CONGRESS ERRS IN DEREGULATING BROADCAST OWNERSHIP CAPS: MORE MONOPOLIES, LESS LOCALISM, DECREASED DIVERSITY AND VIOLATIONS OF EQUAL PROTECTION

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As early as 1815, legislative critics realized that even Congress, “clothed with every power that ought to be desired, with abundant means for a wise and provident government,” could “fall into the mistakes of short sighted man.” Nonetheless, over one hundred years later, Senator Pepper reminded the world that the “English speaking people have found it wise to place their trust in the Legislature, subject only to constitutional restraints.”

Merging the critic’s warning with Senator Pepper’s declaration, Congress errs when it produces short-sighted legislation or contravenes the Constitution. Unfortunately, Congress fell into both pitfalls in relaxing the limitations on broadcast ownership via the Telecommunication Act of 1996 (the 1996 Act).

Restraints on the number of broadcast stations one party may own, both at the national and local level, have been enforced by the Federal Communications Commission (“FCC” or “Commission”) for decades. These restrictions exist to serve two objectives: (1) furthering the First Amendment ideal of promoting the public welfare by providing diverse and antagonistic viewpoints; and, (2) promoting competition in order to ensure efficient use of resources.

Despite the paramount importance of the above objectives, Congress significantly loosened the limitations on broadcast ownership in the 1996 Act. In so doing, the collective Legislature has personified the “short-sighted man.” The results of this Congressional myopia are threefold. First, the proffered purpose of the 1996 Act, to increase competition, is not mirrored in the effects of relaxed ownership restrictions. Specifically, the result of the intended pro-competitive legislation is an increase in monopolies and a centralization of control.

As a result, Congress is legislating in the private interest and deviating from its own mandate to the FCC to regulate in the public interest. This centralized ownership of broadcasting facilities leads to two further det-
rimental effects: less localism\textsuperscript{12} and decreased diversity.\textsuperscript{13}

In addition to suffocating broadcasting ideals, the 1996 Act violates the Equal Protection Clause of the Constitution\textsuperscript{14} by imposing disparate ownership limitations upon radio and television.\textsuperscript{15} Although radio and television are similarly situated, Congress is preferring radio’s purely aural messages over television’s audio-visual communications by allowing the former messages greater audience penetration nationwide.\textsuperscript{16}

Part I of this note traces the history of the five ownership restrictions most purely affecting broadcasting – national ownership caps on radio, national ownership caps on television, local ownership caps on radio, local ownership caps on television, and the one-to-a-market rule banning intra-market ownership of a television and radio station.\textsuperscript{17} Part II explains the changes in each of these five areas as a result of the 1996 Act. The aforementioned Congressional errors of short sighted legislation and equal protection violations are discussed in Parts III and IV, respectively.

I. BROADCAST OWNERSHIP LIMITATIONS BEFORE THE 1996 ACT

The FCC launched its broadcast ownership con-

\textsuperscript{12} See infra notes 127-138 and accompanying text.
\textsuperscript{13} See infra notes 139-152 and accompanying text.
\textsuperscript{14} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids any state from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.
\textsuperscript{15} Although the Fifth Amendment, which applies to the Federal Government as opposed to the states, does not expressly contain an equal protection clause, the Supreme Court has held that the Federal Government is subject to the same equal protection requirements of the states. “It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” Bolling v. Sharpe, 347 U.S. 497, 500 (1953). “(T)he due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.” Washington v. Davis, 426 U.S. 299, 236 (1976). Equal protection analysis is the same under the Fifth Amendment as under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).
\textsuperscript{16} See infra notes 156-165 and accompanying text.
\textsuperscript{17} 1995 FNPRM, supra note 4, para. 2.
\textsuperscript{18} 5 Fed. Reg. 2382, 2384 (1940).
\textsuperscript{20} In re Sherwood B. Brunton, Decision, 11 F.C.C. 407, 413 (1946). The FCC did not impose an absolute limit on AM station ownership as it held that, with respect to AM, concentration of control “is not a factor of the absolute number of stations alone but depends also upon the character of the facilities involved, e.g., the powers and the frequencies of the stations.” Id.

control efforts in 1940 by prohibiting “the issuance of a license to anyone already possessing a license in the same broadcast service unless the applicant could demonstrate that the issuance of the license (1) would have a pro-competitive impact, and (2) would not result in the concentration of control of broadcasting facilities in a manner inconsistent with the public interest.”\textsuperscript{18} The Commission, however, immediately abandoned this pliable standard and journeyed into the turbulent world of absolute limits, as described below.

A. National Ownership Limits on Radio

The first quantifiable limit, announced in 1940, placed on the national common ownership of FM radio outlets was six stations.\textsuperscript{19} Perhaps sensitized by the Supreme Court’s 1945 determination that the First Amendment to the Constitution “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,”\textsuperscript{20} the Commission established a de facto limit of seven on the national ownership of AM radio stations in 1946.\textsuperscript{21} Specifically, the FCC denied CBS’ application for an eighth station stating “it’s against the public interest to permit a concentration of control of broadcasting facilities in any sin-
Seven years later, the FCC expanded its rationale, citing two reasons for placing restrictions on broadcast ownership. First, diversity of ownership would provide diverse sources of information. Second, the Commission sought to safeguard against undue concentration of economic power. The FCC determined the above objectives would be realized by limiting a single entity’s ownership to seven AM and seven FM stations.

Although this “Rule of Seven” remained the status quo for over three decades, the FCC did not remain dormant in its consideration of ownership caps. In 1984, when the FCC did act, its proposal took a turn toward total deregulation. Convinced that the goals of diversity and competition were no longer being realized through ownership caps, the Commission ordered a complete repeal of its national ownership ceilings, to be effective in 1990.

In response to its extremist action, the FCC received eight petitions from industry requesting it reconsider its decision. Upon review of industry’s comments, the FCC affirmed its earlier conclusion that repeal of the “Rule of Seven” was in the public interest; however, it decided that the proposed complete abandonment of the ownership caps was not integral to the effectuation of its goals. As a result, a single entity was henceforth permitted to own up to twelve AM and twelve FM stations nationally. In justifying its move from seven to twelve, the FCC held that while diversity remained an important consideration, it was not to function to the exclusion of other considerations, such as the benefits of group ownership.

In 1991, the FCC accepted its own invitation and considered the increase in competition provided by a multitude of non-radio sources as a reason to consider allowing an individual to own a greater assemblage of stations in order to benefit from economies of scale. This philosophy remained far more constant than the FCC’s implementation, as evidenced by the happenings over the next three years. The ultimate result of this
1991 rulemaking proceeding was the increase in national radio ownership caps to twenty AM and twenty FM stations. These restrictions were in effect when President Clinton signed the Telecommunication Act of 1996 on February 8, 1996.

