can (and does) supplement its pricing revenue and cover fixed costs through syndication, licensing, and, in the case of free TV, advertising.\textsuperscript{272}

Average cost will decline as fixed costs are amortized over more and more people.\textsuperscript{273} With constantly declining average costs, non-rival products have "inexhaustible economies of scale" which explains the fact that media producers typically "seek the broadest market possible."\textsuperscript{274} As we will see,\textsuperscript{275} this feature of media products becomes fodder for both liberalization critics and proponents. On the one hand, localist controls can be seen as necessary checks on the economic incentive to 'produce the most cosmopolitan product possible, while Christopher Yoo argues that such checks actually destroy economic incentives for local and other special interest programming.

In addition to free TV's unique costing and related pricing issues, there are costs associated with free TV itself. From a regulatory point of view, there are opportunity costs of allocating spectrum to free TV. This allocation seems inefficient, when cable and DBS offer pervasive, and technologically preferable, means for video distribution and free TV broadcasters fail to maximize the use potential of the spectrum they have been allocated.\textsuperscript{276} In the meantime, the opportunity foregone is the development of other wireless technologies.\textsuperscript{277} The shift to digital television will redress

\textsuperscript{272} Baker, \textit{Giving the Audience}, supra note 269, at 328.
\textsuperscript{273} Yoo, \textit{Rethinking Free TV}, supra note 183, at 1597.
\textsuperscript{274} Id.
\textsuperscript{275} See \textit{infra} notes 409-417 and accompanying text.
\textsuperscript{276} Hazlett, \textit{Response to Yoo}, supra note 6, at 251-52. ("The use of the television band, which consists of sixty-seven VHF and UHF channels in each of 210 U.S. television markets, has never been intense. The average market features only about seven stations—1500 total U.S. stations divided by 210 total U.S. markets. With several alternative multi-channel systems available to bring local television signals to all who wish to see them, including incumbent cable and satellite operators and several entrants queuing to be licensed, the use of terrestrial airwaves to deliver local television signals is very expensive.").
\textsuperscript{277} Id. ("The entire bandwidth allocated to all mobile telephone service in the United States is 189 MHz, and this block manages to provide bandwidth for six national wireless networks and numerous regional networks, serving over 150 million subscribers who talk over 600 billion minutes and pay over $80 billion annually. In contrast, broadcast television is the primary delivery mechanism to just thirteen million households and could be duplicated (at higher signal quality) by alternative conduits. And yet, government continues to protect some 402 MHz of prime radio spectrum, thereby blocking alternative wireless technologies from productively using this resource. This rich bandwidth could revolutionize multiple industries, from wireless phone service—allowing carriers to offer
some of this inefficiency. By the end of 2006, digital television will replace analog transmission, and, as the "Berlin Switch" has shown, abandoning analog free TV results in more efficient use of spectrum. In addition, if we take seriously suggestions that the spectrum scarcity doctrine propagates a myth about electromagnetic waves, this opportunity cost may be exaggerated. The myth is that the waves "bounce off one another if they meet. They do not. Instead, they travel onwards through other waves forever." As a result, interference "is not a physical phenomenon, but always and only a technological problem, the result of dumb radios and dumb antennae mixing the waves up after receiving them." As these technologies improve, the opportunity cost of spectrum allocation could come down.

Another cost of free TV is advertising. We already know that free TV is a public good and that advertising provides an alternative revenue source to cover the producer’s fixed costs. But advertising also causes a nuisance cost that Yoo describes as "an implicit price" covered by viewers. The other problem with advertising is that it distorts the media consumption transaction by introducing an "indirect pricing mechanism." Advertising is a function of eyeball numbers and demographics—it has no relation to the intensity with which consumers demand media products. With an advertising pricing mechanism, producers are unable to price-discriminate by charging more to those who demand a media product more intensely. Without far better service at significantly reduced cost—to high-speed Internet access . . . Because local television stations may be distributed to viewers via cable, satellite, or other distribution systems, there is almost no cost incurred to obtain this benefit.


279. Hazlett, Response to Yoo, supra note 6, at 251-53. ("In August 2003, the city of Berlin became the first jurisdiction in the world to turn off its analog television broadcasts . . . In analog Berlin, households had been able to receive twelve television stations using twelve television channels. Through the magic of digital multiplexing, more video content is now able to flow through the bandwidth previously used for analog transmissions, such that in digital Berlin viewers now receive twenty-seven television stations over the air. These digital signals use just seven of the original twelve channels once needed for analog television.").


281. Yoo, Rethinking Free TV, supra note 183, at 1630. (Acknowledging the counter that advertising provides information, which facilitates commercial transactions, Yoo concludes that "only in the unlikely event that these two effects exactly offset each other would it be proper to regard advertising-supported television as efficiently priced.")

282. See id. at 1678 for the explanation and quotations that follow.
this pricing flexibility, a production requires massive audience appeal to "generate sufficient revenue to cover its fixed costs." By preventing viewers from expressing their demand through a willingness to pay more for certain programming, advertising bolsters the preference for cosmopolitan programming and worsens "the bias against special interest programs," including local programs:

The empirical evidence suggests that individuals are willing to pay several times more for programming than are advertisers. As a result, reliance on advertising support starves programming of resources. This burden is likely to fall most heavily on programming strongly preferred by small segments of the audience. Such minority-taste products are able to survive in most markets by identifying market niches and charging more for satisfying them. Advertising support frustrates this mechanism by giving viewers only one degree of freedom with which to communicate their desires to programmers: purchasing or non-purchasing.2

Yoo thus shows that the cost of advertising is more fundamental than the nuisance of watching ads, with implications for localism itself. Because it exacerbates the economic imperative to amortize fixed costs over a larger audience, free TV's advertiser intermediated model and lack of price discrimination forces free TV to produce more cosmopolitan, rather than local, programming.

In addition to the costs and costing issues described above, consuming media products like free TV results in several positive and negative externalities, namely the costs and benefits that derive from media consumption transactions but have an impact beyond the circumstances of consumption and/or the consumer or producer.284 At this point, I describe a catalogue of these externalities;285 in the section on the regulatory versus marketplace models, I return to this catalogue to offer my own views of its role in the media ownership

283. Yoo, Response to Hazlett, supra note 119, at 256.
284. Baker, Giving the Audience, supra note 269, at 316.
285. I credit my catalogue here to a list provided and discussed in C. Edwin Baker's work:
1. Quality of Public Opinion and Political Participation
2. Audience Members' Interactions with Other People
3. Audience Members' Impact on Cultural Products Available to Others
4. Exposing and Deterring Abuses of Power
5. Other Behavioral Responses to the Possibility of Media Exposure
6. Nonpaying Recipients of Information and Media Output
7. Positive Benefits to People or Entities Wanting Their Message Spread
8. Messages' Negative Effects on Those Who Do Not Want the Attention
9. Gain or Loss to Sources
10. Costs Imposed or Benefits Created by Information Gathering Techniques.
Baker, Giving the Audience, supra note 269, at 366-82.
debate. The first externality is political: consuming the media affects the way we participate politically and the quality of public opinion amid voters. The disincentive of media exposure also checks abuses of political power, as well as other scandalous behavior, such as white-collar crime and corporate mismanagement. As Sunstein’s thoughts above suggest, there are also social implications from the media consumption transaction, because it affects how we interact with other people, especially those with whom we have little in common. On the culture side, because of the incentive to realize economies of scale, the influence of mass-consumer taste may deny our access to “niche” media products. At the same time, because media products are public goods, nonpaying consumers can gain access to the good. The media offer a positive in the form of access to those who want to disseminate information and a negative to those who don’t want media exposure. This also relates to the privacy costs of news gathering and the reluctance or willingness of information sources to come forward to the media. This list of externalities, coupled with the description above of media products’ economic behavior, introduces the tensions between the economic, political and cultural perspectives, which I describe in detail in the next sub-section.

B. Economic Answers to Political and Cultural Problems

As I describe above, Citizen William Pike’s letter to the editor notes two political concerns in the debate on media ownership: universal access and the educative function of media. Michael Powell’s answer on universal access is that liberalization will save free TV and improve its quality for the small minority who uses it to receive their video programming. I have suggested that there may be other economically feasible means for achieving these universal access ends that could concurrently avert the costs associated with free TV described above.

In response to the political concern that the marketplace of ideas is threatened by media ownership consolidation, liberalization proponents counter that the past generation has seen a diffusion of media ownership and that the concentration of economic power

286. See supra note 218 and accompanying text.
287. Yoo, Vertical Integration, supra note 127, at 208 (describing how, in the last fifteen years, Fox was successfully established as a fourth major television network and then joined by three other smaller networks—UPN, WB, and Pax TV—and how, in the last thirty years, there has also been an “explosion of independent television stations that offer still more programming in direct competition with the broadcast networks.”).
among media companies can be checked by antitrust law. Competition protected through antitrust enforcement "should provide enough diversity of viewpoints without the need either for specific ownership caps or old-fashioned, paternalistic content rules." The first step of antitrust analysis in determining whether a market is concentrated is to properly define the market. Liberalization proponents advocate that the market in which local broadcasters operate includes well-established cable, DBS, and similar technologies that the federal legislation terms multichannel video programming distributors or "MVPDs," as well as the emerging fiber-optic means of video delivery currently being deployed in select markets by Baby Bells. This is based on the proposition that all MVPDs are substitutable for one another. Once the product market is defined, antitrust enforcers use the Herfindahl-Hirschmann Index ("HHI") as the touchstone for determining whether the level of horizontal concentration in a market could threaten competition. An HHI above 1800 will be viewed as illegal according to the Horizontal Guidelines. From his analysis of HHIs, Yoo concludes that the market concentration of television networks does not meet this threshold. On this basis, the shift in the balance of power imposed by the NTSO rule is an unnecessary interference in the market.

