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THE COOPTING OF A FREE AND FAIR PRESS BY PRIVATE MEDIA

CONGLOMERIZATION

Jason Mushnick

Introduction

Throughout the 20th Century and into the 21st Century, ownership of major media outlets has drifted into the hands of corporate giants.¹ These giants are corporate conglomerates that are not merely engaged in entertainment and news media, but also production and distribution companies.² As a result, editorial decisions regarding national news coverage have developed a bottom line, not to inform the public, but based on making a profit.³ As stated by Ben Bagdikian in *The New Media Monopoly*:

In 1983, the men and women who headed the fifty mass media corporations that dominated American audiences could have fit comfortably in a modest hotel ballroom. . . . By 2003, five men controlled all these media once run by the fifty corporations twenty years earlier. These five owners of additional digital corporations, could fit in a generous phone booth. Granted, it would be a tight fit, and it would be filled with some tensions.⁴

As a result, editorial decisions regarding national news coverage have developed a bottom line, not to inform the public, but based on making a profit.⁵

¹ WILLIAM A. HATCHEN, *THE TROUBLES OF JOURNALISM: A CRITICAL LOOK AT WHAT'S RIGHT AND WRONG WITH THE PRESS* 54 (Taylor & Francis 2008) (2005).

² *Id.*; JENNIFER HOLT, *EMPIRES OF ENTERTAINMENT: MEDIA INDUSTRIES AND THE POLITICS OF DEREGULATION, 1980-1996* 3 (Rutgers Univ. Press 2011) (“previous barriers between media industries began to break down; film studios combined with broadcast networks (Fox), production/distribution entities reunited with exhibition outlets (Universal, Paramount, Warner Bros.), and film companies merged with cable properties (Warner Bros., MCA/Universal, Columbia), thereby creating innovative alliances across formerly distinct industrial boundaries.”).

³ Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 386-87 (1994).

⁴ BEN BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 27 (Beacon Press 2004).

⁵ Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 386-87 (1994).

Given that the concentration of media ownership is in the hands of a few publicly traded companies with an interest in making a profit, the media's main focus is on how to attract the largest audience. The decision for a person to consume a type of media will depend on whether they identify with the particular coverage expressed in that media.⁶

Economic forces dictate that media coverage will be based on how a media outlet can achieve the largest audience. For instance, James T. Hamilton in *All the News That's Fit to Sell: How the Market Transforms Information into News* showed that newspapers which tend to be distributed mainly in local cities, beginning toward the end of the Twentieth Century have become more independent rather than partisan.⁷ This occurred because independent papers were more likely to attract a larger scale of association, which meant that advertisers were more likely to place ads in those papers.⁸ However, Hamilton also shows that network evening news programs on television tend to have a core of loyal viewers and some marginal viewers that may or may not tune in.⁹ Network news programs compete for marginal viewers and make content decisions based on what they want.¹⁰ The directors place more value on young adults (18-34), particularly women, as this is the demographic most likely to be making purchasing decisions in a household. Therefore, advertisers are more likely to place an ad on a program that attracts this demographic. Because younger females take an interest in political issues that have a more liberal bias, network news programs, particularly from the three major network evening news programs, began to focus on topics traditionally associated with the Democratic party.¹¹ More, recently there has been a significant increase in cable channels and viewership of any one

⁶ *Id.*

⁷ JAMES T. HAMILTON, *ALL THE NEWS THAT'S FIT TO SELL* 52 (Princeton Univ. Press 2004).

⁸ *Id.* at 60.

⁹ *Id.* at 92.

¹⁰ *Id.* at 93.

¹¹ *Id.* at 3.

channel has decreased. This fostered the possibility of a conservative news channel to become profitable, and so the Fox News Channel was born.¹²

The effect of concentrated ownership of the media has resulted in more coverage of, what Hamilton calls, soft news and less focus on hard news. Soft news stories are stories that tend to focus on human interest and entertainment figures, while hard news has an emphasis on the government and politics.¹³ Because younger female audiences are more interested in soft news stories, the media outlets are more likely to cover such stories in order to turn a greater profit.¹⁴ Further, soft news stories are less expensive to make and the payoff for making hard news stories is not worth the extra expense and effort.¹⁵ Therefore, the increased concentration of ownership of media outlets in the hands of publicly traded firms results in a less informed public due to the focus on soft media topics.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁶ Interpretations of the First Amendment have been conflicting.¹⁷ However, the intent of the Amendment is to give the public a voice and ensure that a diversity of views are communicated as to all subjects in order maintain an informed public.¹⁸ A further purpose of the First Amendment, as will be discussed later in this paper, is to keep the media and news out of the hands of any one person or group, such as the government, in order to ensure an effective democracy. Because ownership of the media is becoming more and more consolidated into the hands of public corporations whose focus is on making a profit and not to inform public discourse, the value of our First Amendment has greatly

¹² *Id.*

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. CONST. amend. I.

¹⁷ Eugene Volokh, *Freedom for the Press As an Industry, or for the Press As A Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 461-63 (2012)

¹⁸ *Id.* at 463.

diminished. Presently, the only regulations used to check the media industry are antitrust laws. Antitrust laws take on a concern primarily with the necessary amount of competition to keep any one firm from taking over an industry. Since the 1980s, the FCC has been deregulating the media industry with the idea that the industry should operate in a free, market-driven society.¹⁹ Further, courts have started to reject any attempts to structurally regulate the media industry and often cite to the First Amendment right for these companies to disseminate their views on as wide an audience as possible. This interpretation is greatly stymying the First Amendment.

This paper will show why greater structural regulation of the media industry is necessary to ensure that no one owner has a monopolistic hold on the industry and show that allowing the media industry to operate in an open market with only antitrust laws regulating is actually a violation of the First Amendment. Further, this paper will propose other potential regulations to make the First Amendment carry out its intended purpose of viewpoint diversity and ensure that all people have freedom of the press and not just a select few.

Part I of this paper will discuss the historical and philosophical antecedents of the First Amendment freedom of the press. In Part II, this paper will discuss the deregulation of the media industry that occurred in the 1980s and how this enabled conglomerization of the media. It will also examine how the Supreme Court has dealt with this climate of deregulation. Part III will discuss the problems with conglomerization of the media and the consequences this has on the news we receive and the First Amendment. Finally, Part IV will provide a prescription for reform.

I. HISTORICAL AND PHILOSOPHICAL ANTECEDENTS

A. Freedom of the Press was Intended for All

¹⁹ EDD APPLGATE, PRINT AND BROADCAST JOURNALISM : A CRITICAL EXAMINATION 88 (Greenwood Press 1996).

In forming the First Amendment, the founding fathers intended that freedom of press prevent the government from having any power over the people's right to speak, write, or publish. This is probably why the Amendment begins, "Congress shall make no law. . ."

John Locke had a profound influence on the founders, mostly for his beliefs about liberty and limited government. Locke, in *Two Treatises of Government*, stated that all men are born with certain natural rights and born "in a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."²⁰ He believed that all men are born into a "state also of equality wherein all the power and jurisdiction is reciprocal, no one having more than another."²¹ While he understood government to be necessary in order to preserve each individual, their liberty and property, "the power of the society or legislative constituted by them can never be supposed to extend farther than the common good."²² Locke's work, being of great influence to the founding fathers, therefore, indoctrinated the ideas that all are equal and that government should be limited only to protect the people, their liberty, and their property.

The colonists were primarily concerned with the allocation of political power and "its endlessly propulsive tendency to expand itself beyond legitimate boundaries."²³ As such, many pamphleteers of the time focused their writing around the need "to check the abuse of governmental power."²⁴ Cato, the pen name for John Trenchard and Thomas Gordon²⁵, wrote of the importance of free speech in checking the power of the government: "Whoever would

²⁰ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 90 (MobileReference) (1689)

²¹ *Id.*

²² *Id.* at 142

²³ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 533 (1977).