B. National Ownership Limits on Television

In the early days of its regulations, the Commission imposed stricter national limits on television station ownership than on radio ownership. In 1941, the FCC limited a person or entity from owning more than three stations nationwide. The Commission’s stringent standards relaxed in 1944, when it raised the limit to five stations. Beginning in 1953, however, the Commission’s concerns for diversity and competition were manifested in a more consistent fashion between radio and television. First, television became part of the FCC’s “Rule of Seven,” so one entity could own a maximum of seven stations, with no more than five in the VHF band. Second, the proposed abandonment of national limits was also made with respect to television ownership caps in 1984. Similar to the case of radio, however, the complete repeal of television ownership restrictions was rejected in favor of imposing a twelve station limit. The Commission also adopted the ancillary restriction of limiting a group owner’s access, via their television stations, to broadcasting too no more than twenty-five percent of the national audience. Although these were the limits in effect when the 1996 Act was passed, the FCC was in the process of considering various proposals to relax the national television ownership limitations.

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36 Minority owners were permitted to own up to 25 stations in each service. Additional owners were permitted to own a non-controlling interest in three additional AM and FM stations if such stations were minority or small business controlled. Id.
37 47 C.F.R. § 73.3555(e)(1) (1995), in pertinent part, states that no license for a commercial AM or FM station “shall be granted to any party...if the grant...would result in such party...owning, operating or controlling, or having a cognizable interest in: (i) more than 20 AM, or more than 20 FM stations, provided, however, that minority controlled entities may acquire an additional five stations per service above the national limit and that multiple owners that are not minority controlled may hold an attributable, but not controlling, interest in five additional stations per service above the national limit that are minority controlled or small business controlled.”
38 47 C.F.R. § 73.3555(e)(1) (1995), in pertinent part, states: No license for a commercial...TV broadcast station shall be granted to any party...if the grant...would result in such party...owning, operating or controlling, or having a cognizable interest in:... (i) more than 14 television stations; or (iii) more than 12 television stations that are not minority-controlled. (2) No license for a commercial TV broadcast station shall be granted...to any party...if the grant...of such license would result in such party...owning, operating or controlling, or having a cognizable interest in, either (i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or (ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.
C. Local Ownership Limits on Radio

In addition to concerns regarding nationwide ownership, the FCC regulates duopolies, the common ownership of same service stations within any one particular market. Regulation of radio duopolies began in the 1940s, when the FCC completely banned such ownership scenarios. The FCC's early proscription against duopolies is understandable given the Commission's literalist approach to maximizing diversity. In 1970, the FCC explained that fifty-one licensees were more desirable than fifty; and if only fifty different entities control an available sixty frequencies, then sources of ideas are not maximized.

The Commission remained faithful to this position for some time. Even while the FCC was endorsing the complete elimination of the national ownership caps in the mid-1980s, it reiterated the need for duopoly restrictions, concluding that local markets were the appropriate venue for achieving diversity.

The FCC's strict adherence to its duopoly restriction, however, gave way to the same economic considerations causing the Commission to relax national radio caps in the early 1990s. In particular, increased competition from the growing numbers of radio stations and non-radio outlets resulted in economic hardship for the radio industry. “In view of the increasingly fragmented nature of the local radio marketplace, the economic strain experienced by many radio broadcasters, and the sizable savings that can stem from joint operation of same-market radio facilities,” the FCC adopted a new duopoly rule in 1992. The revised regulation limited an owner from reaching more than 25% of the audience and instituted numerical caps of three or four stations, depending on the market size. Although
the FCC received petitions to reconsider its actions, the Commission refused to further amend its rules, claiming that the relaxed restrictions were too new to determine if they would create undue market concentration and/or decreased diversity. Accordingly, this two-tiered market approach was in effect when Congress enacted the 1996 Act.

D. Local Ownership Limits on Television

As with the above restrictions, the Commission's regulation of television duopolies began in 1940. The initial restriction prohibited ownership of two television stations broadcasting in substantially the same area. In 1964, the Commission replaced its "substantially the same area" approach with a more definitive standard. The new rule prohibited common control of two stations if it resulted in overlapping Grade B contours. This regulation survived almost thirty years before being reconsidered. The FCC initiated a rulemaking proceeding in the early 1990's to consider loosening the restrictions in light of the increased availability of other media. No changes in the rule resulted, and the prohibition on Grade B contour overlap was the duopoly rule existing when the 1996 Act was passed.

E. One-To-A-Market Rule

In contrast to the turbulence in the above discussed limitations, the FCC's one-to-a-market rule, proscribing the common ownership of a radio and television station in the same local market, reflects a more consistent history. In 1970, motivated by the continuous concerns of diversity and competition, the Commission adopted its one-to-a-market rule. Nearly twenty years later, two events prompted the Commission to revisit this cross-ownership ban. First, the increase in broadcasting outlets lessened the FCC's concern with competition, and second, the realization that increased supply does not necessarily result in commonality of viewpoints. As a result, the Commission announced it would consider granting waivers to the one-to-a-market restriction under certain conditions. Waivers were favored if the resultant television-radio combination occurred in one of the top twenty-five television markets and thirty separate broadcast licensees remained after the combination, or if the waiver request and six stations in the larger markets. Id. para. 40. Upon reconsideration, the Commission divided markets into just two areas and reduced the numerical caps, resulting in the following revised 47 C.F.R. § 73.3555(a)(1) (1995):

(a)(1) Radio Contour Overlap Rule. No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations, if other than a single AM and FM station combination, represent less than 50% of the stations in the market.

(ii) In radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25% will be considered prima facie inconsistent with the public interest. * * *

(iii) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

53 1994 Second Memorandum Opinion and Order, see supra note 35, para. 59.
55 In re Amendment of Sections 73.35, 73.240, and 73.656 of the Comm'n's Rules Relating to Multiple Ownership of Std., FM, and TV Brdcst. Stations, Report and Order, 45 F.C.C.2d 1476, paras. 9-12 (1964), on reconsideration, 3 Rad. Reg. 2d (P & F) 1554 (1964). The Commission adopted this test at the same time it implemented the fixed contour overlap standards for radio. The FCC noted that television had greater impact and fewer channels then radio, therefore, was being subjected to a more restrictive overlap requirement. Id. at 1484.
56 See supra note 50 and accompanying text.
57 47 C.F.R. § 73.3555(b) (1995).
58 47 C.F.R. § 73.3555(c) (1995).
59 1970 First Report and Order, supra note 47, n.15. The following year, the FCC lifted the restriction with respect to the formation and transfer of AM/FM combinations. In re Amendment of Sections 73.35, 73.240 and 73.656 of the Comm'n's Rules Relating to Multiple Ownership of Std., FM and TV Brdcst. Stations, Memorandum Opinion and Order, 28 F.C.C.2d 662 (1971).
61 Id.
62 Id.
concerned a failed station.\textsuperscript{63} If neither of these conditions were present, the Commission would review the waiver request by evaluating and balancing five criteria.\textsuperscript{64}

At the time the 1996 Act was passed, the FCC was contemplating liberalizing the one-to-a-market rule.\textsuperscript{65} Before the rule making proceeding was complete, however, Congress passed the 1996 Act. Accordingly, the one-to-a-market rule, with the waiver policy discussed in the preceding paragraph, was effective when the 1996 Act was signed.\textsuperscript{66}

II. BROADCAST OWNERSHIP LIMITATIONS AFTER THE 1996 ACT

In an effort to promote competition and deregulate the telecommunication industry, Congress, via the 1996 Act, directed the FCC to severely relax the broadcast ownership restrictions.\textsuperscript{67} The following explains the changes implemented by the new legislation and the Congressional justifications therefore.