Liberalization critics respond by first challenging the product market definition employed above. While "proper market definition

289. I note that the NTSO rule refers to vertical and horizontal aspects of the market. The NTSO rule prohibits any entity from controlling television stations the audience reach of which exceeds a percentage of television households in the United States. 47 C.F.R. §73.3555(d)(2004). As applied to the networks, this is a restriction on vertical integration. But the benchmark for the regulatory prohibition is the horizontal consideration of a network's national audience market share. As a result, a complete account of the debate has to alter in focus from horizontal to vertical concerns.
290. Yoo, Vertical Integration, supra note 127, at 208.
292. See Yoo, Vertical Integration, supra note 127, at 209 (10 F.C.C.R. 4538, 4540, §10 (1995) (Report and Order) and 4 F.C.C.R. 2755, 2757, §15 (1989) (Report and Order)) (explaining that the FCC has taken this position in eliminating the Chain Broadcasting Rules' prohibition of "network ownership of certain local broadcast stations" and in repealing the "two-year limit on network affiliation agreements.").
293. Horizontal Guidelines, supra note 57.
294. Yoo, Vertical Integration, supra note 127, at 211-12 (finding, as of 2000, an HHI of 1676 among national television networks by audience share and an HHI of 1605 by revenue share).
requires the inclusion of products that act as substitutes” and MVPDs have overtaken free TV as the primary means of delivering TV programming,\textsuperscript{295} liberalization critics focus on the product differentiation within these formats as a basis for distinguishing free TV products from cable, DBS and the Internet. According to Leanza and Feld, “neither cable networks nor the Internet provide local news,”\textsuperscript{296} Picking up on this point, the Third Circuit agreed with the FCC’s findings that cable and the Internet contribute to a media market’s viewpoint diversity\textsuperscript{297} but concurrently found that neither provides the same degree of local programming as free TV stations.\textsuperscript{298} Echoing Sunstein’s ideas about the media’s intermediary function, the Third Circuit notes that many Internet sites, for example, do not provide the “aggregator function (bringing news/information to one place) as well as [the] distillation function (making a judgment as to what is interesting, important, entertaining, etc.)” that we associate with free TV.\textsuperscript{299} As Yoo points out, the free TV business model is to supply the most common denominator of taste and interests. In contrast, cable and satellite aim to provide tens of specialty channels that appeal to different groups’ unique tastes and interests.\textsuperscript{300} In Sunstein’s terms, while free TV provides a shared cultural experience that gives it the quality of a “general interest intermediary,” other technologies provide the means for personalized cultural consumption. On this basis, liberalization critics could argue that the personalized cultural experience of existing MVPDs and new media are not “reasonably interchangeable by consumers”\textsuperscript{301} for the shared

\begin{footnotesize}
\begin{enumerate}
\item 2004 Third Circuit Review, supra note 1, at 65.
\item \textit{Id.} at 80-82 (affirming the FCC’s decision to discount cable as a separate media outlet category for the purpose of determining the diversity index and deriving the cross-media limits on the basis of doubts in cable’s ability to provide independent local news). \textit{See also id.} at 84-90 (taking issue with the FCC’s failure to discount the Internet as a media outlet category for the same diversity index and cross-media limits purposes on the basis of its insufficiency as an independent source of local news.)
\item \textit{Id.} at 87.
\item See supra note 283 and accompanying text.
\end{enumerate}
\end{footnotesize}
cultural experience provided by free TV and should therefore be excluded from the product market under analysis.

Liberalization proponents can effectively counter that free TV licensees seem to be moving further and further away from their role as Sunstein’s general interest intermediaries. With digital television, the average household will be able to receive more than seventy over-the-air broadcast channels,"^302 suggesting that free TV is pursuing the same degree of specialization as its cable, satellite and new media brethren. At the same time certain MVPDs, such as all-local-news cable programming, are looking more like general interest intermediaries, at least at the local level.^303 Indeed, cable’s public access obligations^305 provide legislative authority for cable being cast in the role of general interest intermediary. Liberalization proponents can thus argue that the relevant media market for antitrust purposes should include cable, satellite and new media, as well as free TV broadcasters.

Liberalization critics might also use *US v. Microsoft* to argue that emerging technologies should also be excluded, even if they are capable of delivering the shared cultural experience, because “the test of reasonable interchangeability” requires the relevant market include “only substitutes that constrain pricing in the reasonably foreseeable future.” United States v. Microsoft Corp., 253 F.3d 34, 36 (D.C. Cir. 2001).


303. These developments could support the theory that Sunstein’s “general interest intermediary” is vanishing in the age of consumer sovereignty and limitless choices for personalizing cultural experience. At the same time, it raises the problem of reconciling Sunstein’s critique within the diversity principle. Sunstein suggests that diversity promotes an individual’s exposure to diverse content, rather than an individual’s choice among diverse options. The problem with assigning the role of general interest intermediary to a particular technology, such as local broadcasters, and thereby privileging the development of one technology over another, is that we choke off the potential diversity arising through other technologies, such as the Internet. The Economist characterized the Internet as a modern-day version of coffee-house networks that spanned Europe in the seventeenth century. This description may not meet the standards of Sunstein’s general interest intermediary, but it does describe a network that promotes diversity of content, viewpoints and interests. *See The Internet in a Cup*, ECONOMIST, Dec.18, 2003, available at http://www.economist.com/World/europe/displayStory.cfm?story_id=2281736 (last visited Aug. 19, 2004).

304. Time Warner’s NY1 is an example. *See also* Yoo, *Rethinking Free TV*, supra note 183, at 1661 (arguing that must-carry threatens “the emergence of locally oriented, all-news channels on cable by preempting channel capacity available for such services. In short, must-carry promotes marginal broadcasters at the expense of marginal cable channels even though it is the marginal cable channels that are more likely to provide diverse (including local) programming.”).

Assuming for a moment that liberalization critics persuade us to take a narrow view of the product market, Yoo’s HHI analysis appears to underestimate the actual level of concentration. Indeed, each mode of video delivery looks like a monopoly. First, broadcasting is a “government-controlled monopoly, and only those with a government license can broadcast.” Second, cable operators “are monopolies in virtually every market,” and “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.” Finally, because of news production economics, very few Internet websites control the bulk of Internet news distribution.

Liberalization critics could also respond that the increasing number of media outlets is an illusion because “new” competitors are owned by incumbent suppliers. The number of voices in the media marketplace has increased substantially. In New York City, the largest market in the United States, between 1960 and 2000, the number of media outlets increased by 107%. This growth has also taken place in smaller markets. In Altoona, Pennsylvania, there was a 109% increase in the same period. But, the increase in the number of owners has not been commensurate. For the same periods, the number of owners increased by 67% in Altoona, while the increase in New York has been much more substantial at 90%. Altoona is much smaller, and in this respect a more authentic “local” market than New York, which is a media capital and cosmopolitan metropolis. Noting this discrepancy, liberalization critics would argue that local communities such as Altoona may have twelve new voices in the media marketplace, but, as in Orwell, they are twelve voices saying the same or similar things because they share ownership (and editorial governance) with existing voices.

306. See Leanza & Feld, supra note 170, at 18 for the explanation and quotations that follow.


308. Altoona had eleven media outlets in 1960. In 2000, there were twenty-three. Id.

309. I am not suggesting that liberalization critics would actually make this argument. But they might if this anecdotal insight offered from the random selection of Altoona and New York could be sustained through a statistically relevant sampling. See supra note 36 for the Orwell reference.
The mismatch between the growth of outlets and owners is most obvious in radio, where the 1996 Act eliminated the limits on the number of AM and FM broadcast stations that a single entity could own nationally (the radio equivalent of the NTSO rule).\(^3\) Between March 1996 and March 2002, the total number of stations increased by 5.4%, but the number of radio station owners decreased by 34%.\(^3\) And between 1996 and 2000, the number of owners in each market declined by three.\(^3\) Despite all these arguments, liberalization proponents can come back and say that antitrust will take care of this—if ownership concentration in the media markets becomes excessive, this will be revealed in the HHI and further consolidation will be restricted. Assuming that certain technologies for media distribution are reasonably interchangeable, the American media market is competitive according to liberalization proponents. This approach is based on the balance of checking intra-modal dominance with inter-modal competition.\(^3\) Free TV competes with cable, which competes with DBS, which will all soon be competing with the Internet and fiber-optic distribution.

