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## Media Consolidation & Political Polarization: Reviewing the National Television Ownership Rule

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## MEDIA CONSOLIDATION & POLITICAL POLARIZATION: REVIEWING THE NATIONAL TELEVISION OWNERSHIP RULE

*Mary R. Hornak\**

*Local television plays an important role in the democratic society. The medium is viewed as being trustworthy, and it is accessible and uniquely situated to report on matters of local interest. Among other roles, the Federal Communications Commission (FCC) regulates firms' ownership interests in the media through regulations that permit a certain degree of consolidation at both the local and national levels. Since 1996, Congress has mandated that the FCC regularly review broadcast media ownership regulations. Originally, this requirement mandated biennial review. In 2004, however, Congress revised the mandate, requiring review on a quadrennial basis and excluding from such review only the regulation limiting broadcast television firms' ownership interests at the national level—the national television ownership rule.*

*Since then, permissive regulations and the financial state of the local broadcast television industry have promoted consolidation among firms, and commentary suggests this consolidation has contributed to political polarization. A case study of the impact of one firm's acquisition of affiliates demonstrates the relationship between consolidation and polarization, while the firm's recent attempted acquisition demonstrates the stakes of the transactions the national television ownership rule currently permits.*

*Balancing First Amendment guarantees viewed in light of the "marketplace of ideas" metaphor with concerns raised by commentary identifying a link between consolidation and political polarization, this Note asserts that the regulations governing national limits on broadcast television ownership should be subject to regular review alongside other broadcast media regulations, beginning with the FCC's next quadrennial review. Beyond this recommendation, this Note proposes moderate amendments to the rule and presents additional mitigating measures that could alternatively address the policy concerns underlying this Note's proposals.*

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INTRODUCTION.....	910
I. BROADCAST MEDIA TODAY .....	914
A. <i>Current Media Landscape</i> .....	915
1. The Importance of Local Broadcast Television.....	915
2. Consolidated Ownership Today.....	917
3. The Federal Communications Commission.....	919
4. Viewpoint Diversity and Localism .....	920
5. The Relevant Rules .....	922
B. <i>Legal Frameworks</i> .....	925
1. First Amendment Law .....	925
2. Antitrust Law .....	928
3. Administrative Law .....	931
II. REGULATING THE MEDIA & PROTECTING THE PRESS .....	931
A. <i>Political Polarization</i> .....	931
1. A Case Study: Sinclair Broadcast Group.....	932
2. Consolidation & Polarization.....	934
B. <i>Regulating the Media</i> .....	937
C. <i>Conflicting Views Regarding Regulatory Immunity</i> .....	941
1. Calls for Increased Regulation.....	942
2. Challenges to Oversight.....	944
III. INCREASED OVERSIGHT AS A SAFEGUARD.....	945
A. <i>Revising the Rule &amp; Reinstating Regular Review</i> .....	945
B. <i>The Insufficiency of Alternatives</i> .....	948
C. <i>Other Mitigating Measures</i> .....	949
CONCLUSION.....	950

## INTRODUCTION

Viewpoint diversity, which refers to the availability of media conveying a range of different perspectives, is a “central puzzle” that both complicates and guides media law.<sup>1</sup> Such diversity is exceedingly difficult to objectively measure, monitor, and maintain,<sup>2</sup> yet its promotion serves a critical role in the democratic society,<sup>3</sup> as a media landscape that conveys diverse viewpoints expands democratic participation and advances voter

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1. Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 792, 798 (2009).

2. See *id.* at 790–98.

3. See Adam Candeub, *Media Ownership Regulation, The First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547, 1551 (2008) (identifying the media’s “essential function” as minimizing the difficulties citizens face in monitoring government); see also John Sands, *Local News Is More Trusted Than National News—But That Could Change*, KNIGHT FOUND. (Oct. 29, 2019), <https://knightfoundation.org/articles/local-news-is-more-trusted-than-national-news-but-that-could-change/> [https://perma.cc/F6KE-6QK7].

knowledge.<sup>4</sup> Practically, individuals rely on the media to provide them with the information they need to effectively “participate in the political process” and maintain the accountability of government actors.<sup>5</sup> The media ownership rules promulgated by the Federal Communications Commission (FCC), the agency empowered to regulate the communications industry, strive to promote this diversity.<sup>6</sup> Beyond viewpoint diversity, the FCC’s rules also seek to promote competition and localism, the latter of which measures the extent to which broadcasters respond to individual communities’ needs and interests.<sup>7</sup>

Compared to the press that existed when the First Amendment was ratified,<sup>8</sup> today’s “press” includes a broader range of outlets, including radio, television, and digital media. Collectively, these media contribute to a seemingly endless supply of news and information. Today, constituents’ relationship with information outlets has been particularly fraught. In addition to the industry’s saturation, leaders have propagated mistrust in the media,<sup>9</sup> and misinformation has spread across digital<sup>10</sup> and traditional

4. Ho & Quinn, *supra* note 1, at 812.

5. See Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/> [https://perma.cc/97SR-E7LD].

6. The FCC seeks to promote: 1) diversity of viewpoints, 2) diversity of programming, 3) outlet diversity, and 4) minority and female ownership of outlets. DANA A. SCHERER, CONG. RSCH. SERV., R43936, THE FCC’S RULES AND POLICIES REGARDING MEDIA OWNERSHIP, ATTRIBUTION, AND OWNERSHIP DIVERSITY 1 (2016).

7. *Id.*; see also FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1155 (2021) (“The FCC has long explained that the ownership rules seek to promote competition, localism, and viewpoint diversity by ensuring that a small number of entities do not dominate a particular media market.”).

8. MARC A. FRANKLIN ET AL., MEDIA LAW: CASES AND MATERIALS 21 (9th ed. 2016) (noting that in 1790 when the First Amendment was ratified, the “press” included only about one hundred newspapers, which were almost all operated by local printers).

9. See Stephen J. Wermiel, *Freedom of the Press: Challenges to This Pillar of Democracy*, AM. BAR ASS’N (Mar. 26, 2019), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-19/insights-vol-19-issue-2/freedom-of-the-press/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol-19-issue-2/freedom-of-the-press/) [https://perma.cc/9L5U-VXVV] (“President Donald Trump attacks the credibility of the media almost daily.”); see also Megan Brenan, *Americans Remain Distrustful of Mass Media*, GALLUP (Sept. 30, 2020), <https://news.gallup.com/poll/321116/americans-remain-distrustful-mass-media.aspx> [https://perma.cc/7KB4-M3UK] (“Americans’ confidence in the media to report the news fairly, accurately and fully has been persistently low for over a decade and shows no signs of improving, as Republicans’ and Democrats’ trust moves in opposite directions.”); Adam Satariano, *Republican Distrust of News May Be Helping Election Misinformation Spread*, N.Y. TIMES (Nov. 12, 2020, 9:51 AM), <https://www.nytimes.com/2020/11/12/technology/republicans-distrust-news-media.html> [https://perma.cc/54UG-NC53];

10. According to a 2019–2020 Gallup poll, 74 percent of Americans consider the spread of misinformation over the internet to be “a major problem.” Megan Brenan & Helen Stubbs, *News Media Viewed as Biased but Crucial to Democracy*, GALLUP (Aug. 4, 2020), <https://news.gallup.com/poll/316574/news-media-viewed-biased-crucial-democracy.aspx> [https://perma.cc/DWVZAP]; see also Sheelah Kolhatkar, *The Growth of Sinclair’s Conservative Media Empire*, NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/22/the-growth-of-sinclairs-conservative-media-empire> [https://perma.cc/X9LT-GFQC].

platforms alike.<sup>11</sup> Further, increasing political polarization and slanted or biased news coverage have, in the eyes of many viewers, engendered further political division in the United States.<sup>12</sup> While viewpoint diversity has been understood to create a media environment in which the truth may be realized through the consideration of competing views,<sup>13</sup> the prevalence of misinformation and the decreased objectivity of some news sources have called into question this competitive safety net by “prevent[ing] the actual battle [of ideas] from being fought” in the first place.<sup>14</sup> Faced with a market of information in which the distinction between objective facts and biased assertions has become increasingly unclear, it is possible that people have “simply give[n] up” and stopped trusting or even consuming the news.<sup>15</sup>

In this overwhelming media landscape, local television news remains an important information source.<sup>16</sup> Local television news stations disseminate information of local and regional interest,<sup>17</sup> and broadcasts are uniquely accessible because the cost of a cable subscription is not a barrier.<sup>18</sup> Further, viewers report that they generally trust local television news more than they trust other sources.<sup>19</sup> Despite the importance of the medium to local audiences, local television stands on unsteady ground in nonelection years. Notably, a 2018 media viewership study conducted by the Pew Research Center suggested that many local stations’ financial hardships are unknown to viewers.<sup>20</sup> In fact, that study found that 71 percent of U.S. adults believed their local news stations were “doing very or somewhat well financially,”<sup>21</sup>

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11. Megan Garber, *Fox News Hits a Dangerous New Low*, ATLANTIC (Nov. 6, 2020), <https://www.theatlantic.com/culture/archive/2020/11/fox-news-trump-election-dangerous-new-low/617019/> [<https://perma.cc/SUQ4-SJW6>].

12. Brenan & Stubbs, *supra* note 10; cf. Wermiel, *supra* note 9 (“Cable organizations are labeled as liberal or conservative instead of just news.”).

13. See *infra* notes 151–61 and accompanying text.

14. Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES MAG. (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html> [<https://perma.cc/LF5Q-GZYB>] (clarifying that the internet is not solely responsible for the spread of misinformation).

15. *Id.*

16. See FRANKLIN ET AL., *supra* note 8, at 25; DANA A. SCHERER, CONG. RSCH. SERV., R45338, FEDERAL COMMUNICATIONS COMMISSION (FCC) MEDIA OWNERSHIP RULES 5–6 (2021).

17. See *For Local News, Americans Embrace Digital but Still Want Strong Community Connection*, PEW RSCH. CTR. (Mar. 26, 2019) [hereinafter *Americans Embrace Digital*], <https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/> [<https://perma.cc/L5BN-V8QB>].

18. Viewers can access broadcast television without a subscription by connecting an antenna to their television, see, e.g., Brian X. Chen, *How to Watch the Super Bowl When You Don’t Have Cable*, N.Y. TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/technology/personaltech/how-to-watch-the-super-bowl-when-you-don-t-have-cable.html> [<https://perma.cc/5H68-F9KX>], or by using a local affiliate’s app, see *News App*, LOCAL 12, <https://local12.com/station/news-app> [<https://perma.cc/JM7V-6JN7>] (last visited Sept. 17, 2021).

19. Kolhatkar, *supra* note 10.

20. See *Americans Embrace Digital*, *supra* note 17.

21. *Id.*

even amid then-declining revenues in the local television news market.<sup>22</sup> While local television news stations enjoyed audience increases and improved overall revenue generation in 2020, such success was considered to be “consistent with a cyclical pattern in which revenue rises in election years.”<sup>23</sup>

The financial challenges local stations face, particularly in nonelection years, almost certainly make consolidated ownership more attractive,<sup>24</sup> and academic studies of the effects of consolidation in broadcast and digital media present a warning regarding the effects of consolidated control.<sup>25</sup> These studies demonstrate that the costs of consolidation may include decreased content quality and increased polarization.<sup>26</sup> Given the importance of objectivity and quality in journalism and news media, the organization and state of the current media landscape raises a few questions: Should mergers of media firms that affect ownership of local television news stations continue to be permitted? Could increased government oversight protect the local press?

One of the FCC regulations that directly supervises firms’ ownership interests in local broadcast television is the national television ownership rule.<sup>27</sup> The rule strives to promote the FCC’s interests in viewpoint diversity and localism by limiting the share of the national audience any firm may reach.<sup>28</sup> Unlike other broadcast ownership regulations, which are regularly

22. See *Local TV News Fact Sheet*, PEW RSCH. CTR. (July 12, 2018), [https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2019/06/Pew-Research-Center-State-of-the-News-Media-2018\\_06-25-2019-2.pdf](https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2019/06/Pew-Research-Center-State-of-the-News-Media-2018_06-25-2019-2.pdf) [https://perma.cc/2C8N-FDAF] (explaining that 2017 broadcast revenues were down 13 percent compared to 2016, an election year).

23. *Local TV News Fact Sheet*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/journalism/fact-sheet/local-tv-news/> [https://perma.cc/A4ZP-B26G]. A more limited data set from the second quarter of 2020 found that the median advertising revenues of local television news companies operating over 600 stations across the country were down 24 percent year over year, while retransmission revenues were up 37 percent. Michael Barthel et al., *Coronavirus-Driven Downturn Hits Newspapers Hard as TV News Thrives*, PEW RSCH. CTR. (Oct. 29, 2020), <https://www.journalism.org/2020/10/29/coronavirus-driven-downturn-hits-newspapers-hard-as-tv-news-thrives/> [https://perma.cc/95U6-FGCB] (defining “retransmission fees” as the fees cable providers pay to carry local news stations in their home markets). As data becomes available over the next few nonelection years, the longevity of the success the medium enjoyed in 2020 will be revealed.

24. See SCHERER, *supra* note 16, at 6 (“As traditional broadcast television stations, radio stations, and newspapers face competition for consumers’ attention and advertising revenue, all three industries have consolidated.”).

25. See generally Gregory J. Martin & Joshua McCrain, *Local News and National Politics*, 113 AM. POL. SCI. REV. 2372 (2019). Cf. UNIV. OF CHI. BOOTH SCH. OF BUS., STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT 271 (2019) [hereinafter Stigler Report] (“[P]latform monopolization removes the accountability afforded by competition”).

26. See *infra* Part II.A.2.

27. The FCC regulates interstate and international communications by radio, television, wire, and cable. *About the FCC*, FED. COMM’NS COMM’N, <https://www.fcc.gov/about/overview> [https://perma.cc/LX88-8KSQ] (last visited Sept. 17, 2021); 47 C.F.R. § 73.3555(e) (2020).

28. Under this rule, no individual firm may reach more than 39 percent of the national audience. See 47 C.F.R. § 73.3555(e) (2020).

reviewed by the FCC every four years, this rule is uniquely excluded by law from such review.<sup>29</sup> This insulation means both that reconsideration of the rule's ongoing relevance and alignment with the FCC's guiding principles is far from guaranteed and that any such reconsideration would occur in isolation from the review of the other broadcast regulations.<sup>30</sup> Removing the statutory audience cap and reinstating the review requirement would ensure that this regulation is regularly considered and modified as the public interest so requires.<sup>31</sup>

Part I of this Note details the role local broadcast television plays in the current media landscape. This part also outlines the FCC's role and goals in regulating the industry. This part then briefly presents an overview of the relevant areas of First Amendment, antitrust, and administrative law. Part II considers the tension between First Amendment guarantees and the role that government oversight of media ownership plays in protecting those freedoms. This part's consideration of those conflicting ideas closely examines the issue of political polarization in the local press. This part further analyzes these ideas' application to local broadcast television by considering ownership regulations in other sectors of the media industry and examining the role that antitrust law plays in media ownership transactions.<sup>32</sup> Part III recommends revising the national television ownership rule and challenging the rule's exclusion from the FCC's quadrennial review. This part asserts such revision and review is warranted by the industry's continued consolidation and the connection between concentrated ownership and polarization. Finally, this part outlines the strengths and limitations of other mitigating measures that may be implemented to address concerns regarding consolidated ownership.

