The purpose of the First Amendment is to protect freedom of expression and to ensure an uninhibited marketplace of ideas. The free press and its mission have been described as "the beam of a searchlight that move[s] restlessly about, bringing one episode and then another out of the darkness into vision." The First Amendment protects the press as an institution because the framers of the Constitution recognized the press' catalytic role in providing diverse and controversial information as imperative for a free and democratic society. The press stirred the colonies to revolution, energized the abolitionist movement, and served as a voice of public rebuke to decrying the United States' involvement in the Vietnam War.

Since the ratification of the Constitution, the newspaper industry has changed dramatically. States once held a multitude of diverse and provocative daily papers. Today, however, each city typically has only one daily newspaper with the majority of these papers owned by fifteen companies. The diversity of voices and viewpoints, once prevalent, has been reduced by media concentration and economic homogeneity. Unlike broadcasting, which has been regulated since its inception in order to ensure the diversity required by the First Amendment, there is no legislation restricting newspaper ownership or concentration.


2 James D. Squires, Read All About It! The Corporate Takeover of America's Newspapers 3 (1993) (quoting Walter Lippmann, the famous columnist). Traditionally the press was a "people oriented, privately owned, public-spirited, [and] politically involved enterprise." Id. at 223.


4 Commission on Freedom of the Press, supra note 1, at 223-24.

5 Id. at 14 (describing the press as it existed at the time of the Constitution's ratification).

6 Miami Herald Publ'g Co. v. Tortilllo, 418 U.S. 241, 248 (1974); see also Commission on Freedom of the Press, supra note 1, at 14.

7 Bagdikian, supra note 3, at 4. By 1986, only fifteen companies owned at least half of the daily newspaper business. Gannett, the largest, owned 93 daily newspapers and their total circulation exceeded 6,101,000 with Knight-Ridder, Newhouse, Times Mirror, Tribune Company as the next five companies, in order of size of ownership. Id. at 20-22.

8 Id. at xix-xxi. The United States has a plethora of mass communication outlets, including 1,700 daily newspapers, 11,000 magazines, 900 radio and 1,000 television stations. If each of these media had different owners, there would be many different voices and viewpoints. Id. The mass media are large conglomerates that have become more conformist in order to appeal to larger audiences. Hillier Krriegbaum, Pressures on the Press 141 (1972).

9 When the technology of radio first became popular, the Commerce Department began controlling spectrum allocations. The Supreme Court eventually stripped the Commerce Department of most of its authority to regulate broadcast spectrum. Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1928) (denying the Secretary of Commerce the power to deny a license to a legally qualified applicant even if that license interfered with existing licenses); United States v. Zenith Radio Corp., 12 F.2d 614 (1926) (holding that the Secretary of Commerce was powerless to impose restrictions on frequency, power, and hours of operation). See Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 211-213 (1942) (describing the evolution of broadcasting medium and regulation).

10 The only statute affecting newspaper ownership is the Newspaper Preservation Act, 15 U.S.C. § 1802(2) (1970) ("NPA"). The NPA is an anti-trust exemption which allows two competing papers to combine business operations if one of the papers is determined to be "failing" under the statute. See 15 U.S.C. § 1802(2) (1970).
This Comment discusses the regulation of newspapers and broadcasters under different First Amendment methodologies and analyzes the soundness of this inconsistency in light of the current state of media concentration. First, this Comment reviews the evolution of the scarcity doctrine and the public interest in diversity which justifies regulation of the broadcast industry. Continuing, this Comment examines the level and type of First Amendment protections that are applied to the print media. Next, this Comment focuses on the trend of concentration in newspaper ownership, the effects thereof, and the concurrent breakdown of the scarcity doctrine and the resulting atmosphere of deregulation present in the broadcasting industry. Finally, this Comment analyzes the rationale justifying different First Amendment standards that are afforded newspaper and broadcasters and suggests that there is a public interest in implementing structural regulations to ensure diversity in the newspaper industry.

I. THE FIRST AMENDMENT TREATMENT OF MEDIA AND THE SCARCITY DOCTRINE

Justice Holmes stated that the "ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market." The Supreme Court has stated that the purpose of the First Amendment is to provide an uninhibited marketplace of ideas. The marketplace of ideas concept created a sharp split between parties advocating different methods of achieving this First Amendment ideal. The proponents of government regulation of the media to achieve First Amendment goals are diametrically opposed to those who follow the First Amendment's strict language forbidding Congress to make any law "abridging the freedom of speech, or of the press."