Liberalization proponents can combine assertions about the health of competition in the media marketplace (either inter- or intra-modal) with pro-competitive justifications for liberalization and concentration that mimic rule of reason antitrust analysis.\(^3\) The first consequence of liberalizing or eliminating ownership regulation such as the NTSO rule will be to destroy the protectionism afforded to free TV. With more media voices joining the consequently liberalized

---

30. See 1996 Act, supra note 26, at §§202(a)-(b).
33. STARR, supra note 2, at 349-50.
34. Although primarily developed out of section 1 of the Sherman Act, 15 U.S.C.A. §1, which contemplates agreements to restrain trade, in the merger context, rule of reason has also influenced the application of section 7 of the Clayton Act, 15 U.S.C.A. §§12-27. A broad rule of reason test, as outlined by Justice Brandeis in *Chicago Board of Trade* distinguishes between restraints of trade that merely regulate or promote competition and restraints that may suppress or destroy competition. See *Chicago Board of Trade v. United States*, 246 U.S. 231, 244 (1918). Pro-competitive justifications for consolidation that lessen the risk of anti-competitive effect also appear in the Horizontal Guidelines, *supra* note 57 at §4 and the Department of Justice & Federal Trade Commission, 1984 Merger Guidelines [hereinafter Vertical Merger Guidelines], 3.5, *reprinted in* 49 Fed. Reg. 26,823 (June 29, 1984).
market, this will intensify competition. As I suggest above, new cable networks could emerge. Or, there could be an increase in the number of stations, as there has been in radio since the liberalizing measures of the 1996 Act. This would promote "diversity and localism in programming as stations seek out specific niche markets to gain the greatest audience share." Even where liberalized ownership regulations allow a single entity to own many stations in the same community, programming diversity could increase with the resulting economies of scope. The owner "would not want to compete with itself for the same group of listeners" so it would program each of its various stations according to different tastes. However, if these stations were separately owned, they would "compete against each other within the same format, targeting the same group of listeners." According to this theory, a concentrated market is preferable to an atomistic market in offering the diverse and personalized products that consumers want. Setting to one side Sunstein's concerns about personalizing cultural experience, it is inconclusive whether this theory has played out in radio markets since liberalization. Classical and jazz formats have decreased, prompting listeners to obtain this programming from the Internet, an imperfect substitute for radio broadcasting, at least presently. For so-called pay-for-play, where artists and record labels gain access to airtime by

315. See Williams & Roberts, supra note 311.
316. Prindle, supra note 221, at 297.
317. Id. at 299-300 (Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q. J. ECON. 194 (1952) and Benjamin J. Bates & Todd Chambers, The Economic Basis for Radio Deregulation, 12 J. MEDIA ECONS. 19, 24 (YEAR)).
318. Prindle, supra note 221, at 300. Prindle explains:
If there is a monopoly, where the only two stations in a market are owned by the same entity, and eighty percent of the audience wants to listen to a country music format and twenty percent wants to listen to a classical music format, the entity would not want to compete against itself. Thus, one station would have a country music format and the other station would have a classical music format in order to reach the most possible listeners . . . [In contrast], if there are only two separately owned stations in a market where eighty percent of the audience wants to listen to a country music format and twenty percent wants to listen to a classical music format, the two stations would have no motivation to have a classical music format. Sharing the country music format could give each station forty percent of the listeners in the market, compared to a maximum of twenty percent of the listeners with a classical music format.
Id. at n.147.
319. Prindle, supra note 221, at 315.
320. Id.
paying for it, consolidation has raised prices and reduced alternative options. Consequently, small record labels and new or independent artists are squeezed out, reducing the potential diversity of the airwaves.\(^\text{321}\)

Does inter-modal competition mitigate the negative effects of consolidation in radio? Digital audio radio satellite ("DARS") "delivers national networks, bundled into one-hundred-channel packages, in a subscription-based business plan that seeks to compete with established broadcast licensees—AM and FM radio stations."\(^\text{322}\)

In other words, DARS is completely inconsistent with the commitments to free, local and single-channel offerings that Yoo attributes to the current regulatory framework for free TV.\(^\text{323}\) Because it offers a way to maximize the economically efficient use of spectrum and great potential for diverse programming, DARS represents a compelling inter-modal alternative to an admittedly consolidated radio market.\(^\text{324}\) The major problem is that regulation prohibits DARS from offering local content.\(^\text{325}\) So any argument about DARS' potential as inter-modal competition is moot. Radio, it seems, has been only partially liberalized, with localism shackling DARS' ability to compete and possibly exacerbating the negatives of consolidation noted above.

The second pro-competitive justification that liberalization proponents offer for ownership liberalization turns our attention to vertical considerations. Liberalization proponents argue that the economics of video production require vertical integration of

\(^{321}\) Prindle, supra note 221, at 323.

\(^{322}\) Hazlett, Response to Yoo, supra note 6, at 249.

\(^{323}\) See supra note 183 and accompanying text.

\(^{324}\) Hazlett, Response to Yoo, supra note 6, at 249. ("'Local' radio stations have for years delivered generic national programs beamed to stations around the country via satellite. Direct broadcasts to customers efficiently cut out the middleman and, via digital technologies, allow customers to expand dramatically the number of programs available. By introducing subscription services offering bundles, satellite radio operators also have economic incentives to avoid bunching up product choices at the least common denominator. Instead of twenty Adult Contemporary, Country Western, or Middle of the Road formats, DARS operators run a long musical continuum through dozens of genres... This is a classic application of the economics of spatial competition.").

\(^{325}\) Id. at 251. Hazlett laments that "this is the 'public interest' policy outcome of localism. Radio stations enjoy larger audiences and will have less incentive to provide interesting, original programming of national or local origin, because competitive pressure will be muted. While there are over 107 million households in the United States, the largest satellite operator barely has one million subscribers. Incumbents, with help from regulators, hope that the rules in place limit the damage this competitive entrant will inflict on 'local' radio audiences." Id. at 251.
networks and local stations to permit diverse and high-quality programming.\footnote{326} This is because of the already familiar "large, up-front fixed costs associated with creating the first copy of television programs and minimal costs associated with distributing programs to additional viewers."\footnote{327} If broadcast networks pursue vertical integration by purchasing local TV stations, this guaranteed network access to audiences would lower the network's costs.\footnote{328} Liberalization proponents assert that, without this access guarantee, there is a risk that investment in programming may fall below the welfare-maximizing level.\footnote{329} But this argument seems strange because those who rely on free TV for video distribution are a negligible share of the population, which does not offer financial resources sufficient to induce programming development. The missing link is the "must-carry" regime under the 1992 Cable Act, which compels cable operators to carry full-power local station programming.\footnote{330} Just as localism reared its head in shackling DARS' potential as inter-modal competition for radio, localism pops up unexpectedly again as the explanation for why networks want free TV stations. In forcing cable to carry full power local stations, localism preserves the stations' importance as media suppliers, and prompts networks to covet their guaranteed access to audiences. Thus, with radio, liberalization critics' complaints about consolidation make no sense because potential competitors are shackled with localist regulation, while liberalization proponents' arguments for vertical integration of free TV make no sense without the localist regulatory interference.

The third pro-competitive justification for ownership deregulation and consolidation that liberalization proponents advocate is the managerial, technical and other efficiencies resulting from vertical integration of networks and local stations.\footnote{331} The idea is that efficiencies resulting from integrating a free TV station's operations with a network improve the station's financial viability and

\footnote{326} This reverberates in Powell's assertion that TV networks require the flexibility to consolidate in order to provide quality programming. \textit{See supra} note 81 and accompanying text.

\footnote{327} Yoo, \textit{Vertical Integration}, \textit{supra} note 127, at 213-214.

\footnote{328} \textit{Id.} at 214-15.

\footnote{329} \textit{Id.}


\footnote{331} In antitrust analysis, efficiencies have more weight in the vertical context than in the horizontal context because there is less risk that price and output will be affected at the vertical level. \textit{See Vertical Merger Guidelines, supra} note 314, at §4.24.
This preserves local, remote stations that are otherwise economically infeasible. This viability rationale motivated the FCC to abandon that part of the chain broadcasting rules prohibiting networks from owning small community stations.

But how do efficiencies benefit media consumers? Productive efficiencies in free TV would likely resemble the economies of scale that have been realized through the liberalization and consolidation of radio ownership. Multiple stations can share resources including "management and production and programming personnel, as well as clerical staff. Additionally, bulk discounts on services and supplies as well as shared advertising, promotions, and technical facilities decrease the costs of doing business." In widget-like manufacturing endeavors, these productive efficiencies are passed on to consumers in the form of lower prices. In the case of free TV, prices are paid by advertisers, not consumers, and benefits to advertisers are too remote from the public interest to be relevant. Liberalization proponents could respond that such efficiencies liberate resources for innovation in, and development of, programming. The FCC's 2003 Order points out that the "consumer welfare enhancing efficiencies" that result from local station consolidation eliminate "redundant expenses" and increase "opportunities for cross-promotion and related programming," with the effect of improving "local news and public interest programming." Radio has shown how such efficiencies benefit consumers in the form of "improved facilities, stronger signals, and more expensive talent." There are also potential economies of scope. A radio conglomerate has "more financial capital to reinvest in local radio stations and markets than smaller owners." So, efficiencies should promote localism, as well as the competition and diversity elements of the public interest.

The idea that a more consolidated market will produce greater innovation is counter-intuitive. To the extent that vertical integration concentrates ownership at the network level, this raises an issue of horizontal concentration. Greater horizontal concentration tends to result in greater market power, which corresponds with greater influence over price and output. According to classic economic

---

332. Yoo, Vertical Integration, supra note 127, at 218.
333. Id.
334. Prindle, supra note 221, at 301-02.
335. 2004 Third Circuit Review, supra note 1, at 112.
336. Prindle, supra note 221, at 301-02.
337. Id. at 302.
theory, a firm with power over price and output has less incentive to innovate because of the absence of competitive threat. Bringing this to the communications context, Lemley and Lessig have asserted that, empirically, competition spurs more creativity than monopoly. Yoo challenges this assertion, arguing that "there appears to be little empirical basis for believing that . . . higher levels of innovation are associated with lower levels of market concentration." Yoo's point is that innovation will be lowest at the extremes of perfect competition and monopoly. This makes economic sense. In perfect competition, competitors will not have the resources to innovate, while an oligopolistic market does not give individual competitors the power to affect price and output unless these competitors are colluding. As a result, the incentive to innovate can survive a highly concentrated market.