A. National Ownership Limits on Radio

The 1996 Act completely erases all limitations on the number of radio stations any one party may own nationally.\textsuperscript{68} The reasoning underlying such a drastic measure is that the objectives of radio ownership regulation have been obtained. Congress appeared satisfied that the existence of 11,000 radio stations nationwide, and an average of twenty-five radio options within each market, evidenced that appropriate levels of competition and diversity were achieved.\textsuperscript{69} The Legislature’s consensus was that in such an environment, “arbitrary limitations on broadcast ownership . . . are no longer necessary.”\textsuperscript{70} Apparently, Senator Burns spoke for a collective Congress in declaring that “radio operators are ready to . . . operate without stifling ownership rules. They need total deregulation to allow them to compete in the new digital marketplace.”\textsuperscript{71}

B. National Ownership Limits on Television

The 1996 Act took a similarly drastic approach to relaxing the limitations on nationwide television ownership. As in radio, there is no longer any numerical cap on the quantity of broadcast television stations permitted to be under common ownership.\textsuperscript{72} The Legislature’s reasoning for this change echoes that supporting the repeal of national radio caps. A 30% increase in the number of television stations in the last ten years, coupled with competition from cable, low power television (“LPTV”), satellite master antenna television service (“SMATV”), direct broadcast satellite (“DBS”), and video cassette recorders (“VCRs”), caused Congress to eliminate restrictions on the number of stations an entity may own nationwide.\textsuperscript{73}

The expanding video market, however, was not enough to instill Congress with a pure laissez-faire attitude. Congress refused to abandon the restriction on the national audience reach; however, it did increase the limitation from 25% to 35%.\textsuperscript{74} Even in retaining this restriction, however, Congress exhibited some deregulatory intent by not dictating how audience reach should be measured. Accordingly, in November, 1996, the FCC

\textsuperscript{63} Id. A failed station is one which has not been operated for four months or more or is involved in a bankruptcy proceeding. Id. para. 86.

\textsuperscript{64} Id. The Commission will determine if the proposed combination is in the public interest by reviewing the types of facilities involved, the potential benefits of the combination, the number of stations already owned by the applicant, the financial difficulties of the station(s), and the nature of the market in light of . . . diversity and competition.” Id. para. 90.

\textsuperscript{65} 1995 FNPRM, see supra note 4, paras. 131-32. The Commission was entertaining two proposals for modifying the one-to-a-market rule. Id. at 131. First, the FCC would eliminate the rule entirely if radio and television stations did not compete in the same advertising, program delivery, or diversity markets. Id. Instead of the one-to-a-market rule, the local ownership restrictions would function to promote diversity and competition. Id. If radio and television did compete

in the aforementioned areas, however, the FCC would allow radio-television combinations in markets where alternative suppliers would ensure competition and diversity. Id. at para. 132.

\textsuperscript{66} 47 C.F.R. § 73.3555(c) and note 7.


\textsuperscript{68} Id. § 202(a).


issued a Notice of Proposed Rule Making to solicit comments on how to calculate the revised 35% limitation. The Commission’s objective in seeking comments was to implement the Congressional directive while continuing to promote competition and diversity.

C. Local Ownership Limits on Radio

In addition to the above changes regarding national limitations, Congress modified the restrictions placed on local radio ownership. Although the 1996 Act retains the market tier framework adopted by the FCC in 1992, it creates four market categories, vice two, and increases the ownership caps depending on each market’s size. The following chart illustrates the new regulation:

<table>
<thead>
<tr>
<th>Number of Commercial Radio Stations in the Market</th>
<th>Maximum Number of Stations One Party May Own</th>
<th>Maximum Number of Stations in the Same Service (AM or FM)</th>
</tr>
</thead>
<tbody>
<tr>
<td>45 or more</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>30 to 44</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>15 to 29</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>14 or fewer</td>
<td>5*</td>
<td>3</td>
</tr>
</tbody>
</table>

*Limitation: A party may not own more than 50% of the stations in the market.

Congress did allow the Commission some discretion in administering these requirements. The Commission may allow an individual to exceed these thresholds if the result is an increased number of operating radio stations.

The Legislature’s intermediate approach of liberalizing the local ownership restraints, but rejecting their complete elimination, is a compromise between two viewpoints. Those opposed to increasing local ownership caps warned such action was “ill-advised . . . until a more thorough analysis of the consequences such deregulation is already having on localism and competition has been completed." Conversely, deregulation advocates assert that ownership restrictions should be fully eliminated in order to allow radio operators to obtain economies of scale efficiencies.

D. Local Ownership Limits on Television

In contrast to national ownership caps, and local radio ownership limitations, restraints on local television ownership escaped Congressional control. Instead of mandating a complete abandonment or setting new numerical limits, Congress directed the FCC to conduct a rule making proceeding in order to determine the fate of local television ownership rules. The Congressional intent behind this directive is that the “FCC should revise the rule as is necessary to ensure that broadcasters are able to compete fairly with other media providers while ensuring that the public receives information from a diversity of media voices." The FCC obeyed orders and is seeking comments on the revision of its television duopoly rule. In particular, the FCC is considering replacing the current restriction on Grade B contour overlap with a ban on DMA/Grade A contour overlap. Further, the Commission seeks comments on possible exceptions to the television duopoly rule.

E. One-To-A-Market Rule

The pervasive 1996 Act did not forget the one-to-a-market restriction. Congress directed the FCC to extend its liberal waiver policy, previously encompassing the top twenty-five markets, to the top fifty markets. In response to this legislative instruction, and the 1996 changes to the local radio ownership rules, the FCC is seeking comment on several proposals to change or eliminate its

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75 In re Brdct. TV National Ownership Rules, Notice of Proposed Rule Making in MM Dkt. No. 96-222, FCC 96-437 (Nov. 7, 1996). The three issues on which the FCC sought comment were: (1) whether to include the ownership of satellite stations in measuring ownership; (2) whether to count LMA s in determining audience reach; and (3) whether to retain or replace the use of Arbitron’s Areas of Dominant Influence ("ADIs") in defining markets. Id. at para. 1.
77 See supra notes 51-52 and accompanying text.
79 Id.
80 Id. § 202(b)(2).
84 142 CONG. REC. H 1145 (1996).
85 1996 Second FNPRM, see supra note 7.
86 Id. para. 92.
87 Id. paras. 29-55.
one-to-a-market rule.99

III. CONGRESSIONAL MYOPIA

In completely "renovating" the broadcast ownership regulations in the 1996 Act, Congress made the following "mistakes of short sighted man."90

A. Congress Blinded by Deregulatory Zeal

First, the Legislature allowed its obsessions to displace its logic. Specifically, Congress' fixation with deregulating the telecommunication industry was inappropriately applied to broadcasting.

The fact that the 1996 Act is over-inclusive is blatantly apparent upon reading the first sentence of the legislation. The proffered purpose of the 1996 Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."91 This statement of purpose, while motivated by good intentions, is inapplicable to broadcasting. Although the reduction of ownership restrictions is clearly deregulatory, and economic theory supports that increased competition results in decreased prices,92 the operative prepositional phrase is "in order to."