²⁴ *Id.*

²⁵ *Id.* at 530.

overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech; a Thing terrible to publick Traytors.”²⁶ John Wilkes, an English politician and polemicist admired by the colonists, emphasized the checking value of freedom of the press:

The liberty of the press is the birth-right of a Briton, and is justly esteemed the firmest bulwark of the liberties of this county. It has been the terror of all bad ministers; for their dark and dangerous designs, or their weakness, inability, and duplicity A wicked and corrupt administration must naturally dread this appeal to the world; and will be for keeping all the means of information equally from the prince, parliament and people.²⁷

This body of thought, emphasizing the significance of freedom of speech and freedom of the press as a means to check abuses of government power, became the bedrock for the First Amendment.

James Madison, widely recognized as the “father” of the Constitution and Bill of Rights²⁸, was responsible for drafting the First Amendment.²⁹ Madison discussed the freedom of the press in the Virginia Report of 1799-1800, which was intended to be a criticism of the Alien and Sedition Acts. The Sedition Act of 1798 was passed by Congress under President John Adams due to hostile relations between government officials and editors and owners of newspapers.³⁰ Following enactment of the Sedition Act were a series of prosecutions sending editors to jail, fining them, and even closing down some publications for criticizing or denigrating the Adams administration.³¹

In the Virginia Report, Madison spoke of the difference between the British legal doctrine of freedom of the press and the American system. In England, the legislature was

²⁶ *Id.*

²⁷ *Id.* at 531.

²⁸ DAVID L. HUDSON ET AL., ENCYCLOPEDIA OF THE FIRST AMENDMENT lxxvi (David L Hudson et al. eds., CQ Press 2008).

²⁹ Blasi, *supra* note 23, at 535.

³⁰ DAVID L. HUDSON ET AL., ENCYCLOPEDIA OF THE FIRST AMENDMENT lxi (David L Hudson et al. eds., CQ Press 2008).

³¹ *Id.*

regarded from distrust and also considered to be “sufficient guardians of the rights of their constituents against the danger from the executive.” However, Madison stated, “[I]n the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible.”³² Therefore, Madison concluded that the meaning of freedom of the press should be held to a broader standard than England, which permitted criminal punishment for seditious libel.³³ Because the government did not have unlimited power and likewise could also make mistakes, Madison believed freedom of the press was necessary to criticize government officials who breach the public trust. The extent of the breach “could only be determined by a free examination thereof, and a free communication among the people thereon.”³⁴ Madison placed much emphasis on the value of the electorate in the checking process, especially the need to check errors of judgment and illegal or despotic actions by officials.³⁵

It is no surprise that in 1800, when Madison’s mentor, Thomas Jefferson, was elected to be president that the Sedition Act expired and President Jefferson pardoned anyone convicted under it.³⁶ Jefferson, also a founding father, with much influence on Madison at the time the Bill of Rights was written, believed strongly in the checking value of the First Amendment. Jefferson stated in a letter to Adamantios Coray that “[t]his formidable censor of the public functionaries, by arraigning them at the tribunal of public opinion, produces reform peaceably, which must otherwise be done by revolution.”³⁷

³² Vincent Blasi, *supra* note 23, at 536.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 537.

³⁶ DAVID L. HUDSON ET AL., *ENCYCLOPEDIA OF THE FIRST AMENDMENT* lxii, lxvi (David L Hudson et al. eds., CQ Press 2008).

³⁷ Blasi, *supra* note 23, at 540.

The above paragraphs show the predominant view of the First Amendment centered on the necessity of the freedom of the press to enable free expression of opinions as to the workings of the government and to serve as check on officials and potential abuses of power. Today, many people contend that freedom of the press was intended to provide freedom to the press as an industry--meaning businesses in the newspaper trade.³⁸ This is the view often used by corporations in the courts when asserting structural regulation of the media industry violates their First Amendment right to express their opinions to the widest audience possible. However, history shows that First Amendment was intended not to protect merely the press as an industry but the right of all people to the press as a technology.

The writings of Eugene Volokh offer evidence that freedom of the press was intended it was the right of every individual to have access to the printing press.³⁹ The printing press was the only means of widely disseminating speech to a broad audience. At the time, no other modes, such as television or the internet were available. The press was a way of advancing in all subjects, including science, religion, literature, and government.⁴⁰ In other words, freedom of the press was not intended to protect primarily those that were in the industry of the press. Freedom of the press was intended to give all men the opportunity to widely distribute information and enable public discourse.

More evidence that shows that freedom of the press was not intended to protect the industry of the press as we know it today is that the newspapers of the era were small and had

³⁸ Applying this view to modern times, they extend the freedom of the press to all media, such as television, radio, and internet businesses.

³⁹ Volokh, *supra* note 17, at 465-66 (2012); Eugene Volokh, *Unradical: "Freedom of the Press" As the Freedom of All to Use Mass Communications Technology*, 97 IOWA L. REV. 1275 (2012).

⁴⁰ Volokh, *supra* note 39, at 1280.

few if any paid writers.⁴¹ Those that argue the press clause was meant to provide more protections to owners of the institutional press are mistaken as the press at the time of the framing of the Amendment was a separate entity from journalism. The press was in the trade of printing. Therefore, it cannot be so that the framers sought to give an industry (that did not exist at the time) the sole voice as to public discourse in a democratic society.

Knowing what we do about the press at the time the First Amendment was written makes it more apparent that freedom of speech and freedom of the press are separate entities. Freedom of speech means “‘the privilege of speaking any thing without control’ and ‘the words freedom of the press, which form a part of the same sentence, mean the privilege of printing any thing without control.’”⁴²

The founders purpose for the First Amendment was to provide a means of checking government power by expressing any opinions favoring or disfavoring a government official’s decisions and not allowing Congress to abridge this right in any way. Further, it is unlikely that the founders intended to give this freedom just to those involved in the press industry and likely intended to provide freedom of press as a technology for all as shown by Volokh. At the time the First Amendment was written, any newspapers that existed were merely local and very small. There is no way that the founders could have foreseen that huge publicly traded conglomerates would run the press and enable it to operate on a national or even global scale, thereby, making it difficult for much smaller companies to compete or attract an audience. Had they known just how big these media corporations would become, while remaining in the hands of so few, they probably would have changed the wording of the First Amendment altogether. Because they

⁴¹ Volokh, *supra* note 17, at 468, 540 (See Anderson, *supra* note 9, at 446-47 (“The concept of press as journalism cannot claim a historical pedigree. When the First Amendment was written, journalism as we know it did not exist. The press in the eighteenth century was a trade of printers, not journalists.”)).

⁴² Volokh, *supra* note 17, at 475.

envisioned the press as a technology that could be used by all, they worded the First Amendment to prevent Congress from abridging this right of all men to freedom of the press. However, knowing what we do now, the founding fathers might have selected an earlier draft of the First Amendment that had been written by James Madison: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”⁴³

B. A Market Place of Ideas: The Egalitarian View of the First Amendment

The intent of the First Amendment as expressed above is analogous to the egalitarian philosophy of John Stuart Mill in *On Liberty*, written in 1859, which is most credited with swaying the opinions of some Supreme Court Justices, such as Oliver Wendell Holmes, Jr. and Louis Brandeis. In *On Liberty*, John Stewart Mill contends that society should never silence an opinion because “[i]f the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.” In doing so, Mill supports the idea that a properly working society requires the expression of all opinions, no matter how unpopular, to be voiced. Further, Mill stated the reason that no one authority should be provided with an absolute power of opinion:

[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an

⁴³ RICHARD E. LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 266 (Oxford Univ. Press 2006).

assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.⁴⁴

Mill's view that no one should have the authority to suppress an opinion is the same idea that guided the First Amendment, specifically that it is the right of *all* to voice their opinions through the printing press.⁴⁵ Mill essentially believed that the success of a democratic society requires the free trade in ideas, or a market place of ideas, so that ideas can be refuted or proven in the search for truth.