A. The Scarcity Principle and the Public Interest

The first mass medium to experience governmental regulation was the broadcasting industry. The justification for this First Amendment interference is based on the unique limitations of the broadcast spectrum. Prior to regulation, broadcasting was chaotic and so overrun that the reception of individual stations was nearly impossible. Congress decided that the electromagnetic spectrum, as a finite resource, should be regulated to ensure diversity within the limited broadcast spectrum. Out of this need for regula-

---

15 U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id. This black-letter law approach accepts the language of the First Amendment without question. Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (writing that "no law" means no law); See generally Hindman, supra note 13.
16 Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 211-15 (1943). Since the inception of radio, the government has undertaken the regulation of broadcast spectrum. In 1912, Congress passed the Radio Act, which forbade radio operators to transmit without a license. Pub. L. No. 62-264, 37 Stat. 302 (1912). As radio grew more popular, the spectrum became congested, but the Commerce Department's power to regulate the spectrum was questioned. This led the Commerce Department to abandon all efforts of radio regulation. In response to this, Congress passed the Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927). The Radio Act is now incorporated into the Communications Act of 1934, which created the Federal Communications Commission and granted them wide licensing and regulatory powers. 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (1996)); see also National Broadcasting, 319 U.S. at 211-12.
18 National Broadcasting, 319 U.S. at 212.
19 See id. at 213-16 (discussing the rationale behind the Act). Part of Congress' motivation was the "fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." FCC v. Pottsville Broad. Co., 309 U.S. 134, 137 (1940). See also Barron supra note 14, at 1666-68.
The Supreme Court reviewed the constitutionality of the FCC’s licensing regulations in National Broadcasting Co., Inc. v. United States and concluded that “[t]he right of free speech does not include ... the right to [broadcast] without a license.” The Supreme Court justified this First Amendment intrusion on broadcasters by distinguishing the broadcast medium from other media due to the technological limitations of the spectrum. The decision in National Broadcasting assumes that the basis of the FCC’s jurisdiction is the public interest created by allocational scarcity. The Court held that broadcast licensing, if exercised in the public interest, does not infringe on freedom of speech. This reflects both Congress’ adoption and the Supreme Court’s approval of the regulate-to-achieve-diversity approach to the broadcast medium.

B. Different Levels of First Amendment Protection and Content Regulation in the Public Interest

The Supreme Court established and defined the modern theory differentiating the First Amendment rights of broadcasters from those of newspapers in two landmark cases: Red Lion Broadcasting Co. v. FCC and Miami Herald Publ’g Co. v. Tornillo. In Red Lion, the Court took the regulate-to-achieve-diversity approach even further by holding that regulations mandating a right-of-reply in the broadcast industry served First Amendment goals and were constitutionally acceptable. These regulations, referred to as the Fairness Doctrine, provide that “broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” The Court found that the rights of the viewers and listeners were paramount and that the Fairness Doctrine served the public interest. Under this public interest standard, the Supreme Court allowed the FCC to overrule broadcaster’s editorial judgment and control of content, which lies at the heart of First Amendment protection, and held that the Fairness Doctrine was constitutionally acceptable.

Since Red Lion’s initial imposition on broadcaster’s freedom of expression, the Supreme Court has consistently applied different First Amendment standards to broadcasting than it does to the print media. This inconsistent application of First Amendment rights is highlighted in Tornillo, where the court held that content regula-
tion in the form of a right-of-reply is unconstitutional when applied to newspapers because it infringes on editorial autonomy. The Supreme Court recognized that there were economic barriers making entry into the newspaper market difficult but specifically rejected economic scarcity as a justification for content regulation of newspapers. The Court, without referencing Red Lion and the scarcity doctrine, explained that independent editorial control of newspapers was necessary to achieve the "widest possible dissemination of information from diverse and antagonistic sources." Emphasizing the unique role of newspapers in our society, the Court said that any imposition on editorial control was clearly unconstitutional. In Tornillo, the Supreme Court adhered to the black-letter law of the First Amendment prohibiting regulation of the press by rejecting content control of newspapers in direct contrast to the regulate-to-achieve-diversity approach taken to broadcasting in Red Lion.

While the economic scarcity argument was not adequate justification for content regulation of newspapers, it was successfully used to justify content regulation of cable programming. In Berkshire Cablevision, Inc. v. Burke, the District Court said "scarcity is scarcity" and whether scarcity is economic or allocational is irrelevant if it has the effect of removing the means of expressing ideas from all but a small group. The Berkshire court distinguished Tornillo by saying that a pamphlet or other inexpensive form of publication is an adequate alternative when access to a newspaper is denied and that cable offers no similar solution.

C. Structural Regulation to Serve the Public Interest in Diversity

Continuing to define the First Amendment rights of broadcasters, the Supreme Court held that ownership caps and co-ownership bans were constitutionally acceptable. It found that natural monopoly that made it unlikely that another cable operator would build a second cable system. The Court concluded that scarcity, even economic scarcity, mandated the application of the Red Lion standard. This approach ensured the confirmation of the Rhode Island regulations as constitutional because they serve the public interest in diversity.