Radio provides examples of innovation in media markets that follow ownership liberalization and consolidation. "Voice-tracking" records programming in central locations such as New York or Los Angeles and transmits it "throughout the nation as a series of taped moments that are spliced together to sound as if the disc jockeys were broadcasting locally." For example, Clear Channel's "Prophet" "allows disc jockeys to . . . spend a few minutes recording introductions and other sound bytes, and a computer merges those sounds with songs, promotional spots, sound effects, and commercials to create the show." This allows smaller markets to receive otherwise unaffordable cosmopolitan programming. However, liberalization critics would quickly point out its potential to undermine localism by offering a uniform radio product manufactured in a major urban center with standardized inputs. The Third Circuit observed that "consolidation has also reduced the amount of locally produced radio


339. Yoo, Vertical Integration, supra note 127, at 277. Yoo states that "my own review of the extensive empirical literature on this question indicates that . . . the relationship between innovation and market structure is more ambiguous . . . While some studies found that increases in research and development tended to be associated with high market concentration, other studies came to precisely the opposite conclusion. Still others argued that the relationship between market concentration and innovation was non-linear. Under these analyses, innovative activity is at its lowest when the market is either highly competitive or monopolistic and at its highest at moderate levels of concentration." Id. at 275-76.

340. See Prindle, supra note 221, at 317-18 for this explanation and these quotations regarding voice-tracking.
content, as large group-owners often broadcast remotely from national offices instead of having local employees produce programming." This chokes off the local "voice" by eliminating the need for a local disc jockey and reducing other forms of local access to the medium:

If the show is taped, a listener cannot call a favorite disc jockey and make a request. Also, local appearances are at a minimum, if at all... and some worry that "formats will serve the most profitable demographics only and that syndicated programming will become a cost-saving mainstay, prompting a decline in localization." This provides ammunition for liberalization critics to claim that efficiencies and innovation cannot be assumed to promote localism. But does this cogently lead to the conclusion that we should prohibit the shift in operational and programming control from the local station owner's office to the network's executive suite?

C. Owner Identity

Regardless of access, innovation and efficiency justifications for vertical integration, liberalization critics argue that integration will harm the public interest value of localism because the increased network ownership of free TV stations will bolster network power, allowing the networks to usurp local station owners' control over programming decisions. This is the same concern that motivated the chain broadcasting rules, which resurfaced with a relatively recent shift in the balance of power from local licensees to networks:

The balance of power began to shift in the early 1990s after networks were allowed to acquire more local stations. For example, Viacom, through its ownership of CBS and UPN stations, now owns 39 stations reaching 39% of the nation's audience, compared with 10 years ago when it owned six stations reaching just 19%. As the networks' power grew, they started to cut payments to locally owned affiliates for carrying their programs and in some cases even demanded payments from affiliates. Growing accustomed to the close control they had over the local stations

341. 2004 Third Circuit Review, supra note 1, at 162-63 (citing Comments of Future Music Coalition, MB Docket 02-277, at 13-14 (Nov. 20, 2002)).
342. Prindle, supra note 221, at 318-19.
343. See 2003 Order, supra note 12, at §578 (providing the rationale for balancing the power of affiliates against networks); and see also NBC v. U.S., 319 U.S. at 224-25 (affirming the chain-broadcasting rules and accepting the FCC's finding that competition and localism suffer when a local station obtains much of its programming from a national network).
344. See supra notes 123-131 and accompanying text.
they own, the networks became more restrictive when negotiating pre-emption deals.

Through a public choice lens, this shift looks like erosion of the FCC's jurisdictional authority, which we know is limited to licensees. But, if liberalization critics depended on a threat to FCC jurisdiction, this would prove the public choice point: protecting licensees protects the regulator and other political investments in regulation. Thus, liberalization critics have to start with a premise that ties the importance of local control over local stations to benefits for media consumers, not licensees, replicating the truism that antitrust's mandate is to protect competition, not competitors.

Liberalization critics start with the idea that owner identity matters in realizing the public interest because of the economic stake that ownership represents. The incentives that flow from this economic stake, combined with the educative role of media, create ample opportunities for conflict of interest. Media owners need advertising revenue to operate, and they are often tied to other industrial enterprises through conglomerate corporate relationships. At some point, the media supplier will have to report or offer an editorial position on an advertiser or related company. Disseminating this information or opinion could conflict with or promote the economic interest of a potential advertiser (potentially hampering/improving access to advertising revenue) or related company (potentially harming/improving the financial position of the conglomerate). Both outcomes affect the financial picture of the media supplier.

Liberalization proponents have offered several arguments in response. The strongest counter is the lack of proof on the degree of influence that ownership has on viewpoint. In its 2003 Order, the FCC states that "although there is evidence to suggest that ownership

347. See Ted Turner, Break Up This Band! How government protects big media—and shuts out upstarts like me, 36 WASH. MONTHLY 30, 34 (2004) ("Disney's boss, after buying ABC in 1995, was quoted in LA Weekly as saying, "I would prefer ABC not cover Disney." A few days later, ABC killed a "20/20" story critical of the parent company."). See also TILLINGHAST, supra note 19, at 161-62 (offering another example of NBC, whose parent GE "designed, manufactured or supplied parts or maintenance for nearly every important weapons system employed by the USA during the Gulf War, including the much-praised Patriot and Tomahawk Cruise Missiles. ... Few TV viewers ... were aware of the inherent conflict of interest whenever NBC correspondents hailed the performance of U.S. weapons.").
influences viewpoint, the degree to which it does so cannot be established with any certitude." With an increasingly fragmented and competitive market, "owners face increasing pressure to differentiate their products, including by means of differing viewpoints." More importantly, "other news and informational outlets" are increasingly available to overcome the risk that "a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent (e.g., such as when an outlet has an interest in a real estate transaction or is being criticized in an op-ed)." While there may be anecdotal evidence in this regard, there is no "pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated. Nor, moreover, do such incidents mean that the public was left uninformed about the situation by other available media. Therefore, it would seem that the remedy for any such "bias" is the provision of antagonistic viewpoint we seek to advance. The Third Circuit affirmed these FCC findings. However, the Third Circuit did not thereby dismiss the risk of ownership influencing viewpoint: the risk will only be mitigated with sufficient substitutes in the market. And, recalling the analysis above on the substitutability of other media for free TV, the Third Circuit cites the FCC's findings that Internet and cable are not complete substitutes for viewpoints provided by free TV.

For liberalization critics skeptical about ownership's neutral impact on viewpoint, liberalization proponents could explain that content production can be insulated from the owner's profit concerns through an institutional separation of "church" and "state:"

This prevents the "state," the business arm concerned with profit, from pressuring the "church," the repository of independent editorial judgment. The "church" part, relieved of worry about profits, single-mindedly devotes itself to serving the public interest, without need to be concerned if a heavy advertiser like Ford Motor Company is disturbed by reports of defects in its product.

348. 2003 Order, supra note 12, at §364. See also infra notes 362, 363 and accompanying text.
349. 2004 Third Circuit Review, supra note 1, at 60.
350. Id. at 66 ("[T]he Commission found evidence to undermine the premise that ownership always influences viewpoint, but it did not find the opposite to be true.").
351. Id. at 66-67, citing Media Ownership Working Group Study No. 3 (finding that the Internet and cable rank as sources of local news, but they do not outrank newspapers and broadcast television.).
352. TILLINGHAST, supra note 19, at 37.
This separation seems problematic in the realm of corporate law, where businesses are required to be run in the interests of shareholders, which usually means maximizing profit. The product (here, editorial and other programming content) is highly relevant to the profitability of all businesses: if the product is bad, the business will do poorly and vice versa. This legal fact may be why the "editorial content of publications and broadcasting is dictated by the computer printouts on advertising agency desks, not the other way around."

There is nothing evil about this. It's just ... the way it is.

Scandals in the securities analysis and auditing sectors show how porous institutional divisions between “church” and “state” can be when economic interests are involved. Even though they were “insulated” from the operations of investment banks, research analysts could not overlook the economic interests of their investment bank employers when giving buy endorsements to securities that their employers underwrote, even though they knew they were not worth buying. Partners at auditing firms were also unable to overlook the economic interests of the firm’s consulting practice when they had to decide whether to accurately report the financial state of the company and risk losing valuable consulting revenue. Congress therefore prohibited auditors from providing certain consulting and other services to their auditing clients in the Sarbanes-Oxley Act. However, potential conflicts are not as easily eradicated from media firms, because of the longstanding tradition that they are concurrently committed to a professional principle of objectivity and the objective function of profitability. The separation of church and state may be an institutional fiction, but it may be the only feasible way of reconciling the media’s educative role with the commercial engine behind American media production. The coexistence of commercial success and editorial autonomy is captured well by Pulitzer’s formula where “circulation means advertising, and advertising means money, and money means independence.”

Liberalization critics maintain that ownership regulation, such as the NTSO rule, offers the best media equivalent of Sarbanes-Oxley to mitigate threats to media independence. Ted Turner explains that:

353. BAGDIKIAN, supra note 39, at 225. The fact that corporate law conflicts with the editorial independence we expect from media enterprises may itself be grounds for regulation, an idea that I hope to explore in future work.