An egalitarian concept established by Mill that should be noted is the idea that “[a]ny person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of another are his own affairs.”⁴⁶ Building on this, Mill believed that while the State must respect the liberty of each individual person, it is responsible with controlling the power that an individual possesses over others.⁴⁷ This concept is analogous to Mill's belief that education should not be “in whole or any large part” in the hands of the State.⁴⁸ Mill strongly believed in the goals of individuality of character and having a diversity of opinions. Of principle importance of achieving these goals, was diversity of education.⁴⁹ A State education would serve the purpose of developing similar viewpoints and essentially mold them in a way “which pleases the predominant power.”⁵⁰ It was Mill's view that “[a]n education established and controlled by the State, should only exist, if it exist at all, as one

⁴⁴ JOHN STUART MILL, ON LIBERTY 99 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

⁴⁵ In modern times, this would be the right to voice opinions in all forms of media.

⁴⁶ JOHN STUART MILL, ON LIBERTY 126 (David Bromwich & George Kateb eds., Yale University Press 2003) (1859).

⁴⁷ *Id.* (“The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others.”).

⁴⁸ *Id.* at 128.

⁴⁹ *Id.*

⁵⁰ *Id.*

among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence.”⁵¹

A final point worth mentioning from *On Liberty* is Mill’s view of the place of the government when “individuals may not do [a] particular thing so well, on the average, as the officers of government.”⁵² Mill stated that “it is nevertheless desirable that it should be done by them, rather than by the government, as a means to their own mental education.”⁵³ Mill continues that “[w]hat the State can usefully do, is to make itself a central depository, and active circulator and diffuser, of the experience resulting from many trials.”⁵⁴ In other words, rather than forcing its own experiments on others, the government’s responsibility is “to enable each experimentalist to benefit by the experiments of others.”⁵⁵

Justice Holmes first accepted this egalitarian approach to the First Amendment in his dissent in *Abrams v. U.S.*, where the defendants were convicted of violating provisions of the Espionage Act of Congress.⁵⁶ *Abrams* involved five defendants that were Russian immigrants who distributed leaflets condemning the U.S. government's involvement in the Russian Revolution.⁵⁷ Three of the counts were that the defendants had conspired to unlawfully utter, print, write and publish (1) disloyal, scurrilous and abusive language about the form of government of the United States, (2) language intended to bring the United States government in contempt, scorn, contumely, and disrepute, and (3) language intended to incite, provoke and encourage resistance to the United States during the war.⁵⁸ The fourth count “was that the defendants conspired ‘when the United States was at war with the Imperial German Government,

⁵¹ *Id.*

⁵² *Id.* at 131.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Abrams v. United States*, 250 U.S. 616 (1919).

⁵⁷ *Abrams*, 250 U.S. at 628.

⁵⁸ *Id.* at 617.

. . . by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products . . . essential to the prosecution of the war.”⁵⁹ While the Court upheld the convictions for these counts, Holmes dissented with the following egalitarian reasoning:

[T]he ultimate good desired is better reached by *free trade in ideas*-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁶⁰

Holmes believed that no matter how unpopular an opinion and even if that opinion disputes the fundamentals of our government, that speech should be protected by the First Amendment unless it poses an imminent danger. Justice Brandeis in his concurrence to the opinion of the Court in Whitney v. California echoed the same beliefs as Holmes. Justice Brandeis added the threat of discouraging unpopular thought through fear of punishment. He stated “that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”⁶¹

Mill’s beliefs about the necessity of a market place of ideas were present in the views another Justice, William O. Douglas. In his concurring opinion in *U.S. v. Rumely*, Justice Douglas stated: “Like the publishers of newspapers, magazines, or books, this publisher bids for

⁵⁹ *Id.*

⁶⁰ *Id.* at 630.

⁶¹ *Whitney v. California*, 274 U.S. 357, 375 (1927).

the minds of men in the market place of ideas.”⁶² Douglas believed that an individual’s fear of criticism can be crippling to a society and that opinions that disagree with the views of the majority are crucial.⁶³

Further, Justice Black’s majority opinion in *Associate Press v. U.S.*, which will be discussed later in this paper, also dictates the egalitarian view that all opinions, including those greatly contested by the majority, should have equal access to the press. This view has been continually used by courts to uphold structural regulation of the media industry through antitrust law. Most importantly, this view shows that the First Amendment provides for even more regulation of the media industry than other free markets and the necessity of preventing media monopolies is paramount to the success of the First Amendment.

II. CONTROLLING THE MEDIA: THE RISE OF THE CORPORATE MONOPOLY

A. Deregulation Making Way for Conglomerization

In the past, the Federal Communications commission (FCC) was the agency responsible for regulating the mass media. The FCC’s policy initiatives centered on ownership, the scale and scope of the businesses in the industry, and the content distributed or broadcasted.⁶⁴ The goal of the FCC’s mass media regulation was to “promote programming that is relevant to important public issues and interesting to viewers and listeners.”⁶⁵ This led to a balancing act trying to serve the interest of democratic debate and market efficiency where the FCC had to structure the media market so “that [it] is both competitive enough to satisfy consumers’ desires and diverse

⁶² *United States v. Rumely*, 345 U.S. 41, 56 (1953).

⁶³ *Id.* at 57 (“Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged.”).

⁶⁴ Howard A. Shelanski, *Antitrust Law As Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 372 (2006).

⁶⁵ *Id.*

enough to provide the range of information and viewpoints necessary for informed public discourse.”⁶⁶

Since the early 1980s, there was a shift toward deregulation of the media industry and antitrust policy in general.⁶⁷ The trend toward deregulation of antitrust policy had its roots in the Chicago School of thought, which “became increasingly influential on policy and regulation in the 1970s.”⁶⁸ The Chicago School believed “that markets operate the most efficiently (and most competitively) without regulatory interference, and their philosophy advocates minimal antitrust enforcement and is extremely tolerant of mergers and industry consolidation.”⁶⁹ The problem with applying the Chicago School to the media industry is that it “applies a single set of operational principles to a wide variety of industrial markets and contexts instead of considering markets on a case-by-case basis.”⁷⁰ The purpose of this paper is not to knock the Chicago School as it pertains to most markets. However, the Chicago School fails to take into account the First Amendment implications of allowing market consolidation of the media industry.⁷¹ While efficiency of the market in enabling wider distribution or broadcasting of content at a cheaper cost is beneficial to First Amendment objectives, if it is worthless if it does so in a way that only enables the expression of certain opinions and fails to discuss certain topics at all.

The first major step toward surrendering multiple ownership rules occurred on October 20, 1983, when the FCC issued a Notice of Proposed Rulemaking as to the seven station rule that

⁶⁶ *Id.*

⁶⁷ HOLT, *supra* note 2, at 2 (Rutgers Univ. Press 2011) (“the 1980s ushered in a period of pivotal transformation in the business of entertainment. . . . [T]he interpretation of antitrust policy underwent significant changes and deregulatory policies became widespread”).

⁶⁸ *Id.* at 9.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (“Though ‘free market’ ideology was touted during the Reagan era as the only way to preserve true competition, it actually worked to stifle competition by allowing for higher degrees of market concentration and control.”).

existed at the time.⁷² The seven station rule restricted the amount of television and AM and FM radio stations that could be owned by the same entity to seven in each category.⁷³ Its reasoning for dispensing or amending the rule was a significant increase in the number of television stations, AM stations and FM stations since the rule debuted in 1953.⁷⁴ As a result, the possibility for harmful concentration that would weaken diversity had diminished and the threat of monopoly was not a concern.⁷⁵ On August 3, 1984, the FCC replaced the seven station rule with an interim twelve station rule that would remain until 1990.⁷⁶ However, upon stay and review of the FCC Order, on February 1, 1985, the FCC let go of the six-year sunset provision on the twelve station rule. In 1992, the FCC continued to deregulate, allowing ownership of up to eighteen AM and eighteen FM stations.⁷⁷

Another major step toward deregulation occurred upon enactment of the Telecommunications Act of 1996 (“The TCA”). When the TCA passed, “the FCC received a statutory mandate to consider repealing all remaining media ownership restrictions, including the newspaper/broadcast cross-ownership ban.”⁷⁸ The TCA completely deregulated national ownership of radio stations and increased the proportion of the national television audience a single owner could reach, from twenty-five percent to thirty-five percent⁷⁹. Additionally, it

⁷² Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 425 (1989).