The first intended effect is lower prices for consumers.93 It is difficult to envision how prices can get any lower in the broadcast medium, as radio and television are already free.94 In return for free broadcasting, consumers are said to pay indirect costs such as purchasing products advertised over the airwaves and allocating time to the medium.95 The deregulation of ownership limits, however, will not result in any savings to these indirect costs of the consumer. Such costs exist independent of who owns, operates, or controls the source of the broadcast. In fact, the 1996 Act, in application, is functioning to increase the indirect cost of advertising. The decrease in ownership restriction has generated an increase in monopolies.96 Mergers allow broadcasters to dominate markets and thereby gain bargaining power over advertisers. The powerful broadcasters can "force advertisers to buy "tie-ins" where they are only allowed to buy on top-ranked stations if they make buys on lower-ranked stations at the same time."97 Any increase in cost born by the advertiser will be reflected in the price of goods and services and is, therefore, passed on to the consumer.

The second goal advanced in the statement of purpose is to provide consumers with higher quality services.98 In the broadcasting arena, the presumed equation under which the FCC operates is competition + diversity = quality.99 Accordingly, the two addends are directly proportional to the sum, quality. Unfortunately, the relaxation of ownership limits is resulting in less competition and, consequently, less diversity in the broadcasting marketplace.100

Given that the 1996 Act's express purpose does not reflect achievable goals in the broadcast arena, one may think it useful to investigate the legislative history to obtain a deeper understand-

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90 See supra note 1 and accompanying text.
93 See supra note 91 and accompanying text.
94 1995 FNPRM, supra note 4, paras. 68, 115: "[B]roadcast television … can be received free of charge through the air with a standard television set and antenna." Ameritech Corp. v. U.S., 867 F. Supp. 721 (1994). The same prerequisites allow consumers to enjoy broadcast radio free of charge. The 1992 Cable Act's "must-carry" provisions, requiring cable operators to carry local television stations, were enacted to preserve access to free television programming for the 40% of Americans without cable. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 629 (1994).
95 "Viewers may be said to pay for over-the-air television through their purchase of advertised products, a portion of the price of which reflects the cost of advertising— including television advertising. Also, the consumer must first purchase a television set in order to receive over-the-air programming and allocate viewing time, at least part of which is likely spent viewing commercials. Thus, viewers pay several indirect costs in return for 'free' television. However, they are not the sort of direct payment that must be made for subscription services." 1995 NPRM, supra note 4, n.91. These indirect costs are similarly applicable to radio.
96 See infra notes 111-126 and accompanying text.
97 Justice Begins Radio Probe, No. 5, Vol. 4, MEDIA Daily (Aug. 2, 1996). One source claims the motivation for Westinghouse to recently buy out Infinity (see infra notes 115-16 and accompanying text), was to control radio pricing in its markets. Id.
98 See supra note 91 and accompanying text.
99 See supra notes 5, 6, and 18 and accompanying text. The FCC's commitment to the ideals of competition and diversity suggests that a broadcast system which achieved such goals would be a quality system.
100 See infra notes 111-126 and accompanying text and notes 159-152 and accompanying text.
ing of Congress’ motivation for addressing broadcasting ownership in the legislation. Unfortunately, delving into this history only underscores the inappropriateness of applying the 1996 Act’s objectives to broadcasting.

The drafters of the 1996 Act continuously stated that the new legislation was needed to replace the outdated Communications Act of 1934. For example, one commentator’s justification for the legislation was that “America continues to operate under an antiquated regulatory regime. Our current regulatory scheme in America simply does not take many dramatic technological changes into account.” Similarly, one reformer phrased his mission as reforming an “outmoded and antiquated, regulatory apartheid system in order to make exciting new information, telecommunications and entertainment services available for America.”

Again, these statements are facially void of any need to relax ownership restrictions. They show overwhelming interest in new technologies, not broadcasting. Granted, new technologies affect broadcasting in that they create a more competitive environment by presenting alternatives to the media consumer. In fact, this is the oft cited rationale of the FCC in explaining its historic increases of ownership ceilings. It is a presumptive leap of logic, however, to conclude that increased competition warrants complete abandonment of national ownership caps which have existed for over half a century. Even the highly deregulatory FCC of the 1980’s, recognizing “that the communications marketplace [was] undergoing rapid change,” realized that “[p]rudence and caution . . . [required] a transition that provide[d] for monitoring and special scrutiny of sharp departures from the current status of the broadcast industry.” The recent legislation is a prime example of Congress throwing caution to the wind.

B. Deregulation of Ownership Restrictions
Destroys Broadcasting Ideals

The effect of including broadcasting in the over-sized umbrella of the 1996 Act, is that the concept of “the public interest” is drowning. Although competition cannot achieve the legislation’s stated ends of lower prices and increased quality, Congress may have believed competition would serve other goals. The 1996 Act, however, is not increasing competition. Instead, Congress, in an attempt to promote competition, has triggered a destructive chain of events which has resulted in an increased concentration of ownership. The centralized ownership of broadcast stations threatens the public interest by detrimentally affecting localism and diversity. Accordingly, by enacting the 1996 Act, Congress legislated in the private interest and placed a heavy burden of the FCC’s ability to regulate in the public interest.

1. Merger Mania = Decreased Competition

Since the inception of ownership limitations, “competition” is the word that’s been offered to justify their existence. Accordingly, the theory is that competition is achieved by placing ceilings on ownership, thus providing increased opportunities for multiple players to enter the broadcast marketplace. Logic dictates that if this theory is effective, the inverse would also be true – fewer participants will enter the broadcasting arena when ownership restrictions are increased or eliminated, thus competition will not be achieved. This hypothesis is proven upon an examination of the events since the deregulatory legislation.

During the first month of the 1996 Act’s existence, over $2 billion in radio station transactions took place in comparison the same sum was spent on such deals during an entire year in the

101 142 CONG. REC. S 2207 (1996). Mr. Pressler, reading from his article, “Telecom Reform: It Ain’t Over ‘Til It’s Over,” “Congress had been so long about the business of updating the nation’s antiquated communications laws . . .” 142 CONG. REC. S 686 (1996); “The purpose of this bill is to update the 1934 Communications Act. This is the first complete rewrite of the telecommunications law in our country. It is very much needed.” 141 CONG. REC. S 15144 (1995); “We are in a situation today that our Nation very much needs to modernize its telecommunications laws.” 141 CONG. REC. S 7881 (1995); “The telecommunications industry . . . is regulated under a set of laws that are antiquated and never designed to handle the challenges of today’s industry.”

103 Id. at 7886.
104 See supra notes 33 and 50 and accompanying text.
106 See supra note 11.
107 See supra notes 95-100 and accompanying text.
108 See infra notes 111-126 and accompanying text.
109 See infra notes 124-148 and accompanying text.
110 See supra note 11.
111 See supra notes 18 and 22 and accompanying text.
112 Peter K. Pitsch, An “Innovation Age” Perspective on Tele-
This first month was indicative of the events to follow. Most significantly, Infinity, the second largest radio group, merged with the even larger Westinghouse/CBS, the latter paying $4.9 billion for the buyout. As a result of the largest acquisition in radio history, Westinghouse/CBS now owns fifty FM stations and thirty-three AM stations throughout sixteen markets, and has sixty-nine of its eighty-three outlets in the largest ten markets. Clear Channel Communications, however, after purchasing Heftel Broadcasting, has an even more pervasive presence owning 108 radio stations.