355. STARR, supra note 2, at 395.
If there is a limit to the number of TV stations a corporation can own, then the chance exists that after all the corporations have reached this limit, there may still be some stations left over to be bought and run by independents. A lower limit would encourage the entry of independents and promote competition. A higher limit does the opposite. This is beneficial for localism in Turner's view because "[l]arge corporations are more profit-focused and risk-averse," killing more costly local programming in favor of cheaper national programming—even if these "decisions run counter to local interests and community values." In contrast, locally based independents will promote a mission and programming consistent with local interests and values. Consider as an example the following local station licensee:

Mr. Goodmon, 60 years old, is a third-generation owner who started working at his family's company, closely held Capitol Broadcasting, when he was 13. As a locally prominent businessman, he fits the mold of an old-fashioned, down-home affiliate owner—a type that was common when most local stations were mom-and-pop affairs. His company owns the local minor-league baseball team, the champion Durham Bulls, and he's leading one of Durham's most significant urban-renewal projects.

Although sensitized to his local community, Mr. Goodmon also faces potential conflicts of interest under the analysis above, suggesting that remote owners could be preferable to local ones. Capitol Broadcasting probably reports on the Durham Bulls and the potentially controversial urban-renewal project (in which Goodmon may have a direct or indirect economic stake). The potential for conflict here is equally acute as when NBC reports on weaponry manufactured by its parent GE or when ABC chooses not to report on its parent Disney. On this view, the Bulls and the urban renewal project become "sacred cows" that are "guaranteed a positive image," or are at least "immune to criticism." This potential for "local"

356. Turner, supra note 347, at 34.
357. Id. at 32.
358. Rose & Flint, supra note 345.
359. See Bagdikian, supra note 39, at 154 ("In the newsrooms of America... 'sacred cows'... frequently include the owners, the owner's family and friends, major advertisers, and the owner's political causes. Sacred cows in the news run from the gamut from petunias to presidents. In one northeastern city the sacred cow is the civic flowerbeds donated by the publisher's spouse; in another city it is an order that any picture of Richard Nixon must show him smiling."). My references to Capitol Broadcasting and Mr. Goodmon are merely exemplary. While I do observe a potential for conflict here, I am not asserting that Goodmon or Capitol Broadcasting is in any actual conflict of interest.
conflicts of interest taints liberalization critics' “sacred cow” assertion that local owners are invariably best able to promote localism and local diversity because of their connections with the community.

Discounting this potential for conflict, liberalization critics stand by a characterization of local licensees as the stewards of localism on the traditional rationale that, if an owner inhabits the license geography, this will align owner and community interests. If the licensee resides in the community, s/he will care as much about its localist integrity as the community members. This resembles the proposition that tying CEO compensation to firm performance aligns management and shareholder interests (so long as the CEO cannot profitably manipulate share price and take advantage of sudden gains or losses). But is this coincidence of economic interest analogous to the geographic coincidence of the licensee’s address with the territory covered by his/her license? The idea seems to be that a local owner will want to improve his/her local quality of life by investing in, or donating to, local cultural or other endeavors. The idea depends on giving geographic relationships the same weight as economic ones, which may or may not withstand sociological inquiry. Economically speaking, Goodmon will use his control over local media to promote his sports franchise and renewal project, and he may be more likely to invest in other “localist” projects that can be effectively marketed through his TV station. However, these same marketing advantages and local market demands offer equally powerful incentives for a remote station owner to invest in such local projects. Why would Goodmon be any more inclined to pursue these endeavors because of his geographic location? The philanthropic aspect of it may be more convincing: Goodmon will probably spend more time investing his resources in local charitable causes than a remote owner, because his geography ensures that he will more likely enjoy them or be recognized for their success. However, this would also be true of local owners of any industrial enterprise. Yet, antitrust and other areas of economic regulation, such as banking, have abandoned their encouragement of local ownership for its own sake. Is there something sufficiently unique about a local community’s relationship with its free TV station that justifies such encouragement of local media ownership?

intention here is to explore plausible explanations of local licensees’ activities and investments in the local community to challenge the assumption that local owners always promote the best interests of the local community, without the potential for conflict.

360. See supra Part IV.1.A.
In answering, liberalization critics take us back to the original point about the local community's need for its taste and sensibility to be reflected in free TV station programming. Goodmon's presence in the geography of the local community enables him to ascertain its sensibility and to select programming accordingly. Liberalization critics, such as Ted Turner, would argue that a remote owner of a large media conglomerate does not have comparable means to decipher these local sensibilities. But, even if we hypothesize that the tastes of local owners are identical to those of their local community, this in no way guarantees that any of the products demanded will be local. Furthermore, there is no empirical consensus on whether an owner's identity is at all relevant to programming, reinforcing the lack of evidence connecting ownership with viewpoint that I noted above:

Multiple studies have concurred that programming differences related to group ownership are mixed and, even at that, are quite small. For example, stations owned by larger groups broadcast slightly fewer minutes per week of all local programming but more minutes of both local news and public affairs programming.362

...within the commercial sectors of the United States broadcasting industry, it is very difficult to point to how ownership has been the cause of specific programming. We cannot say that group-owned stations are programmed differently than independently owned stations. We cannot say that stations owned by racial minorities, by specific ethnic groups, or by a specific gender behave, in aggregate, differently from one another.363

In the context of foreign versus domestic ownership, Grant and Wood concur with Ted Turner's finding that, compared with local owners, "multinational conglomerates make less innovative, more profit-driven and risk-averse choices" and they "tend to focus on local creators whose success is already assured, not on the new, unknown talents who need nourishing and development."364 Because of the economies of scale already noted, a foreign owner producing or acquiring programming in Canada will choose products "less specific to Canadian audiences and more general in their references" because

361. Rose & Flint, supra note 345.
363. Id. at 779. Compaine also notes that "ownership certainly has an effect on content. The content of public television, with its different "ownership" and strategic charge from its board of directors, is distinct from the content of commercial television. We know that the state-owned or controlled broadcasters in Europe created programming that is distinctive from the United States model" Id.
364. GRANT & WOOD, supra note 151, at 259.
“those programs could most profitably be added to the multinational parent’s library and reused in third countries at minimal marginal cost.”365 In contrast, “a local owner is far more likely to appreciate that special un-universality of her native culture than is a multinational conglomerate in dogged pursuit of its next global hit.”366 Grant and Wood do not provide data supporting this position, which leaves us with the empirical ambiguity noted above.367 And, even Grant and Wood are skeptical about the role of ownership in promoting localist expression. They are comfortable arguing that “smaller companies in the cultural field—particularly those with owner-managers in place—have an admirable track record of supporting local cultural expression,”368 agreeing with Ted Turner’s point that the size of the owner matters. However, they are less certain about the importance of the identity of the owner:

statutory limits on foreign ownership may be of value to the extent that they preserve a greater number of local gatekeepers able to bring new cultural expression before their domestic publics. But in contrast to other available measures, such as content rules, mandatory expenditure requirements and . . . targeted subsidies, they are surely not the sharpest or the surest tools in the kit.369

Assuming that ownership rules are ineffective, what rules would liberalization proponents offer as means to ensure localism, diversity and competition in media markets? The answer is the antitrust analysis in Part V.3.B. above, its HHI thresholds, as well as access, efficiency and innovation pro-competitive justifications. But, even if liberalization critics concede defeat on all antitrust arguments, they may still have a leg to stand on in response.

D. The Limits of Antitrust

Because of the media’s educative influence, liberalization critics maintain that concentration standards governing ownership issues should be different for media corporations than for widget makers and fast-food restaurants. If a voice is removed from the market,

365. Id.
366. Id.
367. With respect to the programming incentives that follow from ownership and vertical integration, Grant and Wood cite RICHARD E. CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE (2000) at 296 (describing the incentives for entertainment firms to integrate vertically) and 324-25 (describing the synergies of entertainment conglomerates as “probably illusory,” offering at best “defensive value” and requiring “a water-and-oil mixture of creative talents with bureaucratic planners.”).
368. GRANT & WOOD, supra note 151, at 262.
369. Id.
HHIs can tell us the potential effect on price and output functions. But, we still won’t understand the effect on the diversity of viewpoints and the quality of political debate. Voices and viewpoints, rather than price and output, constitute the nervous system of the marketplace of ideas. While there is widespread acceptance of the proposition that a highly concentrated market can still allow price and output to reach equilibrium, there is no consensus that price and output equilibrium is a proxy for a healthy marketplace of ideas. Indeed, antitrust enforcement and doctrine often claim to lack the measurement tools to decide whether there is sufficient diversity of voices to insure healthy political debate. Because ownership rules and antitrust aim at different concerns, as the Third Circuit pointed out, antitrust laws may be insufficient safeguards to displace the traditional regulatory fare of “specific ownership caps.” If antitrust were enough, license transfer approvals would not consider diversity or localism, nor would many transfers be reviewed by any regulatory authority. The Third Circuit observed that “eighty-five percent of station mergers . . . since 2000 would not have been subject to antitrust review because the parties’ assets fell below” the transaction-size thresholds that trigger antitrust review under the Hart-Scott-Rodino Act.