⁷³ *Id.* at 413-14.

⁷⁴ *Id.* at 425 (“The Commission extrapolated from empirical data in the trade press and its on-air station tallies to document a 466% increase in the number of operating television stations, a 92% increase in the number of operating AM stations, and a 561% increase in the number of operating FM stations, since the promulgation of the ‘seven station’ rule in 1953.”).

⁷⁵ *Id.*

⁷⁶ *Id.* at 425-26.

⁷⁷ C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 855, 868 (2002).

⁷⁸ Daniel C. Moore, *Double Crossed: Why the Newspaper/broadcast Cross-Ownership Ban Remains Necessary in the Public Interest*, 88 MINN. L. REV. 1697, 1705 (2004).

⁷⁹ Baker, *supra* note 77, at 868.

“directed the FCC to reconsider remaining ownership limitations on a biennial basis to determine whether they remain ‘necessary in the public interest.’”⁸⁰

In June 2003, the FCC held a biennial review to determine whether the mass media regulations were necessary to achieve the above policy objectives.⁸¹ It found that at the time the rules were promulgated the media markets were more concentrated than they were at the time of the review.⁸² As such, the “rules governing media ownership no longer served the policy objectives of competition, localism, and diversity for which they had been implemented.”⁸³ The FCC ultimately did away with the media specific rules and left it to antitrust enforcement to keep a check on consolidation of the media.⁸⁴

Following this deregulation, five global media firms have come to “own most of the newspapers, magazines, book publishers, motion picture studios, and radio and television stations in the United States.”⁸⁵ These five conglomerates that dominate the United States are Time Warner, The Walt Disney Company, News Corporation, Viacom, and CBS⁸⁶. Also, worth mentioning is Bertelsmann SE & Co. KGaA, which is a German mass media corporation that in 2004 was the fifth largest media corporation in the United States.⁸⁷ Throughout its history Bertelsmann was owned by the Mohn family, which currently has a 19.1% stake in the company.

⁸⁰ Moore, *supra* note 78, at 1705-06.

⁸¹ Shelanski, *supra* note 64, at 372.

⁸² *Id.* (“In 1980, for example, there were 9,278 radio stations and 1,011 television stations; about 19.2 million household cable subscribers receiving approximately twenty nationally distributed, non-broadcast program networks; 1,745 daily newspapers; and no mass-market internet. By 2003, there were 13,450 radio stations and 1,747 television stations; more than 90 million U.S. household cable and satellite subscribers receiving 388 nationally distributed, non-broadcast program networks; 1,456 daily newspapers; and more than 60 million household internet subscribers.”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ BAGDIKIAN, *supra* note 4, at 3.

⁸⁶ CBS was part of Viacom until 2006. CBS is actually the legal successor of the company and Viacom is a spinoff. The Redstone family owns controlling shares of both Viacom and CBS through their privately owned theatre company called National Amusements, Inc.

⁸⁷ BAGDIKIAN, *supra* note 4, at 47.

The Bertelsmann Foundation, a non-profit think-tank founded by the Mohn family has an 80.9% ownership stake in Bertelsmann.⁸⁸

The largest of these five media conglomerates is Time Warner, Inc. On its 2012 Annual Report, Time Warner classifies its businesses into three segments. First, it holds “[n]etworks, consisting principally of cable television networks, premium pay and basic tier television services and digital media properties. Second, it has a film and TV entertainment segment, “consisting principally of feature film, television, home video and videogame production and distribution.” Third, it possesses a publishing segment, “consisting principally of magazine publishing and related websites as well as book publishing and marketing businesses.”⁸⁹

Four of Time Warner’s biggest subsidiaries are Turner Broadcasting Systems, Inc., HBO, Time, Inc., and Warner Bros. HBO and Warner Bros. are primarily involved in the entertainment side of the media.⁹⁰ Turner owns and operates leading television networks, such as CNN, HLN, TNT, and TBS.⁹¹ Time Inc. prides itself as being “one of the largest branded media companies in the world,” engaging in print, online, and mobile communications. Some of its influential brands are Time, People, Sports Illustrated, InStyle, and Real Simple. Further, its network of internet sites, including time.com, cnnmoney.com, people.com and SI.com reaches over 40 million unique users each month.

The Walt Disney Company is another firm that “caught the merger and acquisition fever of the 1980s and 1990s.”⁹² In 1984, Michael Eisner was named ABC’s chairman and CEO. Eisner had begun his career working for the FCC and then placing commercials for CBS.

⁸⁸ *Investor Relations: Shareholder Structure*, BERTELSMANN, <http://www.bertelsmann.com/Investor-Relations/Bertelsmann-at-a-Glance/Shareholder-Structure.html> (last visited April 30, 2013).

⁸⁹ Time Warner: Annual Report 2012 3, available at <http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-reportsAnnual>.

⁹⁰ This is not to say that people do not get information from entertainment sources.

⁹¹ Our Content, TIME WARNER <http://www.timewarner.com/our-content/turner-broadcasting-system/> (last visited April 30, 2013).

⁹² BAGDIKIAN, *supra* note 4, at 34.

However, he began working at ABC after being noticed by Barry Diller, the head of programming at ABC, who became his mentor. Eisner greatly impacted ABC upon becoming the CEO by transforming it into the Walt Disney Company, especially through the acquisition of the newspaper-broadcast chain ABC/Cap Cities. Presently, Disney's media networks segment "includes international and domestic cable television networks, a domestic broadcast television network, television production operations, domestic and international television distribution, domestic television stations, domestic broadcast radio networks and stations, and publishing and digital operations."⁹³ The Walt Disney Company is involved in various other industries, including Parks and Resorts, the Walt Disney Studios, Disney Consumer Products, and Disney Interactive. In 2005, Robert Iger took over as chairman and CEO amid discontent among the Board of Directors as to Eisner's leadership.⁹⁴

The third largest is News Corporation. News Corporation is run by Rupert Murdoch, its Chairman and CEO.⁹⁵ The corporation is a diversified global media company operating in six different media segments, such as cable network programming, filmed entertainment, television, direct broadcast satellite television, publishing, and another segment primarily consisting of digital media properties.⁹⁶

As stated by Ben Bagdikian in *The New Media Monopoly*, "two impulses seem to drive Murdoch's business life—the accumulation of as much media power as possible and the use of that power to promote his deep-seated conservative politics."⁹⁷ Murdoch began in Australia when his father gave him a control of a newspaper in Adelaide, a small part of his father's news

⁹³ The Walt Disney Company: Fiscal Year 2012 Annual Financial Report And Shareholder Letter 1, *available at* <http://cdn.media.ir.thewaltdisneycompany.com/2012/annual/10kwrap-2012.pdf> (last visited April 30, 2013).

⁹⁴ Alex Armitage & Jason Gale, *Disney Picks Robert Iger to Replace Eisner, NYT Says*, BLOOMBERG (March 13, 2005), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ahBw0yOHsTgE&refer=us>; BAGDIKIAN, *supra* note 4, at 36.

⁹⁵ News Corporation: Annual Report 2011 9, *available at* <http://www.newscorp.com/Report2011/2011AR.pdf>

⁹⁶ *Id.* at 11.