While these high-dollar transactions are placing their initiators on the leading edge in large markets, they are also fueling the strategies behind other mergers. Benchmark Communications, for example, is buying stations in smaller markets where it can avoid wrestling with the oversized stations owned, but in terms of controlling a large percentage of the markets in which it operates.

The radio station buying spree is even trickling down to the state and city level. Paxson Communications recently increased its station ownership from fifteen to thirty-nine outlets, all within Florida. Similarly, as a result of relaxed ownership restrictions, Evergreen Media Corporation now owns six FM stations in the Chicago market.

The above examples are far from an exhaustive list of the transactions occurring since the passage of the 1996 legislation. This fact is exemplified by the statistic that before the Act's nine-month anniversary, 1,175 stations were traded, and the merger-mania trend is not subsiding.

Although numerical restrictions on national television ownership were also eliminated by the 1996 Act, the buying frenzy in this medium has not reached the same heights as in radio. Nonetheless, there is still a wealth of activity resulting in a more concentrated ownership of television. Paxson Communication now owns 48 television stations; Sinclair Broadcast Group, after purchasing River City Broadcasting, operates twenty-eight stations; and numerous other mergers have resulted in similar scenarios. The decrease in competition, evidenced by this categorical data, is generating a decline in localism and diversity.
2. Localism in Danger

The principle of localism has guided the FCC and the judiciary in promulgating regulations and rendering decisions respectively. It apparently did not, however, guide Congress in its decision to dramatically loosen ownership restraints.

The consolidation of ownership resulting from the 1996 Act necessarily increases the number of absentee owners of broadcast stations. This end effect does not in itself threaten localism; therefore, it is important to consider the effect it does have. What motivates parties to be absentee owners? Money. "The reigning mentality [of group owners is] . . . cut costs, squeeze money from the new properties and fight for every last dollar." Successful localism demands comprehensive newscasts and plentiful public affairs programming. The group broadcast owners cannot concurrently pump money into local programming and "squeeze money" from their new stations concurrently. The results of this penny pinching will be to justify the fears that "formats will serve the most profitable demographics only and that syndicated programming will become a cost-saving mainstay, prompting a decline in localization."

Since the absentee owner is motivated by money, he is disinterested in the burdened of non-transferable debt. Accordingly, the "new barons of radio . . . convert their stations from local presences into cash cows for instant milking, their values ballooned for trading to the next buyer." Concluding that this process results in decreased localism is difficult to challenge when group owners themselves admit, "It's commodity trading to us. We don't know [our] community. We're short-term players."

Congress has accelerated the demise of localism by increasing the permissible audience reach of television station owners to 35%. The relaxed ceiling is an invitation for national television networks to increase their ownership of local stations. Localism is certainly not achieved by transforming local broadcast stations into "passive conduits for network transmissions from New York."

Congress also constructed a hurdle to the preservation of localism over the radio spectrum. Due to the new liberal duopoly rules, radio purchasers justify the astronomical price tags of group ownership by reasoning they will decrease costs by consolidating resources and eliminating redundant employees. Unfortunately for localism, the news and public affairs departments are often the first areas of downsizing. In many instances, the once averred local radio newscast has been abandoned in favor of one individual reading "news and weather supplied to all clients by a single news source, the Associated Press." There is hardly anything more juxtaposed to localism then mass produced news.

The decrease in localism is occurring at a time when it is the most needed. Congress reasons that the increased availability of other media warrants decreased ownership caps in broadcasting. The competing video media (e.g. multipoint distribution service, satellite master antenna television systems, direct broadcast satellites), however, are national providers not purveyors of local programming.

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128 Mark Gimein, Groups Look to Cut Costs, Set the Pace, MEDIAWEEK, Sept. 9, 1996, at MQ28.
129 Prior to enacting the 1996 Act, Representative Hollings cautioned that "[a]ny modification in the national ownership cap is important because of localism concerns. Local television stations provide vitally important services in our communities. Because local programming informs our citizens about natural disasters, brings news of local events, and provides other community-building benefits, we cannot afford to undermine this valuable local resource." 141 CONG. Rec. S 7896 (June 7, 1995). "Localism permits broadcasters to tailor their programming to the needs and interests of their communities." 104 H. R. 204 (July 24, 1995).
130 Chuck Taylor, Westinghouse, Infinity Merger Fuels Consolidation Concerns, BILLBOARD, July 6, 1996.
131 142 CONG. REC. S 6108 (June 11, 1996).
132 Id.
133 Id.
134 104 H. R. 204 (July 24, 1995) (saying "Deregulation of the audience cap will intensify concentration in the hands of the vertically-integrated, national television networks.")
135 104 H. R. 204 (July 24, 1995)
137 142 CONG. REC. S 6108 (June 11, 1996). "The name of the game is to avoid being the 'last sucker' stuck with debt if recession hits."
138 1995 FNPRM, supra note 4, para. 67. "[T]hese systems carry primarily entertainment programming, [however], [s]ome will offer national and international news but, with the exception of [Direct Broadcast Satellite], none have public interest obligations." Id.
3. Diversity Threatened

Diversity is equally important as localism in broadcasting. The actual definition of diversity, however, has changed over time. In earlier days, the Commission’s objective appeared to be solely a diversity of sources.

In adopting the “Rule of Seven,” the FCC stated its goal was a diversity of sources. In 1965, the Commission explained comparative hearings existed to achieve diversification of control. Words such as “sources” and “control” lead some to believe the objective is simply diversity of ownership. For example, one writer explains the objective as an “effort to diversify the sources of information coming to the electorate; it is not aimed at diversifying programming or viewpoints.” Followers of this view would argue that the Commission sought program diversity through regulations such as the Prime Time Access Rule and the Fairness Doctrine. Because these two doctrines no longer exist, diversity may encompass more than varied ownership. In fact, the FCC’s own language supports this interpretation. The Commission’s justification for the one-to-a-market rule is the promotion of program diversity. A fair compromise between the two definitions is that the FCC seeks a broad ownership base to maximize opportunities for diverse viewpoints. The fact that the 1996 Act did not provide a foundation for widespread ownership is already established, therefore, the Act’s potential effects on diverse viewpoints must be examined.

The FCC has advanced the ideal of diversity as a justification for restraints on competition for over fifty-five years. Further, this theory received judicial endorsement on numerous occasions. However, the legislature either does not buy into this long standing principle, presumes the existence of alternative media sources satisfies the diversity goal, or believes both alternatives.