35 Tornillo, 418 U.S. at 248. The Florida statute under review required newspapers, which attacked the character of a political candidate, to give free space in the newspaper for the candidate to reply. Id. at 244.
34 Id. at 248-58.
33 Id. at 252, 256-58 (quoting Assoc. Press v. United States, 326 U.S. 1, 20 (1945)). Both Red Lion and Tornillo focused on the same issue, the right-of-reply, and both were unanimous decisions, however "neither the words Red Lion nor Fairness Doctrine appear any place in the [Tornillo] decision." FRIENDLY, supra note 13, at 193. "What is remarkable about the Tornillo opinion . . . is not that it failed to apply the precedent of Red Lion, but that it did not discuss the precedent at all." Id. at 195 (quoting Paul A. Freund, The Legal Framework of the Tornillo Case, The Miami Herald v. Tornillo: The Trial of the First Amendment 27 (Freedom of Information Center, ed. 1975)).
36 Tornillo, 418 U.S. at 258. The Court followed well-established precedent in its decision to disallow government enforced access to newspapers. See Assoc. Press v. United States, 326 U.S. 1, 20 n.18 (1945) (refusing to enforce the Association's bylaws creating a private compulsion to print); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (reflecting a strong aversion to any attempt to create a right of access to newspapers).
37 See generally Lange, supra note 14, at 1, 8-9; Tornillo, 418 U.S. at 258; Red Lion, 395 U.S. at 867.
38 Berkshire Cablevision, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983) (holding that the appeal was rendered moot when the cable franchise was awarded to another applicant without discussing the basis of the lower court's decision). In Berkshire, a cable operator sued a Rhode Island utility division seeking a declaratory judgment holding regulations that required cable companies to carry public, educational and governmental channels unconstitutional because they violated the cable operator's First Amendment rights. Id. at 979-80. The District Court in Rhode Island found that the franchising process created a

39 571 F. Supp. 976 at 986-87. The District Court concluded that the access rules served governmental interests because the First Amendment goal of maintaining an unfettered flow of information could be satisfied by having cable television open to all Americans. Id. at 987-88.
40 Id. at 986.
41 The FCC amended the rules relating to multiple ownership and provided that licenses for broadcasting stations will not be granted if "the applicant, directly or indirectly, has an interest in other stations beyond a limited number." United States v. Storer Broad. Co., 351 U.S. 192, 195 (1956).
42 See ICC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978). The FCC's mass media regulations barred the licensing or transfer of newspaper/broadcast combinations when the final owner would control a radio or broadcast station and a daily newspaper within the same community. See generally Communications Act of 1934, §§ 301, 307(a), 307(d), 308(a), 309(a), 309(d) (as amended 47 U.S.C. §§ 301, 307(a), 307(d), 308(a), 309(a), 309(d)) (authorizing the FCC to grant, deny or revoke licenses).
43 Storer Broadcasting Co., 351 U.S. 193 (1956). In Storer Broadcasting, the plaintiff challenged the FCC's authority to deny new television licenses to any party already owning five such stations. The Court held that the FCC was within its authority to regulate television ownership to serve the public interest. The Court found ownership limits to be in the public interest because they ensured diversity which served First Amendment goals. Id.; see also National Citizens Committee, 436 U.S. at 775. Here, the plaintiffs sought review of the FCC regulations making co-ownership of a radio or television station and a daily newspaper located in the same community
these structural regulations ensured the presence of diverse and antagonistic news sources that served the public interest in obtaining diversity and were consistent with First Amendment goals.\textsuperscript{44} In \textit{United States v. Storer Broadcasting Co.}, the Court easily found that ownership caps, which limited the number of broadcast stations that any one owner could hold, were constitutional.\textsuperscript{45} In \textit{ICC v. National Citizens Committee for Broadcasting}, the Court determined whether the FCC could prohibit a single party from owning both a broadcast station and a newspaper in the same community.\textsuperscript{46} Here, the Supreme Court scrutinized the diversity argument carefully because the regulation affected newspaper industry. The purpose of co-ownership regulations was to ensure the diversity of control of the mass communications media in a given locale.\textsuperscript{47} Analyzing the possibility that these structural regulations violated a person's First Amendment rights to publish a newspaper, the Court found that the co-ownership ban did not preclude a person's ability to publish newspapers altogether and therefore did not raise any First Amendment issues.\textsuperscript{48} The Court recognized that the FCC's authorized purpose is to regulate the mass media in a way that promotes the public interest and, therefore, regulations which ensure diversification, such as ownership caps and co-ownership bans, are constitutional.\textsuperscript{49}

II. THE EVOLUTION OF THE NEWSPAPER AND BROADCAST INDUSTRIES

The Supreme Court's application of First Amendment protections disallows direct content regulation of newspapers by using a literal approach to constitutional interpretation.\textsuperscript{50} In direct contrast, broadcasting is considered a scarce and valuable national resource and, as such, is regulated in the public interest to satisfy First Amendment goals of diversity.\textsuperscript{51} As these different First Amendment methodologies were being developed, the newspaper and broadcast industries followed suit.\textsuperscript{52}

\textsuperscript{44} \textit{National Citizens Committee}, 436 U.S. at 775; \textit{Storer Broadcasting Co.}, 351 U.S. at 199.