## I. BROADCAST MEDIA TODAY

This part presents an overview of the current media landscape and the FCC's role in regulating it. Then, this part details two of the principal policy concerns the FCC considers in its regulations: diversity and localism. Finally, this part outlines the relevant aspects of First Amendment, antitrust,

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29. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (mandating regular review of media ownership rules), as amended by the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629(3), 118 Stat. 3, 100 (codified as amended at 47 U.S.C. § 303 note) (replacing biennial review with quadrennial review and excluding the national television ownership rule from regular review).

30. See National Television Multiple Ownership Rule, 83 Fed. Reg. 3661, 3661 (Jan. 26, 2018) (initiating a “comprehensive review” of the regulation, including the UHF discount); see also Prometheus Radio Project v. FCC, 373 F.3d 372, 397 (3d Cir. 2004) (noting that the FCC may decide “the scope of its authority to modify or eliminate the UHF discount outside the context of § 202(h)’); cf. FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1156 (2021) (“Section 202(h) establishes an iterative process that requires the FCC to keep pace with industry developments and to regularly reassess how its rules function in the marketplace.”).

31. See *supra* note 29; see also FCC Broadcast Ownership Rules, FED. COMM'CNS COMM'N, <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules> [https://perma.cc/M56A-RH2V] (last visited Sept. 17, 2021).

32. See *infra* Part I.B.1.

and administrative law. A closer analysis of these areas of the law reveals the impact media regulation has on the democratic society.<sup>33</sup>

#### *A. Current Media Landscape*

Today, viewers can access information through a range of sources, including broadcast and cable television, satellite and AM/FM radio, print publications, and social and digital media. While American viewers and voters can obtain information from many sources, this Note focuses on broadcast television specifically.

##### 1. The Importance of Local Broadcast Television

In the saturated market for information, local news outlets are particularly important. As an initial, general matter, local news outlets serve the critical democratic role of providing constituents with information about their local governments, during both election and nonelection years.<sup>34</sup> While national news stories may appear in other sources, local news is generally limited to its area of applicability, and it often does not reach national or international platforms absent extraordinary circumstances.<sup>35</sup> The democratic importance of local television news is also connected to its availability; viewers can access local news without a cable subscription.<sup>36</sup>

Next, considering consumers' perception of different media sources, local television news ranks as one of the sources people trust and prefer most.<sup>37</sup> In fact, according to a "nationally representative" study Pew conducted in late 2018, 41 percent of Americans indicated that they most prefer to learn their local news through television broadcasts, while 37 percent turned to online sources, 13 percent turned to print sources, and only 8 percent relied on radio.<sup>38</sup> Looking at viewer preferences based on media type, the same study found that "television-oriented local news consumers" may be more attached

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33. Bazelon, *supra* note 14 ("An information war may seem to be about speech. But [German intellectual Hannah] Arendt understood that what was at stake was far more."); *see also* Hendrickson, *supra* note 5 ("While a constitutional and public commitment to a free press on its own will not ensure the future economic viability of local news, public intervention can help sustain and support strong, independent media for every community in the U.S.").

34. *See Americans Embrace Digital*, *supra* note 17.

35. Reviewing the homepage stories on sources like *The New York Times*, *Financial Times*, and *BBC* supports this proposition.

36. *See supra* note 18. This survey also found that 38 percent of U.S. adults often get their local news from a local television station and that 76 percent of Americans who learn about local news via local television do so by watching the television station rather than by accessing the information via other means. *Id.*

37. Kolhatkar, *supra* note 10; *see also* *Local TV News Fact Sheet*, *supra* note 23; SCHERER, *supra* note 16, at 5–6.

38. *Americans Embrace Digital*, *supra* note 17; *see also* JESSICA MAHONE ET AL., WHO'S PRODUCING LOCAL JOURNALISM?: ACCESSING JOURNALISTIC OUTPUT ACROSS DIFFERENT OUTLET TYPES 4 (2019) ("Even in communities where local newspapers are available, resources were cut to a point where there was minimal local coverage—a situation that researchers have described as 'news deserts.'").

to local news than news consumers who have digital preferences.<sup>39</sup> Accordingly, many local news consumers not only turn first to local television news but also exhibit a degree of loyalty to the medium.<sup>40</sup> Similarly, a study conducted by the Knight Foundation and Gallup in 2019 found more broadly that American viewers trust local news organizations more than they trust national news organizations.<sup>41</sup>

Looking next to content, viewers have high expectations of objectivity in local news coverage.<sup>42</sup> The Knight Foundation and Gallup study found that local journalists, when compared to national journalists, were viewed as being more “caring, trustworthy, accurate and unbiased.”<sup>43</sup> The 2018 Pew study found that a majority of viewers—61 percent—believe that “local journalists should not share their views” in their coverage of local issues.<sup>44</sup> In addition to holding these standards, viewers reported generally trusting the information conveyed in local news programming.<sup>45</sup> For instance, an April 2020 Pew study, focused on news coverage of the COVID-19 pandemic, found that 46 percent of U.S. adults cited local news as an important source for pandemic-related information.<sup>46</sup> Moreover, results from a June 2020 Pew survey demonstrated that half of U.S. adults believed that their local news media, in covering the COVID-19 pandemic, “[g]ot the facts right . . . almost all or most of the time.”<sup>47</sup>

The Pew studies demonstrate that local broadcast television is an important medium by which people receive their local news, particularly in the context of the contemporary media landscape<sup>48</sup> and in the current sociopolitical moment.<sup>49</sup> The studies also indicate that digital media and cable news have

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39. *Americans Embrace Digital*, *supra* note 17 (finding that “U.S. adults who prefer getting local news online are less likely to follow local news very closely”).

40. *Id.* This conclusion is drawn from the distinction between “television-oriented” consumers and consumers who have digital preferences. A consumer’s orientation toward television implies less orientation toward—and less reliance on—digital sources.

41. KNIGHT FOUND. & GALLUP, STATE OF PUBLIC TRUST IN LOCAL NEWS 12 (2019), [https://kf-site-production.s3.amazonaws.com/media\\_elements/files/000/000/440/original/State\\_of\\_Public\\_Trust\\_in\\_Local\\_Media\\_final\\_.pdf](https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/440/original/State_of_Public_Trust_in_Local_Media_final_.pdf) [https://perma.cc/E35B-RHNK]; *see also id.* at 23 (showing that 66 percent of surveyed individuals trusted local sources to report the news without bias, 64 percent trusted local sources to distinguish journalism from commentary, and 59 percent trusted local sources to “[g]et the facts right”).

42. *Americans Embrace Digital*, *supra* note 17.

43. KNIGHT FOUND. & GALLUP, *supra* note 41, at 21.

44. *Id.*

45. *Id.*

46. Elisa Shearer, *Local News Is Playing an Important Role for Americans During COVID-19 Outbreak*, PEW RSCH. CTR. (July 2, 2020), <https://www.pewresearch.org/fact-tank/2020/07/02/local-news-is-playing-an-important-role-for-americans-during-covid-19-outbreak/> [https://perma.cc/3ZT8-473P].

47. *Id.*

48. See *What Are the Local News Dynamics in Your City?*, PEW RSCH. CTR. (Mar. 26, 2019), <https://www.journalism.org/interactives/local-news-habits/38300/> [https://perma.cc/5DGC-S68C] (providing interactive statistics regarding local news consumption).

49. The financial struggles of local news organizations, including radio and print outlets, are particularly dangerous during a public health crisis because “highly localized” information is what the public needs most. *See Steven Waldman & Charles Sennott, The Coronavirus Is*

not entirely supplanted local broadcast news.<sup>50</sup> Finally, the Pew studies suggest that many viewers expect local journalists to accurately and objectively portray information.<sup>51</sup> The Knight Foundation and Gallup study supports the related conclusion that local news is an important source of objectively conveyed information. Because local television news is a leading means by which people consume local news, these studies collectively emphasize the importance of local television news, specifically.

While local television news serves a critical role, many viewers who rely on the medium may not fully appreciate the financial realities local broadcast stations face today or the effect financial pressures may have on the industry's organization.<sup>52</sup> Media conglomerates' financial positioning and size create a significant divide in relative bargaining power—in areas including advertising and capital investments<sup>53</sup>—between purely local firms and larger, better-resourced organizations.<sup>54</sup> Considering larger firms' positioning, potential acquisitions are presumably attractive to both small firms seeking acquisition and large firms seeking to acquire other firms or portions thereof. For instance, after an acquisition, a smaller firm can enjoy the increased stability and resources of a larger firm,<sup>55</sup> while larger firms can expand their reach and influence in communities across the nation by acquiring stations that expand their geographic footprints.

## 2. Consolidated Ownership Today

Over time, the number of firms that own broadcast television outlets has decreased as the media industry has undergone significant consolidation.<sup>56</sup> Today, a few companies have “outsized influence,”<sup>57</sup> which has reshaped a media industry formerly based on “high-quality independent news ownership.”<sup>58</sup> Key firms that own and operate many of the local broadcast television stations today include: Sinclair Broadcast Group, Inc. (“Sinclair”); Tegna, Inc. (“Tegna”); Nexstar Media Group (“Nexstar”); Gray Television

*Killing Local News*, ATLANTIC (Mar. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-killing-local-news/608695/> [https://perma.cc/LXR4-FET2].

50. See *supra* note 39 and accompanying text.

51. See text accompanying *supra* note 44.

52. See *supra* notes 21–23 and accompanying text.

53. See Cecilia Kang et al., *How a Conservative TV Giant Is Ridding Itself of Regulation*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/politics/how-a-conservative-tv-giant-is-ridding-itself-of-regulation.html> [https://perma.cc/7SYA-RLZG] (“Loosened regulatory requirements, Sinclair executives said, will help even the playing field and benefit millions of Americans who rely on broadcast stations for news and entertainment by allowing the companies to invest in new equipment and technology.”).

54. See DANA A. SCHERER, CONG. RSCH. SERV., R44892, SINCLAIR BROADCAST GROUP ACQUISITION OF TRIBUNE MEDIA: COMPETITIVE AND REGULATORY ISSUES 2 (2017) (recognizing that a firm that owns many stations has increased bargaining power in advertising and obtaining rights to programming); SCHERER, *supra* note 16, at 8–9.

55. See Kang et al., *supra* note 53; see also SCHERER, *supra* note 54, at 2.

56. Kang et al., *supra* note 53.

57. *Id.* (quoting Lewis A. Friedland, a professor of journalism at the University of Wisconsin-Madison).

58. *Id.*

(“Gray”); and the E.W. Scripps Company (“Scripps”).<sup>59</sup> Collectively, these firms own and operate over 600<sup>60</sup> of the 1373 licensed commercial broadcast television stations in the United States.<sup>61</sup>

The number of markets these firms reach further emphasizes the current level of consolidation. As of September 2021, there are 210 designated market areas (DMAs) in the United States.<sup>62</sup> DMAs are standardized multicounty regions that are synonymous with a television station’s home market.<sup>63</sup> Sinclair owns and operates 185 stations in eighty-six markets (41 percent of DMAs).<sup>64</sup> Tegna owns and operates sixty-four local news brands in fifty-one markets (24 percent of DMAs).<sup>65</sup> Nexstar, which acquired Tribune in September 2019,<sup>66</sup> owns and operates 199 stations, including partner stations, in 116 markets (55 percent of DMAs).<sup>67</sup> At the time of writing, Gray is expected to serve 113 markets (54 percent of DMAs), pending the closing of the anticipated acquisition of additional television stations.<sup>68</sup> And, Scripps owns and operates sixty-one stations in forty-one markets (20 percent of DMAs).<sup>69</sup> Though some of these companies own competing stations in the same DMA,<sup>70</sup> the number of markets these firms reach individually and collectively<sup>71</sup> demonstrates their significance in the

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59. See *infra* notes 64–69 and accompanying text.

60. See Barthel et al., *supra* note 23.

61. Fed. Commc’n’s Comm’n, Broadcast Station Totals as of June 30, 2021 (July 12, 2021). The 1373 figure is the sum of the number of Ultra High Frequency and Very High Frequency commercial broadcast television stations. *See id.*

62. *DMA Regions*, NIELSEN, <https://www.nielsen.com/us/en/intl-campaigns/dma-maps/> [https://perma.cc/R5FW-8EQ8] (last visited Sept. 17, 2021).

63. *Id.*

64. *About*, SINCLAIR BROAD. GRP., <https://sbgi.net> [https://perma.cc/R48V-VXWV] (last visited Sept. 17, 2021).

65. *About*, TEGNA, <https://www.tegna.com/about/trustworthy-impactful-journalism/> [https://perma.cc/HZX2-6S5E] (last visited Sept. 17, 2021) (stating the firm’s national audience reach is 39 percent).

66. See Press Release, Nexstar Media Grp., Inc., Nexstar Media Group Completes Tribune Media Acquisition Creating the Nation’s Largest Local Television Broadcaster (Sept. 19, 2019), [https://www.nexstar.tv/nexstar\\_completes\\_tribune\\_transaction\\_2019/](https://www.nexstar.tv/nexstar_completes_tribune_transaction_2019/) [https://perma.cc/FP43-BPMT].

67. NEXSTAR MEDIA GRP., <https://www.nexstar.tv> [https://perma.cc/534K-5FFD] (last visited Sept. 17, 2021) (stating the firm’s national audience reach, before the UHF discount, is more than 68 percent).

68. GRAY TELEVISION, <https://gray.tv> [https://perma.cc/HQS9-CXFV] (last visited Oct. 10, 2021) (stating the firm’s expected national audience reach is 36 percent).

69. *Local Media*, E.W. SCRIPPS CO., <https://scripps.com/our-brands/local-media/> [https://perma.cc/XL8A-HRE9] (last visited Sept. 17, 2021).

70. For example, in the Cincinnati, Ohio, DMA, Sinclair owns CBS affiliate WKRC. *See TV Channels*, SINCLAIR BROAD. GRP., <https://sbgi.net/tv-channels/> [https://perma.cc/43RK-VWE2] (last visited Sept. 17, 2021). In the same DMA, Scripps owns ABC affiliate WCPO. *Local Media*, E.W. SCRIPPS CO., <https://scripps.com/our-brands/local-media/> [https://perma.cc/XL8A-HRE9] (last visited Sept. 17, 2021).

71. The total number of stations Gray operates is not defined. However, an October 2020 Pew Research Center study indicated that Gray, Nexstar, Scripps, Sinclair, and Tegna together own or operate at least 600 stations. *See* Barthel et al., *supra* note 23. Though the comparison is not perfect, 600 stations is over 40% of the total number of stations licensed in 2021. *See supra* note 61 and accompanying text.

broadcast television industry. FCC regulations permitting, and in some sense supporting, consolidation have enabled these companies to develop their national portfolios.<sup>72</sup>

### 3. The Federal Communications Commission

The FCC's rules on media ownership regulate how many stations a firm can own based on the number of viewers the firm reaches through those stations<sup>73</sup> or the extent of the company's total media ownership interests in a particular market.<sup>74</sup> A closer look at the FCC and its guiding principles of diversity and localism suggests that the current level of consolidation in local broadcast television may at least be beginning to run counter to those principles.<sup>75</sup>

In the Communications Act of 1934,<sup>76</sup> Congress established the FCC to regulate communications and ensure that information is made available to people throughout the United States.<sup>77</sup> Through this delegation of power, the FCC has authority to regulate radio and wire communication.<sup>78</sup> While this Note focuses on broadcast television, the scope of the FCC's authority is important. The delegation to the FCC of authority over cable,<sup>79</sup> broadband data,<sup>80</sup> and new communications technologies<sup>81</sup> demonstrates the total influence the FCC has on the dissemination of information to the American people.