The legislative history supports that, at a minimum, Congress’ actions were motivated by the proliferation of media outlets. Admittedly, the plethora of mediums available in today’s telecommunication industry provides a marketplace of ideas on a global scale. This does not, however, serve as a substitute for the need of broadcasting to be diverse in and of itself. Although cable television is, in many aspects, a substitute for broadcast television, cable’s distinguishing features preclude it from being fairly considered in the diversity analysis. Unlike broadcast television, cable requires consumers pay a subscription fee and engenders limited public interest obligations. In addition to these inherent differences between broadcast and television, broadcasting is a much more available medium. Only two-thirds of individuals who have access to cable actually subscribe. This statistic magnifies the inappropriateness of Congress in relying on newer technologies, such as DBS and MMDS. If cable, “a mature technology that is well-established and well-entrenched in the media marketplace,” is only desired by 66% (i.e. two-thirds) of those with access, then the less established and pervasive mediums of DBS and MMDS, are surely not serving as broadcast substitutes to the consumer. In short, Congress’ macro approach to diversity in

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142 47 C.F.R. § 73.658(k) (1999) (The Prime-Time Access Rule allowed networks to only program 3 hours during prime time).
143 Red Lion Broad. Co., v. FCC, 395 U.S. 867 (1969). The Court upheld the constitutionality of the Fairness Doctrine (which required broadcasters to provide adequate and fair coverage of public issues) because the scarce spectrum justified this public interest regulation.
144 The FCC repealed the Fairness Doctrine as it found the abundance of media outlets rendered the scarcity rational obsolete. The Commission determined the doctrine was no longer necessary to ensure public access to the marketplace of ideas. In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order, 2 FCC Rcd. 5043 n.88 (1987). In 1995, the FCC repealed the Prime Time Access Rule, determining it was no longer in the public interest given the existence of cable, satellite systems, and VCRs. In re Review of the Prime Time Access Rule, Report and Order, 11 FCC Rcd. 546 (1995).
146 See supra note 23 and accompanying text.
148 See infra note 193.
149 1995 FNPRM, supra note 4, para. 66.
150 Id. (saying “An over-the-air broadcast television station is required to provide programming responsive to issues facing its local community, afford equal opportunities to political candidates, and to provide reasonable access to candidates for federal elective office.”)
151 Id.
152 Id. para. 70.
vites devastating consequences for the micro-media focused consumer.

IV. CONGRESS VIOLATED EQUAL PROTECTION

The Constitution's Equal Protection clause forbids the government to "deny to any person within its jurisdiction the equal protection of the laws."\(^{153}\) The clause "is essentially a direction that all persons similarly situated should be treated alike."\(^{154}\) The following discussion demonstrates that radio and television are indeed similarly situated. Accordingly, Congress violated the equal protection guarantee of the Fifth Amendment\(^ {155}\) by allowing a single television station owner greater audience reach then a single radio station owner.

A. The Disparate Treatment of Radio and Television

The 1996 Act eliminated all national numerical ownership caps on radio and television; however, it restricts one television owner from reaching more than 35% of the national audience.\(^ {156}\) Conversely, a single radio station owner is not limited by any such national audience cap. Although the limitations on radio ownership within each specific market function to limit one owner's national numerical ownership,\(^ {157}\) this is a separate and distinct issue from national audience penetration. Accordingly, the current ownership regulations limit the speaker, who seeks to convey his message through an audio-visual medium, to reach 35% of the population, and allow purveyors of purely aural messages to be heard by all.

A simple example illustrates the unequal treatment. The smallest market category set forth in the rules on local radio ownership is a market with "14 or fewer commercial radio stations."\(^ {158}\) In this scenario, a party may own "up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own . . . more than fifty percent of the stations in such market."\(^ {159}\) In a two-radio station market, a party could own one station, due to the 50% restriction. In a one-radio station market, the 50% rule would have no effect, therefore, anyone could own that station. There is no concern with exceeding national ownership limits or audience reach restrictions, as these types of restraints are not placed on radio.\(^ {160}\) As a result, creating the most restrictive scenario, a single party may own at least one station in every market. It follows that such an individual's message is available to all of America. Alternatively, the purchaser who invests his assets in television, can only speak to 35% of the nation.\(^ {161}\) This example evidences the Congressional favoritism of audio messages over audio-visual communication.

Viewing the above scenario from an alternative perspective of diversity, it is possible that the end result of deregulating ownership restrictions would have been to favor the speech of television, instead of radio, broadcasters. Congress invited the FCC to eliminate all restraints on the number of television stations a party could own locally.\(^ {162}\) If Congress' myopia was contagious, and the FCC accepted the invitation, three people could determine what is communicated via broadcast television because the only restriction remaining would be the 35% audience reach limitation. The duopoly restrictions on radio,\(^ {163}\) however, preclude such a scenario.

Unlike the Legislature, however, the Commission continues to endorse the position that controlling local ownership is a prerequisite for diversity. Instead of abandoning the television duopoly rules in response to the 1996 Act, the FCC is pro-

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\(^{153}\) U.S. Const. amend. XIV.


\(^{155}\) Equal protection analysis is the same under both the Fourteenth and Fifth Amendment; therefore, this article includes cites to state equal protection cases in discussing federal violations of equal protection. See Weinberg v. Wiesefeld, 420 U.S. 636, 638 n.2 (1975). See also Schlesinger v. Ballard, 419 U.S. 498 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

\(^{156}\) The 1996 Act, Pub. L. No. 104-104, §§ 202(a),

\(^{157}\) See supra note 77-78 and accompanying text.


\(^{159}\) Id.

\(^{160}\) See supra note 68 and accompanying text.


\(^{162}\) Id. § 202(c)(2).

\(^{163}\) Id. § 202(b).
posing to modestly relax the restrictions.\textsuperscript{164} The FCC is also proactively attempting to reconcile its own past disparate treatment of the two broadcast mediums. The Commission is currently considering extending its policy of attributing radio local marketing agreements ("LMAs") (in calculating ownership totals) to television LMAs.\textsuperscript{165} If this regulation is implemented, television owners will no longer be able to circumvent ownership caps through the LMA loophole.

B. The Analytical Framework

I. The Equal Protection Standard

The initial task for any tribunal determining whether a law withstands equal protection attack, is deciding which level of scrutiny to apply.\textsuperscript{166} Regardless of the scrutiny level applied, however, the critical question in an equal protection challenge is always "whether there is an appropriate governmental interest suitably furthered by the differential treatment" at issue.\textsuperscript{167} There are two variables in this principal question: (1) what is an "appropriate" governmental interest and (2) what are the "suitable" means for its achievement. When the classification is not the result of invidious discrimination\textsuperscript{168} and the subject of the regulation is not a fundamental right,\textsuperscript{169} then "appropriate"

\textsuperscript{164} 1996 Second FNPRM, see supra note 7. The FCC proposes to modify the current Grade B standard to a rule prohibiting Grade A station overlap, utilizing Designated Market Areas (DMA's consist of counties "grouped together on the basis of actual household viewing patterns" and are established by the A.C. Nielsen Company), and granting waivers under certain conditions. Id. n.12 and para. 4. The Grade A contour is less restrictive because "Grade B contour encompasses approximately a 50-70 mile radius around the television station's transmitter while the Grade A encompasses approximately a 30-45 mile radius." Id. n.23. Relying on DMA vice Grade B contours is thought to be more indicative of a station's true geographic market. Id. para. 14. The Commission is considering granting waivers to its local television ownership restrictions in order to favor UHF over VHF and to exempt satellite stations from the rules. The FCC is also seeking comment on case by case waiver criteria. Id. para. 30.

\textsuperscript{165} Id.