\textsuperscript{45} 351 U.S. 192 (1956). The FCC asserted that it may promulgate rules to limit concentration of station ownership to give concreteness to the standard of public interest. \textit{Id.} at 201. \textit{See generally} 47 U.S.C. §§ 154(i), 308 (1994) (giving the FCC the power to create regulations necessary for the execution of its functions and identifying as one of these functions the ability to make such regulations and prescribe such conditions as may be necessary to carry out the provisions of this chapter, one key provision being a responsibility to regulate in the interest of public convenience, interest, or necessity). \textit{See also National Citizens Committee}, 436 U.S. at 776 (stating that, given the limited broadcast spectrum, regulation of the frequencies is essential and nothing in the First Amendment prevents this as long as the regulation promotes the "public interest" in diversity).

\textsuperscript{46} \textit{National Citizens Committee}, 436 U.S. at 797. The Supreme Court held that the FCC is entitled to make a judgment based on its experience and that "it is unrealistic to expect true diversity from a commonly owned broadcast station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." \textit{Id.} at 797 (quoting \textit{In re Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations}, Memorandum Opinion and Order, 53 F.C.C.2d 589 (released June 5, 1975)). Communications Act of 1934, §§ 301, 307(a), 307(d), 308(a), 309(a), 309(d) (as amended in 47 U.S.C. §§ 301, 307(a), 307(d), 308(a), 309(a), 309(d)) (forbidding one entity from owning both a broadcast station and a newspaper in one community).

\textsuperscript{47} \textit{National Citizens Committee}, 436 U.S. at 781.

\textsuperscript{48} \textit{Id.} at 776. The Court further stated that the prohibition on co-ownership of broadcast stations and newspapers does not preclude a person's right to publish newspapers but simply requires that they may not acquire a broadcast license that would create a situation where the owner would broadcast and publish newspapers in the same community. \textit{Id.} The Court's reasoning enabled it to avoid applying the compelling governmental interest standard normally warranted in cases regarding the newspaper industry. \textit{See generally id.}

\textsuperscript{49} \textit{See National Citizens Committee}, 436 U.S. 775.


\textsuperscript{51} \textit{League of Women Voters}, 468 U.S. at 367; \textit{see also National Broadcasting}, 319 U.S. at 190.

\textsuperscript{52} \textit{See generally James Bennet, Time Out: We Pause For a Word From Our Skeptic: Time-Warner Merger and Excessive Industrial Concentration, The New Republic}, Apr. 1989, at 20 (describing the concentration of the media and its effects).
A. The Newspaper Industry: Concentration and Economic Homogeneity

Since 1909, the number of daily newspapers in this country has fallen steadily from 2,600 to 1,700 in 1987.\(^53\) At the same time, population, literacy and circulation have grown, which indicates that more people are reading fewer papers.\(^54\) Not only were newspapers becoming a scarce medium,\(^55\) but ownership was also becoming concentrated in the hands of fewer corporations.\(^56\) In the late 1950s, over 80% of the daily newspapers were independently owned; but, by 1986, 72% of the daily papers were owned by large corporations and fifteen corporations dominated the daily newspaper industry.\(^57\) This concentration of media ownership was created by the corporate demand for acquiring highly profitable newspapers\(^58\) and the inevitable transition of newspapers from private ownership to media conglomerate ownership.\(^59\) This trend, and the subsequent economies of scale available to large corporate operators, has resulted in the presence of just one daily newspaper in 98% of United States cities.\(^60\)

Media conglomerate ownership has affected the industry and altered news coverage.\(^61\) There is no substantial truth to the image of the ruthless media corporation manipulating news coverage. Modern day journalists are generally better educated and conventions against fictionalizing and factual inaccuracy are widely endorsed.\(^62\) The effects of media concentration, however, are more subtle: changing newspaper coverage, creating a powerful lobby, and presenting a corporate perspective.

Newspaper coverage has been affected by the corporate approach to management decisions and general news coverage is skewed to favor corporate values.\(^63\) Media conglomerates try to maximize profits and please their shareholders\(^64\) and local news coverage suffers because local news is more expensive to produce.\(^65\) Not only have media groups changed the type of news covered, but ownership was also becoming concentrated in the hands of fewer corporations.
they use the work of the journalists they employ more efficiently. A media chain can have one journalist write a story and use that story throughout its chain of papers. Additionally, international news, features, and comic strips can be purchased inexpensively from the news services. One study found that independent newspapers had 23% more local and national news than chain-owned papers.