72. See Stephen Labaton, *Plan to Loosen Network Rules Goes to F.C.C.*, N.Y. TIMES (May 13, 2003), <https://www.nytimes.com/2003/05/13/business/plan-to-loosen-network-rules-goes-to-fcc.html> [https://perma.cc/LTR3-FS7X] (discussing the relationship between the television ownership cap and consolidation prior to the passage of the legislation that ultimately established the current cap); Jon Reid, *Can One Voice Dominate TV and Radio?: FCC Owner Rules Explained*, BLOOMBERG L. (Jan. 4, 2021, 5:01 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/can-one-voice-dominate-tv-and-radio-fcc-owner-rules-explained> [https://perma.cc/N42N-KC6C] (explaining that the reinstatement of the UHF discount enabled Nexstar to acquire Tribune without exceeding the national cap).

73. See 47 C.F.R. § 73.3555(e)(1) (2020).

74. See *id.* § 73.3555(a)–(b).

75. See *infra* Parts I.A.4, II.A.

76. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

77. See 47 U.S.C. § 151; see also Nat'l Broad. Co. v. United States, 319 U.S. 190, 198 (1943) ("The Commission's duty under the Communications Act of 1934 . . . is not only to see that the public receives the advantages and benefits of chain broadcasting, but also . . . to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.").

78. See 47 U.S.C. § 151.

79. See *id.* § 521.

80. See, e.g., *id.* § 642.

81. See *id.* § 157 (indicating that "[t]he Commission shall determine whether any new technology or service proposed . . . is in the public interest" and that "encourag[ing] the provision of new technologies" is a policy).

In 1996, Congress enacted the Telecommunications Act of 1996<sup>82</sup> to promote competition in the communications industry.<sup>83</sup> The legislation endeavored to limit government involvement in the market for communications to only those rules necessary in the public interest.<sup>84</sup> Notwithstanding the arguably deregulatory undertones of this approach, yet in light of technological developments, the FCC has maintained and continued to modify rules guided by the general principle that the “diversification of mass media ownership” best serves the “public interest.”<sup>85</sup>

#### 4. Viewpoint Diversity and Localism

While the definition of the “public interest” the FCC’s rules seek to promote has remained elusive,<sup>86</sup> a “central, animating assumption” underlying the agency’s regulation of media ownership is the belief that consolidated ownership “reduces viewpoint diversity,”<sup>87</sup> a measure that refers to the availability of media conveying different perspectives and approaches to content.<sup>88</sup> Based on this assumption, limiting consolidated ownership would serve to promote “substantive viewpoint diversity,” which, in theory, would advance “broad democratic goals,” such as enabling citizens to become informed, engage in deliberation, and hold government actors accountable.<sup>89</sup> The argument that diversity advances these democratic goals is broadly based on the belief that “true democracy” requires “a vibrant, free, and plural media industry” that includes a wide range of viewpoints for individuals to consider.<sup>90</sup> Despite challenges in measuring viewpoint diversity,<sup>91</sup> courts and the FCC have demanded “empirical evidence” tending to show that consolidated ownership affects viewpoint diversity; yet, simplifications necessarily inhere in any diversity calculation.<sup>92</sup>

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

83. *Telecommunications Act of 1996*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/telecommunications-act-1996> [<https://perma.cc/K2NJ-5FR5>] (last visited Sept. 17, 2021).

84. See Dietz, *supra* note 81, § 3.

85. *Id.* § 2.

86. Jack Karsten, *90 Years Later, the Broadcast Public Interest Standard Remains Ill-Defined*, BROOKINGS (Mar. 23, 2017), <https://www.brookings.edu/blog/techtank/2017/03/23/90-years-later-the-broadcast-public-interest-standard-remains-ill-defined/> [<https://perma.cc/4JZ8-E6J4>]; see also Nat’l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (“The ‘public interest’ to be served under the Communications Act is thus the interest of the listening public in ‘the larger and more effective use of radio.’” (quoting Communications Act of 1934 § 303(g))).

87. Ho & Quinn, *supra* note 1, at 787–88.

88. See *id.* at 792.

89. *Id.* at 788.

90. Stigler Report, *supra* note 25, at 10; see also Kang et al., *supra* note 53 (“[D]emocracy depends on a diversity of voices and competition of news outlets.” (quoting Representative Frank Pallone Jr. of New Jersey)).

91. Researchers have reviewed viewpoint diversity in many ways. See Ho & Quinn, *supra* note 1, at 800, 803, 805–06, 809. Despite the centrality of viewpoint diversity to the FCC’s regulatory approach, none of the measurement methods is without defect. See *id.*

92. See *id.* at 790, 810.

In addition to advancing viewpoint diversity, the FCC seeks to promote localism to ensure that local news sources respond to individual communities' interests<sup>93</sup> and critical information needs.<sup>94</sup> "Critical information needs" encompass the information people need to access educational, employment, and business opportunities; "fully participate" in their communities' civic and democratic lives; and, most generally, "live safe and healthy lives."<sup>95</sup> While much of this information may be available in other media, the collapse of many local print publications,<sup>96</sup> consumers' preference to learn about local news via television,<sup>97</sup> and the prevalence of misinformation in social and digital media<sup>98</sup> emphasize the importance of localism in local broadcast television news specifically.

Regardless of the medium through which local news is conveyed, the dissemination of local information is particularly important to democracy because the "challenge of communication participation" begins on the local level.<sup>99</sup> Local media outlets are uniquely positioned to convey information that is of local interest.<sup>100</sup> Rules promoting localism thus serve the public interest by providing local residents with "meaningful, dedicated local news

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93. SCHERER, *supra* note 6, at 1; see also Letter from U.S. Senators to Ajit Pai, Chairman, Fed. Commc'n's Comm'n 1 (Apr. 26, 2018), <https://www.commerce.senate.gov/services/files/884768be-697f-4f5d-882e-e33fef3589a5> [https://perma.cc/N3CP-VYMM] (recognizing a close connection between media ownership rules and "the heart of localism, diversity and competitive fairness in local broadcasting").

94. LEWIS FRIEDLAND ET AL., REVIEW OF THE LITERATURE REGARDING CRITICAL INFORMATION NEEDS OF THE AMERICAN PUBLIC, at v–vi (2012), [https://transition.fcc.gov/bureaus/ocbo/Final\\_Literature\\_Review.pdf](https://transition.fcc.gov/bureaus/ocbo/Final_Literature_Review.pdf) [https://perma.cc/AAM8-VHRA] (defining the categories of informational needs as: 1) emergencies or risks, 2) health and welfare, 3) education, 4) transportation, 5) economic opportunities, 6) the environment, 7) civic information, and 8) political information).

95. *Id.* at v. The report notes that information needs are "an evolving concept and a function of change in technologies, public expectations and other factors over time." *Id.* at x.

96. See Dan Barry, *The Last Reporter in Town Had One Big Question for His Rich Boss*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/10/us/alden-global-capital-pottstown-mercury.html> [https://perma.cc/GHA5-DHQ8]; see also Barthel et al., *supra* note 23.

97. See *supra* notes 38–40 and accompanying text.

98. See Davey Alba, *On Facebook, Misinformation Is More Popular Now Than in 2016*, N.Y. TIMES (Oct. 12, 2020, 6:00 AM), <https://www.nytimes.com/2020/10/12/technology/on-facebook-misinformation-is-more-popular-now-than-in-2016.html> [https://perma.cc/TE84-UKYY].

99. FRIEDLAND ET AL., *supra* note 94, at xii.

100. *See id.*

coverage”<sup>101</sup> in a medium they trust<sup>102</sup> and can readily access.<sup>103</sup> In sum, local information is valuable in a democratic society, and local broadcast television plays an important role in the dissemination of that information.

### 5. The Relevant Rules

In furtherance of its commitment to diversity and localism, the FCC has broadened its body of regulations concerning media ownership. Today, the FCC’s regulations include limitations on the number of radio or television stations a single entity can own in any radio or television market and the share of viewers any common owner can reach nationally via broadcast television.<sup>104</sup> While cable news, digital platforms, print publications, and satellite and broadcast radio also distribute critical information, this Note focuses on local broadcast television because of the unique democratic role of local broadcast television. The primary regulation this Note addresses is the national television ownership rule,<sup>105</sup> which is closely connected to the UHF discount,<sup>106</sup> discussed in further detail below.<sup>107</sup>

The national television ownership rule limits the audience reach of any single broadcast television company to 39 percent of national viewers.<sup>108</sup> While the regulation does not definitively prohibit all transactions that would result in an audience reach exceeding the defined cap, the regulation requires that any firm exceeding that cap come into compliance with the cap within two years of the transaction by divesting itself of stations.<sup>109</sup>

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101. Letter from Robert Menendez & Cory A. Booker, U.S. Senators, to Ajit Pai, Chairman, Fed. Commc’ns Comm’n 2 (Jan. 30, 2019), [https://www.menendez.senate.gov/imo/media/doc/FINAL%20LETTER\\_FCC%20Rules%20Review\\_1\\_30\\_19.pdf](https://www.menendez.senate.gov/imo/media/doc/FINAL%20LETTER_FCC%20Rules%20Review_1_30_19.pdf) [<https://perma.cc/P6Q4-EURP>]. *But see* Letter from Ajit V. Pai, Chairman, Fed. Commc’ns Comm’n, to Cory Booker, U.S. Senator (Mar. 1, 2019), <https://docs.fcc.gov/public/attachments/DOC-356537A1.pdf> [<https://perma.cc/SY9A-5PJE>] (asserting that the FCC’s role is not to “second-guess” journalists’ editorial decisions but rather to “establish a framework that will allow local journalists and broadcasters to thrive and serve their communities to the best of their abilities”).

102. *See* Letter from U.S. Senators to Ajit Pai, Chairman, Fed. Commc’ns Comm’n 2 (Sept. 29, 2017), <https://docs.fcc.gov/public/attachments/DOC-351358A2.pdf> [<https://perma.cc/8NFV-LLTU>] (advancing Americans’ “faith in their local broadcast stations” as an argument for meaningful regulation).

103. *See supra* note 18; *see also* text accompanying *supra* note 36.

104. *See* 47 C.F.R. § 73.3555 (2020).

105. *Id.* § 73.3555(e).

106. *Id.* § 73.3555(e)(2)(i); *see* FCC Broadcast Ownership Rules, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules> [<https://perma.cc/PG83-Q7TG>] (last visited Sept. 17, 2021) (referring to the calculation method described in the regulation as the “UHF Discount”).

107. *See infra* notes 110–25 and accompanying text.

108. *See* 47 C.F.R. § 73.3555(e) (2020).

109. *See id.* This section of the regulation does not apply when the cap is exceeded as a result of population growth. *See id.* § 73.3555(e)(3); FCC Broadcast Ownership Rules, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules> [<https://perma.cc/3UPP-CC24>] (last visited Sept. 17, 2021) (noting there is no numerical limit on the number of stations a single entity may own nationally).

The UHF discount is “inextricably linked” to the ownership limit because it is used to calculate a firm’s audience reach, which determines the firm’s compliance with the cap.<sup>110</sup> In practice, the discount reduces by half the number of households a broadcast television station reaches.<sup>111</sup> For example, a station that reaches 3000 households over “Ultra High Frequency” (UHF) would be regarded as reaching only 1500 households for the purposes of the rule’s cap.<sup>112</sup> This calculation reflects the former technological limitations of the UHF signal.<sup>113</sup> At the time of the discount’s promulgation, “Very High Frequency” signals supported better transmission.<sup>114</sup> However, when television stations transitioned from analog systems to digital systems in 2009, UHF stations were no longer at a technical disadvantage<sup>115</sup> and may have actually been at an advantage.<sup>116</sup> Because regulators determined that the technological rationale supporting the discount no longer applied, the FCC eliminated it in 2016.<sup>117</sup>

However, the discount’s absence from the FCC’s regulatory framework was short-lived. The FCC reinstated the discount in 2017, soon after Ajit Pai became the agency’s chairman.<sup>118</sup> As an FCC commissioner in 2016, Pai had dissented from the agency’s decision to eliminate the discount.<sup>119</sup> The reinstatement provoked significant criticism because of its timing,<sup>120</sup> its reversal of deliberative agency action,<sup>121</sup> and its apparent politicization.<sup>122</sup> Following pushback, a new rulemaking proceeding, seeking to determine whether the discount and ownership cap should be modified, began in December 2017.<sup>123</sup> The rules were not modified, and the current regulations

110. National Television Multiple Ownership Rule, 82 Fed. Reg. 21,124, 21,125 (May 5, 2017).

111. SCHERER, *supra* note 16, at 14.

112. See 47 C.F.R. § 73.3555(e)(2)(i) (2020).

113. See National Television Multiple Ownership Rule, 82 Fed. Reg. at 21,124–25.

114. SCHERER, *supra* note 16, at 14; 82 Fed. Reg. at 21,124–25.

115. See also Edmund Lee, *Sinclair Tries to Appease F.C.C., but Its Tribune Bid Is Challenged*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/business/media/sinclair-tribune-fcc.html> [https://perma.cc/U5LL-CAPB].

116. See National Television Multiple Ownership Rule, 82 Fed. Reg. at 21,125.

117. National Television Multiple Ownership Rule, 81 Fed. Reg. 73,035, 73035 (Oct. 24, 2016). The discount’s elimination was proposed in 2013. Amendment of Section 73.3555(e) of the Commission’s National Television Multiple Ownership Rule, 28 FCC Rcd. 14324 (Fed. Commc’ns Comm’n Sept. 26, 2013).

118. SCHERER, *supra* note 16, at 15.

119. National Television Multiple Ownership Rule, 82 Fed. Reg. 21,124, 21,125 (May 5, 2017).

120. See Letter from U.S. Senators to Ajit Pai, *supra* note 102, at 1 (asserting that the reinstatement of the discount “has directly facilitated the largest proposed broadcast television merger in history, which would give one company ownership of enough stations to reach over 70 percent of the American population”).

121. See National Television Multiple Ownership Rule, 81 Fed. Reg. 73,035, 73,035 (Oct. 24, 2016) (eliminating the UHF Discount).

122. Margaret Harding McGill & John Hendel, *How Trump’s FCC Aided Sinclair’s Expansion*, POLITICO (Aug. 6, 2017, 7:03 AM), <https://www.politico.com/story/2017/08/06/trump-fcc-sinclair-broadcast-expansion-241337> [https://perma.cc/NXJ2-32DJ].