⁹⁷ BAGDIKIAN, *supra* note 4, at 38.

empire.⁹⁸ Murdoch had his sights on running something much bigger when he left for England where he soon owned “an afternoon sleazy tabloid and a Sunday paper full of overflowing female bodies and sensational gossip” as well as two of the world’s most influential papers, the Sunday Times and the Times.⁹⁹

Murdoch continued to expand his empire into the United States. Notably, he acquired ownership of the New York Post and also created his own radio and television network, Fox. One acquisition at a time, Murdoch’s Fox Network has emerged as the fourth TV network.¹⁰⁰ The Company’s television operations as of 2011 consisted of FOX, MyNetworkTV and the 27 television stations owned by the Company.¹⁰¹

Viacom and CBS were once owned under the same name of Viacom. However, in 2006, they split with CBS taking on most of the operations of the corporation formally known as Viacom. Presently, CBS has operations in the following segments: entertainment, cable networks, publishing, local broadcasting, and outdoor advertising.¹⁰² According to its 2013 Annual Report:

[t]he CBS Television Network through CBS Entertainment, CBS News and CBS Sports distributes a comprehensive schedule of news and public affairs broadcasts, sports and entertainment programming to more than 200 domestic affiliates reaching throughout the U.S., including 16 of the Company’s owned and operated television stations, and to affiliated stations in certain U.S. territories.¹⁰³

⁹⁸ *Id.*

⁹⁹ *Id.* at 39.

¹⁰⁰ *Id.* at 41.

¹⁰¹ News Corporation: Annual Report 2011 12, available at <http://www.newscorp.com/Report2011/2011AR.pdf>.

¹⁰² Form 10K Annual Report, CBS Corporation I-1, available at <http://investors.cbcorporation.com/phoenix.zhtml?c=99462&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdlPTg3MzQ5MzQmRNFUT0wJINFUT0wJINRREVtQz1TRUNUSU9OX0VOVEISRZzdWJzaWQ9NTc%3d>.

¹⁰³ *Id.* at I-2.

Meanwhile, the company that is now known as Viacom operates in the media networks and filmed entertainment segments. Viacom's media networks segment consists of MTV, VH1, CMT, BET, Nickelodeon, Comedy Central, and various others. The filmed entertainment segment consists of companies primarily involved in motion pictures and other entertainment content.¹⁰⁴ It is relevant that Sumner M. Redstone serves as Chairman of the Board for both CBS Corporation and Viacom and he is the controlling shareholder of both companies.¹⁰⁵

As evidenced above, the big five media conglomerates are very powerful and serve as the primary information and news sources to the whole country. They operate in all mediums, including newspaper, television, radio, internet, and book publishing. Not only is the media focused in the hands of the big five, but these companies often take on joint ventures with each other, similar to a cartel. For example, at the time Bagdikian published *The New Media Monopoly* in 2004, Disney had twenty-six joint ventures with other corporations, mostly competitors in the media industry.¹⁰⁶ Similarly, Time Warner had 292 subsidiaries, twenty-two of which were "joint ventures with other major corporations involved in varying degrees with media operations."¹⁰⁷ News Corporation had partnerships with major competitors, such as General Electric (NBC) and Paramount (Viacom).¹⁰⁸ In total, the big five media conglomerate had 141 joint ventures.¹⁰⁹

Concentration of the media industry is even more troubling because although these conglomerates are publicly traded and can have many shareholders, the power remains at the top.

¹⁰⁴ Form 10K Annual Report, Viacom, Inc. 1, available at <http://ir.viacom.com/secfiling.cfm?filingID=1193125-12-471870&CIK=1339947>.

¹⁰⁵ *About CBS: Sumner M. Redstone*, CBS CORPORATION, <http://www.cbscorporation.com/ourcompany-executives.php?id=67&exec=156> (last visited April 30, 2013); About Us: Board of Directors, VIACOM, INC., <http://www.viacom.com/aboutviacom/Pages/boardofdirectors.aspx> (last visited April 30, 2013).

¹⁰⁶ BAGDIKIAN, *supra* note 4, at 36.

¹⁰⁷ *Id.* at 31 ("These partners include 3Com, eBay, Hewlett-Packard, Citigroup, Ticketmaster, American Express, Homestore, Sony, Viva, Bertelsmann, Polygram, and Amazon.com.").

¹⁰⁸ *Id.* at 43.

¹⁰⁹ *Id.* at 9.

Each publicly traded company is supposed to have a board of directors that generally select the executive who runs their enterprises.¹¹⁰ However, most corporations have a controlling shareholder that can select a board favorable to their interests. Frequently, the directors are often “interlocking” meaning the directors are either family members or friends who are also corporate executives.¹¹¹ For, example Murdoch family members sit on the News Corporation and has eleven interlocking directors, who are also directors of British Airways, Compaq Computers, Rothschild Investment Trust, a media company, and YankeeNets, a professional hockey team.¹¹² Disney’s board also consists of interlocking directors, including one former U.S. senator.¹¹³ National Amusements, Inc., a theatre company owned by the Redstone family, owns controlling stakes in both CBS and Viacom. Sumner Redstone presently sits as the Executive Chairman of both Viacom and CBS, while Shari Redstone sits as the Non-Executive Vice Chair of both boards.¹¹⁴ Finally, Time Warner has also had interlocking directors with many corporations in various industries.¹¹⁵

The common interests of the board of directors with the executive officers they select has resulted in indifference by the directors in the officers decisions. Additionally, it has not been “unusual for strong executives [to be in a position] to select directors who are supposed to

¹¹⁰ *Id.* at 50. The board is generally selected this way, but may be selected differently depending on the corporate by-laws.

¹¹¹ *Id.* at 51.

¹¹² *Id.* at 51-52 (Rupert is chairman and chief executive, son Lachlan is deputy chief operating officer, and his younger brother, James, is chairman and CEO of the firm’s major subsidiary, BskyB.).

¹¹³ *Id.* at 52 (Ten of the sixteen directors interlock with Boeing, City National Bank, Hospital Corporation of American, Edison International, FedEx, Northwest Airlines, Sotheby’s, Starwood Hotels, Sun Microsystems, Xerox, and Yahoo.).

¹¹⁴ *About CBS: Sumner M. Redstone*, CBS CORPORATION, <http://www.cbcorporation.com/ourcompany-executives.php?id=67&exec=156> (last visited April 30, 2013); *About CBS: Shari Redstone*, CBS CORPORATION, <http://cbcorporation.com/ourcompany-board.php?id=118&member=110> (last visited April 30, 2013); *About Us: Board of Directors, VIACOM, INC.*, <http://www.viacom.com/aboutviacom/Pages/boardofdirectors.aspx> (last visited April 30, 2013).

¹¹⁵ BAGDIKIAN, *supra* note 4, at 52.

monitor them, which guarantees sympathy and permissiveness.”¹¹⁶ This will allow executives to act both immorally, illegally, and in their own self interest.¹¹⁷ In an industry that has such powerful influence over the ability to obtain information, form opinions, and serve as a check on the government, the concentrated ownership of this industry without any structural regulation will only pave the way for more corruption, which will be discussed in Part III.

B. The Supreme Court Coming to Terms with the New Media Monopoly

Even in 1945, arguments were made that any structural regulation of the media was an “abridgment of the freedom of press guaranteed by the First Amendment.”¹¹⁸ In *Associated Press v. U.S.*, the government charged the Associated Press¹¹⁹, a cooperative association consisting of more than 1200 newspaper publishers responsible for violating the Sherman Anti-trust Act by setting up “a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership.”¹²⁰ The Supreme Court held that the district court was correct in its finding that the By-Laws of the Associated Press had restrained trade in violation of the Sherman Act by tying “the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors.”¹²¹ The majority opinion by Justice Black shows that the First Amendment supports regulations made to ensure

¹¹⁶ *Id.* at 51.

¹¹⁷ *Id.* at 54.

¹¹⁸ *Associated Press v. United States*, 326 U.S. 1, 19 (1945).

¹¹⁹ *Id.* at 4 (The business of the Associated press “is the collection, assembly and distribution of news. The news it distributes is originally obtained by direct employees of the Association, employees of the member newspapers, and the employees of foreign independent news agencies with which the AP has contractual relations.”).