Another consequence of media concentration is the creation of a powerful and unified lobby. In 1969, the seven largest newspaper groups, together owning only seventy-four papers, lobbied for the passage of The Newspaper Preservation Act ("NPA"). This Act, which passed the following year, allows publishers of competing papers an anti-trust exemption to merge their business operations if one of the papers is failing. In response to the Justice Department's initial opposition to the Act, the president of the Hearst Chain wrote a letter telling Nixon that "many important publishers and friends of your administration" wanted this bill passed and "look to you for assistance." The Nixon Administration subsequently reversed its stance and the bill passed. A few papers, including the New York Times, lobbied against the legislation, calling it a "governmental favor" that threatened "the independence of the press." The newspaper lobby has significant influence because of its control over hundreds of media outlets.

A third effect of corporate ownership of newspapers is the lack of coverage on corporation or newspapers themselves. Journalists have commented that corporate owners are gun shy about covering themselves, their influence, or their financial peers. Newspapers rarely criticize corporate America. A survey by the American Society of Newspaper Editors found that 33% of all editors working for media conglomerates said it was unlikely that they would run a story that was damaging to their parent corporation. Such sentiment could be motivated by the fact that every year there are reporters and editors who are fired for covering a story the owning corporation does not like. However, some newspaper chains that started with high-quality papers have continued to operate with sound, autonomous management and to pursue quality content. The impact of corporate ownership can have unintentional and unavoidable effects such as built-in biases that protect corporate power and maintain the status quo. Media conglomerate ownership of newspapers affects the industry and newspaper coverage by influencing the legislature, politicians, editors, and the reporters themselves.

66 BAGDIKIAN, supra note 3, at 212.
67 Id.; see also SQUIRES, supra note 2, at 216-17.
68 SQUIRES, supra note 2, at 216-17.
69 Christopher, supra note 58, at 10.
72 See Suzanne Garment, 30 COLUM. JOURNALISM REV. 44, 47, 49 (Nov. 1991) (arguing that current media concentration defeats First Amendment goals and describing the passage of the Newspaper Preservation Act); see also BAGDIKIAN, supra note 3, at 96-98 (discussing the passage of the Newspaper Preservation Act and the letters written to the Nixon Administration).
73 There was another letter, written by Hearst, directed at Nixon's antitrust chief, Richard McLaren, and forwarded to Nixon, which stated "those of us who strongly supported the present administration in the last election" were the most concerned by the failure to pass the bill, and that "those newspapers should, at the very least, receive a most friendly consideration." Garment, supra note 72, at 48.
74 Id. Cox and Scripp-Howard fully supported Nixon and were major beneficiaries of the NPA. These papers also tended to suppress damaging Watergate stories. Id.
75 SQUIRES, supra note 2, at 12-13.
76 In 1988, Knight-Ridder significantly toned down editorials critical of the Attorney General and removed all editorial cartoons about him. Garment, supra note 72, at 48. Admirably, a reporter for the independent Washington Post did cover this story, commenting on the biased coverage and stated that "it is such an embarrassment...that few people in the news business want to write about it." Id.
78 BAGDIKIAN, supra note 3, at xvi. There is a double standard applied to the public and private sectors. Id. The press is "sensitive to failures in public bodies, but insensitive to equally important failures in the private sector, particularly in what affects the corporate world." Id.
79 BAGDIKIAN, supra note 3, at 50, 217.
80 Id. at 36-7. In August 1982, a journalist wrote a story for the Dallas Morning News about a bank's loan problems, saying that the bank was likely to fail. The story enraged the Bank Chairman, costing the reporter and the editor their jobs. The reporter's story was fully confirmed less than two weeks later when the bank failed and loan losses that exceeded its assets were discovered. Despite this, neither the reporter nor the editor were rehired. Id.
81 ISAACS, supra note 53, at 21.
82 BAGDIKIAN, supra note 3, at xv.
B. The Scarcity Doctrine Crumbles and Broadcast Regulations are Relaxed

In direct contrast to newspapers, the number of broadcast stations has increased dramatically.\(^8^3\) The scarcity rationale, first approved in 1943,\(^8^4\) was a basis for distinguishing broadcast from other media and justifying the regulation of the broadcast industry.\(^8^5\) Since then, technological improvements and the advent of cable have made broadcast spectrum seemingly less scarce.\(^8^6\) In 1984, the Supreme Court commented that the rationale for broadcast regulation based on spectrum scarcity was suspect,\(^8^7\) but that it was not prepared to reconsider the scarcity doctrine without some official indication from Congress.\(^8^8\) The FCC invalidated the Fairness Doctrine in 1987 because it decided that it did not serve the public interest and was not, in fact, appropriate under the First Amendment.\(^8^9\) Even the FCC noted the increase of broadcast stations due to technological advances and that broadcasting is no longer a scarce resource.\(^9^0\)