Within the argument about whether or not antitrust analysis could replace current ownership regulation to safeguard the marketplace of ideas, there is a subsidiary argument about the proper boundaries of antitrust. In the United States, the mandate of antitrust enforcement is set out primarily in the vague prescriptions of the Sherman Act and the vast jurisprudence that interprets these sections. The doctrinal, historical and academic views of antitrust are reasonably well settled that antitrust analysis is the domain of economic efficiency, but there is some controversy about whether

370. See e.g., Robert H. Lande, Consumer Choice as the Ultimate Goal of Antitrust, 62 U. Pitt. L. Rev. 503, 517-18 (2001) (arguing that optimal levels of price competition cannot be a proxy for optimal levels of diversity in independent editorial programming).
371. See Grant & Wood, supra note 151, at 291 (describing how, in Canada, competition authorities have explicitly renounced authority over monitoring editorial diversity). In 2002, the Competition Commissioner told a parliamentary committee that “diversity of voices is not an issue of economic competition and, consequently, does not fall within the purview of the [Competition] Bureau’s mandate.” Id.
372. See supra note 71 and accompanying text.
antitrust can or should be sensitive to political and social considerations. As I state above, Robert Pitofsky maintains that advancing democracy is a goal of antitrust policy.\textsuperscript{376} In contrast, Richard Posner limits the scope of antitrust on the basis that there is no “justification for using the antitrust laws to attain goals unrelated or antithetical to efficiency.”\textsuperscript{377} Even Pitofsky concedes, and antitrust jurisprudence affirms, that, in its analytic approach, antitrust privileges the economic perspective over the political.\textsuperscript{376}

The focus on economic efficiency has been evident in radio merger reviews that have taken place post-liberalization.\textsuperscript{379} Before the 1996 Act, the largest station combinations had less than 65 stations.\textsuperscript{380} Following the 1996 Act’s liberalization,\textsuperscript{381} radio has become a highly concentrated industry, with “10 parent companies . . . that dominate the radio industry and control about two-thirds of both listeners and radio revenues nationwide.”\textsuperscript{382} Yet, mergers have been approved through Hart-Scott-Rodino Act merger reviews\textsuperscript{383} at these concentration levels, implying that they do not violate antitrust standards.\textsuperscript{384} Markets are usually defined in radio mergers along local lines because radio advertising is highly localized. Yet, this does not address whether ownership changes affect localist concerns with programming and development, or whether further concentration affects the editorial diversity required for the marketplace of ideas to function properly. And antitrust admits that it does not have these answers.

So, if we accept the controversial idea that ownership is relevant to diversity and localism, liberalization critics can argue that antitrust leaves gaping holes in its regulatory capacity “including content

\begin{itemize}
\item \textsuperscript{376} Pitofsky, \textit{The Political Content of Antitrust}, supra note 222.
\item \textsuperscript{377}\textsc{Richard A. Posner, Antitrust Law} 1-2 (2d ed. 2001) \textit{in Pitofsky, Goldschmid and Wood, Trade Regulation}, supra note 222, at 7.
\item \textsuperscript{378} Pitofsky, \textit{The Political Content of Antitrust}, supra note 222.
\item \textsuperscript{379} See Cavanagh, supra note 312, at 72 (describing the Department of Justice Antitrust Division’s approach to radio merger cases under the Horizontal Guidelines).
\item \textsuperscript{380} Id.
\item \textsuperscript{381} See supra note 310 and accompanying text.
\item \textsuperscript{382} The largest parent, Clear Channel, controls more than 1200 stations. See 2004 Third Circuit Review, supra note 1 at 162, citing Williams & Roberts, supra note 311, at 4; see also Cavanagh, supra note 312, at 71.
\item \textsuperscript{384} Cavanagh, supra note 312, at 72.
\end{itemize}
diversity and the need for local stations to address local concerns.”

Because it is blind to the owner’s identity, including geographic location, antitrust law is “unlikely to embody the democratic concerns with assuring maximum numbers of separate owners participating in the ‘marketplace of ideas’ or with democratic worries about concentrated power to influence public opinion . . . [which] relate, in the end, to whom has control over media content and how these people will use this power.”

Because of the special non-economic power that accompanies control over a media supplier, regulating control over the supplier has to take on parameters beyond HHI levels to include race, gender and geography:

an ideal policy will be concerned with more issues than mere ownership concentration . . . . Which groups of people or which individuals, with relations to various wider societal groups should exercise control is also important—as implicitly recognized by the former FCC policy favoring racial diversity in ownership. The general democratic goal is increased pluralism of sources and viewpoint as well as of content or subject categories.

Regulating media ownership necessarily becomes less threshold and index based than regulating competition generally—the marketplace of ideas always functions better with an ever increasing pluralism of sources and viewpoints. On this basis, liberalization critics conclude:

Some modest regulation by Congress, which assures that the channels of mass communications, so vital to our democracy, are not merged into the hands of two or three media conglomerates, thereby preserving diversity of content and localism in broadcast media, is essential. Congress now has a window of opportunity in which to act; its failure to do so may have a devastating impact on the market for free ideas. In the meantime, it is both unfair and unwise to expect that antitrust can provide all the answers.

In the end, we know that Congress did heed this call by freezing the NTSO rule’s cap at 39%, but this does not stop liberalization proponents from questioning the fundamental premises of liberalization critics. I have suggested throughout the article that empirical evidence provides little guidance on which position is more

385. Id. at 74.
387. Id.
388. Cavanagh, supra note 312, at 80. See also Baker, Media Concentration, supra note 224, at 911-19 (arguing that antitrust is incapable of scrutinizing the impact of ownership changes on editorial diversity and localism, which justifies “more stringent, somewhat differently focused media-specific rules relating to ownership” monitored and enforced by a regulatory agency).
convincing. Not surprisingly, the divide is essentially an ideological one between a regulatory and marketplace approach to addressing the public interest in media matters. The next section of the article examines the economic and philosophical bases for the regulatory and marketplace models and the models’ roles in the debate on the NTSo rule, media ownership and the political, cultural and economic perspectives. In trying to get beyond this ideological deadlock, we are led back to the importance of territorial institutions as a check on the increasingly un-territorial nature of communications.

VI. The Ideological Dichotomy

1. Consumer Sovereignty Versus Political Sovereignty

At several points in this article, I rehearse the reasons why media markets are different from other sectors. Perhaps the most important of these reasons is that media markets trade in speech—this is the basis for liberalization critics to argue that we cannot take the health of the classic microeconomics market as a proxy for the health of the marketplace of ideas. Therein begins a tension between what Sunstein calls the consumer sovereignty and political sovereignty approaches to free speech. Consumer sovereignty is the starting point for the personalized cultural experience where “consumers are permitted to choose as they wish, subject to the constraints provided by the price system, and also by their current holdings and requirements.” In contrast, political sovereignty shifts our focus from the individual to the public domain, where “democratic self-government” takes the place of consumer’s tastes as sovereign. Sunstein traces this dichotomy back to Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis. Holmes’ consumer sovereignty

389. Cass Sunstein, Republic.com 45-46 (2001). Sunstein goes on to explain that this dichotomy can require trading one form of sovereignty for the other: A commitment to consumer sovereignty may well compromise political sovereignty if, for example, free consumer choices result in insufficient understanding of public problems or if they make it difficult to have anything like a shared or deliberative culture ... If [political sovereignty] is our governing ideal, for example, we will evaluate the system of free expression partly by seeing whether it promotes democratic goals. If we care only about consumer sovereignty, the only question is whether consumers are getting what they want ... [For example,] if the government takes steps to increase the level of substantive debate on television or in public culture, it might well be undermining consumer sovereignty at the same time that it is promoting democratic self-government.

Id.
view treats speech as "part of a great political market, with which government could not legitimately interfere" while Brandeis claimed that "unrestricted consumer choice is not an appropriate foundation for policy in a context where the very formation of preferences, and the organizing processes of the democratic order, are at stake." Consistent with his views of the personalized cultural experience, Sunstein follows Brandeis' viewpoint, casting the citizen in a role completely distinct from the consumer acting in the marketplace. Media "audiences are citizens before they are consumers." Because of the "large difference between the public interest and what interests the public," the political sovereignty approach dictates that media policy needs to use regulatory measures that promote deliberated rather than arbitrary political results, and such measures will include "unchosen exposures and shared experiences." This tension between consumer and political sovereignty frames one of the fundamental controversies within the debate on media ownership and other areas of regulation—the conflict between the marketplace and regulatory models of realizing the public interest. The debate also provides the philosophical underpinnings for the views of liberalization proponents and critics.

2. The Marketplace and Regulatory Models

A high water mark of the regulatory model/political sovereignty approach to media regulation is the Supreme Court decision in Red Lion, which upheld the FCC's mandate to ensure a balanced presentation of "controversial issues of importance and concern to the public" through the Fairness Doctrine. The Fairness Doctrine interfered with giving consumers what they want on the assumption that consumers/citizens will be insufficiently informed by only one viewpoint on an issue:

[There is a] human need for information if we are democratically to make decisions . . . Because selective bites can distort, having all relevant information can be critically important. When do we have "all"? Unfortunately, there is no litmus test that tells us, but the more sources of information, the better the chances of access to the

390. Id. at 46-47.
391. GRANT & WOOD, supra note 151, at 171-72.
392. Sunstein, TV and Public Interest, supra note 1, at 501.
393. SUNSTEIN, REPUBLIC.COM, supra note 389, at 48.
needed "all." The fewer outlets we have, the poorer are those chances.

The original justification for all broadcasting regulation, including the Fairness Doctrine, was technological. Justice Frankfurter in *NBC v. US* pointed out that, because of limited spectrum, access to the radio must be regulated. Thus, it was a combination of speech and technological concerns that gave rise to the regulatory model.