¹²⁰ *Id.* at 4-5 (The government charged that the Associated Press violated the Sherman Act in two ways: (1) Their acts and conduct constituted “a combination and conspiracy in restraint of trade and commerce in news among the states” and (2) their acts and conduct constituted “an attempt to monopolize a part of that trade.”).

¹²¹ *Id.* at 13.

the flow of content to the widest possible audience.¹²² Justice Black, echoing the Opinions of Justice Holmes and Brandeis above, stated:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.¹²³

In the past, The Supreme Court has always upheld “congressional structural regulation of the media, that is, regulation not tied to or aimed at suppressing particular media content against assertions that the regulations violate the First Amendment rights of corporate owners.”¹²⁴ A good example is *F.C.C. v. Nat'l Citizens Comm. for Broad.*, where the Court had to determine whether “regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community” was a violation of the First Amendment.¹²⁵ The Court held the FCC “criteria for determining which existing newspaper-broadcast combinations have an ‘effective monopoly’ in the ‘local marketplace of ideas as well as economically’” to be constitutional.¹²⁶ It reasoned that it is the responsibility of the FCC to determine where the public interest lies by considering both First Amendment and antitrust values—“in particular, . . . the First Amendment goal of achieving ‘the widest possible

¹²² *Id.* at 20.

¹²³ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹²⁴ *Baker*, *supra* note 77, at 848; *see NBC v. United States*, 319 US 190 (1943); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *U.S. v. Storer Broad. Co.*, 351 U.S. 192, 203-04 (1956),

¹²⁵ *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 779 (1978).

¹²⁶ *Id.* at 814-15

dissemination of information from diverse and antagonistic sources.”¹²⁷ Most importantly, the Supreme Court rejected the petitioner’s argument “though designed to further the First Amendment goal of achieving ‘the widest possible dissemination of information from diverse and antagonistic sources’”, the regulations, in fact, “violated the First amendment rights of newspaper owners.”¹²⁸ In so holding, the Court stated: “this argument ignores the fundamental proposition that there is no ‘unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.’”¹²⁹

The Court in Nat’l Citizens Comm. For Broad cited another important case pertaining to a licensee’s right to monopolize the specific radio frequency licensed. *Red Lion Broadcasting Co. v. FCC*, was decided by the Supreme Court in 1969 and ultimately held that a “[l]icensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.”¹³⁰ In its decision, the Court upheld an FCC Order requiring a radio station to provide a person attacked in a broadcast with a right of reply.¹³¹ The Court found that “[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and . . . to present those views and voices . . . which would otherwise, by necessity, be barred from the airwaves.”¹³² The Court cited to both Associated Press and Justice Holmes’s dissent in Abrams stating that the purpose of the First Amendment is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”¹³³

¹²⁷ *Id.* at 795.

¹²⁸ *Id.* at 798-99.

¹²⁹ *Id.* at 799. *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

¹³⁰ *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. at 389 (1969).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 390.

Five years after *Red Lion*, the Court decided a similar case concerning a Florida right of reply statute requiring newspapers to provide free space to a candidate to reply to criticism and personal attacks made in the newspaper.¹³⁴ In *Miami Herald Pub. Co. v. Tornillo*, the Court held that because this was a restriction made by the government on content and an intrusion into the functions of the editors, the statute violated the First Amendment. *Tornillo* and *Red Lion* seem to contradict each other as they both involved a right of reply statute. It was not until 1994 when the Supreme Court decided *Turner Broad. Sys., Inc. v. F.C.C.* that this contradiction was resolved.

In 1994, amid the changing antitrust climate toward deregulation, the Supreme Court decided *Turner Broad. Sys., Inc. v. F.C.C.* This case involved the question of whether “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 (“CTCPA”) requiring cable operators to carry a certain amount of local broadcast television stations violates the First Amendment rights of the cable operators.¹³⁵ The Court found that regulation imposed on cable operators should be looked at by the courts with stricter scrutiny than regulations imposed on broadcast media.¹³⁶ This is because “[t]he scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.”¹³⁷ The Court determined that a more intermediate level of scrutiny applied as the regulations here were content neutral.¹³⁸ It resolved this standard with *Tornillo* by showing that the right of reply required in *Tornillo* was content based and required a strict scrutiny analysis. The regulation in *Tornillo* “required any newspaper that assailed a political candidate's character to print, upon

¹³⁴ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

¹³⁵ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 630 (1994)

¹³⁶ *Turner*, 512 U.S. at 637.

¹³⁷ *Id.* at 637-38.

¹³⁸ *Id.* at 649.

request by the candidate and without cost, the candidate's reply in equal space and prominence.”¹³⁹

However, since *Turner*, lower courts have been using the stricter tests established to overturn structural regulation of the media industry. For example, in *Time Warner Entm't Co., L.P. v. F.C.C.*, the court found that a rule imposing “a 30% limit on the number of subscribers that may be served by a multiple cable system operator. . . . interferes with petitioners' speech rights by restricting the number of viewers to whom they can speak.”¹⁴⁰ Further, the court held a regulation to be invalid that made impermissible a cable operator’s use of 40% of its first seventy-five channels for channels owned by its own affiliates.¹⁴¹ Because this regulation impeded the operator’s editorial discretion, it violated their entitlement “to the protection of the speech and press provisions of the First Amendment.”¹⁴² Similarly, in *Comcast Corp. v. F.C.C.*, the court found that “it was arbitrary and capricious for the Commission to conclude that a cable operator serving more than 30% of the market poses a threat either to competition or to diversity in programming” as cable operators no longer have “bottleneck power over programming” due to the entrance into the market by satellite and fiber optic providers.¹⁴³ Further, “the Commission ha[d] failed to demonstrate that allowing a cable operator to serve more than 30% of all cable subscribers would threaten to reduce either competition or diversity in programming.”¹⁴⁴

In the Southern District of Florida, the court had to determine whether an ordinance requiring cable television operators with access to broadband Internet transport services at rates, terms, and conditions equal to those on which they provided such access to themselves was

¹³⁹ *Id.* at 653.

¹⁴⁰ *Time Warner Entm't Co., L.P. v. F.C.C.*, 240 F.3d 1126, 1129 (D.C. Cir. 2001)

¹⁴¹ *Id.* at 1139.

¹⁴² *Id.* at 1129.

¹⁴³ *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8 (D.C. Cir. 2009).

¹⁴⁴ *Id.*

deemed to violate the operators' right to free speech.¹⁴⁵ The court found that “[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.”¹⁴⁶ Further, “[l]iberty of circulating is not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors and cable.¹⁴⁷ Therefore, the court held that the ordinance violated the intermediate level of scrutiny.¹⁴⁸

III. PROBLEMS WITH CONCENTRATION OF THE MEDIA

Mass media companies control much of the news stories that receive national attention.¹⁴⁹ This means that corporate entities such as “ABC, NBC, CBS, PBS, CNN, The New York Times, The Washington Post (which also publishes Newsweek magazine), The Wall Street Journal, Gannett (which publishes various papers, including USA Today), Time magazine, Associated Press (AP), and United Press International (UPI)¹⁵⁰ are responsible for forming our opinions about what is going on in the world.

As stated by Edwin C. Baker, “the health of democracies . . . depends on having a free press.”¹⁵¹ Baker regards the media as crucial to democracy in that it is essentially the middleman for public will formation and state will formation.¹⁵² This echoes the beliefs of our founding fathers in forming the First Amendment as discussed in Part I. In Giving the Audience What it Wants, Baker explains that media products are different from a typical product on the free

¹⁴⁵ *Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., Fla.*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

¹⁴⁶ *Id.* at 692.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 697-98 (the “ordinance was designed to ensure ‘competition’ and ‘diversity’ in cable broadband Internet services However, the harm the ordinance is purported to address appears to be non-existent. Cable possesses no monopoly power with respect to Internet access. Most Americans now obtain Internet access through use of the telephone. Local telephone companies provide dial up Internet access to over 46.5 million customers, whereas all cable companies combined currently provide Internet services to only about two million customers.”).