In response to a perception of lack of scarcity, the first large-scale modification of telecommunications law in sixty-one years was passed in February of 1996 with strong lobbying efforts from many large media corporations.\(^9^1\) President Clinton, among others,\(^9^2\) wrote that "the legislation should protect and promote diversity of ownership and opinions in the mass media."\(^9^3\) Also showing concern about diversity, the Chairman of the Television Board of the National Association of Broadcasters ("NAB") resigned in protest when the NAB refused to oppose efforts to raise television ownership limits.\(^9^4\) Previously, the Supreme Court said that they "fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."\(^9^5\) In final form, however, the Telecommunications Act of 1996 relaxes broad-

---

\(^8^3\) Bazelon, supra note 50, at 207.
\(^8^4\) See Nat'l Brod. Co. v. United States, 319 U.S. 190 (1943) (introducing the scarcity doctrine).
\(^8^5\) See Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (approving Congress' scarcity rationale for granting the FCC the authority to regulate the broadcast spectrum).
\(^8^6\) Bazelon, supra note 50, at 207.
\(^8^7\) Federal courts recognized and commented on the weakness of the scarcity rationale. "The number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines." Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983). The Court in Media Access says that there is nothing uniquely scarce about the broadcast spectrum and "[u]mploying the scarcity concept as an analytic tool . . . inevitably leads to strained reasoning and artificial results." Telecom. Research and Action Ctr. and Media Access Project v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).
\(^8^8\) The Court recognized that the scarcity doctrine was widely criticized, noting that even the Chairman of the FCC questioned its validity. FCC v. League of Women's Voters of Cal., 468 U.S. 364, 376 n.11 (1984); see also Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-6 (1982).
\(^8^9\) In re Complaint of Syrcause Peace Counsel Against Television Station WTVH, Memorandum Opinion and Order, 2 FCC Rcd. 5043, paras. 61, 98 (rel. Aug. 6, 1987); Charles D. Ferris & Terrence J. Leahy, Red Lions, Tigers and Bears; Broadcast Content Regulation and the First Amendment, 38 Cath. U. L. Rev. 299 (1989).
\(^9^2\) The Chief Operating Officer of Greater Media and Network Affiliated Stations Alliance voiced concerns about reduction of diversity. Cheryl Heuton, Radio's Dereg Dilemma: Politicians, Stations Turn Up The Volume On Ownership Limits Debate, MEDIAWEEK, Nov. 13, 1995, at 12 (stating that competition is important to the free expression of ideas and if there are too few owners that will be lost). See generally TELEVISION DIGEST, supra note 91, at 2 (stating that relaxing ownership restrictions might undermine the agency's goals of diversity and service).
\(^9^3\) Heuton, supra note 92, at 12.
\(^9^4\) Kim McAvoy & Don West, The Battle Over Bigness: Broadcasting's Fatal Attraction, BROADCAST & CABLE, May 22, 1995, at 50. The Chairman of the television board of the National Association of Broadcasters was G. William Ryan who resigned in May 1999 to protest the NAB's failure to oppose the relaxation of television ownership limits. The Chairman objected to regulations that would put broadcasting stations into the hands of a few resulting in less diversity and fewer voices. He said, "[i]f these kind of changes go through and the large companies that emerge from it are allowed to vertically integrate to the extent that I believe they will, the uniqueness of broadcasting and local broadcasting and the serving of the public interest will go by the wayside." Ryan also said that the existing 25% cap does not bother him, saying "if it isn't broke why try to fix it?" Commenting on the large media companies, Ryan said that the emerging companies that believe in centralized control scare him. Id.
\(^9^5\) FCC v. Potomac Broad. Co., 309 U.S. 134, 137 (1940); see Barron, supra note 14, at 1866-68.
cast ownership limits and the audience-reach cap, which limits a group to reaching no more than thirty-five percent of the nation's homes. The Commission rules also eliminate national radio ownership caps while sustaining local ownership restrictions. Analysts predict that these measures will accelerate the industry's rate of consolidation and thereby reduce diversity.

III. THE SCARCITY DOCTRINE: A RATIONALE TO JUSTIFY REGULATION OF BOTH NEWSPAPERS AND BROADCASTING TO ENSURE DIVERSITY

A. The Scarcity Doctrine as Applied to News Media

The varying First Amendment analysis of different media is justified by the unique scarcity problems presented by the broadcast medium. The regulation of broadcast frequency is considered constitutionally acceptable because the scarcity of the medium required regulation to achieve the presence of the diversity of viewpoints and voices called for by the First Amendment. The scarcity doctrine, which creates the public interest in broadcast regulation, can be explained in two ways: numerical scarcity, which describes the number of broadcast stations; and allocational scarcity, which describes the reality that the spectrum is not large enough to accommodate everyone who might desire to use it. The Supreme Court has used, at different times, both the numerical and allocational approach to explain the scarcity doctrine. There has been a trend toward using the numerical scarcity approach because the technological limitations creating allocational scarcity have been reduced. During the early 1960s, the Supreme Court encouraged the FCC to exercise its authority in order to achieve the Congressionally-mandated goal of diversity. Thus the scarcity doctrine became the basis for FCC control, calculated to promote the First Amendment value of diversity in both ownership and viewpoints.