The Fairness Doctrine was abandoned during the ascendance of the marketplace model. This ascendance was punctuated by the 1996 Act, which adopted a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.” Competition would replace administrative and regulatory governance of media, in a manner consistent with other areas of economic regulation, such as airlines, interstate transportation and energy, to minimize “the inefficiencies inherent in any regulatory scheme” and to allow “participants to reap the economic benefits of the free market.”

In the media sector, the shift to the marketplace model was most striking in radio. As we have seen, the 1996 Act eliminated the radio equivalent of the NTSO rule. It was thought that “fewer restrictions would improve competition, as well as allow companies to benefit from the efficiencies found with large-scale consolidation.”

The shift to the marketplace model presupposed that antitrust law would assume jurisdiction over ensuring the competitiveness of the marketplace that would result, following liberalization proponent arguments above about what could happen with free TV.

395. TILLINGHAST, supra note 19, at 150.

396. NBC v. U.S., 319 U.S. at 226 (affirming the chain-broadcasting rules and stating, “unlike other modes of expression, radio is inherently not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.”).


398. Cavanagh, supra note 312, at 67.

399. See 1996 Act, supra note 26, at §202(a)-(b) (also allowing any entity to own up to eight radio stations per market).

400. Prindle, supra note 221, at 296.

401. See 1996 Act, supra note 26, at §601(b)(1) (“[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”).
The regulatory model, broadly construed to include both content and ownership regulation, became unattractive for a number of reasons. First, approaches to spectrum policy changed with Ronald Coase's argument that "the market was far better than governments at allocating the scarce resource of electromagnetic spectrum," which fit with "the Zeitgeist" of associating government intervention with inefficiency. Government regulation is a poor substitute for private ordering where the marketplace allocates the resource to its optimal use, embodied in the party willing to pay the most. A second unattractive feature of the regulatory model (which contributed to the Zeitgeist) was its tendency to force the government to determine what consumers want or should want. By occasionally denying consumers what they want or telling them what they should have, the regulatory model runs counter to First Amendment principles (at least per Justice Holmes) and alarms our sense of justice in a free-market democracy.

The regulatory model, like liberalization critics, distinguishes the media marketplace from other markets, by virtue of the special attributes of media products, particularly TV. As already discussed, media products are public goods with fixed costs that need to be amortized over large numbers of viewers. This compels producers to seek out the widest possible audience, which results in more cosmopolitan, less local, programming. Alternatively, producers can generate other revenue through advertising, syndication and licensing. These alternative forms of revenue are all reinforced by

402. Special Report: Spectrum Policy, On the same Wavelength, ECONOMIST, Aug. 14, 2004, at 2, 3 (explaining the three approaches to spectrum policy since the beginning of broadcast regulation). Initially, spectrum scarcity formed the basis of the regulatory model where the government gave away exclusive privileges of use (for free) to avoid chaos. Then, efficiency demanded a shift to an auction method, where spectrum was treated as property to devote its use to the service most demanded. Currently, a third "open spectrum" approach is emerging where spectrum is treated as the commons, in which technological ingenuity eradicates the spectrum scarcity misnomer and the FCC acts more "as a speed cop than as a real-estate agent" Id. at 63.

403. But see Baker, Giving the Audience, supra note 269, at 314 ("Although the First Amendment ought to restrict purposeful suppression of speech, it should not and has not restricted structural interventions designed to improve the quality of the press").

404. See Sunstein, TV and Public Interest, supra note 1, at 505-06 ("[T]elevision is no ordinary commodity, partly because of the collective benefits of good programming, partly because of the link between television and democracy, and partly because viewers are more like products offered to advertisers than consumers paying for entertainment on their own").

405. See supra note 272 and accompanying text.
legal arrangements, such as intellectual property, and can conflict with what consumers want or how they get it. Consumer choice is also constrained by "gatekeepers," 'chokepoints' and 'tastemakers' deciding "which products get shelf space and which will be excluded from audience consideration." Consumers get what gatekeepers approve and what "the law encourages, not some 'uncontaminated' version of" what they want, positing the pure consumer sovereignty/marketplace model as an illusory ideal.

Christopher Yoo has countered that pay television, combined with price-discrimination, could make the free-market ideal a reality. If producers can charge more to those who demand a media product more intensely, the producer could cover its fixed costs without a massive audience. This would make localist programming more economically feasible without alternative revenue streams and regulatory intervention. Best of all, consumers could communicate what they want, and how much they want it, without advertising and gate-keeper intermediaries, and in the clearest terms available: their willingness to pay. By generating an ever diversifying range of output that would include localist programming, a pay-television/price-discrimination model would bring us closer to market equilibrium. The regulatory approach has the opposite effect. As explained in Part IV.4., throughout the ages of analog broadcasting, cable television, DBS, and digital broadcasting, regulatory localism has protected local free TV licensees and prevented networks from taking advantage of TV's natural economies of scale. This causes the networks' unit costs to increase because they have to amortize fixed costs over a smaller market, which ultimately causes the networks to reduce the quantity and diversity of output below optimal levels. Regulatory localism thus has "the paradoxical effect of reducing the economic viability of programming that appeals to relatively small audience segments (such as local content)."

407. GRANT & WOOD, supra note 151, at 51.
408. Baker, Giving the Audience, supra note 269, at 328.
409. See supra notes 282 and 283 and accompanying text.
410. Yoo, Rethinking Free TV, supra note 183, at 1657.
411. Id. at 1658.
412. Id.
413. Id. As the DARS example illustrates (see supra note 325 and accompanying text), regulatory localism also has the perverse effect of keeping potential inter-modal competition out of the highly consolidated radio sector.
and other niche programming will be the first type of output cut because of their limits in realizing economies of scale.

Taken further, Yoo's theory supports a tendency towards ever-increasing consolidation and centralization across markets and national borders, where economies of scale can be truly maximized to insure sufficient resources for localist and niche programming. Presumably, this cross-border expansion would bring us even closer to marketplace equilibrium. Yoo acknowledges that "television programming will still exhibit a natural tendency toward an equilibrium level of distribution that is geographically quite broad." However, "variations in local preferences may allow products directed at local markets to exist" leading to an equilibrium that includes local and cosmopolitan output, whose relative proportions would depend on local versus cosmopolitan demands.\(^{414}\) Grant and Wood are skeptical about multinational media suppliers providing localist programming, even at Yoo's theoretical equilibrium. They agree with Yoo about the need to amortize costs over the broadest possible market.\(^{415}\) But they think this leads to overwhelming incentives for cosmopolitan programs\(^{416}\) to trump local programs because local communities and small countries, such as Canada, have such a limited number of eyeballs over which to amortize fixed costs.\(^{417}\) The regulatory model also finds a persuasive flaw in Yoo's dependence on consumer demand, which takes us back to Sunstein's key criticism. The media's role should include exposing consumers to content that they may not want or tailor to their cultural and political tastes. And it is entirely conceivable that consumers may not want localist programming. In Canada, for example, the demand for American media has traditionally outweighed demand for local equivalents.\(^{418}\) This illustrates Sunstein's point that a consumer sovereignty/marketplace model can undermine the political sovereignty requirement for a shared cultural experience.

---

\(^{414}\) Yoo, *Rethinking Free TV*, supra note 183, at 1657-58.

\(^{415}\) GRANT & WOOD, *supra* note 151, at 55-60.

\(^{416}\) *Id.* at 109.

\(^{417}\) See e.g., *id.* at 18-19 ("[C]reators of cultural wares in English-speaking Canada can hope to amortize their costs across the potential audience of, at best, about 23 million people; in French Canada, barely 7 million. U.S. creators have a potential audience of 300 million. That is reflected in what networks pay for broadcast rights in each country. U.S. networks typically pay U.S. $1.4 million for an hour of series drama—eight and a half times what CTV pays for Degrassi.").

\(^{418}\) GITTINS, *supra* note 176, at 25.
The shared cultural experience point is one of the market externalities from the catalogue I describe above that support and refute arguments to preserve the regulatory model.419 A media market that only gives consumers what they want may also compromise the quality of political participation because there is no exposure to unsolicited points of view. In addition, it will be more difficult for those who exclusively consume individualized culture to interact socially with those people who do not share their tastes. Without some privilege given to political or democracy-enhancing media production, corruption and/or abuses of power may increase. On the other hand, the disincentive of media exposure may discipline political misdemeanor.

Giving consumers what they want will have obvious positive externalities that would be lost in the regulatory model. Consumer welfare will obviously be maximized. In addition, if individuals can explore the viewpoints, texts and means of expression they find appealing, they can further promote their own self-determination. But this positive also appears on the regulatory side of the ledger. Under a regulatory model, certain groups or interests will gain access to audiences and expression that they may not have under a consumer sovereignty regime.

There are also externalities affecting the subjects of media. A regulatory model might be able to restrict unwanted negative media attention, such as the allegedly unbalanced miniseries “The Reagans.”420 But the marketplace model could respond that concerns about negative publicity and intrusive information gathering are addressed in privacy, libel and defamation laws. A regulatory attempt to mitigate the negative of “unbalanced” media depictions would result in the bigger negative of chilling free speech.

Another category of externalities involves the relationship between the producer and consumer of media. If the media marketplace becomes one in which media consumption is always paid

419. As noted above, supra note 285, my discussion here adds to and elaborates on the catalogue of media transaction externalities addressed by Baker, Giving the Audience, supra note 269, at 366.