123. See National Television Multiple Ownership Rule, 83 Fed. Reg. 3661, 3661 (Jan. 26, 2018).

still account for the discount.<sup>124</sup> Moreover, the current ownership stakes of broadcast television companies show both that some firms' portfolios rely on the discount's survival and, more generally, that the media industry's current composition has been shaped by the discount.<sup>125</sup>

In addition to promulgating rules governing media ownership, the FCC is required to review broadcast regulations on a quadrennial basis to consider whether such rules remain "necessary in the public interest."<sup>126</sup> In the Consolidated Appropriations Act of 2004<sup>127</sup> (CAA), however, Congress established the current 39-percent audience reach cap and excluded the rule from the agency's regular review.<sup>128</sup> While the legislative history reveals lawmakers' frustration with the omnibus legislation's establishment of the audience reach cap, the supporting documents do not explain the rule's exclusion from regular review.<sup>129</sup> Moreover, lawmakers debating the bill's passage expressed concern that amending the cap was procedurally improper,<sup>130</sup> particularly when the vitality of a critical information outlet was involved.<sup>131</sup> One lawmaker expressed concern that even a 35-percent cap would be "big enough" to allow politically biased media empires to gain "more control over local TV news than is appropriate."<sup>132</sup> Noting the importance of ensuring that the local news media communicates a range of content and perspectives, many lawmakers referenced viewpoint diversity.<sup>133</sup> Of the remarks referencing the national television ownership

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124. See 47 C.F.R. § 73.3555(e) (2020) (including the 39-percent cap and the UHF discount).

125. See NEXSTAR MEDIA GRP., *supra* note 67 (stating that the firm reaches more than 68 percent of the national audience); Press Release, *supra* note 66.

126. Telecommunications Act of 1996 § 202(h); see also Consolidated Appropriations Act of 2004 § 629(3) (revising the timing of the review).

127. Pub. L. No. 108-199, 118 Stat. 3 (codified as amended in scattered sections of the U.S.C.).

128. See *id.* § 629.

129. See 150 CONG. REC. 263 (2004) (statement of Sen. Thomas Daschle); *id.* at 188–89 (statement of Sen. Robert Byrd); *id.* at 196–97 (statement of Sen. John McCain); *id.* at 205 (statement of Sen. Frank Lautenberg); *id.* at 14 (statement of Sen. Daniel Akaka); *id.* at 20 (statement of Sen. Thomas Daschle); 149 CONG. REC. 32,273 (2003) (statement of Sen. Robert Byrd); *id.* at 32,079 (statement of Rep. David Obey); *id.* at 32,084 (statement of Rep. John Conyers); *id.* at 32,091 (statement of Rep. Billy Tauzin); *id.* at 32,098 (statement of Rep. Pete Stark); *id.* at 31,774 (statement of Rep. David Obey).

130. See, e.g., 150 CONG. REC. 263 (2004) (statement of Sen. Thomas Daschle) (asserting that the audience reach cap's inclusion in the legislation was the result of "pressure from the White House" and expressing concern about the precedent the action sets); *id.* at 197 (statement of Sen. John McCain) ("The omnibus spending bill is not the appropriate legislative vehicle to undo the commission's broadcast ownership cap.").

131. See *id.* at 263 (statement of Sen. Thomas Daschle); *id.* at 264 (statement of Sen. Jon Corzine) (expressing concern that the revised cap aligns with neither the votes of both houses nor the public interest in diverse programming); *id.* at 276 (statement of Sen. Patrick Leahy); *id.* at 276–77 (statement of Sen. Barbara Boxer) ("[T]his bill allows media conglomerates to control more of the information the public receives."); *id.* at 278 (statement of Sen. Carl Levin).

132. *Id.* at 194 (statement of Sen. Dick Durbin) (referring to Rupert Murdoch's "conservative" outlets); *id.* at 205 (statement of Sen. Frank Lautenberg) (same).

133. See *id.* at 13–14 (statement of Sen. Daniel Akaka); *id.* at 15 (statement of Sen. Joe Biden); *id.* at 194 (statement of Sen. Dick Durbin); *id.* at 276 (statement of Sen. Patrick

rule,<sup>134</sup> there were only cursory references to the FCC's regular review and the fact that any regulations related to the 39-percent cap would be excluded from review.<sup>135</sup> Because the national television ownership rule so directly affects a critical conduit of local news and information, the unceremonious, yet consequential, amendments made in the CAA are puzzling. A statement by another lawmaker more directly suggested that industry interests were at play.<sup>136</sup>

### B. Legal Frameworks

To understand the importance of reviewing the national television ownership rule and the practicability of any changes that may stem from such review, an overview of a few areas of law is necessary. First Amendment law and antitrust law provide important foundational context. First Amendment law informs the relationship between the government and the media, and antitrust law provides a framework for understanding the dissemination of information in the context of a marketplace of ideas. Antitrust law also operates more directly in media consolidation, as mergers and acquisitions in the industry require both the FCC's regulatory consent and the approval of an antitrust enforcement agency.<sup>137</sup> Further, because the FCC is an agency, administrative law principles must also be considered.

#### 1. First Amendment Law

The First Amendment to the U.S. Constitution protects the freedom of expression and, in part, ensures that Congress will not make any law that abridges free speech or the freedom of the press.<sup>138</sup> The guarantees protected by the First Amendment form "the foundation of a vibrant democracy,"<sup>139</sup> and these protections apply not only to individuals but also to corporations and other business entities,<sup>140</sup> including television broadcast companies. In regard to the media, the First Amendment guarantees that the government will not interfere with the press's ability and freedom to "censure the Government."<sup>141</sup> The freedom to criticize the government is an "essential concept" underpinning First Amendment protections,<sup>142</sup> and the protection

Leahy); 149 CONG. REC. 32,084 (2003) (statement of Rep. John Conyers); *id.* at 32,091 (statement of Rep. Billy Tauzin); *id.* at 32,098 (statement of Rep. Pete Stark).

134. See *supra* note 129.

135. See 149 CONG. REC. 32,091 (2003) (statement of Rep. Billy Tauzin).

136. See 150 CONG. REC. 196 (2004) (statement of Sen. John McCain) ("It is no coincidence . . . that the 39 percent is the exact ownership percentage of Viacom and CBS.").

137. See SCHERER, *supra* note 54, at 1.

138. U.S. CONST. amend. I.

139. *Free Speech*, ACLU, <https://www.aclu.org/issues/free-speech> [https://perma.cc/J9D8-MCQ5] (last visited Sept. 17, 2021).

140. See, e.g., Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 16 (1986) ("[S]peech does not lose its protection because of the corporate identity of the speaker.").

141. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (Black, J., concurring). But see Wermiel, *supra* note 9 ("[U]nder some extreme circumstances, especially if there were a genuine threat to national security, a prior restraint [on the press] might be justified.").

142. Wermiel, *supra* note 9.

of a free press “has stood the test of time through vast changes in technology and communications,” as well as through the introduction of new “forms of expression” and significant shifts in “societal values.”<sup>143</sup>

The press plays an important mediating role in society. For example, in *Richmond Newspapers, Inc. v. Virginia*,<sup>144</sup> the Supreme Court noted that the media may report on proceedings to contribute to the public’s understanding of the way that the criminal justice system is functioning; in other words, media representatives may be “surrogates for the public.”<sup>145</sup>

In *Abrams v. United States*,<sup>146</sup> Justice Oliver Wendell Holmes, in dissent, emphasized the importance of protecting the communication of even unfavorable ideas. The Court in *Abrams* considered whether the defendants’ First Amendment rights were violated when the defendants, who had printed pamphlets opposing the country’s military operations, were criminally charged.<sup>147</sup> The Court found that the defendants’ rights were not violated; the protection of defendants’ speech was lower during wartime.<sup>148</sup> In dissent, Justice Holmes asserted that there is an extremely high standard that must be met before government intervention with expression is permissible.<sup>149</sup> Justice Holmes reiterated that the strength and applicability of the constitutional protection cannot turn on whether the content expressed is favorable or not.<sup>150</sup>

Beyond emphasizing the scope and strength of the First Amendment’s protections, Justice Holmes’s dissent also introduced the “marketplace of ideas” metaphor as a central constitutional theory.<sup>151</sup> Aligned with the FCC’s guiding principle of viewpoint diversity,<sup>152</sup> First Amendment jurisprudence has long been viewed as striving to protect “a marketplace for the clash of different views and conflicting ideas.”<sup>153</sup> Justice Holmes’s metaphor draws largely on ideas that John Stuart Mill presented in *On Liberty*.<sup>154</sup> The metaphor conceptualizes public discourse as a market in which ideas are exchanged, and the rationale behind the metaphor’s

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143. *Id.* (defining the freedom of the press as a “pillar of democracy”).

144. 448 U.S. 555 (1980).

145. *Id.* at 573; *see also* Wermiel, *supra* note 9.

146. 250 U.S. 616 (1919).

147. *Id.* at 618–19 (citing *Schenck v. United States*, 249 U.S. 47, 51–52 (1919)) (concluding that the First Amendment’s guarantees are not unqualified).

148. *Id.* at 624.

149. *Id.* at 630 (Holmes, J., dissenting).

150. *Id.* (“[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . .”); *see also* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.”).

151. G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2158 (2020) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

152. *See supra* Part 1.A.4.

153. Parsons, *supra* note 151, at 2158 (quoting *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981)).

154. *See generally JOHN STUART MILL, ON LIBERTY* (1859).

construction is the belief that competitive market forces establish the “best test of truth”<sup>155</sup> and that “the ultimate good desired is better reached by free trade in ideas,”<sup>156</sup> or an unabridged diversity of voices.<sup>157</sup>

Mill’s “utilitarian framework” classifies the discovery of truth as an important societal goal, which can be achieved when individuals reach conclusions in an environment that includes the expression of opposing—and even controversial—opinions.<sup>158</sup> According to Mill’s framework, the majority must be prevented from silencing dissenting minorities because contrary opinions are integral to society’s deliberation of ideas.<sup>159</sup> The marketplace of ideas metaphor is further founded on the belief that truth will more likely be reached if alternative views are presented persuasively to challenge the “prevailing” perspectives.<sup>160</sup> Protecting speech and fostering more speech is thus “necessary” because it prevents “contrary opinions” from being stifled and promotes effective deliberation within society.<sup>161</sup>

As media companies consolidate and the number of disparate voices decreases,<sup>162</sup> the need to consider how well the media industry and relevant regulations align with these constitutional promises becomes increasingly urgent. Demonstrating the necessity of this review, a former FCC official alluded to the marketplace metaphor, noting that a goal of the First Amendment is to ensure that people have access to the information required for them to make “intelligent decisions about our democracy.”<sup>163</sup> However, the official concluded that the American people are reaching the point at which they are not able to make those decisions because such information gathering is, today, impracticable.<sup>164</sup>

Though “news products” are not necessarily “immune from regulation” because of the First Amendment’s press protections, the integrity of the press is “presumptively at risk” the moment the government intervenes or

155. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1166–67 (2015) (suggesting that Holmes’s conceptualization of a marketplace of ideas may have been based on the belief that “democratic political truth is determined by . . . the market”).

156. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

157. Cf. Stigler Report, *supra* note 25, at 316 (concluding that a lack of competition among digital platforms deprives the marketplace of ideas of an important regulator and finding that such “political effects of concentration are unlikely to ever be captured directly by the consumer welfare standard”); *see also supra* Part I.A.4.

158. Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses*, 22 YALE J.L. & HUMANS. 35, 39 (2010).

159. *Id.* at 56; *see also id.* at 62 (“[D]issenting opinions, regardless of whether they are true, partially true, or false, aid in the discovery of truth.”).

160. *Id.* at 76.

161. *Id.* at 61.

162. The conclusion relies on the assumption that firms centrally influence affiliates’ broadcasts. *See infra* Part II.A.1. This assumption is valid at least for stations owned by Sinclair. *See* Martin & McCrain, *supra* note 25, at 378–79, 381.

163. Kolhatkar, *supra* note 10.

164. *Id.* (framing the principles protected by the First Amendment as “the whole premise of self-government” (quoting former FCC official Michael Copps)); *see also supra* Part I.A.4.

encourages modification to the press's messaging.<sup>165</sup> Acknowledging that a strictly laissez-faire approach to the media could appear to circumvent all actual or apparent intervention, First Amendment scholars are now reconsidering the belief that "more speech is better."<sup>166</sup> This reconsideration has arisen in light of the current climate in which "overwhelming waves of speech from extremists" and "mass distortion[s] of truth" have undermined the foundational premise that the truth will certainly be realized in a marketplace of competing voices.<sup>167</sup>

## 2. Antitrust Law

The adoption of the "marketplace of ideas" metaphor as the "dominant lens" for free-speech analysis<sup>168</sup> is fitting for considering the intersection of First Amendment protections and antitrust principles as applied to the media.<sup>169</sup> The two bodies of law intersect in many ways.<sup>170</sup> Beyond their overlapping development,<sup>171</sup> First Amendment and antitrust considerations directly coincide in this context, as the FCC and an antitrust enforcement agency each review proposed media transactions.<sup>172</sup> The FCC considers competitive concerns to the extent they are incorporated into the agency's analysis of what serves the public interest,<sup>173</sup> while the antitrust enforcement agency's focus on competition is necessarily informed by the First Amendment concerns that animate the transaction's relevant market.<sup>174</sup> While antitrust law in most economic sectors seeks to protect consumer welfare, antitrust law and regulatory oversight in the media industry may also be understood as seeking to protect "citizen welfare," which measures how well democracy is functioning.<sup>175</sup>

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165. Wash. Post v. McManus, 944 F.3d 506, 520 (4th Cir. 2019).

166. Bazelon, *supra* note 14.

167. *Id.*

168. Parsons, *supra* note 151, at 2158. *But see* Candeub, *supra* note 3, at 1550, 1581 (questioning the adoption of the marketplace of ideas as a guiding metaphor).

169. In the market of digital media platforms, specifically, "concern with monopoly and economic concentration has grown on the left and the right," supporting, or at least implying, the universal importance of this analysis. Stigler Report, *supra* note 25, at 327.

170. Daniel Crane, *Collaboration and Competition in Information and News During Antitrust's Formative Era*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (June 29, 2020), <https://knightcolumbia.org/content/collaboration-and-competition-in-information-and-news-during-antitrusts-formative-era> [https://perma.cc/EU2B-DEGD].

171. *Id.*

172. See Ho & Quinn, *supra* note 1, at 794; SCHERER, *supra* note 54, at 1.

173. See *Overview of the FCC's Review of Significant Transactions*, FED. COMM'CNS COMM'N, <https://www.fcc.gov/reports-research/guides/review-of-significant-transactions> [https://perma.cc/BU6M-EEEB] (last visited Sept. 17, 2021); *The FCC and Freedom of Speech*, FED. COMM'CNS COMM'N, <https://www.fcc.gov/consumers/guides/fcc-and-freedom-speech> [https://perma.cc/S57D-9G55] (last visited Sept. 17, 2021).

174. See Press Release, U.S. Dep't of Just., Justice Department Requires Structural Relief to Resolve Antitrust Concerns in Nexstar's Merger with Tribune (July 31, 2019), <https://www.justice.gov/opa/pr/justice-department-requires-structural-relief-resolve-antitrust-concerns-nexstar-s-merger> [https://perma.cc/5L4K-UYEY].

175. Stigler Report, *supra* note 25, at 9; *see also id.* at 315 (defining consumer welfare as the primary predicate for "[c]ontemporary antitrust enforcement").