¹⁴⁹ Oswald, *supra* note 3, at 386.

¹⁵⁰ *Id.*

¹⁵¹ C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 5 (Cambridge University Press 2006).

¹⁵² *Id.* at 7.

market.¹⁵³ Media is a public good that is more similar to that of utilities or other natural monopolies. For utilities, while there is a cost to initially produce and create the infrastructure for the goods to reach the consumer, adding an additional consumer will result in marginal cost to the producer. This is similar to the media, where a company might spend “huge amounts to gather, write, and edit news or create and produce video entertainment. However, little cost is added no matter how many people access the media.¹⁵⁴ Therefore, the result in reaching a bigger audience will be more profit.

Despite media being more similar to a public good, media is treated the same as any other free market or at least those that argue against regulation of the media argue that it should be. However, Baker contends that the quality of media content is adversely affected when the market determines performance:

First, to survive, a market participant needs to capture at least enough revenue to replace its capital—that is, to cover its costs. Second, given this first constraint and given competition, the firm must provide a product at a price that satisfies consumers as well as does everything that its competitors can supply at that price. This structurally-created dynamic dictates a profit maximization orientation Thus, the market-based firm must try to fulfill the money-backed preferences of its customers as cheaply as possible—if it does not it will be undersold by a competitor and eventually go bankrupt.¹⁵⁵

Baker notes two problems that are not necessarily true but may have some weight. The first problem Baker notes is that media owners do not know what content will maximize profit. Therefore, they will attempt different content strategies not based on market performance. The systematic error leaves room for different owners to make choices influenced by their own

¹⁵³ C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 316 (1997).

¹⁵⁴ *Id.* at 317.

¹⁵⁵ Baker, *supra* note 77, at 876.

personal ideology “without sacrificing the profits needed to avoid bankruptcy.”¹⁵⁶ The second reason he provides is that because media is characteristically similar to public goods, the market tends to act with monopolistic attributes, which distinguish it from pure competition.¹⁵⁷ The products do not have adequate substitutes and media companies can make substantial profit. Media owners can then invest these profits on indulging their own choices about content or price.

While it is true that the above scenarios provided by Baker could potentially occur when media is treated like any other preference driven market, another theory about the problem with concentration in the media industry is more accurate. Baker is correct that in a free market, a firm must try to fulfill the money-backed preferences of its customers as cheaply as possible. However, due to the fact that the media is a public good with monopolistic characteristics, the true problem is not the potential influence that owners have to support their viewpoints, but rather that the quality of content, in general, suffers.

What has happened in the media industry is more similar to how James T. Hamilton described it in *The News that's Fit to Sell* in that the few firms that remain put more time into soft news than hard news. In other words, the media is putting more into stories that readers find personally interesting, such those that may help them with their jobs “or what products they are thinking about buying.”¹⁵⁸ These soft news stories require little cost and effort to make.¹⁵⁹ In creating a hard news story, a corporation would have to spend money and time to have a reporter and team go overseas to report on a war or other foreign relations. Further, a hard news story could require hours and hours of research into documents and interviewing witnesses and

¹⁵⁶ *Id.* at 878.

¹⁵⁷ *Id.* at 878.

¹⁵⁸ HAMILTON, *supra* note 7, at 3.

¹⁵⁹ *Id.* at 15.

government officials, which may not produce anything helpful or useful for the story.¹⁶⁰ Upon finishing a hard news story, the audience for that story is not nearly as diverse as the audience for a soft news story. Additionally, the audience most interested in soft news stories tends to be young female women as they are the ones usually responsible for making buying decisions in a household.¹⁶¹ As such, advertisers are more interested in the attention of the young female audience who will decide whether to purchase their products. Advertisers are also attracted to the larger audience of these soft news stories. As a result, advertisers pay more for advertisements within soft news stories than hard news stories, thus, making it more profitable for media companies to produce and distribute or broadcast soft news.

Bias in the media has also resulted from the focus of these media conglomerates on making a profit. As discussed above, the three major network evening news programs began to focus their attention on retaining young female viewers because they “carry a greater premium in the advertising market.”¹⁶² The result was that these network news programs devoted more time and stories to liberal issues, such as gun control and education, which tend to be more associated with the Democratic party.¹⁶³ The bias of the big three evening news programs left the conservative audience niche wide open and Fox News came in to fill the void.¹⁶⁴

This method of conscious product positioning of major news outlets has been termed by Hamilton as the “spatial model of news product locations.”¹⁶⁵ The spatial model can be illustrated when there are two competing firms in a market who each want to get the largest audience possible. The competitors will attempt to meet the varying preferences of as many

¹⁶⁰ *Id.* at 239 (“One would expect more soft news programs if their consumers were more highly valued by advertisers. If programmers pay less for soft news content they will be more likely to offer it.”).

¹⁶¹ *Id.* at 239.

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 239.

¹⁶⁴ *Id.* at 3.

¹⁶⁵ *Id.* at 13.

consumers as possible while placing themselves far enough away from the competitor to differentiate itself.¹⁶⁶

The spatial model can also explain the trend toward soft news on television, newspapers, radio, and even the internet. Because the conglomerates that own these information providing sources have so many outlets including many cable television channels, motion picture and other entertainment outlets, they can report on and promote the reality tv stars, late night hosts, news anchors, radio shock jocks, and movie stars that are part of their own media network rather than other media networks. In doing so, they differentiate the soft news that they distribute to the audience. Essentially, this allows the conglomerate to increase the entertainment value of their news coverage to a wider audience interested in these various entertainers thereby keeping the cost of producing the news down as well as serving as a promotion to the conglomerate's other ventures.

The spatial model also helps determine the mix of hard and soft news that is placed in their programming. "Viewers vary in the degree that they want to know about the details of politics and government."¹⁶⁷ Therefore, the extent of hard news or soft news placed in a particular program will depend on the demographics of those that tune in to the program.¹⁶⁸

The resulting problem with the increasing soft news and party bias of the different networks is that people are less informed and are not receiving information from diverse viewpoints. Because of the media's focus on soft news, people are receiving less information about politics and the government. Further, the politics that are discussed on a station's news

¹⁶⁶ Hamilton illustrates this with an example of two ice cream vendors on the beach. *Id.* at 13 ("If two ice cream vendors could choose to locate on a beach filled with hungry consumers, where would each locate? Customers prefer not to walk on the sand in the sun, so they patronize the nearest vendor. Knowing this, each vendor chooses to locate at the exact middle of the beach, so each gets half the market.")

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *Id.* at 14-15.

programming are biased to a particular party, thereby, forcing opinions upon their viewers without providing an adequate assessment of the facts.

Both of these problems discussed are defeating the purpose that the founding fathers had intended for freedom of the press in our First Amendment. As discussed in Part I, the founders believed strongly in the necessity of the freedom of the press to serve as a checking power on the government. Without the press, the government could expand the reach of its power in its own self-interest by punishing those that may disagree with its decisions or judgments. Today, our media corporations have been placed in the hands of a few individuals focused mainly on making a profit. They place soft news on their programs that once served to educate and inform the public. This resulting lack of information means people are unaware of any wrongdoing by the government, thereby completing diminishing the value of the press to check the power of the government.

Additionally, bias in the media means that voters are only receiving positive information about their elected officials without hearing the other side. By looking at a political map of the United States, it would be seen that different regions tend to elect members of one party.¹⁶⁹ This means that the news the majority of that region chooses to watch will tend to fill the niche of the party they most identify with. The news station they watch the most will support that party and only discuss the wrongdoing by the other party. Any wrongdoing by their own elected official will probably not get covered except by the media coverage dedicated to the other party that only a minority of that region watches. This greatly reduces the checking value of the First

¹⁶⁹ 2012 Electoral Map: Barack Obama Wins, POLITICALMAPS.ORG, <http://politicalmaps.org/2012-electoral-map/> (last visited April 30, 2013); 2004 Presidential Election Maps, POLITICALMAPS.ORG, <http://politicalmaps.org/2004-presidential-election-maps/>; PBS NewshourVote 2012, PBS, http://www.pbs.org/newshour/vote2012/map/all_results.html.