\textsuperscript{166} Rimmer v. Colt Indus. Operating Corp., 495 F.Supp. 1217, 1226 (W.D. MO 1980). "The first problem for this Court on this challenge is to determine the level of scrutiny to which the ... [statute should be subjected];" See Marianne M. Jennings, A Primer for the Constitutionally Impaired, 92 Duq. L. Rev. 743 (1994) (Summarizing the three levels of scrutiny used in equal protection jurisprudence as rational basis, intermediate scrutiny, and strict scrutiny). The test applied depends on the subject of the regulation.

\textsuperscript{167} Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Community-Serv. Broad. of Mid-Am., Inc. v. FCC, 593 F.2d 1102, 1122 (D.C.Gir. 1978); Rimmer, 495 F. Supp. at 1217.


\textsuperscript{170} Mosley, 408 U.S. at 95; Community-Serv. Broad., 593 F.2d at 1122; Rimmer, 495 F. Supp. at 1217.

\textsuperscript{171} Ameritech Corp. v. United States, 867 F.Supp. 721, 729 (N.D.Ill. 1994).

\textsuperscript{172} Id.

\textsuperscript{173} The intermediate, or heightened, level of scrutiny requires the government's differential treatment of individuals or entities to be "reasonably related" (instead of "rational" or "necessary") to furthering an "important" (vice "legitimate" or "compelling") government interest. Frontiero v. Richardson, 411 U.S. 677 (1973). This intermediate standard is applied when the class is quasi-suspect (See, e.g., Reed v. Reed, 404 U.S. 71 (1971), subjecting gender based classifications to an intermediate standard) or the right is quasi-fundamental (See, e.g., Plyer v. Doe, 457 U.S. 202 (1982), declaring education to be more than a mere government benefit, and applying heightened scrutiny in striking down a Texas law denying illegal alien children a free public education).
speech, or of the press...".174 Because broadcasters "engage in and transmit speech," they are protected under the "speech" and "press" provisions of the Amendment.175 When this protected speech is encumbered, the courts apply one of three levels of scrutiny in concluding whether the burden on speech is justified. These three tests generally mirror the three scrutiny levels applied in equal protection analysis.

The First Amendment's rational basis test upholds regulations that are a "reasonable means" of promoting a "permissible" government interest.176 This test has traditionally been reserved for regulations burdening broadcasters' freedom of expression.177 The rationale for applying the lowest constitutional threshold to broadcast regulations is the scarcity of broadcast spectrum.178 In upholding the FCC's ban on intra-market common ownership of a newspaper and broadcast station, the Supreme Court reasoned the broadcast medium possessed unique attributes.179 "In view of the limited broadcast spectrum, allocation and regulation of frequencies are essential. Nothing in the First Amendment prevents such allocation as will promote the "public interest" in diversification of the mass communications media."180

Deserving of a higher level of protection are governmental regulations on speech related conduct or on the time, place, and manner of speech.181 A regulation survives this intermediate level of scrutiny if: (1) it is within the constitutional power of the government; (2) it is in furtherance of an important or substantial governmental interest; (3) the governmental interest is not the suppression of expression; and (4) the burden on speech is no greater than necessary to advance the governmental interest.182 This test applies to content-neutral restrictions and "[r]quires the government to demonstrate that its asserted interests are real and that the restriction on speech will further those interests in a 'direct and material way'".183 The Supreme Court has applied this scrutiny level in reviewing, and ultimately upholding, the FCC's requirement that cable systems carry local broadcast stations.184

The strictest level of scrutiny in First Amendment jurisprudence is reserved for content based regulations. These restrictions are upheld only if they are "necessary to serve a compelling state interest."185

b. First Amendment Standards and Ownership Caps

The fact that the three standards are not mutually exclusive is evident when attempting to apply the framework to broadcast ownership restrictions. The less-than-thorough reader would apply the rational basis test upon learning that the government has been granted a more intrusive easement into broadcasters' First Amendment rights. The intermediate scrutiny level, however, is reserved for content neutral restrictions. There is no guidance on which standard takes precedence when the regulation in question possesses both attributes, as do the ownership ceilings.

The Judiciary's confusion on the issue is evident upon an examination of cases involving content-neutral broadcast regulations. In NBC v. United States, the Court upheld the regulation of the relationship between broadcast stations and networks in the face of First Amendment challenges.186 In so holding, Justice Frankfurter explained the broadcast facilities "are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the

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174 U.S. Const. amend. I.
179 Nat'l Citizens Comm. for Broad., 436 U.S. at 796.
180 Id. The Court explained that the cross ownership ban did not violate the First Amendment rights of those denied broadcast licenses because the regulations were a reasonable means to further the public's interest in diversity.
182 United States v. O'Brien, 391 U.S. 367, 377 (1968) (Four-part test established for regulations on speech related conduct). Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (three-prong test to be applied to restrictions on the time, place, and manner of speech). Although Ward's three-part test is slightly different from the O'Brien test, "the Supreme Court considers the two tests to be roughly the same." Ameritech, 867 F.Supp at 734.
183 Ameritech, 867 F.Supp at 733.
184 Turner Broad. Corp. v. FCC, 114 S.Ct 2445 (1994). (The Court found "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech."). Id. at 2469.
186 319 U.S. 190 (1943).
many who apply.”\(^{187}\) In *Community-Service Broadcasting v. FCC*, however, the court did not adopt such a deferential standard of review.\(^{188}\) The issue for the court was whether it violated the First Amendment to require non-commercial educational radio and television stations which received federal funds to record “all broadcasts in which any issue of public importance [was] discussed.”\(^{189}\) In concluding that the regulation did violate the First Amendment, the majority determined the restriction was a content-neutral restraint on First Amendment freedoms and applied the intermediate scrutiny level, even though the regulated medium was broadcast.\(^{190}\)

Despite cases like *Community-Service Broadcasting*, the most offered explanation for why ownership restrictions, and broadcast regulations in general, do not violate the First Amendment is that the scarcity of spectrum necessitates regulation to achieve diversity.\(^{191}\) Curiously, the FCC long ago abandoned the scarcity rationale as warranting any content based regulations. For example, “an explosive growth in both the number and types of [media] outlets in every market . . . .” caused the FCC to eliminate the Fairness Doctrine a decade ago.\(^{192}\) In passing the 1996 Act, Congress echoed the opinion of the FCC that scarcity is no longer a concern in today’s telecommunication industry.\(^{193}\) This is the foundation upon which Congress substantially demolished the ownership restraints.

Also demolished, however, was the armor protecting ownership restrictions from constitutional attack. If the spectrum is no longer scarce, then there is no longer a justification for erecting barriers to enter the broadcast marketplace. It follows that, if the remaining constitutionally infirm ownership ceilings are challenged under the First Amendment, the government will have to advance a new justification for its legislation. Since scarcity is the reason relaxed scrutiny was traditionally applied to broadcasting and scarcity no longer exists, the government’s interest will need to be more than just permissible.

2. Equal Protection and Ownership Restrictions

Returning to the constitutional challenge at issue, the disparate treatment between television and radio could well be subjected to strict scrutiny. As the absence of scarcity increases, ownership restraints become more suspect under the First Amendment and the involvement of a fundamental right is more apparent.