The main antitrust law that governs mergers and acquisitions, including those in the media industry, is § 7 of the Clayton Act of 1914.<sup>176</sup> Section 7 prohibits actions that substantially lessen competition.<sup>177</sup> Under the Clayton Act of 1914, an antitrust enforcement agency considers whether a proposed merger will likely create or enhance market power or eliminate competition.<sup>178</sup> Horizontal mergers between direct competitors are of particular concern.<sup>179</sup> The *Horizontal Merger Guidelines* (“the Guidelines”) outline the analysis an antitrust enforcement agency follows in its review of a proposed merger. Though they are not binding law, the Guidelines aid the agency in “identify[ing] and challeng[ing] competitively harmful mergers,”<sup>180</sup> while preventing the enforcing agency from interfering unnecessarily with mergers that could promote competition—or at least not hurt it.<sup>181</sup> In addition to considering a proposed merger’s competitive effects, the enforcing agency also considers whether the merger will create efficiencies that are contingent on the consummation of the proposed merger or whether the efficiencies can be achieved by less anticompetitive means.<sup>182</sup>

In granting merger approval in the media industry, the enforcing agency may condition its approval on the divestiture of a certain number of stations.<sup>183</sup> For example, after Sinclair’s attempt to acquire Tribune failed on other grounds, Nexstar sought to acquire Tribune,<sup>184</sup> and the U.S. Department of Justice conditioned the approval of Nexstar’s acquisition on the divestiture of certain stations.<sup>185</sup> Assistant Attorney General Makan Delrahim detailed the divestitures on which the granting of the merger approval was contingent<sup>186</sup> and asserted that, absent the mandated divestitures, the consolidation would “threaten[] significant competitive harm to cable and satellite TV subscribers and small businesses” by eliminating “head-to-head competition” in certain markets and requiring cable and satellite providers to pay higher retransmission fees for broadcast content.<sup>187</sup>

176. 15 U.S.C. § 18l; see SCHERER, *supra* note 54, at 6.

177. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/LL7Y-VTRW] (last visited Sept. 17, 2021).

178. *Mergers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers> [https://perma.cc/K26W-ES8X] (last visited Sept. 17, 2021).

179. *Id.*

180. FED. TRADE COMM’N & DEP’T OF JUST., HORIZONTAL MERGER GUIDELINES 1 & n.2 (2010), <https://www.ftc.gov/sites/default/files/attachments/mergers/100819hmg.pdf> [https://perma.cc/EQ8W-CTNT].

181. *Id.* Mergers that will lessen competition are cause for concern. *Id.* at 2–5.

182. *Id.* at 29–30 (conceding that projected efficiencies may not actually materialize).

183. See, e.g., Press Release, *supra* note 174.

184. David Shepardson, *FCC Approves Nexstar Media Deal to Buy Tribune Media*, REUTERS (Sept. 16, 2019, 1:16 PM), <https://www.reuters.com/article/us-tribune-media-m-a-nexstar-media/fcc-approves-nexstar-media-deal-to-buy-tribune-media-idUSKBN1W1276> [https://perma.cc/SH5T-NAD2].

185. See Press Release, *supra* note 174.

186. See *id.*

187. *Id.*

While the FCC adheres to quantitative limitations on ownership to regulate communications, the antitrust enforcement agency's analysis of the same merger looks at a broader range of competitive concerns more closely related to the businesses supporting the media firms involved.<sup>188</sup> The fact that the FCC and the enforcing agency approach the same transactions with different guiding frameworks does not necessarily mean that their analyses are unrelated or that the FCC's regulations do not influence the determinations the enforcing agency makes.<sup>189</sup> To some extent, the threshold limitations established by the FCC likely inform the enforcing agency's analysis of the degree to which consolidation in the relevant sector would interfere with competition or cause harm, while the FCC's framework also considers whether a transaction may increase competition.<sup>190</sup>

The FCC may consider the extent to which licensees seeking renewal maintain or advance anticompetitive practices; however, the FCC is not conclusively directed by a firm's compliance with antitrust laws.<sup>191</sup> Operating within its delegated authority<sup>192</sup> requires the FCC to refrain from concerning itself too directly with the business activities of broadcast firms.<sup>193</sup> Yet, considering antitrust principles in the context of the media has raised the question of whether the First Amendment necessarily precludes the government, including antitrust enforcement agencies, from "imposing" on news organizations its "own vision of information freedom."<sup>194</sup> Moreover, the extent to which otherwise anticompetitive arrangements affect the creation and dissemination of news information<sup>195</sup> demonstrates that the two bodies of law—First Amendment and antitrust—can be in conflict.<sup>196</sup> Under the former, government involvement is viewed with scrutiny. Under the latter, government involvement may be mandated.

Importantly, the FCC's broadcast media regulations are not actually antitrust immunity provisions. Unlike other antitrust principles—such as the *Noerr-Pennington* doctrine, which immunizes from antitrust liability actions constituting government petitioning<sup>197</sup>—the FCC's broadcast regulations

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188. SCHERER, *supra* note 54, at 6.

189. *See id.* at 6–7.

190. *See id.* at 9.

191. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 223 (1943).

192. *See supra* Part I.A.3.

193. *See Nat'l Broad. Co.*, 319 U.S. at 232 (Murphy, J., dissenting) (agreeing that the regulation of radio broadcasting firms may be necessary for the furtherance of the public interest but disagreeing that certain regulations fall within the agency's delegation of power).

194. Crane, *supra* note 170.

195. *See The Daily: Taking Over Local News*, N.Y. TIMES, at 9:40–11:00, 12:35–14:05 (Apr. 6, 2018) (accessed online), <https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html> [https://perma.cc/WJ9U-7ZGZ] (discussing the operational changes, including production centralization, that occurred after a station was acquired by Sinclair).

196. *See Crane, supra* note 170 ("[A]n exclusive legal right to a news story may prevent its broad dissemination and hence limit the right of others to speak and to compete, but also enable the creation of the story in the first place.").

197. *See FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE* 3–4 (2006), <https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff>

simply establish thresholds of consolidation that have been deemed permissible.<sup>198</sup> The regulations do not, however, guarantee a merger's approval.<sup>199</sup>

### 3. Administrative Law

Finally, general principles of administrative law are worth mentioning, as the degree of permissible intervention by the FCC is defined by the scope of authority delegated to the agency by Congress. As noted in the overview of the current media landscape, Congress initially delegated certain powers to the FCC in the Communications Act of 1934. This delegation of power was constitutionally founded in Congress's authority to regulate "interstate and foreign commerce."<sup>200</sup> A court's review of the legality of the FCC's rulemaking is deferential, and judicial intervention is limited to instances in which the agency's action may be deemed to be arbitrary and capricious.<sup>201</sup> For instance, courts have reviewed under this deferential standard the agency's numerical limits on local ownership<sup>202</sup> and the extent to which certain regulations actually advance the policies they purport to promote.<sup>203</sup>

## II. REGULATING THE MEDIA & PROTECTING THE PRESS

This part details the impact FCC regulations have on the state of the press. First, a review of Sinclair's attempted acquisition of Tribune illustrates the connection between media consolidation and political polarization. Next, an overview of media regulations in various sectors outlines the policy concerns underlying the FCC's regulatory approach. Finally, the intersection of antitrust policy considerations in merger review with the First Amendment "marketplace of ideas" metaphor animates the debate between calls for increased oversight of local media ownership and the arguments for continued deregulation.

### A. Political Polarization

Concentrated ownership has had a sizable—yet potentially unrecognized—impact on citizen welfare and the nation's democratic health.<sup>204</sup> Consolidation may facilitate mass polarization by providing firms

report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf [<https://perma.cc/3VNR-65V8>].

198. *See supra* Part I.A.5.

199. *See supra* notes 137, 178–82 and accompanying text.

200. 47 U.S.C. § 151; *see also* U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has held that the "public interest, convenience, or necessity" criteria was specific enough to provide the FCC with sufficient guidance in the exercise of its delegated authority. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

201. Administrative Procedure Act, 5 U.S.C. § 706.

202. *See Sinclair Broad. Grp. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

203. *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

204. Such welfare for viewers of conservative programming, specifically, has been further diminished by the "dearth of competition for factual accuracy" among right-leaning outlets. *Bazelon, supra* note 14.

with outsized influence in a medium that is viewed as being particularly trustworthy and not transparently slanted. While the marketplace of ideas metaphor underlying the FCC's focus on viewpoint diversity promotes the protection of all viewpoints,<sup>205</sup> the metaphor appears to fall short when political biases are embedded in a medium that viewers expect or believe is objective<sup>206</sup> and when the impact of misinformation and consumer preferences on the broader media landscape—the “marketplace”—is considered.<sup>207</sup>

### 1. A Case Study: Sinclair Broadcast Group

Sinclair's attempted acquisition of Tribune illustrates the effect the national television ownership rule has on the current media landscape, while a study conducted following Sinclair's acquisition of other stations warns of the broader implications of media consolidation. Before Sinclair attempted to acquire Tribune, the firm owned 173 stations across eighty-one DMAs.<sup>208</sup> In building this portfolio, Sinclair used “creative” growth techniques.<sup>209</sup> One such strategy involved joint sales agreements,<sup>210</sup> which allowed the firm to circumvent a regulation limiting the number of top-rated channels any company could own in a single market.<sup>211</sup> Sinclair also engaged in agreements, in which the firm sold one station to a former employee, retained ownership in a second, and essentially maintained control of both, even though the firms were formally owned separately.<sup>212</sup> In spite of the seemingly evident reduction in viewpoint diversity these agreements would cause, Sinclair's general counsel noted that, “to his knowledge,” the agreements neither harmed program diversity nor reduced competition for viewers.<sup>213</sup>

In 2017, Sinclair took a similarly strategic approach when it sought to acquire Tribune.<sup>214</sup> The proposed merger would have allowed Sinclair to

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205. See *supra* Part I.B.1.

206. See *supra* notes 42–47 and accompanying text.

207. See Bazelon, *supra* note 14.

208. SCHERER, *supra* note 54, at 1.

209. Kang et al., *supra* note 53. David Smith, formerly Sinclair's president and CEO and now the firm's executive chairman, “helped pioneer a workaround” to avoid the rule limiting local ownership caps by having relative Carolyn Smith become majority owner of the stations Sinclair would be required to divest, “effectively turning control of the station back to Sinclair.” Felix Gillette, *The Sinclair Revolution Will Be Televised. It'll Just Have Low Production Values*, BLOOMBERG BUSINESSWEEK (July 20, 2017, 5:00 AM), <https://www.bloomberg.com/news/features/2017-07-20/the-sinclair-revolution-will-be-televised-itll-just-have-low-production-values> [https://perma.cc/9SN9-F3RK].

210. Kang et al., *supra* note 53.

211. *Id.*

212. *Id.*

213. *Id.*

214. The proposed transaction captured the attention of many lawmakers. See Press Release, U.S. Sen. Amy Klobuchar, Klobuchar, Durbin, Senators Urge Department of Justice and Federal Communications Commission to Closely Scrutinize Media Mergers, Particularly, the Proposed Sinclair Broadcasting/Tribune Media Merger (Jan. 4, 2018), <https://www.klobuchar.senate.gov/public/index.cfm/2018/1/klobuchar-durbin-senators-urge>

control 215 stations, reach more than 70 percent of viewers (before the UHF discount was applied),<sup>215</sup> and enjoy “significant presence” in political swing states.<sup>216</sup> Even though the national television ownership rule forbids one firm from reaching more than 39 percent of the national audience,<sup>217</sup> the reinstated UHF discount would have allowed Sinclair to reach this significant share of the national audience.<sup>218</sup> Even after the discount’s application, however, Sinclair would have been required to sell twenty-three stations to adhere to the regulation’s cap.<sup>219</sup> Still, such divestiture was scrutinized for appearing to be more formal than functional,<sup>220</sup> thereby undercutting the effect of the divestiture requirement and audience-reach limitations.<sup>221</sup> The transaction failed on other grounds, and in May 2020, the FCC fined Sinclair following the agency’s investigation into Sinclair’s failure to disclose certain information.<sup>222</sup>

Before the attempted acquisition, Sinclair had close ties to the Trump campaign and administration.<sup>223</sup> Considering both the extent to which the deal had been steeped in politics and the connection between Sinclair’s leadership and the Trump administration,<sup>224</sup> the FCC’s warning that political

department-of-justice-and-federal-communications-commission-to-closely-scrutinize-media-mergers-particularly-the-proposed-sinclair-broadcasting-tribune-media-merger [https://perma.cc/Q6XP-D2NQ].

215. David Shepardson, *Sinclair to Sell TV Stations as Part of Tribune Acquisition*, REUTERS (Apr. 24, 2018, 4:52 PM), <https://www.reuters.com/article/us-tribune-media-m-a-sinclair-ma/sinclair-to-sell-tv-stations-as-part-of-tribune-acquisition-idUSKBN1HV2RL> [https://perma.cc/6DWH-5CNF].

216. See Kang et al., *supra* note 53.

217. See 47 C.F.R. 73.3555(e) (2020).

218. Lee, *supra* note 115. Importantly, Sinclair was not the first—and likely will not be the last—to exploit the discount. *Id.*; see also Labaton, *supra* note 72 (attributing the growth of Viacom-owned UPN, Time-Warner-owned WB, and Fox to the UHF discount).

219. Edmund Lee, *In Blow to Sinclair, F.C.C. Chief Says He Has ‘Serious Concerns’ with Tribune Deal*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/business/media/fcc-sinclair-tribune-pai.html> [https://perma.cc/S4PC-Y5L7].

220. While the stations would be formally divested, the stations would, in effect, still be subject to Sinclair control via “sidecar” agreements, which transfer the FCC license but allow the seller to retain control. *Id.*

221. Lee, *supra* note 115 (explaining that stations involved in the planned divestitures would “effectively remain within Sinclair’s control”); 47 C.F.R. § 73.3555(e)(3) (2020) (requiring divestiture when an entity exceeds the audience reach cap).

222. Press Release, Fed. Commc’n, Sinclair Agrees to Pay \$48 Million Civil Penalty (May 6, 2020), <https://docs.fcc.gov/public/attachments/DOC-364198A1.pdf> [https://perma.cc/K6AW-M2P7]; see also Neil Vigdor & Edmund Lee, *Sinclair Wanted to Rival Fox News. Now It Faces a \$48 Million Fine*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/06/business/sinclair-fine-fcc.html> [https://perma.cc/GC7V-GQBR].

223. Josh Dawsey & Hadas Gold, *Kushner: We Struck Deal with Sinclair for Straighter Coverage*, POLITICO (Dec. 16, 2016, 5:35 PM), <https://www.politico.com/story/2016/12/trump-campaign-sinclair-broadcasting-jared-kushner-232764> [https://perma.cc/SQF6-FPJ4].

224. Boris Epshteyn, a spokesman for President Trump, became a Sinclair commentator after leaving the White House. See Kang et al., *supra* note 53. Chairman Pai and former Sinclair CEO David Smith met twice after President Trump’s election and before sweeping deregulatory efforts, like the UHF discount’s reinstatement and the refusal to limit use of joint sales agreements, were introduced. *See id.*

motivations cannot guide agency decision-making was somewhat ironic.<sup>225</sup> In the press release announcing the historic fine, Chairman Pai expressed disagreement with the merger's opponents, who had demanded that the agency revoke Sinclair's licenses.<sup>226</sup> Pai asserted that the First Amendment "still applies" even though opponents "don't like what they perceive to be the broadcaster's viewpoints."<sup>227</sup> Though the deal was never completed, the FCC did not expressly indicate how, if at all, the company's political slant and affiliations would have weighed into the agency's consideration of the proposal.<sup>228</sup>

Relying on the same deregulatory discount, Nexstar TV ultimately acquired Tribune in 2019.<sup>229</sup> While Sinclair's attempted acquisition would have allowed its stations to reach 72 percent of U.S. households (before the UHF discount),<sup>230</sup> Nexstar's 2019 acquisition contributed to the firm's current national audience reach of 68 percent (before the UHF discount).<sup>231</sup> While the difference between Sinclair's potential reach and the reach that Nexstar ultimately achieved is not insignificant, Nexstar ultimately amassed an audience reach roughly comparable to that which Sinclair sought. Even without the Tribune stations, Sinclair's national reach remained significant,<sup>232</sup> and the firm's size makes it an apt example for considering the relationship between consolidation and polarization.