While the scarcity doctrine was created in response to allocational scarcity, technological advances increasing the utility of the broadcast spectrum caused a shift in rationale from an allocational scarcity approach to a numerical scarcity approach. The regulate-to-achieve-diversity approach applied to broadcasters is now justified by numerical scarcity and the public interest in diversity. However, in recent times, there has been a strong cultural move toward deregulation. Many people have argued that all media deserve the same degree of First Amendment protection; and most advocate strict adherence to the First Amendment's mandate, which is currently applied to newspapers, to make no law regarding the press. While a consistent approach to First

---

96 The Telecommunications Act of 1996 eliminates the 12 station ownership cap on national television broadcasters and increase the audience limit from 25% to 35%. Jessell, supra note 91, at 18.
97 The statute directs the FCC to modify 47 CFR § 73.3555 (1996) to eliminate restrictions on the total number of AM or FM broadcast stations or television stations one person or entity could own within the United States but retains significant local ownership limits. The statute also relaxes the caps placed on number of television broadcast stations that one person or entity can own within a particular market. The Telecommunications Act of 1996, Pub. L. No. 104-104 § 303, 110 Stat. 133.
98 Jessell, supra note 91, at 18.
99 See Garment, supra note 72, at 51 (stating that the FCC's plans "would remove the few remaining safeguards that now prevent a handful of huge conglomerates from owning and controlling all the means of mass communication in this country" and that further consolidation of the electronic media would seriously undermine the diversity that is vital for a healthy democracy).
100 Burstyn v. Wilson, 343 U.S. 495, 502-3 (1952). The Court commented that the basic principles of freedom of speech and the press, while not absolute, are the rule. Further, the Court said that for any exception to that rule there must be some justification. Id.
103 National Broadcasting, 319 U.S. at 190 (explaining the scarcity doctrine by the allocational limitations created by the spectrum); Red Lion, 395 U.S. at 399-401.
105 See id.
106 Price, supra note 60, at 220.
110 see note 92, at 60.
Amendment protection of the media seems logical, history has shown that, without regulation, media concentration is an inevitable trend. It seems more reasonable to apply the scarcity rationale to both newspapers and broadcasters and to regulate both to achieve diversity. While the newspaper industry does not suffer the technological limitations that create allocational scarcity, it is economically scarce. When the scarcity rationale was first adopted in 1948, the total number of daily newspapers in the United States was 2,043, contrasted with a total of 967 radio stations. By 1987, the number of newspapers had dropped to 1,646 while the number of radio stations has increased to 6,519. In additional to numerical scarcity, there are economic barriers making it almost impossible to start a new newspaper which creates economic scarcity. The scarcity doctrine that now justifies broadcast regulation pertains equally, if not more, to the newspaper industry.

B. Structural Regulation of Newspapers is in the Public Interest

Traditionally, the press has been given hands-off treatment under the First Amendment's protection because of the press' special role in society. Joseph Pulitzer defined that role as a responsibility for the press "to fight for progress and reform, never tolerate injustice or corruption, [oppose] demagogues of all parties [and challenge] public plunderers [while] remain[ing] devoted to the public welfare." But experts say that the present concentration of ownership in the newspaper industry subverts that role, affects newspaper content, and reduces diversity that is required by the First Amendment. One effect of media concentration is that newspapers are large business organizations and, as a result, have become more conformist in order to appeal to larger audiences. Technology and society have intensified the problems of centralized con-

---

110 Newspapers are not a regulated medium. See Kriechbaum, supra note 9. Ownership of newspapers has gradually become more and more concentrated. Fink, supra note 56, at 142. Broadcasting stations have become as concentrated as legally permissible. Garment, supra note 72, at 32. See also Jessell, supra note 91 (discussing broadcasting law and broadcast concentration). President Clinton and other industry experts feel that the deregulation effected by the Telecommunications Act of 1996 will only cause even greater concentration. Heuton, supra note 92, at 12; Television Digest, supra note 91, at 2.


114 Historical Statistics of the United States, supra note 115, at 810; Statistical Abstract of the United States, supra note 111, at 556 (stating the number of radio stations as 8,943); see also Commission on Freedom of the Press, supra note 1, at 37; Bagdikian, supra note 3, at 5-6 (describing newspaper and media concentration).

115 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251 (1974) (describing the economic barriers to starting a newspaper enterprise, but ultimately rejecting the economic scarcity argument as justifying newspaper regulation). Gannett, the largest newspaper chain, actually had the resources to start a new daily newspaper, USA Today, which lost considerable amounts of money for over ten years until it finally turned profitable in 1993. Fink, supra note 56, at 203.