Amendment that serves such an important purpose to the success of our democracy as it was intended by our founders.

Another reason the media being in the hands of so few defeats the checking value of the First Amendment is that it essentially works as a fourth branch of government. Because structural regulation has been rejected recently by courts based on the corporation's supposed First Amendment freedom of the press protection¹⁷⁰, the power of the media in the hands of the few has made it easier for government officials to receive positive press in the media come election time. For example, when Murdoch was trying to expand News Corporation, an Australian company, into the United States he was faced with a law preventing foreign corporations from owning more than 24.9% of a US radio or television station.¹⁷¹ The moves Murdoch pulled are best described by Bagdikian:

[H]e used his new American power base of four newspapers and two magazines as levers for his legendary political behind-the-scenes navigating to obtain special favors. It was a shock to other foreign firms, which had attempted but never succeeded in entering U.S. broadcasting, when Murdoch was granted the first waiver of the United States—only ownership law that have ever been granted.¹⁷²

Murdoch serves as a perfect example of how the media fails to check the government. Rather than criticize government officials when it is due, those that are in charge of the media can use their power over the government to serve their own self interests. By using its powerful influence over public opinion to favor government officials, the government officials will in turn give the corporations what they want. This is probably why our government has done away with

¹⁷⁰ As discussed in Part I, the recent court shift to protect the freedom of the press as an industry rather than freedom of the press as a technology to all is an incorrect interpretation of the First Amendment.

¹⁷¹ BAGDIKIAN, *supra* note 4, at 40.

¹⁷² *Id.*

structural antitrust regulation of media companies and allowed them to become so big. Bagdikian sums it up nicely:

Their steady accumulation of power in the world of news, radio, television, magazines, books, and movies gave them a steady accumulation of power in politics. Political leaders and parties know that the news media control how those politicians are depicted to the voting public; the more powerful the leading media, the more powerful their influence over politicians and national policy. Prudent politicians treat the desires of all large corporations with care. But politicians treat the country's most powerful media corporations with something approaching reverence.¹⁷³

In addition to failing to serve as a check on power which was the founder's fundamental purpose in the First Amendment freedom of the press, the present media industry fails in providing another important purpose served by the First Amendment. By allowing the media to be run by a few individuals, viewpoint diversity suffers. Viewpoint diversity is an essential aspect of the egalitarian theory started by Mill. Further, many Supreme Court decisions regarding the First Amendment have rested their reasoning on the necessity of viewpoint diversity. A successful democracy depends on open expression of opinions in order to challenge our own beliefs in search of the truth. In the case of media viewership, individuals tune in to the program with the particular bias that they identify with. As such, other viewpoints are completely ignored. People do not receive the facts necessary to get themselves closer to the truth but rather their own beliefs are continuously reaffirmed. This is beneficial to a media firm's ownership as it allows them to place their product in a niche and have guaranteed consumers to meet their own goal of achieving a profit. The result is an uninformed public with little understanding of the

¹⁷³ *Id.* at 28-29.

world around them thereby defeating the marketplace of ideas that should be such an important aspect of our Freedom of Speech.

Viewpoint diversity has failed in a more obvious respect due to the limited amount of owners. As described above, we receive less information in the form of soft news and political bias. However, perhaps the limited political information that we do get is only provided to us in such a way to that only supports the beliefs of these few owners. Because the media is in the hands of a few corporate elite individuals with quid-pro-quo relationships with government officials, the views provided will only be provided in such a way that benefits these few individuals. This leads the question: Are they giving us the information that we want or the information that they tell us we want?

IV. PRESCRIPTION FOR REFORM

Various proposals can be made to reduce the adverse effects that media conglomerization has on our First Amendment. First, the FCC could return to the media industry specific regulations that existed prior to the changes that took place in 1984. For example, returning to a rule similar to the seven station rule as to television and radio station ownership so as to prevent the big five from obtaining a bigger share of any media outlets would be a good start.

Second, more can be done to reduce the barriers of entry to new entrants into the media industry. For example, the government could subsidize certain projects that it qualifies to be beneficial to the public interest.¹⁷⁴ It could financially support radio or television programming that provide debates on varying political topics. Rather than having the same hosts and speakers

¹⁷⁴ HAMILTON, *supra* note 7, at 32.

every day that acquire celebrity status, they can have varying hosts and speakers that air and focus the attention primarily on the debate. It could also make the ability for smaller ventures unrelated to the current media conglomerates easier to receive a license to broadcast over the radio. The government can similarly require cable providers to have more channels that can be dedicated to new entrants that seek to offer a new perspective that may be beneficial to the public interest at a limited cost.

Third, the government should require news programs to provide a right of reply to any individuals that disagree with an opinion that was aired on a program. The government should also require each network to have a specific webpage for every television program, radio program, or newspaper journalist, which most of them do already. The government can then require that a link to a right of reply page be placed in a visible place on that webpage.

Fourth, the government should require that the big five television networks provide an hour each night of unbiased news coverage or debate regarding hard news topics only.

Fifth, the Supreme Court should get rid of the intermediate and strict scrutiny analyses established in *Turner* and be more supportive of the structural regulation decisions of the FCC made as to the media industry. The FCC's responsibility to regulate the media industry is more difficult as it must weigh both economic policy considerations with public interest considerations, such as diversity viewpoint. Because of the importance of the First Amendment freedom of the press in informing the public, checking government power, and allowing all views to enter the marketplace of ideas, when in doubt the FCC should be able to lean toward regulating rather than deregulating and not have to worry that the Supreme Court will be checking its every move.

Finally, the last proposal would be to adjust the language of the First Amendment to Madison's early draft, which stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."¹⁷⁵ This will support the original intention of the First Amendment which was to enable the people to have freedom of the press and not let the government or any small group that are members of the corporate elite control the media. This will also enable the above proposals to be enacted without the owners of media conglomerates contending that any regulation of their industry violates the freedom specifically intended to be given to the press, as an industry. The First Amendment freedom of the press was not intended for them, it was intended for the people.

Conclusion

In Part I, this paper showed that the First Amendment freedom of the press was intended by the founding fathers to provide a check on the government by giving all people the ability to publish through the press. Further, it showed how the egalitarian theory that the marketplace of ideas enabled by the freedom of the press is a necessary aspect to a successful democracy. This idea is supported by the Supreme Court throughout its history until recently. Part II of this paper showed how deregulation of the media industry began to occur following the recent rise of the Chicago School that those businesses with significant market share and power are more efficient for the market and less costly to the consumer. The FCC began to deregulate media specific regulations. Further, the Supreme Court began to look at regulation of the industry with strict scrutiny and lower courts started to reject any antitrust regulation of the media industry. This enabled the rise of the Big Five media conglomerates. Part III showed how the concentrated ownership of the media results in a less informed public because the corporate bottom line to

¹⁷⁵ LABUNSKI, *supra* note 43, at 266.

turn a profit has resulted in more soft news as well as politically biased coverage. This has greatly discouraged the purpose of the freedom of the press in providing a check on government power and serving the public interest in providing a diversity of viewpoints. Finally, Part IV discussed some possible prescriptions for reform that include returning to the regulatory policies that existed prior to the changes that took place in the 1980s (including overturning the intermediate and strict scrutiny analysis of Turner), providing government subsidies to new entrants and otherwise reducing the barriers to entry, mandating that networks provide a certain amount of time each night to the public interest, and finally, this paper proposed rewriting the First Amendment to meet the purposes for which it was intended. Those purposes are to serve as a check on government power, support diverse viewpoints in the marketplace of ideas, and lastly, to provide freedom of the press to all.