## 2. Consolidation & Polarization

After Sinclair's proposed acquisition failed, an empirical review of Sinclair's business shed light on the potential impact the deal's success could have had on local news throughout the country.<sup>233</sup> As an initial matter, Sinclair's coverage is generally conservative.<sup>234</sup> While Sinclair's "partisan leanings" are not "immediately apparent" because the firm operates local affiliates of ABC, CBS, Fox, and NBC, its political orientation is woven throughout its affiliates' broadcasts.<sup>235</sup> Some of the most politically slanted pieces of coverage are the firm's "must-run[]" segments.<sup>236</sup> The segments

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225. See *supra* note 122. This warning may be characterized as ironic because it warns against politicization, and there were political undertones to the UHF discount's reinstatement. See McGill & Hendel, *supra* note 122.

226. See Press Release, *supra* note 222.

227. *Id.*

228. See Press Release, Fed. Commc'n's Comm'n, Statement of Chairman Ajit Pai on Sinclair/Tribune Transaction (July 16, 2018), <https://docs.fcc.gov/public/attachments/DOC-352619A1.pdf> [<https://perma.cc/N82C-NSMH>].

229. See Press Release, *supra* note 66.

230. *Sinclair and Tribune, MB Docket 17-179*, FED. COMM'CNS COMM'N, <https://www.fcc.gov/transaction/sinclair-tribune> [<https://perma.cc/2VZC-FLZQ>] (last visited Sept. 17, 2021).

231. NEXSTAR MEDIA GROUP, *supra* note 67.

232. See *supra* note 64 and accompanying text.

233. See generally Martin & McCrain, *supra* note 25.

234. Bazelon, *supra* note 14.

235. *Id.*

236. Kolhatkar, *supra* note 10.

are produced—or scripted—centrally by Sinclair’s corporate team,<sup>237</sup> and local affiliates are required to run these pieces, regardless of the affiliates’ evaluations of the segments’ objectivity and validity.<sup>238</sup>

A report published in the *American Political Science Review* studied transcripts of news coverage from Sinclair affiliates, both before and after their acquisition by the firm.<sup>239</sup> Researchers found that after Sinclair acquired stations, local news coverage decreased, as national news coverage increased.<sup>240</sup> Additionally, politically conservative rhetoric and language increased postacquisition.<sup>241</sup> The study’s demonstration of a politically rightward shift indicates a relationship between Sinclair’s acquisition of stations and the introduction of a politically conservative slant. This observation, in turn, implies that viewpoint diversity was reduced, as postacquisition changes to broadcast content shifted perspectives consistently toward more conservative views. Based on the samples drawn from the Sinclair affiliates, the report broadly concluded that consolidation can support, and potentially fuel, mass political polarization.<sup>242</sup>

Consolidation supports polarization by providing a firm with both a larger audience and the practical capacity to guarantee that the viewpoints the firm wishes to advance are widely shared. A few observations of Sinclair’s model demonstrate these conclusions. First, viewers of Sinclair-owned affiliates are not given obvious notice of the local station’s ownership.<sup>243</sup> Viewers are thus unable to consume the local media with expectations of a broadcast’s political propensities the way they may be able to with cable news channels, like MSNBC or Fox.<sup>244</sup> Second, centrally produced segments, scripts, and topics create content homogeneity among affiliates across the country.<sup>245</sup> Unlike a single local news outlet creating independent content falling short of viewers’ expectations of objectivity,<sup>246</sup> Sinclair’s national scale guarantees that a greater number of viewers across the country will be exposed to such coverage.<sup>247</sup> Finally, Sinclair’s leaders’ political leanings

237. *Id.*

238. *Id.* See generally *Last Week Tonight with John Oliver (@LastWeekTonight), Sinclair Broadcast Group: Last Week Tonight with John Oliver (HBO), YOUTUBE* (July 2, 2017), <https://www.youtube.com/watch?v=GvtNyOzGogc&t=3s> [https://perma.cc/UZ88-G25K] (demonstrating the departure of Sinclair’s coverage from journalistic standards of objectivity).

239. See Martin & McCrain, *supra* note 25.

240. *Id.* at 373, 375, 379.

241. *Id.* at 380.

242. *Id.* at 382–83.

243. See *About*, *supra* note 64 (indicating that Sinclair operates stations “affiliated with all the major broadcast networks”).

244. Cf. *The Daily: Taking Over Local News*, *supra* note 195, at 12:20–12:34 (discussing how the credence of trusted local newscasters may camouflage the subjectivity of must-run segments or scripts).

245. Martin & McCrain, *supra* note 25, at 373, 383.

246. See *Americans Embrace Digital*, *supra* note 17 (“A majority of Americans say local journalists should not share their views about local issues.”). This belief regarding journalists’ sharing of their views suggests that viewers expect, or at least hope, for the medium to be objective. The Knight Foundation-Gallup study suggests that many viewers believe the local news is, indeed, objective. See text accompanying *supra* note 43.

247. See *supra* note 64 and accompanying text.

have ensured that slanted coverage was almost always slanted only one way.<sup>248</sup> Here, it is critical to note that the concerns revealed by this study would be present even if the slant was toward the left.<sup>249</sup>

Notwithstanding the caveat that any divergence from an objective lens is troublesome, Sinclair's conservative slant is particularly problematic given the relationship between viewers' political affiliations and their trust in the news media.<sup>250</sup> A recent Gallup poll showed that most Democrats trust that the media is "fully, accurately, and fairly" conveying the news, while Republicans strongly distrust the media.<sup>251</sup> Absent scholarship defining the extent to which trusting viewers, as compared to skeptical viewers, actually accept the information conveyed in the media, commentary<sup>252</sup> on the impact of widespread misinformation and disinformation suggests that the belief that viewers are capable of filtering and properly situating politically biased coverage<sup>253</sup> is dangerously optimistic. Conservative coverage, which itself may be promoting distrust in the media, thus discourages viewers who have adopted such distrust from seeking out information from other sources and breaks down the foundational assumptions supporting the marketplace of ideas metaphor.<sup>254</sup>

One of the most notorious examples of Sinclair's must-run segments involved centrally drafted scripts about the danger of fake news.<sup>255</sup> This illustration of Sinclair's control of local affiliates' scripts revealed a political

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248. See Bazelon, *supra* note 14. But see Martin & McCrain, *supra* note 25, at 382–83.

249. Stigler Report, *supra* note 25, at 21 n.41 (citing Kolhatkar, *supra* note 10).

250. See Brenan, *supra* note 9 (finding that, in 2020, 73 percent of Democrats trusted mass media a "great deal" or a "fair amount" and that, in 2019, 69 percent of Democrats trusted mass media a "great deal" or a "fair amount," while finding that, in 2020, only 10 percent of Republicans trusted mass media a "great deal" or a "fair amount" and that, in 2019, 15 percent of Republicans trusted mass media a "great deal" or a "fair amount").

251. *Id.*

252. See Miles Parks, *Fake News: How to Spot Misinformation*, NPR (Oct. 31, 2019, 12:01 AM), <https://www.npr.org/2019/10/29/774541010/fake-news-is-scary-heres-how-to-spot-misinformation> [https://perma.cc/GY48-TFB9] (recommending that consumers consider whether content is sponsored or presented with properly contextualized evidence); Brian X. Chen, *How to Deal With a Crisis of Misinformation*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/10/14/technology/personaltech/how-to-deal-with-a-crisis-of-misinformation.html> [https://perma.cc/P6LV-4VCK] (recommending similar strategies).

253. For instance, Boris Epshteyn allegedly used must-run segments to "push the Trump agenda." Adam K. Raymond, *Sinclair, Conservative Local TV Giant, Cuts Pro-Trump Agenda*, N.Y. MAG. (Dec. 11, 2019), <https://nymag.com/intelligencer/2019/12/sinclair-giant-cuts-pro-trump-propagandist-boris-epshteyn.html> [https://perma.cc/T64C-ACLW]. Though his segments were removed from broadcasts, his retention at the firm indicates his influence may persist. The connection between Sinclair and the Trump administration is further evidenced by a 2016 agreement to present increased Trump campaign coverage. Dawsey & Gold, *supra* note 223.

254. See Brenan, *supra* note 9.

255. See Jacey Fortin & Jonah Engel Bromwich, *Sinclair Made Dozens of Local News Anchors Recite the Same Script*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html> [https://perma.cc/3AAX-U26V]; *The Daily: Taking Over Local News*, *supra* note 195, at 12:20–12:34 ("[Y]ou're still using your trusted local anchors, who do not have a bias, . . . to give credence and to give weight to that commentary.").

agenda<sup>256</sup> that threatened the democratic role of the local media.<sup>257</sup> Moreover, the sheer number of stations that aired their trusted local anchors reading the script emphasized Sinclair's national reach<sup>258</sup> and the ease with which a consolidated firm can introduce biased coverage into households across the nation.

Beyond local television news, the consolidation of firms in the digital space has had a discernable and dangerous impact on political polarization.<sup>259</sup> The reckoning of free speech and regulatory concerns in the digital space can easily overshadow the urgency and stakes of what was narrowly avoided when Sinclair's attempted acquisition failed.<sup>260</sup> While other information sources, such as the internet, raise critical concerns of their own, both the importance of local television news to communities and people's trust in their local anchors suggest that a review of one of the primary rules regulating broadcast television ownership is no less urgent. Though one empirical study of one media firm's impact on its affiliates may not be sufficient to support a complete rewriting of the relevant rules, the findings should at least indicate the necessity of closer review. That the FCC already convenes regularly to review other broadcast media regulations further supports this position. While introducing increased government oversight of an aspect of the media raises First Amendment concerns, as the following section shows, government regulation of the media does not inherently contravene First Amendment guarantees.

### *B. Regulating the Media*

Regulations of newspapers and broadcast radio and television have been upheld against constitutional challenges. These decisions show that the constitutional guarantee of a free press does not preclude governmental oversight of the media. Courts have found varying degrees of regulation of certain media forms to be constitutionally permissible based on the nature of the medium concerned.<sup>261</sup> Accordingly, the existence of regulatory

256. For example, President Trump was “a protected figure on Sinclair airwaves,” and the company’s stations had “adopted Trump’s tactic” of attacking competitors’ production of “fake news.” Gillette, *supra* note 209.

257. While must-run segments are unique to Sinclair, a firm’s ability to direct or influence affiliates’ local programming still calls into question the extent to which stations are serving their local communities. See *The Daily: Taking Over Local News*, *supra* note 195, at 10:00, 12:35.

258. See *supra* note 64 and accompanying text.

259. Stigler Report, *supra* note 25, at 277.

260. See notes 14–15 and accompanying text.

261. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (“Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”); see also Reno v. Am. C.L. Union, 521 U.S. 844, 868 (1997) (“[S]ome of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers.”); *Pacifica Found.*, 438 U.S. at 748 (explaining that the broadcast medium has enjoyed the “most limited First Amendment protection” because of its “uniquely pervasive presence” and “unique[] accessib[ility] to children”); Red

intervention or oversight in other areas of the media industry does not suggest that the level of oversight in one area necessarily carries over—or applies—to another. Yet, courts' reasoning in decisions upholding media regulations demonstrates how regulation can comply with the First Amendment and how deregulation may be its own form of interference with press freedoms.

When the New Deal was implemented in the 1930s, an “anti-Bigness” perspective served as the “prevailing” antitrust ideology.<sup>262</sup> At the time, the U.S. Department of Justice initiated antitrust suits against dominant newspapers based on the belief that those newspapers harmed consumers by raising prices.<sup>263</sup> These suits were further based on the belief that the competitive disruption these dominant firms imposed fundamentally interfered with the functioning of the free press and the marketplace of ideas.<sup>264</sup>

In *Associated Press v. United States*,<sup>265</sup> for example, the Supreme Court held that Associated Press (AP) newspapers could not prevent local competitors from becoming AP members.<sup>266</sup> The Court rejected the argument that regulating newspapers in this way violated the freedom of the press and further insisted that antitrust jurisprudence in media could not be adjudged by an industry-specific standard.<sup>267</sup> The Court noted that, while the Constitution guaranteed the freedom to publish, such guarantee did not include the freedom to combine to keep others from publishing.<sup>268</sup> Though Justice Owen Roberts warned in dissent that establishing a decree that sought to prevent future antitrust injury in newspaper publishing could threaten the press’s freedom,<sup>269</sup> this early case demonstrated that oversight—including enforcement under antitrust law—and press freedoms were not mutually exclusive.<sup>270</sup>

The Court has also held that regulation of broadcast radio does not necessarily violate the First Amendment.<sup>271</sup> In *National Broadcasting Co. v. United States*,<sup>272</sup> the Court held that the FCC’s denial of a radio station license did not violate the applicant stations’ constitutional rights because

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Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969) (finding more involved regulation of the broadcast medium constitutional “[i]n view of the scarcity of broadcast frequencies”).

262. Crane, *supra* note 170.

263. *Id.*

264. *Id.*

265. 326 U.S. 1 (1945).

266. *See id.* at 9.

267. *Id.* at 20; *see also id.* at 7 (“Members of [the AP] are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want.”).

268. *Id.* at 20.

269. *Id.* at 48 (Roberts, J., dissenting in part).

270. *Id.* at 20 (majority opinion).

271. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943). *But see FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (finding that First Amendment protection “might be required” if the FCC’s prohibition on allegedly offensive content “could be traced to its political content”).

272. 319 U.S. 190 (1943).

Congress, through the Communications Act of 1934,<sup>273</sup> authorized and empowered the FCC to manage the distribution of broadcast rights to serve the “public interest, convenience, or necessity.”<sup>274</sup> Further, the Court reasoned that the Constitution does not guarantee “the right to use the facilities of radio without a license.”<sup>275</sup>

While the Court’s analysis was focused on freedom of speech in the context of limited licenses, the broader implications of the Court’s holding on the government’s ability to control access to a vehicle of communication suggest that press freedoms did not necessarily remain unaffected, since radio facilities, like broadcast television stations, also serve as conduits for the dissemination news and information. Moreover, the Court’s introduction of the efficiencies that broadcasting agreements with networks may create alluded to economic considerations. Though the Court’s holding was limited to First Amendment concerns, the Court’s acknowledgement of economic efficiencies points to the interconnectedness of the constitutional and antitrust questions raised by regulation of the media.