116 At the time the scarcity rationale was first adopted in 1943, the total number of daily newspapers in the United States was 3,043 as compared with a total of 967 radio stations and 8 television stations. Statistical Abstract of the United States, supra note 111 and accompanying text). See generally National Broadcasting, 319 U.S. at 190, 198-200 (introducing the allocational scarcity doctrine).

117 Bazelgon, supra note 50, at 202.

118 See Tornillo, 418 U.S. at 250-55 (describing the role a widely held press plays in effectuating the First Amendment).

119 Joseph Pulitzer said, "A free press should always fight for progress and reform, never tolerate injustice or corruption, always fight demagogues of all parties, never belong to any party, always oppose privileged classes and public plunderers, never lack sympathy with the poor, always remain devoted to the public welfare." Squires, supra note 2, at i.

120 Bagdikian, supra note 3, at 6. "Concentrated control over public information is inherently antidemocratic." Id. The large media companies universally insist that they improve the newspapers they purchase; and a few actually have, notably Knight-Riddler, Times Mirror, and the New York Times Company. However, most media company have not increased the quality of the newspapers they purchase. The media conglomerates buy newspapers as investments and cut quality and raise prices. No contemporary newspaper group in the United States has ever created a respected daily paper with one exception, Knight-Riddler's Philadelphia Inquirer and the distinguished papers that do exist were created by independent, non-corporate owners. Id. at 5-8.

121 See Bagdikian, supra note 3, at 6; Commission on Freedom of the Press, supra note 1; Isaacs, supra note 55, at 101; Squires, supra note 2.

122 Kriechbaum, supra note 8, at 141.
control of information” and, instead of small town meetings and public gatherings, individuals now depend on media conglomerates to provide news.\textsuperscript{128}

There is a public interest in maintaining the presence of diverse voices and messages in both newspapers and broadcasts.\textsuperscript{124} Excessive media concentration affects the news content and reduces the diversity of viewpoints of the programs and news carried by conglomerate owned media outlets.\textsuperscript{125} When considering the number and impact of all media outlets together, the effect of corporate ownership could be seen as insignificant.\textsuperscript{126} However, the large media conglomerates have centralized control of all types of media outlets, including: television, radio, cable, magazines and newspapers.\textsuperscript{127}

Although allocational scarcity created the public interest justification for broadcast regulation intrusion onto First Amendment rights, the current state of media concentration should justify continued structural regulation of the broadcast industry and new structural regulation of the newspaper industry.

IV. CONCLUSION

Newspapers are a scarce medium because ownership is concentrated in the hands of a few corporations, creating a lack of diversity in newspaper coverage. Newspaper publishing has become big business and this has changed the industry and altered news coverage. When blocks of newspapers are all less inclined to report on their parent company, or other corporations generally, and when the daily newspaper voices that are heard are homogenized through their unified economic interest, diversity is reduced significantly and competing or antagonistic viewpoints are diminished. Diversity of voices and viewpoints are the critical components of the press that the First Amendment aims to protect.

A potential solution that would increase the number of voices and viewpoints would be to abandon the literal-interpretation approach to the First Amendment prohibition of regulation of the press and apply a regulate-to-achieve-diversity approach to the newspaper industry. A cap on the number of existing daily papers any corporation can own or purchase, similar to the ownership cap that applies to broadcasters today, would increase the diversity of voices and viewpoints present in newspapers. It is not reasonable to assume that one paper could represent all of the conflicting viewpoints regarding public issues but, as a whole, the industry, with diversified ownership, could be expected to do so.

This proposed solution follows previous Supreme Court holdings which allowed regulation of broadcasting, based the scarcity rationale, to ensure the First Amendment value of diversity. Further, this proposal does not make the press’ First Amendment right to publish ineffective; the ability to publish would just be limited to allow others the same privilege. It is antithetical to the purpose of the First Amendment to use the language of the freedom of speech and press clause to protect this current concentration and lack of diversity in the newspaper industry. The press earned constitutional protection because it served a critical function in American society and, because that function of diversity of information and viewpoints is not being served the type of protection provided by the First Amendment should be changed.

\textsuperscript{128} Bagdikian, supra note 3, at xx. “The modern systems of news, information, and popular culture are not marginal artifacts of technology. They shape the consensus of society.” Id. 


\textsuperscript{125} See Bagdikian, supra note 3

\textsuperscript{126} Kriechbaum, supra note 8, at 156. Diversity of voices and viewpoint can be achieved through the different media. “A 1971 survey showed that 37 . . . of the 1,511 newspaper communities had two of more fully competing voices [but] [a]n earlier study which included the competition of television and radio found a total of 5,079 competing voices and 202 communities with common ownerships.” Id.

\textsuperscript{127} Bagdikian, supra note 3, at 13-17.