The next step, then, in answering the critical question of “whether there is an appropriate governmental interest suitably furthered by the differential treatment,”\(^{194}\) is to see if the government’s interest is “compelling.” The proposed purpose of the 1996 Act is “to promote competition.”\(^{195}\) As demonstrated earlier, relaxing ownership caps stifle, not promote, competition. “Certainly, a governmental interest, no matter how substantial in and of itself, cannot serve to justify a statutory classification when the interest is not in fact one which is truly furthered by the statute.”\(^{196}\) Accordingly, whether promoting competition is a compelling government interest is moot.

The search then begins for an alternative governmental interest in establishing an audience reach cap for television. First, Congress may have sought to restrict the pervasiveness of one broadcast voice in order to ensure diversity at a national

\(^{187}\) *Id.*

\(^{188}\) 593 F.2d 1102 (D.C. Cir. 1978).

\(^{189}\) *Id.* at 1104.

\(^{190}\) *Id.* at 1114.

\(^{191}\) FCC v Nat’l Citizens Comm. for Broad., 436 U.S. 775, 779 (1978); FCC v. League of Women Voters, 468 U.S. 364, 376 (1984); One justification for FCC imposed barriers to broadcasting is that the Communications Act regards the “Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.” NBC v. United States, 319 U.S. 190, 215-16 (1943).


\(^{193}\) “The availability of a multitude of video outlets - cable, wireless cable, DBS, and the imminent entry of telephone companies offering video dialtone - evidences the fact that the duopoly rule has outlived its usefulness.” 142 CONG. REC. H 1164 (1996); “The local media marketplace has undergone a breathtaking transformation. This has been characterized not only by a large increase in the number of broadcast stations (up one-third in the last decade alone), but more significantly by an onslaught of new multichannel rivals to traditional broadcasters, such as cable and satellite systems, and soon, video dialtone networks.” 142 CONG. REC. 1163 (1996).

\(^{194}\) See *supra* note 167 and accompanying text.


\(^{196}\) Community-Serv. Broad. of Mid-Am. v. FCC, 593 F.2d 1102, 1123 (1978).
level. Implementing the objectives of the First Amendment is clearly a compelling interest. Unfortunately, the means are far from narrowly tailored, which is required under the strict scrutiny test. The restriction is under-inclusive becausetheby not placing a parallel limitation on radio, one broadcast voice can reach all of America. There are no differences between television and radio to justify this discriminatory practice. Although the FCC is guilty of imposing disparate restrictions on the similar mediums, its actions have bolstered the proposition that television and radio are very similar.

The FCC's justification for adopting the one-to-a-market rule in 1970 was diversification. The same year, the FCC instituted its regulation barring television broadcast stations from owning cable systems in the same market. The FCC did not proscribe common ownership of daily newspapers and broadcast stations until 1975. This regulatory scheme suggests that the FCC clearly viewed television and radio to be similar. Radio was the only non-visual medium to be regulated with respect to ownership of visual mediums. By choosing only radio from the media mix and placing it with the audio-visual mediums of broadcast and cable, the Commission was silently Screaming that radio and television, whether delivered via broadcast or over cable wires, were similarly situated.

Twenty years later, the Commission is still declaring that television and radio are equals. "Radio has many of the attributes of television . . . and may be substitutable for diversity concerns." In particular, the FCC explains that both mediums are free, possess public interest obligations, and act as vital sources of information.

Although the Commission does note one difference between the two broadcast mediums, the dissimilarity does not justify the discriminatory regulation. The FCC suggests that the reason more people rely on television than radio as news sources is due to the latter's compelling visual dimension. Even if this theory is accurate, it does not translate into a compelling reason for Congress to prefer the wider distribution of aural messages. Advancing the persuasiveness of audio-visual messages as a reason to limit their distribution implies that persuasive communications are somehow detrimental to the public good. Persuasiveness, however, is not inherently dangerous. More importantly, deciding what does or does not persuade is personal to the individual and, since the government cannot get inside the consumers' mind, attempting to restrict distribution is not a narrowly tailored means of controlling influential messages. From this perspective, the audience reach cap is under-inclusive for there are far more sources than just television that disburse persuasive messages.

The only remaining difference between radio and television is that there are more radio stations. While this might justify different numerical ownership caps in order to achieve equal maximum percentages of control, it does not give the government a license to decide which messages should be heard by a greater percentage of the nation. Clearly the 35% limitation on televised communications is not equivalent to the 0% limitation on radio.

197 In equal protection jurisprudence, courts often discuss whether the classification at issue is under- or over-inclusive. A classification is under-inclusive if "[a]ll who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include; [that is,] the classification does not include all who are similarly situated." Joseph Tussman & Jacobus and Brock, The Equal Protection of the Laws, 37 CAL. L. REV., 341, 348 (1949). An over-inclusive classification, on the other hand, is one which "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." Id. at 351. The Court's tolerance for under- or over-inclusive classifications fluctuates with the level of scrutiny applied. In applying the rational basis test, the Court has upheld under-inclusive classifications explaining that Legislatures may achieve their goals step by step. Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955). Similarly, the Court has approved over-inclusive legislation when applying the deferential rationality test. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding an over-inclusive classification because "rational distinctions may be made with substantially less than mathematical exactitude"). In strict scrutiny analysis, however, the Court will invalidate laws based on under- or over-inclusive classifications. See, e.g., Rimmer v. Colt Indus. Operating Corp., 495 F.Supp. 1217, 1228 (W.D.Mo. 1980) (applying strict scrutiny and striking down Missouri law as violative of the Constitution's equal protection clause because it was both under- and over-inclusive).

198 1970 First Report and Order, supra note 47, at 311.


201 1995 FNPRM, supra note 4, para. 68.

202 Id.

203 Id.

204 See supra note 197.
Even if, in the absence of scarcity, the ownership restrictions could withstand a First Amendment challenge, thus lowering the equal protection scrutiny to a rational basis test, the disparate treatment could not stand. There is nothing rational about an under-inclusive law or one that distinguishes between two mediums that are equally capable of promoting or destroying diversity.

V. CONCLUSION

In passing the 1996 Act, one legislative skeptic stated, "I hope we don’t discover later that we’ve lost sight of the public in this process and of the need to protect the public from potential monopoly abuse." The general relaxation of ownership restrictions, which has resulted in concentrated control of broadcast facilities, makes this concern a reality. Further, the idea of broadcasting in the public interest, through local and diverse programming, is overshadowed by the absentee group owners’ interests in building media empires. Senator Pressler boasted that his bill would cause an “explosion in new investment and development,” and the consumers to be the winners. Unfortunately, Mr. Pressler’s predicted explosion did occur, however, the fallout, not the benefit, is on the consumers.

Besides loosing sight of the public interest in enacting the 1996 Act, Congress violated the very document that gave it life. Although ownership caps have been upheld under the First Amendment, based on a now questionable scarcity rationale, it does not follow that this past approval clothes them in armor sufficient to withstand constitutional attacks of a different nature. The disparate treatment between radio and television results in the government favoring purely aural messages over their audio-visual counterparts. The distinction is void of any principled rationale, and fails to survive an equal protection challenge under even the most deferential scrutiny.