Regulations affecting viewpoint were then addressed directly in *Red Lion Broadcasting Co. v. FCC*.<sup>276</sup> There, the Supreme Court confronted constitutional and statutory challenges to the fairness doctrine and maintained that there is a public interest in viewpoint diversity.<sup>277</sup> The fairness doctrine required broadcasters to present “discussion of public issues” and create opportunity for opposing perspectives on those issues to be given “fair coverage.”<sup>278</sup> The Court concluded that the doctrine complied with the First Amendment’s protections, reasoning that a broadcaster’s freedom to speak and publish “does not embrace a right to snuff out” others’ rights to the same.<sup>279</sup> The doctrine upheld in *Red Lion* suggests that all measures affecting content do not necessarily infringe the freedoms that the First Amendment guarantees.<sup>280</sup> Further, the Court’s holding again demonstrated the interconnectedness of First Amendment protections and the competitive concerns central to antitrust law.<sup>281</sup>

In television specifically, the Seventh Circuit grappled with the balance between promoting competition and protecting the vitality of the marketplace of ideas. In *Schurz Communications, Inc. v. FCC*,<sup>282</sup> Judge Richard Posner questioned whether the FCC’s position that supporting independent stations through syndication would lead to increased diversity in programming within

273. 47 U.S.C. § 151.

274. *Nat'l Broad. Co.*, 319 U.S. at 225.

275. *Id.* at 227.

276. 395 U.S. 367 (1969).

277. *Id.* at 380, 385.

278. *Id.* at 382. In practice, this means that if a broadcaster grants a political candidate coverage, the broadcaster must grant at least equal time to the candidate’s opponent. See *id.* at 385.

279. *Id.* at 387 (reaching this conclusion on the ground that broadcast signals reach further than an individual’s voice).

280. See *id.* at 394.

281. See *id.* at 400–01.

282. 982 F.2d 1043 (7th Cir. 1992).

any particular market.<sup>283</sup> Judge Posner's analysis asserted that consolidated ownership may actually promote diversity by making more feasible the simultaneous broadcast of different types of programs within a given market.<sup>284</sup>

Two years after *Schurz*, the Supreme Court in *Turner Broadcasting System, Inc. v. FCC*<sup>285</sup> considered more directly whether government oversight of television complied with the First Amendment's protections. At issue in *Turner* was a law requiring cable operators to designate a certain share of their transmission capacity to broadcasters that requested carriage by cable.<sup>286</sup> In drafting the law, Congress determined that horizontal and vertical concentration in the cable industry had foreclosed broadcasters, created barriers to entry for new programmers, and reduced the number and variety of voices available to consumers.<sup>287</sup> Importantly, the Court determined that these rules imposed by the law were content-neutral because the interference with cable operators' decisions on the allocation of transmission capacity was not based on programming content.<sup>288</sup> That such designation necessarily limited the transmission capacity cable providers could allocate for content of their choice did not alter the Court's determination.<sup>289</sup> Further, the Court cited the importance of guaranteeing the survival of free broadcast television, which had by then become a "vital" medium in American communications.<sup>290</sup>

Though *Turner* was centrally concerned with a measure applied to cable television providers, the policies underlying the Court's decision demonstrate that the growing influence and prominence of cable communications did not eliminate the public interest in broadcast television.<sup>291</sup> The Court's distinction between content-based and content-neutral measures is also important to understanding the constitutional limits of broadcast television regulations.<sup>292</sup> Just as the *Turner* Court found that measures that were not based on content but that may affect content were content-neutral, so too may a modified national television ownership rule be classified as content-neutral.<sup>293</sup> While a revised version of the rule may ultimately affect the content broadcast on local television

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283. *Id.* at 1054 ("If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group.").

284. *Id.*

285. 512 U.S. 622 (1994).

286. *Id.* at 630.

287. *Id.* at 634.

288. *Id.* at 643–45 (noting that, generally, laws are content-based when they differentiate favored and disfavored speech on the basis of the ideas expressed). *But see id.* at 645 (specifying that facially neutral measures may be content-based if the "manifest purpose is to regulate speech because of the message it conveys").

289. *Id.* at 649–50.

290. *Id.* at 647.

291. *See id.*

292. *See id.* at 645.

293. *See id.* at 643.

stations, modifications seeking to limit increased consolidation and guard against politically slanted coverage would remain neutral because limitations would be based on the size of a media company's portfolio, the company's commitment to objectivity, and the company's potential political ties, rather than the specific content the company's stations present.<sup>294</sup>

As the foregoing overview demonstrates, there has not been a wholesale rejection of media regulation. In fact, regulation has been accepted and promoted as protecting the means by which people receive news and information. In instances in which regulation has been supported, a principal motivation has been the protection of a diversified media.<sup>295</sup> The role that government oversight plays in advancing this goal and the Court's decisions upholding such intervention imply that an entirely hands-off approach is neither beneficial to viewers nor required by the First Amendment. Together, these conclusions validate the necessity of a national television ownership rule that carries weight rather than a rule that is essentially invalidated by the calculation method it employs<sup>296</sup> or that looks beyond the polarization it may, at least in some instances, promote.<sup>297</sup> Most broadly, these conclusions demonstrate that oversight of the press and the freedom of the press are not mutually exclusive.

In light of the concerns raised by Sinclair's proposed transaction and addressed by courts in other media, this Note now raises two questions: Do the national television ownership rule and UHF discount serve the public interest when the consolidations they have facilitated are reviewed in hindsight? Could regular review—and the potential revision—of these rules promote the interests the FCC's regulations purport to advance?

### C. Conflicting Views Regarding Regulatory Immunity

The preceding overview establishes that regulating the media is not necessarily constitutionally problematic. Still, reviewing and reforming the national television ownership rule requires identifying the appropriate level of government oversight that neither renders the relevant rules futile nor empowers the government to effectively control the press. As an initial matter, broadcast media ownership regulations are not truly immunity provisions,<sup>298</sup> even though they permit consolidation that may otherwise be prohibited or viewed suspiciously for being anticompetitive in an ordinary market.<sup>299</sup> In addition, views about "immunity" should not be conflated with views about media regulation as a whole. Arguments against "immunity" should be understood as arguments advocating for regulations that promote oversight and scrutinize consolidation, while arguments for "immunity"

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294. See *supra* notes 226–33 and accompanying text.

295. See *supra* notes 276–77 and accompanying text.

296. See *supra* notes 230–31 and accompanying text (illustrating the effect the UHF discount had on Nexstar's ability to reach nearly 70 percent of the national audience).

297. See *supra* Part II.A.2.

298. See *supra* notes 197–99 and accompanying text.

299. See HORIZONTAL MERGER GUIDELINES, *supra* note 180, at 18.

should be understood as arguments for rules that primarily guard against government intervention and that permit and facilitate continued consolidation.

### 1. Calls for Increased Regulation

Proponents of increased regulation and the prevention of media mergers would argue that consolidation leads to the homogenization of content.<sup>300</sup> Acknowledging that the connection between consolidation and viewpoint diversity must be qualified, there is a strong argument that consolidation in local broadcast news has indeed led to content homogenization.<sup>301</sup> Because such homogenization runs counter to the FCC's goals of diversity and localism, it is reasonable to conclude that increased oversight preventing such consolidation would presumably also protect and promote those values.

Additionally, proponents of increased regulation would likely adopt Judge Learned Hand's conceptualization of antitrust law as a legal framework that operates positively to "further[] the First Amendment goal of wide dissemination of information and competing viewpoints."<sup>302</sup> Practically, this "positive role" is one that prevents "dominant firms" from "lock[ing] down monopolies over news stories."<sup>303</sup> This protection could reasonably be extended to prevent dominant firms from establishing or maintaining power over media through which news and information are disseminated, including local broadcast television. Sitting at the intersection of First Amendment and antitrust jurisprudence, this position essentially turns on the belief that "[w]herever a dominant position has been attained, restraint necessarily arises."<sup>304</sup> When a firm establishes or threatens to establish dominance that would interfere with regular market forces, the First Amendment's guarantees demand action that would prevent such dominant actors from interfering with competition in the marketplace of ideas.<sup>305</sup> Dominant positions have been attained;<sup>306</sup> thus, some restraint is needed.

Focusing on the market definition for local television news further supports this position. Even if a firm owned one station in every DMA, one

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300. Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. UNIV. L. REV. 1399, 1411 (2012); cf. Martin & McCrain, *supra* note 25, at 373 (finding that there is a substantial supply-side influence on local news content that "favors the political and financial interests of [conglomerate] owners"). *But see* Ho & Quinn, *supra* note 1, at 860 (concluding from the results of a study of consolidation in newspaper ownership that "[n]either convergence nor divergence inexorably follows from consolidation").

301. *See supra* Part II.A.1.

302. Crane, *supra* note 170 (citing United States v. Associated Press, 52 F. Supp. 362, 372 (1943)).

303. *Id.*

304. Am. Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921); *see also* Crane, *supra* note 170 ("[T]hat today's marketplace might be characterized by an unlimited cacophony of voices would not make it free if those voices were subject to the dominance and control of a few firms.").

305. *See* Crane, *supra* note 170 (concluding that such intervention protects both marketplace democracy and political democracy).

306. *See supra* Part I.A.2.

could argue that content homogeneity among those outlets is not problematic if the relevant market is defined as the DMA because the sameness would only be recognizable among, not within, DMAs. This is, however, what the local multiple ownership rule protects.<sup>307</sup> The relevant market for the national television ownership rule is a national market.<sup>308</sup> Though the content concerned or affected by the national television ownership rule is local in nature, the audience concerned or affected by it is national.<sup>309</sup> Accordingly, actual or potential content homogeneity on the national level is the proper subject of scrutiny. A firm's ability to reach a majority of the national audience indicates significant concentration in the national local news market and may thus be considered a cause for concern. And, practically, deregulation in local media ownership principally advances large firms' interests without producing offsetting benefits, such as a reduction in job losses.<sup>310</sup>

Finally, opponents of "immunity" would likely also dismiss the counterargument that consolidation could support increased viewpoint diversity.<sup>311</sup> While a larger portfolio of stations provides a firm with more flexibility—and potentially reason—to diversify its programming to appeal to the widest range of viewers possible at any given time,<sup>312</sup> this motivation is limited by the extent of the firm's footprint in each DMA. Moreover, a firm's ability to broadcast diverse programming is separate from the strategy a dominate firm actually implements.<sup>313</sup> Because consolidation may incentivize firms to centralize operations to cut costs, it is possible that the economic gains that consolidation may afford large firms could overshadow agendas for diversification.<sup>314</sup>

307. See 47 C.F.R. § 73.3555(b) (2020).

308. See *id.* § 73.3555(e); see also Martin & McCrain, *supra* note 25, at 383.

309. Cf. National Television Multiple Ownership Rule, 83 Fed. Reg. 3661, 3663 (Jan. 26, 2018) (noting that the FCC previously found, in 1984, that the national ownership restriction was "not necessary to promote the goals of competition or diversity," yet acknowledging the possibility that those conclusions may no longer be valid).

310. See generally Connor Raso, *What Does "Deregulation" Actually Mean in the Trump Era?*, BROOKINGS (Nov. 1, 2017), <https://www.brookings.edu/research/what-does-deregulation-actually-mean-in-the-trump-era/> [https://perma.cc/U7LG-KSUE]. As illustrated by the local newspaper industry, consolidation may actually more likely result in job losses. See Barry, *supra* note 96 (discussing newspaper owners' interest in "siphon[ing] away profits rather than reinvest[ing] in local journalism"); David Folkenflik, *What Does It Mean When 2 Giant Newspaper Companies Merge?*, NPR (Dec. 3, 2019, 4:29 PM), <https://www.npr.org/2019/12/03/784553287/what-does-it-mean-when-2-giant-newspaper-companies-merge> [https://perma.cc/P5VW-73B2] (characterizing corporate owners as "aggressive cost-cutter[s]").

311. See *supra* notes 283–84 and accompanying text; see also Stucke & Grunes, *supra* note 300, at 1412 (discussing content homogenization following consolidation in broadcast radio).

312. See *supra* notes 283–84 and accompanying text.

313. See Edmund L. Andrews, *Media Consolidation Means Less Local News, More Right Wing Slant*, STANFORD GRAD. SCH. OF BUS. (July 30, 2019), <https://www.gsb.stanford.edu/insights/media-consolidation-means-less-local-news-more-right-wing-slant> [https://perma.cc/JF25-G9G4].

314. See *The Daily: Taking Over Local News*, *supra* note 195, at 9:40–11:00, 12:35–14:05 (discussing the centralization of production operations).

## 2. Challenges to Oversight

At the most superficial level, the arguments for subjecting media companies to more relaxed regulations would be supported by the assumption that a lack of government involvement in the media industry necessarily equates to the advancement of First Amendment protections.<sup>315</sup> While this argument and its underlying assumption are not entirely insulated from debate, this position does not fully appreciate the distinction between regulation and control.<sup>316</sup> The FCC is expressly prohibited from censoring broadcast communications,<sup>317</sup> and content-based regulations are subject to strict scrutiny.<sup>318</sup> And, while the line between content-based and content-neutral regulations may not be well-defined in all instances, the fact there is a distinction undermines the assumption that all regulation violates the First Amendment.<sup>319</sup>

Beyond the conflation of regulation and control, advocates for more relaxed regulations would likely assert that increased regulation and harsher scrutiny would be dangerous in the hands of politically motivated regulators and enforcement agency heads. However, the reinstatement of the UHF discount, although deregulatory in nature, was very possibly an example of such politically motivated regulatory action.<sup>320</sup> This argument for increased “immunity” thus overlooks the fact that deregulation is a form of government intervention; deregulation does not necessarily equate to insulation from government control or influence.<sup>321</sup>

Finally, a purely economic approach would be favored by proponents of deregulation or “immunity” because consolidation could promote efficiencies achieved through economies of scale and scope.<sup>322</sup> According to Sinclair executives, for example, the loosening of regulatory requirements allows well-resourced companies to invest in new equipment and technology

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315. See *supra* Part I.B.1.

316. Cf. Bazelon, *supra* note 14 (questioning the efficacy of a libertarian approach to press regulation).

317. 47 U.S.C. § 326.

318. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.”).

319. See *id.* at 642–43.

320. See Michael J. de la Merced & Cecilia Kang, *TV Station Owners Rush to Seize on Relaxed F.C.C. Rules*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/business/dealbook/tv-station-owners-rush-to-seize-on-relaxed-fcc-rules.html> [<https://perma.cc/KL2S-5ZJE>] (“Underpinning broadcasters’ dreams of expansion is the hope that Ajit Pai, the F.C.C.’s new chairman and a Republican, will let through the kinds of deal making that had been held up during the Obama administration.”); see also Kang et al., *supra* note 53 (explaining that the partnership between Pai and David Smith “is a case of a powerful regulator and an industry giant sharing a political ideology, and suddenly, with the election of Mr. Trump, having free rein to pursue it—with both . . . reaping rewards.”).

321. See Raso, *supra* note 310 (discussing deregulation as a reduction in the scope or stringency of regulations, as well as eliminating specific disfavored regulatory impacts).

322. See *The Daily: Taking Over Local News*, *supra* note 195, at 7:50, 8:40.

for the more poorly resourced firms they acquire.<sup>323</sup> By this logic, consolidation among firms would also facilitate quality improvements that would better position local broadcast television to compete with streaming and cable companies.<sup>324</sup> Though the appeal to quality may seem compelling, this position overlooks the value of viewpoint diversity and looks too far beyond the relevant market.<sup>325</sup> Moreover, a quality-based argument could actually cut against the promotion of centrally produced programming because such production sacrifices localism,<sup>326</sup> which may be framed as a factor in quality determinations.<sup>327</sup>

### III. INCREASED OVERSIGHT AS A SAFEGUARD

Even in the contemporary media landscape, local broadcast television occupies a uniquely critical role in the democratic society.<sup>328</sup> As financial and political pressures have set the stage for consolidation in local broadcast television, the impact of the industry's reorganization has made the need for the review of broadcast ownership regulations increasingly urgent.<sup>329</sup> Though changes to the national television ownership rule are arguably supported by the foregoing analysis, this Note asserts that the rule and the UHF discount that is so closely tied to it should, at a minimum, be included in the FCC's quadrennial review. Moreover, Congress should act to permit the FCC to adjust the audience reach cap as the public interest so requires.