420. CBS pulled its controversial mini-series, The Reagans, and moved it to its cable affiliate, Showtime. According to some news reports, the reason was because CBS parent, Viacom, did not want to offend Congress, which was considering how to proceed on the NTSO rule. CBS’ formal justification invoked the defunct Fairness Doctrine, stating that The Reagans “does not present a balanced portrayal of the Reagans for CBS and its audience.” See “CBS Pulls 'Reagans' Amid Opposition From Conservatives, WALL ST. J., Nov. 5, 2003, at A3.
for (unlike free TV), there will be negative and positive externalities for those who pay and those who do not pay for media dissemination. Paying for media consumption can eliminate advertising from the media product (a negative for the advertiser in the absence of comparable access to audiences but a positive for a consumer who can watch uninterrupted programming), but it may also harm those that cannot pay for media consumption. Another negative occurs when an audience is forced to consume an unwanted product, with no political benefit. Because of TV’s pervasive presence in our lives, it is well-positioned to provide the shared cultural experience that Sunstein advocates. Yet, TV’s pervasiveness can be a nuisance. An example here is the 2004 Super Bowl Janet Jackson/Justin Timberlake alleged wardrobe malfunction. The regulatory model narrowly permits the government to restrict transmission of such material, if found to be indecent.

This shows how complicated the interaction is between the externality catalogue and the regulatory versus marketplace model dichotomy. On this basis, Baker argues that the dichotomy is untenable and unhelpful because political sovereignty concerns have to figure in the answer to the question of what consumers want. Baker asserts that the marketplace model fails without some influence from the regulatory model because a pure marketplace approach provides “much too much ‘bad’ quality content—bad meaning content that has negative externalities” and much too little “‘quality’ content—quality meaning content that has positive externalities.” At the same time, it “is unlikely to reflect people’s arguably more mature or more considered conceptions of the content they want, especially of the content that relates to the type of people


422. Baker, Giving the Audience, supra note 269, at 366. Baker argues that once we consider the catalogue of externalities, which is often ignored in media policy debates, regulatory intervention “can be understood as attempting to reduce costs not otherwise borne by the media, to impose those costs on the media, or to promote provision of content otherwise inadequately produced because of the media’s inability to internalize the benefits.” Regulatory intervention is thus a response to the catalogue of externalities, “thereby making the media come closer to giving the audience what it wants.”
they want to be," or to the type of local community or nation of which they want to be a part. Just as the political, cultural and economic perspectives overlap and complement one another, the dichotomy between the regulatory and marketplace models has to dissolve to accommodate the coexistence of citizens and consumers demanding, as individuals, localities and nations, entertainment, political information and cultural exposure.

With this in mind, Baker returns to the question of ownership regulation, arguing that, if our policy is geared towards giving the audience what it wants, it should also promote giving authority over media to people who combine a profit motive (economic perspective) with a sensitivity to community development (cultural perspective) and awareness of the media’s political role (political perspective). The problem is that, even if such enlightened owners exist, would the marketplace allow them to survive? CBS founder and Chairman, William S. Paley, proposed “setting aside a given period of time—say, two hours a week in prime time—for special, high-quality programs that would appeal to educated, sophisticated tastes more than to the mass audience,” but NBC and ABC were not interested. The most likely reason is that this concern for producing programming rich in positive externalities was trumped by the networks’ objective function of airing profit-maximizing mass audience material. With respect to localism specifically, Baker argues that “local owners may have commitments to their community as well as to profits,” which, as I explain above, is possible but not substantiated. Thus, Baker’s attempt to reconcile the regulatory and marketplace models is inspiring but it brings us back to the circular assumption that local owners are better for localism because they’re local. How do we get out of this circle?

VII. Conclusion

In Part II of this article, “Localism Today,” I note the apparent public support for localism and localist ownership structures. Reacting to, and sharing this support, Congress froze the NTSO rule’s cap at 39% for the indefinite future. One possible account of this

423. Id. at 413.
424. Id. at 369.
outcome is that Baker is correct (and Congress accepts) that owner identity and local ownership are inextricably linked with localism and to concerns about media consolidation and its threat to diversity within the marketplace of ideas. An alternative account is that the public suffers from blind comfort with a regulatory model disguising an entrenched coalition between Congress/regulators and free TV licensees. On the alternative account, the public interest would actually be realized under a marketplace model, where optimal output would give consumers what they want. By surveying arguments about the media’s economic, cultural, and political importance, this article shows how awkwardly the media fit within a pure marketplace framework. Unlike an “ordinary” business whose objective function is simply to maximize profit, the media have distinct co-existing cultural, political and economic functions. Acknowledging these coexisting mandates is one of the essential ingredients in the content of localism, because it is the political and cultural functions of media that tie it back to the self-determination of communities. One could argue that all consumption promotes self-determination in some way, but this ignores the wide consensus on the unique role that goods traded in the media market (ideas and expression) play in this process.

This article has also shown that we cannot take for granted the assumption that ownership identity is highly relevant to content and the public interest. How then can we justify localist ownership regulation? We have seen that territory and its role in providing spatial parameters for imagined communities is the other essential ingredient in localism’s content and the essential discovery of this article. The almost too-obvious but overlooked importance of territory gives rise to a value of local ownership for its own sake, even though current legislation and regulation authorize localist ownership regulation for the sake of local programming. The lack of consensus on ownership’s influence on programming is no obstacle to an autonomous and strong impulse for localist ownership regulation, such as the NTSO rule, that discourages consolidated, remote ownership in a round about way of preserving the territorial commonality of the license area and the licensee. Local communities and nations continue to define their selves and their aspirations within territorial parameters. The media provide them with the essential ideas and means of expression to do so. However, because they are easily moved and reproduced over satellite, cable, Internet, phone lines and electro-magnetic spectrum, the media defy the
territorial parameters they are meant to reinforce. It is this ineluctable tension that continues to drive an impulse to maintain media control locally through localist/nationalist ownership restrictions. By territorially circumscribing media ownership (directly achieved through Canada’s foreign ownership restrictions and indirectly achieved through America’s NTSO rule), ownership regulation confines otherwise territorially disrespectful media. This tension will only dissolve with a decline in the importance of territory to the way we determine our local and national selves.

A lingering question is why the NTSO rule became such a prominent issue in 2003 and why, among all the rules liberalized in the 2003 Order, Congress chose to intervene on the NTSO rule. One possibility is that the 2003 media ownership controversy represents a reaction to the imminent decline of territorially defined communities. At the dawn of the Internet age, legal scholars Rosemary Coombe and Thomas Francke argued that we were embarking on a trend to increasingly construct our identities through cosmopolitan transnational communities. This has obvious implications for nationhood and for the foreign ownership restrictions at issue in my discussion of Canadian media ownership regulation. But the implications are also local because the point is that “cultures can no longer be considered bounded, insulated, or discretely located in territorial terms,” on either a local or national scale. As alluded to above, the beginning of the Internet age brought significant pressure from a paradoxical “wave of global localism” that challenged the relevance of territorially determined constituencies, including the idiosyncratic local communities that Carol Rose describes. Determining identity focused less and less on territorial communities and more and more on individuals.


428. Id.

429. See supra notes 227-243 and accompanying text.


431. Thomas M. Franck, Community Based on Autonomy, 36 COLUM. J. TRANSNAT’L L. 41, 64 (1997) (“[T]he twenty-first century, the realities of social interaction, conflict resolution, economic, scientific, and cultural development, and ecological and resource management have combined with various facets of the communications revolution to point us towards a global civil society. In that society are found interactive transnational factions, passionate value-and-policy discourses and emerging public and private transactional networks. In short, a community is emerging in which, for the first time,
The prominence given to the individual through the "communications revolution" and the consequent pressure on territorially defined communities inevitably trickles down to the regulatory norms that reflect such communities, such as localism and nationalism in media ownership regulation. The conflict is palpable, for, as we have seen from the beginning, localist and nationalist ownership regulations, privilege local and national "selves" over the individual "self." The controversy on the NTSO rule may be the smoke from the fires of what my introduction would call a genuine communications revolution, where technological and social changes combine. Internet or other technologically determined affinities among individuals/consumers may be challenging and replacing the territorial parameters of imagined local and national communities of citizens. Congress' move to freeze the NTSO rule at 39% may prove to be an attempt to confine the impact of the revolution. However, this is likely an overly dramatic depiction. Given the public's reaction to NTSO rule liberalization in 2003, the persistent health of geographic localism in politics and the considerable regulatory attention to media localism through the Localism Task Force and other venues, the revolution still seems remote. To more precisely assess where things stand in this regard, in future work, I intend to look more closely at the same tension, as manifested in nationalist ownership regulation in Canada.

Localism's role in media ownership regulation is much more than a rhetorical cipher. Its content is enigmatic but that is because it is essentially a tension—between the ongoing socio-cultural relevance of the territorial parameters our communities inhabit versus the capacity for media products and technologies to defy such territory. Localist ownership rules, such as the NTSO rule, are meaningful to ordinary Americans because territorial communities remain meaningful, and there is comfort in restricting media control within these communities' territorial parameters. Such comfort may be entirely false: the NTSO rule may have no impact on local programming and the needs of local communities, while localism, in general, may be partly or wholly explained by the public choice conspiracy theory. However, this diagnosis will be difficult to confirm individuals are free to choose the components of their identities and to manifest a free choice of affinities. They are liberated to express associational preferences.

432. Id.
absolutely without empirical consensus or an autopsy made possible through a Mancur Olson-type revolution. This genuine communications revolution will only come when the fundamental tension above falls away. For that to happen, territory will have to be irrelevant to community, a prospect that is currently highly unlikely.