#### *A. Revising the Rule & Reinstating Regular Review*

Despite any economic efficiency arguments, consolidation is causing communities to lose access to coverage of their local governments as rosters in newspapers' newsrooms shrink<sup>330</sup> and as television stations are permitted to move operations away from the communities they serve.<sup>331</sup> While many areas of the media industry should be scrutinized in light of the wave of issues facing the press today,<sup>332</sup> including a recent Supreme Court ruling affirming the FCC's relaxation of other broadcast regulations,<sup>333</sup> reviewing the rules

323. Kang et al., *supra* note 53; see also Martin & McCrain, *supra* note 25, at 382; Stucke & Grunes, *supra* note 300, at 1403.

324. See Kang et al., *supra* note 53.

325. See *supra* notes 308–09 and accompanying text.

326. See Martin & McCrain, *supra* note 25, at 373.

327. See *id.* at 383.

328. See *supra* Part I.A.1.

329. See *supra* Parts I.A.2, II.A.

330. See Barry, *supra* note 96.

331. See Letter from Robert Menendez & Cory A. Booker, *supra* note 101 (responding to the elimination of an FCC rule requiring broadcast stations to maintain a studio in or near the community associated with its license). See generally Elimination of Main Studio Rule, 82 Fed. Reg. 57,876 (Dec. 8, 2017).

332. See Crane, *supra* note 170 ("In recent years, as antitrust law has become less aggressive on economic terms and technological shifts have enabled a few dominant firms to amass immense power over reams of data and the channels of information exchange, the questions posed by Holmes and Brandeis are ripe for renewed consideration.").

333. FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021) (holding that the FCC's decisions to modify local television ownership rules and to repeal rules limiting the

governing the ownership of local television stations on a national level is particularly important because of the medium's significance and because of the national rule's unique exemption from regular review.<sup>334</sup>

Before Sinclair's attempted acquisition of Tribune failed, commentators feared that regulations supporting continued consolidation could help major broadcasters expand their footprints, "particularly in swing states where political ad spending surges during election years."<sup>335</sup> Though Sinclair's attempt to expand was avoided, the policy concerns it exposed should not be ignored. Consolidated ownership in local television, regardless of the viewpoints the leading firms possess, creates a vehicle by which dominant firms may advance agendas in communities across the country and nearly ensures that viewpoint diversity is not advanced.<sup>336</sup>

Considering the value of local television broadcasting and the influence of the national television ownership rule and the UHF discount on the composition of the industry, both regulations should be included in the FCC's regular review.<sup>337</sup> While these rules have not been precluded from the rulemaking process entirely,<sup>338</sup> incorporating these regulations into the FCC's standing review would promote more consistent review and enable the FCC to determine the appropriate cap for ownership of broadcast television stations at the national level, based on conditions in the media industry.<sup>339</sup> Inclusion in the regular review would also ensure that the rule is considered within the context of other broadcast ownership regulations that affect the same firms. Moreover, the ongoing review would encourage increased accountability and, somewhat counterintuitively, preserve the freedom of the press by guarding against politically motivated or reactionary amendments.<sup>340</sup>

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cross-ownership of media was not "outside the zone of reasonableness for purposes of the APA").

334. See *supra* notes 126–28 and accompanying text.

335. Lee, *supra* note 115 (underscoring the political stakes of media ownership regulation).

336. See *supra* notes 243–49 and accompanying text.

337. See *supra* Part I.A.5.

338. See National Television Multiple Ownership Rule, 82 Fed. Reg. 21,124, 21,125 (May 5, 2017) ("Nothing prevented the [FCC] from issuing a broader *Notice* at the outset or broadening the scope of the proceeding by issuing a further notice to consider whether the public interest would be served by retaining the cap while eliminating the UHF discount."); see also National Television Multiple Ownership Rule, 83 Fed. Reg. 3661, 3662 (Jan. 26, 2018) ("The [FCC] concluded that the CAA did not impose a statutory national audience reach cap or prohibit the [FCC] from evaluating the elements of this rule.").

339. See 2018 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules, 84 Fed. Reg. 6741, 6743 (Feb. 28, 2019).

340. See Michael J. de la Merced, *Sinclair Is Said to Be Near a Deal for Tribune Media*, N.Y. TIMES (May 7, 2017), <https://www.nytimes.com/2017/05/07/business/dealbook/sinclair-is-said-to-be-near-a-deal-for-tribune-media.html> [https://perma.cc/HL9T-G4YM] (characterizing the timing of Sinclair's proposed deal as "auspicious"); Ho & Quinn, *supra* note 1, at 862 (arguing for moderate, incremental reform of communications rules); see also *supra* notes 115–17 and accompanying text (explaining why the discount was eliminated). But see National Television Multiple Ownership Rule, 82 Fed. Reg. at 21,125–26 (indicating that the interconnectedness of the discount and the national ownership cap requires any inquiry into the rules' necessity to be made at once, not independently).

The demonstrated impact of consolidated ownership also supports reevaluation of the national television ownership rule. For example, a revised rule could account for sham divestitures<sup>341</sup> and require an inquiry into any direct political affiliations of media companies seeking to consolidate.<sup>342</sup> More simply, a revised rule could have a lower cap, and the UHF discount could be eliminated.<sup>343</sup> Because the cap and the discount are so closely related, any action regarding one should trigger action—or at least review—of the other.<sup>344</sup> Finally, when companies possess portfolios that, through proposed acquisitions, would approach the updated audience reach cap, regulators could establish specific guidelines for ensuring that the deal does not pave the way for future deregulation via modifications that bend to current ownership interests.<sup>345</sup> While the FCC cannot—and should not—police the content presented via local broadcast television,<sup>346</sup> the call for review simply asks the FCC to do for the national television ownership rule what it is already doing for other broadcast regulations.

In a January 2018 rulemaking proceeding, the FCC asked what “public interest reasons” supported modification to the national television ownership rule.<sup>347</sup> The extent of consolidation in local television and the increasingly polarized political atmosphere that is advanced, at least in part, by such consolidation surely count.<sup>348</sup> To the extent that technological advancements in the broader media environment have informed revisions to other rules,<sup>349</sup> those findings should also inform the agency’s analysis of the national television ownership rule and the UHF discount.<sup>350</sup> Finally, the consideration of additional or modified guidelines that proactively protect the industry from further consolidation constitutes a complex proposal that merits the resources, industry-wide context, and agency attention available at the FCC’s quadrennial review.<sup>351</sup>

341. See *supra* notes 219–21 and accompanying text.

342. See *supra* notes 223–27 and accompanying text.

343. See National Television Multiple Ownership Rule, 83 Fed. Reg. at 3664 (“[N]o commenter in the prior UHF discount proceedings presented evidence that the original technical justification for the discount is still valid, and the [FCC] . . . did not disturb its earlier conclusion that the UHF discount no longer has a sound technical basis following the digital television transition.”); *supra* notes 110–17 and accompanying text.

344. See National Television Multiple Ownership Rule, 82 Fed. Reg. at 21,125–26.

345. See 150 CONG. REC. 196 (2004) (statement of Sen. John McCain).

346. See *supra* note 288.

347. National Television Multiple Ownership Rule, 83 Fed. Reg. at 3665.

348. See *id.*; see also Candeub, *supra* note 3, at 1551 (asserting that the FCC should focus on “protect[ing] the essential function the media serves in a democracy,” which is “minimiz[ing] the difficulties citizens face in monitoring government”).

349. FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1157 (2021) (explaining that the FCC has rationalized changes in the rules with reference to the “rapidly evolving technology and the rise of new media outlets”).

350. See *supra* note 324 and accompanying text.

351. See Ho & Quinn, *supra* note 1, at 862–63 (discussing the complexity of consolidation); National Television Multiple Ownership Rule, 83 Fed. Reg. at 3665 (discussing the benefits of comprehensive review); cf. Candeub, *supra* note 3, at 1609 (“Before the FCC blocks a merger or limits ownership rights, it must be able to tell a fairly

### B. The Insufficiency of Alternatives

While this Note primarily advocates for regular review of the national television ownership rule and the UHF discount and the potential revision of the regulations, this section supplements that recommendation by outlining the limitations of other measures, such as reliance on divestiture and consumers' access to other information sources.

Reliance on divestiture is impractical, and it is not a strong enough measure for addressing the broader policy concerns associated with consolidated ownership.<sup>352</sup> First, divested stations may not actually escape the control of the party from which they have been divested, depending on the structure of the transaction and the parties involved in the divestitures,<sup>353</sup> because divestiture requirements emphasize form over function.<sup>354</sup> Formal divestiture fails to advance the FCC's guiding principles if it does not promote viewpoint diversity, competition, or localism but instead underestimates a company's actual, practical reach.<sup>355</sup>

Next, relying on consumers' access to many information sources is ineffective. While regulations should be informed by the total media landscape, regulations cannot be entirely guided by the general availability of information today.<sup>356</sup> Relying on the fact that the most broadly defined news market is saturated fails to acknowledge the range in quality and trustworthiness of other—even locally oriented—sources. Local broadcast television occupies a particular position in the overall media landscape and in the democratic society.<sup>357</sup> Part of its unique positioning is its focus on—and relevance to—the local market.<sup>358</sup> In terms of quality, the other places to which individuals may turn for local information also pose risks of bias and misinformation. Even Americans' trust in online local news has been exploited by "faux-local" sites that either direct readers to polarizing articles or rewrite content gathered from sources like politically motivated think tanks.<sup>359</sup> Further, many local newspapers facing financial struggles have folded entirely or moved under the ownership of private equity firms that may have no interest in local journalism.<sup>360</sup> Such ownership diminishes the

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convincing story, either theoretically or empirically, showing that its regulations will substantially increase news output.”).

352. See *supra* Part II.A.2.

353. See *supra* notes 209–13, 220–21 and accompanying text.

354. See *supra* notes 220–21 and accompanying text.

355. On paper, sham divestitures would underestimate the firm's audience reach by associating the divested stations with another owner, while failing to recognize that the firm still effectively controls the divested station. See *supra* notes 209–13, 220–21 and accompanying text.

356. See FRIEDLAND ET AL., *supra* note 94, at x.

357. See *supra* Part I.A.1.

358. See *supra* notes 34–35 and accompanying text.

359. See Brendan Nyhan, *Americans Trust Local News. That Belief Is Being Exploited*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/upshot/fake-local-news.html> [https://perma.cc/3CV2-DUUQ].

360. See Marc Tracy, *McClatchy, a Family Newspaper Business, Heads Toward Hedge-Fund Ownership*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/>

newspaper's function as a reliable source for at least two reasons. First, staff can be reduced to the point where the due diligence role the paper plays cannot be sustained.<sup>361</sup> Second, depending on its new owners' motivations, a paper that was once a "watchdog" for local government could be quickly transformed into an outlet that replaces investigative reports with "puff pieces" benefitting its owners.<sup>362</sup>

Relying on the diversity of viewpoints available in the entire media industry also depends on the unsupported assumption that people have access to all news sources<sup>363</sup> and consistently gather their news from all sources available to them.<sup>364</sup> In short, viewpoint diversity is not significantly increased if the other sources that contribute to such diversity are sources to which constituents do not—or cannot—pay attention.<sup>365</sup> Finally, the internet and social media, which have low or no cost barriers,<sup>366</sup> should not be generally regarded as reliable alternative sources of news and local information until baseline media literacy is increased.<sup>367</sup>

### C. Other Mitigating Measures

The issues raised by Sinclair's attempted acquisition may also support the introduction of supplementary mitigating measures beyond the regulatory framework—namely, disclosure.

One issue with the consolidated ownership of local broadcast television stations is the lack of transparency regarding ownership.<sup>368</sup> Disclosure of ownership interests is, therefore, one measure that can be implemented. Relatedly, fact-checking and labeling of stories as editorial or opinion pieces could similarly put viewers on notice of a segment's divergence from objective standards, without running against First Amendment protections

07/06/business/media/mcclatchy-newspapers-hedge-fund.html [https://perma.cc/N6JS-4G2K].

361. See Jennifer Szalai, *Yes, Fake News Is a Problem. But There's A Real News Problem, Too.*, N.Y. TIMES (July 26, 2020), https://www.nytimes.com/2020/07/26/books/review-ghosting-news-local-journalism-democracy-crisis-margaret-sullivan.html [https://perma.cc/7E4D-UE3L].

362. *Id.*

363. See *supra* note 36 and accompanying text (discussing the accessibility of broadcast television).

364. See *supra* notes 37–40 and accompanying text (discussing the preferences of consumers of local news).

365. Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/3KB4-47PP] ("[I]f it was once hard to speak, it is now hard to be heard. Stated differently, it is no longer speech or information that is scarce, but the attention of listeners.").

366. This Note does not address variations in internet access, news sites' paywalls, or membership requirements on social networking sites.

367. See Amy Yee, Opinion, *To Recognize Misinformation in Media, Teach a Generation While It's Young*, N.Y. TIMES (Oct. 23, 2020), https://www.nytimes.com/2020/10/23/opinion/truth-media-teach-young.html [https://perma.cc/2J4R-NZPC].

368. See text accompanying *supra* note 235.

against content-based mandates.<sup>369</sup> For instance, Sinclair's defense to challenges against its political commentary segments has been the fact that they label commentary as commentary.<sup>370</sup>

However, the efficacy of even prominently disclosing ownership information or the fact that a particular segment is labeled as an editorial or commentary segment is limited if the disclosure does not explain its impact on the content of the segment. For instance, even if a local station prominently disclosed its ownership by Sinclair, it is not clear that all viewers would understand that such ownership means that it is possible that viewers may encounter a rightward slant.<sup>371</sup> Requiring disclosures or disclaimers would also implicate compelled speech concerns, which are beyond the scope of this Note.

These mitigating measures, which are not without their own limitations, are not intended to be alternatives to the proposed regular review. Instead, these measures are proposals for protecting the local press until the national television ownership rule and UHF discount are reviewed and potentially revised.

#### CONCLUSION

As demonstrated by both the degree of consolidation in local television and the impact such consolidation has had on local television news, increased government oversight of the local press may be needed to protect its freedom. The first step in pursuit of this goal is challenging the exemption of the national television ownership rule and UHF discount from the FCC's quadrennial review and revising both the national audience reach cap and calculation method. This would require the amendment or repeal of the provisions that both established the current national audience reach cap and removed the rule from regular review. While increased scrutiny of proposed mergers within the media industry would necessarily involve government interaction with the press, increased oversight does not necessarily run counter to the First Amendment. Increased government oversight may be exactly what is needed to protect the local press today.

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369. Bazelon, *supra* note 14 (referencing the steps social media sites have taken to mitigate the spread, and impact, of misinformation).

370. See *The Daily: Taking Over Local News*, *supra* note 195, at 11:40.

371. See *supra* note 234 and accompanying text. While Sinclair's broadcasts are generally perceived as being conservative, it cannot be said that all viewers would understand the implications of the firm's ownership of an affiliate.